

Title: Environmental Constitutionalism in China: A Constitution without Constitutionalism?

Abstract: China has a long tradition of constitutionalising environmental protection, as seen in the state duties to protect the environment since the 1980s. Particularly, in its constitutional amendments in 2018, China has enshrined ‘ecological civilisation’ construction. Yet, the Constitution of China is often commented as a constitution without constitutionalism. My paper examines the constitutional environmental provisions in China, as well as the underpinning constitutional theories. I argue that framing China as a state without constitutionalism is narrowly approached from a liberal perspective. More importantly, environmental constitutionalism in China, whilst being manifested as the state mandate to construct ecological civilisation, goes beyond the traditional rights and courts approach favoured by liberal constitutionalism. Ultimately, an analysis of environmental constitutionalism in China sheds light on how environmental constitutionalism as an environmental concept could be formulated beyond liberalism, a doctrine that is frequently used to describe constitutionalism yet arguably leads to today’s large-scale environmental challenges.



***Environmental Constitutionalism
in China: A Constitution without
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China's Constitutionalisation of Ecological Civilisation in 2018

❖ **Before**

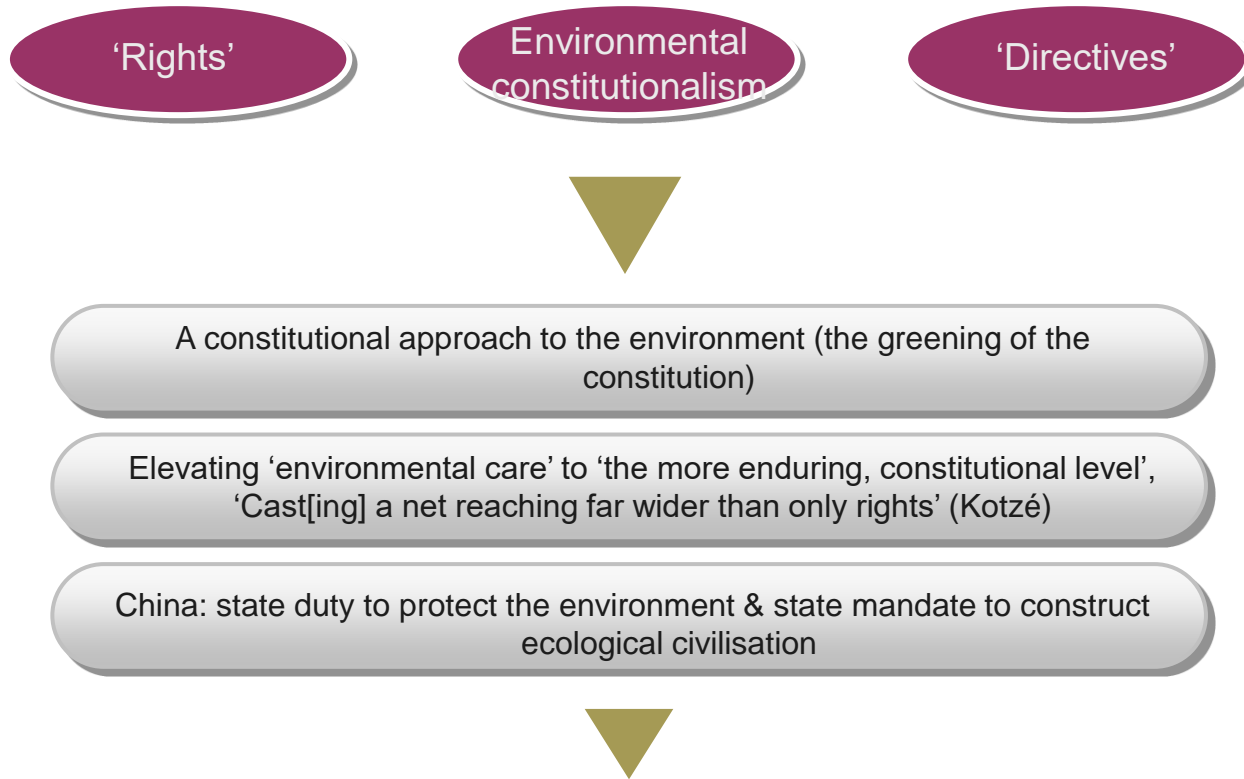
- **State duty to protect the environment**
 - Article 9(2): 'The state ensures the rational use of natural resources and protects rare animals and plants'
 - Article 10(5): 'All organisations and individuals who use land must use it rationally'
 - Article 26: 'The state protects and improves the environment in which people live and the ecological environment.'

❖ **After**

- **The State Council's mandate to direct the building of ecological civilisation**
 - The 7th paragraph of Preamble: 'ecological civilisation' & 'a beautiful China'
 - Article 89(6): 'the State Council exercises the following functions and powers: ... to direct and administer economic affairs and urban and rural development, as well as the building of an ecological civilization'.



Environmental Constitutionalism in China

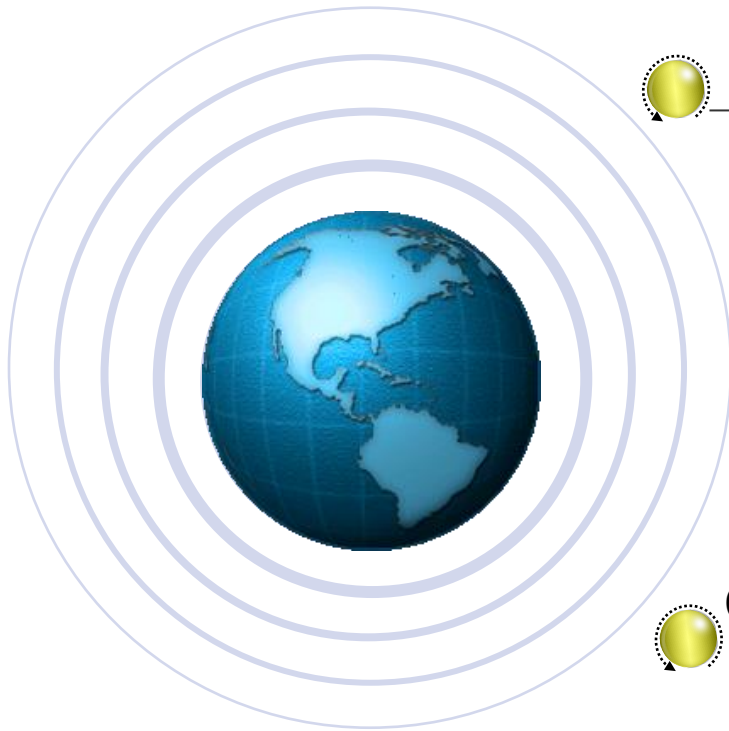


Environmental constitutionalism in China: state policies & directive principles



A Constitution without Constitutionalism?

- ❖ **A constitution: the fundamental and paramount law of the nation**
- ❖ **Constitutionalism: ‘the advocacy of government channelled through and limited by a constitution’ (the rule of law, human rights, democracy, constitutional supremacy, separation of powers and judicial independence)**



Constitutionalism in a liberal sense



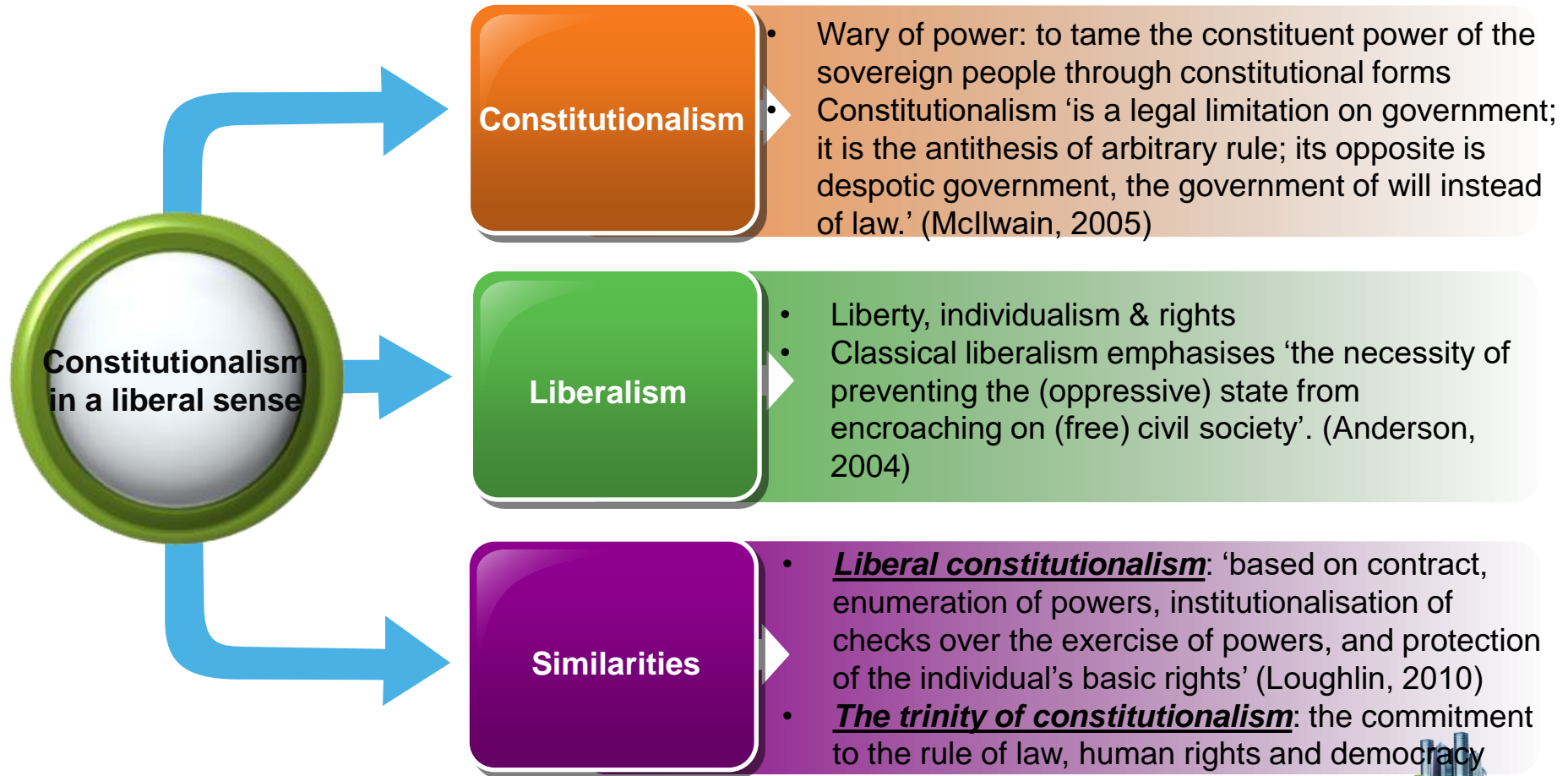
China's contextualisation of liberal principles



Constitutionalism in the context of China

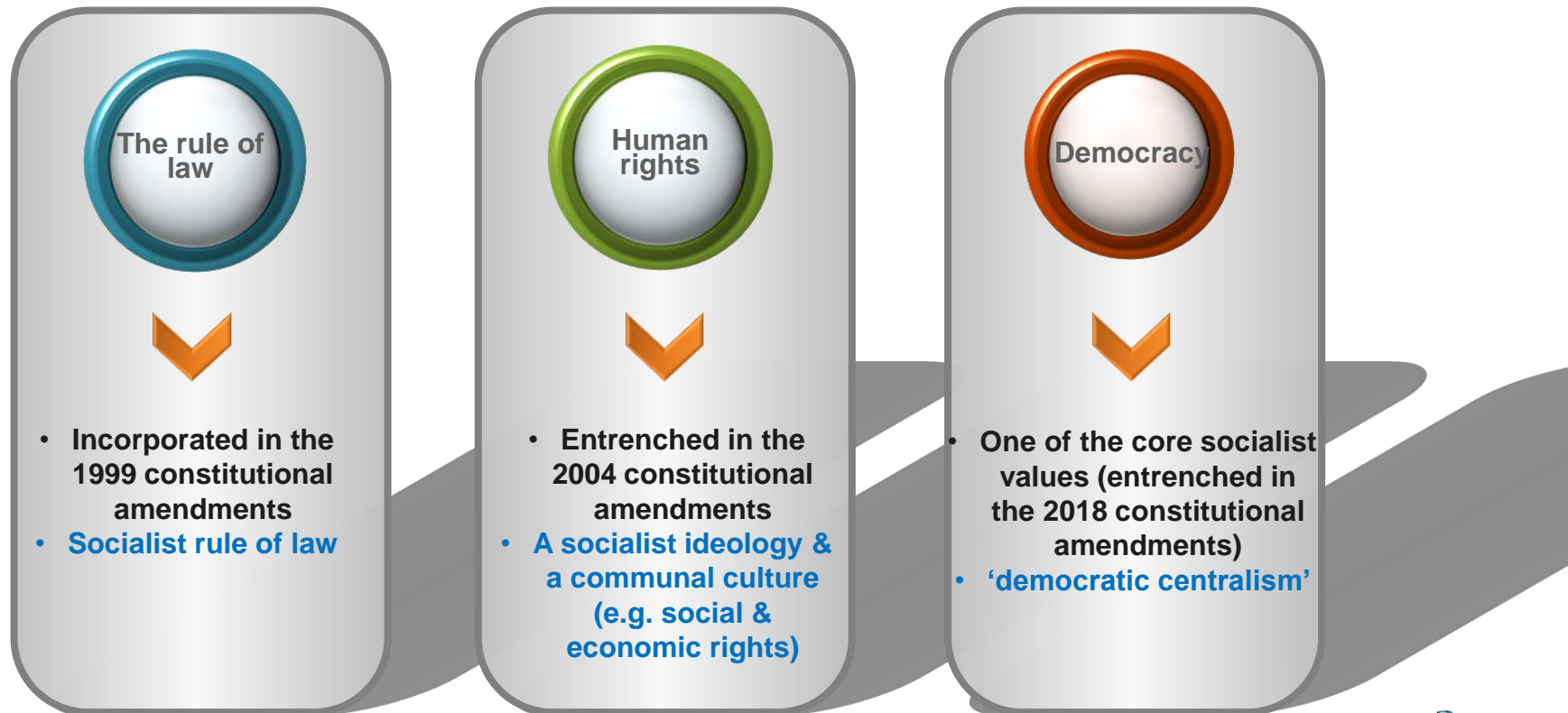


A Constitution without Constitutionalism?



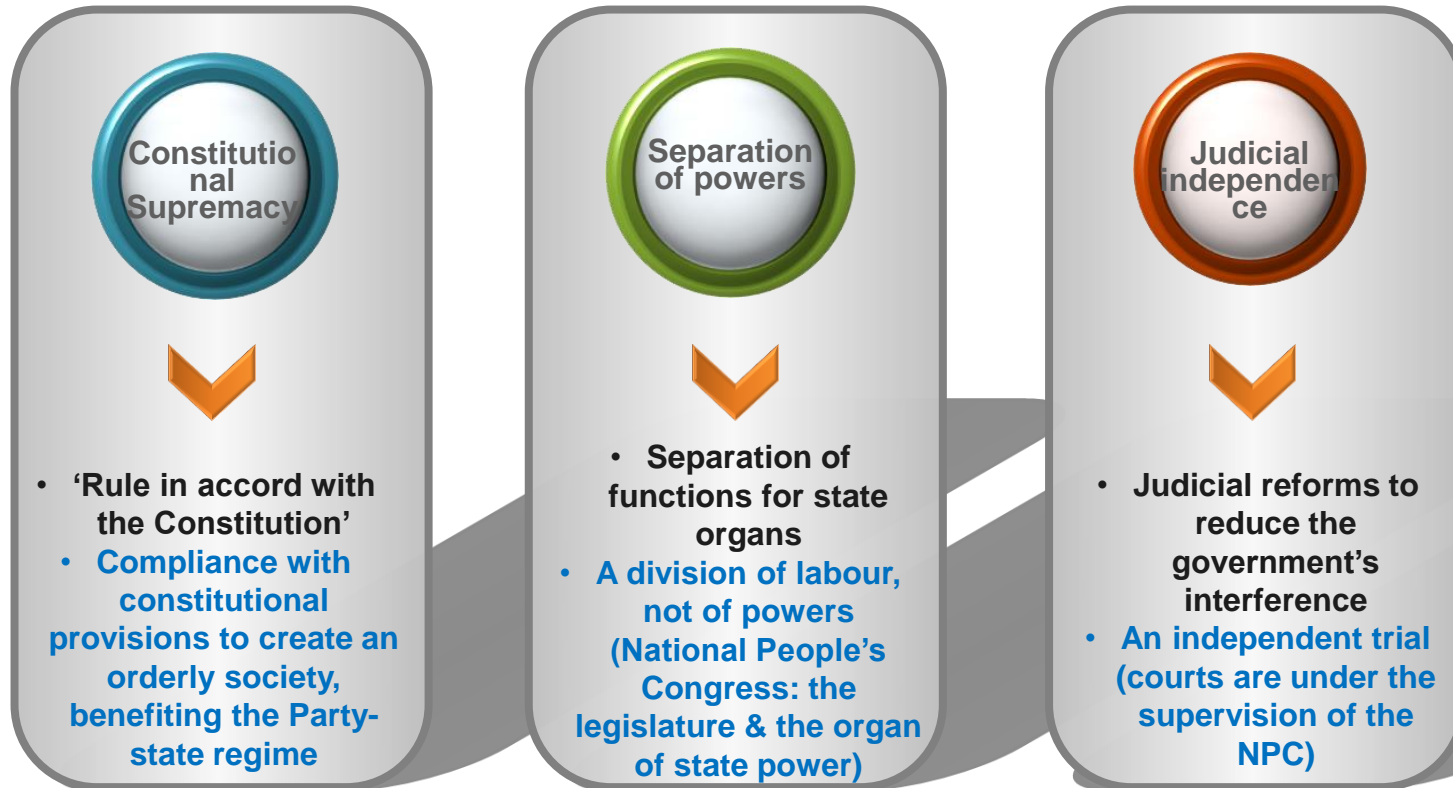
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❖ China's contextualisation of liberal principles



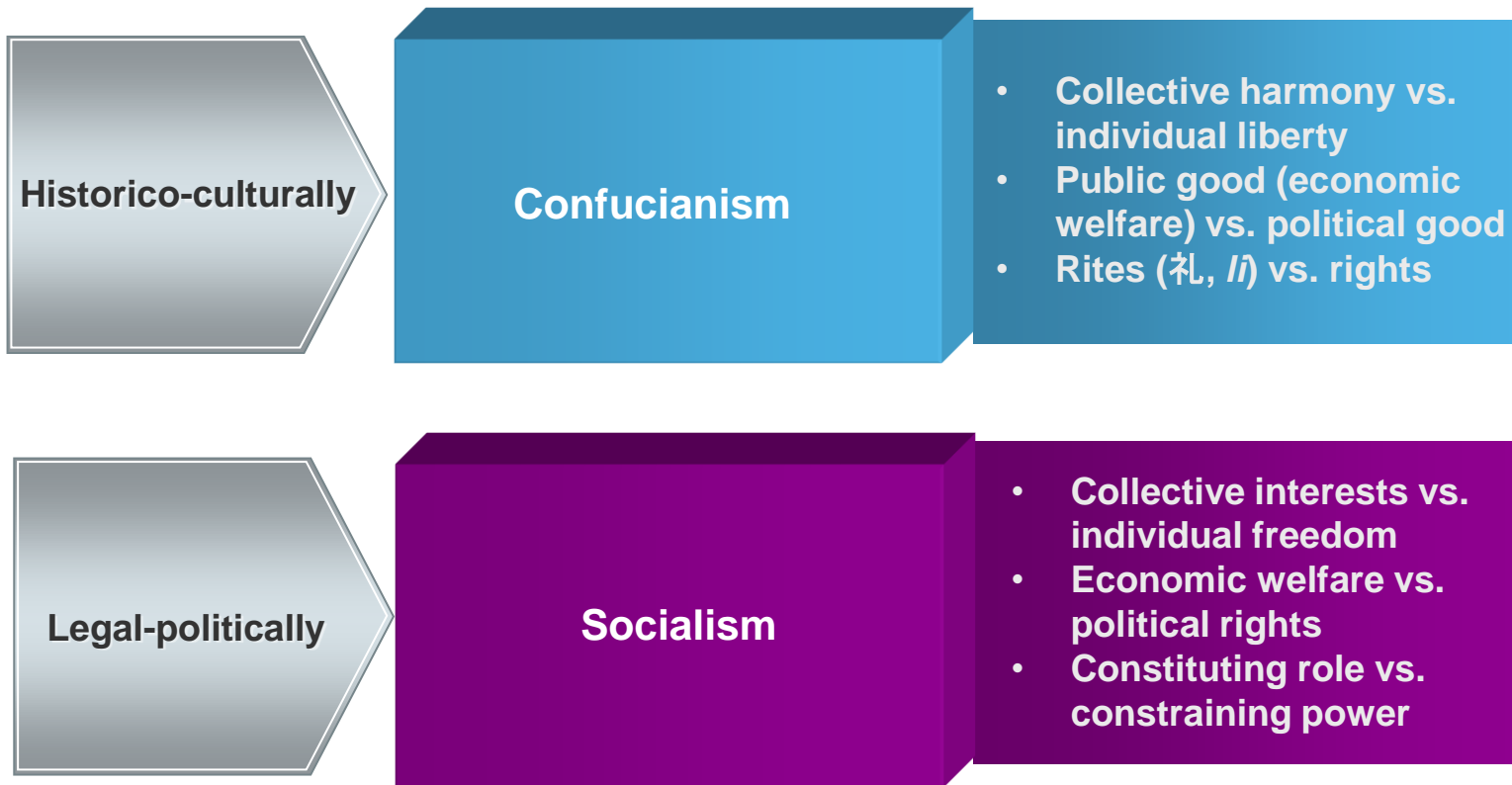
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A Constitution without Constitutionalism?

❖ Constitutionalism in the context of China



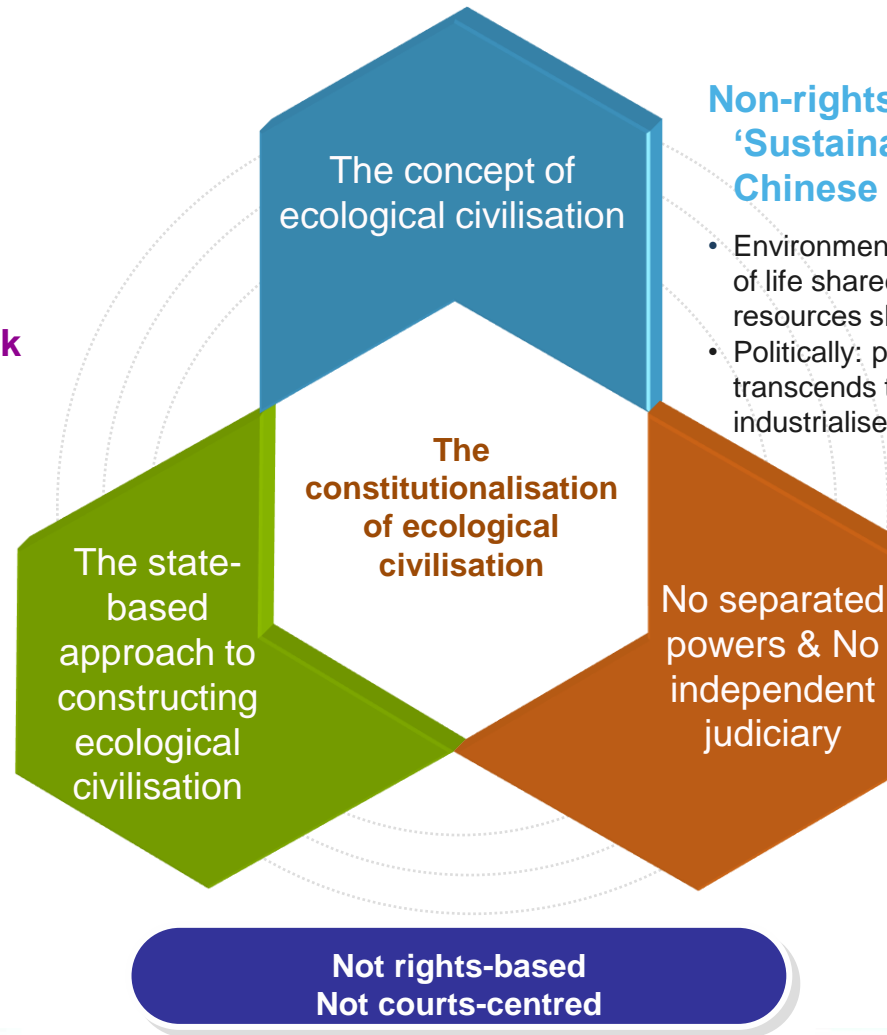
Liberal constitutionalism, with the emphasis of 'self', may be less capable to address communitarian issues such as cultural imperatives and developmental priorities.



Non-liberal Characteristics of China's Environmental Constitutionalism

State institutions to work together to bring the common good

- The legislature is under the obligation to facilitate the enactment of environment-related laws;
- The executive branch should adhere to the constitutional environmental objective in the process of implementing and administering environmental laws;
- The judiciary is required to respect the constitutionally protected environment when applying and interpreting relevant laws



Non-rights environmental care: 'Sustainable development with Chinese characteristics'

- Environmentally: treating Nature as part of life shared with humans rather than resources shared for human's exploitation
- Politically: providing a green prospect that transcends the Western capitalist industrialised modernisation

Politically compliant courts

- Chinese courts: rule-interpreting bureaucrats, not value-driven lawmakers
- E.g. Chinese judges' use of non-binding climate documents to aid statutory interpretations and accomplish regulatory objectives



Environmental Constitutionalism beyond Liberal Constitutionalism



Distinction between liberalism and constitutionalism: individual liberty vs. fettered power

'In addition to the threat to individual liberty, there are also other dangers that need limitations of the arbitrary power because 'from the perspective of other places and other histories, there may well be other harms to avoid, and other goods to pursue publicly, besides individual freedom.

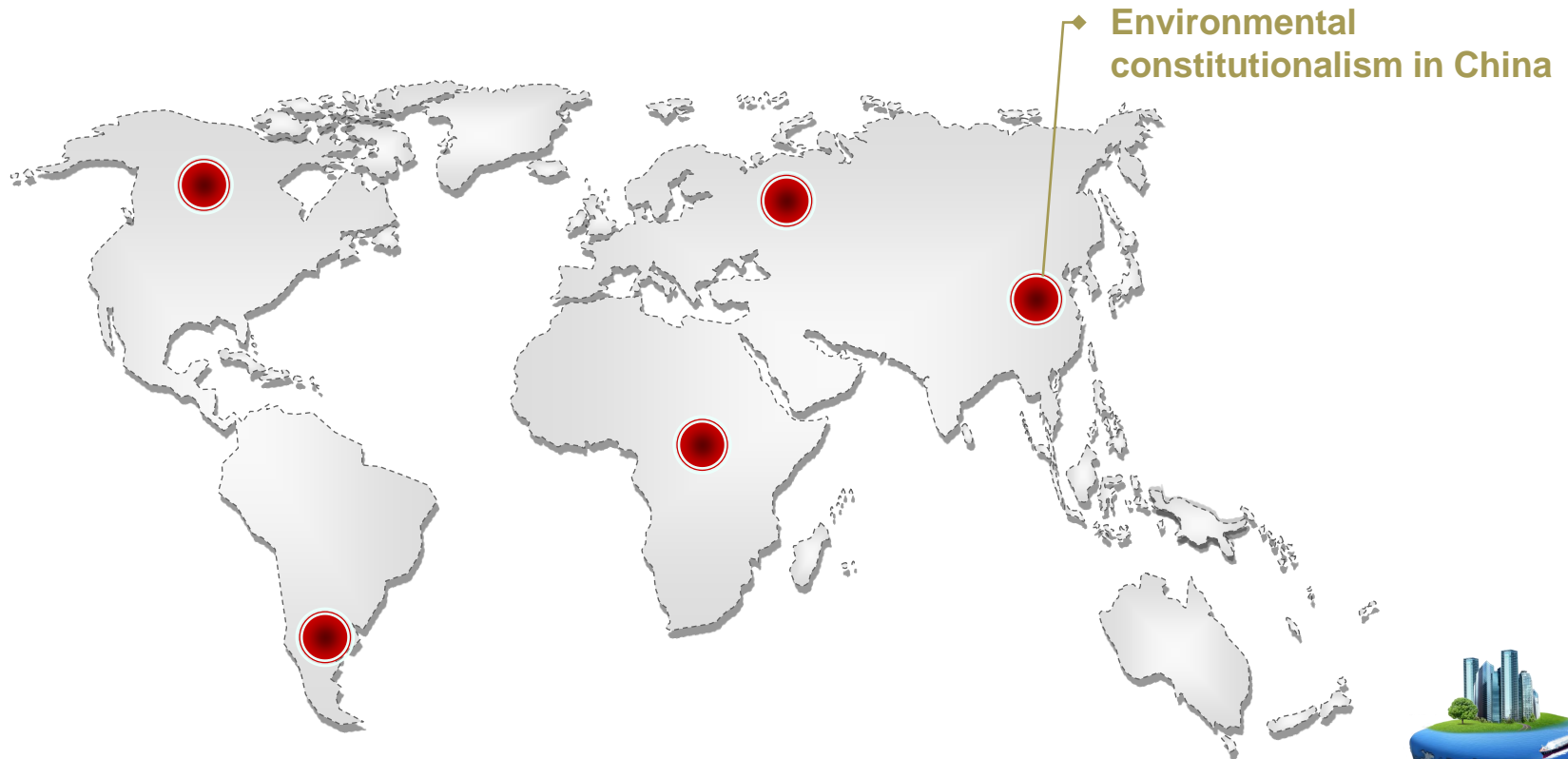
(Walker, 1997)



Environmental Constitutionalism beyond Liberal Constitutionalism

A pluralist & comparative perspective to environmental constitutionalism

Liberal constitutionalism is challenged by and presents challenges to large-scale environmental crises worldwide, e.g. climate change



Environmental constitutionalism in China

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Thank You !