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PERSPECTIVE

A COMPARATIVE ANALYSIS OF CONTEMPORARY
CONSTITUTIONAL PROCEDURE*

Min Zhou**

INTRODUCTION

WITH THE RAPID DEVELOPMENT of the Chinese market economy, the construction of democracy in China, as well as its legal system, has significantly improved. However, several important issues remain for the Chinese people, including those concerning the practice of constitutional law, development of current democracy, reinforcement of the legal system, limitation of the "rule by man," protection of human rights, and the establishment of a complete rule of law. However, the significance of these issues is by no means restricted to the geographic boundaries of China. The resolution of these issues should be of interest to the international community as a whole, as the development of the Chinese legal

* Editor's Note. This Article is based on a portion of the author's doctoral thesis written at Wuhan University School of Law, the People's Republic of China, in May 1994. See also Zhou Min, Introduction, On Constitutional Procedure, in LAWASIA: COMPARATIVE CONSTITUTIONAL LAW (1994). It has been translated from Chinese into English. The editors have striven, whenever possible, to preserve the direct translation in order to maintain the author's original intent. In some instances, the text has been supplemented by Western sources.

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system will be of significance to the relationship of China with the other countries of the world.

In order to establish such a society, the constitutional democracy of the Chinese social structure must be used as a foundation. Constitutionalism is the ideological framework for practicing constitutional mores and principles. For a hundred years, constitutionalism has been the goal of the Chinese social struggle. The constitutional democracy of Mao Zedong finally achieved freedom and openness for the Chinese people. However, a few thousand years of Chinese feudalism and rule by man have influenced the Chinese society and its political operation. These tenets increase the difficulty of China's attempt to establish a constitutional democracy and rule of law society.

Facts have shown that in order for individuals to practice constitutional democracy, it is incumbent to know how to establish and operate such an ideology — a feat more important than the mere acquisition of it. Otherwise, even if it exists, it operates in chaos without the capability to correctly function and achieve a rule of law society with constitutionalism, democracy, order, and freedom.

Constitutional procedure is an important part of the constitutional system. It reflects the spiritual difference between constitutional democracy and the legal system. It supplies many essential operating procedures and methods for the establishment and practice of contemporary constitutional democracy and legal society. The goal of researching constitutional procedure is to understand the theoretical meaning and practical use of constitutional procedure in limiting rule by man, developing democracy, and protecting human rights through analyzing constitutionalism and its procedure. A theoretical analysis and criticism can provide the essential foundation for establishing a Chinese constitutional democracy and its rule of law society.

This Article is divided into four parts: (1) procedure and law; (2) the concept of constitutional procedures; (3) constitutional procedures and the democratic system; and (4) comments on constitutional procedures. The historical and comparative analysis of these four aspects begin with the premise that the process of law is the key element to forming order in society. Although a traditional notion of law focuses on the importance people attach to substantive law and disregards procedural law as less valued, modern trends, driven by due process concerns, have taken a different approach especially in the area of human rights and the spirit of the rule of law. This view of procedure is essential to strengthening the construction of democratic systems.

The concept of constitutionalism refers to the dynamic process of enforcing current constitutional law, including all the democratic and political processes and actions of government, parties, interest groups, and
citizens. Constitutional procedure refers to the specific process defined by the constitution to restrict the powers of the government and to protect human rights by regulating the actions of the government, parties, interest groups, and citizens.

The procedure of representative democracy originates from the constitutional principle of the sovereignty of the people. Related to this principle is the system of checks and balances which derives from the concept of separation of powers. In the context of the Chinese government and constitution, Chinese democratic centralism refers to the procedure of democracy and centralism. The combination of the legislative and executive is no longer the constitutional principle organizing the system of the People's Congress. This change in organization is largely economically driven; the combination of the legislative and executive is not conducive to the development of a modern system of the People's Congress. This Article suggests that although majority rule is used in many countries, minority interests must also be accommodated to ensure that everyone has equal rights under the law.

According to the constitution, each organ of the government should follow the procedures defined in the constitution, thereby restricting the powers of other organs. However, each organ endeavors to erode the restrictions of the other organs. This is demonstrated by the current trend of the executive branch in modern constitutional governments in many countries.

The position of this Article is that, although human rights have been protected by the constitution and its procedures, the constitution itself needs protections. To accomplish this, China should create a procedural system to defend the constitution, its power, and authority. This proposal advocates constructing and implementing such constitutional procedures in China in order to develop China's democracy and political system.

I. PROCEDURE AND LAW

A. The Concept of Procedure and Law

1. The Definition of Procedure

"Procedure" is commonly used broadly in an increasingly complex world. The modern Chinese definition of the word is used to mean the

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1 In China, all administrative, judicial, and procuratorial organs of the State are created by the People's Congresses, to which they are responsible and under whose supervision they operate. Furthermore, no one on the Standing Committee of the National People's Congress shall hold any post in any of the above administrative, judicial, or procuratorial organs. See Wu Jialin, China Law (1990).

2 Examples are operation procedure, legal procedure, court procedure, just to name
order of time or the hierarchy of work. This definition includes three main elements. The first element is the time and order relationship, without which the working process cannot be placed on a time schedule at the planning phase nor organized hierarchically at the operation phase. The second element is "arrangement," by which I mean an ordering with two subdivisions: 1) a conscious decision of subjective will and behavior; and 2) the following of a natural order. The third element is the division of work into stages and the relation between those stages. Without these elements, work cannot be arranged into a hierarchy; these form the most basic definition of the term "procedure."

"Procedure" and "process" are related terms with slight differences. "Procedure" is a more formal means of defining the order of work-governing operations, such as legal procedure and political procedure. "Process" is more concerned with a series of related behaviors and changes; "process" can also mean a series of carefully chosen steps that are similar to the definition of "procedure." Although these alternate definitions of "process" can be used under different circumstances, process must be understood as merely a part of fixed procedure. Conversely, procedure is often times included within the process. Procedure emphasizes subjective order and standards mandating the steps that must be followed in an operation, while process concentrates on the related behavior as a continuous operation. An undefined process is unlimited and intertwined in many variables, but as soon as it is defined, the process' boundaries become limited; procedure is merely a kind of defined behavior with the

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3 See CHINESE THESAURUS PART II 4012.
4 NEW ENGLISH-CHINESE DICTIONARY 1050; MODERN ENGLISH-CHINESE DICTIONARY 837.
5 There is a demonstration in the relationship between procedure and process. Procedure is the process for work and behavior, such as legal procedure is a type of statutory process. That is why it can be called "law procedure" or "process of law." Simple process is the objective description of the natural phenomena of work behavior and development.
steps of a normal process. This Article will discuss both procedure and process in their contexts.

2. Procedure and Order

Everything in the universe, from the motion of subatomic particles to the conscious behavior of human society, is within the confines and objective rule of time. Procedure uses time as a reference to set its course, following a certain order, model, and rule of operation for decisions to be made. The design and operation of this relationship creates a work process operable by humans in an orderly manner. Each previous operation uses the next operation as its goal; the latter one begins at the end of the prior one, thus maintaining a procedural relationship between time and order.

The boundaries of contemporary society's social and working lives are very broad, encompassing a nation's political, economic, cultural, and legal improvement and development, but also including the rights of individual citizens to democracy, freedom, and equality in their everyday lives. For nations to develop, there must be stability and security, and order provides these. Abraham H. Maslow commented from a psychological angle: "The common members of our society generally tend towards a secure, ordered, predictable, legal and organized world." Order is neces-

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6 In contemporary social science, such as political science, law, and economics, there are many studies on "process" including "The Process of Policy-making," "Procedure and Democracy," "The Process of Legislature," and "The Economics in a Democratic Process". These are important contributions to objective scientific analysis and criticism of the relationships between different behaviors, aims, and results. This is a very important area of research and research method in the field of modern social science.

As the author of THE PROCESS OF POLICY-MAKING, OOTAKE HIDEO, said: "On a macro scale, the concept of the process of policy making can represent long term policy changes; on a micro scale, it can also represent the model of decision making process." As a result, the policy making process theory insists on a certain "policy phenomena" with descriptive and narrative analysis to be performed concurrently with an examination of the procedural question. Much emphasis is placed on the legal procedure boundaries during legislation, including judicial procedure, court procedure, legislative procedure, and executive procedure, etc., from which the relationship between procedure and social order, system, and law may be found. See OOTAKE HIDEO, THE PROCESS OF POLICY-MAKING (1992); PIERO CALAMANDREI, PROCEDURE AND DEMOCRACY (New York University Press) (1956); James M. Buchanan, Public Finance, in DEMOCRATIC PROCESS: FISCAL INSTITUTIONS AND THE INDIVIDUAL CHOICE (University of North Carolina Press) (1967).

sary for developing nations to become developed and for developed nations to progress to more sophisticated levels.

Procedure helps provide the order needed for this progress. Although the changes necessary for development can contradict stability and order, the positive factors of this relationship are important. While a partial emphasis on stability, security, and order would only hinder much-needed changes and development, a reasonable amount of emphasis on these provides enormous propulsion for changes and development because stability, security, and order unite the society for improvement. Development and change can thus reach the height of their potential under a stable, secure, and ordered condition, achieving the best efficiency and effect. Therefore, the more a society needs development changes, the more it requires an orderly operation. Procedure is essential to creating and building the conditions for an ordered society, an institutionally ordered society. Samuel Huntington commented that the more complex a society is, the more it would rely upon the functions of institutions.\(^8\) This institution is a kind of institutionalized procedure, in which “procedure is also a kind of institutionalized foundation stone.”\(^9\)

Procedure is a reflection of the goals sought and the reality within which it exists. The use of procedure as a model behavior is not only the result of a subjective effort, but also the final product of practical experience. Procedure objectively follows the development pattern of matters while emphasizing the goals sought in the process of social behavior. The design of procedure integrates subjectivity with objectivity and the overall objective with existing factors.

Procedure should be built upon a solid foundation of science and logic in order to reach the societal goals in an efficient way. First, procedure can be used as model steps, to simplify and channel complex matters in a way that allows for a better and more flexible management. Second, procedural design strives for “the most suitable route for the task to take,” a procedure that is easy to understand, to be accepted, and to be used. Third, procedural design requires a system that follows the natural development of matters. Thus, a scientifically logical procedure serves to cut off the distractions of subjective randomness to promote a fairer and focused result.

The use of procedure through practice by political and legal systems has made procedural content more sophisticated while serving to demon-

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\(^9\) Ji Weidong, Theory of Comparative Procedure, in Comparative Law Study (1993).
strate its function and value. As a result, procedure has become an essential model tool of societal development, particularly in modern society.\textsuperscript{10}

3. The Relationship Between Procedure and Law

Procedure and law are inseparable; procedure is the nucleus of law, without which law cannot exist. From the creation of the framework to the establishment of the whole legal system and its operation, procedure plays an essential role.\textsuperscript{11}

First, we can observe the relationship of procedure and law through the structure of law. Law is a model for mandated behavior that uses rules for guiding the actions of people. Law creates guidelines for human behavior, ranging from the relationships of direct and indirect conflict of interest to the range of rights with their corresponding duties.\textsuperscript{12} Law can direct people how to and how not to behave, demonstrating the legal consequences through model example.

The general academic understanding in China is that the legal norms are divided into three parts: hypothesis, handle, and sanction.\textsuperscript{13} “Hypothesis,” which means the conditions given according to context, points to the circumstances and terms required for certain behaviors. “Handle” refers to regulating behaviors such as allowing, inhibiting, or requesting the content of certain behaviors, such as the nuclear content of the model behavior sought. “Sanction” means the rules for the consequences, usually the legal consequence as a result of violating the code of behavior. These three components are essential to the legal norms; in other words, for the regulation to guide the behavior there must be behavioral requirements, including content and consequence. The general rule of such a model is usually:\textsuperscript{14}

If . . . , then . . . ; but if . . . , then . . . ;
If . . . , then . . . ; then . . . , then . . . ;

\textsuperscript{10} The research topic of this Article, constitutional procedure, is based on the function and use of procedure in a society and its different systems, especially that of constitutional system. The basic point and initial aim of this Article is to analyze the effect and value procedure has on the constitutional system, by understanding the theory and practice of constitutional procedure. As a result, a thesis can be established for the socialist legal system and constitutional order of China.

\textsuperscript{11} See Xin Chunying, \textit{U.S. Procedural Legal Science, in LAW STUDY.}

\textsuperscript{12} See, \textit{e.g.}, HUA ZHONG, \textit{NEW LEGAL THEORY} 262, 270 (Teacher Univ. Press) (1990).

\textsuperscript{13} \textit{Id.}

\textsuperscript{14} \textit{Id.}
The relationship of behavioral content and consequence is a mutually dependent one. If there is no requirement for the behavior, then the content of behavior cannot be satisfied and a consequence cannot exist. For the same reason, if only the conditions and content of behavior exist, but without the consequence, then the law has lost its effect. The content of behavior can only exist after it is defined, and only then can the consequence occur. A person living in society accepts some sort of legal consequence because he/she has carried out a certain proscribed behavior, and this behavior must be carried out under the proper terms or circumstances set by law. Otherwise, he/she should not have to bear the legal consequence. This logically causal requirement for triggering and implementing legal action is a kind of "procedure" with set steps and process. These deeper logical roots of procedure in law are usually not noticed by the general public, but in this often-subtle procedural design, we can reflect upon a very important question: the layman's definition of the law.

Once the legal framework is in place, people can make their own enlightened decision whether they want to follow the will of the ruling class or break the rules and accept the consequences. Overall, the procedural relationship between the terms, contents, and consequences of behavior has provided people with a model and the opportunity to make behavioral choices. Procedure helps make this decision more clear to the people. Because the legislature has provided a punishment for proscribed behavior, the guide given by the legal principle is a beneficial one that treats illegal behavior in terms of basic prevention and avoidance. One scholar opines: "Procedure is a mutual behavior system created for the choices of legal decision. Law has to be free from the image of actual behavior in the human mind, and contain a more abstract concept. And so it has to satisfy the internal decision-making function of its concept. For this reason, procedure contains a special development of order of behavior."

Because procedure is the essential component of a legal system, a fully effective, competent legal system must rely upon a tightly knit body of procedure. Whether we look at legislative procedure, executive

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15 Id.
16 According to Marxism, law is the embodiment of the will of the ruling class. However, it does not expand on how the law actually does this or how this will manifest itself in the principle of law. In other words, the manifestation of the embodiment of the ruling class is not superficial. Such existence can be witnessed in the deeply layered structure of law. The design process of behavior and result cannot be separated from the will of the ruling class.
17 THEORY OF COMPARATIVE PROCEDURE.
18 Id. See also E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN
procedure, court procedure, supervisory procedure, or other democratic procedure, from the perspective of whole legal system, procedure in each is equally essential. Through procedure, one can see the existing law through procedure, as well as its goals. Procedure is the main component for the creation and practice of law, while law is the means by which procedure manifests its own value.

There are many connections between procedure and law; law is a kind of procedure, a part of procedure. Law is also the logical framework upon which the principle and body of law is constructed. Max Weber called this relationship logically formal rationality, saying: "Legal thought is rational to the extent that it relies on some justification that transcends the particular case, and is based on existing, unambiguous rules; formal to the extent that the criteria of decision are intrinsic to the legal system; and logical to the extent that rules or principles are consciously constructed by specialized modes of legal thought which rely on a highly logical systemization, and to the extent that decisions of specific cases are reached by processes of specialized direct logic proceeding from previously established rules or principles. Since in such a system, court decisions can only be based on previously established legal principle, and since the system requires these to be carefully elaborated, normally through codification, legal decisions will be based on rules, and these will be general as well as derived from autonomous legal sources."\(^{19}\)

Weber identified European law in particular with logical formal rationality,\(^{21}\) where the law exists in a logical system, yet the law itself is the goal. "In other words, this type of system combines a high degree of legal differentiation with a substantial reliance on pre-existing general rules in the determination of legal decisions. Indeed, these two features are closely related."\(^{22}\)

Such a link demonstrates the relationship between society and legal procedure while demonstrating the common goals of legal procedure and principle.

The special features of law are manifested through procedure, without which they cannot exist; however, the features of legal procedure are manifested through legal norms, without which they cannot exist.

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\(^{20}\) Id.


\(^{22}\) Id.
Legal procedure is a process and steps of behavior defined by the legal norms.

One of the features of law is that when conflict occurs, the law can deal with it through a normal procedure, although the main goal of normal procedure is to prevent conflict occurring in sectors not yet regulated by legal norms. Normal procedure does not have a specific candidate for regulation and is thus a tool of broad implication; it strives to demonstrate commonly known concepts of justice and equality. The practice of equality and justice is not only the designed purpose of procedure, it is also the value to be achieved by procedure itself.

Nevertheless, the success of a goal depends upon many different factors; it is not as simple as defining and achieving it. Whether one examines legal norms or legal procedure, self-reliance is not always sufficient, therefore some scholars have proposed that: "There are other ways of achieving a just, free or model society. Rules are referred to as legal norms because they can practice through certain legal procedure. As a result, we have to remember that law has its own limitation as a tool." We cannot merely accept this statement, but strive to overcome the limitations of law. It is important to have a complete and competent legal system in which a tightly knitted normal procedure system is essential in every aspect of law, from the common law through the basic constitutional law.

B. Comparisons on the History of Procedure and Law

Law is usually divided between procedural and substantive law, as it is divided between public law and private law. Generally, the historic treatment of these areas has been unequal; substantive law has been emphasized over procedural law, just as private law has been emphasized over public law. The carryover effect of this has been the greater traditional emphasis placed on private procedure over public procedure. However, with the development of and changes in society percolating into the law, this emphasis is changing drastically.

1. Procedural Law and Substantive Law

The separation of law into procedural and substantive categories began early in the history of legal study, a separation originally proposed in the academic community by Jeremy Bentham. According to

23 *Id.*
24 *Id.*
25 See also J. Galligan, Procedure: The International Library of Essays in
Bentham, substantive law is the law that creates, defines, and regulates the rights and duties of the parties, while procedural law prescribes methods for enforcing rights or obtaining redress for their invasion. The attitude toward substance and procedure has varied with time, but until now people have embraced the traditional emphasis on substantive law.

In the practicing legal community as well, there have been many recorded efforts to contribute and define procedural law. The first five terms of the Hammurabi First Code, created 3,700 years ago and which is the oldest code, were designed to ensure fair trials and to establish sanctions for frivolous claims, perjury, and for judges who change their judgment.26 As early as 5 B.C., the first Roman legal code, the Twelve Deceui Vival Tables, gave distinct definitions to substantive and procedural law. There is a noticeable difference between the content of the first three sections of the table (subpoena, trial, and execution) and the substantive sections in the back of the code. Although the code is not complete as a civil procedure, it standardized the basic procedure for civil trials in a way reflecting the general order of civil procedure.27 The Roman Civil Law Digest promulgated, under Justinian in 534 A.D., also makes a clear separation between substantive and procedural law.

Although early codes differentiated between the two fields, the scholastic view has been very different. In the research of Roman law, scholars have published much on substantive law while comparatively little on procedural law. The status of procedural law in civil-law systems can be further contrasted with that of the English common-law systems.28 The seventeenth century natural-law scholar Hugo Grotius is one who has neglected procedural law.29

The scholars in the fields of civil law and legal history regret this unequal emphasis. Alan Watson states, "In the area of civil law, the

27 Id.
29 In his works, there are detailed descriptions of the regulation and rights of substantive law but hardly anything on procedural law. His brother defended this with the reasoning that in the older work of the Netherlands, there has not been anything on procedural law. Similarly, in the works of other legal scholars, there is neither a single page of content on procedural law nor any wordings about the subject, establishing a trend of indifference. See Alan Watson, The Making of the Civil Law (1981).
The reason why the importance of procedural law has been so neglected is the result of the Civil Law Digest completely dominating the field of education. Whether it is the legal theories of any country, or in the codes of any time, there has not been a place for procedural law. For a long time even after its codification, procedural law has been looked down upon by university legal education. However, in common-law countries, procedure has received much more favorable treatment, both in practice and by scholars. When procedural law and substantive law are intertwined, as they are under a common-law system, procedure is the first question to be concerned with before trial. In legal education and research, procedural questions have also received much attention.

The research of procedural issues by contemporary legal scholars is still influenced by the traditional emphasis, however. People may distinguish procedural and substantive law, but that still does not mean equal treatment. Chinese legal study and practice still tends to neglect the research of procedural law, and, except for a few articles about trial procedure, there is little material on other procedural issues in academic law journals. In practice, even if procedure is invoked, it is usually limited to trial procedure issues, rarely venturing into contact with other legal procedure. Constitutional procedure as a question has never attracted much attention, and this is a serious issue requiring much future examination by Chinese academia.

2. Conflicts and Changes Between Public and Private Laws and Their Procedures

The difference between public law and private law, and their conflicts in traditional theories and practice is quite striking. The status of procedure in public and private law are very different because of the different legal systems of common law and civil law. The research of this question will help to find out the historical sources of constitutional law, administrative law, and their procedure of public law.

One of the earliest definitions of private and public law is given by a Roman legal theorist, who said, “Public law is about the law of the Roman Empire; private law is about the law of personal gain.” From the early codes such as the Twelve Deceui Vival Tables, it would seem that Romans were already conscious of the difference between private and public law because its content has only private law but no public law.

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30 Denning, supra note 28, at 2.
31 Id.
CONTEMPORARY CONSTITUTIONAL PROCEDURE

The content of the Roman "Civil Law Digest" is also mainly private law. The massive "Collection of Theses" consists of fifty volumes, yet only the first and the last volume are about public law (covering, for example, the responsibilities of state officials) while the rest is about private law. Even Roman legal theorists could not elevate public law to its deserving status during the Renaissance of Roman law. As a result, it has become meaningless to distinguish private law from public law in Roman law and legal study because in the minds of the people, Roman law is Roman private law.

There are several standards on the theoretical distinction between public and private law, just as there are continuing disagreements between the proponents of those standards. The first type of standard uses the special features of the form of law, including the subject of legal relationships and the legal status of the involved parties.

The second type of standard distinguishes based on the substantive content and the intent of the law. The benefit theory dictates that any law that protects public interest is public law, while any law which protects personal gain is private law. This is similar to Cicero's early definition.

The comprehensive theory recognizes that public and private law can interlock with each other in a way that cannot be distinguished with only one form or standard, but rather only with a comprehensive analysis. Comprehensive theory's leading thesis says: "Public law is really the regulation of public organizations and the ruled, i.e., the law using the government as one party and the individuals as the other. But this does not include all the legal relationships between the public organizations and the individuals."

The civil-law legal systems were built on the foundation of the ancient Roman codes with private law as its nucleus. Even in distinguishing public- and private-law relationships, the private law was used for establishing the codes and law, and thus the emphasis on private-law research grew from the structure of the civil law. This had a corresponding effect on the research of procedure, in which procedural issues relating to private law issues were sometimes examined while public-law procedural issues were ignored. However, this avoidance of public-law procedural research is a relative one, as even private-law procedural research is usually limited to the procedural questions involving civil-law trials.

Because the common-law systems, particularly those of Britain and its Commonwealth states, developed outside the Roman law, there has

33 Id.
been no traditional distinction between public and private law. Under certain circumstances, the common law has as far as to deny the distinction between public and private law; it is quite difficult to see the line between the two fields in British law, and this holds true in its operation. Nevertheless, perhaps through the multiple exchanges of different legal perspectives in the 20th century, there appears to be a trend toward distinguishing public and private law in common-law systems.

The development and practice of the public/private law distinction has had an effect upon the areas of procedural and substantive law in a way that has created parallels and differences between them. There are two basic similarities between the two areas; the first is the academic distinction between the substantive content of public and private law, the second is the reinforcement of the concept of public law. Although the practice and legal tradition of public and private law are different, there has been a gradual academic harmonization in the conceptualization and substantive content of public and private law. Civil law systems still distinguish between public and private law in practice, the status of public law is rising with the development of society. Even in common-law systems, where public and private law are not usually distinguished in practice, the concept of public law is becoming more apparent as its importance grows. One reason for this is the dissolution of feudalism and the contemporary growth of nationalism in newly born countries which have furthered the concept of national authority, spurring the rapid growth of national law. The development of capitalist economies has required not only the protection of private economic rights, such as those for property and freedom of trade, but also the protections for public political and legal rights, such as the freedoms of speech, press, assembly, and association. Furthermore, the influence from the legal thinking of the contemporary natural-law school has increased the awareness of the concept of public law.35

Then there are the differences between the two legal systems in the field of public and private law. From the perspective of civil-law systems, the distinction between public and private law has created two kinds of court system — courts of law and administrative law courts. The distinction between and establishment of these court systems and their judicial practice mainly developed in countries like France, increasing the importance of public administrative law. This in turn promotes a clear distinction between public and private law and the development of public law in countries operating with civil law.

35 See SHEN ZHONGLING, COMPARATIVE THEORY OF LAW (1987).
3. Constitutional Law and its Procedure as Public Law

The birth and development of Western constitutionalism in common-law countries, such as the United States and the United Kingdom, encouraged the growth and development of a public law equal to, and perhaps superior in some ways, to that of the civil-law countries. What is remarkable is that this was accomplished despite the fact that the public/private law distinction is not really made in the common-law systems. The birth and development of the U.S. Constitution and its constitutional system, like its unwritten British predecessor, is a modern pioneer of constitutions and constitutionalism with far-reaching influence upon the development of other countries' systems. A constitution is the basic law and politics of a country, including not only the basic political system of a country, but also the basic rights of individual citizens, such as equality and freedom. The constitution regulates the relationship between various national agencies, but more importantly, it regulates the relationship between the government and its people. Therefore, constitutions began from the concept of public law, and their development coincides with that of the public law. That is because the constitution is not only the publicly recognized standard public law but the supreme law in the public law system. From a different angle, the development of constitutional law not only raises the status of public law, it also expedites the development of other public laws. Tied in a symbiotic relationship, the theory and practice of constitutional procedure has benefitted from the development of public law, just as public law has benefitted from the growth of constitutionalism.

The establishment and operation of the common-law system and the Western constitutional system gives citizens many protected substantive political and economic rights, affording citizens the protections of public- and private-law procedure.

Although there is no clear-cut distinction between public and private law in the common-law systems, the practice of constitutional, administrative, and other public law has instilled the concept of public-law procedure in people while serving to protect their interests. The spirit of procedure is already inside every line in every law, creating the foundational principle of the constitutional procedure, by which procedural violations receive the same treatment from the system as substantive violations. This situation exists because although the promulgation and practice of any law, government policy, and administrative code appears in the form of a "public benefit" or a "public right," these rules are concerned with the benefits and rights of every individual citizen. The relationship between the government and its people has become a part of national law, especially as the main target of regulation by constitutional
and administrative law; thus, this relationship is increasingly affecting the benefit of individuals.

Because of this protection of public-law rights, the development of constitutional and administrative law in the common-law systems has started to reverse the historic trend, bringing people to consider and examine the development of national policy, law or election activity, especially the operating process and legal procedures of the nation, its politics, and public activities. Because the "ripple effect" of procedural violations in the legislative or decision-making process distorts the law, it is the rights of the individual as well as the population as a whole whose benefits are invaded. The broad effects of public law and its procedural issues mean that citizens, politicians, and legal scholars must take these issues seriously.

4. Comment on the Historical Perspectives and Trend

There are many reasons why procedural law has been ignored historically, but procedural law has a dialectical relationship to substantive law that cannot be ignored. Three basic reasons for this status problem include invalid assumptions about procedure's role in the legal system, the natural desire of rulers to reduce or eliminate procedural barriers to their power, and the risks that public-law scholars must face for offering criticism of the status quo.

First, it seems logical to people that there be this preference of content over form — procedure seems to be mere form without content. Because substantive law contains substantive rights and duties, it is thus directly related to the benefit of the people. These assumptions about procedure result in a neglect of procedural law and serves to illustrate the focus of the general population on their own personal benefit. However,

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36 First of all, although there has long been a historical distinction between procedural law and substantive law, people generally focus on substantive law, while neglecting procedural law. Secondly, although there is a distinction between public and private law, people generally focus on private law, while neglecting public law. Furthermore, they only focus on the procedure of private law, while neglecting the procedure of public law. Thirdly, people's understanding of procedural law has been historically limited to trial procedure, while neglecting the procedure responsible for the operation of state authority. Fourthly, Western countries place more emphasis on procedural law than Asian countries; Asian countries place more emphasis on substance while neglecting procedure. This phenomena still persist today. Even though the four trends mentioned exist in different degrees in terms of areas of law, countries, and time period, the overall result is the same, i.e. the development of all procedural law is far behind that of substantive law; the legal research of procedural law is also far behind that of substantive law.
this categorization is illusory; procedural regulations, in fact, contain substantive content under many circumstances. Taking inheritance law as an example, the most important parts of the law are the order and right of inheritance, which apparently are procedural matters. Nevertheless, this procedural matter is directly related the rights or benefits of property inheritance, therefore inheritance law is historically very important.

Second, the emphasis and survival of procedure is the result of a conflict of concepts between the “rule of law” and the “rule by man.” The ruling class is accustomed to the methods and concepts of the rule by man, and thus dislikes the annoyance of procedural restrictions and regulations. This is because procedure restricts the exercise of the ruler’s will, and so if the ruler invokes procedure, it is only to use the special ones beneficial to the ruling class’s self-interest. This demonstrates that the concept of the rule by man dominates the ruling class. From a more intellectual comparative perspective, this means: “Westerners strive for philosophy with form; while Southeast Asians strive for philosophy without form.” This difference in philosophical approaches has been said to lead to “a disparity of the prosperity of the people in East and West.” If we take a further step to understand this from the angle of the rule by man and of the rule of law, procedure represents such a form and becomes the embodiment of the rule of law, and so formlessness, like randomness, becomes the soul of the rule by man. Even in ancient China, the class-based feudalism was also government with form. However, it is merely a form of feudalistic rule, fundamentally different from the modern government with form. Because of the rule of law’s restrictions upon the power of leaders, rulers forsake it to pursue governance by custom, thus ultimately achieving a rule-of-man system.

Third, apart from the restrictions placed by the development level of the nation and the law at the time, political psychology is one of the important reasons why people focus on private law and neglect public law. Because private law is primarily concerned relationships between individual citizens and public law with national and official benefit, there is more risk for legal scholars who criticize their government or individual officials. People, whether average citizens or legal scholars, are generally averse to the government, and a wrong step or word in the research or critique of public law could create dire consequences. The safest way is to leave it alone. Thus, although Roman law had the distinction of

37 See Sun Xiaoxia, A Comparison of Two Kinds of Procedural Law, in LEGALISM (8th ed. 1992)
39 Id.
public and private law for centuries, legal scholars tend to avoid public law, concentrating on Roman private law and totally ignoring the question of public law. Thus, "[I]legal scholars carefully avoided this dangerous forbidden zone."\textsuperscript{40}

C. Developing Theories of Procedural Law

Although procedural law has existed for a long time in the developing process of law and legal study, it has only received attention and development recently. The ancient concept of natural law has been through a lot, but with its decline, the new natural law is symbolized by the "Procedural Natural Law." This allows the ancient study of natural law to be demonstrated through the influence of a new era. Justice, as a social virtue, has been a constant focus in human history. In the West, from Socrates, Plato, and Aristotle of ancient Greece to the modern-era philosophers, Hegel, Marx, and Engels, all have tried to find the source of its value. But in the many different theories of justice, a thesis has appeared that uses "procedural justice" as its center, making it seem more vigorous and down-to-earth among the other concepts. Furthermore, there are an ever-increasing number of new concepts and theses of procedural law. In the process of changing and developing legal theories, procedural issues have become very important in the legal field. These new procedural laws and perspectives are invaluable to our understanding of the value and use of procedure, providing insight to upcoming constitutional procedural issues.

1. The Idea of Natural Law Procedure

Ever since the ancient Greek philosophers brought up the concept of natural law, it has passed through a history of changes, development, and decline. Ancient Roman legal scholars integrated the concept of natural law with Roman law, giving a new development and content to Roman law. Even medieval religions borrowed the concept of natural law, thus serving their eternal loyalty to God. The anti-monarch, anti-prerogative, and anti-racial-oppression movement in the seventeenth and eighteenth centuries by the capitalists not only invoked the developed concept of rational natural law, but also brought it to its peak. Although natural law met its decline in the nineteenth century and was slowly replaced by the rising historical jurisprudence, philosophical jurisprudence and analytical positivism, it was resurrected after the world wars. In this new natural law, there is a new concept of "Procedural Natural Law" that not only

\textsuperscript{40} IMPORTANT LEGAL SYSTEMS OF CONTEMPORARY WORLD 79 (1978).
enriches the research content of law and moral content within the natural law, it creates new development and use for the concept of procedure in the concept of natural law.

The legal scholar who proposed and analyzed "Procedural Natural Law," Lon L. Fuller, is an important representative of the new natural law. Fuller inherited the rational tradition of natural law thinking in Western history. While emphasizing the indivisibility of law and morals, he insisted that law contains both inner morality and external morality; the external morality is the actual goal of law, the inner morality is the method of interpreting and executing law, i.e., a special procedural question of expansion. He also proposed eight legal requirements for the creation of a real legal system and contended that they are also "a procedural description of the natural law." Overall, Fuller's concept of procedural natural law can be condensed into several points.

One, the form of law has value. Fuller opposed legal positivism, contending that the goal and the form of law are indivisible — without the goal of law, the form of law cannot be understood; the form of law cannot exist on its own. In fact, the concepts overlap. Therefore, the form of law must consist of values, like law itself. When the Nazis considered some forms of law to be unsuitable for their fascist government, law and order were destroyed and replaced with street violence. As a result, Fuller said: "Every law is designed to fulfill a certain value of the law and order" is the question of procedural inner morality of law and also the methodology for interpreting and executing the law. Both of these contain the same goal and value of achieving law and order.

Two, the completeness of law depends on the procedure used to achieve the goal. In the law of Hitler's Nazism, there was no such inner

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41 Born in 1902, he became one of the four most important American legal theorists of this century. See SHEN ZHONGLING, MODERN WESTERN JURISPRUDENCE (1992). Fuller was a professor at Oregon University, Illinois University, and Duke University between 1926 and 1939. He then taught at Harvard University until he retired in 1972.

42 EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 86 (Harvard University Press) (1962). Fuller was saying that we are not concerned about the actual goal of law, but the method of establishing and executing rules for modifying people's behavior, if this system is to be functional and maintain its original meaning. See also LON L. FULLER, THE MORALITY OF LAW, 97 (Yale University Press) (1964). Fuller's theory was developed during a long-term argument with the new analytical jurisprudence represented by H.L.A. Hart at England's Oxford University. Id. According to the thesis of Fuller, although law and order were widespread in Hitler's Nazi Germany, it was "extremely decadent" because they created ex-post facto laws and refused to announce them, operating under "secret law." Id.

43 FULLER, THE MORALITY OF LAW, supra note 42, at 185.
morality in procedure, and so it is an "extremely decadent" law. This so-called law destroys the legal principle of inner morality and cannot be called law. On the other hand, the integrity of the legal system must satisfy the eight principles Fuller proposed. These principles demonstrate the procedure and requirements of natural law, and so they are a description of procedure of natural law, without which the legal system is incomplete.

Three, the inner morality of the law is neutral and it can serve various different subjects. The inner morality of Fuller's law is opposite from substantive natural law, i.e., procedural natural law. He said that although the eight legal principles serve subjects with different goals, it does not violate its legal system. On the other hand, inner morality of law demands respect for human character and the protection of human dignity. If human behavior is to be judged by unannounced or ex-post facto law, or by laws that ask the impossible, then the laws are an insult and violation of human capability. Therefore any behavior contradictory to these eight principles is contradictory to procedural natural law. "[It] not only leads to bad law, but to something which is not to be suitably described as law." The result is that the law cannot serve properly.

Four, the law and its method and result of execution should be identical. This is the most important aspect of the principles and is the central question of procedural natural law. Fuller said: "The substance of rule of law must be that: when invoked against a citizen (e.g., throwing someone in jail or revoking his passport), the government should honestly use the rules that were announced for the citizens to obey and defining the rights and duties of the people." Otherwise, the rule of law becomes meaningless. Actually, Fuller emphasizes the integration of legislation and execution — the government cannot go against its own laws, including the procedure guaranteeing the execution of law.

Chinese scholar Shen Zhongling's opinion is that Fuller's partition of procedural natural law into substantive and procedural areas is new and noteworthy. Although from the angle of methodology, Fuller's perspective has departed from the terms of class and materialism, thus transcending

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44 1) There must be rules made for specific behavior; 2) these rules must be announced; 3) in most situations, these rules should be post facto, but not ex-post facto; 4) there rules should be easily understood; 5) these rules should not be contradictory; 6) these rules should not require the impossible; 7) these rules should have suitable stability; 8) the rules should be identical to the act of the government. See Fuller, The Morality Of Law, supra note 42.
45 See Shen, Modern Western Jurisprudence, supra note 41, at 65.
46 Id. at 39.
47 Id. at 61, 62.
tradition, Fuller’s concept of procedural natural law is a response to fascism and its decadent law. Fuller thinks any legal system that is destructive or contradictory to his procedural principles cannot be called a legal system. Basically, Fuller favors the establishment of a legal system with favorable substantive content and formative content, contending that a complete law or legal system must consist of both, as without a corresponding legal form, the execution of the law cannot be guaranteed. I am thus positive that legal form can have its own value. The central content of Fuller’s procedural natural law appears in his eight legal principles, in which he wrote: “Law is designed to make people’s behavior obey the order of rule.” In other words, law is a continuous activity with an aim. This view greatly contrasts that of legal positivism, where people only notice the inactivity of the current law, but not the mobility of the law. According to American legal theorist Golding, the center of the concept of Fuller’s procedural natural law is “system design;” law and its procedure can all be designed, through which the government is “making people’s behavior obey the order of rule.” Fuller may well think the research of principles favorable to human’s well-being is always limitless, but the attempt to pre-set an unchangeable natural legal code and natural law thesis is unacceptable. Fuller also proposed the major role of the new natural law scholars to be in researching the favorable order and suitable arrangement so that a theory for methodology can be proposed. Such methodology is essential to social order achieving the goal of certain social organization. Overall, Fuller saw law and its procedure as a cause, one that is continuously solving problems through human rationale.

From the operation of Fuller’s procedural natural law, the nucleus of the inner morality of procedure or law or the eight principles he has emphasized, each is really a kind of use or function of legal form. The value and goal of his procedural natural law is to achieve law and order.” Since there is a close relationship between goal and value, therefore the goal must be used as the basis and standard for determining facts. Law cannot possibly force an individual to work at his best; neither can it mandate a rational life, but it can satisfy the essential requirements for the rational existence of human beings, prevent people from following fate blindly, and thus encourage people to engage safely in meaningful creative activities. Obviously, Fuller thinks law and its rules can not only create law and order, but also lead people voluntarily down the road

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48 Fuller, The Morality of Law, supra note 42, at 186.
50 Fuller, Morality of Law, supra note 42, at 9.
toward a rational lifestyle. If law can follow his eight legal principles of procedural natural law, then law can achieve this value and goal. This view has some logic with its idealism. Both the inner morality and the principles of procedural natural law can be viewed as the path for achieving this goal, consisting of the function of leading towards rationale and order. Therefore, Fuller concludes, "If I am required to point out the central indisputable principle of procedural natural law — with a capital N — then I will discover from this order: open, maintain, and protect the completeness of this channel of exchange. Through such a channel, people exchange what they observe, feel and want."\(^5\) Therefore, Fuller believes that the legal system that satisfies the eight legal principles is usually logical and just in its substantive content.\(^5\)

Overall, Fuller and his concept of procedural natural law not only blazed a new trail for the ancient natural law, he also raised the standards for pursuing the procedural rational principle and its value in the historically neglected field of procedural law. This has provided us with an enormous contribution to, and guidelines for, the establishment of a perfect legal system.

2. Procedural Justice

The theory of "procedural justice" is central to John Rawls' concept of justice. Rawls' theory of justice, as value jurisprudence with social justice as its center, has his own special insight and evidence. In his book *A Theory of Justice*, Rawls proposed two principles of justice. The first principle: every individual has an equal right to have the most basic right of freedom, like everyone else. The second principle: unequal social and economic arrangement should be able to make this equality: 1) logically suit the benefit of every individual, and 2) related to the open status and duties of everyone.\(^5\)

\(^{51}\) *Id.* at 86.


\(^{53}\) Rawls published his book *A THEORY OF JUSTICE* in 1971. It attracted wide attention in the Western world, and it was praised as one of the most important works on Western political philosophy, jurisprudence, and moral theology after the Second World War. See JOHN RAWLS, *A THEORY OF JUSTICE*, (Wang Huning, trans., Harvard Univ. Press 1971). Famous American political scholar Robert Dahl has also assured Rawls' success by praising that the book is a fundamental contribution to political philosophy in English speaking countries.

\(^{54}\) Simply put, the first principle dictates that everyone has equal freedom. The second principle is suitable for the allocation of income and property, and is suitable for the designing of an organization and command system that operates on the disparity of power and duties. Although the allocation of income and property does not have to
Rawls contended that these two principles have to be arranged in order, with the first superior to the second. Such order indicates that if the right of freedom is violated, then even the possibility of a greater social and economic benefit cannot defend or compensate for this transgression. Thus, the allocation of income and property, as well as the allocation of power, must correspond to the principle of equal opportunity and freedom for each individual. Only when these two principles are satisfied is real justice achieved. While proposing these principles, Rawls also offered a set of procedures in order to achieve these principles. He proposed a procedure to be used to prove the logic of the principles based on a kind of "ignorant screen" designed or developed by Rawls that filters out all the background factors of the choosers, including status, ability, concept, economic status, and social connections. It isolates the choosers, and then allows them to choose some principles; the result generated is what must be faced and accepted. The aim is to achieve a form of pure justice, and this is Rawls' procedural justice. However, there are several versions of Rawls' procedural justice.

The first is perfect procedural justice. Rawls used the example of dividing up a cake, by which the cutter receives the last piece. This procedure of allocation is just, and it is perfect procedural justice.

The second is imperfect procedural justice. Rawls used trial procedure as an illustration. The special feature of this kind of procedure is that although there is an independent standard for the correct result, there is no solid workable procedure to guarantee it will happen. Trial procedure provides ad partial procedural justice based on the consideration of reality. Correct law does not mean correct results, just as good procedure cannot guarantee completely correct results.

be equal. it must be beneficial to everyone. At the same time, positions of power and communal duties must be open to all, and, using this basis to address social and economic inequality, must benefit everyone. *Id.*

55 *Id.*


57 "A number of men are to divide a cake: assuming that the fair division is an equal one, which procedure, if any, will give this outcome? Technicalities aside, the obvious solution is to have one man divide the cake and get the last piece, the others being allowed their pick before him. He will divide the cake equally, since in this way he assures for himself the largest share possible." Rawls, *A Theory of Justice*, *supra* note 53, at 85.

58 It has two special features: 1) an independent criterion for what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed; and 2) assurance that the desired outcome will be reached. Rawls thought this kind of perfect procedural justice is rare, if not impossible. It is indeed difficult to find such a perfect solution in a complex society. *Id.*

59 Rawls contends that for a trial to have a satisfactory result, the defendant can
The third is pure procedural justice. Based on the examples mentioned, a different procedural justice exists, depending on the existence of an independent standard and a fair procedure. The special feature of this kind of procedural justice is that the procedure meant to decide a just result must be actually carried out for a just result to occur.

Rawls' expectation of procedural justice is that while satisfying the need of justice, a fair and just result can be achieved despite the conditions of an infinitely complex background and ever-changing circumstances. This kind of justice is "pure procedural justice," and only through the execution of it can a just and fair result be guaranteed.

Based on the aforementioned types of procedural justice, Rawls further proposed the applications of these concepts to society. Rawls contended that a just constitution should best be a set of just procedures designed to protect a just result of law, writing: "In the process of pursuing the ideal of a complete procedure, the first question to ask is the designing of a just procedure. In order to do this, equal protection of individual freedom must appear in the constitution and be protected by it." Thus, making the constitution contain just procedure can promote just results. If the political system cannot grant this right of freedom, then it might not have a just procedure.

Rawls maintained from a historical perspective that one of the major shortcomings of constitutional systems is their inability to guarantee the fair value of political freedom. This shortcoming is merely a controlled conflict in the political process of democracy. In theory it does not even only be found guilty after he has been found to have committed the crime he has been charged with. The creation of trial procedure is for the purpose of investigation and fact-finding, but the creation of a legal system that always produces the correct result seems impossible. A competent trial procedure and rule of evidence can at most try their best to provide the right result, but a good trial procedure does not always guarantee a completely correct result. Id.

Therefore, if there is no independent standard for the correct result, but instead only a correct kind of fair procedure that allows the result to be similarly correct and fair (regardless of the content of the result), then "pure procedural justice" is produced. Rawls used a third example to illustrate his point. Id. at 86.

Therefore, in terms of the application of this type of pure procedural justice to social quota allocation, Rawls suggested that, "a just system must be established and managed fairly. Only when the basic structure of justice is used as background, including the methodology of political formation of the main body and social and economic system management of justice, then people can say the procedure of the subject exists." Id.

Id.

Id. at 215, 216.
contain the value theory existing in real market competition ideology, although unjust influence in a political system is much more serious than the shortcomings of the market. Rawls further stated: "Since the constitution is the basic structure of the society, and the supreme body governing and controlling other bodies, each individual has the same opportunity to utilize the political procedure mandated by the constitution. If the principle of participation is carried out, then everyone can have the equal status as a citizen." In order to reach this goal, the most important factor is to go through the different basic rights of freedom and equality mandated by the constitution and to protect the just value of the basic rights to achieve social justice. This is Rawls' perspective on procedural justice and its application to constitutional justice.

3. Other Ideas of Procedural Law

The concept of procedural jurisprudence has excelled in the West, especially in the United States. With origins perhaps from the concepts of freedom and democracy in Western society and its practice of law, the enormous amount of trial and appellate litigation has raised the importance and usage of trial and appellate procedure, thus encouraging a focus and research on legal procedure. This has increased the influence and development of the concept of procedural law.

American procedural jurisprudence was developed in the late 1860s from legal instrumentalism, but it did not become developed into theory until the 1950s. Although it is difficult to confirm that American procedural jurisprudence reached the same level as other schools of thought, the concept of procedural law does exist and has had an important

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65 Id. at 248-49. Furthermore, while emphasizing procedural justice, Rawls proved his theory of justice from a different angle, through his "formalist justice theory." He contended that justice is divided into form and substance. Substantive justice is the justice of the system itself, while the formalist justice is the correction and consistent execution of law and system. Disregarding this principle, formalist justice is the "regular justice," i.e., the rule of law. A legal system is a mandatory order of public rules given to rational people, designed to regulate their behavior and to establish the structure of social cooperation, execution of regular public rules, and the law. This is formalist justice. Rawls' favored legal principles also include freedom, equality, and black-letter law.

Overall, Rawls' theory of justice explores different aspects of inequality in Western society, as well as the difficulties of overcoming and eliminating such phenomena. The principle of justice and the procedure he proposed have discussed the question of justice deeply and served as a pioneering work.

66 See Xin Chunying, American Procedural Jurisprudence, in LEGAL STUDY RESEARCH.
influence. The perspectives of procedural jurisprudence mainly concentrate on the probing of theories of legal concept and the processes of political and economic operation. In terms of methodology, procedural jurisprudence focuses on deliberation, rationale, and economic analysis. In the different concepts of procedural jurisprudence, the following are worth our attention.

First, the concept that law is procedure originated from two Western law professors, H.L.A. Hart and A.M. Honore, who co-authored *Causation of Law*.67 Two Harvard professors, Harold Berman and William Greiner, co-authored *The Nature and Functions of Law*,68 in which they explained their perspective that law is a social system and the form and procedure of social behavior and thinking. Law shapes the behavior of people, breaking down all the complex social problems into one to be solved. It also shapes the overall procedure of the society, creating the phenomena of an entire society operating under rules and procedures, which become the nexus where people are directly in contact with the law. Procedure not only has the function of guiding behavior, it also guarantees the execution of law. Without legal procedure, neither the legislation, execution, nor amendment of law could exist. Therefore, it could be said that law is procedure.

Based on the above concept, Hart and Honore proposed establishing institutionalized procedure, forming procedural systems. They also contended that such an institutionalized procedure is even more important than the substantive content of the social structure because in the process of dealing with different social problems, procedure can increase the efficiency of the society. Law demonstrates itself through the form of procedure, through which it also guarantees the execution of law; procedural law is very technical and is thus capable of carrying out the substantive content of privileges and duties. Hart and Honore recognized the great number and variety of problems an increasingly complex society requires the law to handle.69 They contended that an organized society is a society with different kinds of procedural institutions or one that

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69 Id. at 28. According to Hart and Honore, the way law deals with this is “legislative questions will be solved by legislature passing legislative procedure; judicial questions will be solved by the court using judicial and trial procedure; official violations and wrong-doing will be solved by the compensation procedure. Therefore, law is a general procedure, and a kind of institutionalized procedural body. Its features are that it is exquisite, clear, open, objective and simple. It is an organic procedure that eliminates conflict and protects social order.”
possesses adequate procedures and institutions to deal with internal and external human relationships. The definition of law is included in the procedural body; procedure is not only the method and the path, but it also contains the substantive content.70 Berman also offers procedure’s value to society in creating order, using the hierarchy of facts to explain the relationship between procedure and law.71

Second, with the concept of “new proceduralism;” people usually think procedure corresponds with substance, but because procedure seems not to have substantive content, it is mere “form.” The new proceduralism has broken out of this area, recognizing that procedure is the institutionalization of the process of negotiation. “The importance of law is not the content of decision or the result of management, it is who follows what procedure to make the decision for the question.”72 The essence of procedure is not its form or substance, but its reflective quality, and this reflective rationale exists outside from procedural rationale and substantive rationale. It is not part of the “natural social order,” but instead strives a kind of “self-governing management.”73 Reflective law contains procedural direction; procedural rules would thus be used to arrange process, organize relationships, and allocate rights. On this definition, reflective law is known as a type of “new proceduralism”; it not only brings procedure from the formative area to reflective area, it deepens the main idea of legal procedure in terms of legal development. Scholars contend that the use of this thesis as a model for legal development takes the political terms of modern Western countries into consideration. National management must convert social changes from a structural control to a reflective control. The joining of the reflective rationale with procedure,

70 Such as in the process of civil and criminal trials, the trial and sentencing procedure not only peacefully solve the conflict ends and dilemmas, they also protect the peace and stability of the society. In the whole proceed of trial, substantive law operates entirely on the basis of procedure. For example, in the process of protecting various rights of criminal defendants, such as the right to counsel or from self-incrimination, procedure protects the basic rights and dignity of the human being.

71 Berman wrote: “[L]aw is a special kind of procedure which creates order. It is a special procedure existing between morality and force which revives, protects, and creates social order. We define law this way because we emphasize the quality of law as a reflector of social problems, but not its origin and punishment. [It] is designed to deal with potential and actual intrusion against the form and model of social behavior.” Overall, procedure is the nucleus of law, without which law cannot exist. Although this view may seem absolutist, it is helpful in considering their basic function: procedure is an enforcement norm embodying an order-creating beneficial relationship, just as law is. Id.

72 Ji Weidong, Procedure Comparison, in COMPARATIVE LAW STUDY 10 (1993).

73 Id.
and the reflective integration of procedure towards this kind of decision-making process, can eliminate or reduce the functional paralysis of formalist law while preventing the problems of too much freedom in substantive law.\textsuperscript{74} Thus, the procedure of reflective law functions to establish social order through the combination of rationale, intelligence, and experience.

In my opinion, this method of dialectical logic could actually be used from the angle of content and form to understand procedure, thus solving the "formalist category" question of procedure. In the content and form of this antagonistically unified relationship, substantive content exists in a certain form, and any form must have a certain content. Furthermore, within bounds, it creates a corresponding relationship based on form and content. However, once outside that bound, the corresponding form and content of the original matter (or the sum of all the internal factors of change) will appear as the "content" of a new matter, or as the structure or form of the new matter. In other words, from different perspectives and bounds, the form of a certain matter can become its content, or vice-versa.

From another angle, the substantive content of legal norms is usually based on rights and duties, some of which are procedural rights and duties. When procedure becomes the rights and duties of the system, the contents and rights are of substance rather than form.\textsuperscript{75}

Third, the idea of market force procedure was pioneered by the leading American economic analyst, former University of Chicago professor and now judge Richard A. Posner, who presented his concerns with constitutional law and its legal procedure. He wrote: "legal procedure is competitive like the market."\textsuperscript{76} While carrying out research and analysis

\textsuperscript{74} Id.

\textsuperscript{75} While deciding whether the procedural body is in "form" or in "substance," legal scholars should observe from different perspectives when we focus on the status of the procedural rule in law because people change their perspective and understanding constantly when they make observations and decisions within the legal system. My understanding is that, the perspective and premise of deciding whether an object is substantive or formative is a relative matter. Otherwise we will fall into dead ends. We discuss about reinforcing rule by law, completing the legal system. From the angle of legislating law, the procedure, opposite to the substantive content, should be a form within the objective premise of a complete legal system. A legal procedure with the combination of substance and content is the content of a legal system. We have to recognize that a form is not absolute, but a relative form with a certain content. As a form, procedure also has the mandatory and regulatory power of law, just like the substantive rule of law. The procedure of the law and order society we pursue, i.e. formative procedure, is also the content procedure.

\textsuperscript{76} RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 321 (Little Brown Press)
on the adversarial procedure of the American trial court, Posner recognized that lawyers in court, regardless of whether their client was a plaintiff, a defendant, or the state, all present their evidence in an adversarial manner in an effort to win over the judge and the jury in a heated battle. In his economic analysis, Posner found that "the result of many cases depends on whether the resource allocation can achieve its maximum efficiency, which is usually decided by the market. If the market cost exceeds legal cost, then the case will go to trial." Even in sentencing procedure, Posner saw a similarity between law and the market: "Just like the market, the practice of legal procedure relies on the incentive of economic self-interest, which benefits oneself rather than others." Compensation of the victims of a violation of law is important because it gives them the excitement of participating in the legal system. The economic incentive of the victims to obtain this kind of compensation is obviously greater than that of the police and judges, thus this as well is subject to the market forces. The allocation of justice is controlled by the conflict between the plaintiff and the defendant to win the court over.

Posner began from the perspective of individualism, using the basic assumption of humanity that man is selfish, and concluded that man pursues self-interest to its furthest limit. People, therefore, react to different stimuli of benefit, and the basic function of law is to provide or change stimuli. Using criminal law as an example, punishment is the price society demands for criminal behavior; to prevent crime, the cost of criminal behavior must exceed the value of such behavior to the perpetrator, otherwise there is no deterrence. Increasing fines and sentences increases the price of crime, thus furthering efforts to deter and reduce crime.

4. Comments

In the aforementioned theses, whether it is the concept of procedural natural law, procedural justice, or the new proceduralism, all represent a procedural thesis that uses legal procedure as its focus.

It is amazing that after its decline, natural law can be revived via procedural issues while consistently rejecting the obsolete concepts of the classic natural law. Natural law uses the rule of law demands of modern society as its requirement, combined with Fuller's eight proposed legal principles. Procedural natural law has the realist temperament of pursuing

\[\text{(1992).}^7\] \[\text{Id.}\]
the perfect rule of law; this demonstrates the potential power and value of the procedural question.

In the pursuit of social justice, procedural justice reflects the needs and concepts of law and justice in Western society while demonstrating the use and value of procedure. Perfect procedural justice, imperfect justice, and pure procedural justice (including quasi-pure procedural justice), all have inspirational meaning to the research of different political, economic, and legal procedural questions.

The new proceduralism analyzes the categorical question of procedure from a reflective angle that provides unique insight. Other kinds of procedural ideas all have other strong points. From the angle of jurisprudence, the research of procedure not only has to go through the usual trial-procedure law, but also through the democratic and operational process and procedure of the entire constitutional system. The jurisprudence concerning the developing process must expand the scope of its own research while serving to improve the depth of general procedural research. Even though we should oppose a total focus on procedure, the comparative research of the basic procedural issues and the process of social practice of political and legal behavior is meaningful. From the theory and practice of contemporary constitutionalism, the development of human rights concepts and the reinforcement of rule of law allow procedure to flourish with greater contemporary features and meaning. Procedure is not only a formalist tool, but also a means to bring justice, a procedure of rights with the same value and meaning of substantive rights.

D. Forming and Development of Modern Ideas of Procedure

1. Perspectives

The democratization of the capitalist market economy and the institutionalization of democratic politics has promoted human rights and the rule of law through constitutionalism, thus fundamentally changing the concept of procedure. In modern history, people have not only focused on the procedural law and trial procedure law, they also have focused on public law and its procedure, such as the operating procedure of political power. Citizens have become concerned with the procedures of participatory democratic politics and procedural protections for basic citizen rights. The Western people's understanding of substance and procedure no longer remains at its original stage; as far as people are concerned, all basic rights exist not only in substantive law but also in procedural law. Under certain circumstances, because of the relationship between substantive and
procedural rules, procedural rules should be given priority, as procedure is not only a tool to guarantee the execution of law, but also to create justice.

Procedure not only can create law, it can also create the rule of law social order. Using governmental power and individual rights as an example, the proper procedure recognized by the constitution not only can restrict the abuse of power under the rule of man, it further serves to protect the substantive rights of the citizens. Proper procedure is becoming the content and principle of modern procedure, and its use to protect rights is a self-expression of the concept of modern procedure.

To conclude, the concept of modern procedure is a human rights concept, and the spirit of the rule of law embodies contemporary constitutionalism.

2. Three Steps Based on Constitutionalism

The formation and development of the modern concept of procedure has had three major stages that have marked progress on the path toward constitutionalism. These steps were supported by the development of the capitalist market economy and the establishment and development of the practice of constitutionalism and human rights. The growth of the modern concept of procedure is also that of human-rights concepts, the rule of law, and the practice of constitutional politics.

The first stage is based on the creation process of the British body of constitutional law, by which rights, duties, and freedoms were gradually recognized and developed. Here, the procedural concept originated from the "Papal Revolution" of the twelfth century and the Magna Charta of 1215 that protected the interests of feudal nobility, and the procedural legal rules that limited the power of the monarch. Other

78 In other words, the procedural rights of citizens are sometimes more important than the substantive rights. That is because one substantive right concerns more than one or part of citizen organizations, and the restrictive power of the legal procedure might even be wider because of its wide-spread nature. Overall, procedure not only can create legal rules, but it can also become a right with substantive meaning.

79 Harold Berman held that the "Papal Revolution" of the 12th century created the thoughts making all other Western revolutions possible, and became the thought weapon of supporting the Western concept of limiting government, rule by law, and the main substantive law and procedural principle in our legal jurisprudence. The concept of procedure was born inside the internal self-governing body of the church which demands "self-discipline." This demand quickly raised a passion to reshape society. HAROLD BERMAN, LAW AND REVOLUTION; THE FORMATION OF WESTERN LEGAL TRADITION (Harvard University Press) (1983).

80 See MAGNA CARTA, sec. 39.
such developments included the Petition of Right of 1628, the Individual Protection Law of 1679, and the Bills of Rights passed by the Parliament in 1689. Every time such a bill is formed, signed, or announced, it is an important mark that human rights, the rule of law, and their concepts of procedure are further consolidating, forming, and legalizing the process.

The second stage is based on the U.S. federal constitution and its Bill of Rights, the French "Rights of Man," and constitutional Bill of Human Rights, and the birth of constitutions in countries all over the world. This process has allowed the modern procedural concepts to gain a solid constitutional form and the clear aim of protecting human rights, each strongly influencing constitutional practice and the operation procedure of other countries.

The third stage is the never-ending process of consolidation and refining of procedure, the spirit of the rule of law and human-rights thinking through the practice of constitutions and constitutionalism by contemporary nations. For example, in the United States during the 1960s, when the revolution of due process caused much upheaval and experimentation, this change not only served to correct against the past discrimination under the traditional concept of procedure, it served to clarify the value of due process and consolidated restrictions on government power. The citizens' rights were further protected in a manner that promoted the further development of procedure.

3. The Process of the Establishment and Development of Human Rights

The modern concepts of procedure were formed and developed against the backdrop of the rapid development of the Western capitalist market economy, all of which developed together with the modern conceptualization of human rights and the rule of law. There are several reasons for this simultaneous process.

First, the demands of capitalistic economic development are such that the bourgeoisie will seek to protect their human rights in the form of law; because that law must protect the economic freedom and equality of the citizens, procedural protections must be included. On this foundation, citizens' rights not only mean substantive rights, but also the important rights of procedure.

Second, the practice of constitutionalism not only abstractly replaces the rule by man with the rule of law, it also replaces the rule by man with the constitutionalist system of governance through politics. This practice of constitutionalism uses the supreme law of the land — the form of constitutional law — to recognize and announce the spirit of human rights and the rule of law, especially due process.
Third, the separation of powers concepts developed and discussed by Locke, Montesquieu, Hamilton, and other Western pioneer philosophers and its practice by countries, such as the United States, has demonstrated the ability of procedure to create order in the midst of democratic politics through the use of checks and balances. This consolidates the people’s constitutional concept of a restricted government, allowing the integration of the concept of the rule of law with procedurally controlled thinking through democratic politics.

4. The Need and Development of Modern Procedure in Socialist Countries

Along with the formation and development of the Western version of modern procedure, the concept of procedure in socialist countries also began to develop with the concepts of socialist human rights and the rule of law. The formation and development of socialist procedure came from two major factors.

First, there was the need for the internal development of socialism. The development of the socialist merchandise and market economies clearly requires a due-process control system in order to protect orderly economic development. In the meantime, the development of socialist democracy also requires the same things. In order to establish a modern socialist power with a people’s democratic government, there must be a developed legal system in which the procedure and rules concerning democratic behavior are given a priority. This need directly conflicts with the long-established tradition of the rule by man, therefore, the act of replacing the rule of man with the rule of law, and its replacement of the rampaging of individual wills with the operation principles of legal procedure, uses legal rules to recognize the status of procedure.

Second is the influence of developed countries’ concepts of constitutional law and human rights. The recognition of the concept of procedure by the constitution of socialist countries exists partly because of the need for development, but it also demonstrates the influence of foreign constitutional law and its concepts of procedure. This has become apparent in the language of the socialist constitutions. These procedural constitutional and legal rules not only reflect the legal needs and realities of socialist countries, but also the penetration of modern concepts of procedure in the constitution and law of socialist countries.

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81 Including article 37, 39, and 40 in the section of Chinese Constitution concerning the protection of the rights of citizens, article 126 of independent trial section of the people’s court, and the rule of discussion in the National People’s Congress of China.
The most common process of a socialist country is the system of
democratic centralism. This principle originated from the former Soviet
Union and the Communist Party created by V.I. Lenin, and it was later
absorbed by Mao Zedong, who used it in the Chinese Communist Party
and in the democratic life of the Chinese nation. Democratic centralism
requires concentration on the foundation of democracy and rule under it;
this concept became not only the principle of the life and organization of
the Chinese Communist Party, it also became an important principle for
directing the national political lifestyle as recognized by the Chinese
Constitution. It is also a special feature of the democratic procedure of
China that reflects the current status of constitutional process in China.

Practically speaking, the modern procedural concepts of socialist
countries are not reflected clearly or completely in their law, and the
theories are currently superior to their operation in practice. In other
words, there is still a great distance between the focus on procedure and
the practice of those procedural rules. Abstractly, the result of direct
conflict between the concepts of the rule by man and the rule of law
cannot guarantee that rule of law will prevail under every circumstance.
For example, because of the thousands of years of the rule by man and
dictatorial tradition under the Chinese emperors, it is difficult to guarantee
a balanced relationship between democracy and power in current Chinese
procedural operations. However, with the establishment of the socialist
market economy in China, the trend should follow those of other coun-
tries because the people’s economic interests must have the protection of
modern law. China’s efforts to establish a complete socialist legal system
has already seen great improvement; China now has a great opportunity
to further develop modern procedural concepts as the foundation for
further efforts to build the system of the rule of law in modern China.

Overall, the development of modern procedural concepts has not only
embodied the development of constitutional government and its democratic
process, it has also concentrated on achieving the modern concepts of
human rights and the rule of law. If we do not pay more attention to the
establishment of the concept of procedure and the practice of procedural
law, we cannot promote the development of human rights and the spirit
of the rule of law in China.

II. THE ESSENCE OF CONSTITUTIONAL PROCEDURE

Constitutional procedure is the most common type of modern proce-
dure. The modern concepts of procedure have been extended to the
categories of democracy, politics, and justice, thus raising such operational
procedures of the government to a more prominent position.\(^{82}\) Because

\(^{82}\) The word “government” has a broad as well as a narrow meaning. For conve-
this modern view of procedure should also belong in the category of constitutional law, these concepts are also constitutional procedure. Although more about the roles and relationships of constitutional procedure will follow, it will be helpful to discuss the meaning of "constitution" and "constitutionalism" first.\(^{83}\)

**A. The Meaning of Constitutionalism**

1. The Concept of Constitution and Constitutionalism

The close relationship between constitution and constitutionalism has deep historical roots going back to Aristotle's research on the constitutions and political systems from 158 ancient Greek cities.\(^{84}\) In his book *Politics*, "constitution," "constitutionalism," "political body," "constitutional system," reappear constantly with in-depth discussion. Aristotle thought the constitutions of the cities formed a political body based on the principle of equality and made up of people of equal status.\(^{85}\) The definition of people as having equal and similar status arose from another kind of rule between free men outside the master-slave relationship; the upbringing of the ruler and the ruled are identical.\(^{86}\) According to Aristotle, constitutional and political bodies have the same meaning: "Political bodies could be said to be the functioned organization of the city. It is arranged by the supreme ruling body and political power, and the requirement of the city and its members. Law is actually, and it should be based on, the political body (constitution)."\(^{87}\)

The modern concepts of constitution and constitutionalism are different from those of ancient Greece in substance, but there are similarities in terms of language and definitions. One commentator used modern
methods to research the constitutions of 157 countries. They found that constitutions not only represent a legal document, they are more importantly a political legal document. In other words, a constitution is a tool to clarify the factors of political law. In terms of the international meaning of constitutional law, it is the birth certificate of newborn countries. Constitutions and constitutionalism are "the concentration of written and unwritten principles and rules used for the goal, function and limit of regulating the source, public authority." From the perspective of legal jurisprudence, the national constitution as the supreme law of the land is the source of basic rule. From the perspective of politics and functions, constitution is a political declaration, and also the blueprint of organized agencies or 'the blue print of power.' Every constitution is a declaration of politics or the belief of ideology. They are also an integration of an operation blueprint contained in the bill of rights, which expresses itself with the language of law, and is restricted by different terms.

Professor He Huahui pointed out that there are two basic standards and methods of expression for the definition of constitutions. The first one is based on the concept that the constitution "is the sum of different principles of procedure of the highest national agency and its exercise of power; the internal relationship and authorized power of the highest national agency and individuals towards the status of a national political principle." The second one is the concept based on the form of law; for example, a "constitution is the subject of the basic law and principles for running a country." The constitutional concept of the first Chinese law textbook is that "constitution is the fundamental law of the nation, the legalization of the democratic system, and the expression of the contrast of class power." This view is generally accepted in China. Giving this theory such a concentrated and high inclusiveness is the personal view of Professor He that the "constitution is the national fundamental law that is concentrated to express the ruling class' train of thought." This concept integrates the content and form of constitution

89 Id. at 5
90 Id. at 3.
92 Id. at 165.
93 See COMPARATIVE CONSTITUTIONAL LAW, at 11.
94 Id. See also 7 AMERICAN ENCYCLOPEDIA, at 46.
95 WU JIALIN, CONSTITUTIONAL JURISPRUDENCE 46 (1983).
96 See COMPARATIVE CONSTITUTIONAL LAW, at 11.
with its essence. Thus, these last definitions of "constitution" should be used as a third method that uses Marxism to discover its essence.

From the content and form to its essence, the contemporary modern constitution is the national fundamental law that defines the basic rights and protections of the citizens, as well as the power structure and principle activities of a country. Expressed in written or unwritten form, the constitutions of most countries is a document.

The contemporary meaning of "constitutionalism" is different from that of "constitution" and from the ancient constitutionalism concept. Most Western constitutional scholars recognize two basic definitions of constitutionalism: 1) constitutionalism is a series of special moral perspectives decided by the conscious form and culture, such as respect for human dignity, recognition of inherent human equality, and the rights to enjoy freedom and the pursuit of happiness; 2) constitutionalism considers the legality of national authority, public policy, and law in a manner that includes the citizens' recognition and "agreement" with their government and its behavior. Mr. D. Lev of the United States wrote that constitutionalism implies legalized political procedure, i.e., the public rule and system that limits and restricts political power. Professor T. Raychauduri, of the New Delhi University in India and Cambridge University in Great Britain, wrote that constitutionalism is a kind of political requirement and system that includes the declaration of basic citizen rights, such as equality, a general and secret election system, as well as the separation of powers, checks and balances, representative democracy, the multi-party system, the bicameral system, federalism, and an independent judicial system. However, Professor Yash Ghai of Hong Kong University wrote: "My version of constitutionalism is that the power of the government and the legislative department is defined and restricted by the constitution, where it enjoys the status of fundamental law. It will have the power to carry these restrictions through different forms of the judicial review process. Such a process can begin with the complaint of the people who feel that they have been violated by legal or executive behavior. The power of the executive behavior must also follow the law. Overall, law must provide equal treatment for everybody."

The definitions of constitutionalism given by the above scholars focus upon the control and restrictions that a constitution places on the

98 Id.
99 Id.
100 YASH GHAI, NATIONAL THEORIES AND CONSTITUTIONALISM SYSTEM QUESTIONS OF THE THIRD WORLD INTERNATIONAL CONSTITUTIONAL DISCUSSION GROUP THESIS.
governmental power of systems that respect human rights. The Chinese constitutional scholar Zhang Qinfu wrote: "Constitutionalism is not only a series of special moral perspectives, it is more importantly the practice of these perspectives in the society. Constitutionalism is neither merely the restricting of political power, it has to also protect and develop this power. Constitutionalism is not only a systematic arrangement of better political requirements, it is more importantly the practice of this arrangement that satisfies these terms such that the constitution should be democratic politics and constitutional politics. This is the practice of constitution." Zhang's constitutionalism definition focuses on the practice of constitutionalism and constitution in a new manner; whereas the earlier definitions are more dormant concepts focused on the content and system, Zhang's pays more attention to its activity.

However, one must keep in mind that by employing the subtleties of the Chinese language, the words used for constitutionalism can mean several things: constitutional government, constitutional politics, and polity, among others. Constitutional government is the focusing of the status of the constitution in the political regime. It is "subjected to the control of regular law and politics, and it is responsible to the citizens. Under constitutional government, public authority agencies have to follow the law and constitution just as the average citizens."

Other concepts regarding the theory of constitutionalism usually examine abstract forms and constitutional ideas with much the same meaning. One Chinese scholar wrote: "[T]he idea of constitutionalism is like the rule of law. At the very least they can used interchangeably, one of which focuses on form while the other on substance."

From the angle of form, the theory of constitutionalism means "the rules establishing, managing and restraining the government," that is, those that establish the practice of constitutions, regardless of their contents. Constitutionalism means establishing and encouraging the practice of a certain kind of politics; this kind of system includes the rules and principles of limited government, a law and code protecting the economic and political rights the citizens, and the use of other structural features to protect individual rights from government violation. Overall, the idea of constitutionalism is a constitutional framework which goes

102 In other words, in a constitutional government, constitution and law have the status and function to restrain public authority agencies, i.e. the government.
103 *Blackwell Encyclopedia of Political Science*, at 168.
104 *Id.*
105 *Id.*
from nothingness to establishing a constitution and practicing the system, creating the supreme status of constitutional power.

From the angle of politics, Mao Zedong had a famous definition: "What is constitutionalism? It is the politics of democracy." The meaning of this definition is very broad and perhaps over-inclusive, but most Chinese scholars still accept it. Furthermore, the Western scholars' understanding of constitutionalism goes directly to its goal and function, holding that the goal and function of constitution is to restrain the power of the government. With this standard, constitutionalism is "limited government." Those who agree with this perspective see that, constitutionalism is an effective control mechanism which ensures and defines the behavior and activities of the government, designed to protect the right and freedom of individuals.

2. The Relationship Between Constitution and Constitutionalism

The content, goals, and spirit of a constitution comprise those of a system's constitutionalism; a constitution is the legal form of expression of constitutionalism. Serving as the supreme legal norm in written or unwritten form, the constitution has to establish the spirit and principle of constitutional government and its theory, reflecting the freedom and equality of citizen rights and human rights while structuring the national authority and its operational relationship. However, although the constitution completely expresses the content, goal, and spirit of constitutionalism, constitutionalism is not a form of legal rule. Constitutionalism is actually the politics and systems regulated by the constitution, which serves as a means to express a goal unreachable by the constitution as a dormant code. Constitutionalism is also a behavior process that actively practices a constitution and the theory of constitutionalism.

Constitutionalism exists in three basic stages. First, before or during the establishment of a constitution, constitutionalism is expressed through activities, including those of the cultural, abstract, political, or legal-theory areas, intended to promote the constitution and the establishment of constitutionalism. Second, while creating the constitution, the society directly expresses its constitutionalist view through the form of its constitution. According to Mao, "[t]he constitutionalism of the world in history, whether it is the British, American or Russian, all happened after the

106 MAO ZEDONG, 2 THE COLLECTED WORKS OF MAO ZEDONG 690.
success of revolution and democracy as a reality; declaring a set of fundamental law and then recognizing it. This is constitution.”

Third, after the successful establishment of the constitution, the country must recognize, praise, and protect the constitutionalist system and its status. The rules must be practiced with the goals of the constitution in mind. These three stages of constitutionalist activities help illustrate the process and reality of the practice of constitutionalism. From this it can be said that constitutionalism is a behavior process with the goal of practicing the theory of constitutionalism and its constitution. Constitutionalism is the active expression of constitution, while the constitution is the dormant form of constitutionalism.

Although a constitution is the legal form of expression of constitutionalism, that does not mean constitutionalism automatically comes with a constitution. That is because a constitution as a form of legal rule is an objective fact existing in reality, but it does not express the actual existence of this constitutional system in the social reality, i.e., the constitution does not clearly reflect the actual operation of the society. Only when the constitution and its system are carried out, with means in existence to protect such practice, can it be said that constitutionalism exists.

B. The Creation and Interpretation of Constitutionalism

1. A Brief on the Creation

Constitutionalism, as the appearance of a constitution and its system in social practice, is a kind of active behavior process. This behavior process should contain corresponding political, economic, and cultural thought among its supporting structure, serving as the load-bearing walls do in a building. Therefore, although the analysis of the constitutionalist system often is focused upon its external aspects, one cannot ignore the internal requirements of the creation process and the supporting structure.

The formation of the constitutionalist system uses the constitution and its principles as its highest standard and basis, while the actual workings are used as the foundation standard. This is because the constitutional system exists both in the words of the constitution and in the actual operation of the system; the formation of the constitutionalist body is thus both a dormant relationship of constitutional rule and an active subject behavior with aim and direction. This active/dormant

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structural relationship is an organic one that allows a constitutional system to nurture a living and breathing constitution.

The structure of the constitutionalist system contains the constitution, the constitutionalist subject, the constitutional relationship, the behavior process, and the aim and direction of constitutionalism. The following are brief descriptions.

First is the constitution. This is the current constitutional rule, the sum of the content of all systems, principles, and human rights mandated by the constitution. It is the highest criteria and direct basis for the creation of the constitutionalist system.\(^\text{110}\)

Second is the subject of constitutionalism. This category includes the participants in constitutional practice, i.e., those who practice the constitutionalist behavior mandated by the constitution. This includes the people, the government, the political parties, and other interest groups or organizations.\(^\text{111}\) First of all, the people, as the part of the constitutionalist subject, are the nucleus and value goal of contemporary

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\(^\text{110}\) See 15 THE COLLECTED WORKS OF LENIN 309. The general relationship between the constitution and constitutionalism body is very close. If there is a constitution, then there is corresponding constitutionalism. Just as the constitution of a capitalist state must create a capitalist constitutionalism system, the constitution of a socialist state must also create a socialist constitutionalism. But on a practical level, there is a trend towards constitutions losing touch with reality, thus certain constitutions will inevitably lose touch with their constitutional body. Lenin commented on this phenomena: "When law loses touch with reality, the constitution is fake; when they are identical, then the constitution is not fake." Id. We could just as easily apply Lenin's critique to the relationship between the constitution and constitutionalism. In terms of form, we use the constitution as the standard for criticism, but perhaps we should also use the close relationship between the constitution and reality as the standard to judge the authenticity of constitutions and constitutionalism. Nevertheless, constitutions are the standard and basis for the creation of the constitutionalism system, and the social practices of the constitution and constitutionalism are identical. When the constitutionalism actually practices the constitution and its system, it is authentic, and so is its basis, the constitution; if the constitution loses touch with reality, then constitutionalism will do the same. Obviously, the relationship between the constitution and constitutionalism does not stay constant. However, the more certain a constitution is, the more certain its constitutionalism; the relationship is a reciprocal one in which a more certain constitutionalism serves to encourage the improvement and maturity of the constitution. The role of constitutionalism is to practice the constitution while improving and developing it.

\(^\text{111}\) The concept of government is divided into broad and narrow meanings. The broad meaning includes the three branches: legislative, executive, and judicial; the narrow only means the executive branch. For convenience, I use the broad meaning here.
Western constitutions. One of the main goals of constitutionalism is to achieve the maximum benefit and happiness for the people, and without the people, any constitution or constitutionalism is an empty hat. Therefore, the constitution not only mandates the subject status of the people in the constitution, it also mandates the basic rights and protections for the citizens. From a political angle, the sovereignty of a country belongs to its people, and their pursuit of personal rights and benefits is also their own affair.

As a subject of the constitution and constitutionalism, the government is also part of the nucleus because the government is the main power body (power user) that represents the nation and people’s practice of the constitution and constitutionalism. The nucleus of the whole process of the constitutionalist operation lies in the power operation of the government, which has the responsibility for practicing the constitution, governing the country, protecting citizen rights, and striving for the more general goals of the constitution.

Formed by the people under the rights given by the constitution, political parties have the important political powers for active participation in the constitutionalist process. Sixty-five and a half percent of the world’s national constitutions have political party requirements. Contemporary constitutionalist activities are closely related to political parties, which also have important influence upon policy making, legislation, and other government decisions.

Interest groups are organizations formed with economic benefit as their nucleus with functions corresponding to political parties. The difference is that, in the operating process of constitutionalism, interest groups only follow their own benefit to influence political parties or even the decision-making and legislative process of the government. The behavior of interest groups is driven by economic forces, although such groups have their own politics and process; thus, a nation’s politics are actually the accumulated expression of these many economic forces. The economic driving force of these interest groups usually comes into play through the organization of the political force of the parties. In order to influence government policies, interest groups usually seek cooperation in their effort to form a political driving mechanism. Whether we examine interest

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112 Although the political party in power has a leadership role in the process of political operation, the role of the minority party is equally important through its participation in constitutionalism activities, such as supervision of the party in office, its decision-making, and its power behavior. Whether the majority or minority party, their behavior has politics and processes that are closely related to the national constitution and its constitutionalism process.
groups or political parties, citizens and individuals are included, as well as the general relationships of economic benefit and class benefit.\textsuperscript{113}

The third element is the constitutional relationship.\textsuperscript{114} This is mainly the relationship created within the constitutionalist subject, such as that between the government and the citizens or between government agencies. The constitutional relationship also includes the relationships between the government and political parties and interest groups. The constitutionalist relationship is a dormant form of expression, such as that between the government and the citizens under the guiding principle of "power belongs to the people." This also includes the relationships among the executive, the legislature, and the judiciary under the principle of separation of powers. In the constitutionalist process, they all exhibit an active relationship.

Fourth is the behavior process and directed goals of constitutionalism. This is an important component for the creation of the active constitutionalist structure, for without the actual operation of constitutionalist behavior, there is no practice of constitution. The process of constitutionalism touches upon the basis of the constitutionalist operation, its subject, and the thus-directed goals of the constitutionalist operation. Constitutionalism without a constitutional basis cannot be complete, and constitutionalism without a goal and direction is one without the power of focus and motion.

The creation of a certain constitutional system must reflect a certain social, political, and economic background, and a cultural thinking, which means that the creation of the constitutionalist system not only has the external form and structure, but also the internal requirements for creation.\textsuperscript{115}

\textsuperscript{113} In the Western countries, bourgeois democracy is far more advanced than feudalism, "but it should not be forgotten for a minute the bourgeois factor of this kind of democracy . . . the government is merely the machine of one class oppressing another class." V.I. Lenin, Democracy and Authoritarianism, in 3 THE COLLECTED WORKS OF LENIN 711 (1936).

\textsuperscript{114} This is actually an active form of the constitutional relationship. The establishment of a constitutional relationship is based on the relationship recognized and regulated by the constitution.

\textsuperscript{115} The constitutional system of the contemporary bourgeois has its own basic political and economic background and its own foundation of cultural thinking. First, economically speaking, the development of the contemporary capitalist market economy required the abandonment of the feudal relationship and the establishment of new production relationships suitable to the development of capitalism. Recognition of the private ownership of property was needed to protect the economic benefit of the bourgeois, who were the economic foundation and driving force behind the birth of contemporary constitutions and constitutional systems. Second, because of the drive of
2. The Creation and Conflict of Constitutional Relationship

In the establishment of contemporary constitutional governments and their constitutional systems, two particular relationships stand out from the others. The first is the relationship between the citizens and the government. The second is the relationship between government agencies. Simply put, the former is the relationship between power and right, while the latter is the relationship between power and power.

The "limited government" theory of constitutionalism sees the relationship between the government and the citizens as a major contradiction within the constitutionalist process that creates different national and constitutional rules with different understandings of the process. The relationship between agencies can be an effective method of reinforcing control over the citizen-government relationship. This theory also sees these relationships and conflicts as the major topics of constitutional law and its study. In this theory, a good citizen-government relationship is the goal, and the inter-agency relationship is the method. Conflict or imbalance in either relationship affects the constitutional relationship as a whole, thus threatening the rights of the citizens. In theory as well as reality, the relationship between the government and citizens has actually become the central focus of contemporary constitutions. The field of constitutional theory found that a constitution "is not only called the written legal document of the constitution, it is also the kind of law which defines the relationship between the government agencies and the citizens." The constitution defines the relationships within the govern-

economic benefit, the bourgeois correspondingly demanded political freedoms and equality, eventually building toward control of national sovereignty and the establishment of a new constitutional system under bourgeois rule. From a cultural angle, the humanist Renaissance movement of medieval Europe established the conceptual foundation for the bourgeois constitutional government. This foundation assembled the conceptual content for modern constitutional governments, including the human-rights ideas of freedom, equality, and compassion, as well as power belonging to the people and the rule of law. These ideas became the intellectual backbone of constitutional theory and the basic principles and spirit guiding constitutionalism practice. See Min Zhou, Procedure and Law, in THE COLLECTIVE WORKS OF CONSTITUTIONAL LAW (He Huahui ed., 1996).

116 See THE ORIGIN OF CONSTITUTIONALISM

117 BLACKWELL ENCYCLOPEDIA OF POLITICAL THOUGHT, at 169. This view has the trend of broadening the constitution, equating the category of national law with that of constitutional law. This is obviously controversial in a written constitution. In terms of an unwritten constitution, the range of content is probably even broader. Therefore a written constitution generally refers to constitutional document or the code itself.
ment and its operations, creating a “power map,” and these rules on governmental power mainly appear in three areas. First, it serves to provide a clear source of national governmental power. From the source of thought and concept of constitutional theory, constitutional government is built on the foundation of “people’s power,” which emphasizes the fact that all of a nation’s power comes from the people. The government, as the organized form of national authority, “is merely an agency who uses national power to carry out political duty.” More than half of the world’s national constitutions clearly define the sovereignty of the country as belonging to the people or people’s power principle. For example, Article 3 of the French constitution states: “National power belongs to the people, who utilize it through their representatives and plebiscite. Any portion of people or individuals cannot use the national power on their own.” Second, it serves to separate the different powers of the government, such as the general separations between legislative, executive, and judicial powers, with each department using its power independently. Third, it serves to make sure the power is used within the constitutional premises and to prevent abuse of power. For example, a clear definition is seen in the U.S. constitution, in which constitutional control of governmental power explicitly defines the boundaries between powers of the government branches, while creating a checks-and-balances system between each to prevent governmental abuse of power. According to constitutional theory, these restraints upon governmental power are necessary because of human weaknesses; the theory recognizes that absolute power corrupts absolutely.

Furthermore, from the history of the development of government agencies, corruption and abuse of governmental power have been particularly serious problems. These abuses may also come from a government that loses touch with reality. As Engels wrote on sovereign power: “The simple division of labor of the early society has created some special agencies to protect its common goal. However, these agencies, mainly national political power, later on in pursuit of their own benefit, have gone from being the servants of the society to being the masters of the society. This situation is not only seen in monarchies, it can be seen in
democratic republics." Constitutional government not only emphasizes the power going to the people, it also incorporates the substantive political power and the power relationships into the constitution and its legal system, allowing the power to be restrained.

According to Thomas Paine:

Once a special power or special reward is given to anyone in the government, he will become the center of formation and arenas of different kinds of corruption. Give a person one million pounds (sterling) every year as well as the power of several positions with the expense paid by the government, then the freedom of that country is no longer protected.

This is so in democratic republics, and even more so in authoritarian societies, where such abuses are deeply felt by their people. Many who support this reasoning have suggested that a constitutional government means limited government, and the checks-and-balances of constitutionalism establishes this.

The relationship between the government and its people is actually a relationship between power and rights. Constitutional theorists write that constitutionalism is the view of restricting the government. Its history can be said to be directly related with the limitation of monarch's power in the British Magna Charta of 1215. Afterwards, the British Petition of Rights and Declaration of Rights, the U.S. Declaration of Independence, and the French Declaration of Human Rights, all have become the direct sources of contemporary constitutional provisions concerning the protection of human rights. Without this progression of historic documents, modern constitutional drafters could not have so clearly defined limitations of governmental power, proposed the declaration of certain human rights, nor demanded the protection of those rights. The successful revolution of the bourgeois not only demanded the protection of their basic benefit through the establishment of a new constitutional system, they developed the rights of freedom of equality and protected them in the practice of constitutionalism. The limitation of governmental power and the protection of citizen rights are both completed through the creation of a constitution and its practice. Thus, when Thomas Paine spoke of the U.S. Constitution, he said that this constitution is not only a kind of power, it is also a law that consolidates the control of government.

\[ \text{PREVIEW} \]

\[ \text{FOOTNOTES} \]

\[ ^{123} \text{FREDERICK ENGELS in 2 COLLECTED WORKS OF MARX AND ENGELS 334, 335 (Progress Publishers).} \]

\[ ^{124} \text{SELECTED WORKS OF THOMAS PAINE, at 269 (World Library Inc.) (1991).} \]

\[ ^{125} \text{Id. at 252.} \]
Practice has shown that the process of constitutionalism is actually the process from the rule by man to the rule of law. From negative limitations upon governmental power to positive protections of citizen rights, there must be a practical method suitable to the situation of all countries that is logical, legal, and efficient. The constitution must be able to manage the relationship between governmental power and citizen rights so as to protect citizen rights and fundamentally achieve the goal of rule of law and constitutionalism.

3. Behavior of Constitutionalism — the Goal and Direction

Constitutional behavior is mainly that of practicing an existing constitution. As mentioned earlier, constitutionalism is a kind of active constitution, the substantive practice of a constitution and the process of that behavior. The special features of this behavior are that: 1) it is a set of rules in touch with reality, which means the constitution is not only a document, but also a system that exists in a real manner; 2) it is active, meaning that it is a system that operates substantively with real effect; and 3) it is a kind of process, meaning that constitutionalism does not focus on only one substantive behavior or activity but includes a series of operations. After the successful creation of the constitution, the successful practice of it becomes the main role of constitutionalism.

Constitutionalist behavior includes every political and legal behavior that practices the constitution and its system, such as the respective behaviors of the legislature, the executive, and the judiciary. Constitutional behaviors can be divided into different categories using different standards. In order to avoid over-broadening or trivialization of the research of constitutionalism behavior, this Article limits the discussion of constitutionalism behavior to those recognized by the constitution to infringe upon the constitution and constitutionalism system and law.

One method examines different subject behaviors, which includes those involved in making legislation and government policy, in holding general elections and political party elections, and in handling judicial review. This method examines the behavior of creating, amending, and abolishing law, as well as the interpretation of constitutional and other legal behaviors. A second method distinguishes within different forms of a single behavior. Thus, in examining legislatures, one may include central, local, executive, or delegated legislatures; in examining supervisory behavior, one may include legislative, executive, judicial, political-party, democratic, and public-opinion supervision. The division according to government agencies and their roles is even broader, which includes the constitutional power duty behavior carried out by the head of state, heads of departments, and justices. It also includes the signing of agreements and treaties, the promulgation of law, and other behaviors that have major constitutional and legal effects. Different behaviors have a different corresponding set of processes, but the
The direction and goal of the constitutional behavior process is a behavioral goal that uses the spirit and principle of the constitution as its guide. In Western society, it is mainly a pursuit of human rights, the rule of law, and the drive for maximum benefit and happiness. In its abstract concept, it is the pursuit of social equality and justice. The constitutional behavior process mainly seeks: 1) establishment of the authority and status of the constitution and encouragement of the normal operation of the constitutionalist system; 2) restraint of governmental power and assurance of its operation only within the bounds of constitutional law; 3) protection of the basic rights of citizens, including the rights to life, liberty, and equality; 4) a complete legal system with the constitution as the nucleus for economic stability and citizen benefit.

The establishment and development of constitutionalism have been inextricably tied to democracy, but the result has been that different models of constitutionalism have had correspondingly different forms of operation. The democratic freedom model emphasizes individuals as the center of the constitution under the assumption that everyone is born equal. Governmental power thus strives to protect the equal rights of individuals. However, socialist democratic constitutionalism uses the society as its center and emphasizes the harmony of the society; the overall benefit outweighs the freedom and benefit of any individual.

In contemporary constitutionalist behavior, whether it is freedom, democracy, or society that is used as the focus, the priority must be to achieve its constitutional goal. Only then is the form of practicing constitutionalist behavior consistent with its goal and direction; each system must strive for the logic, legality, science, and efficiency of its constitutionalist behavior.

Without a logical operating procedure, the justice and equality of the behavior process cannot be guaranteed, nor can the system react to the ever-changing, complex problems of a modern society. For this reason, the establishment of an operation procedure that is flexible enough to deal with the changing needs of constitutionalism is demanded by science and modern legal systems. Such a flexible operation procedure should also be systematic and codified, as well as easily managed and operated within a democracy. This will allow the whole operating and developing process of constitutionalism to follow a certain order to thus achieve the hierarchy and legality needed. This is the logical demand of constitutionalist behavior categorized by constitutional subject is relatively more systematic and general, in which the behavior of government agencies is most important because they form the nucleus of constitutionalism and its behavior.

128 In some societies, even though class and disparate allocations of wealth exist in reality, they are covered under the topics of human rights and justice.
operation, and it is the starting point of the research of constitutionalist procedure within this Article.

C. The Concepts and Features of Constitutional Procedure

1. The Concepts

The modernization of a society demands the modernization of its politics, economics, and law. Constitutional procedure is an essential component of this development that touches upon the codification and legalization of national politics, economy, and democracy, as well as the stabilization and modernization of these areas. Whereas constitutionalism is defined as the behavior process of the practice of the constitution through its systems and principles, constitutional procedure is the whole operation procedure within the premise of constitutionalism.

Constitutional procedure and substantive law are similar in that they are both programmable processes. A programmed legal procedure uses

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129 It includes the separation and operation process of political process and governmental power, and also the control and influence process that political parties have over the government. Furthermore, it includes a certain decision-making process, such as important economic decisions, or the process of carrying out economic and legal policies. Meanwhile, another important process is about democratic participation, such as the behavior and process of citizen vote. Usually, these behavior processes are defined as procedures by common legal form, some of them are obviously defined by constitutional form. From an integrated angle of form, constitutional procedure mainly is democratic political procedure of the practice of the constitution with its system and principle whether it is defined by common law or constitutional law. This in turn is defined with the constitution as the nucleus. It includes procedure defined by constitutional form, and also procedure defined by common legal rule under the guidance of constitutional principle.

130 In terms of content, constitutionalism mainly is the democratic and political operation procedure of a nation which includes the organization and operation procedure of governmental power, and the procedure of democratic election, supervision and political participation, and also procedure of creating and amending the constitution and legislation. In terms of the operation of power, it also includes substantive operation and procedure of legislative, executive, and judicial powers. In terms of the relationships concerning constitutionalism procedure, the range is even broader. Constitutional procedure, for example, touches the protection of citizen rights, as well as the premise and limit of governmental power while concerning the development of the democratic system, and the execution of economic policy. Of course, it also touches the power relationship in the heart of a nation, the relationship between national powers, between the citizens and the state, and also between the citizens themselves. In terms of the legal structure, it touches the status and standard of the rule of law of a nation.
codification, and it is in clear contrast to a natural behavior procedure, which is neither programmed nor codified. The former has system, rules, and predictable features, but the latter is none of those. Without order, the society will lose its stability and control, and thus an orderly society must have systematic behavior and procedure. The goal of constitutionalism is to build an orderly society with the rule of law, and so it especially emphasizes the use of procedure, or as Rawls proposed: "A just constitution should be a just procedure arranged to guarantee just results." Constitutional procedure not only serves as a substantive procedure and systematic behavior process, but it also introduces a complete ordered system and relationship into the different areas of democracy, politics, economy, and law.

2. The Features

Constitutional procedure shares features with modern constitutionalism, as well as the role and function of modern procedure. Based upon the democratic and political operations mandated by the constitutions, constitutional procedure seeks to guide and regulate behavior to be consistent with constitutionalism and the rule of law. The nucleus of constitutional procedures formed by the modern constitution is democracy and politics. Although the procedural means for carrying out these constitutional principles may vary, modern constitutional procedure consists of certain basic factors.

First, constitutional procedure is a set of rules that institutionalize the rule of law and procedure itself. Legal procedure is a special kind of process that uses legal rules to establish a logically ordered relationship and a formula based upon time priorities or the development of facts. Constitutional procedure, as does constitutionalism, seeks to substantively limit random behavior, which corrupts society and encourages the arbitrary rule by man.

Second, constitutional procedure is open to the public. Opening constitutional procedure in the process of democratic political operation to

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132 In terms of procedure, constitutional procedure belongs to the area of modern procedure. But in terms of constitutional study, it belongs to the area of constitutionalism and its democratic politics.
133 The democracy and political behavior in constitutionalism, including those of important national legislative and policy-making process, is behavior procedure concerning major benefit of the state and the people. And so no random behavior of individuals or independent organizations is allowed in the society. Therefore, the special feature of rule of constitutional procedure not only functions in legal terms, it also creates influence from the anglo-democratic politics.
public supervision is an expression of democratic politics; this public participation protects against secret behavior or policy-making by the government in a manner opposed to democratic principles. The open procedure of democratic politics promotes the right of the public to know and to understand the operations of their democratic government, and it also protects the public's right to participate and supervise.

Third, the corresponding feature to the openness of constitutionalism and procedure is predictability. This means that in the periodic and constantly changing democratic political behaviors such as election, legislation, and trial, the development of the next step can be predicted according to the operation of each step of its behavior procedure. This ability to predict what comes next enables the citizens and government to plan for different contingencies. This is confirmed in practice by the result of the analysis of the psychologist Maslow.

Fourth, justice is another feature of constitutional procedure. In any executive or judicial behavior of the government, an open procedure allows people to understand the process and content of the behavior so they can discern justice from injustice. It is thus important not to slip into complacency; the people's notion of procedure and procedural rights must be reinforced in order to maintain the foundation of the rule of law.

Fifth, constitutional procedure is very practical in its regulation of the broad and complex political activities of democracy. As the supreme law of the land, the constitution is source to all laws, and from the creation and amendment of the constitution to legislation and elections, substantive power regulation exists with procedural regulation. Constitutional behavior is thus given an operation manual that promotes the practice of the substantive constitution. For countries with separation of powers, the constitution regulates the separation's form and content as well as the operation procedure of those powers. Such practical procedural regulation not only reflects the level of modern constitutional operation,

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In the practice of many countries, there exists such an equal protection clause, measuring the legality or justice of the executing process of governmental power. For example, the U.S. Constitution has an equal-protection clause that states that every citizen will receive equal protection regardless of race, culture, ethnicity, and religion; such discrimination is against the spirit of the constitution. In practice, citizens receive equal protections in procedure, and these "procedural rights" are really the embodiment of equal rights. Citizens enjoy this right in several ways: criminal defendants have the right to counsel; unauthorized searches and seizures are prohibited; and "due process" before the deprivation of life, liberty, or property. Any violation of an individual citizen's procedural rights directly affects the substantive rights of all citizens. Like a chain, these rights and protections are only as strong as their weakest link. Although this relationship may seem obvious, it is nevertheless usually ignored by countries that use the rule of man for governance.
but also the tactical advantage of procedure in carving complex issues into simpler ones to be solved accordingly.

Sixth is the conservative and open sides of constitutional procedure. This has to be analyzed from two different views: 1) legal procedure is stable and regulated, but such conservative restrictions upon randomness can make the system too inflexible; 2) the openness of legal procedure allows citizens to protect themselves in a manner not otherwise available. This combination of process-rigidity with participant-flexibility yields a system that restricts human emotions to law and the public interest, thus making the system just and more logical.

The first view sees legal procedure as the same as the substantive regulations of the law; it is not to be subjected to constant changes because it is clear and consistent in guiding people's behavior and in clarifying complex processes. However, this view can be pessimistic in that such conservative procedural rigidity may cause a system to "fall into one's web." In the procedures of legislation and policy-making, as soon as a bill is passed or policy published, it can only be amended through a new set of legislation or policy. The costs of changing legislative policy are enormous because such revision brings economic loss and affects the authority and status of the government. In Western countries, such policy failures can lead to the fall of administrations. Thus, the question is raised of whether the political procedure of democracy is prohibitive. Although amending a legal behavior is difficult, establishing a new legal procedure and allowing it to take effect is even more costly.

The openness, justice, predictability, and practicability of procedure allows for freedom. Because procedure is neutral, anyone can exercise their rights or protect their benefit within the boundaries of the law. The freedom of the procedure is established on the logical and legal foundation of equality, with the constitution as the nucleus. As Rawls wrote: "Since the constitution is the foundation of social structure, and the supreme regulatory body directing and controlling the other bodies, then everybody has equal opportunity to make use of the political procedure mandated by the constitution. If the principle of participation is satisfied, then everyone has the equal status as a citizen." Constitutional procedural freedoms broaden the public participation in democratic politics and

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135 Ji, Procedure Comparison, supra note 72, at 10.
136 To use South Africa as an example, the cost of establishing a multi-party election procedure was enormous after that country's long national and international struggle. However, in terms of the value and efficiency of democracy and politics, the benefit of establishing the constitution and its procedure is inestimable.
137 RAWLS, A THEORY OF JUSTICE, supra note 53, at 248, 249.
increases the opportunities for the public to exercise "logical choice;" the right to participate is established upon the right to freedom, and the democratic political procedure gives the public legal protection as well as the right to make choices and participate.

Practice has shown that contemporary constitutional procedures designed to serve constitutionalism do, indeed, demonstrate the features of democracy and the rule of law. Such procedures serve to nurture and institutionalize democratic practice and contemporary human rights in a manner that is gathering international acceptance. For example, the term and spirit of "due process" in the U.S. constitution is now widely accepted in many nations' constitutions, but "due process" not only legally protects the life, freedom, and equality of the people, it protects human dignity and rights through morality and law, thus creating a superior form of modern civilization and the rule of law.

D. The Forms and Categorization of Constitutional Procedure

1. The Forms

There are two main forms of constitutional procedure. The first one is legal form, and the other is the tradition habit procedure, i.e., habit form. Legal form procedure is mainly regulated by the constitution and law, while habit procedure is usually established during constitutional practice and in the constitutional operating process. The latter has never been written down in ancient codes or constitutional documents, but it has been the procedural means for establishing constitutions. Usually, habit procedure is the result of changes in the constitution; such changes are not made through the legal form of amendment, but rather through precedents in the actual constitutional process.\(^{138}\)

Legal-form procedure comes in two varieties, constitutional procedure and normal legal procedure, and their behavior process is usually regulated by the form of the constitution or law.\(^{139}\) Generally speaking, the constitutional procedure directly mandated by the constitution concerns the formation of national authority, the government structure, and the allocation of governmental powers. Like the creation procedure of the legislative body, presidential election, or the formation procedure of the cabinet,

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\(^{138}\) Habit here means the custom of public understanding. This kind of procedure or process is usually well-known or understood by the public, even if it is not written down or passed as a bill by the legislature.

\(^{139}\) Constitutional and legal procedure can also be called constitutional process. But as mentioned, they differ from the natural occurring behavior process.
the national constitution usually regulates directly. Because many equally important procedures are not easily mandated by the constitution, constitutions will mandate such procedures to be handled through other law. For example, the Chinese constitution's Article 59 states: "The number of deputies to the National People's Congress and the manner of their election are prescribed by law." Article 78 states: "The organization and working procedures of the National People's Congress and its Standing Committee are prescribed by law." In other words, certain important organizational procedures, election procedures, or meeting rules are created in the form of "organization law," "election law," or "meeting regulations."

Habit-form procedure has usually not been formally regulated by the constitution or law, but it becomes publicly understood as true procedure either following one influential event or more gradually, as a traditional behavior with constitutional or legal effect. There are not many examples of this type of procedure, but it is extremely influential in constitutional practice. For example, the judicial review procedure of the United States was established in the famous case of Marbury v. Madison. In that case, Chief Justice Marshall established the precedent of using judicial power to review law to find it unconstitutional, thus successfully starting judicial review as a procedure with constitutional effect. In this case, the effects went beyond the borders of the United States. The formation and operation of this kind of judicial procedure has established it as a vital feature for the separation of powers that has had great influence in the world constitution history.

Because the earlier constitutions neither designed nor regulated the procedural terms of some of the two-party or multi-party elections in Western countries, such procedural habits became the source of their procedure. The creation of political parties and their activity guidelines also has their historical sources. Overall, political parties and their systems established themselves outside the constitution, as demonstrated by the United States. Although the 1787 U.S. constitution has no regulation toward political parties and no structural arrangement for presidential candidates, an early version of the two-party system already existed by 1800 that "[consolidated] the support of the party in a relatively short time around a powerful named candidate." The formation of the American two-party election system and its habit process only gradually

140 U.S. Const., arts. I, II.
141 See XIANFA, arts. 59, 78.
142 5 U.S. 137 (1803).
143 See BLACKWELL ENCYCLOPEDIA OF POLITICAL THOUGHT, at 520.
144 Id. at 524.
became an election system and procedure with the substantive legal power of today. Some national constitutions or legal regulations concerning political party activities also originate from a similar situation and tradition.  

2. The Categorization

In order to analyze and understand constitutional procedure, as the regulatory law of the constitutional process, the operation and procedure of democracy and politics must be categorized. The content of a country’s constitutionalist system is basically its organization, system, and power, which are the focus of contemporary nations and their constitutional politics. This content is the important candidate for active regulation by constitutional procedure.

In modern constitutional countries, different political arrangements have different national power structures and operational guidelines. Powers vary, depending upon the limitations within different power structures. The categorization of constitutional procedure develops from countries’ organization, system, and power, or it can be done through the substantive form of procedure. Because procedure regulates behavior processes, then any procedure, whether it is macro- or micro-level, will substantively reflect the steps and progress of the behavior. As we know, all election systems include procedural content, whether for a two-party or multi-party system, for a single- or double-majority vote system, or for a direct or indirect election.

Overall, the categorization of constitutional procedure is based upon constitutional content and its behavior. Just as the best way to categorize constitutional behavior is to look at the subject of its behavior, the same method can be used to categorize constitutional procedure through its subject. There are four basic standards by which constitutional procedure may be examined.

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145 29 U.S.C., art. 29.
146 More specifically, organization includes national bodies, such as the congress, the president, and the courts, and also political parties and special interest groups. Systems include political, democratic, congressional, constitutional-monarchical, and people’s congress system. In terms of narrower meaning, there is the election, appointment and removal, and committee system. In terms of power, a nation has legislative, executive and judicial power.
147 For example, the legislative power of a country with a congressional system and that of a country with a presidential system; the executive power of a country with quasi-presidential system and that of a country with a presidential system, all have obvious differences. Such differences are most apparently reflected in how far the power structure can reach and its operating procedure.
The first uses constitutional behavior and its subject as the standard. This includes the government, political parties, special-interest groups, and other national and independent bodies. Citizens may or may not belong to such organizations, but they are still an important subject of constitutional behavior. Except certain internal procedures, the majority of operating procedures of political parties and special-interest groups form gradually under the operating process of the national constitution. The internal departments and their organization procedure of the government usually have already formed their own network structure.

The second uses the constitutional system as the standard. Its procedure mainly contains: a congressional system, a governmental system, a judicial system, a political-party system, and an election system.

The third uses power as the standard. Its procedure contains: the operating procedure of legislative power, executive power, and judicial power. By using a power operating principle that creates the relationship between powers and power structure, there exists the operating procedure for the separation of powers, legislative and executive combination, and for democratic centralism.

The fourth uses the form of organization of political bodies and power as the standard. This creates the procedure of the presidential system, the congressional system, the constitutional monarchy system, the people’s congress system and the committee system.

The categorizations mentioned above all overlap each other. Therefore, as long as different angles are chosen to research constitutional procedure, different types of procedure can be systematically included. Under each area, there are many behavior processes of democracy and politics, such as the procedures for congressional hearings, investigations, review and approval; and the aiding, approval, and policy-making procedures of the executive branch. These are all part of the organic parts of the entire constitutional procedure.148

E. The Key Factors and Value Direction of Constitutional Procedure

1. The Key Factors

Generally speaking, procedure as a behavior rule and process has internal requirements for existence. Legal procedure as an overall concept also has its own new definition and requirements. The important distinc-

148 Because of the page limitations, the area touched by this Article will be limited to macro structure of procedure, such political models, and power operating procedure or process.
tion between common working procedure and general legal procedure, such as trial procedure, is the changing factors required for their creation.

First, we must look at the creation factors of work, which include order, steps, spatial displacement, and location. Objective and subjective factors link them together. This logical relationship follows an ordered timetable of order and steps (including segments) to design a set of procedure for the work, which is also a subset of logical relationships. The objective factor in the procedure forms the important basis of subjective design procedure, and all procedures must integrate these.

However, mechanical operating procedures are based on machines, and their changes can only be carried out by people, without whom the machines are only a pile of junk. Such mechanical rules cannot be equated with the procedural rules of social behavior because whether we look at political, legal, or any other behavior, the flexibility of the subject originates from the people themselves. Therefore, the behavior guided and restrained by procedure is like trying to control a human with marionette strings; obviously such an operation is more difficult than a mechanical counterpart. As a regulator of human behavior, legal procedure contains all the above factors, but also has a mandatory power. The violation of a mechanical operating procedure may cause the inactivity of the machine or its destruction, as this is the objective rhythm of a machine. However, the mandatory force in legal procedure has added a human factor — that whoever does not follow legal procedure will be sanctioned by law, or else such behavior will not have legal effect. For example, according to Chinese marriage law, marriage without registration has no legal effect and thus is not under the protection of the law.

Constitutional procedure uses the practice of law and its system as its main content, through the form of the constitution and laws. The behavior process of constitutionalism is also created with factors such as a timetable, a spatial premise, order and steps, but if we expand the area of observation, it can also include the subject of such behavior, i.e., the participants. Such participation is open to all who satisfy the legal requirements. The political contents of constitutionalism, such as the operation of national power, the activities of the political parties, trials, and general elections, all have their own objective requirements. For example, the operation of national power must satisfy the constitutional and legal requirements; the U.S. president is elected by the electoral college, elected officials have set terms of office, and the passing of each bill requires a set quorum. We know that procedure is an open system. As long as the legal requirement is satisfied, or there is no disqualification, one can enter the procedure. This ability to enter and remain within the system is the basis for creating constitutional procedure, which thus contains the political content of democracy.
In the substantive process of constitutionalism, the objective demands and requirements of constitutional procedure usually displace the following functions and contents. The first is the objective demand of using time as the content. This includes "terms of office, meeting date, trial date, election date, waiting period for a veto, etc., creating the time requirement of the behavior in terms of procedure and dictating the use and termination of power."

Second is using a certain time-space background as an essential process requirement. In the operating process of power, decisions made or bills passed without approval within procedural form have no legal effect; only when such procedure is satisfied is the legal effect granted. If a bill is not passed by the proper authority with the required quorum, then it cannot become law. This procedural demand reoccurs constantly in constitutional procedure and is the key to the substantive rights of constitutionalism. For example, the emergency powers and procedures of a nation in crisis are only effective when there is an actual emergency threatening the nation and its people, and the nation still must follow the proper limitations and procedures.

If the state of emergency is invoked without reason, then it is against the law and the constitution and has no legal power. There is an important principle from the constitutional theory here because in the representative system, power belongs to the people; any action taken without the prior approval of the people or its representative body is a violation of substantive law and regulation. More importantly, it violates the public will, the principle of the people's power, and the representative system. The approval procedure is the principle emphasized by contemporary...

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149 See XU CHONGDE, HEAD OF A NATION 50, 67 (People's Press) (1982). The term of office for duties, for example, is an important procedural requirement in the constitution for congress members, government leaders, and the party in power; its function is to guarantee a stable period for the office in power to exercise its constitutional power, to prevent the life position of any individuals, and to restrict the shortcomings of individual authoritarianism or the aging of knowledge. This is beneficial to the interchange and continuation of national power, and guarantees stability and continuity. Furthermore, the regulation of meeting dates demonstrate a close relationship with substantive rights of the congressional representatives. The legislators enjoy constitutional rights and privileges regarding official business during the meeting, but afterwards, such privileges cease to exist. See XIANPA, arts. 74-75. During closed meetings, the allocation and use of power ceases to exist outside the set period. Id. at art. 61. The inability to satisfy such time requirements directly affects substantive rights.

constitutionalism, but it is also the most important procedural principle of the representative system.

Third are the procedural requirements of quorum to determine the legality of certain behavior. Examples include the votes and percentages required in an election, for passing a bill, or the number of people required to be present in a meeting to be effective. The formation of the decision-making process of other countries consists of similar procedural factors.

Fourth is age as an essential procedural requirement, such as the age requirements for voting or to become a candidate. These are all essential requirements for entering the election procedure; those under the required age cannot enter the procedure or use power.

Overall, these different types of objective procedural factors are important requirements for creating effective and legal substantive rights in the constitutional process, and they are also the special feature of constitutionalist practice.

2. The Direction of Value

Although the first chapter discussed the general function and value of procedure in constitutional procedure, the extent and content is broadened and deepened to include the function and value of constitutionalism. The basic functions of procedure are to prevent bottlenecks in the system, to provide guidance and to restrict randomness, all of which now play a vital role in bringing constitutionalism into practice. Because constitutional procedure seeks to provide an overall systemic order, its development and use have great effect throughout a given legal system.

Constitutional procedure, like procedure in general, must simplify and separate complex social problems to create an order and hierarchy. As the main actors in the constitutional process, the government, political parties, and special-interest groups must contend with these problems; constitu-

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151 Dr. Katz, the chairman of the United States Academic Body pointed this out in an international discussion group comparing constitutionalism.

152 For example, the Chinese constitution mandates that decisions concerning the election of the People's Congress can only passed by the votes of at least two-thirds of all the members of the Standing Committee. See XIANFA, art. 60. It is the same for other legislatures. For example, the Japanese constitution's Article 59 states: "A bill which is passed by the House of Representatives, and upon which the House of Councilors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present." KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION 287 (1991). This requirement can thus void something decided by only one group or by an individual who controls the party or group.
tional procedure is both a tool for cutting problems down to size and a regulation upon the means for doing so. Such powers are determined by the support and institutionalized procedure at the disposal of the organization.\textsuperscript{155}

The direct function of constitutional procedure in a more developed system may be used to further institutionalize or modernize existing political behavior; that of a less-developed system may be needed to establish a mode of political behavior that reflects the rule of law. In developed countries, the modernization of a system requires the rationalization of power, the demarcation of political functions, and broad political participation, all of which require the regulatory power of procedure. Huntington felt that the rationalization of power requires political power to be removed from traditional influences of religion, dynasty, and race to establish a unified power of mortals; modern procedure serves to encourage this change while serving to concentrate and centralize this power.\textsuperscript{154} The demarcation of political functions makes the government more specialized, scientific, and meticulous. Broad political participation within a developed country allows procedure to function more effectively; the canal that procedure opens between the people and governmental politics and power is a widening one that increases public control over the government.

In developing countries, constitutional procedure must lay the foundation for constitutionalism, respect for human rights, and adherence to the rule of law. In those developing countries with a rule by man tradition in practice or still lingering, regulated procedure brings them out from the abyss of feudal ideas to come face-to-face with the just force of the rule of law.\textsuperscript{155} Professor Yash Ghai, of Hong Kong University, commented on the absence of the rule of law in African governments: "The human right records of the majority of African governments is rather dismal. In terms of the governments and their officials, there exist many incidents that violate the law. Random and dictatorial power is commonplace. Many have been imprisoned without trial. There are many direct and indirect inspections to prevent mass gathering,... official position is seldom inherited through election results. The judiciary is weak, and some are merely rubber stamps. A one-man system or one-party system dominates the political systems of most countries."\textsuperscript{156} As Yash Ghai further

\textsuperscript{155} \textsc{The Revolution of Political Order}, at 12.
\textsuperscript{154} See \textsc{Huntington, The Political Order of Changing Societies, supra} note 8, at 12.
\textsuperscript{155} Id.
\textsuperscript{156} Yash Ghai, \textit{The Problem of National Theory and Constitutional System of Third World Countries}, in \textsc{Thesis of International Constitution Discussion Group
noted: "Throughout history, human rights have only been won through struggle." Such rights should be won through struggle, but the rule of law must be protected and nurtured in a society under peaceful circumstances. In developing countries, the function of constitutional procedure is to lead the people and their governments toward the development of a democratic process that promotes consistency and protects human rights.

Organization and procedure are required to provide the flexibility, complexity, independence and concentration needed for a society to progress. The flexibility of a system is increased as its constitutional procedure becomes more institutionalized and more sophisticated. This is a symbiotic relationship in which a system's ability to absorb and solve complex problems leads to greater procedural stability; greater procedural stability increases its ability to handle more complex problems. The society's power becomes concentrated within this flexible and independent procedure in a manner that promotes the institutionalization of order.

With constitutionalism as the goal, constitutional procedure brings the democratic and political behaviors of the people in line with the constitutional process. The roles assigned by constitutionalism are: 1) to promote and protect the people's access to their legal and political systems and 2) to guide the people and the government from the rule by man to the rule of law. Constitutional procedure thus uses the spirit of constitutionalism to establish a legal system founded upon democracy and a democratic system that functions within the law.

III. CONSTITUTIONAL PROCEDURE AND DEMOCRACY

A. Democracy and the Principle of Democratic Procedure

1. The Relationship Between Democracy and Procedure

From the tribal governments described by Lewis Henry Morgan in *Ancient Society* to the formation and development of contemporary constitutional democratic systems, democracy existed in several forms in different historical time periods and backgrounds, whether as used by organizations or by nations. Through the ages, one consistent feature of

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157 *Id.*

158 See generally LEWIS HENRY MORGAN, ANCIENT SOCIETY (1964). Morgan wrote that the tribal meetings of the chief of the Indians can be looked at as the origin of contemporary congress, parliament, and legislature. The concept of government begins at the tribal stage of the earlier time, and finishes at the establishment of political society entering the civilized stage. There are altogether three stages: first is the tribal meeting of the chief, i.e. one-power government; second is meeting of chief and supreme military commander, i.e. two-power government; third is with the people's congress participation, i.e. triple-government.
democracy has been procedure's role in providing the operating structure and process.  

First, different democratic operating processes and forms reflect different kinds of democracy. Procedure is not merely a democratic veneer; it reflects the content and features of the democratic system. The democratic operating process of the ancient city-state of Athens, for example, is substantively different in content from those of modern constitutional systems.

Second, the sophistication and maturity of the democratic system is reflected in its procedure. Earlier undeveloped democratic systems have undeveloped democratic procedures, while developed democratic systems have correspondingly developed procedures. The degrees of maturity and completion of a democratic system determine those of the democratic procedure. This is illustrated by the split between Western and Eastern democratic systems. The differences in their democratic systems can also be seen in their democratic procedures.

Third, the relationship between democracy and procedure comes from the function of procedure to guide and protect democracy. The quality of the procedure directly determines the quality of the democracy. Just as procedures have reflected the characteristics and development of their democratic systems, a complete, logical, and scientific procedure guides democracy toward those same attributes. Procedure serves to provide the structure necessary for the democratic content to be complete, and without a complete structure, the democracy cannot be carried out in practice. Therefore, a complete and developed democracy must have a complete and developed procedure.

The relationship between procedure and democracy can be examined further through the two basic democratic systems, direct and indirect democracy. Each system developed its own procedures and contents as a result.

159 The tribal democracy of ancient clan societies demonstrates the most basic form and process through which kind of "democratic" policy or decision are formed. For example, in order for tribal members to replace an unsuitable leader or chief, they could just remove the horn, a symbol of leadership, from his headgear. Without his horn, he no longer enjoyed the status and power of a leader and became a mere tribal member. This is an impeachment procedure, and its use to control the power of a leader can be said to be a form of tribal democracy. Even though such restraint power remains in contemporary constitutional systems, the form and process is infinitely more complex, which also reflects the different democratic form and content of a different time period. Id. at 72.

2. Direct Democracy and its Principle of Procedure

Direct democracy is a political form in which the decision-making power is held by all citizens without a medium of political organization, such as political parties. A typical form of direct democracy would be the sort practiced by the ancient city-state of Athens.

First, the members of government agencies were determined by drawing straws according to regions and tribes. As Aristotle wrote: "Taking the executive member as an example, the method of drawing straws is considered that of the citizens." The fact it belonged to the citizens meant it belonged to the democracy of that time.

Second, for the members who participated in drawing straws and deciding political affairs, membership came from the entire population of free male citizens. Although slaves, women, and people under the legal age were excluded, such political participation of the entire population of free male citizens was still a special example of democracy.

Another form of this democratic characteristic was the trial by jury system. The basis of the jury's majority vote was the mutual understanding between it and the defendant. In other words, any defendant had to understand the individual characteristics of each jury member through direct contact before solving the conflicts at trial. Without mutual understanding, the case could be mishandled.

Although the ancient Greek system applied direct democracy to nearly all of its governmental functions, it is more currently seen in the use of plebiscites or referendums through which people vote upon national, state, or local affairs. The earliest modern country to use general elections was 16th century Switzerland. Although the result was a "nay" vote, Massachusetts held the first general election to determine the fate of a constitution. The French used general elections to make Napoleon a lifetime executive in 1802, and emperor in 1804. More recently, in 1958, the French used this method to pass its constitution. Despite Napoleon,

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61 See BLACKWELL POLITICAL ENCYCLOPEDIA, at 203.
62 The main political bodies of Athens consisted of a general assembly, a 500-member congress, and a jury system. All free male citizens were eligible to participate in the general assembly, the highest governmental body, which handled the internal and external issues of the city-state and proposed amendments to current laws. The 500-member congress served as an executive branch that dealt with general daily affairs and looked at the bills proposed to the general assembly. The judicial branch of the city-state was formed of jury members and judges in a majority-vote system by which the jury members could number as many as 6,000. All three of these branches, through their creation and operation, had democratic characteristics. See ARISTOTLE, POLITICAL THOUGHT, at 1294.
the general election has nonetheless become a valuable tool for democratic nations. Statistics show that between 1945 and 1980, there have been 244 general elections held in twenty-one countries, 169 of which were held in Switzerland. The most recent use of a general election to pass a constitution happened in Russia on December 12, 1993.

A couple of other forms of direct democracy that correspond with general elections are the use of voting to express public disapproval and the voting public's influence on the creation of bills. These tools are additional means of applying the principle of people's sovereignty, effectively guaranteeing that the public will have a place in government legislation and decision-making.

It is important to note that some applications of modern direct democracy have diverged substantially from the ancient version, as the direct democracy process has infiltrated the functioning of organizations, such as political parties and interest groups, that participate in indirect democratic activities. Nevertheless in smaller countries or in regional affairs, the form of direct democracy is still commonly used. Overall, the direct democratic operating form and process has developed despite restrictions from many practical considerations. With time and social development, another form of democracy has been gradually forming, developing, and spreading.

3. The Representative Democracy and its Principle of Procedure

Indirect democracy is the opposite of direct democracy in that all democratic behaviors are not directly practiced and completed by the citizens, but rather are handled through an intermediate link or organization. The mainstream form of expression of indirect democracy is representative democracy, which grants the political power of decision-making to representatives elected by the people. Representative democracy has two characteristics: 1) the members of the representative agencies all come from a general election and serve a fixed term, and 2) the representative agencies have legislative power and so maintain an important status in the national body. Representative democracy has done more than

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163 See BLACKWELL POLITICAL ENCYCLOPEDIA, at 635-36.
164 For example, although it was not a U.S. presidential election year, the 1994 election of the first Republican Party majority in both congressional houses in 40 years can be attributed to public disapproval of the policies followed under the Democratic Party leadership of the president and both houses.
165 Id. at 20.
to change the national authority of direct democracy; it has created an upheaval throughout democratic systems.

The byproducts of representative democracy are numerous and have added to the complexity of democratic systems. First, representative democracy led to the creation of the first political parties, interest groups, and other democratic and political forces. Second, the practice of representative democracy requires the election of congress members; many new requirements needed to be created and developed in order to carry out this process. Third, representative democracy has changed the relationship between the citizens and legislation while also forming a master-servant relationship by which representatives must answer to their constituencies. Fourth, representative democracy relies heavily upon procedure because legislators must represent a somewhat nebulous “will of the people,” the operating process has to be consistently adhered to in a manner that promotes some understanding of public opinion and benefit. Representative behavior outside this framework is a violation of the spirit of democracy and modern constitutions.

4. The Comparison Between the Two Kinds of Democratic Procedural Principles

The procedural principle of direct democracy is its inherent directness, while that of representative democracy is whether the final result reflects the will and benefit of the people. Direct democracy’s procedural principle reflects the people’s opportunities for and burdens of setting the national agenda, managing day-to-day affairs, and fielding new issues as they arise. The principle requirements of representative democratic procedure are to carry out the general elections, to ensure that legislation and policy pass the approval process required by law, and to carry out the will of the sovereign people. Modern constitutions have placed the people’s sovereignty as the foundation for the creation of constitutional systems, and contemporary constitutional procedure has been established upon this principle.

Although the use of direct democracy is limited by practical factors, such as population, geography, and society, many countries now combine the operations of direct and indirect representative democracy. In so doing, the qualities of direct and indirect democracy are recognized and used to supplement each other’s shortcomings. New communication technologies may make direct democracy concepts such as “electronic town hall” meetings, more feasible, but those technologies also serve to increase the efficiency of representative democracy.

B. The Modern Constitutional Procedure and Principle of the Constitution
Constitutional procedure, as the political process of democracy or the active process of practicing the constitution, is built on the foundation of the constitution. Different constitutional operating procedures are determined by different constitutions and constitutional principles. For example, the Western countries have used a constitutional operating procedure that features the separation of powers and checks-and-balances between those powers. However, the socialist countries' systems have featured a centralized democracy in which the legislative and executive powers are integrated. Therefore, the observation of constitutional procedure must be placed in context with the appropriate constitutional principle so that the procedure's operation can be understood.

1. Representative Procedure and People's Power

Modern constitutional political bodies and their democracies are mostly built upon representative democracy and the principle of the people's sovereignty. The decision-making power rests in the hands of representatives elected by and responsible to the people, and the basic content and form of representative democracy practice is demonstrated in several ways. First, general elections allow the people to elect their representative agents. Second, the representative agency holds legislative power. Although the people enjoy national sovereignty, they cannot directly use the legislative, executive, or judicial powers. Because these powers are in the hands of others, the procedural requirement of representative democracy is whether the government can be restrained or approved by the people.

The procedure of a representative democracy should substantially embody the constitutional principle of the people's sovereignty. Whether it involves elections or legislation, the procedure has to be consistent with the people's benefit and be approved by the people. This approval is a procedural concept, but it is not limited to its procedural definition; it is more important to ensure the substantive meaning of the people's sovereignty. The approval of the people is manifested in many different ways in constitutional process, but mainly it is through: 1) people's election of representatives and officials whose positions and decision-making skills are thus "approved" before legislation is passed or policy is made, and 2)

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167 The practice of constitutional procedure has demonstrated that some habit procedures have not been reflected in the constitution. As a result, not all constitutional procedure originates from the code of constitution. But constitutional procedure will not usually specially develop on the foundation of constitution.

168 The concept of the integration of the legislature and the executive has gone through many changes and development in the constitutional practice of socialist countries, and it is no longer a simple organization.
through the people's ability to exert control over policy and legislation after the election. Although, as Jean-Jacques Rousseau pointed out, sovereignty cannot be represented, legislation is void without the approval of the people. Rousseau thus emphasized the role of direct democracy. Such approval at this level is a more general ability of the people to recognize or accept government cabinet formation, personnel appointments, and powers requested for handling foreign affairs. For this approval process to have real power, law must be used to regulate government to make sure it answers to the people.

Louis Henkin, an American scholar, suggested a connection between the representative government and democracy in the context of the United States: "In a republic, people are both the sovereign and the ruled. It implies respecting the people's sovereignty and the approval of the ruled masses." Only those representatives directly elected by the people can be fully said to be responsible to their constituents. But, Henkin points out, democracy is not merely the right to vote. According to Henkin, the people's sovereignty and representative government have become reality through 200 years' service as the principle foundation of the American government. "Now, we are all represented and our agents must answer to all of us and they also have the duty to explain to us. We are all the ruled masses and our government must have our approval to be legal."

The representative system of democracy not only requires the procedure of general approval, it also requires the right of the people to participate in public affairs and the government. In Considerations on Representative Government, John Stuart Mill wrote: "[i]dealistically the best form of government is the kind where the control of sovereignty and the final solution belongs to the society as a whole. Every citizen not only has the right to speak out about the final sovereignty, they are, at least in certain times, required to join the government and personally take charge of the local or general public affairs." Because it is impossible for everyone to participate in public affairs, representative government has become the ideal form. Nevertheless, Mill never completely discount-

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171 Id. at 11.
172 Id. at 13.
173 John Stuart Mill, Considerations on Representative Government 43 (1862).
174 Id. at 55.
ed the possibility of citizens joining the government directly. The representative system is used merely because not everyone can join at the same time.

Representative democratic procedure also has a vital role in the supervisory function of the representative agencies. As Mill wrote: "The duty of representative congress is not to manage— it is not suitable for that — instead it is to supervise and control the government, and publicize the behavior of the government and so force it to adequately explain and defend questionable behavior, and criticize violations. Furthermore, if government officials abuse their power, or their form of carrying out their duty clearly conflict with public opinion, then they are to be fired and replaced by suitable candidates." 5 The operating procedure of the congress is thus centered on this supervisory duty; the discussions, hearings, and inquiries of the congresses of many modern countries demonstrate how procedures reflect this responsibility.

The people's sovereignty is also recognized by the constitutions of socialist countries. Although both capitalist and socialist representative constitutional systems have many superficial similarities, there are some substantial differences in the means used to carry out the will and benefit of the people. The People's Congress system practiced by China seeks to centralize democratic powers through the practice of the people's "democratic dictatorship," a term likely to be seen as something of an oxymoron by Westerners, but which represents a Maoist vision of a nationally united front that would wipe out class distinctions and the old divisions of power en route to ultimate communism.

2. Restricting Procedure and Separation of Powers

One of the most important principles of contemporary Western constitutions is the separation of powers. National power is separated into legislative, executive, and judicial powers, which reach an equilibrium through a system of checks and balances. This separation is intended to avoid authoritarian corruption or expansion of power. Although Aristotle had earlier discussed the legislative, executive, and judicial functions as the most important of a political system, it was Locke who first clearly proposed the separation of powers. Locke suggested a separation between legislative, executive and foreign affairs, in which the legislative power is "to guide the use of national power to protect the power of the society and its members"; executive power is the power "responsible for carrying those laws which are passed and continuously effective"; foreign-affairs power is "to include war and peace, alliance and coalition, and all affairs

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5 Id. at 80.
dealing with foreigners and foreign societies.\textsuperscript{176} Locke provided a clear status for each of the powers, although a popularly elected legislative power would be the highest under Locke’s system, each branch would have checks and balances to use.

The Baron de Montesquieu’s concept of separation of powers was built on Locke’s foundation, but his proposed governmental powers were divided among the legislative, executive, and judiciary. Montesquieu wrote: “If the judiciary power is not separated from the legislative and executive power, freedom no longer exists. If the judiciary and legislative powers are joint, then there will be dictatorial power against the life and freedom of the citizens. That is because the judge will also be the legislator.”\textsuperscript{177} Furthermore, if all three powers were held by the same entity, he was concerned that the governmental system would be destroyed. For the system to work, Montesquieu thought the legislative power should belong to the people; executive power should belong to the monarch, and the judiciary should belong to an English-style court and jury.\textsuperscript{178} The checks-and-balances system Montesquieu proposed also assumes that some powers cannot be restrained equally. For example, he wrote: “Legislative power should not have the equal power to restrain executive power because executive power has its own substantive premise and so does not require much restriction.”\textsuperscript{179} However, this is self-contradictory.

Although these concepts of separation of powers and checks and balances maintained a certain idealism, constitutional practice as led by United States has brought such concepts into reality. The United States has also turned such concepts into important constitutional principles that have guided the operation of its constitutionalist system for the past two hundred years.

The constitutional practice of the American separation of powers developed the concepts of power separation beyond those of the Age-of-Enlightenment scholars, allowing national power not only to be separated into three equal portions but also to mutually restrain and cooperate with each other. As Alexander Hamilton wrote: “As long as the departments of authority mainly maintain separation, it is not out of the question to

\textsuperscript{176} JOHN LOCKE, 2 OF CIVIL GOVERNMENT 89, 90 (J.M. Dent & Sons, Inc.) (1936).
\textsuperscript{177} CHARLES DE SECONDAT, BARON DE MONTESQUIEU, 1 THE SPIRIT OF LAW 156 (P.F. Collier) (1900). The Baron felt that national power must be separated; if the legislative and executive powers fell into the same hands, then freedom could no longer exist. The people would have reason to fear a monarch or legislature making tyrannical laws and then having responsibility over carrying them out. \textit{Id.}
\textsuperscript{178} \textit{Id.} at 162.
\textsuperscript{179} \textit{Id.} at 161.
have local integration with a specified goal. Such integration under certain circumstances is not only proper, but essential to the check and balance between different departments of authority.\textsuperscript{180}

The American system uses power to restrain power, but in practice, the most important method is the active checking in the process of operation between the three powers. Overall, it can be analyzed in terms of dormant and active aspects of the power relationships.

The dormant checks upon the power relationships serves to protect against the abuse of power in two basic ways. First, the status, ability, reputation, and influence of individuals, political parties, and interest groups play a key role in standoffs between powers. Second, within the confines of the constitution, every power has a certain amount of constitutional control over the others, and the ability to exert force varies, depending upon the respective force and energy of the power subject. Thus, standoffs between powers are confrontations that involve political, psychological, and legal forces.

The active checks upon the power relationships arise in other ways. First, the checks between power behaviors use the actual practice of power as its method, directly using dos and don’ts, agreement or disagreement to express itself.\textsuperscript{181} Second, the powers may exercise checks through other means, such as meetings, votes, investigations, inquiries and criticisms. Other sorts of active persuasion exist, such as the use of public influence and peer pressure, and each branch may be expected at any time to use these indirect methods to control their opponents. However, these active checks upon powers are practiced through the procedural limitations established by law and by each power’s pursuit of benefit. For example, if a U.S. president vetoes a bill, it cannot become law unless the bill is then passed in both houses of the Congress by a two-thirds majority.\textsuperscript{182} These procedural controls demonstrate that the relationship between the powers is actually a control relationship between power operating procedures. This relationship exists between the three powers and internally, as between the two legislative houses; the relationship also operates between the national and state governments.

The checks-and-balances procedure is not only embodied in constitutions with the separation of powers, it can also be applied to other types of constitutions. However, the checks-and-balances relationship and the procedures between the powers is decided by the constitution, itself.

\textsuperscript{180} Alexander Hamilton, in \textit{The Federalist Papers}, at 337.

\textsuperscript{181} For example, the U.S. president can veto congressional bills, and the U.S. Supreme Court can hold a law to be unconstitutional. \textit{See generally} U.S. \textit{Const.}, arts. I, II, III.

\textsuperscript{182} \textit{Id.}
Although the power structures and relationships of nations may vary, the checks-and-balances relationship between the powers still exists. The constitutions of socialist countries do not practice the separation of powers, but there still exists supervision and restraint between the functions of those powers.

3. Due Process and Human Rights Protections

The concept of due process developed over many centuries, but it has great importance for the rights of citizens. The early code of the Holy Roman Emperor Handois I stated: “Trials that do not follow the law of the empire or nobles of equal status cannot deprive anyone of their land.”¹³³ Forced upon the British King John in 1215, the Magna Carta states: “No freeman shall be arrested or imprisoned, or diseseized, or outlawed, or banished, or in any way molested; nor will we set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.”¹³⁴ These two documents were important milestones on the path toward modern due-process, and despite their imperial and feudal backgrounds, they contain some rule of law concepts.

Before the American independence, the charters of the colonies of Virginia and Massachusetts had absorbed the concept and terms of this procedure, allowing a clear recognition of due process and the terms later used in the 5th and 14th amendments of the post-revolutionary U.S. Constitution. In constitutional practice since the development of due process, it has become an important procedural means for protecting citizens from government abuse. In judicial practice, due process has become a substantive and meaningful legal regulation.

The terms and principles of due process protect the rights of defendants in civil as well as criminal actions. For example, the first section of the 5th amendment of the U.S. Constitution states: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any crime case to be a witness against himself . . . .”¹³⁵ This is restricted to criminal cases and their legal procedure, but then we find: “nor be deprived of life, liberty, or property without the due process of law.”¹³⁶ Thus, due process is not merely restricted to criminal trial procedure.

¹³³ WILLIAM STUBBS, THE GERMANY OF EARLY MIDDLE AGES (476-1210) 146 (1908).
¹³⁴ MAGNA CARTA, sec. 39.
¹³⁵ U.S. CONST. Amend. V.
¹³⁶ Id.
The concept of due process within the United States has gone through several changes. First, there was a change from procedural to substantive due process. Second, there was a change from a protection of criminal trial procedure to include protection of private property. Third, a change to the use of federal power to protect private property. The practice of the U.S. Constitution has already incorporated the principle of due process in areas of judicial and executive process, including trial procedure. In order to protect human rights, the 14th amendment was adopted in 1868, which brought due process to the legislative, executive, and judicial branches of the states to protect the fundamental rights of the citizens.

The constitutions of socialist countries have also developed similar due-process regulation and brought it into practice. For example, in Articles 37 and 40 of the Chinese Constitution, although the term "due process" is not used, it clearly states: "No citizen may be arrested except with the approval or by decision of a people’s protectorate or by decision of a people’s court, and arrests must be made by a public security organ." The form and content of such regulation is very similar to the terms of the constitution of the former Soviet Union, which only points out the overall process without clarifying the due process concept. However, Article 17 of the new Russian Constitution states: "[the] constitution protects the life of every person. The value of every person is protected by the country. Everyone enjoys freedom and is free of violation of the person. Arrest and imprisonment must closely follow judicial procedure." The Russian Constitution now also mandates that when the court handles a criminal case, the defendant has the right to demand the participation of sworn-in jurors.

The formation of the due-process concept contributed greatly to the world’s constitutions through the application and practice of other constitutional principles. Due process is essential as long as a constitution recognizes human rights, the equality of citizens, the rule of law, and the functional role to protect the fundamental rights of the citizens.

The American administrative law scholar, Peter L. Strauss, emphasizes the importance of executive procedure and explains several theories and practical problems regarding procedure. He noted the growth of

188 For example, in 1890, Supreme Court ruled on the case of Minneapolis and St. Louis Railway Company v. State of Minnesota 140 U.S. 690, 11 S. Ct. 1024, using the terms of due process held that Minnesota’s law regarding railway transport fees conflicted with the 14th amendment thus it was bad law. Ever since that case, when any state passes laws or regulations restricting private ownership, there will be a question of due process, allowing the federal court to review the relevant state law.
189 See Peter L. Strauss, An Introduction to Administrative Justice in The
procedure: "On the foundation of proper procedure in the last five years, the court has built a great mansion of formal trial procedure." Justice Frankfurter wrote: "We have already witnessed the development of procedural due process in the last five years which has already surpassed the sum of development after the approval of the constitution." In the development of contemporary protection of human rights, the principle of due process has gained much attention in the United Nations and other international arenas. The concept of due process has seen great increases in its development and influence, from which human rights can hope to gain a more complete and reliable protection.

4. The Procedure and Principle of Centralized Democracy

Democratic centralism is recognized by the constitutions of socialist countries as the organizational principle of national authority. However, it is not merely an organizational principle, it is also an important procedure of socialist national constitutions and democratic constitutional operation. Although one could define democratic centralism as the combination of democracy and centralism, this would appear to be yet another oxymoron for Western scholars to struggle with. Compounding the confusion, the concept has had different meanings over time and in practice. For example, in 1937, Mao Zedong said: "There is no uncrossable trench between democracy and centralism. Both of them are essential to China. On one hand; the government we require must be one that can represent the will of the people. This government must have the overall support of the Chinese people; and the people must also have the freedom to support the government or the opportunity to influence government policy. This is the definition of democracy. On the other hand, the centralization of executive power is necessary. When the policy demanded by the people is passed by public agency and transferred to elected government, it will be implemented. As long as the implementation does not contradict the general direction approved by the public, then it will be carried out. This is the definition of democratic centralism." As we can see the democracy of that time sought for the government to

United States (1989).

190 Id.
191 Id. at 1. See also id. at Preface.
192 Article 3 of the Chinese Constitution says that, "The national agency of the Republic of China will practice the principle of democratic centralism." XIANFA, art. 3. Therefore it is also the important principle of practice for Chinese National agency.
193 The Theory and Practice of the People's Congress, at 51.
194 See Mao Zedong, 1 The Collected Works of Mao Zedong 354 (reflecting on Mao's conversation with British journalist in 1937).
represent the public will and to receive the support and consent of the people, while centralism is concerned with governmental actions that are merely not against the public will.

Initially, democratic centralism was an organizational and activity principle of the Communist party originating from Lenin's theory of party establishment. Since 1905, Lenin had sought to unify the party and practice democracy within it. He wrote: "We insist on party democracy in our publication. However, we have never objected to the centralization of the party. We propose democratic centralism." This idea reflects the essence of Marx and Engel's democratic and central thinking regarding the organization process of international Communism. Lenin further wrote: "Engel is the same as Marx, insisting democratic centralism has not only become the guiding principle of establishing the party, but also become the model principle for other Marxist proletarian party." The Chinese Communist party has accepted this principle for a long time and adopted it as principle of the party constitution. The use of democratic centralism in the national arena also began with Lenin. Since then, it has developed to become the organizational principle of national agency recognized by the Chinese government.

Democratic centralism was included in the 1954 Chinese Constitution. Liu Shaoqi wrote in the report on the draft constitution: "We have centralized the national authority and unified the People's Congress thus demonstrating our democratic centralism." Liu said that when the people live under oppressive circumstances, they cannot entirely centralize their power and consciousness, but revolution makes this happen. As the people establish their country, they must centralize their power and consciousness in the national agency. The democracy and centralization mentioned here is the expression of the people's consciousness through democracy, but it is also the singularity of the people's politic. It is the centralization and unification made by consciousness through national authority and agency.

192 V.I. LENIN, 21 THE COLLECTED WORKS OF LENIN 405.
196 V.I. LENIN, 25 THE COLLECTED WORKS OF LENIN 433.
197 When Lenin explained about this ethical question, he said, "A democratic country must recognize the self-rule of every province. This self-rule isn't contradictory to democratic centralism." He also said, "Rather than having ethnic inequality, it is better to establish a federal system. That's because this is the only road to democratic centralism." This is Lenin's view for establishing an unified and concentrated central regime. V.I. LENIN, 20 THE COLLECTED WORKS OF LENIN 218; V.I. LENIN, 22 THE COLLECTED WORKS OF LENIN 140.
After the 1954 Chinese Constitution, democratic centralism, in practice, became the tool for handling the problems relating to freedom and discipline in China. Mao Zedong's point of view was completely accurate, but in actual practice sometimes democratic centralism became simply the combination of the leader and the people; the ideas from the people indicate democracy, while those from the leader alone indicate a centralism such that democracy is excluded. Under many circumstances, the ideas of democracy and centralism that cannot be separated from each other are ignored or become excuses of the leaders. This lesson was learned the hard way during the Chinese Cultural Revolution.

When the current Chinese Constitution was accepted in 1982, it also recognized democratic centralism as its principle of national agency but this time regulated the principle with a constitutional definition divided among three levels of relationships. The first level is at the relationship between the people and the national authority agency. For example, the National People's Congress and different levels of regional congresses are all elected by, responsible to, and supervised by the people. In other words, the national authority agency is created by public election, it represents the people's use of power, and this power goes back to the people through delegated responsibilities and supervision. The second level is the relationship between the national authority agency and the executive, judicial, and prosecutorial departments. These departments are tied to the centralized national authority through supervision and responsibilities and are thus tied back to the people. The third level is the relationship between the central and regional governments, in which a balance must be struck between the needs for local initiatives and for coherent national policy.

There are several schools of thought concerning democratic centralism. Some offer that it is not only the organization principle of the national agency, but also the fundamental principle of the people's congress system. However, critics of this view argue that the two above principles should be differentiated; democratic centralism concentrates on the means, not the ends, and so the two principles differ on priority. On the other hand, the democratic decision-making and discussion of the representative system is a form of democracy, but it is not democratic centralism. "The minority following the majority is a form of democracy, not a form of centralism." Administrative agencies in China practice a system that places responsibility upon the department heads, and although such a system is effective in carrying out laws and soliciting

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input and feedback, it is substantively a centralized relationship rather than an example of democratic centralism.\textsuperscript{200}

Whether we examine the operations of a party or a national agency, what is reflected is the formation and allocation of power. Democratic centralism is reflected in the high- and low-level organization of the party, as well as in the relationship between the party organization and the central government. Because parties must emphasize centralization and unification in order to gain and consolidate power, democratic centralism serves a vital role in tying the individual to the organization, the lower ranks to the upper ranks, and ultimately, the whole party to the central government. This ordering is an attachment of power and the unification of ideology. In terms of a national agency, the track of the formation and attachment of power starts with the people through their election of the People's Congress, which in turn creates administrative and judiciary agencies responsible to their departments. The representative agency will then answer to the people, and so the power is recycled to its starting point.

Regardless of the levels of organization or power, under democratic centralism, the people are the source of concentrated power as well as the starting point and subject of practical democracy. Thus, the People's Congress system and democratic centralism are not the goals, but only a structure for the nation.\textsuperscript{201} The former is the fundamental form of practicing socialist democracy of China,\textsuperscript{202} and the latter has become the organization principle of the national agency of this form. Mao described the active relationship between the two: "[i]t is democratic, and also centralized. In other words, the centralism is based on democracy, and the democracy is under the guidance of centralism."\textsuperscript{203} In China, the elections of the National People's Congress and local people's congresses are democratic processes under a constitutional procedure mandated by law. The process through which the People's Congress answers to the people and is supervised by the people is a centralized procedure or process.\textsuperscript{204} This concept is also demonstrated by the relationship between the National People's Congress and the administrative, judicial, and prosecutorial agencies; the congressional supervision is a process of centralism based upon democracy, while the behavior of these national agencies is democracy working under the guidance of centralism. As we

\textsuperscript{200} Id. at 79.
\textsuperscript{201} This concept comes from Lenin.
\textsuperscript{202} THE THEORY AND PRACTICE OF THE PEOPLE'S CONGRESS, at 3.
\textsuperscript{203} MAO ZEDONG, ON UNITED GOVERNMENT.
\textsuperscript{204} The overall method of supervision and responsibility are all reflected in the People's Congress meeting and official responsibility regulation of the constitution.
can see, democratic centralism is not only an organized principle of national agency, it is also a legalized procedure principle guiding the operation of national agency.\textsuperscript{205}

Mao Zedong once interpreted democratic centralism as a method or group behavior, meaning democracy first, followed by centralism; from the people, to the people, with leaders working with the people. However, from the activities of party and national politics, democratic centralism is not an abstract principle, but an overall operating process and method. As mentioned, it is already a legalized procedure, and so this Maoist interpretation sees democratic centralism as only a form of working process. When this process is elevated to law, thus regulated and legalized, it becomes mandatory procedure, and so Mao Zedong's theory of methodology and group behavior of democratic centralism has become the constitutional principle of organization and the operating procedure and the confirmation of its use as the principle and methodology of organization.

It is important to note that China practices a multi-party cooperation system under the leadership of the Communist party.\textsuperscript{206} As the leader, the Communist party has practiced the democratic centralism principle since its formation and brought this principle into national life, regulating it through constitutional socialism. This has allowed democratic centralism to transcend political parties and become an important principle of the national system. In other words, the principle of democratic centralism has already gone from a single-party principle to become a principle recognized by the national constitution. The political parties and organizations that operate within the constitutional premise must all follow this principle. Just as the separation of powers is characteristic of the constitutional procedure of Western capitalist countries, democratic centralism is a characteristic of the democratic political procedure of Chinese socialism.\textsuperscript{207}

5. Comparison and Comment on Procedure and the Rule of Law

Constitutional procedure receives its operating principle and basis from the constitutional principles of people's sovereignty, human rights,

\textsuperscript{205} This is the reason why scholars of the field generally feel that Democratic Centralism is a type of organization and activity principle, which, it seems to me, has active and dormant characteristics. Furthermore, the constitution has not clarified that Democratic Centralism is a type of organization principle, or activity principle, but merely shown that national agency practice the system. Therefore, it is correct to also understand such principle as an "activity" principle.

\textsuperscript{206} See \textit{Collected Works of Deng Xiaoping} 1998.

\textsuperscript{207} Id.
separation of powers, and democratic centralism. The spirit and value of
the rule of law principle are further emphasized through the operation of
constitutional procedure.

It is essential to recognize the relationship between the rule of law
and procedure. As mentioned, law exhibits itself through procedure and
form, and even the internal formation of law consists of the logical
structure of procedure. The rule of law is an active concept, and it should
be said that the function and value of law are embodied in the practice
of the rule of law. However, the rule of law is also an idea and a spirit;
apart from the legal premise of black-letter law, the concept only exists
in human minds. The function of the rule of law is demonstrated through
the people's ideology, as well as through the overall guidance and
operation of legal regulation. As long as a system is operated under the
procedural premise and guidance of law and forms a self-aware, law-
abiding body, such a system can be said to follow the rule of law. The
constitution recognizes the rule of law principles through its goal of
establishing a legal body; the constitution meanwhile trains and encourag-
es the people to obey the law, planting the seeds of the rule of law
within society. Procedure represents the law and directs the behavior of
government and society in the form of regulation, and procedure also
shoulders the overall duty of the rule of law.

The internal function of law is the overall regulation of people's
behavior. The rule of law, however, seeks to establish order through law,
elevating law to a supreme status that is embodied in the societal life and
the people's minds. The concepts of the rule by man and the rule of law
are directly opposed to each other in a manner not based on empty
concept, but rather upon the overall legal premise and regulation. This
conflict exists because the nature of regularized procedure does not allow
it to be random; its neutrality does not allow for the use of emotions, as
regularized procedure must be administered dispassionately. The rule by
man is rich in emotion, reacting to wind with rain, to tears with sympa-
thy; at first glance, this may seem reasonable, but no doubt will destroy
the order of the society. Procedure's indifference to emotion is the most
important function and quality of the rule of law. No political animal can
exercise the rule by man method in the face of procedural regulation, and
so therefore the rule by man is opposite to the rule of law. Without
procedure, the rule of law is nothing more than words.

The British constitutional scholar Albert V. Dicey once summarized
the three main components of the rule of law. First, the rule of law is not
consistent with authoritarian governments in which the citizen role is
limited to accepting the laws or being punished accordingly. Two, every-
one is equal in front of the law. Three, the constitution is not the source
of personal liberty, which is set by the courts and is the consequence of
the exercise of power.\textsuperscript{203} British constitutional scholars Phillip and Wade object to these three components and proposed their own theory of the rule of law that concentrates on government and the rule of law through politics. Wade and Phillip wrote that law and order is superior to anarchy; law and order can be used by authoritarian government or protected by a democratic means of government. The difference between authoritarian and democratic systems is that the former avoids violence by solving conflicts in court, while the latter avoids the threat of governmental abuse by arranging the system in a way that ensures political rights for the people.

Phillip and Wade represent some progress in analysis of the rule of law, but the Chinese constitutional scholar He Huahui comments that Wade is in some ways a step back compared with Dicey.\textsuperscript{209} However, Phillip and Wade have not left the area of rule by man because it cannot exist under an authoritarian or dictatorial government. This does not mean that authoritarian governments do not use the law; they use the law as a tool to establish and consolidate the authoritarian order. This is the rule by man, which may also be called "rule by law." There is thus a distinction to be made between the rule of law and rule by law. The former is the ruling of law without human factors; the latter is ruling by law or through law, obviously emphasizing human factors and using law as the objective tool. Actually, what Wade describes is the latter, which he thought could be used by both authoritarian and democratic governments. Nevertheless, Wade and Phillip feel that the rule of law is the government acting according to law and that officials who violate the law will be punished by the law. People would have the right to challenge the government under this view.

I propose a slightly different set of characteristics for the modern rule of law, based upon the comments to the work of Dicey and Wade. One, the law that represents the common will and benefit of the people rules the society. Two, everyone is equal in front of the law, and this equality is protected by an independent judicial authority. Three, the self regulation and management of the government removes the rule by man, instead practices procedure and regulation.\textsuperscript{210}

\textsuperscript{208} See ALBERT VENN DICEY, 3 A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE PROGRESS OF LAW 7, 24 (STEVENS & SONS PRESS) (1932).
\textsuperscript{209} See HE HUAHUI, COMPARATIVE CONSTITUTIONAL LAW, supra note 84, at 79.
\textsuperscript{210} The above discussion concerns the relationship between procedure and rule of law. In the constitutional process, the relationship between rule of law principle and other constitution approved principles is also very practical. It can be clearly reflected through the above mentioned investigation of the relationship between constitutional procedure and principle. See Min Zhou, On the Validity of the Prefaces of Constitu-
Simply put, there can only be an overall representative procedure after the existence of the people’s sovereignty principle. The same applies to the law and constitutional process, which must be approved by the people through general election and plebiscite, legal practice, and other multi-level behavior procedures. Only after human rights principles are recognized can there be human rights protections, and only then can due process become part of those protections. The principle of separation of powers guarantees the importance of procedure in the process, as power restrains power, and due process allows restraint of the separation of powers to become the process of procedural control. The Chinese democratic centralism principle and procedure both embody organizational characteristics and democratic process characteristics.211 In the constitutional operation process, the rule of law has a dual function: 1) to restrict and displace the intrusion and violation by the rule by law through overall operating procedural regulation and the guidance of the constitutional process and 2) to protect the supremacy of law with the constitution as its center, through the spirit and concept of the rule of law.

The final emphasis is that, although procedure is neutral without any bias or emotion, in the practice of the principles of the people’s sovereignty, human rights, the separation of powers, and democratic centralism, because constitutions are inherently different, such as those in capitalist and socialist systems, each principle embodies constitutional characteristics. Because the overall operating procedure is decided by its content, it will similarly reflect the qualities and contents of different types of constitution.

C. The Majority Rule in Democratic Procedure

1. Majority Rule

Modern democratic political process is full of elections, plebiscites, meetings, and other events. Whether as a common citizen or as a government official, one participates according to the law and express their own choice and decision. Majority rule is the rule for decision-making involving decisions to agree or disagree with a certain event. Majority rule can be categorized into absolute majority rule or relative majority rule. Absolute majority generally means over half of the chosen population,

211 The Chinese democratic centralism would seem that all these have pushed rule of law principle aside. It is not necessarily so. All the other constitutional and procedural operation should embody rule of law operation. That is because the participation of procedure is rule of law activity which is the practice towards different principles, as well as the protection of different principle content.
and some scholars feel that it means, "whether the yea vote has the absolute majority in all the votes."\textsuperscript{212} Relative majority generally means a majority in a comparative sense, i.e., two or above of the group have the majority regardless of if it is over half of the vote. The vote in election or legislation can operate on absolute majority or relative majority. The primary goal of majority rule is to realistically reflect the will and protect the benefit of the majority, and with this, the decisions are legal and logical.

Starting from the point of reflecting and protecting the benefit of the majority, the rule of an absolute majority requires more popular support than that of a relative majority. However, the absolute majority is more difficult to achieve and thus operates with a lower efficiency. While designing such a rule, there are a full range of considerations. In order for the decision-making or policy-making to adequately reflect and protect the benefit and integrity of a larger group of the people, the law usually requires the majority to reach a certain scale to reach a decision. For example, the requirement for at least two-thirds or three-quarters of the vote to reach a decision is a preset supermajority rule.\textsuperscript{213} Such provisions can be linked, as in the Chinese Constitution, to the ability to propose or pass amendments to the constitution; the requirement of a supermajority prevents the government from potentially changing the people's constitutional rights without a broad base of support.

2. Legal Quorum Rules

In designing majority rule, the method of generating the majority is a key question.\textsuperscript{214} Overall, there are three ways to achieve this.

The first is to require the majority of the entire group of members. For example, the Japanese Constitution states: "Business cannot be transacted in either House unless one-third or more of total membership is present."\textsuperscript{215} The Chinese definition of majority for a constitutional amendment is generated by all the representatives of the National People's Congress.\textsuperscript{216}

The second is to require the majority of the present members. For example, U.S. Constitution says, "The Senate shall have the sole Power

\textsuperscript{212} \textit{Blackwell Encyclopedia of Political Thought}, at 442
\textsuperscript{213} See \textit{Xianfa}, art. 64. "The amendment of the constitution can be proposed by the National People's Congress, and passed by a two-thirds majority of the entire of population of the Congress."
\textsuperscript{214} The "majority" here means the majority at the time, such as 2/3 or 3/4, sometimes not, such as 1/5 and 1/3.
\textsuperscript{215} \textit{Kenpo}, art. 56.
\textsuperscript{216} See \textit{Xianfa}, art. 64.
to try all Impeachments . . . And no Person shall be convicted without the Concurrence of two thirds of the Members Present."\(^{217}\)

The third is to require that the majority of the qualified members also are present. This premise exists because some of the members present might be unqualified. If they are all allowed to vote, it will definitely affect the legality of the result.

The goal of quota rules is to make sure the decision is both logical and legal. At the same time, it is convenient for the purpose of calculation. If the quota is not reached, meetings cannot be held, bills cannot be debated, and decisions cannot be made. The goal is to satisfy justice, legality, and effectiveness.

3. Discussion of the Rule: Efficiency, Cost, and Justice

The American scholar Cohen wrote that in order to analyze these procedural rules, one must look at the results from using them. There are two kinds of results: 1) the trend of a rule is to protect different social members and to prevent decisions from having a beneficial or negative effect on them, and 2) the trend of a rule is convenient for making decisions and to efficiently carry out the public will. In other words, it has to balance the relationship between protective effects and efficiency.\(^{218}\) For example, the larger the scale of debate required by a rule, the greater its probability of protecting majority benefit and the lower its efficiency. Efficiency is inversely proportional to the difficulty of the rule's requirements, yet the scale of the debate is directly proportional to the protection of majority benefit. In order to balance the pros and cons of the rule, and to design the scale of the quota rule, one must look at the overall situation because there is no single rule that suits all.

Analyzing from the angle of public choice and its economic and other perspectives, the larger the scale of majority rule, such as the rule of unanimous decision, then the greater the cost of passing legislation.\(^{219}\) Critics refer to this cost as the base, and so before deciding which rule to use, one must consider the base cost of that rule. Otherwise, the social benefit will also be damaged.

Because majority rule is designed to protect the majority, it has been used since the clan society era, but majority protections conversely hurt

\(^{217}\) U.S. \textsc{Const.}, art. I, sec. 3.


\(^{219}\) In order to persuade or influence the majority or entire group to vote yea, one must go through a nearly infinite amount of dealing and waiting because a few people or even one person can exert blocking power. The resulting cost of both time and money will increase accordingly, or even become infinite. \textit{See generally} Dennis C. Mueller, \textit{Public Choice} (1979).
the minority. This contradicts the equal protection clause of many constitutions. Therefore, this is to be taken into consideration when using majority rule in a manner that prevents the violation of the minority. In the United States, the Senate is formed by each state electing two senators; this quota is not changed by population fluctuations, as in the House of Representatives. If majority rule is used in the Senate, then the minority benefit will always at a second place and without equal protection.

Rawls proposed that certain forms of majority rule logically serve to guarantee just legislation, which echoes the equality of freedom as part of the national law. One of the basic functions of supermajority rule is that such a procedure can satisfy the requirement of a just background. These requirements are the availability of political freedoms, such as freedom of speech, association, political participation, and the use of constitutional methods to influence the legislative process and to guarantee the fair value of these freedoms.

Rawls felt that citizens have an equal right of freedom to participate, and the constitution should be a just procedure that satisfies this. The premise of the participation principle is decided by the restrictions of the constitutional system upon supermajority rule procedures; this gives the majority the power to make the final decision and determine the speed with which to reach its goal. The constitutionally recognized majority rule may guarantee the citizens an equal right of participation, but it cannot guarantee the majority or supermajority rule can generate the correct policy. However, the constitution uses traditional methods to regulate the supermajority rule, and so it may be considered to have generated just legislation. Rawls suggests that when using a supermajority rule or participation principle, the result should be used as the standard of justice. When individual freedoms and the participation principle conflict, the former should not be put at risk. One should try to find "constitutional procedure that carries out the function of participation principles without violating other rights of freedom." Actually, the constitutional restrictions on majority or supermajority rule depend on the will required to force the majority to adapt and consider the issue further before making its decision. Such constitutional procedural restrictions reduce the shortcomings and inadequacies of majority rule. However a supermajority rule is used because it is the most ideal way of achieving certain goals, preset by the principle of justice.

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220 Id. at 14.
221 Rawls, A Theory of Justice, supra note 53, at 251-52.
222 Id. at 394.
4. Comment on the Majority Rule

The Nobel Prize-winning American economist, James M. Buchanan, is a constitutional liberal who feels that democracy must have a constitutional guarantee. Buchanan has a different interpretation of majority rules: "In terms of definition, as a type of politics-government form of policy making democratic politics is the same as majoritarianism. That is putting the majority vote rule at the center of the most important status. However, after careful analysis, there is a strange contrast between what it stands for and its constitutional foundation. The ideal of majoritarianism is supreme, and so any restriction placed upon it is a violation of sacred ground. At the same time, the structural requirement for the operation of majority rule also requires strict constitutional protection. In order to eliminate the majoritarian process of decision-making, simple majority cannot be allowed to function; in order to prevent one alliance to always stay in power, period new selection cannot be stopped." Buchanan interprets the relationship of democratic majoritarianism, constitutional protection, and restrictions upon the majority as a form of contradictory democracy. Under his view, constitutional protection of majority ideals might lead to corruption of power and the fall of democracy. He also wrote that the majority ideal in the legislative agency is similar to the majority ideal of the entire constituency in a general election. What worries him is that the majority may appear in a fraudulently democratic form and thus replace democracy. Therefore, Buchanan is one of many scholars who agree wholeheartedly with the standardization of rules.

In terms of the constitution, majority rule is practiced with the goal of protecting the majority interest, but the constitution also practices equal protection, which uses the right of equality and freedom as its priority and goal. When the constitution is practicing majority rule, any individual can participate in policy-making or selection and become a part of the majority or minority. The constitution never requires a certain group to always be the majority and the others minority. As a democratic constitutionalist, Buchanan should understand this.

The author of The Theory of Democracy, American scholar Joshua Cohen, defines this probable change of majority and minority as "the rule of changing majority." According to Cohen, this rule is the key factor in the healthy development of any large-scale democratic society. Citizens know they play several roles in the society; when they are on the side of the majority, they are the rulers, but whether they are in the majority or

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minority, they must obey the law. Under this definition, they are ruled. Considering this, minority citizens will restrain themselves from oppressing others when they become the majority or when they are in power. Cohen proposes the classic Chinese moderate path to warn people not to be disgruntled or to carry out revenge through oppressive behavior because today's majority is tomorrow's minority. In a democratic society that has a changing majority, the politically moderate path is much like the Golden Rule: what one does not desire should not be applied to others. Cohen considers this the highest ideal of morality in the political arena.

On the question of majority rule, Rawls' theory of justice is objective. But Buchanan has not given up: "Although there are many similarities between mine and Rawls' perspectives, his method would force me to depart far away from my goal." Buchanan's reason for objecting to majority rule comes from his theory of contract and public-choice theory, in which using the democratic decision-making procedures gives equal status to all the members of the political body when making their choices. This is partially contradictory to the real definition of law. If the majority of the population is allowed to determine that an individual or a group have violated the law, then that will directly imply that law does not exist independently. Such an arrangement will allow the authoritarian rule of the majority. In other words, the democratic process leads to the authoritarianism of the majority; majority rule has been turned into an absolute. If at any time majority rule cannot be used to decide, then the minority can take its place; or only if a jury is formed by the entire population. Then is it called democracy? Reality has shown that this is not the case.

Buchanan further concludes that majority rule is merely one of acceptable rules of decision-making. People can legally choose any other types. In his book, Calculation of Agreement: The Logical Formation of Constitutional Democracy, jointly authored with Tulloch, Buchanan overturns the sacred and inviolable ground of majority rule. He writes that simple majority vote is probably the most effective method in the election of political representatives and legislative activities. However, in other elections which generates more important cost-benefit results, an active group might require a qualified majority. Buchanan's view of election rule has at least considered the result and costs. He feels that apart from rule of unanimous agreement, all the other rules of decision-making must be based on an equal right of election, but that the result of

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224 COHEN, ON DEMOCRACY, supra note 218, at 75.
225 BUCHANAN, LIBERTY, MARKET, AND STATE, supra note 223, at 127.
226 Id. at 246.
the choice has generated an unequal benefit. Obviously, between the choice of an unfair result and higher costs to society, Buchanan is willing to pay the higher price (under certain circumstances) of choosing the rule of unanimous agreement. The goal is to use this cost to exchange for "the value of individual freedom" and political equality. This is also unrealistic thinking even if his idea is reasonable in theory.

It is worth noting that Buchanan goes through the comparison of election process and ruling system or structure, concluding that people tend towards the democracy of election while hoping that the elected decision-making body or committee will benefit "all members of the society." But results demonstrate that if the formal system and structure is separated from the usual election process, the ruling committee will work for the "benefit needed by the people" and refuse to work for the "benefit of the ruling class." Then it can call itself democratic, although the definition of "the people's benefit" is decided by the ruling committee. Obviously, Buchanan is criticizing those fraudulent methods of democratic election where the government turns out to be a wolf in sheep's clothing, using dictatorial and authoritarian behavior after gaining power. This is a powerful expose and criticism of certain authoritarian regimes.

To conclude, Buchanan feels the need to use the constitution to guarantee democracy as well as for political restraint because if an election system has no effective guarantee, a majority party can eliminate all elections as soon as it comes to power to maintain its own indefinite power. Therefore, the constitutional restrictions upon political procedure are an essential restraint upon government activity.

D. The Process Analysis of Power and System

In constitutional process, the country has to practice legislative, executive, and judicial power. At the same time, citizens have to exercise such democratic rights as voting and the formation of political parties and interest groups based on their freedom of association. The behavior process of the parties and groups are also important parts of the democratic system, which also follows different principles of constitution and democracy, forming different internal requirements and characteristics.

1. Legislative Procedure

Legislative procedure is an essential legal process of legislative behavior in a country governed by law. Even in slave holding and feudal societies, there must legislative behavior, even though its legislative

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227 Id. at 262.
process may be substantively different from a modern one. Where the legislation of a feudal society is built on the foundation of the rule of man — one can do whatever he wishes if he possess the divine rule — a truly democratic nation governed by law would not allow such a thing to happen and would instead require legal procedure.

Legislation is a type of national legal behavior, which also concerns a series of legal and technical questions. The internal requirements and characteristics of legislative process is demonstrated by:

One, creativity and legality. As a legal behavior, legislation has a creative characteristic which must be concentrated to reflect the will and benefit of the people in the form of law that guides and regulates people’s behavior. In order to do this, the legislation has to be legal first, meaning that the subject of legislative behavior must be the agency enjoying the legislative power generated by the people’s election. Otherwise, there cannot be legislation or the exercise of legislative duty. Legislative agency must really represent the people and reflect the will and work for the benefit of the people, while overall legislative and behavior processes must also fit this requirement. As a creative behavior, legislation also must meet the need of reality, i.e., make use of the legal requirement and observe the future, noting the reality and advancement of law. At this point, such legislative creativity should act with the goal of serving the people and protecting human rights. It should not be allowed to restrict the fundamental rights of the people or deprive them of freedom. Otherwise, such creativity is against the benefit of the people and the constitutional principle.

Two, conflict and compromise. The creativity and establishment process of legislation must reflect certain interest relationships and conflicts. For example, the different class levels and interest groups of capitalist countries must go through different channels to be reflected in the legislative process; legislatures must deal with such clashes of interest. Another conflict of legislation is whether the legislation and creativity of a new law conflicts with the constitution, or other existing laws and codes. With the changes and development in society, law must also change correspondingly; therefore, the changes within common-law systems must guarantee compromise and improvement of law within the legal body under the pretext of fitting the needs of time. However, the changes cannot be unconstitutional. The legislature must also promise to establish a complete and synchronized legal body with the unified guidance of the constitutional spirit and principles in order to maintain the completeness, unification, and timeliness of law.

Three, authority and regulation. Legislative process is full of technical problems, such as the basic vocabulary, and the area and candidate of protection, as well as the rights and duties of the target of legal regulation. Scientific legislation must have the complete technique and the
practicability of the legal premise must be considered, allowing people to execute regulation accordingly. Legal regulation cannot be separated from operability, otherwise the law will lose its function and its authority. To prevent this, the legislation must guarantee the overall quality and standard of the legislators. Meanwhile, the collection and analysis of messages in the legislative process must be comprehensive. Only legislation properly reflecting the present needs of society can direct reality and exercise the authority of law. Furthermore, legislative review and decision-making must follow rigorous standards and procedures, as well as the rigorous practice of majority rule. These are the essential procedures and requirements for maintaining the authority and dignity of legislation.

2. Executive Procedure

Executive procedure is the legal process of exercising executive and managerial duties. To guarantee the practice of the executive duty, there must be a logical regulation of executive power, subject, behavior, responsibility, and efficiency. The executive process consists of problems that require a complex, enormous, and sophisticated behavior process. The characteristics and requirements of modern executive procedure are:

One, power and responsibility. Executive power is an important part of the active sovereign power, and because of the complexity of the problems concerned, the executive procedure cannot be too inflexible. Meanwhile, the demand of subjective flexibility is high in the process of exercising power with a great function and correspondingly large influence. For this reason, the exercise of power should have a corresponding agency responsible of restraining it. Otherwise, if there is separation of power and responsibility, then there could very well be abuse and corruption of power. The separation of powers system of the West was established to prevent such abuse and corruption, but even as the socialist countries object to the political body of the separation of powers, they can learn from its experience. Procedural regulation is an important method and requirement for restraint.

Two, decision and principle. Executive process includes many decision-making behaviors that reflect a certain amount of existing public policy as well as an individual's subjective initiative. For this, executive policy-making behavior cannot be inflexible and follow everything by the book; nor can it be random, forsaking all principles. The biggest feature of executive behavior is the power of execution discretion. Although it is

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the court's duty to prescribe the limit, the lack of means of enforcement makes it inadequate to prevent the behavior of the executive from going out of bounds. Therefore, an open executive procedure system should be established to absorb the control of external procedure.

Three, restriction and efficiency. The constitutional theory of limited government emphasizes the executive branch. However, the exercise of executive power has a direct effect on national politics and economy, as well as on the functions of democracy. Therefore, when dealing with executive power and agency problems, the expansion of governmental power has to be restrained to prevent its abuse. At the same time, the operation efficiency has to be guaranteed, and so although executive power has to be protected within the premise of law, such protection should focus on the overall operation of political power. The restriction should point towards the individual behavior of the power operator, and the power and responsibility system should embody this goal.

3. Judicial Procedure

Judicial procedure is a work process that guarantees legislative creativity, the practice of executive work behavior, and the protection of the rights and benefit of the people. The nucleus of judicial procedure is trial process, but its establishment is subject to constitutional regulation of judicial power, which is also subject to its relationship with other national powers. The characteristics and requirements of modern judicial procedure are displayed in:

One, independence and justice. The first value goal of judicial trial procedure is to embody justice. As a result, whether it is the process of an individual judge's behavior related to a trial or all judicial behavior, it must be just. The famous English judge, Alfred T. Denning, feels that justice means going through the due process of law, maintaining the innocence of daily judicial work, and the proper use of judicial power. Judges must be just, they cannot be swayed by the parties, nor can they be restrained by other legislative and executive power. As a result, the status of judges must remain independent and inviolable. The judicial behavior process also cannot be influenced in any way. There cannot be any inhibition in the operating process to guarantee the independence and the integrity of the judicial trial process. Only based on these points can the independence of the judiciary be maintained, and so, its justice.

Alfred Thompson Denning was the chairman of the British Appellate Court. He had many writings including DUE PROCESS OF LAW.
Two, emotion and fact. The independence of the judiciary is aimed against the external terms and circumstances of the behavior process. However, such external circumstances are inadequate to guarantee judicial justice. Internal requirements must also exist that use the law as the standard and the facts as the basis, to cut off any emotional factors of individuals and organizations. Furthermore, in terms of judges, their independent status help to make them inviolable. However, this is the only a guarantee based upon external requirements. Whether a judge can make a fair judgment (excluding competence factors for the moment), usually depends on the internal qualities of the person. Such qualities draw upon not only the legal ideas, but also the moral standards of individuals. This demand seems difficult to balance and quantify, but good moral standards do not require external restriction and supervision — it is the social and individual concepts of value and the moral standard embodied in the judges. Without such an internal moral code, all the external requirements are meaningless. In countries using the jury system, such as the United States, the demand on jury members is not as severe as that on judges. However, the factor of the jury’s emotions, including the effect of external influence and judgment, will have an important effect on the result of the trial.  

Three, debate and judgment. The characteristics of the judicial trial process is on two behavior tracks. The first is the debate behavior between the parties (plaintiff and defendant). Both sides use facts and evidence as the reason and basis of debate, and trial procedure has paved a neutral path for this purpose. The second track is the trial and judgment behaviors of the judge and jury. The two tracks correspond to each other and they are open, neutral, and legal because legal procedure does not have a specific target, nor has it a flexible device to react to circumstances. This is decided by the internal substances of procedure legal norm.

4. Citizens and the Procedure of General Election

The process for citizen participation in elections is an important embodiment of the exercise of people’s sovereignty and approval, and the establishment of election procedure is an important means and guarantee for the people to participate in politics. For voters, the concept of sover-

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230 In reference of the O.J. Simpson case in 1995. In this case, the jury was sequestered, such that the opinion of the press would not influence that of the jury. The goal was to achieve a fair judgement. However, this also had the side-effect of bringing inconvenience upon the jury. Such discomfort might itself influence the decision making process of the jury. As a result, people have begun to look into the problem, allowing the jury to make reasonable and legal decisions.
eignty is very influential upon the designing of procedures to encourage participation in elections. The design and application of procedure should have the convenience of the voters in mind in order to fully exercise the sovereignty, dissent, and equal political rights of the people. Based on the principle foundation of "one person, one vote," the public should be represented in a manner in which the timing, locality, scope, and goal of the election are very obvious. Usually when the people have made their choices, it should be irreversible; the election system should promote finality. This is because procedure is an one-direction operating process. Furthermore, an election procedure is not merely a procedural operating process of rights, it is the operating process of actual substantive rights. In terms of the sovereignty, it is an "entire process" of the public poll. The processes of election, plebiscite and referendum are also very important rights of democracy.\(^{231}\)

5. The Democratic Political Process of Parties and Interest Groups

In the Western democratic political process, political parties and interest groups are important participants with a broad front of activities.\(^{232}\) These groups go through internal and external forms of organization management, and members act as individuals and as group members to participate in general and party elections. Such groups give financial support or may even be directly involved in a campaign, seeking to influence the congressional legislation in order to benefit from the government policy. These interest groups are known as the "second echelon policy-makers."\(^{233}\)

The internal operation of interest groups mostly follow "the single iron head rule," i.e., the groups are only led by the leader or by active members. Although the external activities of interest groups are not regulated by the constitution or law, interest groups and political parties

\(^{231}\) See Xu Chongde, National Leaders 38, 49 (The People's Press) (1982).

\(^{232}\) In the United States alone there exist 100,000 private clubs and organizations belonging to different fields and reflecting different interests. The pursuit of interest is the primary goal of these organizations, but there are also non-profit organizations with public-interest goals, such as the American Society for the Prevention of Cruelty to Animals. There are several groups that lobby specific political goals to sway government legislation and policy, such as those groups that seek to end the death penalty, abortion, or the mismanagement of environmental or wildlife resources. There are also social groups and organizations concerned with women's rights, racial equality, freedom of religion, etc. Many major groups are concerned with industrial, agricultural, and commercial fields. See Roger Hilsman, The Politics Of Governing America 292, 313 (1985).

\(^{233}\) Id. at 313.
are determined to preserve the freedom and rights of the people to associate. Political parties play an important part in modern democratic countries, especially in those that practice two- or multi-party systems. This is the direct form of organization that receives political power.

In the election process, the multi-party adversary procedure can excite more democratic enthusiasm and wisdom. The pluralism theory says that the function of a "responsible political party" is: 1) to propose and describe to voters choices of political perspectives and methods of solving problems; 2) to employ candidates who argue with the party line, then organize and direct the campaign; and 3) to guarantee elected officials will responsibly represent the view of the party and to establish legislative agency to maintain party control of legislation.\(^{234}\) In the operating process of the government, the standoff between internal and external parties exists because of political power. The party in power wants to stay in power, and the party out of power wants to gain power in the next election. However, such a standoff has the benefit of preventing policy deviation and error in the government operation. Once there is a mistake or an error, political parties or interest groups will go through different channels to criticize or expose the problem, forcing the government to find a solution. Under many circumstances, interest groups either work with or through the political parties.

Therefore, although the political participation process of political parties or interest groups is usually not regulated by the constitution, long-term political practice has made their role a habit that has long been accepted by the people. As a result, such a habit procedure has also becomes a component of establishing constitutional procedure, and it is also an important part of the Western constitutional process. If political parties and interest groups are the motivators of Western constitutional systems, then benefit is the power source. If the supply line of this motivator is cutoff, then the Western parties and interest groups would become inactive and the Western constitutional system would be paralyzed. Therefore, Western constitutional procedure must have the aim of pursuing the greatest economic gain, and the inclusion of the rights to life, liberty, and property are of the highest importance to this goal.

IV. COMMENTS AND DISCUSSION ON CONSTITUTIONAL PROCEDURE

A. Constitutional Protection and Protecting Constitutional Process

Since the Magna Carta of medieval England to the birth of the contemporary capitalist constitution, the development of constitutionalism based on natural law and rights has been on a tortuous path. From limiting royal power to limiting modern governmental power, the goal has been to protect the natural rights, freedom, dignity, and equality of the people. The birth of the contemporary constitution is a landmark in the limitation of governmental power and the protection of human rights.

From the history of social development and the requirements of capitalist development, a constitution shoulders the protection of individual rights, while protecting the fruits of improvement and the development from feudalism to capitalism. It protects democracy and the rule of law. Constitutions are practiced through a type of constitutional process, whether they handle issues of human rights, democracy, or the protection of social economy. The process of constitutionalism is legalized and institutionalized, and in this process, the opposition between the rule of man and the rule of law, the changes and development of a society, as well as the legal and institutional operation of constitutionalism, allow procedure to exercise its important functions.

The institutionalization of constitutionalism is the process of the organization and of the procedure receiving value and stability. Constitutions protect human rights and restrict the power of the government, whose basis is to pass democratic procedures that oppose authoritarianism; rule-of-law procedure is used to achieve such a goal.

In the constitutional process, the practice of the people’s sovereignty is through the procedure of direct or representative democracy. The protection of human rights, apart from being recognized by the constitution, also has a series of legal systems focused upon the guarantees of the constitution. Such is the principle of due process that it not only protects criminal defendants with procedural rights in trials, but also the property rights of individuals. This procedure protects the benefit of the owner but

235 It is commonly known that, from the Magna Carta of 1215 in England, the Petition of Rights of 1628, the Habeas Corpus Amendment Act of 1679, and the Declaration of Rights of 1689, to the Declaration of Independence of the United States, the U.S. Constitution of 1787, the Declaration of Human Rights of France in 1789, through the birth of the other written constitutions, all were the product of the people’s desire for rights won through bloody struggle. See Min Zhou, On Separation of Powers, BEING L. DAILY (1988).

236 See Huntington, The Political Order Of A Changing Societies, supra note 8, at 1-2.
also restricts the ability to abuse power and to violate others. As a result, the recognition of separation of powers restricts the legislative, executive, and judicial powers, and causes the powers to restrain each other under the supervision provided for by the constitution. In the constitutional process, the basic candidates and benefits protected in form of constitutional procedure can be defined into two categories: 1) the widespread concepts of human rights have determined the general constitutional protection of human rights; and 2) the human rights protected by the constitution are actually a part of the class system, that is, people of different classes will have different amount of actual protection. Just as the American Professor Likt said in his lecture *American Class Structure* during a visit to China: "In the United States, just like in any complex society, there exists enormous inequality in terms of power, wealth and status. Every citizen should have equal rights, but in practice, we Americans have not reached total equality." On the other hand, the protection of human rights includes the right to live and develop, otherwise basic human rights cannot be maintained. As a result, constitutions should follow the development of society, paying attention to different citizen rights at different stages of development.

In terms of the process of constitutional operation, the nucleus of the constitution is not only the publicly recognized fundamental human rights. It also includes many candidates that should be protected, such as the sovereignty of a nation; the type and form of political body; the national structure and the territorial content. For example, the French constitution clearly recognizes that: "If the amendment of the constitution should damage the integrity of the territory, then no amendment process can begin or continue. The republic system of the government cannot be amended." Overall, the content of constitutional protection includes all those recognized and regulated by the constitution.

In order to guarantee that the content and candidates regulated and protected by the constitution are not violated, aside from depending on the constitutional protection system, the constitution also requires self and external protections. A constitution is like the fortress of human rights, and if the fortress itself is violated, it will similarly directly affect the objects it protects. The weakening of the status and authority of the constitution, as well as its loss of control, can bring an unfavorable or disastrous result to society. The Chinese Cultural Revolution was a direct result of the constitution losing its control, such that even the national leader was not protected by the constitution.

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238 French Const., art. 89.
The result is usually caused by many unconstitutional behaviors and the corruption of constitutional power. For example, the authority of the constitution will be damaged if we ignore the conflict between common law rulings, codes, and decrees; allow one branch to break the constitutional premise to receive more power than the check and balance system should give; or let the executive bypass the legislative agency, without the approval procedure. As Roger Hilsman wrote: "[a]ll stable countries must have satisfactory procedure to complete its political and social improvement in value."

A question of protecting the constitution and its procedure should therefore be proposed here. Specifically, the amendment and the interpretation of the constitution, as well as the effect of habit over the constitution, especially the review and processing of unconstitutional behavior, should be included in the protection of the constitution itself. In practice, the constitution generally regulates such protection, but in terms of procedural considerations and the emphasis of constitutional protection, there should be more research. For example, to deal with unconstitutional behavior and law, there are already the U.S. Supreme Court, the French Constitutional Council, the German Constitutional Court, etc. Each uses different approaches and methods to practice constitutional review to protect the status and authority of the constitution. The present question being proposed to nations is how to improve such protection procedurally.

Apart from widening the area of research of constitutional procedure, it is important to recognize the status and value of procedure in the entire constitutional system. Obviously, procedure is merely one of the factors of social order and legal order. The procedure we need is one that can react to future development and also encourage the legalization and institutionalization of social and democratic political behaviors. With such factors, systems will have an antibody to resist rule by law, allowing them to develop healthfully on the legal track.

B. Discussion about Western Constitutionalism and Process

Looking at Western constitutionalism and its procedure from the development path of Western constitutions, they have been forced by the needs of the economic development of capitalism to pursue free, equal, and just economic terms and legal situations. These economic requirements have been reflected in politics, producing the pursuit of free and equal democratic participation; the goals are still based on the pursuit of economic benefit. Although the West is economically developed, with

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239 HILSMAN, THE POLITICS OF GOVERNING AMERICA, supra note 232, at 27.
240 Benefit is the power source of the Western constitutional operation, without which the machinery will become paralyzed. In theory, Western constitutionalism is an
a modern society and broad participation of democracy, only a minority may really benefit. The majority of the poor still suffer, thus we must consider more than what is said in the constitutions.

The operating process of Western constitutionalism is the more idealistic constitutional structure, whether we look at the people's sovereignty, human-rights protections, or the separation of powers. However, the present overall trend is that the constitutional separation of powers and its checks and balances are, in practice, destroyed by the malignant expansion of executive power. All powers are trying to protect their own territory while trying to break the balance and expand into the others' territory. On one hand, the power struggle is to break constitutional control, and on the other to protect it. Such a break away from control is motivated by what philosophers call the "Power Desire" and "Political Animal" human weaknesses, but more importantly it reflects the motivation of benefit because, whether it is a political party, an interest group, or a wealthy capitalist, their agents will not remain inactive in the government.

Apart from its substantive side, Western constitutionalism pursues free, equal, and just rule-of-law circumstances. Because the pursuit of benefit is desired by the people, no one can rule forever in free states or bear to the manipulation of others. As a result, equal opportunity and circumstances have become the first requirements for existing in a free society. Therefore, people might not feel the wealth disparity in their society is too unjust, but they would feel it much more if their equal opportunity is deprived. However, equal rights of constitutional protection is widespread in Western society. For example, during former U.S. President Ronald Reagan's 1984 re-election campaign, Reagan ran over the time limits in a televised debate with opponent Walter Mondale. The moderator interrupted Reagan and told him to stop. To observers outside the United States, this seemed shocking, but Americans took it in course because of this ingrained sense of equal opportunity. If the president had been allowed to exceed his time limit, then the next candidate might do the same, and then there would be no regulation. In this example, we can see that power has to obey rights; this embodies the protection of

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operating system transcending class through such issues as human rights and equality, which are not defined by class or individuals. But in practice, the wealthy citizens of the capitalist society are the real benefactors. However, using Likt's own comments: "Millions of Americans are poor, although using the standard of China, they might not be poor. Many of whom tolerate poverty, the humiliation and tiredness of unemployment, the inadequacy of public service, racial prejudice, as well as other problems affecting the quality of life." KAHL, THE AMERICAN CLASS STRUCTURE, supra note 237, at 9.
people's rights and the limitation of power that should be carried out through procedural regulation.

In modern democratic representative systems, there is a common practice of term length. Regardless of the post, when the set term is finished, the duties and power are automatically terminated, replaced by the next term. This is an important procedure in the constitutional process, but as they say in English: "The neighbor's grass is always greener."

In U.S. history, there has been much debate on constitutional questions that has increased in intensity over time. Recently, the debate has been concentrated on government structure and political procedure. The scholarly field takes pride in the separation-of-powers system. However, today, there are many who propose that the United States should change its governmental power structure; the legislative power and executive power relationship; the length of its terms; and the election system. For a long time, the expansion of presidential power has greatly reduced the power of the congress. In the disputes concerning war powers and executive agreements, although the congress has made many resolutions to limit presidential power and demanded the president to follow legal procedure by getting congressional approval before exercising presidential power, the president often ignores Congress. Even when what the Congress requests is a mere notification after the exercise of power, such as sending troops or using force, the president still ignores it, and even the State Department, itself, may not be fully aware of the war activities or troop movements ordered by the president. As we can see, the power of the president is above that of congress, and this may have an impact on the constitutional separation of power and balance structure or perhaps could damage the principles of which Americans are most proud.

As a result, the proposal to change the U.S. government structure is to copy the British parliamentary system, creating an American cabinet and make the president accept responsibility. The congress would have the power to hold a vote of "no confidence" against the president. In Britain, even prime ministers are perhaps envious of the U.S. presidential

241 Americans have said: "When an American considers establishing a government, his goal is not to establish authority and concentrate power, but to limit authority and separate power. If an American is asked to design a government, he will bring with him a constitution, a bill of rights, a bill of political separation, as well as checks and balances, federalism, election, competitive political party, etc." HUNTINGTON, THE POLITICAL ORDER OF CHANGING SOCIETIES, supra note 8, at 7.

system, dreaming of an American-style midterm election, used to supervise the government through public opinion without jeopardizing their own position.

Although such changes are not easy, they help demonstrate that any Western constitutional system will have some shortcomings, and the person in power will try to take advantage of such gaps. The early American revolutionary James Madison wrote: "[i]f people are angels, then there is no need for government. If people are ruled by angels, there is no need for any internal and external control on the government." In practice, there is a distance between the Western government structural regulation and reality. For example, the French quasi-parliamentary system produced the power of "Super Presidency"; the British Prime Minister has become a "popularly elected monarch," and the U.S. president has become "president-like monarch."

As a result, through the observation of constitutional systems, we have to recognize that the Western constitutional system has values and defects. Developing nations must avoid the old mistake of complete Westernization; the establishment of any system cannot depart from its own national culture and background, nor can it be restricted to a traditional framework. In order to establish a complete constitutional system, there must be objectivity as well as modern concept and perspective.

C. The Establishment and Development of Chinese Constitutional Process

Through the historical observation of procedural law and substantive law, we have discovered a trend that the ancient civilizations emphasized substantive law and private law, to the neglect of procedural law and public law. Until recently, some scholars commented that: "The West studies philosophy with form, while the East prefers the ones without." Other scholars have said: "The thinking of Asians has the characteristic of being directly perceived through the senses, while the thinking of Westerners is orderly." Critics disagree, saying that the ancient Chinese


244 Anthony King, The British Prime Minister (1988).

245 In 1982, the Constitutional System Committee was established in United States, to research and solve U.S. constitutional problems. This committee consists of senators, university deans, lawyers, and government officials, as well as financial and industrial leaders and professors. The committee found out through public-opinion polls that the once-proud system of U.S. government is making the public anxious. The committee feels that this loss of confidence is not due to the quality of the leaders, but the defects of government structure.
concepts of "benevolence" and "yin-yang" are not a matter of direct perception, but rather logical concepts. The concept of "reason" and "force" are also a pair of basic premises. There are many examples of such corresponding differences between the east and the west, but at the same time, we can also discover mutual respect and communication.

Procedure and substance have a corresponding relationship of form and content, and the differences of western and eastern countries perhaps reflects a difference in focus. If the western emphasis on philosophy with form emphasizes form, then the Asian preference of formless philosophy is an emphasis on the objective essence. Using the Chinese medical theory of "appearance and content" as an example, it embodies the theory of "form" and "formless." In terms of the understanding of the Chinese constitution and its constitutionalism, China emphasizes their substance. That is, the constitutions of socialist countries embody the interest and will of the people. That all the power of the nation belongs to the people should be the most fundamental substance of the constitution and constitutionalism of socialist China. Then, whether China is in the process of establishing the constitution and laws, amending the constitution, or the execution of the constitution and laws, it is most important not to go against the interest of the people. As a form of thinking or methodology, this should be used for constitutional and democratic political problems.

Nevertheless, when an object contains the qualified substance and tries to practice it, should the method be passive or active? In the context of the practical problems of constitutions and constitutionalism, we cannot prove which philosophy is more attractive. Simply put, historically people have neglected procedural law and emphasized substantive law. Maybe it is appropriate to use the same analogy to comment of our modern selves.

In the process of Chinese legislation, execution and legal supervision, procedure is understood to be a pure form, which results in an ignorance of legal procedure. However, because of the increase of bureaucracy, procedure is seen as its symbol, or formalism. Obviously, there is the problem of procedure being legal and scientific, but procedure is essential to a society governed under the rule of law. In considering Chinese constitutional procedural problems, we can discover that the procedural issues regarding power and democratic political operations are important ones influencing constitutional practice and the quality of democratic politics. Today, in the process of Chinese constitutionalism, inadequacy of procedure is a serious concern all over the country.

Although China has developed a lot about legislation, the Chinese legislative stage needs to build a process that encourages scientific decision-making, and the executive power is poorly regulated. Although there may seem to be enough time set aside for discussion of bills, there is no debate system inside the Congress. Most members thus tend to be "yes-men," and since many legislative drafts come directly from the
government departments, the result is departmental and personal conflicts in national legislation. Most important is that the legislative content lacks regulation and procedural design, making it hard to operate. There are similar regulatory problems in the language and legislative technique of these statutes, and such legislative inadequacies also lead to executive problems. The police force is not well-regulated, and there are no effective restraints or basic procedures to deal with such violations. For example, some behaviors lack time limits, causing indefinite delays that lead to anarchy of conflicts and a vicious cycle. In form, the constitution mandates the executives to be responsible for using their power, but this becomes a rubber stamp only and few people are dismissed because of executive incompetence. One of the very reasons is that there is a lack of procedural regulations and a responsibility system.

The substantive characteristic of the rule of law is its regulation, in which operation and execution have to be completed through procedure. At this point, in order to improve and perfect the socialist legal system and to reinforce the Chinese constitutional establishment, we have to first build up a proper concept of procedure, by making procedural establishment an important content and duty of the socialist legal establishment. The overall content and duty of the establishment of Chinese constitutional procedure includes micro and macro areas.

In macro-analysis, China practices the People's Congress system, where the people are the masters of the nation. As a result, it is important to establish a proper procedure and system to efficiently protect the political participation and discussion of the people, allowing the people to use their rights more efficiently. It is also important to exercise fully the functions of current multi-party cooperation and political consultation under the leadership of the leading party, thus the relationship with the democratic parties can be linked through better channels and procedure, to strengthen the internal workings of the People's Congress and its procedural links and restraints upon other executive and judicial agencies. For instance, judicial power is supposed to be separated from the executive power completely, but it is kept under the supervision of the People's Congress. Separation of power for the judiciary will allow democratic participation and supervision to be regulated, institutionalized, and proceduralized.

There are several important points of procedural establishment. One, the communication procedure between the government and the people and the procedure for protecting the fundamental rights of citizens. The most important of these is to establish the concept of due process, prohibiting the improper use of form and procedure in the execution of powers and duties, otherwise citizen rights might be violated. As a result, there should be a complete compensatory procedure for human rights violations.
Two, the protection and restraint procedure of power. In order for power to serve its function, there must first be protective measures for the exercise of power. As a result, the operating process of power should be regulated and restrained, limiting the gaps that could be infiltrated by the rule by man. Furthermore, power and responsibility regulations should be linked, with that power inseparable from responsibility. The authority of power should be built on legality and responsibility, as a power without responsibility will lose its democratic spirit and legality. External restraint of power mainly includes open processes, legal supervision of processes, and democratic supervision of processes. Openness is mainly a social supervision, and it is similar to the democratic supervision process. The procedural foundation of openness is free speech and the mass media; the freedom of speech of socialist countries are naturally built on the legal foundation of socialism and upon the exercise of free speech within the law. As we can see, openness is the natural enemy of corruption of power. As a result, as the external controls of power, open reporting and mass media should be established and protected.

Three, a constitutional process that still serves economic goals. The establishment of the socialist market economy requires the protection of an equal and just legal environment. As a result, there should be a scientifically just procedure to guide the economy to the track and development of a market economy, solving the problems encountered during economic development. For example, whether the country must contend with third-party debt and local protectionism, or the unjust behavior of a few judges and judicial officials; these issues should be guided through an open procedure.

Lastly, the protection of the constitution itself. On one hand, the interpretation of the constitution must reinforce the procedural establishment, including the agency that interprets the constitution, as well as the premise and form of the interpretation. All these should be procedurally regulated. The corresponding issue is how a country can increase judicial review to protect the unification of law and its supreme status and authority. The Chinese have the challenge of setting up a judicial-review agency, as well as solving its procedural problems. Furthermore, the Chinese Constitution has never been applied to actual court cases, meaning that there has not been such a procedure or system of constitutional application in the judicial area. However, to exercise the authority of the constitution through the essential judicial review, there would inevitably be application and trial problems involving the constitution.

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247 See Hu Jinguang, THE COMPARATIVE RESEARCH OF CONSTITUTIONAL TRIAL
should be solutions and procedural regulations for these problems, otherwise, it will be impossible to protect the dignity of the constitution, its operational order, and the development of the legal system. This is the important theoretical and practical problem in front of the Chinese.

V. CONCLUSION

After the observation and analysis of constitutionalism and its constitutional procedure, this Article comes to the following conclusions.

One, constitutionalism is a behavior process with the active characteristic of practicing the constitution and its constitutional spirit and ideas; it is the active demonstration of the constitution. As a result, constitutionalism has no fixed or stable form, as different types of constitutions and different constitutional ideas have different types of constitutionalism. The constitutional content of socialism is decided by the qualities and features of the constitutions of socialist countries and the will of the people, as are capitalist constitutional contents. Those two different types of constitutions and constitutionalisms are substantively different, but they are both the form of demonstrating of the constitution because all constitutionalism seeks to achieve the goals of the constitution through its operating process.

Two, constitutional procedure is a democratic political process and rule based on the constitution as its nucleus to practice the constitution and its system. It brings an ordered regulation and relationship to the different areas of national democratic politics and law. It broadly develops and establishes a procedural system of human rights protections and a power operations based on the constitution that is pioneered by due process and power of restraint procedures. Constitutional procedure fights against the rule of man, restrains randomness, and creates a rule-of-law spirit and principle, while regulating and guiding the entire constitutional process in order to establish important terms and guarantees of proper constitutional order.

Three, constitutional procedure is an important part of the creation of constitutionalism and an essential side of the democratic legal system establishment. In the Chinese development of its socialist constitutional establishment, it is important to recognize the building and improvement of a substantive constitutional agency. There should also be attention toward the building and improvement of constitutional procedure, such as due process, the power-restraint procedures and responsibility system, the democratic supervision procedure, and other democratic political procedures.

See also THE INEVITABILITY AND FEASIBILITY OF A JUDICIAL CONSTITUTION INTERNATIONAL CONSTITUTIONAL DISCUSSION GROUP THESIS.