

## Lorenz von Stein and Chinese Constitutional Movement: A Reexamination of Legal History

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### ABSTRACT

*This article aims to explore the relationship between Lorenz von Stein and Chinese constitutional movement. It will undertake an historical comparison of events in order to interpret the development of the Chinese constitution during the late Qing and the early period of the Chinese Republic. It is well known that the Chinese constitution (1905-1916) was greatly influenced by the Meiji constitution, but it is often overlooked that the Meiji constitution was actually directly influenced by the German constitution, especially by Stein's thoughts on political theory. It has always been acknowledged that Stein had an influence on Chinese constitution; however, the relationship was often associated with the connection between Germany, Japan, and China. In this article, we try to explore his influence on those who drafted the Meiji constitution to further understand Stein's indirect influence on the Chinese constitution through those Japanese pioneers. In particular, we discover the dynamic law of historical change which presents in Stein's writings, if we review the interactive law between state and society in the Chinese constitutional history.*

**Keywords:** Lorenz von Stein, Chinese Constitution, Meiji Constitution, Science of State, Itō Hirobumi, Ariga Nagao, Yuan Shikai

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## I. INTRODUCTION

What is the relationship between Lorenz von Stein (1815-1890)<sup>1</sup> and China? As a European and despite having never left Europe, Stein has always been assumed to be related to the Chinese constitution in the struggle of constitutional debate; however, this relationship is not always clear in the constitutional laws owing to the complexity of the constitution. In this article, we try to explore his influence on those who drafted the Meiji constitution to further understand his direct or indirect influence on the early Chinese constitution through those Japanese pioneers.

As previously mentioned, Japanese pioneers, greatly influenced by Stein, played an important role in the drafting of the Chinese constitution. However to develop a clear understanding of this event, we must first look at the historical background that paved the way for constitutional reforms in China. There were two important constitutional movements in the early 20th century China.<sup>2</sup> The first one, called the “One-Hundred-Day Reform” originated from the Guangxu Emperor in 1898 (光緒皇帝), but it was hindered by the Conservatives which were led by the Empress Dowager Cixi (慈禧太后). Even though it failed, the Chinese people began to expect change, which led to the Boxer Rebellion in 1900, inflicting much suffering on the Chinese people. These events persuaded the Qing Court that constitutional reforms were necessary so the Court sent some officials to various countries to survey and study their constitutions, and they reached a consensus that the most suitable constitution was that of the Meiji government in Japan.

The second constitutional movement was from the overthrow of the Qing dynasty in 1911 to the death of Yuan Shikai (袁世凱) in 1916. To establish a new China required a government with legitimate power to stabilize the whole state; thus, a constitution became an approach to gain political power. The establishment of the new China was formed by a compromise between two forces—the Conservatives and the Revolutionaries—both of which took different approaches to drafting the constitution. The Conservatives were led by Yuan Shikai, and they occupied the president’s office with its considerable influence and power. The Nationalist Party, led by Sun Yatsen, controlled the parliament and was thus

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1. For an account of the life and career of Lorenz von Stein, see Jang Daw-Yih (張道義), *Shijiu Shiji Deguo Guojia Faxue zhe Shitanen: Lorenz von Stein 1815-1890* (十九世紀德國國家法學者史坦恩: Lorenz von Stein 1815-1890) [*The German Theorist of State and Society of the 19th Century: Lorenz von Stein 1815-1890*], 38 TAIDA FAXUE LUNXHONG (臺大法學論叢) [NAT’L TAIWAN UNIV. L.J.] 187, 187-233 (2009).

2. FISCHER TASCHENBUCH VERLAG, FISCHER WELTGESCHICHTE BAND 19: DAS CHINESISCHE KAISERREICH [FISCHER WORLD HISTORY VOL.19: THE CHINESE KINGDOM] 330 (Herbert Franke & Rolf Trauzettel eds., 2005).

able to reform the apparatus of a state and limit the president's power. At that time, under the heavy influence of the Japanese consultant, Ariga Nagao (有賀長雄, 1860-1921), Yuan established a constitution based on the framework of the Meiji constitution.

It was within these two constitutional movements along with the influence of the Meiji constitution on China that the relationship between Stein and China began to form. Although the Manchurian Qing Court modeled its constitution after Meiji's, the Meiji constitution was deeply influenced by German thoughts which were directed to Stein's. If this relationship were not to be clarified, the early history of this constitutional process would be incomplete. The Meiji constitution not only emphasized the constitutional laws, but also took into account the social and administrative foundation which the constitution required. This is the perspective that Lorenz von Stein stressed in his writings on political constitutions, and thus a link can be found between Itō Hirobumi (伊藤博文, 1841-1909), the Meiji government, and the work of Lorenz Von Stein.

Though the relationship between Stein and China was tied through Japan, he actually paid attention to the Asian situation long before he worked with the Japanese delegation. Although he never left Europe, he was concerned about sea power and commercial trade relations with China and even published several articles on this matter. This shows that Stein had a deeper interest in Chinese politics than many give him credit for.<sup>3</sup> This article concerns the relation between Stein and China which was connected by Japanese, thus it was supported that Steins thoughts went beyond Japan and expanded to China. This article introduces two Japanese—Itō Hirobumi and Ariga Nagao—who were influenced by Stein's thoughts at first, and then discusses how they influenced the Chinese constitution, based on Stein's thought.

The significance of this research is to reexamine the Chinese constitutional history through the relation between Stein and China, and not only stays in the discussion about the lone connection with the Meiji constitution but also clarifies how the actual connection lies in the influence

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3. These articles are: Lorenz von Stein, *Zur Frage der ost-asiatischen Consular-Jurisdiction* [*On the Question of Austrian-Asian Consular Jurisdiction*], 10 OESTERREICHISCHE MONATSSCHRIFT FUER DEN ORIENT [AUSTRIAN MONTHLY FOR THE EAST] 18-20, 39-44, 78-81 (1884); Lorenz von Stein, *Ueber die Settlements in Ostasien und ihre Rechtsverhaeltmisse Mit specieller Beziehung auf Japan* [*About the Settlements in East Asia and their Legal Behaves with More Specially Relation to Japan*], 11 OESTERREICHISCHE MONATSSCHRIFT FUER DEN ORIENT 215-18, 241-45 (1885); Lorenz von Stein, *Der Vertrag von Tien-Tsin zwischen Japan und China vom 19. April* [*The Treaty of Tien-Tsin between Japan and China on April 19*], ALLGEMEINE ZEITUNG [GENERAL NEWSPAPER], June 30, 1885, at 2617-18; July 2, 1885, at 2649-50; July 19, 1885, at 2985-86; Lorenz von Stein, *Zur Organisation der Land- und Seemacht Chinas* [*The Organization of the Army and Navy of China*], in 1 UNSERE ZEIT DEUTSCHE REVUE DER GEGENWART [OUR TIME REVIEW OF CONTEMPORARY GERMAN] 408, 408-15 (1885).

of constitutional thoughts in Europe. Although this article probes into the historical relation between Japan and China, its aim is to go through the constitutional relation between Japan and China to trace back their absorption of the European constitutional thoughts. Thus we can reconsider the Chinese constitutional movements in the early 20th century by a more macroscopic approach which offers new interpretive meaning to substitute for past negative and pessimistic views, and connect the past constitutional development with the current constitutional practice for a positive perspective. Moreover, we discover that the Chinese constitution in the early 20th century is in fact tied with the globe constitutional development. These important findings may be merged in accordance with observations about Stein's concepts.

In order to address this link between China, Japan and Stein, this paper will ask the following questions: How did Stein have a direct or indirect influence on the Chinese constitution through the Japanese such as Itō and Ariga? How deep was his influence?

## II. LORENZ VON STEIN'S "STAATSWISSENSCHAFT"<sup>4</sup> IN EAST-ASIA

### A. *Itō Hirobumi's Constitutional Survey in Europe*

#### 1. *Background*

In 1853, an incident that became known as the Black Boat Event occurred that greatly influenced the history of Japan. The American captain Matthew Calbraith Perry forced the Japanese to open Japan's mercantile harbors and sign an unequal trade treaty with the USA. In 1867, because Tokugawa Shogunate was found to be an ineffective ruler for both foreign and domestic affairs, the Japanese ruling class gave back the dominant power to the Meiji Emperor. Although one of their first priorities was to strengthen national power and develop Japan's international status, the first problem that the Meiji government needed to face was to amend the unequal treaty so as to regain equal trading rights with the foreign powers.

On the 23th December 1871, the Meiji government sent a group of ambassadors led by Iwakura Tomomi (岩倉具視, 1825-1883) to the United States and Europe to study their industrial development and civil structure. According to the basic guidelines in "*Jiyusho*" (*Statement of Purpose*),<sup>5</sup>

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4. The word "Staatswissenschaft" means the science of state, political thought or political idea. There is no corresponding word in English, so that we use the "Staatswissenschaft" to present its essential meaning.

5. KAZUHIRO TAKII (瀧井一博), *THE MEIJI CONSTITUTION: THE JAPANESE EXPERIENCE OF THE WEST AND THE SHAPING OF THE MODERN STATE* 4 (2007).

there were three main tasks for the ambassadors to carry out: (a) to recruit foreign consultants, (b) to ask for the negotiation of the unequal treaty, and (c) to survey the structure of western governments and society.

After Iwakura returned to Japan, the Meiji government actively put the political reform into practice by imitating European governments and social constructs in all their aspects. They based their constitution not only materially, but also conventionally, culturally and institutionally on the European model. Japan also experienced social unrest at this time and many campaigns for liberal civil rights were launched.<sup>6</sup> People advocated a British-style constitutional monarchy in which the emperor had less political power than the Parliament. Since the Meiji government and the civilian population argued vehemently over the establishment of the constitution, the constitution was postponed.

After a coup in Meiji 14 year (1881), the Meiji government issued “the Imperial Rescript” promising the opening of a parliament by 1890. At the same time Itō Hirobumi was appointed as councilor, but he was under pressure from two sides: the liberal civil rights movement, and internal pressure from ambitious opponents within his own government. Moreover, he felt his knowledge of constitutional laws was insufficient to draft a constitution suitable for Japan. Just in time the Japanese emperor suggested sending an assembly to investigate the contents of constitutions in Europe in order to confirm the content of the Imperial Rescript.<sup>7</sup> Therefore, Itō Hirobumi accepted the emperor’s requirement to solve the questions which he confronted.

The above showed how Itō Hirobumi went to Europe to survey constitutions, but it was not a spontaneous process of instituting a constitution. The next section will reveal how Itō Hirobumi took the entire political situation into account before drafting the constitution. Accordingly, it could be inferred that the fulfillment of the Meiji constitution was not spontaneous but a consensus formed by collective opinions. The noteworthiness was how Itō Hirobumi persuaded the opposition of his achievements in surveying the constitution abroad.

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6. XIAO CHUAN-GUO (肖傳國), JINDAI XIFANG WENHUA YU RIBEN MINGZHI XIANFA: CONG YING FA SIXIANG XIANG PULUSHI DEYIZHI SIXIANG DE YANBIAN (近代西方文化與日本明治憲法：從英法思想向普魯士德意志思想的演變) [EARLY MODERN WESTERN CULTURE AND JAPANESE MEIJI CONSTITUTION: FROM BRITISH-FRANCE IDEOLOGY TO PRUSSIAN-DEUTSCHE IDEOLOGY] 43-44 (2007) (During the decade of the exploration of liberal civil right movement from 1874, there were more than 80 constitutions appeared from the civil society, especially during 1880-1881 there were more than 50 constitutions appeared).

7. GEORGE BECKMANN, THE MAKING OF THE MEIJI CONSTITUTION: THE OLIGARCHS AND THE CONSTITUTIONAL DEVELOPMENT OF JAPAN 1868-1891 70 (1957) (As a guide for Ito’s use, the rescript included a detailed list of questions regarding the political power and financial independence of Emperor and his ministers).

## 2. *Itō Hirobumi's Survey of the Constitution*

Itō Hirobumi accepted the imperial appointment to gather a delegation to survey the German constitution and Itō Hirobumi stayed in Berlin and Wien for 8 months. First, he consulted Rudolf von Gneist, a famous jurist and professor in Berlin University, over constitutions and politics. After the consultation, Itō Hirobumi was very disappointed to hear his answers.<sup>8</sup>

Nevertheless, Gneist still suggested that Japan should imitate the Prussian constitution, because it could be adapted to Japan's situation and the demands of a constitutional monarch. Gneist taught Itō about constitutions three times a week from 27th May to 26th July. He also assigned his disciple Albert Mosse to explain the content of the constitution to Itō Hirobumi and it was all recorded by his follower, Itō Miyoji (伊東巳代治, 1857-1934).<sup>9</sup> However, Itō Hirobumi was not satisfied with Gneist's arrangement: the first obstacle was language; they lectured in German rather than in English, which Itō Hirobumi was more familiar with, so that they couldn't discuss the issues and questions with each other in class clearly. Secondly, Mosse explained each article of the Prussian constitution one by one and since Itō Hirobumi had already read the Japanese translation, he became disagreeable and uninterested. Therefore, Itō Hirobumi was left unsatisfied after Gneist's teachings, and was worried that he did not possess sufficient knowledge of European constitutions to draft a Japanese one.

Because Gneist could not lecture during the summer vacation, on 5th July Itō Hirobumi was advised to contact Stein, who was based in Wien. Arriving in Wien on the 8th August, Itō Hirobumi went to visit Stein immediately. In the meeting that day, Stein explained the theory of the European constitution and its practical operation in several countries, such as England, French and Germany. These macroscopic explanations and lectures in English impressed Itō Hirobumi greatly and encouraged him to have direct discussions with Stein.

Itō Hirobumi wrote a letter to Iwakura to address his feelings and the

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8. KAZUHIRO, *supra* note 5, at 60 ("I am most grateful that you have come all the way to German on this mission, but a constitution is not a legal document; it is the [embodiment of] the spirit and capacities of a nation. I am a German, and therefore a European. I know something of the countries of European, German best of all. Unfortunately, however, I know nothing of Japan. If I studied it, I might understand it, but first I must ask you about Japan, and ask you give me a clear account of the nature of the relations between rulers and ruled the customs and temperament of its people, its history, and so forth. I will think about all this, and then give you my advice. But I have no confident that I can tell you will actually be of use to you, or provide a basis for your drafting of a constitution.")

9. The note of Mosse's lecture was edited as "Notes on Mr. Mosse's lectures" by Itō Miyoji, and was taken in Itō Miyoji Kankei Bunsho (伊東巳代治關係文書) [Itō Miyoji Papers], 13(45). It also was taken in SHIMIZU SHIN (清水伸), DOKUŌ NI OKERU ITŌ HIROBUMI NO KENPŌ TORISHIRABE TO NIPPON KENPŌ (独塊に於ける伊藤博文の憲法取調と日本憲法) [ITOU'S STUDY OF GERMAN AND AUSTRIAN CONSTITUTION AND THE JAPANESE CONSTITUTION] 337-440 (1939).

benefits that he gained from Stein. He felt “as if I finally find the place where I could peacefully die” since he had such a mentor in his life.<sup>10</sup> He also told Iwakura that he had already discussed a plan to draft a constitution with Stein and had acquired explanations on national frameworks and government institutions in Europe. That is, although there were parliaments in many countries, their operations differed from one government to the next. Similarly, the emperor in a constitutional monarchy had the right of legislation and administration, giving him authorization over the laws and policies. In other words, an emperor is like the brain which is the main control over all the organs in the body; likewise, an emperor is the connection between the different government branches within a country.<sup>11</sup> For these reasons, Itō Hirobumi firmly decided that a constitutional monarchy could be instituted in Japan in the future.

All the lectures were recorded by Itō Miyoji, and the notes taken in the lectures were sorted into 17 chapters. Later, the notes were published and named *Lectures on (legal) principle and Manuscript notes on lectures by great Doctor Stein* (《大博士斯丁氏講義筆記》).<sup>12</sup>

We can understand that Itō Hirobumi kept the idea that the emperor possessed sovereignty during the process of the drafting of Meiji constitution, in order to set up the best position to stabilize the constitutional order. That is why the Japanese constitution differed from those in other countries which only focused on people’s rights and duties. It appeared that the Meiji constitution was a new type of constitution, which absorbed yet differed from Japanese history and the history of other civilized countries. Therefore, Japan could get rid of the critique and interference of the opponent in the inner country, and gained great strength to further strengthen national power. However, this approach may have ignored the fact that the development of the society was too fast to address the difference of social classes, and created the egoist mind to struggle with each other for social resources. This was perhaps the key point which Itō Hirobumi had no time to consider, or maybe he could understand the signification of Stein’s social

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10. KAZUHIRO, *supra* note 5, at 73.

11. Kaname Nishiyama, *Lorenz von Stein’s Influence on Japan’s Meiji Constitution of 1889*, in LORENZ VON STEINS “BEMERKUNGEN ÜBER VERFASSUNG UND VERWALTUNG” VON 1889 [LORENZ VON STEINS “NOTES ABOUT THE CONSTITUTION AND ADMINISTRATION” FROM 1889] 44 (Wilhelm Brauneder & Kaname Nishiyama eds., 1992).

12. Itō Miyoji, *Dai Hakase Shutain Shi Kougi Hikki* (大博士斯丁氏講義筆記) [*Manuscript Notes on Lectures by Great Doctor Stein*], in ITŌ MIYOJI KANKEI BUNSHŌ (伊東已代治關係文書) [ITŌ MIYOJI PAPERS] (Kokuritsu Kokkai Toshokan ed., 1883) (The two lectures were taken in); SHIMIZU (清水伸), *supra* note 9, at 331 (The two lectures also were taken in). During the lectures, Itō Miyoji recorded the notes in English, and then the notes were revised by Stein. The English version later was translated in Japanese. But the English version now was disappeared. INADA MASATSUGU (稲田正次), MEIJI KENPŌ SEIRITSU SHI JŌKAN (明治憲法成立史上卷) [THE HISTORY OF THE ESTABLISHMENT OF MEIJI CONSTITUTION VOL. 1] 588 (1960).



monarchy.

### 3. *A Brief Summary*

From the above discussion, we can conclude that Itō was influenced by Stein from three perspectives: (a) by considering the nation in its entirety and respecting that the nation's constitution reflects the inherent historical tradition in a country, (b) the change in the constitution must be consequence of a historical change, (c) and the administration has priority over parliament.<sup>13</sup> According to these points, the most important lessons which Itō learned from Stein were the principles on how a state operates and how it practices through a modern civil service. But the way in which Itō explained Stein's ideas, especially to the opposition, the liberty party, helped cement the foundation to draft the constitution in Japan. To achieve this, Itō returned to Japan and adopted two important measures: he established the Bureau for the Study of Administrative Reforms (Seido Torishirabe Kyoku) to substitute the feudal official system, and encouraged officials, politicians and scholars to go to Europe and visit Stein in order to gain more support for change in the political and legal culture. Therefore, the significance of Stein's lectures on Itō not only helped him acquire comprehensive constitutional knowledge in order to draft the Meiji constitution, but was also a starting point to encourage other politicians to participate in political reform, including Ariga Nagao who we will introduce in the next section.<sup>14</sup> Therefore, Stein's ideas gradually spread to East-Asia through the activities of Itō Hirobumi and Ariga Nagao.

#### B. *Ariga Nagao's Succession as a Drafter and Contributor*

##### 1. *A Brief Introduction to Ariga Nagao's Life*<sup>15</sup>

Ariga Nagao was born on 1st October 1860 in Horikawa, Osaka. His father was a famous scholar and his grandfather was a famous poet of waka (a style of Japanese poetry). In 1876 Ariga studied at Preparatory School for preparation to enter Tokyo Imperial University. Later, Ariga studied in Tokyo University, majoring in philosophy and literature and striving hard to learn foreign languages. Influenced by Fenollosa at school, he became interested

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13. Itō Yukio (伊藤之雄), ITŌ HIROBUMI: KINDAI NIHON O TSUKUTTA OTOKO (伊藤博文——近代日本を創った男) [ITŌ HIROBUMI: THE MAN WHO CREATED THE MODERN JAPAN] 191 (2009).

14. JUERGEN ZANDER, DIE PILGERFAHRT ZU STEIN, LORENZ VON STEIN ALS SOZIOLOGE [THE PILGRIMAGE TO STEIN, LORENZ VON STEIN AS SOCIOLOGIST] 8 (2002); Johann Nawrocki, *Der Japanische Nachlass Lorenz von Steins (1815-1890)* [The Japanese Nachlass of Lorenz von Stein (1815-1890)], 36 ORIENS EXTREMUS 83 (1993).

15. Due to Ariga's unfamiliarity, we introduce his belief biography first.

in Spencer's sociology and after graduating from Tokyo University in 1881 he worked as a Japanese Social Science textbook editor where he published papers on sociology, including *Social Evolution* (《社會進化論》), *Religionary Evolution* (《宗教進化論》), *Ethnic Evolution* (《族制進化論》), *Lecture on the West Philosophy* (《西洋哲學講義》), and *James Johonnot's Pedagogy* (《如氏教育學》). His perspectives on sociology were deeply influenced by the English sociologist Spencer who defined society as an organic system aggregated by the division of human labor, and believed that social evolution occurred based on the principles of natural selection.

In 1884 Ariga started his public service career as a secretary in the Japanese senate. Then in 1886 Ariga studied political science, philosophy, European history of civilization and psychology in Paris and Berlin University. During this period, he participated in the Stein's Lecture with Kaeda Nobuyoshi (海江田信義) and his followers.<sup>16</sup> However, Ariga's participation in these lectures was not originally planned. The delegations first translator was taken ill, so they recruited Ariga as the translator. Ariga's professional ability, jurisprudence and language skills added a level of fine detail to Stein's lecture on state and administrative science. This impressed the delegation so much that thereafter, Ariga became the main translator. Ariga was so influenced by Stein's lectures that he started to study the constitution and science of state, and in 1888 he returned to Japan to take the position of secretary in the Privy Council. Later, he published his writing: *Science of State* (《國家學》), *Imperial Constitution* (《帝國憲法篇》), *Lorenz von Stein's Lecture Notes* (《須多因氏講義》), and *the Responsibilities of Ministers* (《大臣責任論》). Following this he became a famous jurist in constitutional and international law, and a professor in the Army University, Imperial University and Waseda University.<sup>17</sup> When the Qing court sent officials to study the constitution in Japan, Ariga was the one of the teachers. Due to this connection, after the overthrow of the Qing dynasty, Ariga was recruited as President Yuan Shikai's constitutional consultant, and he wrote an opinion piece on the constitution called *Guan Yi Xian Ping* (《觀奕閒評》)<sup>18</sup> to defend the Yuan's constitution. After Yuan

16. Nawrocki, *supra* note 14, at 92 (1993); ARIGA NAGAO (有賀長雄), SUTAIN SHI KOUGI HIKKI (須多因氏講義筆記) [LORENZ VON STEIN'S LECTURE NOTES] (1889) (Ariga stated the process of lecture).

17. Saitō Shōji (齋藤正二), *Ariga Nagao to Shakaigaku Shi No Igi* (有賀長雄と「社會學史」の意義) [*Ariga Nagao and the Meaning of Sociological History*], in NIPPON SHAKAI GAKU SEIRITSU SHI NO KENKYŪ (日本社会学成立史の研究) [THE STUDY OF HISTORY OF THE ESTABLISHMENT OF SOCIOLOGY IN JAPAN] 81, 81-84 (Saitō Shōji ed., 1976); Zhang Xue-Ji (張學繼), *Lun Youhe Zhangxiang Yu Minchu Xianzheng De Yanbian* (論有賀長雄與民初憲政的演變) [*On Ariga Nagao and the Constitutional Development in Early Republic of China*], 2006:3 JINDAI SHI YANJIU (近代史研究) [MODERN CHINESE HISTORY STUDIES] 54, 57 (2006).

18. Ariga Nagao, *Guan Yi Xian Ping* which also named *Youhe Boshi Minguo Xianfa Quanan*

died, Ariga continued to be a consultant to the government. In 1919 Ariga returned to Japan and died in 1921.<sup>19</sup>

## 2. *The Content of Lorenz von Stein's Lecture Notes by Ariga Nagao*

Ariga's early sociological beliefs were influenced by the English sociologist Herbert Spencer, McLennan and Morgan which he used to attempt to explain the social situation in Japan and Asia. His book, *Social Evolution* was viewed as the earliest sociological theory in Japan.

There were two main themes in Ariga's sociological beliefs: (a) Sociological discourse is built upon the foundation of historical fact. Theory could not depart from historical fact but could be verified by empirical data. (b) State and society could be changed through the theory of social evolution—an organic system.<sup>20</sup> Although his early beliefs were strongly influenced by Spencer, after he left Germany and returned to Japan, he expanded his perspectives to incorporate national organization and operation—a direct result of listening to Stein's lectures about the science of state. This transformation from pure sociology to the science of state and administrative science can be seen in the books he translated and published.

Taking Stein's theories, Ariga explained the elements and operation of a state in the following way. First, the concept of a state originates from the system of the individual (human character), which is developed by communal cooperation. The system of the individual, including ego, will and action, comprises the principle of individual organism.<sup>21</sup> As an individual organism, a state is also an entire institution of organismic operation, and respectively forms the head of state, legislative power and executive power, which are the three elements of state life.

Secondly, Stein adapted the European concept of a state to Japan's idea of state, stressing that the emperor was in harmony with the legislation and administration. Therefore, the emperor must keep supremacy and majesty, while the relationship between the legislation and administration is not oppositional but mutual support. The administration must not only obeys the laws, but also observe the legislation's deficiency in regard to social affairs.

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*Yijian Pilu* (有賀博士民國憲法全案意見披露) [Dr. Ariga's Opinions on the Constitution of Republic of China], 17-24 XIANFA XINGWEN (憲法新聞) [CONSTITUTION NEWSPAPER], Aug. 31-Dec. 1, 1913.

19. The discussion of relationship between Yuan Shikai and Ariga always presents a negative perspective in Chinese academic circles, because his activity damaged the Chinese constitutional movement. We will focus on the Ariga's constitutional thought to examine his relation with Stein's thought and the Chinese constitutional movement. The discussion will be present in detail on third part.

20. See Saitō, *supra* note 17.

21. ARIGA, *supra* note 16, at 525-26 (Ariga used the ego to express the meaning of Ich.).

That is the principle of administrative responsibility and initiative.<sup>22</sup> The emphasis on administrative application makes Stein unique and different from other experts on matters of the state.

What Ariga learned from Stein's lectures was the definition of the state, which meant a unification of all organs in a body, a state where the citizens could be depended on.<sup>23</sup> Contrary to the state, in the society there were practical inequalities which may lead to many social questions, such as the poverty, class conflict and opposition of capital and labor.<sup>24</sup> Therefore, Ariga accepted integrated thoughts on the state, which needed to integrate the emperor and administration so as to complete the state system and operation. This perspective conformed to the political position of the Meiji government.

### 3. *Ariga Nagao's Creation of the Science of State*

After *Lorenz von Stein's Lecture Notes* was printed, Ariga then published the *Science of State*, subtitled "*System der Staatswissenschaft*" and attached portraits of Johann Caspar Bluntschli, Rudolf von Gneist and Lorenz von Stein in order to highlight the influence of German state science on the content. *Science of State* was the draft of the research Ariga had conducted into the principle of state during his studies in Europe, and was later published to meet the requirements of Tokyo specialized school. One of the aims of writing this book was to help all the people understand the organization and operation of the state after the promulgation of the Meiji constitution. As mentioned in the preface, the majority of the quotations in the book were cited from the books of Stein and Bluntschli, and the importance of Gumpłowicz's sociological perspective on state science was placed secondarily. From its framework and discussion, it is easy to see that Stein had a great influence on Ariga.<sup>25</sup>

Ariga's *Science of State* is divided into four parts: (a) the entire state, (b) the legislation, (c) the head of state, (d) and the administration, which summarizes the constructive and operative principle of a modern state. The first part emphasizes the social foundation of the state, and states that the composition of a state cannot depend on a contract agreed by all the people. A state has its own unique organic character and appearance which resembles a personal organism that constantly changes and develops in its construction and appearance. Ariga criticized the perspectives of the social contract and conquered theories. The former did not conform to the historical facts, and the latter considered that the origin of state began with one nation

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22. *Id.* at 551.

23. Saitō, *supra* note 17, at 90-91; *Id.* at 79.

24. ARIGA, *supra* note 16, at 424-35.

25. See ARIGA NAGAO (有賀長雄), KŌKAGAKU (國家學) [SCIENCE OF STATE] 3 (1890).

conquering another. In order to dominate the defeated nation, the conquering nation formed a dominating state. Nevertheless, this perspective still could not explain why war happens. Ariga considered from a sociological perspective that the cause of war resulted from social evolution and development, and then further influenced the construction and arrangement of the state. Seen from the above discussion, Ariga strongly emphasized the importance of social influences on the state. These perspectives had been mentioned in his book *Social Evolution* where he adopted Spencer's theory to further stress the distinction between the state and society which contributed to a reassurance of the foundation of state on the one hand, and was able to protect the liberty of society and avoid tyrannical despotism on the other hand. This social theory toward forming a state originated from Stein's theory of social movement,<sup>26</sup> which advocated that the construction of a state was based on society.<sup>27</sup>

Moreover, Ariga discussed the relationship between the state and society, in which he used Stein's dual theory of state and society, and explained the principle of state and society. The principle of state is that the purpose of individual life was infinite; however, under limited individual capability, the purpose of life must be collectively fulfilled by individual cooperation. And a state is the most important apparatus to take this task so as to make all the people gain full development.<sup>28</sup> On the contrary, the principle of society exists as the pursuit of purposes and interests during an individual's development, in which it brings about the distinction of upper and underclass and a differentiated social order. In other words, the principle of state strives for equality, but the principle of society gives rise to inequality. The history of the movement of state and society is the history of the opposition between the ideas of equality and inequality. Also, because opposition directly influences the freedom of state and society, the freedom of state lies in the achievement of public interest through the limitation of state power by constitution and the practice of the will of people through

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26. LORENZ VON STEIN, DIE GESCHICHTE DER SOZIALEN BEWEGUNG IN FRANKREICH VON 1789 BIS AUF UNSERE TAGE, LEIPZIG 3. BD.: LEIPZIG [HISTORY OF SOCIAL MOVEMENT IN FRANCE FROM 1789 TO THE PRESENT DAY, VOL. 3, LEIPZIG] (1850); LORENZ VON STEIN, THE HISTORY OF THE SOCIAL MOVEMENT IN FRANCE, 1789-1850 (Kaethe Mengelberg trans., 1964).

27. ARIGA, *supra* note 25, at 26-27.

28. *Id.* at 13, 28; compare ARIGA, *supra* note 25, with LORENZ VON STEIN, DIE GESCHICHTE DER SOZIALEN BEWEGUNG IN FRANKREICH VON 1789 BIS AUF UNSERE TAGE, LEIPZIG 1. BD.: DER BEGRIFF DER GESELLSCHAFT UND DIE SOZIALEN GESCHICHTE DER FRANZOESISCHEN REVOLUTION BIS ZUM JAHRE 1830 [HISTORY OF SOCIAL MOVEMENTS IN FRANCE FROM 1789 TO OUR DAYS, VOL. 1: THE CONCEPT OF THE SOCIETY AND SOCIAL HISTORY OF THE FRENCH REVOLUTION TO THE YEAR 1830] 37 (1850) ("Sie muss, soll sie der Idee des Staats und mithin der Idee der Persoenlichkeit ueberhaupt entsprechen, wesentlich dahin streben, mit den Mitteln des Staats die hoechste Entwicklung aller einzelnen zu foerdern. Die Verwaltung des Staats erreicht demnach ihre reinste, idealste, durch das Prinzip des Staats gebotene Gestalt, wenn sie das Leben aller Staatsbuerger zu ihrer einzigen Aufgabe machte").

making laws in the legislative body. The freedom of society lies in the opportunity of upward-development, even though a society has a strong distinction between poverty and wealth, or the upper class and underclass.<sup>29</sup> From this discussion, it can be clearly seen that Ariga adapted Stein's social theory to his principle of state, and believed that the construction and arrangement of the state must be based on a comprehensive understanding of social order.<sup>30</sup>

According to the social perspectives mentioned above, Ariga explained the social basis of the constitution and the influence of social perspectives on the drafting of a constitution. First, he quoted the analysis of social change in Stein's *textbook of administrative science (Handbuch der Verwaltungslehre)*, in which he discussed social order in three periods: the social order of kinship (Geschlechterordnung), the social order of hierarchy (Die ständische Gesellschaftsordnung) and the social order of civil society (Die staatsbuergerliche Gesellschaft).<sup>31</sup> The three types of social orders form three different social institutions. The institution of civil society is quite different from the other two because the apparatus of state will take the purposes of the different individual civilians into account in order to gain civilian freedom. Therefore, he proposed that the constitution of civil society is equal to "the constitution of freedom".<sup>32</sup> The construction of a constitutional state needs specific conditions, including analysis of the social principle, and consideration of the interaction between state and society. If the administration is controlled by legislation or administration acts arbitrarily, there is no healthy constitutional state. Ariga subsequently explained the main content of the science of state: the head of state, administration and legislation. This was all published in his writings entitled *Administrative Science*, and *Science of State Law*, which went into further details on the content of administration based on Stein's framework in administrative theory.

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29. *Id.* at 38-39.

30. *Id.* at 44-45.

31. *Id.* at 46-51; see also Lorenz von Stein, *Lorenz von Stein: Gegenwart und Zukunft der Recht- und Staatswissenschaft Deutschlands [Present and Future of Legal and Political Science in Germany]*, in LORENZ VON STEIN: GESELLSCHAFT-STAAT-RECHT 147 (Ernst Forsthoff ed., 1972) (Lorenz claims that "Geschlechterordnung", "Die staendische Gesllschaftsordnung" and "Die staatsbuergerliche Gesellschaft". Three orders originated from the difference of wealthy type which constructed three different characters of orders of social types); LORENZ VON STEIN, LORENZ VON STEIN: GESELLSCHAFT-STAAT-RECHT [LORENZ VON STEIN: SOCIETY-STATE-LAW] 302, 334, 366 (Ernst Frostoff ed., 1972); LORENZ VON STEIN, SYSTEM DER STAATSWISSENSCHAFT, BAND II, GESELLSCHAFTSLEHRE. STUTTGART UND TUEBINGEN [SYSTEM OF POLITICAL SCIENCE, VOL. II, SOCIAL STUDIES: STUTTGART AND TUEBINGEN], 38-46, 158-66, 423-31 (1856).

32. STEIN, *supra* note 28, at 53.

#### 4. *A Brief Summary*

According to the discussion above, we can see the close relationship of thoughts between Stein and Ariga. After listening to Stein's lectures of the science of state, Ariga continued to research Stein's ideas and comprehended his state science based on social theory which emphasized the relationship between state and society. These perspectives formed Ariga's unique constitutional thought that a society existed before a state was founded, and as the premise was sustained, the concrete content of constitution, administration, and legislation could be discussed. Stein's constitutional thoughts were different from those of the Anglo-Saxon tradition, but tended to the ideas of organic state in German science of state in that the state was involved positively in common social life. The Meiji constitution, influenced by Stein also presented this character.

But Ariga's receipt of Stein's thoughts on science of state not only simply accumulated academically, but also transformed into an influence on the practice politics. Later, it would be used to influence the drafting of the Chinese constitution in the early 20th century.

Ariga applied the knowledge of German science of state and constitutional theory to fit in with the reality in Japan, and then created his unique constitutional thoughts. Furthermore, having researched into the Meiji constitution, Ariga became a famous constitutional jurist whose reputation was equal to the other jurists, such as Hozumi Yatsuka (穂積八束) and Tatsukichi Minobe (美濃部達吉). When he lectured on the constitution to Manchu officials and served as the legal consultant, he not only had a practical influence, but also played an important role in the history of constitutional movement in China during the early 20th century.

### III. LORENZ VON STEIN'S INFLUENCE ON THE CHINESE CONSTITUTIONAL MOVEMENT

#### A. *The Constitutional Monarchy of Manchurian Qing Dynasty*

##### 1. *The Investigation of the Five Commissioners: Itō Hirobumi's Lecture on the Constitution*

Due to the threat of Western powers and the urgent thirst for the reform of the legal institution, wealth, and power, the Qing Court resolved to reform the institutes in the constitution from 1905-1911. Seen clearly, the Qing Court was inclined to follow the framework of the Meiji constitution because it adopted the emperor-monarchy that kept the emperor's power on the one hand, and they believed it was a constitution worth studying and copying on

the other hand. This concept was built up by constantly studying Western constitutions by a group that became known as the Five Commissioners.<sup>33</sup>

The Qing Court had implemented a series of reformative measures called New Policy since 1901, including the institutions of military, education, finance, and local government. Based on this reformation, many officials who participated in the New Policy suggested their expectations of the constitution to the court. On 30th May, 1905, the viceroy of Zhili, Yuan Shikai, and the viceroy of Liangjiang, Zhou Fu (周馥), and the viceroy of Huguang, Zhang Zhidong (張之洞) submitted a petition to the emperor, suggesting him to implement constitutional reforms within twelve years. In early June, Yuan Shikai suggested that the Qing Court should send nobles and officials to investigate the constitutions of other countries. Due to this, and the fact that the people yearned to have a constitution, the Qing Court ordained some officials to travel overseas to investigate the foreign constitutions in different countries. Therefore, the Court promulgated *The Imperial Edict to Investigate Constitutional Politics* (〈派戴澤等分赴東西洋考察政治諭〉), which said that: “At present, society is difficult for people and the court continuously makes edicts to attempt to reform the institution to make the country more prosperous. For several years, the institution had been built, but the effect was invalid because the legislators did not have sufficient background knowledge to have an insight into the principles of the institution. Therefore, the Five Commissioners, including Zaize (載澤), Dai Hongci (戴鴻慈), Duan Fang (端方), Xu Shichang (徐世昌) and Shaoying (紹英), was sent to investigate the political systems abroad in order to choose the best model to follow.”<sup>34</sup>

We discuss Zaize’s experience in Japan because it determined the constitutional development of the Qing Court. In Japan, Zaize’s delegation observed modern facilities, communicated with people from all walks of life,

33. The Five Commissioners were either nobles or high ranking officials.

34. Aisin Gioro Zaize (愛新覺羅載澤), Pai Zaize Deng Fen Fu Dongxi Yang Kaocha Zhengxhi Yu (派載澤等分赴東西洋考察政治諭) [The Imperial Edict of Sending Zaize and others Abroad to Investigate Constitutional Politic] (Guangxu (光緒) 31/6/14) (dates are given by reign year/lunar month/day), in QINGMO CHOUBEI LIXIAN DANG’AN SHILIAO SHANGTSE (清末籌備立憲檔案史料上冊) [HISTORICAL MATERIALS OF PREPARATORY WORKS ON CONSTITUTION IN LATE QING VOL. 1] 1, 1 (National Palace Museum ed., 1981). However, the Five Commissioners were wounded by the revolutionary Wu Yue’s bomb attack, and Shichang Xu and Shaoying were injured and replaced by Shang Qi-Heng (尙其亨) and Li Sheng-Duo (李盛鐸). Finally, the list of the officials was Zaize, Qi-Heng Shang, Sheng-Duo Li, Hongci Dai and Fang Duan, and they started off on 15th November. Ze Zai, Qiheng Shang, and Sheng-Duo Li went to Japan, Britain, France, and Belgium; Hong-Ci Dai and Fang Duan went to America, German, Italy, Austria, and Russia. Li Shou-Kong (李守孔), Lun Qing Ji Zhi Lixian Yundong — Jianlun Liang Qichao Zhang Jian Zhi Lixian Zhuzhang (論清季之立憲運動——兼論梁啓超張謇之立憲主張) [On the Constitutional Movement in Qing: the Constitutional Opinions of Liang Qichao and Zhang Jian], in 16 ZHONGGUO JINDAI XIANDAI SHI LUNJI (中國近代現代史論集) [COLLECTIVE ESSAYS OF MODERN CHINESE HISTORY] 1, 25-27 (Chinese Culture Association ed., 1986).



and went to the lectures held by constitutional jurists.<sup>35</sup> The emperor also granted an interview with the delegation. In order to help the Zaize delegation gain as much information as possible, the emperor instructed Itō Hirobumi, Kaneko Kentarō (金子堅太郎), and Hozumi Yatsuka to preside over the constitutional lectures together. Itō Hirobumi and Kaneko Kentarō were the drafters of the Meiji constitution, and Hozumi Yatsuka had contributed many important issues. Kaneko Kentarō explained the process and essence of the Meiji constitution, and he reminded them that three points must be considered, even though the Meiji constitution was modeled on the western constitutions: (a) During the preparation of a constitution, the drafters should consider in detail the advantages of western constitutions, and abandon the disadvantages. (b) Based on national customs and history, the drafters should estimate the livability of the constitution. (c) The constitution is presented as an outline so as to be revised in the future.<sup>36</sup> Moreover, Hozumi Yatsuka explained the content of the Meiji constitution, and he pointed out the significance of imperial sovereignty. Imperial sovereignty was the source of the constitution and could not be changed by the constitution. The emperor possesses supremacy in the state and could avoid parliament's interference.<sup>37</sup>

Finally, Itō Hirobumi presented the Zaize delegation with his writings called *Imperial Household Law* (《皇室典範義解》) and *Commentaries on the Constitution of the Empire of Japan* (《憲法義解》), and personally taught in English the process and the key points of the constitution. The form of lecture adopted the ask-answer style, and the key point lay in the importance of imperial sovereign power. He emphasized the emperor's sovereign power was supreme in the Meiji constitution. If the Qing Court would like to implement this style of constitution, the sovereign power must

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35. Han Da-Yuan (韓大元), *Lun Riben Mingzhi Xianfa Dui "Qing Ding Xianfa Dagang" De Yingxiang – Wei "Qing Ding Xianfa Dagang" Banbu Yibai Zhounian Er Zuo* (论日本明治宪法对《钦定宪法大纲》的影响——为《钦定宪法大纲》颁布100周年而作) [*On the Influence of Meiji Constitution to Outline of Imperial Constitution – to Commemorate the 100 Anniversary of the Promulgation of Outline of Imperial Constitution*], 27 ZHENGFA LUNTAN (政法论坛) [TRIBUNE OF POLITICAL SCIENCE AND LAW] 19, 23 (2009); AISIN GIORO ZAIZE (愛新覺羅載澤), *Kaocha Zhengzhi Riji* (考察政治日記) [*A Diary of Political Investigation (1905-1906)*], in 9 ZUOXIANG SHIJI CONGSHU (走向世界丛书) [TO THE WORLD SERIES] 559, 575 (Zhong Shu-He (钟叔河) ed., 1985).

36. XIONG DA-YUN (熊達雲), *KINDAI CHŪGOKU KANMIN NO NIHON SHISATSU* (近代中國官民の日本視察) [JAPAN VISITS OF MODERN CHINESE PUBLIC AND PRIVATE SECTORS] 132 (1998).

37. SODA SABURŌ (曾田三郎), *RIKKEN KOKKA CHŪGOKU E NO SHIDŌ: MEIJI KENSEI TO KINDAI CHŪGOKU* (立憲國家中國への始動：明治憲政と近代中國) [THE INITIATION OF A CONSTITUTIONAL COUNTRY CHINA: MEIJI CONSTITUTION AND MODERN CHINA] 62 (2009). Hozumi Yatsuka's lecture notes of constitution named an INSTRUCTIONS LEAFLET OF JAPANESE CONSTITUTION (《日本憲法説明書》), the Chinese version was taken into Zhengzi Guanbao (政治官報) [POLITICAL OFFICE NEWSPAPER] 20-79 (Guangxu (光緒) 33 year) (Sept. 10-12, 1907).

belong to the emperor.<sup>38</sup>

When the Five Commissioners met in Belgium on 3rd June, Zaize summarized the Meiji constitution, which drew the attention of the other Commissioners. They decided that the Japanese model was worth further investigation, so they sent the counselor Xiong Xiling (熊希齡) to seek candidates who could compose reports on the surveying of constitutions. Yang Su, who was an official at the embassy in Japan, requested Takata Sanae (高田早苗), the president of Waseda University, to seek a candidate. Ariga was the best candidate which Takata Sanae recommended, so Ariga spent two weeks drafting the reports, and then Xiong Xiling received the reports which were translated into Chinese. Although Dai Hongci and Duan Fang together presented *the Essentials of the European and American Politic* (《歐美政治要義》) to Empress Dowager Cixi and the Guangxu Emperor, the real author was alleged to be Ariga. If we read Duan Fang's letter to Ariga, it appeared his thankfulness to him: "We appreciate your kindness in helping us write a detailed survey report which will have a great effect on our politics. Fortunately, the report has been successful and the contents adopted, and we now are preparing to establish the constitutional policy and reform the institution. In the future, we will be very busy with political affairs, and the questions arisen from the political affairs will increase day by day. We hope that you can be generous in giving us advice."<sup>39</sup> In other words, it appeared that Ariga was asked to participate in the Qing's constitutional movement.

*The Essentials of the European and American Politic* played a very important role to push the Qing court's constitution. This report consisted of 18 chapters. The title of first chapter was "the reason for the establishment of a constitutional monarch", which expressed that this book served as the proposal to draft the constitution, and indicated the purpose of the establishment of a constitutional monarch: "the constitutional monarch is to raise the development of the individual life through the power of state, for the reason of attain the people's purpose the power of state must be strengthened by the people".<sup>40</sup> Chapter 6, "The Government as the

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38. Han, *supra* note 35, at 24; AISIN GIORO, *supra* note 35, at 579.

39. Ariga Nagao, *Chuukaminkoku Komon no Oubo Keika* (中華民國顧問の応募經過) [*The Process of Recruitment of Chinese Consultant*], 17 GAIKOU JIHOU [DIPLOMACY NEWSPAPER] (外交時報) 6, 6-7 (1913). Cited by Han, *supra* note 35, note 3. Although some scholars considered the *The Essentials of the European and American Politic* was written by Liang Qichao (1873-1929), this argument was not confirmed by direct evidence. On the other side, due to Liang was a rebel, it was less possible that the secretary of state would like to comminute with him. The real truth needs more materials to survey.

40. DAI HONG-CI (戴鴻慈) & DUAN FANG (端方), OUMEI ZHENGZHI YAOSI (歐美政治要義) [ESSENTIALS OF THE EUROPEAN AND AMERICAN POLITICS] 1 (1908). Cited by CHEN DAN (陳丹), QINGMO KAOCHA ZHENGZHI DACHEN CHUYANG YANJIU (清末考察政治大臣出洋研究) [THE STUDY ON INVESTIGATION ABROAD OF THE FIVE COMMISSIONERS] 295 (2011).

responsibility of Cabinet”, and chapter 7, “The establishment of the parliament”, mentioned that the spirit and purpose of state should be to assist the development of people’s lives through the power and action of the state. Chapters 1, 3, 4 and 5 were related to the content of the monarch, which elaborated on imperial sovereignty. The other chapters involved the administration, judicature and military affairs.<sup>41</sup> In sum, this book included a comparison of international constitutions, international relationships and the differences between different types of constitutions. Moreover, it gave several opinions on how to implement the constitution, such as the distinction between the civil service in administration and the officials in the imperial house, and the abolishment of the eunuchs.<sup>42</sup> Ariga expressed an interest in the constitutional movement in the late Qing era by publishing an article entitled “The Process of Recruitment of Chinese Consultant” in the *Diplomacy Newspaper*. Furthermore, helping write *The Essentials of the European and American Politic* provided Ariga with the opportunity to participate in the process of the Qing constitution, and influence both the drafters of the Qing constitution and Yuan’s constitution.

After the Five Commissioners returned to the homeland, they delivered the outcome of the comparison of political institution in the various countries. The terms of the democratic constitution or the constitutional monarchy were denied by the Qing Court, but the Meiji constitution and Prussian constitution which advocated the supremacy of the emperor were favored as the best model. Ariga had great influence on this, and his reports, originated from the German science of state, which were especially influenced by Stein, motivated the Conservatives to deliberate the constitution, thus in 1906 the Qing Court prepared to draft the constitution. However the Qing Court believed that their knowledge of constitution was still insufficient so they sent a delegation to Japan for a second time. For this reason, they sent Da Suo (達壽) and Li Jiaju (李家駒) to study the constitution in Japan. Ariga was one of the teachers in the lectures.

## 2. *The Second Delegation Learned the Constitutional Monarchy through Japan*

In June 1907, Yuan Shikai proposed that the Court should send a delegation to Japan, Germany and Britain a second time. The imperial commissioner in Japan was Da Suo, who investigated the terms for the Office of Drawing up Regulations for a Constitutional Government. In the expected plan, Itō Hirobumi would have presided over the lectures, but he

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41. CHEN, *supra* note 40, at 296.

42. *Id.* at 296-97.

was serving as the Korean viceroy at that time, so he consigned Itō Miyoji to preside over the lectures. He also consigned Prime Minister Saionji Kinmochi (西園寺公望), and the ministers Katsura Tarō (桂太郎) and Ōkuma Shigenobu (大隈重信), to recommend lecturers. The lists of lecturers were Itō Miyoji, Yatsuka Hozumi, Ariga Nagao, Shimizu Toru (清水澄) and Ōta Mineburu (太田峯三郎), who lectured on the constitution in accordance with their specialties. The contents were the history of the Japanese constitution, the comparison of various constitutions, parliamentary law, jurisdiction, administration and finance.

In the lectures Ariga lectured actively. His lectures on constitution were published and called the *Dr. Ariga's Lecture on the Constitution* (《日本憲法講義有賀長雄述》),<sup>43</sup> which consisted of 60 chapters, and lasted from February 1908 to July 1909. Chapter 1 to chapter 30 lasted from 4th February 1908 to 31st May, and the contents were on how the Meiji government adapted the western constitutions, the phase of preparation of the drafting and practice of the constitution, a comparison between the Meiji constitution and western constitutions, and their different historical background. From this perspective, Ariga explored the differences between Japan and the West and the differences between the contents of the constitutions. It appeared that he stressed the social basis of the constitution before concretely explaining the imperial status, government, parliament, and the rights and obligations of the people. Chapter 31 to chapter 60 lasted from 8th November 1908 to 9th June, and included the central government, local government, their relationship, communalism and the civil service.<sup>44</sup>

In *Dr. Ariga's Lecture on the Constitution*, the essentials of the constitution were as follows:

- (1) The drafting of a constitution should start with the reform of the civil service, and should be made cautiously and gradually. After the people have acquired the concepts of constitution, it may then be allowed to promulgate. To unite the knowledge and thoughts of the people, the government should compile and write an authoritative textbook. Ariga cited Itō's *Commentaries on the Constitution of the Empire of Japan* to explain that it rectified the ideas that a new constitution was chaotic and provide ideas on what constituted a state.<sup>45</sup>

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43. Miyoji Itō, *Dainipponteikoku Kenpō Kankei Shiryō, Nippon Kenpō Kōgi Ariga Nagao Jutsu* (大日本帝国憲法關係資料・日本憲法講義有賀長雄述) [*Documents of Great Japanese Kingdom, Dr. Ariga's Lecture on the Constitution*], in ITŌ MIYOJI KANKEI BUNSHŌ (伊東巳代治關係文書) [ITŌ MIYOJI PAPERS] (Kokuritsu Kokkai Toshokan (国立国会図書館) ed., 1962).

44. Han, *supra* note 35, at 25-27.

45. Ariga Nagao, *Dainipponteikoku Kenpō Kankei Shiryō, Nippon Kenpō Kōgi Ariga Nagao*

- (2) A form of imperial constitution should be adopted to implement the constitutional monarchy. Ariga suggested that imperial sovereign powers must be strengthened to prevent parliament's violation.<sup>46</sup> The scope of the emperor's ordinance must be extended. According to the ordinance of comparison between Japan and the West, it appeared that the ordinance in the Meiji constitution was more complete. Its theory came from Gneist's and Stein's theory. Gneist considered that the ordinance was one of the basic types of legal institutions, aimed at the deficiencies in legal institutions. Stein considered that the ordinance distinguished between provisional ordinances; execute ordinances, appointment ordinances and independent ordinances, which explained why the ordinance brought in the constitution was necessary. It was helpful in promoting the practice of imperial sovereign rights.
- (3) Ariga believed that the relations between the imperial house, government, and army should work harmoniously. Ariga believed that the state was an historical fact that could not be rejected by the theory of social contract, thus before the drafting of the constitution, the history of the Qing dynasty had to be researched completely, especially the history of the status of the emperor and imperial house. Determining the scope of the imperial house and emperor required a consideration of the setting of national organizations.<sup>47</sup> Ariga suggested enshrining the authority of the imperial house in the constitution at first. Secondly, a Privy Council should be constructed in order to

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*Jutsu: Dai Roku Kai Kenpou Shikou no Junbi* (大日本帝国憲法關係資料・日本憲法講義有賀長雄述：第六回 憲法施行の準備) [Documents of Great Japanese Kingdom, Dr. Ariga's Lecture on the Constitution: Chapter 6: The Preparation of the Constitutional Practice], in ITŌ MIYOJI KANKEI BUNSHŌ (伊東巳代治關係文書) [ITŌ MIYOJI PAPERS] (Kokuritsu Kokkai Toshokan (国立国会図書館) ed., 1962), cited by XIONG, *supra* note 36, at 167 (1998).

46. Ariga Nagao, *Dainipponteikoku Kenpō Kankei Shiryō, Nippon Kenpō Kōgi Ariga Nagao Jutsu: Dai Juu Kai Ichi Hachi Roku Roku Nen Igo Niokeru Oushuu Rikkenseitai Joutai* (大日本帝国憲法關係資料・日本憲法講義有賀長雄述：第十回 一八六六年以後における欧州立憲政体状態) [Documents of Great Japanese Kingdom, Dr. Ariga's Lecture on the Constitution: Chapter 10: The Constitutional Politics in Europe since 1866], in ITŌ MIYOJI KANKEI BUNSHŌ (伊東巳代治關係文書) [ITŌ MIYOJI PAPERS] (Kokuritsu Kokkai Toshokan (国立国会図書館) ed., 1962), cited by XIONG, *supra* note 36, at 169 (1998).

47. Ariga Nagao, *Dainipponteikoku Kenpō Kankei Shiryō, Nippon Kenpō Kōgi Ariga Nagao Jutsu: Dai Juu Ni Kai Kouji Oyobi Koushitsu Nikansuru Sai* (大日本帝国憲法關係資料・日本憲法講義有賀長雄述：第十二回 皇位及び皇室に関する差異) [Documents of Great Japanese Kingdom, Dr. Ariga's Lecture on the Constitution: Chapter 12: The Difference between Status of Emperor and the Imperial House], in ITŌ MIYOJI KANKEI BUNSHŌ (伊東巳代治關係文書) [ITŌ MIYOJI PAPERS] (Kokuritsu Kokkai Toshokan (国立国会図書館) ed., 1962), cited by XIONG, *supra* note 36, at 170 (1998).

provide suggestions to the emperor. Moreover, Ariga believed that the emperor could cement a relationship between the state and the army. On the one hand, the emperor, as the head of state, led the army's administrative affairs; on the other hand, the emperor, as the commander of the army, handled the affairs of the commander. The two affairs should be balanced and connected harmoniously.

- (4) The reform of parliament, government, the local system and the imperial house were discussed. After a comparison of the history, the principle, and the status of the parliament between monarchical states and democratic states in Europe, Ariga decided that parliament tended to produce many problems, and he provided preventive strategies to benefit the Qing constitution. Though parliament was the trend of the world, it was easily controlled by poverty's force to manipulate the policies, thus this must be carefully prevented. The best method was to dictate who of those with Confucian scholarship good candidates of the franchise were, for example the Xiucan (scholar) represent the public opinions through his morality.<sup>48</sup> Moreover, Ariga discussed the organization of government.
- (5) The suggestions for reform of the imperial house included: (a) reducing the number of members of the imperial house, (b) setting up a minister for the imperial house, (c) abolishing The Three Banners in internal minister,<sup>49</sup> (d) thoroughly checking the property of the imperial house and abolishing the eunuch system and (e) the appointment of military officers could not only be limited to the imperial house.<sup>50</sup>

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48. Ariga Nagao, *Dainipponteikoku Kenpō Kankei Shiryō, Nippon Kenpō Kōgi Ariga Nagao Jutsu: Dai ni Jū Yon Kai Gikai Nikansuru Sai (Doitsu · Osutoria)* (大日本帝国憲法関係資料・日本憲法講義有賀長雄述：第二十四回 議会に関する差異 (独乙・澳太利)) [Documents of Great Japanese Kingdom, Dr. Ariga's Lecture on the Constitution: Chapter 24: The Difference between the Parliaments (German and Austria)], in ITŌ MIYOJI KANKEI BUNSHŌ (伊東巳代治關係文書) [ITŌ MIYOJI PAPERS] (Kokuritsu Kokkai Toshokan (国立国会図書館) ed., 1962), cited by XIONG, *supra* note 36, at 172 (1998).

49. The Three Banners in internal minister was the one of the military and social structure of the people of the Manchus called The Eight Banners, and it took over the protection of the Emperor and the imperial city, while the Lower Banners guarded the capital Beijing and the provinces.

50. Ariga Nagao, *Dainipponteikoku Kenpō Kankei Shiryō, Nippon Kenpō Kōgi Ariga Nagao Jutsu: Dai Roku Jū Kai Tennō Chokusetsu Jimu to Kiyokuni Kōshitsu Mondai* (大日本帝国憲法関係資料・日本憲法講義有賀長雄述：第六十回 天皇直接事務と清国皇室問題) [Documents of Great Japanese Kingdom, Dr. Ariga's Lecture on the Constitution: Chapter 60: The Emperor's Affairs and the Questions of Qing Monarchy], in ITŌ MIYOJI KANKEI BUNSHŌ (伊東巳代治關係文書) [ITŌ MIYOJI PAPERS] (Kokuritsu Kokkai Toshokan (国立国会図書館) ed., 1962), cited by XIONG, *supra* note 36, at 174 (1998).

These concepts discussed above profoundly influenced the ideas of constitution in the Qing Court. The Qing Court especially appreciated chapter 14 “the distinction between the imperial house and the state” and chapter 17 “the forms of the responsibility of the Cabinet”, which Da Shou had learnt from the Japanese jurists and believed that the monarchy constitution was the reason for the safeguard of the imperial house. Da Shou understood the distinction between the constitution and the polity: “The so-called constitution means the sovereignty is controlled by an emperor or by the people. A sovereignty controlled by an emperor is called a monarchal constitution, while a sovereignty controlled by the people is called a democratic constitution. The so-called polity is not more than the distinction between the constitution and despotism. The constitution is rooted in history and not changed because of political reform.”<sup>51</sup> It stated that the constitution originated from its historical root and did not change in virtue of political reform. The following statement may have convinced the Qing Court to reform: “The people are concerned about the change of constitution because of the political reforms; thus, they believe that sovereignty was decreasing and doubted that a parliament was a step to overwhelm the emperor. However, the perspectives that made the people anxious and terrified were misconceptions.”<sup>52</sup> Regarding how to avoid violating the constitution in practical politics, Da Shou quoted Ariga’s belief that the emperor possessed the dual qualities of direct and indirect politic. The direct politic meant that the objects of the administration were the members of the imperial house. The indirect politic meant the objects were involved in the development of everyone’s lives, which was executed by the government.<sup>53</sup> Furthermore, the administration was responsible for national affairs. If a conflict between the parliament and the administration occurred, the emperor should intervene and harmonize. In this way, it could avoid that emperor suffered the violence arisen by opposing political parties. This perspective confirmed that the constitution did not violate the sovereignty of the emperor, but was helpful in maintaining political stability.<sup>54</sup>

Practical political responsibility must be based on a completed national institution. Ariga explained the responsibility of the prime minister and the system of civil service after chapter 17 in lectures which was listened to and recorded by Li Jiaju. Returning to his homeland, Li Jiaju said in a memorial to the emperor: “The investigation of foreign institution focuses not only on

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51. The memorial of the investigation official Da Shou surveys the situation of Japanese constitution practice. ZHENGZI GUANBAO (政治官報) [POLITICAL OFFICE NEWSPAPER] 4-6 (Guangxu (光緒) year 34) (Jul. 23, 1908).

52. *Id.*

53. SODA, *supra* note 37, at 78.

54. *Id.* at 79.

imitating their laws but also on researching into the essence and illustration. Therefore, I discussed the affairs of the bureaucratic system with Ariga Nagao and Shimizu Toru to seek their opinion on the principle that aims to clarify the nature of legislation as well as considering adopting a suitable one in accordance with the Chinese situation. In this way they could compare the experience of the Meiji constitution to choose the advantages and discard the disadvantages. And finally we can continue to edit the textbooks about the bureaucrat, self-government and ordinance.”<sup>55</sup> Later, he handed over the survey reports to the Bureau of investigative constitution which named them *the Bureaucrat* (《官制篇》). These writings were similar to Ariga’s lectures. Li Jiaju presented the reform of administrative institutions according to *the Bureaucrat* so as to influence political reform, and it served as the reference for implementing the local government which the Office for Drawing up Regulations for Constitutional Government instituted.

In the process of the studying the constitution in Japan, Ariga’s lectures had a large effect on the Qing dynasty and pushed them to institute the constitution in accordance with the framework of the Meiji constitution. In the content of the *Outline of the Imperial Constitution*, we could see the outcome of the survey, and based on this foundation, Li Jiaju absorbed the various foreign constitutional thoughts and the international situation, and he gradually gained a constitutional orientation.

Seen from the above discussion, the Qing constitution sought to absorb the parts of western constitutions they felt would work for China, so they neither imitated the foreign constitutional laws, nor placed a strong emphasis on the civil aspect of the constitution; on the contrary, it absorbed solidly the quintessence of the cosmopolitan constitutions at that time. We could see from Ariga’s constitutional lecture that the writers of the constitution wanted to know the basic principles of a modern constitution. This was also Itō Hirobumi’s understanding which was conceived during the surveying of the western constitutions. However, the work of the Qing constitution was prevented by the Xinhai Revolution, and the two thousand year old monarchy was ended. Paradoxically, after Yuan Shikai attempted to reestablish a monarchy a few years later, it brought about the militarized order of society which caused conflict between special interest groups and

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55. Li Jia-Ju (李家駒), *Kaucha Shian Jeng Dachen Li Jia-Ju Tzou Kaucha RiBen Guanjr Chingshing Ching Su Liding Neiwai Guanjr Je* (考察憲政大臣李家駒奏考察日本官制情形請速釐定內外官制折) [*Li Jia-Ju, The Minister of Investigating Constitution and Politic, Reported the Investigation of the System of Japanese Bureaucratic and Asked for Deciding the Bureaucratic in Qing*] (Hsuantung (宣統) 01/05/07) (dates are given by reign year/lunar month/day), in QINGMO CHOUBEI LIXIAN DANG’AN SHILIAO SHANGTSE (清末籌備立憲檔案史料上冊) [HISTORICAL MATERIALS OF PREPARATORY WORKS ON CONSTITUTION IN LATE QING VOL. 1] 523, 523 (National Palace Museum ed., 1981) (The memorial of the investigation official Li Jiaju suevrys Japanese bureaucratic system and suggests instituting the bureaucratic system).



social classes.<sup>56</sup>

### B. *Yuan's Constitution of the Republic of China*

After the success of the Xinhai Revolution in 1911, the Republic of China was established, but it suffered political and military problems from the onset. Although there are conflicting reports on why this disorder occurred, the ultimate blame has historically been placed on Yuan's constitution and the throne from 1912-1916. However, this perspective tends to ignore the constitutional thoughts and debates in this process, including the differences between the North and the South in China. Therefore, we will attempt to observe the relationship between Yuan Shikai and Ariga to explore the context of the thoughts of constitution from another angle, and to examine the content and Ariga's influence on the constitution.

#### 1. *The Recruitment of a Foreign Consultant*

In 1912, Yuan Shikai became the president of China, and the constitutional parliament attempted to institute the constitution to constrain the president. However, Yuan was not satisfied with the *Provisional Constitution of the Republic of China* (《中華民國臨時約法》), because it constrained his power, but he required the constitutional parliament to institute the *Electoral Law of the President* (《總統選舉法》) to formally elect the president in order for the western powers to recognize his legal status. In order to restrain the president, the Nationalist Party decided to institute a constitution which tended to constrain the president. To change this situation, Yuan Shikai needed to legally alter the constitution, and recruited foreign consultants to help implement these changes. The leading consultants were Frank J. Goodnow and Ariga Nagao.

These foreign consultants made up the Research Institute for the Constitution, and invited political and academic personage to participate. The opinions of the Research Institute of Constitution were often adopted by Yuan. Goodnow was, nominally, the leader in the Research Institute of Constitution, but Ariga actually presided over the meetings, because Goodnow was often too busy to participate. Ariga provided new perspectives on the constitutional contents for the national situation and political affairs. These perspectives were later published and called *Guan Yi Xian Ping*.<sup>57</sup> Its contents were as follows.

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56. It means the warlord era of Chinese Republic during 1916-1928.

57. SODA, *supra* note 37, at 289.

## 2. *The Fundamental Theory of the Yuan's Constitution: Guan Yi Xian Ping*

### (a) The Foundation of the Legitimation of Regime

In chapter 1, Ariga discussed the foundation of the sovereignty aiming to explain the legitimate source of the national institution which related to the particularity of the Xinhai Revolution and he suggested that a constitution must be based on the history of a country, in order to understand the entire national institution. The purpose of *Guan Yi Xian Ping* was stated in the very beginning: “The constitution in any country must be consistent with its history. The current relation to the national rights is naturally developed from the past. Therefore, the past must be anatomized first to manifest the current situation, and then the basis of the future constitution can be affirmed”.<sup>58</sup> This perspective inherited Itō's constitutional thoughts which were enlightened by Stein.

Ariga opposed the Revolutionists' perspectives where the Qing was overthrown by a revolution of people, and he sought to relocate the national power. Therefore he distinguished four periods of the transition of sovereignty. (a) The Qing emperor should institute the constitution to console the people. (b) The constitutional monarchy and the constitutional democracy should be resolved by parliament. (c) The Republic should be acknowledged and the imperial house should be given preferential treatment. (d) Unification between the North and the South should be negotiated. Thus it can be seen that when the emperor renounced the throne, the Republic of China was established, but it was not solely decided by a Revolution of the people.<sup>59</sup>

Ariga explained the political situation at that time according to the following: (a) the establishment of the Republic of China began with the Xinhai Revolution and the transfer of sovereignty from the emperor. (b) Based on the discussion above, the Republic of China could not adopt democracy. This decision must be made by negotiation between Yuan and the Revolutionist, highlighting the important status of Yuan in the establishment of the Republic of China. (c) After secession of the emperor, sovereignty did not just belong to Yuan, it also belonged to the people, but the operation of sovereignty depended on political organizations. The current political organizations were controlled by Yuan, because he possessed the

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58. Ariga Nagao, *Youhe Boshi Minguo Xianfa Quanan Yijian Pilu: Diyizhang Geming Shi Tongzhiquan Zhuanyi Zhi Benmo* (有賀博士民國憲法全案意見披露：第一章 革命時統治權移轉之本末) [Dr. Ariga's Opinions on the Constitution of Republic of China: Ch. 1 the Process of the Transition of Sovereignty in Revolution Era], 17 XIANFA XINGWEN (憲法新聞) [CONSTITUTION NEWSPAPER] 154, 154 (1913).

59. Ariga, *id.*, at 156-63.

military. Therefore, it was legitimate that as Yuan held the power, he should form a government. According to this discussion, Ariga concluded that Yuan's constitution belonged to constitutional politics, rather than being overruled by the model of judicial constitution or normal politics.<sup>60</sup>

(b) A Critique of the Deficiency in the Democracy

In chapter 2, Ariga criticized the regulations of the polity and the form of franchise in *Provisional Constitution of the Republic of China*, and he opposed the Cabinet's policy on the social under class.<sup>61</sup> He cited an instance in France and America which brought about social riots; on the contrary, they didn't occur in German and Japan due to a successful suffrage policy. But Ariga acknowledged that the limitations of the Yuan constitution could not be maintained forever, and once the social under class could pay taxes independently, they naturally possessed the franchise. This perspective resulted because Ariga found it hard to trust Chinese society, which had just withdrawn from an autocratic state, and questioned if it had the mature qualities that were needed to practice democracy. This was the epoch's limitation.

(c) The Spirit and Value of the State

Chapter 3 indicated that the purpose of the constitution lay in the unification of the various forces in China. It must reconcile the fierce conflict between the revolutionary force in the South and the conservative force in the North aiming to maintain a stable constitutional practice. "In Southern China, trade thrives, and the people's thinking is more advanced due to influences from other cultures; nevertheless, despotism was brought on by the Xinhai Revolution. In Northern China, agriculture is the mainstream of the economy, and the people are more conservative. They own the sovereignty but without the big stick, the economic power. Combining both will form a powerful China, but "the southern progressive force" thrives so the state will be in disorder".<sup>62</sup> Ariga claimed that the conservative force in the North should be based on the inherent civilization in accordance with Chinese history and tradition to reconcile the two forces in the nation and provide security for the people. Ariga suggested the

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60. John A. G. Griffith, *The Political Constitution*, 42 MODERN L. REV. 1 (1979); JOHN A. G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (1997).

61. Ariga Nagao, *Youhe Boshi Minguo Xianfa Quanan Yijian Pilu: Dierzhang Xianfa Shang Bixu Yuxian Fangfan Shehui Dang Zhi Bihai* (有賀博士民國憲法全案意見披露：第二章 憲法上必須預先防範社會黨之弊害) [Dr. Ariga's Opinions on the Constitution of Republic of China: Ch. 2 The Prevention of the Socialist Party's Defect in the Constitution], 18 XIANFA XINGWEN (憲法新聞) [CONSTITUTION NEWSPAPER] 112, 112 (1913).

62. Ariga Nagao, *Youhe Boshi Minguo Xianfa Quanan Yijian Pilu: Disanzhang Beifang Xu Yang Qi Baoshouli Yi Tiaojie Nanfang Zhi Jinbuli* (有賀博士民國憲法全案意見披露：第三章 北方預養其保守力以調節南方之進步力) [Dr. Ariga's Opinions on the Constitution of Republic of China: Ch. 3 the North Should Raise the Conservative Force to Harmonize with the Progressive Force in the South], 18 XIANFA XINGWEN (憲法新聞) [CONSTITUTION NEWSPAPER] 121, 123 (1913).

following that respects traditional Chinese society: (a) it must be defined in the constitution that Confucianism is the foundation of the state; (b) It must revise the organization of the Senate. In this way, it could maintain the conservative forces in the North and harmonize the radical progressive forces in the South in order to secure permanent development.<sup>63</sup>

(d) The Governmental Organization and the Arrangement of Power

Chapter 4 discussed the form of government. Ariga explained the contents of the American and French constitution which the Chinese constitution took as its model, and indicated whether American constitution or French constitution had their political tasks, that is to say the executive of national purpose: “It should think over the national affluence through the national force; in the enterprise it would consider which one is important, and to process in turn”.<sup>64</sup> There are three types of national concerns: (a) concerns that made the country strong, such as the military and finance, (b) concerns that made the people safe and healthy, such as police, health and judicature, (c) concerns that expanded the interests of the people, such as the protection of commerce, the encouragement of agriculture and the promotion of industry. According to the organismic theory, Ariga considered that all national concerns should keep an organismic connection.<sup>65</sup> If we used the most force to develop one part of the nation, the other parts would naturally prosper. For example if a patient accepted the nutrition to cure his heart, the whole body would prosper.<sup>66</sup> There were many concerns, but which one was the most urgent? Ariga considered that the answer referred to “the decision of the guidelines”<sup>67</sup> that was the real task and the political responsibility of the head of state. The difference between the politics in America and in France lay in the assignation of the right and responsibility of “decision of the guidelines”.

Ariga recommended that China form an “Aloof Cabinet” to solve the questions which the Republic and the Cabinet confronted. Though its name included the Cabinet, the power was mostly controlled by the president. The character of the Aloof Cabinet was: “The President can determine the political guidelines without asking anyone in or out of the parliament, but if there were someone willing to execute the policies based on the guidelines,

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63. *Id.* at 131.

64. Ariga Nagao, *Youhe Boshi Minguo Xianfa Quanan Yijian Pilu: Disizhang Gonghe Zuzhi Lun* (有賀博士民國憲法全案意見披露：第四章 共和組織論) [Dr. Ariga's Opinions on the Constitution of Republic of China: Ch. 4 On Republican Organization], 19 XIANFA XINGWEN (憲法新聞) [CONSTITUTION NEWSPAPER] 165, 166 (1913).

65. These perspectives of national enterprises were implemented by national actions, which is similar to Stein's administrative theory.

66. Ariga, *supra* note 64, at 167.

67. It means the president has rights to decide the important policy regardless the opinions of parliament.

they could organize the Cabinet. As the Cabinet has no alternative but to reorganize, the standard of reorganization is not based on the majority in the parliament. So if the effect of the political guidelines needs to be inspected, the standard of reorganization will focus on public opinion and the President's arbitrary ordainment".<sup>68</sup> This policy has historical precedence in France in 1877. In the monarchy, German and Japan were the patterns of the Aloof Cabinet, and their nation prospered. Thus, Ariga indicated that "in the Aloof Cabinet the relationship between the president and minister was equal to the relationship between the emperor and prime minister." If the president was excellent, he could propose the guiding principle or policy, so as to benefit the country. If not, the ministers assisted the president in the governing, and then the state could not be hurt. Ariga considered that Aloof Cabinet had many advantages at the beginning of the establishment of a state: "There is nothing but implementing the detachmentism so as to practicing in the constitution."

We can see that the *Provision of the Constitution of the Republic of China, 1914* (《中華民國約法》) imitated and quoted the opinions in *Guan Yi Xian Ping*, which claimed to institute the presidential government and limit the functions of parliament in opposition to the Cabinet instituted in the *Drafting of the Constitution of the Republic of China, 1913* (《天壇憲草》). It is believed that Ariga's opinions on the Chinese constitution followed the framework of the Meiji constitution where the emperor monopolized sovereign powers. As Itō was enlightened by Stein's thoughts, Ariga also considered that the constitution could not be directly borrowed from another country, but must pay homage to national history and tradition. The constitution could not be equal to the national institution, but just represent one moment of the institution. More importantly, it must institute suitable regulations in accordance with the current situation. Thus, Ariga relied on his imagination of the construction of national powers at that time, and then suggested integrating the head, action and will of the state through the perspectives of the organism of state. That is the reason why he centralized sovereignty in the presidency based on the theory of state and historical experience, which aimed to regulate the disorder in a constitution and to get rid of the disorder caused by social ideologies and special interest groups. This perspective, enlightened by Stein's views on science of state, was certainly viewed as heresy by the Revolutionist who advocated the Anglo-Saxon liberal democratic theory.

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68. Ariga, *supra* note 64, at 174.

### 3. *Why Did Yuan's Constitution Fail?*

Although the reason why Yuan's constitution failed is complicated, we could discuss it from the constitutional opinions of the Nationalist Party and Yuan at least. The Nationalist Party and Yuan respectively made a claim for their constitution to construct a framework to arrange the revolutionary power. The Nationalist Party's cognition of the constitution which was based on the history of the theory of constitution, the definition of laws, the constructive moments and the concentered content must be comprehended thoroughly, but it was hardly recognized by the social upper-class. It meant the content of the constitution necessarily combined with social structure and social order, and through the organism of national organization kept the harmonious interaction between the constitution and the social order. That was the real life constitution. The *Provisional Constitution of the Republic of China, 1911* and the *Drafting of the Constitution of the Republic of China, 1913* which the Nationalist Party endeavored to institute invariably imitated the western constitutions. This was just a brief in the western politics, but they did not know how to put it into practice. However, even though they had progressive political theory on the rights of security and the limitations of national power, there was no space to practice the content of the constitution, because the revolutionary power was too strong to arrange through a normal constitution.

The constitutional theory which Ariga delivered in *Guan Yi Xian Ping* was made with the intelligent observations about social situations and political force. It criticized others for only imitating the abstract theory and considered that if China followed in their footsteps, it would also achieve a successful constitution. However, Ariga did not completely explain the essence of the head of state either. He ignored that the theory of social monarchy in Stein's ideas was bound to harmonize the social conflict. Even though he did not raise the question of social classes at that time in China, the society was in a strained situation between new and old forces, and must be reconstructed and raised by national power. As a result of Yuan ascending to the throne, the incident caused radical opposition and critique resulting in the Second Revolution (1913). Though Ariga attempted to construct a stable order of constitution, it just aroused the revolutionary wave in society. In many ways the history of this period was similar to the period after the French Revolution, which Stein analyzed in the context of historical dynamic law in *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage*.<sup>69</sup>

Furthermore, from the point of view of social theory, the constitutional

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69. See STEIN, *supra* note 28.

opinion of the Nationalist Party could be regarded as the belief in the western parliamentary politics. Ariga deliberated the constitutional opinions for Yuan and based them on the political knowledge and historical tradition which might be considered to be the representative of political knowledge. Besides, his constitutional opinion contained the theory of German science of state, the practice of Meiji constitution and the support of Chinese traditional intellectuals. The constitutional conflict at that time, simply speaking, meant the opposition of political belief and political knowledge; as what Stein explained in his writing—*Gesellschaftslehre*, the social harmony ought to be based on the reconciliation between knowledge and belief. Either belief or knowledge belongs to the social rationality by which people attempt to solve the contradictions in social common life and to distribute rationally the social resources. If the belief goes beyond the knowledge or the knowledge denies the belief, social rationality would not be adequately practiced. The belief and the knowledge coexist in social common life.<sup>70</sup> Therefore, even though Ariga's progressive constitutional knowledge suited China, his endeavor contrarily encouraged Yuan to ascend the throne which departed from the framework of democratic constitution, because his constitutional opinion gave much power to the president. The reason why Ariga's political knowledge caused this result was not only because he ignored Chinese history which had already stepped into the democratic period, but also because the democracy in China became a political belief which represented progressive force. Ariga's political knowledge was eventually defeated by the political belief in democracy. The cleavage between political belief and political knowledge not only signified the constitutional predicament, but also presented the cleavage between political upper-classes. The severe political and social turmoil would continuously occur in the following constitutional movements.

#### IV. CHINESE CONSTITUTIONAL MOVEMENTS AFTER YUAN (1916-): FROM MOVEMENT TO MOMENT

After Yuan died in 1916, the political forces were fragmented in China, and the expectations of the constitutional movement were seen as impossible, and then finally abandoned. Although the Republic was politically united there were a lot of social and economic problems. Between 1916 and 1928, there was political cleavage between the North and the South in China. Despite efforts by the KMT leader, Chiang Kai-shek, to unite China after the Northern Expedition in 1928, there was still political

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70. STEIN, SYSTEM DER STAATSWISSENSCHAFT, BAND II, GESELLSCHAFTSLEHRE. STUTTGART UND TUEBINGEN, *supra* note 31, at 262-67.

cleavage between the central and the local government. During the Japanese invasion from 1937 to 1945 the political cleavage between the central and the local government was temporarily put aside to fight a common enemy. Military action against the invaders took precedence over political divisions, but after the war ended, a brutal conflict between the Kuomintang (KMT) and the Communist Party escalated into a civil war from 1945-1949. From this struggle the Communist Party attempted to build a new state and society.

In 1947, the KMT attempted to introduce a constitution but they failed to unite China, and were forced to move to Taiwan after the communists defeated them on the battlefield. Even though the constitution of the Republic of China was promulgated, the fragmentary forces still could not be unified or moderated; on the contrary, the fragmentary forces further expanded from the political dimension to the social dimension. Therefore, a social revolution based on the opposition of ideologies emerged, causing a social cleavage throughout Taiwan. The constitution in 1947 was frozen because of the cleavage of state, so the parliament never operated efficiently.

In 1949, the Republic of China in Taiwan was formed by the KMT, and they were finally able to introduce social reforms. In other words, the land reforms (1948-1963) gave the KMT government a legitimate basis and brought about social and economic development. Taiwan was gradually transferred from an agricultural society with landed property (*der Grundbesitz*) to a commercial society which characterized the coexistence of landed property and produced property (*der gewerbliche Besitz*), even though the constitution was frozen and the entire country was under martial law.<sup>71</sup> Although the constitution was frozen, however the economy still developed rapidly, so that the capitalist class occupied a dominant position in upper society because of the mobility of social stratification.

In 1987, civil society requested the right to participate in politics, and social pressure resulted in political changes where representatives in the central and local parliaments were reelected. This led to the reformation of the additional articles of constitution which took ten years to finish. This historical period demonstrated that Taiwan was able to move towards a positive interaction between social reform and political reform based on democracy. Although the history of the Republic of China is mixed with political disorder and social struggle, its phases of development demonstrate the historical dynamic laws of dualism of state and society which Stein manifested in *Geschichte der sozialen Bewegung in Frankreich von 1789 bis*

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71. JOHN COOPER, TAIWAN: NATION-STATE OR PROVINCE? 114 (2003) ("In 1949 the executive branch of government pushed through the Legislative Yuan a bill called Chiehhyen Fa (戒嚴法), means literally 'vigilance measures law', but generally translated as 'emergency decree' in Taiwan and 'martial law' by the West media").



*auf unsere Tage*: political reform, political revolution, social revolution and social reform.<sup>72</sup> Political reform means political and social change accommodating to institutional reform in the constitution. If the political reform failed, political revolution would break out. Because political revolution merely changes the political structure, it does not touch the actual questions about the distribution of resources. So political revolution merely causes the alteration of a regime, but after long-term regimes the same problem also repeatedly appears. Social revolution is inevitable if the political revolution is left incomplete. A revolution which disappoints the polity not only needs to overthrow the old regime but must also reestablish a new regime and new constitution by means of the transformation of social structure. That signifies the destruction of the old civilization and history. The only way to avoid this is to implement effective social reforms.

If we reexamined the history of the Chinese constitutional movement through the four phases of interactive relation over the past hundred years, the chaos of the political and social change clearly present its dynamic laws and context. The “One-Hundred-Day Reform” was the political reform, and its failure caused the outbreak of the Xinhai Revolution as a political revolution. After the revolution, the Republic of China was established, but nothing but cleavage emerged. Thus the Xinhai Revolution failed, and its failure caused a civil war between the KMT and the Communist Party. The land reforms in Taiwan were a kind of social reform, and only through this social reform could social revolution be stopped. The additional articles of constitution was a kind of political reform, its success ensured political stability. But after political reform, social reform should be implemented, because the adapted interaction between political reform and social reform expected by the people in civil society deserves to be seriously considered, otherwise social revolution would break out once again. This concept is consistent with Stein’s perspective of the historical dynamic laws.

## V. CONCLUSION

Lorenz von Stein is considered one of the German idealists, but he also departs from the German idealism. In discussion of German idealism about China, Kant is only concerned about famous people, such as Confucius and Lao-tzu; Hegel was only concerned about the Chinese monarchy, but Stein

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72. Lorenz von Stein, *Der Begriff der Gesellschaft und die Gesetze ihrer Bewegung* [*The Concept of Society and the Laws of Their Movement*], in LORENZ VON STEIN: GESELLSCHAFT-STAAAT-RECHT [LORENZ VON STEIN: SOCIETY-STATE-LAW] 21, 81-88, 103-13 (Ernst Forsthoff eds, 1972); see also Ernst Wolfgang Boeckenfoerde, *Lorenz von Stein als Theoretiker der Bewegung von Staat und Gesellschaft zum Sozialstaat* [*Lorenz von Stein as a Theorist of the Movement of State and Society to the Welfare State*], in LORENZ VON STEIN: GESELLSCHAFT-STAAAT-RECHT [LORENZ VON STEIN: SOCIETY-STATE-LAW] 513, 513-47 (Ernst Forsthoff eds, 1972).

was different from Kant and Hegel because he was more concerned about how the actual movements served as the centrality of understanding China.<sup>73</sup> This could indicate that Stein was more progressive than other idealists. In this paper we examined the essence of the Chinese constitutional movement through the significance of Stein's thought of the science of state, which lies in social construction and organism of the constitution. The Qing's constitution only concentrated on the laws of the constitution, and ignored the social and administrative basis which a constitution really needs. For this reason, it was incomplete when the Qing constitution was constructed. This process of constitutional reformation was repeated when the KMT government moved to Taiwan as it only focused on the laws of the constitution and still ignored the social process. This had a negative impact on democracy in Taiwan.

Basically, the aim of a European constitutional monarch is to prevent democracy and socialism, in which the value of Stein's thoughts lies. On the one hand, he emphasized the social reform by monarchial power; on the other hand, he emphasized the dimension of spirit prior to material in the development of personality so as to spread to the public dimension.

According to our analysis of the Chinese constitutional movements, we consider that there are three significant parts to Stein's science of state, which can enlighten our understanding of the Chinese constitutional movements. First, Stein emphasized the connection between the constitution and society. That is, the constitution did not lie in constitutional laws, but rather in the constitutional content constructed from an interaction between the constitution and society.<sup>74</sup> Secondly, Stein emphasized the organism of constitution which actually meant the organism of the state.<sup>75</sup> Here two dimensions can be analyzed: one meant the harmony in administrative organizations so as to cohere with the national force; the other meant the harmony between the individual and the entirety, which meant the organism of state not only lay in the development of the entire nation, but also lay in the personal development of the individual citizen.

This comprehensive perspective of the science of state can be used to observe the contents of the Japanese and Chinese constitutional movements, and also helps us explain the reason why Japan succeeded in establishing a constitution while China did not.

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73. Boeckenfoerde, *id.*, at 515.

74. Stein, *Gegenwart und Zukunft der Recht- und Staatswissenschaft Deutschlands*, *supra* note 31, at 259; STEFAN KOSLOWSKI, ZUR PHILOSOPHIE VON WIRTSCHAFT UND RECHT: LORENZ VON STEIN IM SPANNUNGSFELD ZWISCHEN IDEALISMUS, HISTORISMUS UND POSITIVISMUS [THE PHILOSOPHY OF LAW AND ECONOMICS: LORENZ VON STEIN IN AREA OF CONFLICT BETWEEN IDEALISM, HISTORISM AND POSITIVISM] 169 (2005).

75. Stein, *Gegenwart und Zukunft der Recht- und Staatswissenschaft Deutschlands*, *supra* note 31, at 259 (The discussion was about the relation between the law and organism).

From the process of Japan's reception of the German science of state, we can see that the drafters of the Japanese constitution understood that the constitution was not only an explanation of laws but also the organism of the state in accordance with the theory of personal organism. As a result, Japan became very powerful, but also ignored the harmony between individuals and the entirety, and it could be said that this lacked respect for the personal development of individual citizens, as this concept was not addressed in the Meiji constitution. Therefore, this is perhaps why Japan went towards militarism based on the Meiji constitution.

The Qing government, however, sent officials to Japan to study the constitutional monarchy, and they considered that if the constitutional laws were implemented, the government would be identified by society and subsequently develop long term peace and stability. Although the outcome of studying brought a draft for a constitution and building blocks for a basic administrative system, these practices had hardly accomplished the organism of constitution, which needless to say is the harmony between individual citizens and the entire nation. Therefore, seen from the perspectives of Stein's science of state, we can easily predict that the Qing constitution was bound to fail. This understanding of the constitution actually continued in early Republic of China, especially by the first president Yuan Shikai's constitutional claim. Although Ariga Nagao understood the organism of the constitution, and provided opinions on drafting the constitution to president Yuan, because Yuan ascended to the throne, the acknowledgement of the organism of the constitution failed. Hence the chaos in social order was at the beginning of the Republic of China.

We also used the above discussion to consider the constitutional development in democratic Taiwan, especially the constitutional reforms between 1987 and 1997. Because the constitution of the Republic of China remained motionless during the martial law period, there was a deep division between the state and society. After the constitution was reformed, the newly transformed state was acknowledged by society, but this brought a negative result. The national institution was adjusted and the relation between state and society was connected through constitutional reforms, but it brought about strong social participation in the state, which made society control the state.

This article probes the relationship between Stein and China, reminding us of the significance of the organism of the constitution, which not only explained the constitutional laws and the harmony between state and society, but also the same emphasis between the individual and the entire state, to avoid conflict among social interests.

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## 史坦恩與中國立憲運動： 法制史的再檢視

張道義、徐國慶

### 摘 要

本文探討德國法學者史坦恩與中國清末民初立憲運動的關聯性。史坦恩的國家學思想深刻影響日本明治憲政，形成日本近代憲政思潮，這個影響力並且跨越日本，持續影響當時的中國立憲運動。探討這段法制史，如果不能掌握明治憲法背後來自於德意志憲法思想的影響，特別是史坦恩的國家學思想，就無法完整呈現當時的憲法思潮與脈絡。在這樣的理解下，中國的立憲運動，實質上穿越日本明治憲政，深刻連結當時的歐洲文明。國家與社會的互動法則，也形成我國憲法史中「法思想」與「法文化」的核心議題。

關鍵詞：史坦恩、國家學、伊藤博文、有賀長雄、袁世凱