

Constitutionalism in Present-day China and the International Situation

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Summary:

Why has the issue of constitutional government remained important since the late Qing Dynasty despite the fact that the history of modern and contemporary China tends to be viewed as one of revolutions, wars, socialism and nationalism? This study proposes to re-examine the issue of constitutional government in modern and contemporary China from the perspective of the international situation around China.

The modern and contemporary history of China, though accentuated by revolutions, wars, socialism, and nationalism, has also been characterized by continuing efforts to search for a constitutional government, and constitutionality, democracy, and freedom. In China, the history of revolutions, wars, and nationalism has certainly taken precedence over the history of democracy and constitutional government. In fact, modern and contemporary China's decision to pursue socialism has had the effect of preventing both the modern western concept of freedom and the ostensibly universal principle of constitutionalism from taking root in the country. Nevertheless, when we take a fresh look at the Xinhai Revolution of 1911, exactly one century ago, we can see that it shifted the focus of political disputes from the question of which form of government to choose to the question of which national structure to choose. Thus, we can see that the issue of constitutional government was pivotal to the choice of a form of government. Indeed, in China in the latter half of the 1940s, when the civil war between the Chinese Nationalist Party (or the Guomindang [GMD] of China) and the Communist Party of China (CPC) was at its height, the question of whether or not a constitutional form of government – as prescribed by the Constitution of the Republic of China, which took effect in 1947 – was appropriate and worth preserving was a major bone of contention. Even in present-day China, the questions of what might be the ideal form of constitutional government and how the principle of constitutionalism can be put into effect are the subjects of animated discussion among many jurists, other intellectuals, and politicians. The issue of constitutionalism, therefore, still carries much historical significance in China today.

In the period between the Guang Xu Political Reform in the late Qing Dynasty and the establishment of the Constitution of the Republic of China, rich discussions took place in China on the question of constitutional government. Jurists in present-day China still frequently review these discussions, including, in particular, the theories of

constitutionalism that were advanced by prominent scholars of the Republican period (1912-1949), such as Wang Shi Jie, Wu Jing Xiong, Zhang Zhi Ben, Xiao Gong Quan, and Qian Duan Sheng. One salient feature of these views about constitutionalism was that they were very attentive to the trends in constitutional government in other countries at the time, and were thus finely tuned to the international situation surrounding China. This close link with the international situation seems to have remained essentially intact in the ongoing discussions on constitutionalism in China. This means that the issue of constitutionalism in modern and contemporary China cannot be fully understood from the perspective of Chinese history alone, regardless of whether China is taken as a nation state or as a regional unit. It should also be examined from a perspective that captures China as an integral part of the world.

Now how did I come to take an active interest in this research? The starting point was the Tiananmen Square Protest (or the Democracy Movement) of June 4, 1989.

Though I was only 15 years old at the time, I could easily see that socialist regimes were falling around the world, but I could not understand why socialist China, a neighbor of Japan, was able to resort to a violent “undemocratic political crack down”, seemingly in opposition to the world trends of the time. Furthermore, it was apparently managing to maintain its socialist regime. Disturbed by this, upon entering college, I started to inquire into the Tiananmen Square Protest and the underlying democracy movement in contemporary China.

During my inquiry, I hit upon an unexpected discovery, namely, that a wide variety of constitutional movements and political activities that had championed the causes of freedom and human rights took place in China during the Republican period, prior to the establishment of the People’s Republic. These movements were carried out in close conjunction with international developments in Britain, the United States, the Soviet Union, Japan, and so on. I was also surprised to find out that the Guomindang under Jiang Jieshi, which was in power in the 1930s and the 1940s, was taking steps amidst the Japan-China War to institute a constitutional government by carefully taking stock of these developments, and it actually put a form of constitutional government into effect immediately after the war. This discovery astonished me. I had been firmly convinced that “modern and contemporary Chinese history must be entirely devoid of such episodes,” and that “it was not until the emergence of a democracy movement in present-day China that the issue of constitutionalism arose.” I found it imperative to radically rethink my hitherto distorted perception of modern and contemporary Chinese history.

I then gradually focused my attention on the historical background that had led to the Tiananmen Square Protest. More specifically, I became interested in addressing questions such as the following. How did the Guomindang assess the domestic and international situation when it introduced a constitutional government? Why did its constitutional policy fail? What were the main features of liberal thought in modern

China that informed the Guomintang's decision to establish a constitutional government? How did these features affect the subsequent history of China, Taiwan, and Hong Kong? Fortunately, not only have I been able to enjoy an academic environment in Japan that is open and receptive to students like myself who have new research interests, but I have also been blessed with the fact that pertinent primary historical materials (such as the Dang'an and other archival records) and pioneering studies on the subject have begun to be published in China and Taiwan. Some of my early findings are published in the book, *Sengo-Chugoku no Kensei Jisshi to Genron no Jiyu, 1945-1949* (Constitutionalism and Freedom of Speech in China during the Civil War Period, 1945-49); University of Tokyo Press, 2004.

This work was the starting point for my research career. However, a large number of questions remain unanswered, and I have also seen new and challenging issues pile up with each passing year.

For example, one important question is: How should we summarize the theories of constitutional government that have been advanced in modern and contemporary China? If we define constitutionalism as a universal concept with an emphasis on the importance of "ensuring the freedom and rights of individuals, by restricting the powers of the state," then some theories of constitutionalism in modern and contemporary China do not perfectly match this definition. Both the Guomintang's argument for the "separation of the five powers", which is different from the generally accepted notion of the separation of powers into three branches, and the CPC's assertion about socialist constitutionalism may be considered the prime examples of such theories. It should be remembered, however, that the concept of the separation of powers into five branches is not necessarily incompatible with the theory of universal constitutionalism, because the government made some effort to realize universal constitutionalism on the basis of the separation of powers into five branches. Similarly, attempts were also made to reconcile socialism and constitutionalism, and there were also attempts (and still are) to realize universal constitutionalism on the basis of three branches. What is more, each of these two theories of constitutionalism is far from unrelated to international developments, and, as such, takes on many different forms that are often advocated in response both to changing world-wide trends in constitutionalism and to changes in foreign impressions of China. This has sometimes affected the political process.

A second important question is how to explain the relationship between the legal theory around the freedom of expression (speech and press), which is central to any discussion on constitutionalism or constitutional government, and the underlying domestic and international environment. While there is no denying that the social and cultural structure of modern and contemporary China, which accepts the practice of categorizing the freedom of speech and press with the issue of copyrights, which are a form of intellectual property right, has been formed in a way that is partly influenced by the international situation around China, it is worth examining whether or not this same

social and cultural structure has influenced legal theory and constitutional government in modern and contemporary China.

Thirdly, it is also important to ask how the more than one-century-long history of constitutional government in China should be assessed in modern and contemporary China, where the logics of nationalism and socialism tend to stand out. Before answering this question, it is imperative to ascertain what view modern and contemporary China has formed of what a constitution and a constitutional government should be like under socialism, and how it has put that perception into effect in establishing and enforcing its constitution. Chinese scholars studying the history of the Chinese legal system and those studying modern and contemporary China (and its law) have presented outstanding findings that are pertinent to these questions, but attempts to analyze the political process, inclusive of the formative process of the constitution, in conjunction with developments domestically and internationally have only recently begun.

Such an inquiry is essential, because it will help to clarify not only how China accepted a socialist constitution and the logic of constitutional government, but might also explain what it chose not to receive and why. The legal system and the theory of law at work during the Republican period were not formally followed by the People's Republic which replaced the Republic, but why are they still being referred to in present-day China?

It is important to find out how the People's Republic, after coming into existence while upholding the revolutionary concept of a New Democracy, behaved with respect to the issue of constitutionalism during the period from the 1950s to the 1970s (i.e. the period that saw the Sino-Soviet Split). How did it assess the Soviet theory of constitutionalism, and to what extent did it follow the Republican period's theory of constitutionalism in terms of lineage and academic or institutional structures. It is also important to understand the Soviet view of constitutionalism in the period from the 1920s to the 1940s, because this view must have served as a foundation for the socialist theory of constitutionalism in China in the period beginning in 1949.

The foregoing are only a few of the important research topics that remain to be tackled. Basing myself on *Ken'sei to Kin-gendai Chugoku: Kokka, Shakai, Kojin* (Constitutionalism and Modern China: The State, Society, and Individuals); Gendai Jinbunsha, 2010 and other findings from interdisciplinary and collaborative studies, I would like to continue to tackle these important issues – see <http://www016.upp.so-net.ne.jp/dragon-china99/> for further details – with the ultimate aim of gaining a deeper understanding of the relationship between “Constitutionalism in China and the International Situation.”