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# **Constitutional Development in China: Comparative Perspective 1954 – 1982**

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## Abstract

This paper takes Chinese constitution making. Focus is on Comparison the Chinese constitution making in the first version/ constitution 1954 and the last version/ constitution 1982. It is pointed out that the meaning of the "constitution" Word in Chinese, who makes the Chinese 1954 and 1982 and duration of making the Chinese constitutions 1954 and 1982.

The problem of how to make the Chinese constitutions making Process. In Particular, the first version 1954 and the last version 1982.

**Key Word:** China-Constitution -Constitution Making- the 1954 Constitution- the 1982 constitution.

## المخلص

يتناول هذا البحث عملية التطور الدستوري في الصين، مع التركيز على المقارنة بين صياغة الدستور الصيني في النسخة الأولى / دستور عام 1954 والنسخة الأخيرة / دستور عام 1982.

وتدور مشكلة الدراسة حول كيفية عملية صنع الدساتير الصينية. على وجه الخصوص، الإصدار الأول 1954 والإصدار الأخير 1982.

الكلمة المفتاحية: الصين - دستور - صنع دستور - دستور عام 1954 - دستور عام 1982.

## I. Introduction

China provided the world with an impressive developmental model, even though the government leaders keep on stating the country is a developing country, the fast developments and booming economy fascinates the world. There are several aspects to this advancement: economic, social, and political. This paper aims at elucidating the advancement on the political aspect, more specifically, the Constitutional development, in a trial to understand if it was the source behind the advancement or the constitutional developments came as a result to these changes.

The Chinese leaders realized the importance of the role of constitution in the development process, hence, they gave due care to the advancement of their constitution in line with the country's unique value, culture, and political system. The constitutional change dates back to December 1905, when a commission was sent abroad to study how constitutional governments function. Upon the commission's return, a palace council meeting was held to consider its report, despite opposition from some conservative Manchus. The Empress Dowager approved the decision to draft a constitution. Later on, September 1, 1906, an edict was issued in the name of the emperor. The reasons put forth for this remarkable change were striking as it stated:

*"...we sent our High Ministers to various countries to study and investigate their governmental systems and administrative methods. Now, these Ministers have returned, and in their report, all submitted their opinion, as the result of their study and investigation, that the weakness and inefficiency of our country is due to the lack of close touch between the government and the people and the entire separation of those who are in office and those who are not. The officials do not know how to protect the people, and the people how to defend the country. That other countries are wealthy and strong is primarily due to the adoption of a constitution, by which all the people are united in one body and in constant communication, sane and sound opinions are extensively sought after and adopted, powers are well divided and defined, and financial matters and legislation are discussed and decided upon by the people. Moreover, other countries look to one another for improvement, and amend their constitutions and change their laws to their highest efficiency." (Payson, 1911: 148-151)*

An insight on this statement pins down the lapses in the existing constitution and sheds light on the milestones of drafting an effective constitution, these pillars are;

- a. Pointing to the gap in the – at then – existing Chinese system – where they pointed out the gap between the government and the people. And

the influence of this on the political system and overall efficiency of the country's performance/development.

- b. Pointing out to the role of constitution in developing other countries by involving the masses in the decision-making process and getting their feedback as well.
- c. Finally, and most importantly the use of power, this includes definition and division of power.

Some efforts followed to implement the constitutional change on several levels; as for the masses, all classes were urged to acquire the qualifications of a subject under a constitutional government. (Payson, 1911: 151) On the administrative level, a committee on reforming administration was appointed, several projects were discussed. On the governmental level emerged some challenges, the most important was the centralized power and the ways of defining and dividing authority between the central and local governments given all the power vested in provincial authorities. (Payson, 1911: 152).

All these preliminary efforts led to the development of the 1949 Common Program, followed by the first constitution in 1954, other versions in 1975, 1978, and finally the most recent version in 1982. The constitution was amended several times (the last time in 2004). Nonetheless, 1982 constitution laid the foundation for a complete and effective legal system. (Zijiang, 1987)

## **II. The concept of “constitution” in the Chinese context**

Since we are trying to identify the influence of the constitution on the Chinese development, we first need to explain the perception of the masses on the constitution especially with the uniqueness and privacy of the Chinese culture. Many Chinese viewed the notion of “constitution” as a Western

intruding concept, however the following illustrates how the concept was embedded in the Chinese culture;

### 1. The Concept of Constitution in classical Chinese literature

In Chinese, the term “constitution” has been translated since late 19<sup>th</sup> century as "*xianfa*", a term copied verbatim from Meiji Japan. However, *xianfa* is neither borrowed nor newly constructed word. It was used in classical literature meaning "fundamental law"<sup>(1)</sup> (*The Chinese University of Hong Kong, 1999: 92-108 & Zuoqiu, BaoSitao, 2000: 237*) indicating a general moral and natural order for humans to obey. (*Hyung, 1981: 115*) The term also indicated the charisma of the Kings' personal actions<sup>(2)</sup>, it implied that the masses shall follow the king, in particular obeying rulers, to help them remain in harmony with Heaven. (*Fu Jiao, 1932: 141-142*).

Set rather early in a religious and philosophical framework, precepts of *xianfa* were directed at people's inner nature, suggesting a restrained behavior, even though this might run counter to convenience and ambition. At first glance, one could say that it strongly resembled the concept of natural law<sup>(3)</sup> (*CICERO, 1928: 33*) Thus, individuals who deviate from *xianfa* will deny their own nature and suffer in turn the mental torment stemming from their

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<sup>(1)</sup> The *Guoyu* (Discourses on the States) tells the story of General Xun Wu (519 B.C.), a nobleman of Jin State. When Xun Wu led his troops to besiege the rival state of Gu, a magistrate from Gu proposed a conditional surrender. Although Xun Wu knew that by accepting the offer, he could have conquered Gu State without deploying any troops, he still turned it down. He later explained to his attendants that “it is not the right way to serve our Lord to accept this conditional surrender...the *xianfa*[fundamental law] of our state is to reward the virtuous and punish the evil. If I accepted the offer without rewarding the traitor, I am not faithful to my words. But if I rewarded a traitor, then where is justice?”

<sup>(2)</sup> Compared to *fa*, in the early classics, *xian* was not frequently used. Its origin can be traced to as early as the *Shangshu* (*The Book of Documents*). In “Charge to Yue III” of the *Shangshu*, *xian* is used as a verb: “to survey the perfect pattern [*xian*] of our first king – so shall you forever be preserved from error.” Taken together with the main theme of the *Shangshu*, which perceives Heaven as a final judge to reward the virtuous and punish the evil.

<sup>(3)</sup> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands and averts from wrongdoing by its prohibition.

conscience. The political community will pay a price as well: if a state deviates from its own *xianfa*, it will be destroyed.

Unlike the Stoics, who suspected that natural law could be enforced by any human agent - a belief that some political theorists assert can help emancipate “mankind from its subjection to despotic rule” - the ancient Chinese tended to claim that some human agents - especially extraordinary and moral ancestor kings or sages- could master the Way of Heaven. This partly explains why *xian* had another connotation, referring to the charisma and power of the Sage Kings. Many scholars view this unity of man and nature as a sign that ancient China never innately broke from nature as early Greece did, resulting in a long-lasting shortage of sharp distinctions between law and morality, religion and state, and the divine and human realms. Some even take it further, suggesting that this is the fundamental and epistemological reason why China has never been able to develop a genuine constitution. *(Neville & Emerich, 1907: 95) (Michael J. Puett, 2002: 111)*.

However, if one closely reads the work of Cicero -the first Western thinker to use the term and the inventor of the idea of the constitution- one sees that he does not emphasize on these sharp distinctions in his writing either.

The next section of this paper examines Cicero’s *Constitutio* in further detail. Suffice it to say, the Chinese idea of *xianfa* that implies human action ought (normatively) to be in accordance with Heaven is not particularly unique to China. Both Cicero’s *Constitutio* and the *Guoyu*’s *xianfa* merge the divine and human realms; they tend to embrace both what is above us (natural law) and what is below us (positive law). According to this perspective, people are capable of living virtuously with guidance. Nonetheless, support for top-down instruction cannot be equated with despotism or a centralized

model, because the ethos of *xianfa*, as seen in the *Guoyu*, is to internalize a mode of restrained behavior, especially among ambitious rulers.

Compared to the Roman concept of *constitutio*, to which Cicero contributed two treatises (one political and one legal), *xianfa* is a much more abstract notion. If there is anything arguably analogous to *constitutio* in early China, it would be *The Zhou Li* (*The Zhou Li*, 1989: 165) which many scholars conceive of as the basic law of the Zhou Dynasty (1045–256 B.C.) (*The Zhou Li*, 1989: 166). The resemblance is not only perceived by modern scholars, but also by many late reformers, even high officials who at the time often cited *The Rites of Zhou* to justify their proposals for constitutional reform. Given the text's popularity among late Qing thinkers, it might be helpful to summarize its content here, which will also help situate the emergence of *xianfa* as a term. (*Elman, Martin*, 2010: 65 & *Jaeyoon*, 2007: 56-101 & *Chao*, 1940: 176-177).

After the 5<sup>th</sup> century, *xianfa* gradually faded from medieval and late imperial Chinese texts as a political and legal concept. Instead, *huiyao* or *huidian* was often used to refer to a collection of dynasty laws and procedures. The extant source materials are too limited to explain why *xianfa* never became popular. Suffice it to say, the transcendence or natural law dimension, as embodied by *xianfa* in the *Guoyu*, was greatly reduced with the usage of *huidian*. The last imperial administrative code, *Da Qing Huidian* – acknowledged by Staunton and Vandermeersch as “the official account of the political constitution of China in its several branches” (*Chao*, 1940: 178) – is more like a statutory encyclopedia of an imperial dynasty, rather than higher law. It is too detail oriented to count as higher law, as it covers not only government structure, but also the details of government activities. Moreover, the decrees in *Da Qing Huidian* were not considered superior to other decrees. In fact, neither the *Da Qing Huidian* nor its companion volumes were reserved for administrative regulations.

## 2. Xianfa according to the Late Qing Chinese Constitutionalists

*Xianfa*'s use as a compound word did not resonate with everyone as a given, and certainly not Yan Fu (1854–1921), one of the most knowledgeable Chinese philologists at the time. At the end of 1906, in a speech titled *The Meaning of Constitution* presented at Anhui Normal University, Yan Fu said:

*During ancient times, it was unheard of to use the two characters xian and fain conjunction with one another. In the Confucian classics, xian means the same as fa. Thus, it is redundant to put the two characters together. Much of the lingo in vogue now, as it comes from Japan, has tons of problems – except lixian (constitution-making): li herein means “to constitute,” and xian means “laws”; put together, this at least makes sense. (Yan Fu, 1998: 472).*

The history of *xianfa* does not support Yan Fu's claim that using *xian* and *fain* one word was unprecedented. As mentioned in the previous section, as a compound word, *xianfa* was used in China's ancient vocabulary. In addition, before being superseded by administrative codes in the late imperial era, *xianfa* was treated in the *Guoyu* fundamental law, and even carried a centrifugal connotation of natural law. However, the most dominant opinion representing the thinking of most thinkers of the Late Qing Dynasty stated that the term was borrowed from Japan.

Indeed, *xianfa* is not a popular term in classical Chinese literature. In primary resources on the Qing Dynasty (1644–1911 A.D.), before the Hundred Days' Reform of 1898, very few writers used *xianfa* except for Kang Youwei (1858–1927) and Liang Qichao (1873–1929) who re-entered the concept to the Chinese dictionary. Given their leading role in the Late Qing constitutional reform and their incomparable influence on the formation of early modern Chinese constitutional thought, their responses to certain questions - such as whether China has constitutional precedents? what is a

constitution? and why China should move toward drafting one? deserve special attention.

### 3. Kang Youwei and Liang Qichao's definitions of *xianfa*

In a memorial presented to the Qing Emperor Guangxu (1871–1908), (Zhangjian, Huang, Youwei, 1974: 88-92) Youwei systematically explained why China should engage in constitution making:

*"Your servant has heard that the recent countries, be they in the East or the West, are strong in that they have established a constitution and convened a national assembly (guohui). In a national assembly, the ruler and the populace together discuss the laws of the nation... This kind of regime is not the sole invention of Western countries. It appeared in early Chinese history: Fanhongonce said, "The discussion of national affairs should be reachable to the magistrates and the people." Mencius also said, "Let the gentry [and the people] participate in the deliberations..." These were all precursors of the parliamentary model, except the lack of specific institutions for bicameralism. Even as early as the Spring and Autumn period, xianfa[constitution] was established. Our nation, from the monarchs to the people, has been under the rule of the law, but regrettably, without being mediated by a parliament. Thus, I plead with your Majesty, besides emulating Yao, Shun, Yu, the three early Sage Kings, also learn from the West and the East by making a constitution, convening a parliament, putting affairs of the state up for deliberation with the people and three branches of government. By these means China's growth in power shall be in the near future. (Youwei, 1995: 134-136).*

Youwei's argument can be summarized as the following. (1) Ancient China had something comparable to constitutionalism (as to whether *xianfa* was from ancient China versus Japan, Youwei does not provide an answer); (2) Chinese constitutionalism emerged as early as the Spring and Autumn period (though it functioned unsatisfyingly due to a lack of commensurate institutions); and (3) China should develop its constitution, it should convene a parliament and re-organize the principle of the "tripartite separation of powers". (Kang & Others, 1998: 6-18).

On the whole, the core of Youwei's constitutional thinking is not so much about clarifying the meaning of *xianfa* – *constitution*- but rather using the idea to promote radical institutional change (*bianfa*). From Youwei's perspective, constitution making is politically and legislatively challenging, especially in establishing a political system guarded by basic law that ensures broad participation. The crux of the matter, as he often emphasized, is convening a parliament. This institutional reform not only implies revitalizing the ancient Chinese view of *xianfa* <sup>(4)</sup>, but also opening up to foreign models. Given that China had not developed its own institutional means to materialize *a constitution*, it was time to learn from the West and the Japanese model that gained strength and prestige through these institutional mechanisms.

Youwei captures the characteristic of strengthening the modern constitution. As discussed in the first section of this paper, besides its limiting features, the modern constitution serves as an empowering agent, enabling and authorizing institutions to act in the name of the sovereign. Youwei identified this and explored how the constitution was used to tempt the Guangxu Emperor to call for new and improved power arrangements so that the Qing Dynasty could grow stronger. Youwei barely discusses the restrictive aspects of the modern constitution -often called a “legal” constitution by contemporary scholars such as Ronald Dworkin- a system of legally guaranteed civil liberties that prevent state intrusion or societal pressure; or, in modern political science, a system meant to protect the “negative rights of people.” (Dworkin, 1977: 188- 192).

Neither did his best student, Liang Qichao, pay much attention to the “negative rights” of people, although Qichao does seem to have a deeper understanding of “limited government,” (*youxianzhengfu*), which inspired

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<sup>(4)</sup> he refers to constitutionalism, or the spirit of it.

him to write the essay “A Treaty on *Lixian*” (1901) (Wu Song and Qichao, 2001: 920-922) referring to the idea of constitutional government, he stated:

*Lixianzhengti (a constitutional government) is called limited government... [within such a system], the ruler has powers, but only limited [ones]; the officials have their powers, but [these] are restricted; the people have powers, but their powers are also limited. The constitution of every nation sets out the rulers' prerogatives and the laws of succession, which are in reality limits on the rulers' power. Then the constitution addresses the relationship between [the] central and local governments, which delineates the limits on local officials' powers. Lastly, the constitution discusses the relationship between the role of the legislature and the people, which sets limits on people's power. Some have objected that it would be contrary to reason for people...to limit the ruler's power since only the ruler has the right to restrain the people, but not vice versa. Those who hold such opinions are mistaken: The ruler's powers are limited – not by the people – but by the constitution.* (Wu Song and Qichao, 2001: 920-922)

Qichao might be the first Chinese scholar to perceive a constitutional government as a limited one. However, his use of “limited government” might differ from the current liberal definition of the idea. To him, a constitutional government is restricted because the power of the ruler and its agencies needs to be constrained by *xianfa*: “a higher law for centuries to come...within a nation, whether it is the prince, the officials, or the people, all must obey it”. (Wu Song and Qichao, 2001: 195) The underlying rationale is the supremacy of the constitution, rather than people's rights. In addition, far from viewing the constitution as a way to empower people, his “limited government” aims to oppose both the ruler's absolute power and also to avoid the potential danger of popular politics. (Hao Chang, 1971: 200-213)

“A Treaty on *Lixian*” was published in 1901. By then, Qichao had fled China, sojourning in Japan where he found company among Germans, especially Johan Kaspar Bluntschli (1808–1881), who developed the organic

theory of the state. (*Guangzhe, 2005: 295-301 & Lei Yong, 2010: 95-116*) Taking this intellectual background into account, one can better understand why his definition of “constitution” lacked commentary on people’s rights. Following Bluntschli’s ideal, a constitution, under Liang’s interpretation, represents the highest spirit of the state. People’s rights are *granted* by a constitution; they do not precede the document. Thus, a constitution can and should limit people’s power, as the latter hinges on the existence of a constitution.

Why might Qichao have desired a foreign conception of the constitution? Why did he think the traditional Chinese system could not envision a better political order on its own? Qichao’s answers are quite sophisticated. First of all, he admits that in Chinese history, the emperor’s power has always been seen as limited:

*This notion has been around since ancient times. A ruler stands because Heaven so allows. A ruler falls because Heaven so intends...Many emperors and [their] officers in old times were wont to refer all matters to ancestral laws...Many sage teachers and sage kings held it as an eternal truth that the power of the ruler has limits. With the exceptions of a few despots, such as Qin Zheng [the first emperor of the Qin Dynasty] and Sui Yang [the second emperor of the Sui Dynasty], most rulers did not dare to conceive of their own powers as unlimited. (Wu Song and Qichao, 2001: 921)*

Despite such inclinations, Qichao lamented that after thousands of years of history, China had still not developed a more effective practice of limiting state power in the way a constitution would:

*They speak of Heaven, but Heaven does not really speak [for the people to constrain those in power]; they point to the ancestors, but ancestral laws are no more than inherited customs untempered by common justice...Thus, although with all good intentions, the way of Heaven was never really taken, and the intent of the people was never listened to. As a result, the nation has never perfected a constitution. This is why I said that [the] Chinese Emperor’s power is not unlimited, but Chinese*

*nonetheless never developed a sufficient means to realize a limited government.* (Wu Song and Qichao, 2001: 922)

Herein, Qichao seems to imply that ancient China indeed had *some* equivalent of constitutionalism, however incomplete its design. Ideas such as *the way of Heaven, models offered by sage kings, and ancestral laws*, are all resources that could be used to restrain a ruler's power. Nonetheless, according to Qichao, these unwritten rules -or to use today's term, "constitutional conventions"- could not be considered a constitution because they were not formalized, had no legal effect, and no corresponding institutions to guarantee them. Thus, the very mission that he and many of his contemporaries took upon themselves to materialize in the late 19<sup>th</sup> century - either through codification or institutional reform- traditional Chinese had only intended, leaving them unwritten, and thus never officially guaranteed.

#### **4. The unwritten constitutional agenda**

What exactly did Youwei and Qichao intend in writing down constitutional laws? Did they simply want to transcribe the way of Heaven or ancestral laws? Neither. Qichao insisted these laws were not worthy of the Chinese people's trust because they had not functioned well for thousands of years. Were they simply inviting the Qing state's wrath in order to attain the glory of martyrdom? This was indeed the end met by Tan Sitong (1865–1898), a colleague of Youwei and Qichao, who was beheaded on September 28, 1898, after the failure of the Hundred Days' Reform.

Both Youwei and Qichao had no interest in meeting Tan's fate. They wanted a new political system guarded by a supreme law, where political participation was legitimate and safe. Historians have demonstrated that the degree of popular participation advocated by Youwei and Qichao was not nearly as broad as that found in democracies. Both were rather skeptical of giving power to the uneducated Chinese masses. (Zhang Pengyuan, 1989: 23 & Zhang,

Hao, 1987: 43-45 & Young-tsu, 1983: 188) This is why Qichao believed a constitution should also constrain people's power. The distrust of mass politics was indeed part of German statist teaching, but also a deliberate Chinese choice. As Lloyd E. Eastman summarized in his work, late Qing constitutionalists such as Youwei and Qichao,

*like early advocates of parliamentary government in the West...did not conceive of parliaments as representative of the common people. Government would continue to be monopolized jointly by the throne and the bureaucracy. But parliaments would broaden the sphere of active political participation to include the lower strata of officialdom.* (Lloyd E, 1968: 702)

The plea for broader political participation was not an innovation of late Qing constitutionalists. Since the Ming Dynasty, there had been persistent demand from non-official scholars, who were denied access to official appointments due to the disparity between the large numbers of degree holders generated by the civil service exams, and the small number of government posts to which they might be appointed. (Jakov, Smith & Richard: 2003: 221) Even worse, those incumbents often “owed less to quality than to circumstance,” (Kuhn, 2000: 18) which further exacerbated the chagrin of talented but unlucky out-of-office degree holders. As Kuhn points out, after the Opium Wars, popular discontent with the overly exclusive but highly corrupt bureaucracy spurred activism among intellectuals at all levels. “Some of the literati who were most concerned with the national dimensions of the domestic crisis [before]...became deeply involved in the foreign-affairs dimension of the national crisis as it intensified over the course of the 19<sup>th</sup> century.” (Kuhn, 2000: 21)

Indeed, after being battered by Western soldiers and gunboats, many Chinese began to reflect on the style of regime that might produce the power and wealth of the West. One of the first to explore the subject was Zheng

Guangying (1842–1922), who urged China to promote commerce and convene a parliament – the two crucial sources of Western success, in his opinion. After Guangying’s writings circulated widely, convening a parliament - and thus letting more literati and merchants participate in politics- became the prime political plea of his era. However, it was not until 1895, when Youwei brought this age-old issue to the table of the Qing court, that it sprung into national reform.

No matter how novel the reform plan appeared to be under the Japanese term *lixian*, its agenda and the problems it attempted to solve were not new. Many late Qing constitutional thinkers were working on old problems. These challenges, which this paper conceives of as the unwritten constitutional agenda, included: (1) how to fight the abusive, arbitrary power of rulers, a topic well studied by Huang Zongxi (1610–1695) and Gu Yanwu (1613–1682); (2) how to broaden political participation while enhancing the power and legitimacy of the state, a seemingly achievable goal sought by Wei Yuan (1794–1857) and Feng Guifeng (1809–1874); and (3) how to capitalize on the resources of local communities while providing for their needs, a question investigated hundreds of years ago by Ye Shi (1150–1223) and Zhu Xi (1130–1200). (*Kuhn, 2000: 22- 25*)

Not only the content is significant, but also the vocabulary. According to Joan Judge, both Youwei and Qichao drew intensively on the works of late Ming and early Qing thinkers such as Huang Zongxi and GuYanwu. Many keywords from those early Qing thinkers – such as “sovereign nation” (*junguo*), “popular power” (*minquan*), and “imperial power” (*junquan*) – were reclaimed in late Qing constitutionalists’ writings. (*Judge, 1994: 1-33*) What distinguishes Youwei and Qichao from their predecessors is that they believed they had found a panacea for old dilemmas. By laying down a self-referential, fundamental law, Qichao wished to constrain a ruler’s arbitrary

power more effectively. By convening a parliament warranted by the constitution, Youwei hoped that “the minds and wills of the empire [could] be brought together, so that all [could] share cares and pleasures, forgetting the distinction between public and private.” (*Xunzheng, Zhongguoshixuehui, 1961: 153*) By delineating the relationship between the central and local governments, and also citizens’ duties and rights in a national constitution, Qichao asserted conformity between local and national interests, and an accord between individuals and state so that China’s wealth, power, and prestige could be enhanced harmoniously.

To some degree, Youwei’s and Qichao’s perceptions of the constitution were quite Chinese in nature. Their visions were shaped not by a language barrier or cultural biases, but by the indigenous political agenda passed on by earlier Chinese thinkers. Both Youwei and Qichao, and many other early Chinese constitutionalists, were very much driven by problem-solving. Their incentive to borrow from foreign thinkers and practices was not to keep the notion faithful to the original foreign concept, but to plant these ideas in Chinese soil, producing Chinese outgrowths that addressed the country’s problems.

## **5. Xianfa and lixian in view of the ruling class**

Did Manchu rulers share Youwei’s and Qichao’s attitude? Many did. However, the Qing ruling class held concerns not shared by non-official scholars like Youwei and Qichao. In the minds of the ruling class, a constitution was sensitive not only politically, but ethnically as well; the Qing Dynasty was a minority-ruled regime in which the Manchu conquerors were outnumbered by the Han majority by a ratio of 350:1. (*Elliott, 1993: 160-161 & Elliott, 2001: 146 & Rhoads, MANCHUS & HAN, 2000: 79-80*) Broadening political participation would mean inviting a swath of ethnic Hans into the ruling arena, putting the dominant Manchus in a potentially precarious position. Not to mention, since

founding their regime in 1644, the Manchu people had enjoyed considerable privileges based on their shared ethnic identity with the monarch. (Elliott, 1993: 66-70) Thus, a parliament-supporting constitution as Youwei and Qichao proposed threatened not only the monarchy and the bureaucracy, but Manchu rule as well.

By that time, Han Chinese had seized upon the idea of a constitution as a way to redress the inequalities of Manchu governance. Youwei, Qichao, and their followers suggested that Manchus' privileges be abolished, with each ethnic group treated equally. Crucially however, they argued that the Manchu emperor could remain; historians have thus dubbed them *lixianpai* (a group of late Qing intellectuals who advocated for a constitutional monarchy). In contrast, radicals such as Sun Yatsan (1866–1925) and Zhang Taiyan (1869–1936) asserted that a true constitution could not be comprised by a decayed, ethnic minority monarch. The first step they yearned to take toward a constitution was to overthrow Manchu rule.

Despite the danger that appeals for *lixian* seemed to entail, interestingly, many Manchu elites proved no less interested in constitution-making than their Han counterparts. The Empress Dowager Cixi (1835–1908) once asked Duan Fang (1861–1911), her favorite Manchu minister, “What is constitutionalism about?” Fang answered, “If constitutionalism is implemented, then the imperial institution may last forever.” Fang’s answer disqualified a professional definition of a constitution yet revealed the attitude of many members of the Manchu ruling class. They too were unsatisfied with the crumbling imperial system. Despite the risk it carried, many Manchus reasoned that perhaps only a constitution could cure China. (Rhoads, 1989: 96)

After the Russo-Japanese War (1904–1905), such thinking became increasingly dominant in the Manchu court. Japan’s surprising victory over Russia played a major role in renewing momentum for China’s constitution-

making. In 1905, the Empress Dowager appointed five top officials to go abroad “to investigate all aspects of governmental administration with the intention of selecting the best for adoption.” (*Zarrow, 2006: 23-26 & Gadsden, 2005: 115*).

This “constitutional mission” was led by two Manchu ministers. One was Prince Zaize (1868–1929), a grandson of Emperor Jiaqing and the Empress Dowager’s brother-in-law. The other was Duan Fang (1861–1911), the minister mentioned earlier and head of the Bureau of Agriculture, Commerce, and Industry. Remarkably, he had supported the Hundred Days’ Reform. Another top official who deserves special note here was Dai Hongci (1853–1910), a native of Canton, who served on the Board of Families and Revenue (p. 217). (*Marinus, 1950: 58-59, 217*)

After almost a year of travelling, Fang and Hongcai submitted a 133-page report titled “*Lie GuoZheng Yao*” (“The Essentials of Government in Various Nations”). Following that, Hongci penned a special volume, “*Ou Mei ZhengzhiYaoyi*” (“The Essence of European and American Governance”), edited by Fang, which describes what China might take from the world as it pursued reform. Scholars hardly hold these two volumes in high regard, probably because of how pitifully late Qing constitutional reform met its end. Moreover, as Amy Epstein Gadsden documents in her dissertation (2005), “The Essentials of Government in Various Nations” is quite detail oriented; it is famously inaccurate, explaining all Western banking, for example, by looking at Russia’s system in detail (p. 218). (*Gadsden, 2005: 24*) However, the other report, “The Essence of European and American Governance,” should not be ignored. Well written, it is as accessible as it is valuable. It is a precious source for exploring how top Manchu officials reflected on and evaluated their own system and why, after seeing the world, they perceived a constitution as both desirable and necessary.

At the level of constitution-making, they were more concerned with positive rights (i.e., *letting* people participate in government in order to mobilize society) rather than “negative rights” (i.e., to protect individual liberty and property against state infringement). This ideological bias resulted in a shell of a constitution, making it impossible to maintain the control necessary to implement and defend a true constitutional government in China.

### **III. Creating Chinese constitution: Historical perspective 1954 and 1982**

#### **1. The 1954 constitution**

According to Mao Zedong, the Chinese revolution had to go through stages. The first step was to establish a “new democratic nation,” while the second was to build a socialist one. The second phase was based on the first action and would not be initiated until the new democratic nation had fully developed. Mao estimated that it would take at least two or three decades before China would be ready to take the second step. (*Pang Xianzhi and Chongji, Jin, 1996: 236-240*)

However, three years after its founding in 1952, the state recovered from war and the government was fairly consolidated. Based on these developments, Mao Zedong changed his mind and suggested that China could start the second step at that time versus several decades later. In other words, he would give up his new democratic policies and accelerate speed towards Stalinist socialism. This was a fundamental change and completely new to his colleagues, who were still inclined to their budding democratic policies. To win Moscow’s support for his idea, Mao Zedong asked politician Liu Shaoqi to seek advice from Stalin during his visit to the 19<sup>th</sup> Congress of the Communist Party of the Soviet Union (CPSU) in October of 1952. (*Pang Xianzhi and Chongji, Jin, 1996: 240-242*)

During the congress, Shaoqi wrote a letter to Stalin in which he introduced Mao Zedong's idea and raised the issue of constitution-making in China:

*The issue of constitution-making has been raised within the CPC [Communist Party of China] ...we think we do not have to [form] a constitution [during the present] transitional period...and use the Common Program as a constitution. The Common Program can be revised by the Plenum of the CPPCC [Chinese People's Political Consultative Conference] or NPC [National People's Congress]. After the class relationship in China achieves substantial change, i.e., [when] China achieves socialism...we can make a constitution then, when we can basically [develop] a socialist [one].* (Wenxian, Dang De, 2005: 9)

Although preoccupied with his successor, Stalin still met with Shaoqi and responded to his letter. Stalin not only endorsed Mao Zedong's idea to transition to socialism, (Wenxian, Dang De, 2005: 10) but also suggested drafting a constitution for the transitional period for almost the same reasons he had given about three years earlier:

*If you do not [draft] a constitution and [hold] elections, your enemies will [make] two accusations against you. Firstly, they can say that your government was not elected by the people; secondly, your country had no constitution. Since the CPPCC is not elected by the people, they can accuse you of establishing your government on the basis of force and your own will. Besides, the Common Program is not adopted by a congress elected by the people. Instead, it was submitted by the CPC and agreed upon by other parties. Therefore, they also can accuse you of having no law. You should take these accusations from enemies both at home and abroad [seriously] and give them no excuse. I agree [with] your idea in your letter to transform the Common Program into a constitution, i.e., the basic law. of course, such a constitution is a raw product, but it is better to have one than [not, as there would be] one more problem in China. At present your government is a united one; hence the government cannot be responsible to only one party...instead, it should be responsible to all parties. If so, it will be hard to protect state [secrets]. I think foreigners*

*have [found out] some of your important confidential information. For example, your government delegation will come to us, and then the United States and Britain [will] know we are going to discuss the issue of Lushunkou. Since you have other political parties, the government has to [consider] them and...discuss with them...important state affairs...in turn, the United States and Britain will also know about these state affairs, as many of [the parties] maintain [a] relationship with the United States and Britain. If your plans are known by [your] enemies, it will be harmful to you. If you win the majority in the election, you can form a one-party government.* (Shi Zhe, 2001: 407- 408)

This was the third time that Stalin made a similar recommendation to the CPC. Stalin's suggestion had merits; otherwise, China would have to go without a constitution for quite a long time, and problems concerning legitimacy and security could arise. On the other hand, Stalin was still suspicious of the CPC's so-called new democratic practices. For Stalin, the CPC was not a true Marxist party and China would not be an authentic socialist country if it did not have a government of his style, which Eastern European countries followed in 1949 and 1950.

While seeking advice from Stalin, Shaoqi and the Chinese delegation noticed that his health had been deteriorating, and the struggle to find a successor after his death had already begun in Moscow.

Soon, the CCPCC had a change of heart and accepted Stalin's suggestion to create a constitution (p. 273). On December 24, 1952, on behalf of the CPC, Zhou Enlai advised that the CPPCC National Committee propose that the Central People's Government (CPG) convene the National People's Congress and form a constitution in 1953. On January 13, 1953, the participants of the 20<sup>th</sup> meeting of the CPG Council accepted this proposal and decided accordingly (p. 275). A constitutional drafting committee of 32 members, headed by Mao Zedong, was also set up based on his nomination. (Xianzhi, Chongji, 2003:433-434 & Jialiang, Xiaoji, 2008: 17)

What kind of government organization was to be codified in the new constitution? As discussed in the previous section, in the middle of 1952, the CPC took actions to restructure the government, moving towards the Stalinist model. As a result, by the middle of 1953, the government system stipulated by the Common Program and the Organic Law had been substantially modified; Mao Zedong had been in tight command of government affairs and must have been satisfied with this new government structure, as indicated by Shaoqi in his letter to Stalin.

However, it would no longer be feasible since Stalin questioned China's form of government, and the CPC decided to move closer to Moscow. A Stalinist government would be a better choice. After all, Moscow had become the only example for China to follow in its pursuit of becoming a socialist country. After the CPC decided to draft a constitution, the CPC seriously considered following Stalin's example and fully adopting the Russian model. Suggestions had been put forth within the CPC that the Council of Ministers from the Soviet Union could be emulated as China's highest administrative body. In addition, it was recommended that the CPC's organization be reformed by adding the new positions of vice chairman or general secretary. It seemed that the CPC intended for the chairman and vice chairman to constitute a presidium but was uncertain about the choice between general secretary and the presidium. *(Xianzhi and Chongji, 2003: 278)*

Irrespective of Mao Zedong's opinion on the Russian form of government, he did not want to completely adopt the Soviet model. Although leading a big and underdeveloped country like China was a heavy burden, his health deteriorated, and he had to take sick leave three times after 1949. He was also greatly affected by the death of his eldest son in the Korean War (p. 281). It would be better for him if he could be relieved from such a heavy workload, even to a small degree. Upon hearing of Stalin's death, Mao

Zedong was supposedly in such a low mood as to give up his government chairmanship (p. 282). If the Russian form of government were fully adopted, the center of government power would shift from the post of chairman of the CPG to the new chairmanship of the Council of Ministers. If Mao Zedong continued to lead the country, he would surely have to follow Stalin's example and take on the post of chairman of the Council of Ministers, which Zhou Enlai had suggested as early as January of 1949 in their talk with "Stalin's ear," politician AnastasIvanovich Mikoyan, during his secret visit to China. This meant no difference to Mao Zedong regarding his CPG chairmanship, for which he served as the final decision-maker and took direct responsibility for government affairs. Hence, for the sake of his health, Mao Zedong did not choose the Soviet model. (*Yinqiao, Li and Guixin, 2002: 234 & Zai Mao, 2006: 237-238*)

More importantly, the struggle to find a successor to Stalin reminded Chinese leaders of the need to eventually find one for Mao Zedong. This made them – including Mao Zedong himself – think more about this issue when designing the constitution. If the Russian model were to be followed, Moscow's experience of power struggles could be repeated in China after Mao Zedong died. Having witnessed this, in the latter half of 1953, Mao Zedong suggested that the CPC Central Secretariat (p. 283) be divided into "two fronts," (i.e., Mao Zedong would retire to the second front, while younger CPC leaders would remain on the first front).<sup>(5)</sup> (*Xianzhi and Chongji, 2003: 278 & Chongji, 1998: 743 & Liu Ying, 2005: 226 & Deng Xiaoping, 1983: 257*)

Years later, he explained this idea as following:

*Why was the central committee divided into two fronts? It was because of*

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<sup>(5)</sup> The Central Secretariat of the CPC was the CPC's highest decision-making organ and was replaced by the Standing Committee of the Politburo later on during the 8<sup>th</sup> Party Congress of 1956.

*my bad health and the lessons of the Soviet Union. Malenkov was chosen by Stalin, but he was not so experienced. He had not been in power before Stalin's death, and lost power soon afterward. I wanted to help establish the authority of Liu Shaoqi and Deng Xiaoping before I died... (Mao Zedong, 1966: 16)*

*Considering Malenkov could not take control, the Russian government faced problems, and the revisionist line emerged there; I suggested the division of the first and second fronts to make the country more secure. Before the 11th Plenum of the 8th Central Committee, I was on the second front and not involved with daily business, letting others complete many tasks. In this way, I thought they could establish their own reputation among the people so that the country would not suffer much turbulence when I died. (Xianzhi and Jin Chongji, 1996: 1449-1450)*

Clearly, Mao Zedong thought of Moscow's experience as a failure, and that Stalin should have put his chosen successor in power earlier, which China could learn from. Therefore, he decided to choose his successors before his death. This meant that Mao Zedong had to give up (at least some if not all) of his power and share it with his successors. By dividing the CPC leaders into two fronts, other CPC leaders ensured the regular workings of the party-state as the first front, whereas Mao Zedong retreated, maintaining control on the second front. He had the final say on major policies to keep the first front on the right track. This could benefit both sides. On the one hand, by retiring to the second front, Mao Zedong could extract himself from daily state affairs, thus being saved from tiresome duties, and focus on major policy issues. On the other hand, younger CPC leaders would take care of daily operations, accumulating experience in running the country. To be concise, the first front leaders were apprentices, while Mao Zedong played his role behind the scenes.

Such a notion is not new to the Chinese. In ancient China, many emperors adopted this method to choose their successors, for which they observed candidates to select those who could faithfully carry out policies.

The timely idea of “two fronts” suggests that Mao Zedong may have intended to use this traditional approach to solve the problem that emerged after Stalin’s death and achieve a better outcome for China.

However, this custom engendered a new challenge: the dilemma of the successor. As implied by Mao Zedong, over the course of the apprenticeship, if the first front leaders proved to be faithful executors of his policies, they could succeed him after his death; if their performance were not satisfactory and they were found to be revisionist like Nikita Sergeyevich Khrushchev, he still had time to change his candidates. In other words, tension would exist between the two fronts.

The 1954 constitution consists of four chapters, preceded by a preamble that briefly describes how the country is united, and how all of China’s ethnic groups live in harmony. The four chapters are (1) General Principles, (2) State Structure, (3) Fundamental Rights and Duties of Citizens, and (4) National Flag, State Emblem and Capital. The first constitution grants the Chinese people freedom of speech, correspondence, the press, assembly, association, procession, demonstration, and religion. *(Chen, T, 1967: 5-7)*

The 1954 constitution was influenced by that of the Soviet Union, which did not establish a right to strike (p. 95). Being one of the few socialist countries at the time it was founded as well as today, the People’s Republic of China (PRC) has learned many things from the former Soviet Union, the first socialist nation in the world. In most contexts, the Chinese government adopted the Soviet Union’s system, without making any changes. The 1954 constitution was impacted by lessons learned from the Soviet Union, because it was often drafted verbatim based on the 1936 Russian Constitution. *(Vyshinsky, 1948: 618)*

The Chinese government regards the first constitution as “a very good” one, whereas some Chinese scholars refer to it as “a socialist

constitution” that “promoted socialist transformation and [the] advance[ment] of socialist construction, and guaranteed China’s success in its transition from a new democratic to a socialist society in accordance with national conditions.” (*Peng Zhen, 1982: 11*)

## **2. The 1982 constitution**

China promulgated four constitutions in 1954, 1975, 1978, and 1982. The 1978 constitution was adopted in March of 1978. Since then, great changes have taken place (p. 143). The most important was the 3<sup>rd</sup> Plenary Session of the 11<sup>th</sup> Central Committee of the CPC, held in December of 1978, which “rectified” the mistakes of the Cultural Revolution in all fields and “summed up the historical experience” gained since the founding of the PRC. The 1978 constitution, which was adopted “in a hurry,” no longer conformed to the realities of the state in many ways. Thus, it was necessary to revise the constitution based on the country’s new conditions. (*Xianzhi and Jin Chongji, 1996: 9 & Hu Sheng, 1982: 15*)

The 1982 constitution contains 138 articles in four chapters. Although it has similar chapters to the first three versions, “Fundamental Rights and Duties of Citizens” is the second one for the purpose of emphasizing citizens’ rights (p. 149). There is no freedom to strike under this constitution. Article 35 provides that “citizens of the PRC enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.” More specifically, Article 53 imposes on citizens the duty to “abide by the Constitution and the law, keep state secrets, protect public property, observe labor discipline and public order and respect social ethics.” (*Xianzhi and Jin Chongji, 1996: 119, 11*)

The Chinese government was satisfied with the 1982 constitution when it was promulgated. In his “Report on the Draft of the Revised Constitution of the People’s Republic of China,” Peng Zhen said that the 1982

constitution “is distinctively Chinese and meets the needs of Chinese socialist modernization” since it incorporated a careful summary of China’s socialist development and drew on international experiences as well. In addition, the 1982 constitution took into account both the current situation and prospects for growth. Hence, it would remain valid for a long time. (*Xianzhi and Jin Chongji, 1996: 11*)

As noted, the 1954 constitution is regarded as “relatively flawless.” Thus, the 1982 constitution “maintains and develops the fundamental principles of the 1954 constitution.” As for the chapter “Fundamental Rights and Duties of Citizens,” “the provisions concerning citizens’ rights draw on those of the 1954 constitution.” (*Baum, 1997: 112,119,131, 350*)

#### **IV. The chronological development of China’s constitution**

##### **1. Drafting the 1954 constitution**

The first constitution was promulgated on September 20<sup>th</sup>, 1954. From 1949 to 1954, the so-called Common Program took the place of constitutional principles. In January of 1954, a Committee for the Drafting of the Constitution was set up under the supervision of Mao Zedong, Chairman of the Central Government. After the draft was ready, it was discussed among the highest regional circles by a total of 8,000 people. The final draft was published on June 14<sup>th</sup>. The first constitution was passed on September 1<sup>st</sup>, 1954, by the First National People’s Congress.

Starting December 27<sup>th</sup>, 1953, Mao Zedong began to lead a team of CPC members and started to draft the constitution in Hangzhou, a Chinese city known as “heaven on earth.” His draft was submitted to the Constitutional Drafting Committee for further discussion. Mao Zedong personally made a schedule for this team in which he listed some constitutions as references, including those of the Soviet Union, Romania, Poland, (then) East Germany, (former) Czechoslovakia, and France, as well as China’s

constitutional documents from before 1949. He remarked that the German and Czech constitutions were quite detailed and unique, whereas the French constitution was a progressive representative of a capitalist cabinet system.

*(Mao Zedong, 1993: 320, 437, 438)*

What made the German and Czech constitutions special? While following the basic structure of the Soviet Union, both constitutions had a presidency, thus being different from those of Romania and Poland. Czechoslovakia enacted its constitution on February 29<sup>th</sup>, 1920; it was “mainly shaped in accordance with the constitutional patterns of Western European democracies and adhered to the doctrine of [the] separation of powers” (p. 293). After the communists took full control of the government, a second constitution was promulgated on May 9<sup>th</sup>, 1948, which Mao Zedong referred to. Although the people’s democracy and socialism were claimed as its goals, it still retained elements of the old constitution, including the principle of the separation of powers and the presidency. According to this constitution, the Czech president would be elected by the National Assembly as head of state (p. 295) and could exercise dozens of “powers and functions” (*zhiquan*) including proposing, convening, postponing, and dissolving the Assembly, and commanding the armed forces. Most uniquely, he would take no responsibility for any of his “duties” (*zhiwu*), which were to be borne by the administration (p. 298). His documents would only be effective when co-signed by responsible administrative officials. Similar to its predecessor, this presidency was regarded as “the greatest single institutional departure from Soviet constitutionalism.” (*JiekeSiluo, Fake, 1953: 81*)

In contrast, the German president was rather weak. Elected and removed by both chambers, he was to represent the country in international relations and perform several functions (excluding commanding the armed forces), to be effective either when co-signed by the premier or relevant

government ministers or based on proposals of certain committees from the chambers. The French constitution, adopted in 1946, also provided for a presidency.

An independent chairmanship finally took shape in the first *Constitutional Draft of the PRC*, submitted by Mao Zedong on behalf of the CPC to the Constitutional Drafting Committee at its first meeting on March 23<sup>rd</sup>, 1954. According to it, the chairman was to be elected by citizens 35 years and older who had the right to vote and stand for elections and removed from office by the NPC with a term in office of five years until the new chairman was elected by the succeeding NPC. (*Xianfa, Chugao, 1954*)

After deliberations, the Constitutional Drafting Committee decided to submit the first draft to the CPPCC National Committee for consideration, in addition to the leading organs of main administrative regions, provinces and cities, democratic parties, peoples' organizations, and military entities. During these discussions (p. 330), the CPC revised the organization of the state organs provided in the first draft, including the chairmanship, and issued a notice on this matter before May 6<sup>th</sup>, 1954, possibly in response to the results of the CPPCC's talks (p. 332). Thus, the CPC formed another constitutional draft (the revised version). About 8,000 people participated and around 5,900 suggestions were made, all of which have been documented in a 25-volume book titled *Xianfa Caoan Chugao Taolun YijianHuij* [*Compilation of Suggestions in Discussions on the First Draft of the Constitution*].

However, in discussions organized by the CPPCC National Committee, the participants repeatedly recommended that the chairman be appointed as head of state (p. 333). In response, an article was added to the revised draft, which was also supported by the CPPCC in its proposed constitutional draft.

When all these talks ended, all drafts and suggestions were turned over to the Constitutional Drafting Committee for consideration. <sup>(6)</sup> At its 6<sup>th</sup> meeting, some committee members claimed that the chairman should not be appointed as head of state. These CPC members changed their minds on this issue once again and were against the article for the following reasons:

*We are the people's congress. The chairman exercises his functions and powers based on the decisions of the NPC and its Standing Committee. Therefore, at most, the chairman could be thought of as a "head of state with partial functions and powers," but not as "the head of state." Otherwise, this would be unscientific. Therefore, we think the chairman's status would not be compromised without such a clear provision. Instead, it will be hard for us to explain if we adopt this provision.*

Some other committee members who did not belong to the CPC were in favor of it and held that the chairman should be considered head of state, or at least "the representative of the State," "the leader of the State," "the leader of the people," "the supreme leader of the country," or "the State's representative in foreign affairs." Otherwise, "it would go against the idea and wishes of the people," they argued. *(Xianzhi and Jin Chongji, 1996: 135-136)*

This controversy was finally ended by Mao Zedong at the next meeting of the Constitutional Drafting Committee. When a non-CPC committee member continued to ask about it, he replied, "The chairman is not the head of state. I think we had better not stipulate him as the head of state." *(Xianzhi and Jin Chongji, 1996: 16)* He explained why:

*It is said that a certain clause was abolished because some people [including Mao Zedong] are very modest. This is not true. It is not because I am modest. Rather it is inappropriate, unreasonable, and unscientific if we keep that clause. In a people's democracy like ours, that kind of inappropriate condition should not be made.* *(Xianzhi and Jin Chongji, 1996: 506)*

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<sup>(6)</sup> The committee held nine meetings all together to discuss the constitutional draft.

When the constitutional draft was published for national discussion, this article was removed from the draft. Again, although it was widely supported by the Chinese populace (p. 341), the national discourse did not change the status quo.

Some non-CPC people thought that “this issue still exist[ed] in many people’s minds,” and suggested providing some explanations when submitting the constitutional draft to the first NPC. In response, Shaoqi made a special remark in his “Report on the Draft Constitution of the [PRC],” delivered to the first NPC:

*The functions and powers of the head of state in our country are jointly exercised by the Standing Committee of the NPC, which is elected by the National People’s Congress, and by the Chairman of the PRC. This conforms to the actual situation of our country and is based on our experience in building up the highest bodies exercising state power since the founding of the PRC. Ours is a collective head of state. Neither the Standing Committee nor the Chairman of the PRC has powers exceeding those of the NPC.* (Shaoqi, 1969: 297).

The NPC accepted his explanation, along with the constitutional draft. Thus, the chairman was finally construed as a “partial” head of state of the PRC.

On September 15<sup>th</sup>, 1954, the NPC held its first session in Beijing, in which the final version of the constitutional draft was submitted. Shaoqi, representing the Constitutional Drafting Committee, gave a speech based on his “Report on the Draft Constitution of the [PRC].” Five days later, it was put up for a vote; 1,197 people’s deputies, in attendance, all voted in favor. The NPC promulgated the constitution the next day on September 21<sup>st</sup>, 1954. (Alice & others, 1992: 162-169)

To conclude, by learning from experiences abroad and aiming to choose a successor, Mao Zedong proposed an individual chairmanship in the

constitution, thus adding elements of Western ideas (such as the separation of powers) into the Stalinist structure of government. Such a chairmanship was weakened and centralized in the constitution-making process after various revisions, with contradictions remaining. Unlike the almighty CPG chairman during the Common Program, the new chairmanship was better defined and far more limited in its scope of jurisdiction, with “necessary” policy-making power, allegedly no administrative responsibilities, shared power in terms of military affairs, and complete irrelevance to judicial bodies.

## **2. Drafting the 1982 constitution**

The work to discuss and revise the constitution lasted for two years. In September of 1980, the 3<sup>rd</sup> Session of the 5<sup>th</sup> NPC resulted in the decision to set up a committee to revise the constitution. In April of 1982, a draft was published for a nationwide discussion. It was claimed that approximately 80% of the country’s adults participated. The final draft was adopted by secret ballot at the 4<sup>th</sup> Plenary Meeting of the 5<sup>th</sup> Session of the 5<sup>th</sup> NPC on December 4<sup>th</sup>, 1982. (*Xianfa, Chugao, 1954*)

The draft of the 1982 constitution was prepared by the CPC’s Central Committee following prolonged, nationwide talks over a span of 2 years. The NPC, which met in December of 1982, officially recognized it. The draft is based on four cardinal tenets of adhering to: (1) a socialist path; (2) the people’s democratic dictatorship; (3) CPC leadership; and (4) Marxism, Leninism and Maoist thought. Chapter 1 of the constitution deals with general principles.

This constitution reflects Deng Xiaoping’s determination to lay a lasting, systematic foundation for domestic stability and modernization. The new state constitution provides the legal basis for broad changes in China’s social and economic institutions, and significantly revises government structure. (*Constitution in China, 2019 & Jianfu, 2008: 53*)

The constitution makes a tentative move towards liberalization, both politically and economically, while insisting on firm control by the party. Thus, the preamble both upholds the so-called “four fundamental principles” and stresses socialist modernization as an essential national task. Article 18 formally provides a constitutional basis for foreign investment and protections in China. Article 11 allows for the development, within the limits prescribed by law, of an individual economy as a complement to the socialist economy. Article 10, for the first time in the PRC’s constitution, defines the ownership of land in China. Hailed as “the best [version] since the founding of the PRC,” the 1982 constitution was thus amended.

## **V. Conclusion**

The theme of late Qing constitutionalism was about expanding the power of the state, if not necessarily of the minority Manchu rulers themselves. As discussed earlier, by this time, both intellectuals and high officials viewed China’s government as weak, dissolute, indecisive, and reactionary, unable to handle the overwhelming challenges posed by foreign encroachment. They all aimed for a new way of structuring power in order to enhance the state’s capabilities. They imagined sharing power, re-organizing structures, and clarifying boundaries. This does not mean that no one was able to identify and value the problem of guaranteeing civil liberties. Duan Fang, the Manchu chief minister, who was under pressure to save both the nation and the Manchu regime, was fully aware – and naturally cautious – of the modern constitution’s limiting features.

Besides neglecting strong Chinese voices for civil liberty, all of these modern critiques were “steeped in 20<sup>th</sup> century Anglo-American liberal ideals,” which assumed the core of the modern constitution to be protecting individual liberties against the abuse of state power, and underemphasized concerns that very much occupied their 19<sup>th</sup>-century predecessors, such as

national power. Those claims also presupposed that the Anglo-American model of constitutionalism was a golden rule for protecting individual liberty from state authority. However, these unwarranted assumptions forget that the English word “constitution” has a muddled history. Even the founding fathers of liberalism might not have trusted individual liberty or limited government as the sole touchstone of modern constitutionalism. Surprisingly or not, many of these founding fathers shared the same dilemma as late Qing constitutional thinkers. To them, from the very start, when the idea of a constitution was put forth by Aristotle and Cicero, it was always employed as a tool to strengthen and perpetuate a political community.

The 1954 constitution is regarded as “relatively flawless.” Thus, the 1982 constitution “maintains and develops the fundamental principles of the 1954 constitution.” As for the chapter “Fundamental Rights and Duties of Citizens,” “the provisions concerning citizens’ rights draw on those of the 1954 constitution.” The 1982 constitution reinstates PRC citizens’ duty to uphold labor discipline and keep public order, a provision that appeared in the 1954 constitution.

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