

Part II

Conclusion

Conclusion

If we adapt and rewrite a sentence from Jane Austin, it could be said that “It is a truth universally acknowledged that a Chinese intellectual in possession of a modern China must be in want of a constitution.”¹ As a matter of fact, if we have a glance at the immense amount of literature and writing that appeared in the first half of this century in China, we will find that topics such as the constitution, democracy, liberty and freedom, periodical or lifelong, occupied their whole minds; Furthermore, not only the figures who contributed to the law and politics in either practice or theory,² but also the people whose ambition aimed to be the “pure learned man” or the “devoted scholar”,³ or even the dictators Mao Ze-dong and Jiang Jie-shi, showed their engagements with those topics, in particular, the constitution.

Indeed, since the late *Qing*, facing the various Western conceptual and institutional apparatus, what Chinese intellectuals experienced were the same as what O. W. Holmes had when he began his law studies.⁴ But with a striking difference, what

¹Cited from *Pride and Prejudice*, at 1. The original sentence is: “It is a truth universally acknowledged that a single man in possession of a good fortune must be in want of a wife.”

²A profound phenomenon during this period in China is that since middle of 19th century to 1946, the amounts of Chinese students who returned back to homeland after they had finished their law studied in Europe, America and Japan, as known as so far, are about more than 4500, of which many contributed to constitutional law studies and some played an important role in both academia and practice. For details see Hao Tie-chuan, “*The Chinese Law Students Who Studied Abroad and the Legal Modernisation in Modern China*”.

³A good example is Professor Zhu Guang-qian (1898–1986), a Britain-educated scholar on aesthetics, possibly, a greatest one in China of this century. He is well known for being a “pure scholar” keening on the thinking, but we still can find an essay titled “The development of Constitutional Government and Freedom of Speech” (1944) in his *Collected Works*.

⁴In his “*Brown University—Commencement 1897*”, Holmes wrote, “there were few of the charts and lights for which one longed when I began. One found oneself plunged in a thick fog of details—a black and frozen night, in which there were no flowers, no spring, no easy joys.” In *Collected Legal Papers*, at 164, 164–65; also see his “*Introduction to the General Survey by European Authors in the Continental Legal Historical Series*”, *ibid.*, at 298, 301–2.

most of the Chinese intellectuals had seen were simply “flowers, spring and joys”, albeit in that grave time, because they thought they had already found a panacea to resolve the “problems of China”, that is, constitutionalism or constitutional government. As with the accusation made by Hans Kelsen against natural-law doctrine that “Nature is conceived of as a legislator, the supreme legislator”,⁵ constitutionalism or constitutional government had been conceived of as the supreme panacea to them in the course of resolving China’s crisis, at both the symbolic and substantial levels. Indeed, they hoped for, and believed, that China would overcome disaster and become a “modern China” by being equipped with this institutional instrument, which can be, as they imagined, established by a horizontal institutional transplantation. In doing so, they neglected or were unable to appreciate the practical difficulties and duration of this process, of the paradox beneath the relation between the starting point and the final outcome, the norm and fact, the value and the norm, the is and ought, the history and system, or even, the *Mine* and *Thine*. As for the image as a “The other” that China had been dealt by those very models they were trying to copy from, of course, this was far beyond their imaginations and understandings. The balance between focusing on “A code is at once a history and a system”⁶ and remembering “Our history is our code,”⁷ was totally lost. In the process of forming a new superstructure in the light of the institutional transplantation, therefore, it was this negligence and unawareness that contributed to and accelerated the cultural conflict in inner space and the social anomie in the external, which was one of, and contributed to, the holistic crisis of identity of Chinese culture which was characterised as an integrated entity. Owing to the facts that social anomie and the “problems of China” were still unresolved or even were getting worse, as had happened in the name of constitution-drawing since 1911, as illustrated by Liang Shu-ming, “revolution” rather than evolution then became the tendency of the day.⁸ The modern Chinese intellectual history then was a process of radicalization.⁹ Meanwhile, it also can be taken as a striking testimony that the wishful institutional-designed resolution of the “problems of China”, starting from *Nomos* to *Physis* rather than the reverse, will definitely fail to achieve its end.

In *Russian Populism*, Isaiah Berlin presented a penetrating argument about Russian populists, which is relevant to be cited here for the purpose of inspecting the Chinese case,

⁵Hans Kelsen, “The Natural-law Doctrine before the Tribunal of Science”(1949), reprinted in his *What Is Justice*, at 137.

⁶Eugene Lerminier, *La Philosophie du Droit* (II, 311; Paris: 1831), cited from Donald R. Kelly, *Human Measure, op. cit.*, at 233.

⁷The original sentence by Rabaut Saint-Etienne was “Our history is not our code.” (Cited in Georges Gusdorf, *Les Sciences Humaines et la Pensee Occidentale* [13 vols., Paris, 1966–88], VIII, 122.)

⁸LSM, “*Studies on the China’s Politics*” (19), 6: 771.

⁹Yu Ying-shi, “The Radicalism and Conservatism in Modern Chinese Intellectual History”, reprinted in his *Qian Mu and Chinese Culture*, at 201.

All these thinkers share one vast apocalyptic assumption: that once the reign of evil - autocracy, exploitation, inequality - is consumed in the fire of the revolution, there will arise naturally and spontaneously out of its ashes a natural, harmonious, just order, needing only the gentle guidance of the enlightened revolutionaries to attain its proper perfection. This great Utopian dream, based on simple faith in regenerated human nature, was a vision which the Populists shared with Godwin and Bakunin, Marx and Lenin.¹⁰

In the Chinese case, after their failure to achieve the goal they struggled for, while some radical intellectuals turned themselves to the revolution, they still conceived of institutional transplantation as being able to lead to the resolution of the “problems of China”, and ultimately a “modern China”, through revolution. The only difference is that the former put their hope on a *constitution* while the latter’s hope was the *revolution*, by which the Russian style of communist system, which was the newest and most functional “Western” civilization in the eyes of its Chinese admirers, can be transplanted into China to serve the old goal.

At that time, most Chinese intellectuals failed to understand that “one should be careful in importing constitutional devices. There is no such thing as a ‘one size fits all’ in constitutional law”.¹¹ The Western institutional arrangements such as democracy, rule of law and constitutional government, which were the model of their transplanting project, derived from and were shaped by their own key ideas such as “reason”, “history” and “human-beings”, and originated in the fact of their own way of life, in particular, the middle class way of life, which were shaped gradually over the past few centuries. “Western communities became ‘modern’,” as pointed out by Arnold J. Toynbee, “in the accepted Modern Western meaning of the word, just as soon as they had succeeded in producing a bourgeoisie that was both numerous enough and competent enough to become the predominant element in Society.”¹² It is in comparison with the West, Franklin W. Houn said that

The most significant social problems in China during recent centuries have been those which resulted from economic and technical backwardness. As a result, a powerful and enlightened middle class, which has been the backbone of constitutional democracy in the Western world, was still not yet in existence in China.¹³

¹⁰Isaiah Berlin, *Russian Thinkers*, at 217.

¹¹Elisabeth Zoller, “Southey Memorial Lecture: Constitutionalism in the Global Era”, in 20 *Melbourne University Law Review* 1996, at 1151.

¹²Arnold J. Toynbee, *A Study of History*, at Vol. 8, 338. At the same page, the following paragraph provided a further clear illumination:

This definition of the Modern Western culture as being a phase of Western cultural development that is distinguished by the ascendancy of the middle class throws light on the conditions under which, before the advent in the West of a post-Modern Age marked by the rise of an industrial urban working class, any alien recipients of this Modern Western culture would be likely to be successful in making it their own. During the currency of the Modern Age of Western history the ability of aliens to become Westerners would be proportionate to their capacity for entering into the middle-class Western way of life.

¹³Franklin W. Houn, *Central Government of China, 1912—1928: An Institutional Study*, at 175.

And also it is in this context that we could understand the remarks put by Kung-Chun Haiso when he commented on a similar point that was published in *The Times* (*Shi-wu Bao* 《时务报》) of 8 September 1898, that

the assertion that China did not have a “wealthy and talented” middle class, which contributed to the successful operation of Western democracies, is essentially well-founded. The absence of such a class remained, in fact, a limiting factor in China’s struggle to develop a viable democratic system of government, even after the 1911 revolution, as more than one writer has noted.¹⁴

Hence, in implanting this “middle class brain” into the body of China, especially at village-level, and in wishing it would function as a “starting point”, they totally failed to be aware of that potential conflict between them, quite aside from their failure to recognise that the patterns among the models—Britain, France, American, Germany, Italy and Japan were differentiated from one to another. They just described them in one word: “Western”.¹⁵ Just because they failed to get a critical insight about the intrinsic interaction between *Nomos* and *Physis* in terms of the way of life among these models, hence, as criticised by Liang Shu-ming, they “regarded the (Chinese) society as a white paper and the people who live in this society as undifferentiated from pliable noodles which could be dyed and changed willfully”.¹⁶ But unfortunately, the norm was alienated from and blind about the facts, i.e., the basic realities of the provincial society, the localized way of life, the popular attitude towards life and the essential deeply-rooted value-orientation of the society that justified and legitimized it, and so the norm would be a fatal failure in functioning as a panacea, or something like a *deus ex machina* in ancient Roman or Greek drama, in resolving the “problems of China” and the “problems of life”, if anything such as this sort of panacea or superpower really existed on the earth. As an understood conventional framework of government, constitutionalism or constitutional government lies not so much in itself, rather, as a “supreme law”, in reflecting the facts mentioned above and in making the responses to the “local” people’s life which is in a situation of change while still keeping continuity. If the history of the Chinese constitutional campaign affords any clue, it is for those points, one conclusion suggests itself: that the illuminations and farsightedness presented by Liang Shu-ming should not be ignored, if “we the Chinese people” are still willing to have a life governed under, and, a society organised by, the true constitution, as previously revealed by Liang Shu-ming.

¹⁴Kung-Chuan Hsiao, *A Modern China and a New World: K’ang Yu-wei, Reformer and Utopian, 1858–1927*, at 218–219.

¹⁵For this matter, Xiao Gong-qin contributed a vibrant analysis in his “*The Chinese Intellectual’s Mis-rendering on the Constitutionalism and its Consequences in Modern Age*”.

¹⁶LSM, “*An Account in My Own Words*” (1934), 2:21.