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PROJECT

A Comparative Study of the Central-Local Relationship

The proposed project is to continue and expand my comparative research on the central-local relationship, focusing on the German federal system and its relevance to legalizing the central-local relation in China. The ultimate purpose of this research is to re-examine the central-local relationship that has puzzled China's governance for a long time. Although scholars in China have paid close attention to this problem, they have not been able to put forward any constitutional theory that can effectively resolve the growing central-local conflicts. Limited by its anachronistic understanding of unitary sovereign power, traditional Chinese jurisprudence has failed to recognize the need to balance the plurality of local interests against national uniformity, much less to propose a new institutional design for such balance. By contrast, the research on vertical separation of powers has produced many interesting insights in the federalist states. In Germany, for example, the central-local (i.e., federal-state) disputes are usually resolved through constitutional litigations, which has produced abundant case decisions that rather effectively resolved the conflicts between national uniformity and local autonomy. During my visit, I plan to compare the constitutional experience of Germany and other major states, e.g. the United States, Canada, Australia, and India, generalize the constitutional principles that regulate the central-local relationship, and propose plausible scenarios for the resolution of central-local conflicts in China. Preliminary study illustrates the need to legalize the central-local relationship and to allocate the central and local power most effectively. Thus, the central government should not busy itself with regulating everything; it has neither the right nor the obligation to meddle in affairs of purely local nature.

Recommended Reading

Zhang, Qianfan. "Judicial Reform in China: An Overview." In *China's Socialist Rule of Law Reform under Xi Jinping*, edited by John Garrick and Yan Chang Bennett, 17-29. New York: Routledge, 2016.

-. "Legalising Central-Local Relations in China." In *Central-Local Relations in Asian Constitutional Systems*, edited by Andrew Harding and Mark Sidel. Oxford: Hart, 2015.

-. "A Constitution without Constitutionalism? The Paths of Constitutional Developments in China." *International Journal of Constitutional Law* 8, 4 (2010): 950-976.

Social Contract as a Metaconstitution

Social contract theory has been discredited by many, on account of misunderstandings and the neglect of its essential function in founding a legitimate constitutional state.

There are several related misunderstandings commonly found in the relationship between social contract and constitution. It is usually taken for granted that the constitution is the social contract and thus the highest positive law of the nation, above which there is no higher, more fundamental binding norm. As a result, the "constituent power" representing the "sovereign people" wields supreme and unlimited power during constitution-making, a revolutionary event which creates the basic order from the moment of its inception, and cannot possibly be bound by any prior valid norms. The holistic notions created by Rousseau and Sieyès were used by demagogues around the world like Hugo Chávez, who destroyed Venezuela's age-old constitutional order within a year of taking up power as president.

In my talk I will begin with the histories of the constitutional coup in Venezuela and a few other developing countries, and give a summary critique of the holistic constitutional theories of Rousseau, Sieyès, and Carl Schmitt. Although Rousseau failed to construct a defensible social contract theory, I argue that a social contract is nevertheless indispensable for the legitimacy of the state and its constitution. It is followed by the introduction of what I call the "skeptical experimentalist" framework, inferred from J. Holmes's landmark dissenting opinion in a U.S. free speech case in 1919, which laid the ground for a "bounded majoritarian" social contract.

I will then sketch the outline of a prototype social contract, a "metaconstitution" that serves as the foundation for a legitimate constitutional state. The talk will end with a discussion of possible implications for constitution-making and revision processes, using post-apartheid South Africa as a positive example that successfully framed its social contract in a two-stage constitution-making process.

PUBLICATIONS FROM THE FELLOW LIBRARY

Zhang, Qianfan (Abringdon,2018)

Against the holistic temptations

<https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=1687958300>

Zhang, Qianfan (Getzville,2018)

Guarding against holistic mothodology : a critique of theories on constituent power and general will

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Zhang, Qianfan (New York,2016)

Human dignity in classical Chinese philosophy : Confucianism, Mohism, and Daoism

<https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=857391917>

Zhang, Qianfan (2014)

Xianfa xue daolun : yuanli yu ying yong

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Zhang, Qianfan (Xiang gang,2013)

Manifesto of constitutional China

<https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=1020781173>

Zhang, Qianfan (Oxford [u.a.],2012)

The constitution of China : a contextual analysis

<https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=721352367>

Constitutional systems of the world

<https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=721352367>

Zhang, Qianfan (Beijing Shi,2011)

The principles of constitutional law

<https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=742642747>

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