

## Constitutional Projects in Modern Chinese History

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Ever since Western constitutional ideas were introduced to China, they have inspired various projects by Chinese officials and intellectuals to introduce constitutional rule. These initiatives were often undertaken under the direction of various political authorities, though they just as often became a source of friction between jurists and China's successive regimes, or between political groups. Although the basic project of achieving a "modern" constitutional order was broadly shared by most if not all of these constitution drafters and advocates, they had very different interpretations of such a document's proper structure, content, and relation with the Chinese state.

This chapter examines constitutionalism in modern China as a chain of interrelated initiatives and projects by competing actors emerging from concrete social and professional contexts. It suggests that, counter-intuitively, some of the most important "constitutional moments" in modern Chinese history have not been those associated with successful constitutional *texts*, but rather comprised situations in which a milieu of constitutional discourse helped to redefine state-society relations. The constitutional drafting processes of 1916-17 and 1946, for example, while soon superseded by political events, left legacies that profoundly shaped subsequent developments in public law.

Similarly, some of the most important individual contributions to constitution-formation in modern Chinese history have been from those who, without necessarily acting as lead drafters of a given text, nonetheless played significant roles in promoting certain principles or tropes in the public sphere. Notions of popular sovereignty, separation of church and state, fundamental rights (both civil-political and social-economic), federalism or centralization, and Executive or Legislative supremacy all framed the (often clashing) agendas of particular individuals and groups, with impacts upon the designs of various draft constitutions and also on the public's "constitutional imaginary." Adopting a "cultural study of law"-approach to the successive generations of constitutional drafting and scholarship in modern Chinese history, this Chapter focuses in particular on the figures whose constitutional projects during China's Republican Era had arguably the greatest impact on later developments, including John C.H. Wu, Wang Chonghui, and Zhang Junmai.

## **The Late Qing Constitutional Movement in the Global Constitutional Moment of the 1900s**

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This chapter aims to reconstruct the formation of constitutional thought in the late Qing Empire by carrying out a contextual analysis of the tumultuous process that led to the presentation of the first, and ultimately futile, drafts for a Chinese constitution before the Xinhai revolution of 1911. In the first years of the twentieth century, four major Eurasian powers, Russia, Persia, the Ottoman and Qing empires, alongside a handful of other countries around the globe, drafted constitutional documents in a roughly simultaneous effort to align their polities with an emerging international consensus about the indispensable elements of modern statehood.

By the early 1900s, even before the Japanese military victory over the Russian Empire, Chinese intellectuals were debating the apparent correlation between constitutionalism and national strength. Increasingly, Chinese observers not only expected a constitution to grant them higher international legitimacy and recognition, but that it would also strengthen their country in political, military and economic terms.

The military outcome of the Russo-Japanese War seemed to confirm such positions. Furthermore, it resulted in political upheavals in Russia and, indirectly, in Persia, which led to the promulgation of constitutions in the two countries. Closely monitored by Chinese observers, these events were interpreted in various diverging ways, ultimately aggravating internal political tensions in China. If these constitutionalizing processes were a strong incentive for China to follow suit, their failure to bring about the desired political stability were a warning against either too rash reforms or against the alleged “sham constitutionalism” performed by monarchies. The reinstatement of the Ottoman constitution two years later was generally welcomed in China, but again elicited varying interpretations across the political spectrum: While it was a further incentive for reformists to push for a constitutional monarchy, revolutionaries stressed that it was the outcome of the Young Turk Revolution.

Conventional accounts tend to look at these efforts through separate national lenses and interpret them as belated responses to the political and intellectual challenges posed by the irresistible forces of “Western modernity.” In contrast, the proposed chapter seeks to overcome such parochial narratives by reframing the Qing constitutional experiments as part of an interconnected wave of constitutional movements, which swept through large swaths of the non-Western world in the 1900s, and helped bring about the emerging world of nation-states.

## **The Temporalized Structure of Chinese Constitutions: A Comparative Historical Perspective (1908-2018)**

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The process of making of modern Chinese constitutions (1908-2018) could be conceived as a series of translation practices that recontextualize devious normative knowledge, between East and West, ancient and modern. And, the intense spatial tension of constitutional knowledge is often transformed into a temporal reconciliation, whether it is a fixation on the past or an anticipation of the future. Moreover, different temporal dimensions are gradually attached to specific constitutional institutions, such as sovereignty or rights, so as to evolve into a kind of time-based structure of the constitution, reflecting a unique mechanism of institutional production, in cross-cultural encounters, especially throughout the twentieth century.

More specifically, differing from the classical structure of Western constitutions composed of sovereignty and fundamental rights, the Chinese constitutions continue to add ideological provisions and fundamental national policies at both ends of this binary structure. On the one hand, in an attempt to make stable sovereignty more stable, the Chinese Constitutions, inspired by the Japanese concept of National Body (Kokutai) in the Meiji Constitution, have tried to place the precarious notion of sovereignty in an ideology that represents historical orthodoxy, generally embodied in the Preamble and Article 1 of the Constitution. For example, the Confucian clause under the Nanjing government (1912-1928), or Sun Yat-sen's Three Principles of the People under the Beijing government (1928-1948), or the Party's ideological clause after 1949, which was once again reinforced by the 2018 constitutional amendments.

On the other hand, in order to make flexible fundamental rights even more flexible, the Chinese constitution transformed the socio-economic rights of the Weimar constitution into future-oriented fundamental national policies. The constitution of the ROC formulated in 1947 extended this paradigm to national defense, foreign policy, national economy, social security, education and culture, and frontier regions. The PRC further reinforced this constitutional model of governance by policy to this day. If the classical structure of sovereignty and rights represents the present moment of the constitution, the ideological provisions and the fundamental national policies of Chinese constitutions bridge the temporal dimensions of the past and the future respectively, pushing forward the profound transformation of society within a stable constitutional order.

From a comparative historical perspective, this contribution seeks to provide insights into how various foreign constitutional knowledge was appropriated, translated and recontextualized into the Chinese constitutional institutions, in particular from the concept of National Body to Party's ideological provisions, and from fundamental rights to fundamental national policies. Moreover, it will shed light on how this temporalized structure of Chinese constitutions was shaped in an ongoing dialogue with the self and the others, and what constitutional implications and mechanisms are represented by different temporalities, especially at a moment of modern transformation of China.