



Globalization: Law and Policy

CHINESE CONSTITUTIONALISM IN A GLOBAL CONTEXT

Peng Chengyi



Chinese Constitutionalism in a Global Context

Over the course of the last four decades, as China's ideological realm has been transformed, it has become significantly more complicated. This is well illustrated in the current discourse concerning China's constitutional future. Among Chinese intellectuals, the liberal constitutional paradigm is widely accepted. However, more recently, this perspective has been challenged by mainland New Confucians and Sinicized Marxists alike. The former advocate a constitutionalism that is based upon and loyal to the Confucian tradition, while the latter has sought to theorize the current Chinese constitutional order and reclaim its legitimacy. This book presents a discussion of these three approaches, analyzing their respective strengths and weaknesses and looking to the likely outcome. The study provides a clear picture of the current ideological debates in China, while developing a platform for the three schools and their respective constituencies to engage in dialogue, pluralize the conceptions of constitutionalism in academia, and shed light on the political path of China in the 21st century. The consequences of this Chinese contribution to the global constitutionalism debate are significant – notions of the meaning of democratic organization, of the nature of the division of authority between administrative and political organs, of the nature and role of political citizenship, of the construction of rights are all implicated. It is argued that China's constitutional system, when fully theorized and embedded within the global discourse might serve, as the German Basic Law did in its time, can be a model for states seeking an alternative approach to the legitimate construction of state, political structures, and institutions.

Peng Chengyi is currently a full-time research fellow of the Institute of World Economics and Politics at the Chinese Academy of Social Sciences in Beijing. Previously, he attained his PhD degree from the Department of Public and Social Administration at the City University of Hong Kong and his BA and MA degrees in political science at St. Thomas University and the University of British Columbia in Canada. His research interests include constitutionalism, comparative political philosophy, world political thoughts, and corruption prevention in contemporary China.

Globalization: Law and Policy

Globalization: Law and Policy builds an integrated body of scholarship that critically addresses key issues and theoretical debates in comparative and transnational law and the principles governance and policy on which they are developed. Volumes in the series focus on the consequential effects of globalization, including emerging frameworks and processes for the internationalization, legal harmonization, juridification, and democratization of law among increasingly connected political, economic, religious, cultural, ethnic, and other functionally differentiated governance communities. Legal systems, their harmonization and incorporation in other governance orders, and their relationship to globalization are taking on new importance within a coordinated network of domestic legal orders, the legal orders of groups of states, and the governance frameworks of non-state actors. These legal orders engage a number of important actors, sources, principles, and tribunals – including multinational corporations as governance entities, contract, and surveillance as forms of governance that substitute for traditional law, sovereign wealth funds, and other new forms of state activity; hybrid supra national entities like the World Bank and the International Monetary Fund; and international tribunals with autonomous jurisdiction, including the International Criminal Court, the World Trade Organization, and regional human rights courts. The effects have been profound, especially with respect to the role of states, and especially of developed states as their long time position in global affairs undergoes significant transformation. Comparative and transnational law serve as natural nexus points for vigorous and sometimes interdisciplinary approaches to the study of state and non-state law systems, along with their linkages and interactions. The series is intended as a resource for scholars, students, policy-makers, and civil society actors, and includes a balance of theoretical and policy studies in single-authored volumes and collections of original essays.

Larry Catá Backer is the W. Richard and Mary Eshelman Faculty Scholar, Professor of Law and International Affairs at the Pennsylvania State University. Previously he served as Executive Director of the Comparative and International Law Center at the University of Tulsa. He has published widely on comparative and transnational law.

Also in the series

Power, Procedure, Participation and Legitimacy in Global Sustainability Norms

A Theory of Collaborative Regulation

Karin Buhmann

Chinese Constitutionalism in a Global Context

Peng Chengyi

For more information about this series, please visit: www.routledge.com/Globalization-Law-and-Policy/book-series/GLOBLP

Chinese Constitutionalism in a Global Context

Peng Chengyi

First published 2019
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2019 Peng Chengyi

The right of Peng Chengyi to be identified as author of this work has been asserted by him in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data

Names: Chengyi, Peng author.

Title: Chinese constitutionalism in a global context / Peng Chengyi.

Description: New York : Routledge, 2018. | Series: Globalization : law and policy | Includes bibliographical references and index.

Identifiers: LCCN 2018016875 | ISBN 9781409454106 (hardback)

Subjects: LCSH: Constitutional law—China.

Classification: LCC KNQ2070 .C4355 2018 | DDC 342.51—dc23

LC record available at <https://lcn.loc.gov/2018016875>

ISBN: 978-1-4094-5410-6 (hbk)

ISBN: 978-1-315-57175-1 (ebk)

Typeset in Galliard
by Apex CoVantage, LLC

**To all those who are concerned about the development
of China and the future of the world!**



Taylor & Francis

Taylor & Francis Group

<http://taylorandfrancis.com>

Contents

<i>List of figures and tables</i>	viii
<i>Preface</i>	ix
1 Introduction	1
2 Conceptual frameworks towards constitutionalism in China	8
3 Western Liberal Constitutionalism in China: its history, core claims, and challenges	20
4 Traditional Confucian Constitutionalism: current explorations and its prospects	39
5 Sinicized Marxist Constitutionalism: its emergence, contents, and implications	65
6 The romance of “three constitutional kingdoms”: who will unify the world?	86
7 Implications for the world	100
<i>Appendix: Zhuangzi’s view of non-action as the panacea of peace</i>	118
<i>References</i>	122
<i>Index</i>	131

Figures and tables

Figures

4.1	The three layers of Traditional Chinese Constitutionalism	55
5.1	An ideological spectrum of approaches towards Chinese constitutionalism	70
6.1	Current strategic configurations and developmental trend	95
7.1	Marx's two visions of emancipation and religion in history	103

Tables

5.1	Number of core social science journal articles on the “Chinese Model”	69
6.1	A preliminary comparison of the three constitutionalisms	90

Preface

My interest in the research took shape in part from my participation in two conferences. The first was “The 100th Anniversary of Constitution Setting-up in China and the Future of Chinese Constitutionalism” (*zhongguo lixian yibai zhounian ji zhongguo xianzheng de weilai* 中国立宪100周年及中国宪政的未来), held at the City University of Hong Kong on October 17–18, 2008. At this conference, I discovered Larry C. Backer’s interesting and path-breaking theorization of Chinese constitutional development since Deng Xiaoping’s reform and opening-up. In contrast to the mainstream contempt of the Chinese constitution as a sham, Backer develops a legitimate framework for understanding the construction of Chinese constitutionalism. While his theory is not the mainstream, nor supported by the authority of China, it provides a new perspective for China’s constitutional development in the future and poses a challenge both to the dominant Western Liberal Constitutionalism and to the emerging Traditional Confucian Constitutionalism. The other conference I attended was a conference of devout Confucian practitioners entitled “The Unfolding of reform and opening-up and China’s Future – Principles, Values, Motivations of Confucianism, and Contemporary Explorations” (*gaigekaiifang yu zhongguodeqiantu – rujia de yili, jiazhi, dongli, ji dangdai tansuo* 改革开放与中国前途 – 儒家的义理, 价值, 动力及当代探索) held at Confucius’ hometown – Qufu, Shandong, on April 25–26, 2009. Jiang Qing, the leading figure of the so-called “mainland Neo-Confucians,” gave the keynote address at this conference, “Reflections on ‘Confucian Religious Constitutionalism’” (*guanyu rujiao xianzheng de sikao* 关于儒教宪政的思考), in which he shared his latest thoughts on the issue of constitutionalism for China. Even though some “mainland new Confucians” such as Chen Ming immediately expressed doubts about Jiang Qing’s specific constitutional framework, Jiang Qing’s call for and justification of developing a form of constitutionalism based on China’s own cultural tradition did find resonance among members of the audience. reform and opening-up As a result of attending these two conferences and consequently discovering these new developments in the discourse concerning China’s constitutional development, I think it would be enlightening and important to sort these three constitutional discourses out, explore their respective strengths and weaknesses, and shed light on the likely outcomes. The result is a 2-year research project on this topic as my PhD dissertation focus. The current book at hand is mainly a result of that research, with some updated reflections on the issue in light of the new development since then.

The significance of the research is quite obvious. A century ago, Chinese intellectuals were facing the same choices of Western liberal path, traditional Confucian path and Sinicized Marxism path. The ideological chaos was regarded as unprecedented in the long Chinese history. The ideological battle ended with the victory of Sinicized Marxism in mainland China. After nearly four decades of reform and opening-up, the ideological realm in China,

however, has been jumbled again. History seems to repeat itself in the sense that proposals of Western liberal path and traditional Confucian path have been advocated again by some intellectuals. How the ideological game will evolve and end up certainly have significant implications for both China and the world, especially with China's rapid rise in the West-dominated liberal world order, despite that the Western liberal order itself is under significant transformations due to the challenge of rising populism. This book will be a mapping of the ideological realm in China as well as a search to the answer to the billion-dollar question about China's future path and its implications. Thus, anyone concerned about China's future and its impact on the world should have a careful reading of this book.

In celebration of the completion of this book, I want to make a number of acknowledgements here. First of all, I want to thank my parents who have not only given me the physical body but also injected in me a clairvoyant soul. Their humbleness, simplicity, hard-working as well as unconditional love, typical to all those living at the bottom layer of Chinese society, have always touched me to tears and inspired me with inexhaustible powers to pursue my dreams. Second, I want to thank the Project of Hope in China, which had provided financial supports to over 5.7 million students and built up nearly 20,000 "Primary Schools of Hope" in impoverished areas by 2017. Without the support of the Project of the Hope for its sponsorship of attending the Peipei Foreign Language School (培培外国语学校) in Zhejiang Province in China, as well as the financial support of Gao Qi (高崎) from Shanghai, I would not have had the opportunities to study in China's first "Stars of Hope" class in the beautiful harbor-city Wenzhou and receive my tertiary education in the beautiful Canada and the modern Hong Kong. Without all these supports, I would certainly not have arrived at my current stage today. Third, I want to thank Prof. Philip Ivanhoe, for his guidance in writing my dissertation each step along the way and his meticulous editing of a previous version as well as careful comments on various arguments of the book. I would also like to thank Prof. Larry Backer for his consistent support as well as encouragement for turning the dissertation into a book, without which the book would have not been possible at the current stage. I am also thankful to Dr. Sungmoon Kim, Prof. Julia Tao, and Prof. Hon-mun Chan for their support as well as feedback on various sections of the work. Despite the lessons and inputs from them, I need to acknowledge that any errors in the book are my own and I alone am responsible for the contents of the work.

1 Introduction

Background

With nearly four decades of rapid economic growth, China has emerged as a great power on the world stage with rising impact throughout the world. Meanwhile, China also faces enormous challenges domestically due to its sheer size and rapid development amid drastic societal and economic transitions. Can the current political structure cope with those challenges? What would be a socialist China's impact on the West-dominated liberal world order? These million-dollar questions have attracted the attention of many outsiders and insiders alike. For some, the answers to these questions hinge on the political path the Chinese leadership would steer China towards. Perhaps few would disagree that the Chinese leadership has no realistic choice other than constitutionalism. But which constitutionalism, since in China there is more than one constitutionalism discourse, such as liberal constitutionalism, Confucian constitutionalism, and socialist constitutionalism? This book thus will seek to examine China's constitutionalism choice and its implications for the world.

Indeed, a prominent event in China's ideological realm has been a heated debate on constitutionalism after the new leadership taking office in 2012. Not long after the new political leadership of China was elected in the 18th National Congress of the Chinese Communist Party in November 2012, the 2013 *Southern Weekly* incident occurred. The incident led to the threat of strikes by the newsroom staff of the *Southern Weekly*,¹ as well as actual demonstrations outside the newspaper's headquarter in Guangzhou, China. On the surface, it was about press freedom, a conflict between the Propaganda Department of Guangdong Province and the *Southern Weekly*, in which the original New Year's special editorial was changed under the pressure from the propaganda officers. On a deeper level, however, it is an ideological competition related to constitutionalism, since the special New Year's editorial tried to graft the hot notion of "Chinese Dream" made popular by the new General Secretary Xi Jinping with the heavily value-laden Western political terminology of constitutionalism. As a result, the title of the editorial changed from "Chinese Dream, Constitutionalism Dream" to "We are Closer to the Dream than Any Other Times."

The reason for the incident to emerge is the liberals' partly wishful and partly strategic optimism about the prospects of Xi's political reform as inspired from his open-minded remarks in a speech delivered on the 30th anniversary of the 1982 Constitution in December

1 Also referred to as *Southern Weekend*, which is one of the most influential media outlets in China based in Guangzhou China. Although it is a part of the Nanfang Media Group, a provincial government-owned media corporation, it is well-known for its outspokenness as well as pro-liberal views and stances.

2 Introduction

2012. Xi's remarks that "No organisation or individual has the privilege to overstep the Constitution and the law, and any violation of the Constitution and the law must be investigated" and that "the life of the Constitution lies in its implementation" excited the liberal reformists who read the speech as a sign of his determination to undertake a liberal overhaul of the political system. This triggered an open letter of constitutional reform demands signed by 72 liberal intellectuals,² as well as the *Southern Weekly* incident mentioned earlier. They urged the Chinese Communist Party (CCP) to uphold constitutional government, ensure the rights enshrined in the Chinese Constitution, and set up checks and balances on the power of the party-state. In response, a loose coalition of conservatives, including party ideologues and leftist intellectuals, responded by unleashing a spate of ferocious counterattacks in a number of key party publications. Adopting an ideological stance, they argued that constitutional government was a by-product of Western capitalism, incompatible with China's own practice of socialism, and that China's political system must reflect the country's social and cultural conditions. They argued that the campaign for constitutional government was part of a malicious Western plot to subvert the CCP, just as Gorbachev's constitutional reform brought about the dissolution of the Soviet Union.

Even as China has entered the New Era with the successful completion of the 19th congress of the CCP in the autumn of 2017, the debate is still going on with neither side convincing the other side, which is a well reflection of the ideological nature of the debate. There is almost no systematic or theoretic engagement among the arguments of the different constituencies. This is particularly the contribution the current work seeks to make. In terms of the background of the debate, if we locate it within the larger ideological context of China since the reform and opening-up, as well as its recent history, we can see that the debate is by no chance accidental and in fact has deep historical reasons.

As we all know, after nearly four decades of economic reform and opening-up to the outside world, it is clear that China's ideological realm has been significantly transformed and complicated. This is well manifested in the wide acceptance of the liberal constitutional paradigm among Chinese intellectuals, which is so deep and profound that it is fair to say the notion of "constitutionalism" has become a pronoun for Western Liberal Constitutionalism in mainland China. This has induced some established³ political scholars in China to call for a banning of "constitutionalism" as a basic political terminology in China and for state leaders to shy away from the notion as early as the turn of the new millennium. This is also why contents related to "constitutionalism" face stricter scrutiny in the mainland press.

As a matter of fact, the aspiration of constitutionalism as an ideology dates back to about a hundred years ago, when Chinese intellectuals were aspiring and trying to help China recover from the chaos inflicted by colonialism, imperialism, and civil war and transform it into a stable and strong state. Nevertheless, while China has doubtlessly succeeded in finding a way for rejuvenating its national strength, the aspirations for constitutionalism has persisted among the liberals, who seek to build a constitutional government based on Western models. Some of them have issued *Charter 08* (*lingba xianzhang* 零八宪章) in 2008 in China and generated some significant impact both domestically and overseas. For example, Liu Xiaobo, one of the main drafters, received the Nobel Peace Prize in 2010 for largely the

2 Chen Hongguo et al., "A Proposal for a Reform Consensus" (《改革共识倡议书》), last retrieved at http://club.china.com/data/thread/1011/2755/18/60/3_1.html on Oct. 21, 2016.

3 "Established" is a translation of the term "tizhinei" (体制内) in Chinese, which refers to those embedded into the regime and, hence, mostly in accordance with the official lines and ideologies.

same acts that led him to an 11-year prison sentence in China. To some, the latest proposals of the liberal camp in the recent heated debate of constitutionalism has not gone beyond the tenets of the Charter (Tong, 2015).

The dominance of Western Liberal Constitutionalism in China, however, has been challenged from two unexpected quarters. One is from the cultural conservatives. Historically it is widely thought that Confucianism and constitutionalism are incompatible, even antithetical, since Confucianism is usually associated with authoritarianism, rule of man instead of rule of law, collectivism, hierarchical role-based order, over-emphasis on obligation, and so on, while constitutionalism is founded on the rule of law, individual rights, equality, and so on. This view is indeed a prominent feature of Chinese thought from the New Cultural Movement of the early 20th century to the “Asian Values” debates of recent decades. Even today it still holds some currency among many intellectuals both in and outside China. For example, those subscribing to the view of the overseas New Confucians do not question whether liberal democracy, as practiced in the West, should be the form and direction of China’s political future, but rather focus on the compatibility between the two traditions and the liberal democratic roots found within the Chinese tradition, centered on Confucianism.⁴ This view was first well expressed in the *Manifesto to the World on Behalf of Chinese Culture* issued in 1958 by the four great New Confucian philosophers, and since then, many works have been devoted to this endeavor, for example, Joseph Chen, Li Minghui, Lee Seung-hwan, Cheng Chung-ying, Yu Kam-por, Heiner Roetz, and Huang Chun-chieh all have written on some aspects of this theme. However, in recent years, some intellectuals are breaking the yoke of this dominant view by exploring the constitutional resources within Confucianism and challenging previous conceptual frameworks. And we can identify three main approaches on the issue of Confucian Constitutionalism in contemporary academia, namely the institutional approach, the ritualistic approach, and the religious approach. These various approaches all make valid discoveries and have unearthed excellent constitutional resources within the Confucian tradition; however, each approach seems to have its respective limitations, and only a combination of them could render a full picture of Traditional Confucian Constitutionalism, which would have some significant implications.

The second challenge to the dominance of Western Liberal Constitutionalism in China comes from the established orthodox school of Sinicized Marxism. Because both the liberal and tradition-based schools display a certain level of hostility toward Marxism, they implicitly deny the legitimacy of the current constitutional framework of China and consequently ignore its achievements particularly in the past four decades, such as the progress in regard to the rule of law. However, in recent years, in light of the significant progress of the constitutional framework of China, including its values and practices regarding the rule of law, this dominant liberal perspective has been challenged. Stephanie Balme and Michael Dowdle (2009), for example, have devoted their book *Building Constitutionalism in China* to exploring the empirical impacts of the emerging constitutionalism on many aspects of Chinese society, including its juridical, political, and social realms. A US constitutional scholar, Larry C. Backer, has also sought to establish a party-state model to grant legitimacy to China’s current constitutional development in the international community. This effort has been echoed by the separate articulations of Jiang Shigong, Lin Feng, Chu Jianguo, Randall Peerenboom, and so on as well. Mainstream

4 For a full list of the works, see notes 3 and 20 of Chen (2007).

4 Introduction

legal scholars in China have made similar efforts and convened a conference on “Socialist Constitutionalism with Chinese Characteristics” in May 2010 in Changsha City of Hunan Province, although many scholars attending the conference are still thinking within the liberal constitutional paradigm. As a result, we can see that a new Sinicized Marxist constitutional paradigm is emerging.

While not utilizing the notion of “constitutionalism” to the same degree, the notions of Western Liberal Constitutionalism, Traditional Confucian Constitutionalism, and Sinicized Marxist Constitutionalism indeed represent well three “flags” in the ideological realm of contemporary China that have each attracted its own large constituencies. It is in this sense that I compare the three constitutional discourses to three “kingdoms,” the competition of which to some extent resembles the *Romance of the Three Kingdoms* (*Sanguo yanyi* 三国演义) actually occurred in the Chinese history.⁵ In this research project, my task has thus been seeking to sort the three “constitutional kingdoms” out and help the audience to have a clearer picture of them as well as attain a more informed forecast of the result of the grand game.

The importance of this research project is quite obvious. It has the potential to make contributions in regard to five primary issues. First, since China’s current regime is perceived to lack legitimacy by some critics both in the West and within China, especially those hard-core advocates of Western Liberal Constitutionalism and Traditional Confucian Constitutionalism, a clarification of the criteria used for making such a judgment could shed light on the issue of legitimacy. Second, facing perhaps a new wave of democratization ushered in by recent Middle East and North Africa uprisings, Chinese politics seems to have come to a crossroads once again, and a report of the state of play among the three constitutional discourses certainly would shed light on the political path that China will undertake in the future. Third, through a careful sorting out of the contents of each school’s constitutional discourse, as well as a cautious evaluation of their respective strengths and weaknesses, this research seeks to construct a platform for engendering genuine dialogues among the schools that currently remain in a polemic and largely unproductive atmosphere. Fourth, given that the three constitutional blueprints introduced earlier, namely liberal, religious, and Marxist, can also be found at the global level (Backer, 2009a), this research can serve as an in-depth case study for the latter. Finally, given China’s sheer size and development speed, the choice of China’s political path in the 21st century certainly would have profound implications for the world, especially the Western world that holds a different ideology amid a possible turning point in history with the rise of populism. This would also impact the relationships between China and the rest of the world.

Methodology

The methods for conducting this research mainly include literature review, post-modern critical analysis, and comparative perspective. For the first method, the literature mainly consists of those that are directly related to the notion of constitutionalism. In the few

5 I need to acknowledge that the metaphor may not be very precise, partly because each of the “three kingdoms” in actual Chinese history had the same kind of political organization; nevertheless, their vying for power and increasing independence as well as exclusivity towards each other in the ideological realm do match the points of the metaphor here to some extent.