

Article

## China's Unwritten Constitution: Ideological Implications of a "Non-ideological" Approach

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### Summary

Since the promulgation of China's present constitution in 1982, liberal approaches have been dominating debates in Chinese constitutional jurisprudence as well as political and legal dialogues between the Chinese and Western governments. More recently, however, the liberal mainstream seems to be challenged by new strands of a "Sinicized Marxist" or "political constitutionalism" criticizing the Chinese constitution for being subject to Western ideological hegemony. This article focuses on the work of Jiang Shigong, a law professor at Peking University who has been lauded by Western scholars for his sophisticated distinction between "written" and "unwritten constitutions" to capture the "real" constitutional and political rules by which Chinese politics functions. It will be shown how, in the name of a supposedly "non-ideological" approach, his analysis of China's "unwritten" constitution and political rules actually bears strong ideological implications. Reading between the lines of Jiang Shigong's argumentation, it appears not only to justify the Chinese Communist Party's leadership as the "absolute constitution" behind China's political regime, but also to contribute to a slow but steady crowding out of liberal voices in Chinese jurisprudence and political science.

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### The Chinese constitution under a new party leadership

All over the world, but particularly in the Chinese context of a communist party regime which exerts strict controls on historiography, political anniversaries open windows of opportunity for protest and calls for reform in a most predictable, institutionalized manner. This predictability was manifest, for example, when shortly after the 18th National Congress of the Chinese Communist Party (CCP) in mid-November 2012, some 120 liberal intellectuals came together at a hotel in Beijing to discuss a "reform-consensus proposal" drafted by Peking University law professor Zhang Qianfan. Amongst other demands, this document called for constitutional government, the protection of democratic freedoms anchored in

Article 35 of the constitution, judicial independence and more efficient implementation of the constitution.

In order to justify their demands and to increase the proposal's leverage, however, the group waited for the new party leader, Xi Jinping, to say something positive about the constitution on the occasion of its thirtieth anniversary on December 4, before finalizing and sending out the document. Xi Jinping had little choice but to comply, of course. The passage from his anniversary speech which the group selected for citation in the proposal was: "The life and authority of the constitution depend on its implementation" (*xianfa de shengming zaiyu shishi, xianfa de quanwei ye zaiyu shishi*) (Zhang Qianfan et al. 2012, last section; cf. Xinhua 2012). With this authoritative imprint — or as one of the 71 signatories put it, with this "carrot dangling in front of the donkey's mouth" (personal communication in March 2013), the proposal was publicized as an open letter, albeit only after the anniversary. Similarly, other calls for political and legal reform published before and after the 18th Party Congress based their argumentation on the authority of the written text of the 1982 constitution, from which they tended to quote at length.

## A "non-ideological approach" of written versus unwritten constitutions

While this liberal reading of the constitution's written text has clearly formed the mainstream approach in Chinese constitutional jurisprudence and the prevailing paradigm for dialogues with Western governments since the turn of the century, another approach seems to have gained currency more recently. From the point of view of this alternative approach, the liberal approach is regarded as highly "ideological" and subject to Western normative "hegemony." One prominent representative of this new approach is Jiang Shigong, another law professor at Peking University, whose work has been translated into English and has been quite well received in international jurisprudence and social-science circles. For example, according to Lynn T. Whyte III, a political-science professor at Princeton: "The Chinese constitution in action is far more flexible than the written state charter might suggest. Jiang Shigong and Xueguang Zhou [a professor of sociology at Stanford University] best capture China's actual constitutional patterns of power [...]" (Whyte 2010: 100). Jiang Shigong is categorized by some observers under the banner of Sinicized Marxist Constitutionalism (Peng 2011; Carver 2011) and as a member of the school of Political Constitutionalism (*zhengzhi xianfapai*) under the influence of Carl Schmitt by others (personal communication in February 2013). He is lauded for his sophisticated approach, which, instead of focusing solely on the written constitution, takes into account the "unwritten constitution," that is, the real constitutional and political rules by which politics functions, and the interaction between written and unwritten constitutions (based on Wheare 1951). In this way, Jiang claims to be adopting "non-ideological, historical-empirical methods," (Jiang 2010: 41), "not to

question 'what the constitution should be' in a metaphysical or ideological sense, but to examine 'what the real constitution is in political life'" (Jiang 2010: 15; cf. Jiang 2009).

So far, so good. This paper posits the notion, however, that this decidedly "non-ideological" approach presents a huge ideological challenge, not only to liberal constitutional jurisprudence, but also to intergovernmental rule-of-law dialogue as it has been practised over the last decade. In order to dissect these ideological implications, this paper will now provide a closer reading of Jiang Shigong's work before moving on to assess the wider prospects of legal reform in the wake of the 18th Party Congress.

### **The "ideological hegemony" of the liberal mainstream in constitutional jurisprudence**

First of all, we need to understand what exactly is "ideological" about the liberal-mainstream approach in the eyes of Jiang Shigong. On the one hand, it is the fact that developing countries under the influence of the "Western Enlightenment tradition" had been "compelled to enact a written constitution in line with Western standards" if they wanted to be recognized by the international community. On the other hand, and somewhat ironically, Jiang finds that "[s]ocialist countries even adopted constitutions more radical in their protection of human rights than Western countries to prove the superiority of socialism over capitalism." In other words, the PRC, sailing between Scylla and Charybdis, or rather, between the normative strongholds of Cold War ideologies, did not adopt a written constitution on its own initiative, but because it "felt forced to deviate from [its] national cultural traditions and duplicate Western 'constitutional norms.'" Even worse, according to Jiang, the repeated revision of the 1982 constitution — in 1988, 1993, 1999 and 2004 (when, amongst other provisions, the explicit protection of human rights was added in Art. 33 of the constitution; Holbig 2004) has been driven by the continuous "intention to accord with international ideological standards" (the quotes in this passage are all taken from Jiang 2010: 14).

As we can see here, the gap between the written text of the constitution and the unwritten constitution — the rules of the real political game — is framed not as a home-made problem, but as a result of ideological pressure from the West, including the former Soviet Union. Thus, the fragility of the repeatedly revised written constitution and the hypocrisy surrounding its implementation, which notoriously invites foreign criticism, are interpreted as resulting from the historical dilemma between forced adaptation to Western ideology on the one hand and assertion of China's indigenous and cultural traditions and political realities on the other. To cope with this dilemma, Jiang's recommendation is "not simply to avoid the so-called hegemony of Western-centrism, but to guard against ideological bias in the theorizing about constitutions" (Jiang 2010: 15–16). The liberal paradigm is labelled

under ideological hegemony and accordingly framed as inherently hostile to the true national interests of China.

### **Party leadership as the “absolute constitution”**

Moving on now to the next question, what is the “unwritten constitution” in contemporary China, or in other words, what are the rules by which politics functions? According to Jiang Shigong, the main element that has remained unchanged in the course of the repeated revision of the written constitution is the “leadership of the CCP within the system of multiparty cooperation,” which he regards as “‘the primary fundamental law’ of China, or what has been called China’s ‘absolute constitution’” (Jiang 2010: 23). Seen in the light of these multiple superlatives attributed to the party, the ongoing controversy among the Chinese political and academic elite as to whether the CCP should be placed under the authority of the constitution or vice versa is now completely irrelevant since the CCP is, in any case, considered to be the absolute source of the unwritten (and written) constitution.

Interestingly enough, the 18th Party Congress work report contains a passage on the relation between the CCP and the constitution, which seems to be similarly ambiguous: “As the Constitution and laws are adopted by the Party and the people under its leadership,” the report reads, “the Party must act within the scope prescribed by the Constitution and laws” (Hu 2012). On the one hand, this passage seems to signal the willingness of the party to exercise its power only within the confines of the constitutional and legal framework, but on the other, the CCP is also clearly asserting its claim to be the originator of the constitution, and thus implicitly, the authority in control of the constitution (cf. Minzner 2012).

In another apparently ironic twist, Jiang Shigong portrays the National People’s Congress (NPC) as a toothless “rubber stamp,” a description with which most Western commentators would agree. In contrast to the latter, however, Jiang assigns a key function to the “rubber stamp” role of the NPC in the legitimization of party rule: “much like the ‘king’s two bodies’ in medieval European politics [...], ‘people’s sovereignty’ in China has its own two bodies, the CCP and the NPC.” “In this way, the will of the CCP [...] can be nationalized and legitimized, thus converting the general will of the people into the national will under the highest authority of the written constitution” (Jiang 2010: 24). According to this reading, the NPC’s constitutional status as the “highest organ of state power” (Art. 57) is not simply a façade, but an indispensable ingredient in the ongoing process of nation-building. The written constitution, so to speak, is utilized as the source of the normative justification of the CCP leadership in the name of popular sovereignty, one of the core doctrines underlying the socialist claims of regime legitimacy (Holbig 2009: 16–18; cf. Brunner 1982: 33, 36–42).

## Towards a “unique Chinese model” of jurisprudence

Although Jiang Shigong identifies further elements of China's unwritten constitution, these examples suffice to illustrate what he calls his “non-ideological” approach. To grasp the full ideological implications of this approach, however, it is necessary to look at his programmatic conclusions in some detail. In Jiang's view, the current focus of the liberal mainstream of constitutional studies on the protection of citizens' rights “does not address the real issues of political life in China” (Jiang 2010: 42). Rather, the future direction for the development of Chinese constitutionalism should be “to take our unwritten constitution seriously as a constitution” (Jiang 2010: 42). In particular, he suggests that “a constitutional statute about the rule of the party should be developed, which would make the CCP a constitutional party,” and that modifications of the party constitution “should be a matter of the whole Chinese people and agreed upon by the people” (Jiang 2010: 42). Up to now, the CCP leadership has only been mentioned in the preamble to the constitution, but this proposal suggests that the hitherto largely unwritten role of the party as the “fundamental law” or “absolute constitution” should be codified not only in the party statutes, but also through a separate constitutional statute. Again, the status of the party implied in this suggestion seems to hover between that of an entity subject to the constitution and the people's will on the one hand and that of the originator of the constitution with authority over it on the other.

This proposal culminates in a moralistic plea for China to develop “its own unique constitutional model” instead of simply replicating the West in order to make “a real contribution to *tianxia*, to human civilization” (Jiang 2010: 43). Reminding his colleagues of their “responsibility as Chinese intellectuals,” particularly in this period of “the rise of China,” Jiang Shigong demands that they “restore the prestige and status of constitutional jurisprudence as a political and social science” (Jiang 2010: 42). As this plea confirms, the narrative of China's rise has led to a growing demand for the assertion of “unique Chinese model(s)” and for the establishing of distinctively “Chinese” schools and academic disciplines.

## Outlook

This growing bias against the “hegemony of Western-centrism,” which seems to be part of a broader trend in Chinese academia that has been observable since the late 2000s, can be welcomed, of course, as a sign of the maturity and increasing self-confidence of Chinese scholarship. At the same time, the insistence on the “non-ideological” nature of this approach — which goes hand in hand with the ideologization of the liberal approach — combined with what could be called a new (hegemony of) “China-centrism,” might well morph into a different sort of ideology which might, in turn, contribute to the slow but steady crowding out of liberal voices.

In their personal communications, proponents of the liberal mainstream in Chinese jurisprudence have sometimes hinted at the gradual closure of the discursive space in which they articulate their reform proposals and visions. While this group continues to receive much media attention in Western countries, the resonance of their cause seems to be lessening inside China. The official reaction to the recent calls for political and legal reform — that is, for immediate censorship followed by active disregard — provides further confirmation that the air is indeed becoming even thinner for liberal intellectuals.

If this trend continues, Western participants engaging in intergovernmental rule-of-law dialogue with China, who have relied on a common language of liberal jurisprudence being spoken by at least some of their Chinese colleagues, might find themselves and their Chinese counterparts speaking at odds with each other more and more often. Whether this common liberal language is called “ideological” or not does not really matter in the end: without any common ground formed by constitutional norms and narratives, even the small amount of leverage exerted by intergovernmental rule-of-law dialogue could shrink substantially.

“The life and authority of the constitution depend on its implementation,” declared Xi Jinping. This anniversary statement, which some have seen as a ground for optimism that legal reforms will become more far-reaching under the new leadership generation, could also be understood in the context of the distinction made by Jiang Shigong between the written and unwritten constitution: what really matters (the “life” of the constitution) is not the written text, but its implementation — the “real”, unwritten rules by which politics functions; the “constitution in action” (Whyte 2010: 100). Similarly, the “authority” of the constitution is guaranteed by the authority of the party, which has not only “led the people to promulgate the constitution” (18th Party Congress work report, see above), but also oversees its implementation. The CCP leadership might retain its role as the “absolute constitution” behind China’s political regime for a while yet.

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