公法

第一卷

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卷首语

"西学东渐"百余年，吾国人文学术之变尤在关涉公共生活领域。公法是为一隅。丁匙良译书《万国公法》先行于世，沈氏法律馆编译踵接而出，复有清末修律厘分民刑，民国立宪规设共和。虽征实言之，可谓有法律而无法治、立宪法而阙宪政、言仁道而疏人权，然吾国之有现代公法名称、律条与学问，盖自此耳。揆度吾国旧时公法学问，有改制变法、据摄西律及民主革命经验积为深厚资源，有戴雪《英宪精义》、狄骥《公法变迁》、康有为《实理公法》及王钱二氏《比较宪法》等著译蔚为大观。功之不昧，过亦足惕。或因动乱频仍，时政所需，公法研究惯受政治思潮裹挟，统治权宜左右，辨不实之理、习乡愿之技俱为时俗。是故热热闹闹、弄潮抒臆之作枝繁叶茂，平心静气、洞幽究微之学鲜且冷矣。

最近二十年改革开放，拨乱反正，公法学术生机重现。然比之于当世学术先进，衡之于时下民众需求，公法学问之滞塞令吾辈愧然失色矣。本刊之创立，意在偕志同道合者，荟汉语世界公法著译之精粹，为推进公法研究、译介与教育尽绵薄之力。

编辑方针如下：

1. 每卷于"主题研讨"之外，设固定栏目"理论前沿"、"改革建言"、"国际人权公约与中国法"、"传媒与法律"、"书评"、"学术对话"、"名作鉴赏"、"学位论文选萃"及"小资料"；

2. 收文范围按学科包括国际公法、宪法、行政法、刑法、诉讼法、大众传播法以及人权理论、法律哲学、中国传统政治哲学；

3. 每卷拟根据需要在海内外聘请主编，并主持主题研讨和相关会议；

4. 鉴于我国公法研究现状，拟在近年内以较大比重译介国外公法学问。

5. 每年不定期出版若干卷。如资金及人力无虞，可考虑定期。

编者　夏　勇

一九九八年十一月于北京

Inaugural Statement on the First Issue of *Public Law Review of China*

After more than 150 years of the "Dissemination of Western Learning in China", great changes have occurred in the humanities studies in China, especially in those areas relating to public life. Public law is one such area. Following the first Chinese translation of English law book, Wheaton's *Elements of International Law*, by W. A. P. Martin and his Chinese associates, a series of Western books on public law were translated and published by Mr. Shen Jiaben's Institute of Law Revision in the late Qing Dynasty. Since that time, the legal reform was carried out which abolished the Chinese legal tradition of amalgamating different laws into one single code and separated civil from the criminal law. With the founding of the Republic of China in 1911, a constitution was adopted which established the principles of republicanism and a democratic government. It was during this period that the concept, provisions and study of public law in its modern form began to emerge in China. However, one may well argue that at that time China enacted laws without establishing the rule of law, adopted a constitution without embodying the principle of constitutionalism and stressed benevolence without respecting human rights.

A review of the history of public law studies in China has revealed both remarkable achievements and serious shortcomings. The achievements include the rich experiences of political and

legal reforms, the assimilation of western laws, republican revolutions and a splendid array of works and translated works in the field of public law, such as Dicey's *Essentials of the British Constitution*, Duiguit's *Evolution of the Public Law*, Kang Youwei's *Positive Theory of Public Law* and Wang and Qian's *Comparative Constitutional Law*. The shortcomings are reflected in the fact that, due to the frequent social turmoil and political needs of the time, the study of public law has often been influenced by the trend of political fashions and controlled by the expedience of the political rulers. It was often the fashion of the time for scholars of public law to engage in meaningless debates, cater to the whims of the rulers or practice hypocrisy. As a result, many of them indulged in writing superficial and subjective articles and few were able to do any serious and indepth research.

The reform and the implementation of an open policy in the past two decades has restored order and brought new life to the research of public law in China. However, the enormous gap that still exists between China and the advanced Scholarship in the field of public law, whether in terms of carrying forward legal heritage, development of new theories, or possession of materials, has made us flush with shame. The inability of public law research in China to meet social demands, whether in terms of analyzing national conditions, upholding justice or changing the legal system, has given us many sleepless nights. The purpose of initiating this publication is to bring together legal scholars who share the same ideals and interests, to collect the best works on public law, whether written by Chinese or foreign scholars, and to contributes to the promotion of the research, translation, as well as education in the field of public law in China. It is also our hope that through this publication we are able to lay the necessary theoretical foun-

dation for an exploration, from the perspective of legal research, of the ways to reform the political system.

The guiding principles for this publication are as follows:

1. Apart from the "Subject Discussion", each volume will include the following regular contents: "Frontier of Theories", "Proposals of Legal Reform in China", "International Human Rights Treaties and Chinese Law", "Mass Media and Law", "Book Review", "Academic Dialogue", "Appreciation of Masterpieces", "Excerpts from Excellent Dissertations of Students" and "Database".

2. The contents of this publication are primarily within the scope the following fields: public international law, constitutional law, criminal law, legal procedure, mass media law, human rights theories, legal philosophy and traditional Chinese political philosophy.

3. According to the actual needs of each volume, we may invite Chinese or foreign scholars to be the editors-in-chief of this publication and to chair the subject discussions or other relevant meetings.

4. In light of the current situation of the study of public law in China, in the next few years we plan to put the emphasis of the publication on the translation and introduction of the researches of public law in foreign countries.

5. This publication is a non-periodical, published irregularly several times a year. We will consider turning it into a periodical if we are able to secure sufficient funding and staff.

Xia Yong, Editor-in-Chief
November 1998 in Beijing

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Vol. 1, 1999. Editor-in-Chief: Xia Yong

A Special Issue Celebrating the 50th Anniversary of
The Universal Declaration of Human Rights

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中国民权思想的特色

溝口雄三* 著
孙　歌　译校

一、作为反君权的民权

本报告意在讨论中国近代的民权思想。

首先必须指出的是，共和思想、民权思想等都是十九世纪时从欧洲传输到亚洲的外来思想。中国自然亦非例外。然而，就其内容而言，决非是原封不动地从欧洲输入，而是在输入摄取时发生了相当的变化。这种变化正是植根于中国前近代时期的思想基体进行的。

所谓前近代思想基体，具体而言，即十七世纪初叶，所谓明末清初以降至十七——十九世纪清王朝时期而渐次萌芽发生的中国式的民权思想。

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* 原日本东京大学文学部教授。现为日本大东文化大学教授。感谢溝口雄三先生以该文参加本卷《公法》的主题研讨，并嘱中国社会科学院外国文学研究所孙歌教授审校原文。孙歌教授除了对原译文作了若干重要的校对和重译之外，还承担了与溝口雄三先生的联络工作。李薇博士亦提供了宝贵的支持和帮助。特此一并谨致谢忱——编者

其中之一，即是反君权的民权思想。

或许有人会认为，既然讲民权，则当然是反君权的。但此处所谓反君权，在其终极目标是废除帝制这一点上，是迥然有别于日本明治时期的民权思想。

日中两国同处东亚，且差不多在同一时期接触到欧洲的近代政治思想，然而日本建立了天皇制立宪体制，中国则走向了废除帝制、创立共和体制国家的道路。这种差异，诚如后述所阐明的那样，是两国前近代的社会结构、思想结构之不同使然，决非仅仅是外来思想接受的深浅度所致。

试举一单纯比较之例。

福泽谕吉（1834—1901）与陈天华（1875—1905）在介绍社会契约论时，都曾将政府与国民的关系喻作公司老板与雇员（或股东）的关系。在此比喻中，福泽认为，既然雇员视老板为自己的代表，所以雇员必须绝对服从老板的意志，“故国法虽不正不便，却绝无以其不正不便为口实而破其之理”。[①] 相反，陈天华则认为，倘若老板不正，股东有“纠正他们的权力”，如果熟视无睹，则等于“放弃股东的责任，丧失了做股东的资格。”[②]

此外，中江兆民（1847—1901）与郑观应（1842—1922）分别将天皇与国会、皇帝与臣民喻作舟水。中江说：“天子如坚固之铁舰一样，波浪再汹涌暴虐，铁舰始终稳在其上而无受破损。”[③] 郑却以“水（臣民）能载舟（皇帝），亦能覆舟。”[④] 来告戒君民间意思的隔绝，并以之作为开设议院的根据。

陈天华将国家视为公司的比喻，乃是清末所常见的比喻方式，都是主张对政府有纠正、罢免权；郑观应之君民与舟水的关系，乃是《荀子》以来屡见不鲜的比喻，皆暗示水能覆舟即推翻王朝，并非陈、郑独有的卓见。同样，毋容赘言，福泽与中江之遵守国法、天皇绝对观等也乃日本大多数人的见解。

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① 劝学篇，7编。

② 狮子吼，第三回，民报，第七号所载。

③ 平民之觉醒，第二章。

④ 盛世危言，议院上。

两者之间横亘着难以逾越的两国传统之差异，即一方是根植于中国易姓革命思想的传统；另一方则是根植于日本万世一系的天皇观这一历史事实。这种不同，成为导致两者的政府与国民观、君民观相异之母体。

换言之，日本明治时期的民权不包含对天皇（国体）的反乱权。反之，中国清末时期的民权则含有对皇帝（王朝体制）的反乱权。这种差异，乃是两国不同的历史基体所导致。

不过，此处所见的中国清末时期的反乱权，作为其渊源，不能仅仅追溯于易姓革命思想。众所周知，所谓易姓革命之易姓，不过是王朝之改易而已，并不意味着王朝体制本身的兴废 。

也就是说，此处所言之反乱权，并非指历来的易姓革命那种单纯的对现存王朝之反乱，而是指体制本身之兴废 ，此正是中国清末民权的历史性特色所在。

那么，上述意义的反乱权、反君主体制观在何时、又是怎样在中国逐渐形成的呢？

二、作为地方分权的民权

在此我们注意到的，是明末清初时期显现的君主观的变化以及清初以降的地方自治倾向。

关于前者，另文已有论述⑤，故在此仅限于行论所必要的略论。明末清初时期，以君主的仁德为治世的出发点这样一种旧来的德治主义政治观开始发生变化。

明末清初的思想家黄宗羲（1610—1695）在其《明夷待访录·原君篇》中，因将“民之自私自利”与“皇帝之大私”描写成相互矛盾的对抗物而名闻遐迩。这里所谓“自私”、“大私”的私，并不是利己、利己主义等道德关系的概念，而是以私有为实体的观念。可以说，在这里黄宗羲所企求的，是从政策上、制度上来保证民众的私有不受皇帝“大私”的侵犯。

在其“破邪论”中的论述，即田地已不再是天子的“王土”，而是民众

⑤ 参见拙著《中国前近代思想的演变》序章，中华书局 1998 年版。