

WHY LATE QING CONSTITUTIONAL REFORM FAILED: AN EXAMINATION FROM THE COMPARATIVE INSTITUTIONAL PERSPECTIVE

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I. INTRODUCTION: WHY LATE QING CONSTITUTIONAL REFORM FAILED

The Late Qing constitutional reform was a political reform promoted by the Qing government under both internal and external pressure. The reform inherited the Hundred Days' Reform¹ in that both had hoped to achieve a top-down political reform through adopting Western systems. For the Hundred Days' Reform the main obstacle was the lack of consensus within the Qing government, which thereby led to the rise of conflicts between the conservatives led by the Empress Dowager and the reformists led by the Emperor. The main problem for the Late Qing constitutional reform attempt, however, was the tension between constitutional reform and constitutional revolution, or constitutional monarchy and constitutional republic. One popular explanation for the failure of the constitutional reform blames the feudal nature of the Qing government. However, the feudal government in Japan successfully transformed itself into a constitutional monarchy. Another explanation argues that the reform failed because the need of survival suppressed the need of enlightenment, which is critical for constitutional reform. This article reviews both explanations and finds them unpersuasive. Furthermore, it is argued that it is the design of constitutional institutions, especially the power structure in the constitutional reform that leads to the failure.

The article develops into four parts. Part I provides the social background of the constitutional reform and explains why the need of survival was not the major reason for the failure of the reform. Part II provides the major contents of the constitutional reform and explains why it is the power structure that caused the failure of reform. Part III compares the Late Qing reform with Japan's Meiji Restoration and explains the failure of the Late Qing reform from a comparative perspective. And Part IV further explores the legacy of the Late Qing constitutional reform and concludes the article.

II. WHAT CAUSED THE CONSTITUTIONAL REFORM: POSITIVE AND

¹ The Hundred Days' Reform was between June 11 and September 21, 1898. Both Emperor Guangxu (光绪) and Empress Dowager Cixi (慈禧) supported the reform in the beginning. But the reform was later suppressed by conservative political forces headed by Empress Dowager Cixi.

NEGATIVE IMPACTS OF INTERNATIONAL FACTORS

Semi-feudalism and semi-colonialism is considered to be the basic nature of Chinese society before 1949.² Accordingly, the failure of constitutional reforms, including the Late Qing reform was ascribed to foreign attempts of colonization and China's counter-colonization efforts. However, a historical review of the social background of the Late Qing constitutional reform tells a more complicated story. On the one hand, the Qing government was determined to introduce constitutional reform to survive colonization by foreign countries. On the other hand, enlightenment was introduced with the constitutional reform, which was the result of foreign cultural exchange and became part of the constitutional reform.

After the failure of the Hundred Days' Reform, the Qing government became reactionary and began to persecute the reformists. After fleeing abroad, Kang Youwei and Liang Qichao continued to attack the Qing government, advocate for reform and revolution as well as introduce and explain political legal theories and evolution theories through newspapers such as *The China Discussion* (《清议报》) and *Xinmin Po* (《新民报》). Although the Imperial Court of Qing repeatedly tried to ban the newspapers, the publications were sold abroad or in foreign concessions and were therefore largely beyond the reach of the Qing government. Moreover, the ban provoked curiosity among the general population, resulting in a considerable increase in sales of the newspapers and the propagation of new ideas, including freedom, civil rights and constitution.³ Nonetheless, the main stimuli that precipitated the Qing Court's determination to transform itself into a constitutional government was the Boxer Rebellion in 1900 and the Russo-Japanese War in 1905.

A. *The Boxer Rebellion and the Crisis to the Imperial Court*

In 1900, the Boxer Rebellion erupted. During the spring of that year, tens of thousands of peasants living in poverty in the Province of Zhili, who had been practicing spiritual possession and

² Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Gangling (中国人民政治协商会议共同纲领) [Common Program of the Chinese People's Political Consultative Conference] (promulgated by Chinese Pol. Consultative Conf., Sep. 29, 1949, invalidated by Constitution (1954)) pmbl. (Chinalawinfo); Xianfa (宪法) [Constitution] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 4, 1982, amended 2004) pmbl. (Chinalawinfo).

³ According to statistics, the average sales for each issue of *The China Discussion* was around 3,000 to 4,000 and its readers amounted to more than 40,000 to 50,000. See ZHANG PENGYUAN (张朋园), LIANG QICHAO YU QINGJI GEMING (梁启超与清季革命) [LIANG QICHAO AND LATE QING DYNASTY REVOLUTION] 206 (Zhongyang Yanjiuyuan Jindaishi Yanjiusuo (中央研究院近代史研究所) [Institute of Modern History, Academia Sinica] 1999).

supernatural invulnerability, began to call themselves the “Yi He Tuan”⁴ and rise up against foreign forces in China. Initially, they attacked and killed Catholics but soon targeted all Christians, burning down churches and the homes of Christians. The Rebellion spread rapidly towards Beijing and Tianjin. In the beginning, the Qing government adopted a policy of appeasement and non-interference towards the Boxers. Indeed, since the failure of Hundred Days’ Reform in 1898, the Qing government had resumed its ban on association in order to outlaw the various societies and associations flourishing during the reform period. However, on January 11, 1900, the Qing Court issued an imperial decree stipulating that local officials only need to apprehend and prosecute troublemaking crooks and mobsters, and do not need to be concerned about the peaceful villagers practicing martial arts. The decree read:

For the law-abiding commoners, they were either practising skills to defend themselves or organizing with their fellow villagers to defend each other. This is the righteousness of keeping watch and helping each other...When dealing with these cases, local officials only need to ask whether the person was a crook and whether he has caused trouble, and not whether they are organized or educated.

Therefore, this decree was in fact protecting the Boxers. However, since January 1900, British, French, German, American and Italian ministers stationed in China as well as other foreign ministers began to jointly submit petitions to the Qing Court demanding it to outlaw the Boxer organizations. The Qing Court was both afraid of publicly offending the foreign countries and unwilling to publicly outlaw the Boxers. Instead, it issued the decree to “only consider whether the person is a crook or not, and not whether it is organized or not” and to “prioritize the arrest and dissipation of the crowds.” In May, the Boxers began to move towards the Capital. By the end of the month, foreign officials in the Beijing Legation Quarter sensed the looming danger and sought foreign help. On June 1, an international force of 432 navy troops from eight countries disembarked from warships and travelled 120 km by train from Dagou to Beijing to help set up defensive perimeters in the Legation Quarter. In June, under the permission of the Qing Court, the Boxers entered Beijing and soon launched violent attacks against Christians and their churches. On June 10, the foreign legation quarters in Beijing lost contact with the outside world. The foreign forces held an emergency meeting and sent an additional international force of 2,157 sailors and marines (916 British, 540 German, 312 Russian, 158 French, 112 American, 54 Japanese, 40 Italian and 25 Austria-

⁴ Yi He Tuan (义和团) was also referred to as “the Righteous and Harmonious Corps” or “the Boxers” by the American Christian missionaries in China at the time.

Hungarian soldiers) from Tianjin to Beijing by train to defend the missions. Additional foreign forces continued to join the battle. On August 14, after 55 days of gun battles, the over 50-day siege of the Beijing Legation Quarter that began on June 20 finally came to an end, with the crushing defeat and retreat of the Boxers and the Qing army.⁵

On September 7, 1901, the Qing government was forced to sign the *Boxer Protocol*. It required the payment of 450,000,000 taels of fine silver over 39 years as war reparations. Chinese customs income and salt tax were listed as the guarantee of the reparation.

The Boxer Rebellion was an absurd and frenzied tragedy before the fall of the Qing Court. The Rebellion appeared to be fighting the foreigners and foreign religions on its surface, but in fact, it reflected the racial and religious conflicts, which were occasioned by the ignorance and incompetency of the Qing government, under the semi-colonial social conditions during the Late Qing period. On one hand, the privileged status that the foreigners and foreign churches enjoyed in China, which stemmed from the Qing government's defeat and therefore unequal treaties with the foreign forces, triggered general resentment among Chinese, which mainly accounted for the rise of the Rebellion. The Qing government dared not and could not object to those privileges openly. On the other hand, although the Qing government signed various treaties with Western countries, it was still reluctant to resort to diplomatic negotiation or international law. The Qing government not only avoided equal diplomacy with the West, it also constantly and unrealistically hoped to "save face" as the greatest empire as well as "personal face" of the ruler. Therefore, when the "legendary invincible" Boxers rose, Empress Dowager Cixi and her fellow conservatives all held a wishful thinking and attempted to take advantage of the Boxer Rebellion to resist the Western forces and to vent their discontentment. At the early stage of the Boxer Rebellion, the Western countries had repeatedly petitioned to the Qing government, hoping to resolve the issue through diplomatic negotiation. The Qing government, however, intentionally delayed and evaded the issue until the Eight Country Alliance entered the Capital. It even denied its earlier declaration of war against the eleven countries on the grounds that it was under duress of the Boxers.⁶ Thus, by this token, it was the Qing government itself that incurred its own misfortune and humiliation by the Boxer Protocol.

⁵ Lin Huaguo (林华国), *Gengzi Weigong Shiguan Shijian Kao* (庚子围攻使馆事件考) [*A Study of the Legation Quarter Siege in 1900*], 3 *LISHI YANJIU* (历史研究) [HIST. RES.] 57, 57–67 (1991).

⁶ TANG DEGANG (唐德刚), *WANQING QISHI NIAN SI: YI HE TUAN YU BAGUO LIANJUN* (晚清七十年(四): 义和团与八国联军) [*THE SEVEN DECADES OF LATE QING 4: BOXERS AND THE EIGHT-COUNTRY ALLIANCE*] 41–112 (Yuanliu Chubanshe (远流出版社) [Yuan-Liou Pub.] 1998).

Yet, the Protocol imposed a burden on all Chinese who instead had to pay a heavy price for the Qing government's insane decision. The Qing government's tolerance of the Boxers not only led to the murder of many innocent Chinese Christians, but also resulted in a payment of 450 million taels of fine silver for war reparations. After the Rebellion, the reputation of the Qing Imperial Empire was completely ruined. Another consequence of the Rebellion, on the other hand, was a growing sentiment for political reform on the part of the Qing government in order to prevent the fall of the Qing Empire.

*B. Preparation for Constitution-Making and the Five Ministers
Abroad*

In 1901, Empress Dowager Cixi's acquiescence allowed the Qing government to initiate reforms. It proposed to imitate Japan and establish constitutional monarchy. In April 1901, it established the Superintendency of Political Affairs (督办政务处) and began to devise a general plan for a comprehensive reform. Rong Lu (荣禄), Prince Qing (庆亲王) and Li Hongzhang (李鸿章) were appointed as superintendents whereas Zhang Zhidong (张之洞) and Liu Kunyi (刘坤一) were appointed as collaborative advisors. Zhang and Liu had jointly submitted three memorials to the throne – *The Three Joint Submissions for Reform from Jiang and Chu* (《江楚会奏变法三折》) – pointing out the direction of the reform, which was to follow Japan and establish constitutional monarchy. In 1905, as a “tiny island country,” Japan successfully defeated Russia, one of the great powers of Europe. Japan's victory in the Russo-Japanese War further roused the constitutional camp's call for the implementation of constitution within the Qing government. On July 16, 1905 (Year 31 of Guangxu era), the Grand Secretariat, under imperial order, issued a decree titled “An Imperial Edict Sending Zai Ze and Others Eastward and Westward on a Mission to Study Foreign Politics.” Officials including Zaize (载泽), Dai Hongci (戴鸿慈), Xu Shichang (徐世昌) and Duan Fang (端方) were sent abroad to “study all forms of politics in the hope of selecting the good ones to follow.” On September 24, 1905 (the 26th day of the 8th month in Year 31 of Guangxu era), due to the revolutionist Wu Yue's (吴樾) assassination attempt on the five Ministers (Zaize, the Defender Duke, Dai Hongci, the Minister of Revenue, Xu Shichang, the Assistant Minister of Defence, Duan Fang, the Governor of Hunan and Shao Ying, the Right Minister of Commerce) at Zhengyang Gate Station, the mission was forced to postpone. On October 27, 1905, the Qing government redirected Shang Qiheng (尚其亨), the Administrative Commissioner of Shandong, and Li Shengduo (李盛

铎), the deputy prefect of Shuntian, to voyage abroad together with Zaize, Dai Hongci and Duan Fang.

On December 7, 1905, Dai Hongci and Duan Fang, the first group of the study abroad mission set sail. One after another, they visited thirteen countries—Japan, the United States of America, the Great Britain, the French Republic, the German Empire, the Kingdom of Denmark, the Kingdom of Norway, the Austro-Hungarian Empire, the Russian Empire, the Kingdom of the Netherlands, the Swiss Confederation and the Kingdom of Italy. On January 14, 1906, Zaize led the second group, Shang Qiheng and Li Shengduo, and visited five countries—Japan, the United States of America, the Great Britain, the French Republic and the Kingdom of Belgium.⁷ The commissions, throughout their journey, received high standards of reception at the fourteen countries. The Ministers had the opportunity to visit and study the parliaments, the executive institutions, schools, churches, industries, farms, banks, prisons, post offices, theatres, museums, zoos and botanical gardens in each of the countries. They also met with the politicians and scholars in each country and collected a variety of documents and literature. On November 25, the Qing government established a specialized political reform institution, the “Institute of Political Study” (考察政治馆), to study constitutional governance in different countries and to provide advice on constitutional reform.

Between the summer and fall of 1906, following their return to China, the commissions compiled 133 volumes of *Nations Politicians* (《列国政要》) and 18 chapters of *The Essentials of Political Administration in Europe and America* (《欧美政治要义》) and submitted a study report urging that “a strong country need to have a constitutional government.” The report was drafted by the retinue Xiong Xiling (熊希龄). The drafter had consulted the constitutional research materials written by Liang Qichao, who was taking refuge in Tokyo at that time, and Yang Du (杨度). Zaize and Duan Fang’s support of constitutionalism exerted a relatively great influence. Following the report, Zaize also published *A Journal of the Study on Politics* in the summer of 1908.

On September 1, 1906 (the 17th day of the 7th month of Year 32 of Guangxu era), the Qing government issued a decree declaring that it had begun to prepare for establishing constitutionalism. In 1907, the Institute of Political Study was changed to the Institute of Constitutional Compilation (宪政编查馆), with Yikuang (奕劻)

⁷ GUGONG BOWUYUAN MINGQING DANG’AN BU (故宫博物院明清档案部) [Department of Archives of Mingqing Dynasties in the Palace Museum], QINGMO CHOUBEI LIXIAN DANG’AN SHILIAO SHANG (清末筹备立宪档案史料 上) [HISTORICAL ARCHIVES OF THE PREPARATION FOR CONSTITUTIONALISM IN LATE QING 1] 1–3 (Zhonghua Shuju (中华书局) [Zhonghua Book Company] 1979) [hereinafter Historical Archives].

appointed as the Minister. Shen Jiaben (沈家本) and Yang Du were appointed as members of the Institute. Yikuang provided support to the legislative drafting. In the same year, the Preparatory Office for the Provisional Assembly (资政院筹备处) was established. Pulun (溥伦) and Sun Jianai (孙家鼐) were appointed Directors. In August 1908, the Qing government issued the *Outline of the Imperial Constitution* (《钦定宪法大纲》) (“The Outline”), the *List of Annual Preparatory Work* (《逐年筹备事宜清单》) as well as three appendices including “Civil Rights and Duties of Officers and Citizens,” “Essentials of Parliamentary Procedure” and “Essentials of Election Procedure.” The documents stipulated that the election for local assemblies and the central national Provisional Assembly would take place in the following year and the Constitution would be prepared over a nine-year period. The Outline showed strong indications of imperial sovereignty, but fundamentally, it also reflected the principle of separation of powers. It stipulated that the officers and common citizens have the rights to free speech, writing, publication, assembly, association, property ownership as well as the right to vote and to be elected as a member of the assembly. At the same time, the Qing government also loosened restrictions on newspapers and political parties.

In November 1908, Emperor Guangxu and Empress Dowager Cixi passed away consecutively within two days. The two-year-old Puyi (溥仪) succeeded the throne with his father Zaifeng (载沣), brother of Emperor Guangxu, serving as the regent. In order to further centralize the power in the hands of the royal family, Zaifeng used Yuan Shikai's (袁世凯) foot problems as an excuse to remove Yuan from his position and send him home to grow lotus flowers. In 1911, the first Cabinet was established. However, more than half of its members were Manchus and from the royal clan. It was nicknamed the “Princes’ Cabinet” by its critics in the constitutionalist camp. The constitutionalists were disappointed and believed that the Qing government in fact had no real intention to establish a constitutional government. They gradually came to sympathize with and lean towards revolution. On August 19 of the same year, the Xinhai Revolution broke out. On October 30, Empress Dowager Longyu issued a penitential edict, lifted the ban on the formation of political parties and agreed to organize a true Cabinet without favouring the close royal followers or nobles. Subsequently, Yuan Shikai was appointed as the Prime Minister of the Cabinet. Yuan led his troops into the Capital in the name of sending more men to the battlefield and dispatched the royal guards away from the Capital. Hence, the fate of the royal Manchu family fell entirely into the hands of Yuan. On November 3, the Qing government issued the *Nineteen Important Constitutional Articles*.

On January 1, 1912, the revolutionists established the Provisional Government of the Republic of China in Nanjing. Yuan forced the Qing Emperor to abdicate. Finally, on February 12, Emperor Puyi announced his abdication. The Qing Empire had come to an end.

To sum up, although foreign countries' occupation of sphere of influences and attempts to colonize China challenged the independence of Chinese sovereignty and the authority of the Qing government, it was not the major hindrance to the constitutional reform. On the contrary, Qing Government's interaction with foreign countries created incentives to explore constitutional government and introduce it into China.

III. THE NEW CONSTITUTIONAL REFORM IN LATE QING AND THE IMBALANCE IN POWER STRUCTURE

In order to facilitate a successful constitutional reform, different interest groups shall be able to express their principles and goals of the reform on a communicative forum and through practical institutional arrangements.⁸ However, the Late Qing constitutional reform did not provide such a forum and the various interest groups eventually gave up their hopes to compromise with the Qing government through constitutional reform.

The Late Qing constitutional reform can be divided into three periods. The first period emphasized educational reform. The second period focused on bureaucratic reform. And the third period concentrated on constitutional reform.

In the early stages of the reform, only three policies were actually followed through: the abolition of the old imperial examination system, the establishment of new style schools, and sending students to study abroad. On June 3, 1901, Zhang Zhidong petitioned for reforming the imperial examination system. On July 26 of the same year, Zhang, together with the Viceroy of Liangjiang, Liu Kunyi, jointly submitted a memorial petitioning for the reform of imperial examinations of liberal arts and the abolition of imperial examinations for martial arts. They also advocated for the establishment of Western schools and the gradual elimination of the imperial examination system within 10 years. To that end, on August 29 of the same year, the Qing government declared that beginning in the year 1902, in accordance with the recommendations of Zhang Zhidong, liberal arts examination would undergo reform and martial arts examination would be abolished. For the examination of liberal arts, the first exam was five essays on Chinese political and historical

⁸ See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, DUKE L.J. 364, 373–76, 386–94 (1995).

events. The second exam was five essays on foreign political arts. The third exam was two essays on the Four Books and one essay on the Five Classics. In addition, students were not allowed to use the format of the eight-legged essay, nor would calligraphy skills be one of the evaluation criteria. On March 13 of the next year, Yuan Shikai and Zhang Zhidong petitioned again to the throne for the gradual reduction of imperial examination quota so that the new schools could develop without as much hindrance. On January 13, 1904, the Qing government declared that it would abolish the imperial examinations entirely within ten years in response to the recommendations of Zhang and Yuan. Ultimately, on September 2, 1905, the results of the Russo-Japanese War prompted Viceroy of Zhili, Yuan Shikai, General of Shengjing, Zhao Erxun (赵尔巽), Viceroy of Huguang, Zhang Zhidong, Viceroy of Liangjiang, Zhou Fu (周馥), Viceroy of Liangguang, Cen Chunxuan (岑春煊) and Governor of Hunan, Duan Fang to jointly petition for the complete abolition of imperial examinations. The Qing government took the advice and abolished the thousand-year-old imperial examination system.

The abolition of imperial exams, the rise of new schools and sending students to study abroad had deep impacts on China. From 1905 to 1906, more than 8,000 were funded publicly or privately to study in Japan. These people later exerted great influences to both constitutional and revolutionary movements. The young military officers in the Southern New Army had also either studied in Japan or provincial military schools. Many of them, therefore, held revolutionary ideas. The implementation of new policies, on the other hand, seemed to have accelerated the collapse of the Qing Empire.

In 1906, the five Ministers had returned to China from their study of constitutional reform in European and American countries. The constitutionalists within the Qing government all started to petition for reform. The Defender Duke, Zaize, who had sailed to Europe, stated, in his "Secret Petition for Constitutional Reform," that "the most powerful countries are the ones who constitutionalize the last, for they were subject to little foreign impacts and therefore, their countries' situations were shaken more slowly. Nonetheless, even for a country as strong as Russia, it was still provoked by its defeat by the East. It had no other ways to reconstitute but to constitutionalize in the hope of recovering its strength. If we take a look around the world today, no matter how strong or weak, or how big or small the country is, they have all one after another chosen the constitutional

path. Therefore, from them, we can see the general trend.”⁹ In July 1906 (Year 33 of Guangxu era), Yuan Shikai, together with Zhou Fu and Viceroy of Huguang, Zhang Zhidong, petitioned to implement a constitutional government within a twelve-year period. They also requested the commissioning of high and noble officials to study politics abroad.¹⁰ Subsequently, when Governor of Hunan, Duan Fang, was summoned to the Imperial Court and accepted the position of Viceroy of Minzhe, Duan also repeatedly recommended the implementation of constitutionalism. Ultimately, under the strong appeal of constitutionalists, on September 1, 1906, the Qing government declared that it would prepare to constitutionalize. However, although the imperial decree entitled “A Decree Declaring the Establishment of the Official Bureaucratic System in Advance of the Preparation for Constitutionalism” was commonly called the “Decree for Imitation of Constitutionalism,” its original title had clearly revealed that its focus was in fact on bureaucratic reform. The decree reads,

Upon the Imperial Order of Empress Dowager Cixi,

Since the founding of our Dynasty, there had been generations of sage emperors succeeding one after another. Their wise policies had been passed on, all of which had made concessions based on the needs of the time and were made into law. Today, across the world, the transportation, political and legal systems of the foreign countries all had corresponding trends. In our country, however, the political system remained the same one that was accumulated from the ancient times. Every day, our country is getting closer to closer to danger. Crises are looming. Unless we can openly seek wise knowledge and reform our systems, upwards, we would let down our ancestors’ founding wish and downwards, we cannot meet the officers’ and commoners’ hope for prosperity and peace. Therefore, we have sent high Ministers to various countries to study and investigate their governmental systems and administrative methods. Now, Zaize and other Ministers

⁹ (奏请宣布立宪密折) [*Secret Petition for Declaration of Constitutionalism from Zaize, Minister Sent to Study Foreign Politics Abroad*]. See GUGONG BOWUYUAN MINGQING DANG’AN BU (故宫博物院明清档案部) [DEPARTMENT OF ARCHIVES OF MINGQING DYNASTIES IN THE PALACE MUSEUM], *supra* note 7, at 173.

¹⁰ (宪政考察奏折) [*Petition from the Yuan Shikai, Viceroy of Zhili, to Send Ministers to Germany and Japan to Study Constitution and to Send Close Royal Relatives to the Great Britain and Germany to Study Politics and Weapons*]. See GUGONG BOWUYUAN MINGQING DANG’AN BU (故宫博物院明清档案部) [DEPARTMENT OF ARCHIVES OF MINGQING DYNASTIES IN THE PALACE MUSEUM], *supra* note 7, at 202.

have returned, and in their report, all submitted their opinion from their study and investigation that the weakness and inefficiency of our country is due to the lack of close connection between the government and the people, and the complete 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 do not know how to defend the country. The other countries are wealthy and strong primarily because they have adopted a constitution, by which all people are united as one with the Crown and all are in constant communication. Wise opinions are widely sought after and adopted. Powers are well divided and defined. Financial matters and legislations are discussed and decided upon by the people. Moreover, other countries look to one another for improvement. They amend their constitutions and change their laws to achieve the highest efficiency. This is why their governments are in such a good working order and their people live in great happiness and harmony.

At the present, we can only study and verify in detail without delay and attempt to implement a trial constitution. The supreme power will remain with the Imperial Court, but common political affairs will be determined through public deliberation so that we may set the cornerstone for another ten thousand years of good governance of our country. However, at present, no definite plan has been decided upon and the people are not educated enough for a constitution. If we adopt one hastily and regardless of the circumstances, it will be nothing more than a paper constitution. If so, how can we stand before the people and ask them to have faith in us again? Therefore, in order to clear the accumulated corrupt practices and clarify accountability, we must start from the bureaucratic system. We should immediately deliberate and agree upon the new bureaucratic system first and reform the systems orderly one after another. We should also carefully draft the codes of law, and then widely promote education, clean up the finances, reorganize and improve the military defence, establish general police patrol and educate the common people about political affairs so that our country can prepare the foundation for constitutionalism. I hereby direct all officials to devote all their efforts in the revitalization of our country and strive for good results. We will conduct an evaluation in a few years and examine the circumstances then. At that time, we can consult the constitutions in other countries and set a timeline for implementing the constitution. We will set the timeline based

on the progress. I hereby direct all provincial administrative and military leaders, viceroys and governors, commoners and scholars who are aware of this decree to make a determined effort, to understand the meaning of patriotism and the principle of progressing together. Do not harm the collective interests for private gain. Do not damage the greater plan for small bitters. Respect order and defend peace. This way, I can have high hope that our country and our people are prepared to constitutionalize.¹¹

The next day after the declaration of the “Decree for Imitation of Constitutionalism,” the Qing government ordered Zaize, Shixu (世续), Natong (那桐), Rongqing (荣庆), Tieliang (铁良), Dai Hongci and Yuan Shikai to jointly draft a bureaucratic reform proposal. In September 1906, the Qing government issued a decree setting out the new central bureaucratic system, replacing the Six Ministries with Eleven Ministries, temporarily retaining the Grand Secretariat and the Grand Council, changing the name for the Court of Judicial Review from “*Da Li Si*” (大理寺, literally, the Temple of Grand Justice) to “*Da Li Yuan*” (大理院, literally, the Court of Grand Justice) and establishing the Provisional Assembly and Audit Council. However, the bureaucratic reform in late Qing did not achieve the objective of “retaining the supreme power with the Imperial Court, but determining common political affairs through public deliberation.” This further triggered discontent from several sectors of society. The underlying reason is that there remained three major issues with the bureaucratic reform. First, the bureaucratic reform emphasized more on administrationve than political participation. Second, the reform focused on the centralization of power rather than decentralization. Third, the reform did not resolve the increasing racial conflict between Manchu and Han, or in other words, the issue of Qing’s tribal rule.

A. The New Reform Prioritizing Government Administration over Political Participation

Although the late Qing constitutionalists and revolutionists chose different paths to constitutionalism, they both had hoped to achieve political participation. However, for the Qing Dynasty, the purpose of constitutionalism was to maintain social order and stop the

¹¹ *Yushi Yubeilixian Xianxing Liding Guanzhi Lun* (预示预备立宪先行厘定官制论) [*Decree Declaring the Establishment of the Official Bureaucratic System in Advance of the Preparation for Constitutionalism*]. See GUGONG BOWUYUAN MINGQING DANG’AN BU (故宫博物院明清档案部) [DEPARTMENT OF ARCHIVES OF MINGQING DYNASTIES IN THE PALACE MUSEUM], *supra* note 7, at 43–44.

revolution. Therefore, the Qing government was quite reluctant to respond to the public call for “convening the parliament” even though the Decree of September 1906 mentioned, “all common political affairs will be made public.” The existing Provisional Assembly could only discuss political affairs rather than actually participate in political decision-making.

Before the Sino-Japanese War in 1894, the issue of political reform had yet been raised. At the time, most of the determined modernization supporters treated the preservation of the Chinese traditional ways as the most fundamental objective. Gradually, however, the political corruption and the weakening of the country prompted the intellectual community to rethink China’s traditional governance system. In Wei Yuan’s (魏源) *Illustrated Treaties on the Maritime Kingdoms*, 1842 (《海国图志》), he introduced, in an affirmatory tone, the democratic systems at the time in countries such as Great Britain and the United States of America. The book explained the British parliamentary system, which held the power relationship between the Parliament and the Crown, as well as the powers of the Upper House (House of Lords) and Lower House (House of Commons) within the Parliament. He also affirmed that when responding to the public will, the Parliament must adopt the principle that “[the proposal] be passed if the public approves it; it be rejected if the public disapproves it.” The book also praised the US election pattern, where a “supreme leader” (President) is selected by popular will every four years, describing it as “a unique transformation of both past and present bureaucratic systems.” He also complimented that “all proceedings, hearings, official elections come from the people; it is passed if the public approves, it is rejected if the public disapproves; it is good if the public thinks it is good, it is bad if the public thinks it is bad.” In the 1940s, in a printed version of Liang Yunnan’s (梁廷楠) *On the United States* (《合省国说》), Liang introduced and explained the US democratic republic system in detail. In his book, Liang noted that the distinguishing feature of such system was “[n]o man can interfere with the law,” which, in other words, meant the rule of law. The book praised the United States for “establishing the fundamental law even before having chosen a supreme leader.” The first Chinese scholar advocating for the idea of imitating the Western constitutional monarchy system was Zheng Guanying (郑观应), who did so in his 1875 book, *Yi Yan* (《易言》). In the same period, Wang Tao (王韬) expressed a similar idea, referring to the Western constitutional monarchy system as a “co-ruling system of the Crown and the people.” He believed that such system conformed to the “systems of the three generations (i.e. the generations of the three sage kings, Rao, Shun and Yu), which was a form of ideal governance that had

long existed in China.¹² Feng Guifang (冯桂芬) (1809–1874), who advocated for “Chinese learning as the essence; Western learning as practical use,” combined the Western parliamentary system with China’s national development fairly early. In his 1861 book, *Essays of Protests from the Study of Jiaobin* (《校邠庐抗议》), Feng analyzed the reason why China was defeated by Western powers. He pointed out that “it was not due to the wrong timing, being at the wrong place or the lack of sufficient recourses; it was because our people were indeed not as good.” The latter can be shown through the fact that “we cannot measure up to the foreigners who leave no talented people idle, who leave no resource of the land unused, who leave no communication barrier between the government and the people, and who ensure that the practice can always match with the name.” However, the main measures that Feng proposed to remove the communication barriers between the Crown and his subjects, such as “public punishment,” “re-establishment of local county-level offices,” and “allowing for self-explanation,” all consisted of bureaucratic reform and were unrelated to democracy. Feng, too, believed that these measures stemmed the “systems of the three generations of the sage kings.”

The Chinese hoped to improve the functioning of social systems through reform, but at the same time, rejected the idea of changing the existing customs or political organizations. Before the Sino-Japanese War, Zheng Guanying praised the parliamentary system, describing it as “a place for public discussion of political affairs” where “the thoughts and opinions of many are solicited, and the administration and appointment of people are the most equitable; the system is indeed excellent and the intention is indeed good.” Zheng also compared the British parliamentarians with the court advisors (议郎, *yilang*) in the Han dynasty and the official censors and remonstrators in the Tang and Song dynasties. He believed that because the latter benefitted from the grace of the Crown, they would not disregard their gratitude. In addition, among the parliamentarians, there were an even proportion of officials and gentry, and they were all generally selected from the people, so that it might be easier for them to understand the hardships of the people.¹³ After the Sino-Japanese War, Zheng focused on the parliamentary system again. He compared the composition of the parliament and the election of members among several European

¹² Wang Tao (王韬), *Zhong Min Xia* (重民下) [*To Respect the People 3*] in TAOYUAN WENLU WAIBIAN (弢园文录外编) [ADDITIONAL COLLECTION OF ESSAYS FROM THE TAO GARDEN] 65–67 (Zhongzhou Guji Chubanshe (中州古籍出版社) [Zhongzhou Ancient Works Publ. House] 1998).

¹³ Zheng Guanying (郑观应), *Yiyuan Shang* (议院上) [*On Parliament 1*] in SHENGSHI WEIYAN (盛世危言) [WORDS OF WARNING TO A PROSPEROUS AGE] 95–97 (Zhongzhou Guji Chubanshe (中州古籍出版社) [Zhongzhou Ancient Works Publ. House] 1998).

countries including Great Britain, France, Germany, Austria-Hungary, Poland, and Greece to show that the Western countries “used public discussion as the cornerstone of its politics...the Crown cannot abuse the people and the people would naturally be loyal in serving their Crown.” Moreover, during the Hundred Days’ Reform, Kang Youwei and Liang Qichao advocated for the establishment of a parliament and the joint governance by the Crown and the people.¹⁴

During the constitutional period in late Qing, the intellectual community had a deeper understanding of the parliamentary system. Two representative thoughts arose: the national sovereignty and the imperial sovereignty. The factions differed in their understanding of the status and nature of the parliament. The national sovereignty supporters believed that the parliament had the nature of an institution and was a component of the power of the state. Parliament was not an auxiliary institution but an independent lawmaking institution. A privy council only had chairman and councillors, whereas a parliament was different. On the other hand, supporters of imperial sovereignty believed that even though a parliament might have an independent will, it was still an institution of the state, serving to express the force of desire and the force of reason for the state. “When you are thirsty, you desire drinking and when you are cold, you desire clothing. This is the force of desire.” “To comment on whether the food, drink or clothing is appropriate or not is called the force of reason.” Therefore, according to supporters of imperial sovereignty, a parliament is a state institution for implementing the directorial system, but, it was neither an institution representing the people, nor a representative institution, because “the significance of an election is nothing but the selection of people who can meet the qualifications of a councillor in terms of morality, knowledge and experience. It was not intended so that the voted will represent the voter.”¹⁵ So the primary function of a parliament was to enable the discussion of issues related to the survival and development of the state and citizens through a directorial method. It was an institution for “political discussion” rather than for political participation.

With respect to the nature of the parliament, national sovereignty supporters maintained that, in principle, as opposed to unicameralism, a bicameral system was not only inefficient, but also

¹⁴ For example, see Kang Youwei (康有为), *Qing Dinglixian Kaiguohui Zhe* (请定立宪开国会折) [*Petition for Constitutionalism and the Convening of Parliament*] and *Qing Junminhezhi Manhanbufen Zhe* (请君民合治满汉不分折) [*Petition for Non-Discrimination and Joint-Governance by Manchu and Han*] in KANGYOUWEI WENXUAN (康有为文选) [COLLECTIONS OF ESSAYS OF KANG YOUWEI] 399–400, 401–04 (Xie Xialing (谢遐龄) eds., Shanghai Yuandong Chubanshe (上海远东出版社) [Shanghai Far East Publ. House] 1997).

¹⁵ BAO TINGLIANG (保廷梁), *DAQING XIANFA LUN* (大清宪法论) [On the Constitution of the Great Qing] 128 (Japan Shukousya Press 1910).

inferior to unicameralism in that it “distinguished between the noble and the common, which would increase the gap between the classes.” However, whether to adopt bicameralism or unicameralism depended on the particular national level and historical progress at the time. On the issue of parliamentary reform, they believed that the Upper House should have three qualification restrictions: family background, education, and wealth. For the Lower House, on the other hand, it should adopt a regional representative system. They proposed to follow the example of Japan and limit the election qualification based on factors including age, domicile, and tax payment. Supporters of imperial sovereignty also advocated for the implementation of bicameralism in China. However, since they believed that elections were simply used by the state to “show that there are moral, knowledgeable and experienced people among its citizens and to grant these people with legal personalities to organize the parliament so that they may express the force of desire and force of reason for the state,”¹⁶ and insisted that the power of the Crown was superior to that of the Constitution, they maintained that the composition of the Upper House should follow the British House of Lords, requiring members to have either noble or royal background, and that the qualification for the Lower House should also be subject to special restrictions.

In the midst of debates and controversy, in 1907, the Qing Court ordered the establishment of Provisional Assembly within its central government. However, the Provisional Assembly was not a parliament. Rather, it was an institution with some parliamentary features before the formal establishment of a parliament in Qing. The powers of the Provisional Assembly included resolving annual revenue and expenditure, budgeting and final accounts, codes and rules of law, state bonds and tax rate, as well as other affairs turned over by imperial order. However, the resolutions of the Provisional Assembly must be submitted jointly with the Grand Councillors and the Ministers for review by the Emperor. Following the passage of the *Outline of the Imperial Constitution* in 1908, the Qing government also planned to make certain preparations each year before officially convening the parliament. These included making arrangements for the establishment of provincial assemblies in the same year (the first year), which would be delegated to the provincial viceroys and governors. Nonetheless, similar to the Provisional Assembly, the provincial assemblies were also merely local provisional decision-making institutions. Even though both imperial decrees and statutes granted provincial assemblies the power to resolve on provincial affairs as well as on matters including financial

¹⁶ *Id.* at 125–28.

budgeting and final accounts, tax, public bond, amendment of provincial legislation and election of members for the Provisional Assembly, for all resolutions passed by the provincial assembly, they might only become effective upon the approval of the viceroy or governor. "A legislative assembly is where civil rights are. And the so-called civil rights are the right to speak, not the right to execute...In addition, a provincial assembly is merely a collection of the public opinions in the province and cannot compare with the central national assembly. Therefore, the boundaries for its words and actions must be particularly set out in definite. There cannot be any overstepping."¹⁷ Under such guiding principle, neither the Provisional Assembly nor the provincial assembly was able to play a role in lawmaking or political decision-making based on the public will. In 1909, elections were held for the Provisional Assembly and the provincial assemblies. In 1910, the Provisional Assembly convened its first session. Among its members, 98 councillors were elected by the people and 101 were selected by the Imperial Court. The imperially selected councillors consisted of 16 people from royal families holding prince, duke or hereditary titles, 12 people from Manchu and Han noble families with hereditary titles, 14 people from vassal states with prince, duke or hereditary titles, six people from the royal Gioro families, 32 officials from the five councils, 10 high-ranking Confucian scholars and 10 top taxpayers. Furthermore, one chairman, one vice chairman and one secretary general were also selected imperially. The 98 elected councillors were selected by the people in name, but in fact, they were elected among the provincial assemblies. Since the provincial assembly was formed through indirect election, the "democratic election" component in the elected councillors was also quite small. As the Provisional Assembly was formed in such a manner, naturally, it would be reluctant to interfere with actual government administration. It was not until the break-out of revolution next year that the status of the Council finally became more significant.

B. The New Reform Prioritizing Centralization over Decentralization of Power

Directory and decentralization are special measures based on tradition and reason to limit centralized governance. Jointly, they facilitated the foundation of modern executive management and

¹⁷ *Daqing Fagui Daquan* (大清法规大全) [*Complete Collection of the Laws of Qing*] in ZHONGGUO JINDAI XIANZHENG XIANFA SHILE (中国近代宪政宪法史略) [OVERVIEW OF THE MODERN CONSTITUTIONALISM IN CHINA] 76 (Jiang Bikun (蒋碧昆) eds., 1988).

constitutionalism.¹⁸ The objective of decentralization is to prevent the mutual encroachment of different functional departments. It can also prevent state power from being centralized in the hands of one department, resulting in power centralization and infringement of citizens' liberty rights. The traditional bureaucratic system in China also contained mutual checking mechanisms. However, such measures always involved the appointment of two or more officials in the same position to achieve mutual restraint. For example, a ministry always had seven superior officials and a province always had a viceroy, a governor, two commissioners and several circuit intendants. These were all intended to prevent encroachments of power and achieve mutual restraint, but such arrangements could also easily cause mutual obstruction among the officials, who would shift responsibility to each other. In regard to decentralization in the traditional Chinese bureaucratic system, enlightened thinkers initially affirmed the rationality of the principles of separation of powers as well as the checks and balances of power in theory. In *The Complete Book on Veritable Order and Public Law* (《实理公法全书》) drafted before the Hundred Days Reform (i.e. before 1898), Kang Youwei, from the perspective of geometric principles, asserted that "laws should be made through a mutual restraint system. For all people on Earth, past or present, none can escape from the system of mutual restraint."¹⁹ Kang maintained that "if laws are made through a favour and adverse system, for all people on Earth, past and present, everyone will have someone they can restrain and someone that can restrain them...therefore, there will be people that play with and abuse power but they will also be inferior to and restrained by somebody."²⁰ In the memorial drafted by the acting Censor Song Bolu (宋伯鲁) titled "Memorial seeking prompt imperial decisions to save the country from crisis, for reform has an order of its own," the Kang follower specifically pointed out the main contents of the principle of separation of powers:

In Western principles of governance, there is a principle of the "tripartite separation of powers." The tripartite powers are

¹⁸ See Max Weber's discussion on directory and decentralization. Max Weber, JINGJI YU SHEHUI SHANG (经济与社会 上) [ECONOMY AND SOCIETY I] 271 (Lin Rongyuan (林荣远) trans., Commercial Press 1997).

¹⁹ Kang Youwei (康有为), *Zonglun Renlei Men* (总论人类门) [On the General Discussion of Humanity] in KANG YOUWEI QUANJI (康有为全集) [COMPLETE COLLECTION OF THE WORKS OF KANG YOUWEI] 279 (Shanghai Guji Chubanshe (上海古籍出版社) [Shanghai Ancient Works Publ. House] 1987).

²⁰ Kang Youwei (康有为), *Shili Gongfa Quanshu* (实理公法全书) [The Complete Book on Veritable Order and Public Law] in KANG YOUWEI QUANJI (康有为全集) [COMPLETE COLLECTION OF THE WORKS OF KANG YOUWEI] 280 (Shanghai Guji Chubanshe (上海古籍出版社) [Shanghai Ancient Works Publ. House] 1987).

comprised of legislative officials, executive officials and judicial officials. The political system of a country is like the body of a human being. Those who legislate are like its mind. Those who act as executive officials are like its hands and feet. Those who adjudicate are like its eyes and ears. Each branch carries out its own official functions and together they form a body to smoothly carry out state affairs.²¹

At the same time, Kang was opposed to the overlapping of state institutions, believing that the malpractice of China lied in “its territory too large and the low-ranking officials too few and sporadic.”²² Therefore, it is apparent that the separation of powers mentioned here really meant the separation of functions. It emphasized the coordination of power and not its restraint. This argument can be proven through the Late Qing reforms. Other than emphasizing the separation of functions among the three government powers, Kang also asserted that the government should pay attention to the power distribution between the central government and local administration. In 1902, Kang criticized his contemporaries’ view in his book, *Opinions on the Chinese reform* (《中国改制议》), stating that “the political system is formed after the separation of powers among legislative, executive and judicial branches are established” and asserting that such views come from “those who only learned the most superficial part of Western politics and Western theories.” Kang believed that the political power in a country can be divided into three levels. “The government in the Capital is the governance of the country. The self-governance of commoners is the governance of the people. Between the country and the people is the governance of officials. Without the governance of the people, the country will be without its foundation. A country cannot stand without its foundation. Without the governance of officials, the country will be without its institutions. A country cannot function without its machinery. If a country cannot stand or function, it will be useless.”²³

In addition, the New Reform in Late Qing had originally hoped to prioritize the reform of the Province system and the implementation

²¹ KONG XIANGJI (孔祥吉), *Kang Youwei Bianfa Zouyi Yanjiu* (康有为变法奏议研究) [THE STUDY OF THE REFORM PETITIONS OF KANG YOUWEI] 294 (1988).

²² Kang Youwei (康有为), *Yu Hong Youchen Gei Jian Lun Zhongxi Yixue Shu* (与洪佑臣给柬论中西异学书) [Discussing the Differences Between Chinese and Western Theories with Hong Youchen] in Kang Youwei Quanj (康有为全集) [COMPLETE COLLECTION OF THE WORKS OF KANG YOUWEI] 537 (Shanghai Guji Chubanshe (上海古籍出版社) [Shanghai Ancient Works Publ. House] 1987).

²³ Kang Youwei (康有为) *Zhongguo Gaizhi Yi* (中国改制议) [Opinions on the Chinese Reform], in SHANGHAI ANCIENT RELICS PRESERVATION COMMITTEE (上海市文物保管委员会), *WUXU BIANFA QIANHOU: KANG YOUWEI YIGAO* (戊戌变法前后: 康有为遗稿) [BEFORE AND AFTER THE HUNDRED DAYS’ REFORM: THE LEGACY OF KANG YOUWEI] 293 (1986).

of a responsible government, but neither was ultimately realized. The reason why the establishment of a responsible government was heavily resisted by the Qing government was that the Qing government believed that the overall general administrative power should be shared by multiple officials; otherwise, it might give rise to the centralization of power in one individual, which might in turn encroach on the power of the Crown. As a result, the central administration system did not undertake any material reform. The vision for a reform of the provinces also did not come to fruition. After the Taiping Rebellion, the authority of the central government was weakened drastically. Southern and Eastern provincial governors openly disobeyed imperial orders and took liberty to act as they wished during the Rebellion. Yet, they were rewarded by the Imperial Court after the fact. Viceroys and governors across the country showed the tendency to withdraw from central control. The centralization system began to collapse. One of the objectives of the late Qing reform was to weaken the powers of local viceroys and governors and to build a central unified political system, placing the provinces under the authority of the Ministries, rather than under the emperor together with the Ministries.²⁴ However, this measure met with strong resistance. Ten years later, the rebellious movement of the Southern revolutionists became more aggressive. In 1911, the rebels rallied the new armies in each of the provinces and initiated the Xinhai Revolution in the city of Wuchang. The Southern provinces directly defied the rule of Qing and either self-declared its independence or stood idle and watched. Ultimately, Yuan Shikai forced the Qing Emperor to abdicate, which finally led to the founding of the Republic of China.

C. The New Reform failed to resolve the Manchu-Han conflicts arising from Qing's tribal rule

The constitutionalists in Late Qing primarily consisted of Han scholars and gentry. They became increasingly discontented with the Manchu nobles monopolizing central political power. Intense conflicts occurred on end during the meetings at the Provisional Assembly and provincial assemblies. In order to accelerate the convening of parliament, the constitutionalists organized multiple petition movements, requesting a prompt establishment of parliament, but the petitions were rejected each time. Furthermore, the reform of the administration system antagonized the Manchu and Han bureaucrats. In May, 1911, a responsible government system was finally established within the central government. The former

²⁴ *Guangxu Shilu Juan* (光绪实录卷) [The Chronicles of Emperor Guangxu] VOL. 574, 6–7. Neiwu (内务) [Internal Affairs] in 8 *DONGFANG ZAZHI* (东方杂志) [E. MAG.] 401–24 (1878).

Grand Secretariat, Grand Council and Superintendency of Political Affairs were abolished. The new Cabinet consisted of thirteen members including one Prime Minister, two Deputy Ministers, Minister of Internal Affairs, Minister of Finance, Minister of Education, Minister of Army, Minister of Navy, Minister of Justice, Minister of Agriculture, Industry and Commerce, Minister of Mail and Communications, Minister of National Minority Affairs, and Minister of Foreign Affairs. Among the thirteen Cabinet members, eight were Manchu and five were Han; and among the eight Manchu members, five were from the royal family. Hence, the power of the central government was further centralized in the hands of Manchu. At the same time, through promoting locally powerful Han officials (such as Zhang Zhidong and Yuan Shikai) into the central administration system, the Qing government was able to weaken the Han officials' power in local administration.

The "Princes' Cabinet" made many constitutionalists feel that the Qing government was hopeless and beyond saving. Many of them hence turned to revolution and became the antagonists and gravediggers of the Qing government. The centrifugal tendencies of the constitutionalists and their ultimate disappointment with the rule of Qing brought about grave consequences for the Qing Empire. Within seven weeks after the onset of the Wuchang Uprising, fifteen provinces followed the advice of their provincial assemblies and declared independence one after another. One major contributing factor was the fact that the constitutionalists, mostly the Han people, had given up on the Qing government.

Moreover, the abolition of the imperial examination system also exacerbated the Manchu-Han conflict. Due to the implementation of the new education system, the termination of imperial exams and eight-legged essays caused hostility against the government from many scholar-officials. In addition, the new modern schools introduced Western knowledge. The younger generation was bathed in Western liberal and democratic thinking. This was particularly the case for young students studying abroad, especially those studying in Japan.²⁵ The new generation of youngsters either organized or joined revolutionary groups. They believed that to save China, the despotic Manchu government must be overthrown.

In sum, when the Qing government was facing crisis but the whole society still had hope for constitutionalism, the Qing government did not seize the opportunity and make heavy policy

²⁵ For the sympathy and participation of the revolutionist movement by students studying in Japan in late Qing, see SANG BING (桑兵), QINGMO XIN ZHISHI JIE DE SHETUAN YU HUODONG (清末新知识界的社团与活动) [THE SOCIETIES AND ACTIVITIES OF THE NEW INTELLECTUAL COMMUNITY IN LATE QING] 147-48, 330-53 (Sanlian Shudian (三联书店) [Joint Publ.] 1995).

reforms to implement a representative political system. Rather, it merely abolished the former imperial examination system and reformed the old bureaucratic system. In doing so, the Manchu-Han conflict was not mitigated. The scholar-officials had many discontents but lacked a political venting channel to voice those. At the same time, due to the lift on restrictions of freedom of speech and freedom of association, criticisms of the government grew increasingly intense. Yet, the governance of the Qing Imperial Court declined rapidly and finally collapsed altogether.

IV. CHINESE MODEL OF ENLIGHTENED DESPOTISM IN COMPARISON WITH JAPANESE CONSTITUTIONAL REFORM

Although the traditional Chinese governance philosophy shares some similarities with modern constitutionalism, the governance system in existence before the constitutional movement in Late Qing did not manifest as fundamental laws of the country. Rather, it was scattered amongst the various Confucian classic works. Therefore, the constitutional movement in Late Qing marked the beginning of a written constitution in China. In the early 20th century, the majority of the countries in the world still used the monarchy system, with a few exceptions such as the United States and France. In Asia, only Japan implemented a constitutional monarchy. Hence, although it is undeniable that the failure of the constitutional reform in Late Qing was caused by the stubbornness, conservatism and, the many deeply embedded corrupt practices within the Qing government, objectively speaking, it was not just the Qing Imperial Court that was conservative; the long-existing Chinese governance philosophy and even the governance philosophy of the entire world at the time were conservative. The reason why the constitutional reform in Late Qing was able to launch was that the constitutionalists and the conservatives were able to reach a consensus on the implementation of a constitutional monarchy system with characteristics of enlightened despotism. However, the failure of the constitutional reform in late Qing could also be attributed to that specific choice of the Japanese and German models-based constitutional monarchy.

A. Enlightened Despotism and Constitutional Monarchy

The concept of enlightened despotism stemmed from the concept of developmental stages of state law in theories of socio-cultural evolution. Towards the end of the 19th century and the beginning of the 20th century, works of evolution theorists such as Charles Darwin, Herbert Spencer and Thomas Henry Huxley were introduced into China. Chinese intellectuals advocating for political reform often analyzed the Chinese society based on the evolution

framework. Constitutional research in China was also deeply influenced by social evolution theories. Those intellects believed that the evolution of state law was also along the path from non-existence to existence and from immaturity to maturity, and that the evolution of state law can be roughly divided into three stages. The first stage was in the 17th century, when monarchial power was at its height. Louis XIV once said “I am the law,” but in fact, it was a lawless era. The second stage was in the 18th century, when individualism flourished. “Everyone knows that the king is also a person.” Hence, laws began to be made in order to regulate the power of the Crown and state institutions. However, the state law during this period was still imperfect and this era was only the “semi-enlightened era.” The third stage was between the 18th and 19th century. “The emperor and the officials were regulated by the constitution made by parliament and therefore, this was the enlightened era.”²⁶ In the framework of the evolution theorists, a political society was a evolutionary process from chaos to good governance. When the society reached a certain stage, its laws should also be adjusted correspondingly and cannot be developed ahead of the phase of social reality. It was the evolutionary progress of the state and its state laws that determined China should implement a form of enlightened despotic constitutional monarchy. Therefore, according to the sociocultural evolution theorists, since the Chinese people were under-educated and lacked constitutional understanding, China must first proceed through the stage of enlightened despotism.

More importantly, enlightened despotism was considered to be the main feature of Japanese and German constitutional monarchy and was highly praised by people of all sectors. The Japanese constitutional theorists with great influence in China at the time, such as Kakehi Katsuhiko (筑克彦) and Tatsukichi Minobe (美浓部达吉), had all explained the Japanese and German constitutional monarchy system with the concept of enlightened despotism. The Chinese intellects had also realized that this concept could bridge the gap between the humanism in traditional Chinese governance philosophy and Western democratic philosophy. The self-strengthening supporters, reformists, and constitutionalists were all simultaneously influenced by both Confucian classics and Western new thoughts. They had all attempted to find a way to revise the monarchy system with the Chinese traditions, especially with the governance tradition of the “Three Generations” of ancient sage kings, Yao, Shun and Yu. They in turn reached a consensus on enlightened despotism.

²⁶ LUO JIE (罗杰), GUOFA XUE (国法学) [THE STUDY OF STATE LAW] 98–100 (Tokyo Namiki Prg. 1905).

For the reformers, the government form in enlightened despotism should be designed as constitutional monarchy. As Kang Youwei stated, the “reform” should “adopt the central principle of Peter the Great of Russia as its central principle, and the governance system of Meiji of Japan as its governance system.” The first part of the statement was intended to emphasize the top-down means of reform adopted by Peter the Great; the latter was referring to the constitutional monarchy system established following the Meiji Restoration in Japan.²⁷ The constitutionalists within the Qing government also started to accept the concept of enlightened despotism. The *Outline of the Imperial Constitution* was compiled and drafted by the Institute of Constitutional Compilation in name, but in fact, Zaize was the main drafter. In the book *Nations Politicians* written and edited by Dai Hongci and Duan Fang, although it explained the constitutional system and parliamentary procedure in each country in detail, it did not discuss any concrete legal theories and placed particular emphasis on the constitutionalism in monarchy countries. On the other hand, when Zaize was studying constitutional governance in Japan, Itō Hirobumi gave lectures to the Manchu royalty on the Japanese Constitution in the Kyū Shiba Rikyu Garden. Itō only addressed parts of the provisions governing the power of the monarch in his talk and briefly mentioned a few provisions as examples. However, surprisingly, Zaize and others actually drafted the Imperial Constitution of Qing based on Itō’s lectures. Therefore, the Outline was copied from Japan for the most part and particularly emphasized the supremacy of the power of the Crown.²⁸ In fact, during this period, the most influential constitutional theorist in Japan was the liberal constitutionalist Tatsukichi Minobe. However, when the High Ministers of Qing visited Japan, explanations of the Japanese Constitution were given by the Prime Minister Itō Hirobumi. This may be an accidental occurrence in history, but if associated with Qing government’s own

²⁷ In *Faguo Chuangxini Yange* (法国创新沿革) [*The Prosperity and Evolution of France*] (1906), Kang Youwei also analyzed and stated that “the two countries [France and Germany] were founded simultaneously, but when they become more powerful than the other depended on whether the power of the Crown was centralized or not.” See SHANGHAI WENWU BAOGUAN WEIYUAN HUI (上海文物保管委员会) [SHANGHAI ANCIENT RELICS PRESERVATION COMMITTEE], *supra* note 23, 350 (1986).

²⁸ For Itō Hirobumi’s constitutional theory, see Riben Xianfa Jieshi (日本宪法解释) [Explanations of the Japanese Constitution] [Shanghai Commercial Publ.] 1904). The book was extremely devoted to the protection of the power of the Emperor and criticized the European practice for vesting the power to legislate with the parliament or for using the law to bind both the high and low classes of people. It called Japan as having “the most extraordinarily right state system and the emergence of its power is unique.” On the other hand, it called the separation of powers in the Great Britain passivism whereas Japan’s principle of “laws must come from royal proclamation” activism. The words in the book are so strong that it was not surprising at all for Zaize and other high officials to believe it. However, from the constitutional history of the Meiji era in Japan, the Meiji Constitution was actually the result of great concessions made by the royal family for civil rights.

interest in enlightened despotism, there is actually some sense of inevitability.

On August 27, 1908 (The 1st day of the 8th month of Year 34 of Guangxu Era), Qing government issued the *Outline of the Imperial Constitution*, in which it stated:

1. The Empire of Qing shall be reigned over and governed by a line of Emperors unbroken for ages eternal.
2. The Emperor is sacred and inviolable.
3. The Emperor gives sanction to laws and orders them to be promulgated and executed.
4. The Emperor convokes the Parliament, opens, closes and prorogues it, and dissolves the House of Representatives. After the Parliament is dissolved, representatives no longer enjoy any privileges.
5. The Emperor determines the organization of the different branches of the administration. Ministers assist the Emperor. The Parliament shall not interfere with the Emperor's executive power.
6. The Emperor has the supreme command of the Army and Navy. The Parliament shall not interfere.
7. The Emperor declares war, makes peace, and concludes treaties. Foreign affairs shall be determined by the Emperor. The Parliament shall not interfere.
8. The Emperor declares a state of martial law. In case of emergency, the Emperor shall be able to restrict the subjects' liberty.
9. The Emperor confers titles of nobility, rank, orders and other marks of honor.
10. The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor. All judges shall be appointed by the Emperor. Important cases must be approved by the Emperor.
11. There is a separation of decree and legislation. Legislation is for judicial application. Decree is for executive enforcement. Legislations shall not be revised by decrees.
12. When urgent necessity arises, an extraordinary session may be convoked, in addition to the ordinary one.
13. The expenditures of the Imperial House shall be defrayed every year out of the National Treasury, according to the present fixed amount for the same, and shall not require the consent thereto of

the Imperial Diet, except in case an increase thereof is found necessary.

- 14.A Regent Rites shall be deliberated by the Emperor, the royal family and authorized ministers. The Parliament shall not interfere.

Compared with the 1889 Meiji Constitution of Japan and the power vested in the Emperor of Japan, Qing's *Outline of the Imperial Constitution* granted more power to the Emperor of Qing and mentioned very little, if any, the mechanism that can truly reflect the spirit of democratic constitutionalism, such as the convening of parliament and legislative assemblies as well as the establishment of cabinet. In contrast, in the Meiji Constitution, in addition to Chapter I Emperor, there were in fact seven chapters with 76 provisions in total designated for "Rights and Duties of Subjects," "The Imperial Diet," "The Ministers of State and the Privy Council," "The Judicature," "Finance," and "Supplementary Rules." Therefore, one may say that Qing's *Outline of Imperial Constitution* was in fact short on enlightenment but quite excess on despotism. Its protection of the power of the Crown was to far surpass that in the Meiji Constitution.

B. Imperial Constitution versus Constitutional Monarchy

The Decree mentioned above proclaiming the *Outline of the Imperial Constitution* and approving the petition of the Institute of Constitutional Compilation had established a nine-year timeline for the preparation of constitutionalism. It listed all the items to be completed in each year and contemplated the final adoption of a constitution by 1917 (Year 42 of Guangxu Era).²⁹ Two months after the proclamation of the *Outline of the Imperial Constitution*, Emperor Guangxu and Empress Dowager Cixi died within days of each other. Emperor Xuantong succeeded the throne and the Emperor's father, Zaifeng, the Prince Chun, acted as regent. In the same year, the Provisional Assembly and the provincial assemblies were established timely as planned. However, all sectors of society hoped to accelerate the political reform and shorten the preparation period for the constitution. In the fall of 1909, after the inauguration of the provincial assemblies and under the planning and leadership of Zhang Jian (张謇) from the Jiangsu Provincial Assembly, a large-scale petition movement for convening a parliament quickly formed.

²⁹ Xianzheng Biancha Guan Zizheng Yuanhui Zou Xianfa Dagang Ji Yiyuan Fa Xuanju Fa Yaoling ji Zhunian Choubei Shiyi Zhe (Fu Qingdan Er) (宪政编查馆资政院会奏宪法大纲暨议院法选举法要领及逐年筹备事宜折 (附清单二)) [Memorial of the Institute of Constitutional Compilation and the Provisional Assembly with respect to the Outline of the Constitution, the Principles of Parliamentary Law and Election Law and the Annual Preparation Items (Two Lists Annexed)]. See GUGONG BOWUYUAN MINGQING DANG'AN BU (故宫博物院明清档案部) [DEPARTMENT OF ARCHIVES OF MINGQING DYNASTIES IN THE PALACE MUSEUM], *supra* note 7, at 55–67.

After the representatives from each province arrived at the capital, they organized the “United Comrade of Petition for Losing No Time in Convening Parliament.” They filed the petition with the Censorate and also lobbied before the Grand Councillors and Ministers. Some of the high officials had agreed with the implementation of constitutionalism in private. However, on January 30, 1910, the Qing government issued a Decree denying the petition and maintaining the original nine-year timeline. The second petition occurred. The representatives of the third petition changed the name of “United Comrade of Petition for Losing No Time in Convening Parliament” to “United Comrade of Petition for Immediately Convening Parliament.” In order to expand the influence of the movement, in addition to organizing the “Coalition of Provincial Assemblies”, the petitioners also gathered representatives from abroad and from all occupations and professions. The crowd assembled in the capital to petition once more, but unfortunately, the Qing government once again denied the petition sternly and ordered that no one shall be allowed to bring any more petitions in the future. In the fourth petition in 1910, the representatives filed their petition to the Provisional Assembly. At the same time, over 10 viceroys and provincial governors telegraphed the central Qing government expressing their support and approval of the petition. Under pressure, the Qing government finally declared to shorten the preparation period by three years and announced that parliament would convene in 1913.³⁰

In 1911 (Year 3 of Xuantong Era), following the onset of the Wuhan Uprising, the Qing government held an emergency meeting with the Provisional Assembly in order to win over the popular support and salvage the crisis situation. The majority of the Provisional Assembly proposed that first, Manchu royalty and nobles shall not participate in politics; second, the drafting of the Constitution shall be assisted and approved by the people; third, the ban on political party shall be abrogated immediately. These proposals were approved by the Qing government within a few days. However, these measures could not slow down the tide of revolution. Zhang Shaozeng (张绍曾), the Beiyang Army General in charge of the 20th Division, who was stationed in Luanzhou at the time, along with Lan Tianwei (蓝天蔚), contacted Wu Luzhen (吴禄贞) and other military personnel in secrecy. Together, they engineered a military remonstrance and submitted the “Twelve Political Petition Opinions” to the Qing government. Under pressure, the Qing government accepted Zhang’s proposal in its entirety, among which

³⁰ JING ZHIREN (荆知仁), *ZHONGGUO LIXIAN SHI* (中国立宪史) [THE CONSTITUTIONAL HISTORY OF CHINA] 138–43 (1984).

was the clause that the Constitution should be drafted “based on the monarchy constitution of the Great Britain.” The Provisional Assembly, therefore, drafted a constitution, the *Nineteen Important Constitutional Articles*, with the British parliamentary system as the blueprint in accordance with Zhang’s proposal. Under the social circumstances at the time, Zhang’s proposal that the constitution should be made “based on the monarchy constitution of the Great Britain” in fact referred to the need to weaken the power of the Crown and to adopt a constitutional principle similar to that of Great Britain, which was aimed at restricting the power of the Crown and whose core constitutional philosophy was “constitutional monarchy.”³¹

The *Nineteen Important Constitutional Articles* was the first written constitution of China. Its contents can be found below.

Article 1 The Qing Dynasty shall reign forever.

Article 2 The Emperor shall be heavenly and inviolable.

Article 3 The power of the Emperor shall be limited by a Constitution.

Article 4 The order of succession to the throne shall be prescribed in the Constitution.

Article 5 The Constitution shall be drafted and adopted by the Provisional Assembly and promulgated by the Emperor.

Article 6 The power of amending the Constitution belongs to the Parliament.

Article 7 The members of the Upper House shall be elected by people from among those particularly eligible for the position.

Article 8 The Parliament shall elect and the Emperor shall appoint the Prime Minister. The Prime Minister shall recommend and the Emperor shall appoint the other members of the Cabinet. The Imperial Princes shall never be eligible to be appointed as the Prime Minister, Cabinet Ministers or executive leaders of each province.

Article 9 If the Prime Minister, on being impeached by the Parliament, does not dissolve the Parliament, he must resign, but one Cabinet shall not be allowed to dissolve the Parliament more than once.

Article 10 The Emperor shall assume direct control of the army and navy, but when the power is used with regard to internal affairs, he must abide the special conditions to be decided by the Parliament; otherwise the Emperor is prohibited from exercising such power.

³¹ WANG SHIJIE (王世杰) & QIAN DUANSHENG (钱端生), *BIJIAO XIANFA (比较宪法)* [COMPARATIVE CONSTITUTION] 401–02 (1999).

Article 11 Imperial decrees cannot be made to replace the law except in the event of immediate necessity, in which case decrees in the nature of a law may be issued in accordance with special conditions, but only when they are in connection with the execution of a law or what has by law been delegated.

Article 12 International treaties shall not be concluded without the consent of the Parliament, but the conclusion of peace or a declaration of war may be made by the Emperor; if the Parliament is not sitting, the approval of the Parliament is to be obtained afterwards.

Article 13 Ordinances in connection with the administration shall be settled by Acts of the Parliament.

Article 14 In case the Budget fails to receive the approval of the Parliament, the Government cannot act upon the previous year's Budget nor may items of expenditure not provided for in the Budget be appended to it. Further, the Government shall not be allowed to adopt extraordinary financial measures outside the Budget.

Article 15 The Parliament shall fix the expenses of the Royal Household and any increase or decrease therein.

Article 16 Regulations in connection with the Royal Family must not conflict with the Constitution.

Article 17 The two Houses of Parliament shall establish the machinery of an administrative court.

Article 18 The Emperor shall promulgate the decisions of the Parliament.

Article 19 The Provisional Assembly shall act upon Articles 8, 9, 10, 12, 13, 14, 15 and 18 until the convening of the Parliament.

Thus, the imperial constitution based on enlightened despotism came to an end in China. However, the enlightened despotism did not. Following the Xinhai Revolution, Liang Qichao proposed a centralized presidential system, which still originated from the concept of enlightened despotism.³² Furthermore, Sun Yat-sen's

³² There have always been two lines of thinking in constitutionalism in China. One attempted to find the causes within the system, whereas the other tried to start with the people and emphasize the importance of democratic enlightenment. Compared to his teacher Kang Youwei, Liang Qichao had always had doubts in relying on the Emperor to implement reform whether it was before or after the Hundred Days' Reform. In his essays such as Liang Qichao (梁启超), *Lun Junzheng Minzheng Xiangshan Zhili* (论君政民政相嬗之理) [*On the Principle of Evolution from the Government of the Crown to Government of the People*] (1897), Liang expressly proposed that the replacement of Crown power by civil power was an inevitable trend in the development of history. He combined the Western capitalist political theories with the traditional Chinese theory of "Three Ages" by Gong Yang, and asserted that the evolution and development of human society shall follow such a pattern, from an Age of government by multiple monarchs to an Age of government by one monarch and finally to an Age of government by the people. The three big stages can also be divided into six smaller stages. The Age of multiple monarchs can be further divided into the age of chiefs and the age of feudal lords. The Age of single monarch can be divided into the age of monarchy and the age of joint rulership by the monarch and the people. The Age of people's government can be divided into the age of presidency and the age of no presidency. Kang

theory of political tutelage also contained traces of enlightened despotism. Even some modern Chinese theorists still assert that nowadays China is not yet ready to implement direct elections for representatives of the People's Congress or government officials because the Chinese people are under-educated and lack sufficient democratic understanding. Hence, enlightened despotism has great influence on China.

C. Why the Japanese Meiji Restoration Model did not work in China

The failure of the constitutional reform in Late Qing can be traced to Qing's choice to adopt the Japanese Meiji Constitution as its model. Geographically, Japan is China's neighbour and its cultural customs have been deeply influenced by Confucian traditions. During its own constitutional movement, Japan was also facing the threat of Western colonialism. However, the issues to be solved during the constitutional movement in Late Qing were quite different from those in Japan during the Meiji Era.

First, Japan built feudalism prior to the Meiji Restoration. The Japanese Emperor had already lost his power. The real power was in the hands of the Tokugawa shogunate. There was also the issue of local separatism. Therefore, although the Meiji reform was called a "Restoration," its slogans were "return the power" and "restore the power of the Emperor." It needed to restore the Emperor's governance and re-establish a centralized government through movements overthrowing the shogunate. In June 1869, the Meiji government implemented the policy of abolishing the *han* system

believed that the Age of multiple monarchs corresponds to the Age of chaos in Gong Yang's theory of the "Three Ages." Correspondingly, the age of one monarch is the Age of peace and moderate happiness and the age of the people's government is the Age of great community in Gong Yang's theory. Liang used historical facts to concretely demonstrate the development from multiple monarch to one monarch and finally to people was a gradual and orderly evolutionary process from hardship to happiness, from evil to good, from chaos to good governance and from barbaric to civilized. Leaving the question of whether this claim is scientific or not, its extremely realistic aggression at the time is very obvious. This is because according to this claim, the Qing regime belonged to the age of monarchy within the Age of one monarch, whereas other countries including the Great Britain, Japan, United States and France were either in the age of joint-rulership within the Age of one monarch or in the age of presidency within the Age of people's government, which were all more advanced than Qing. Therefore, it can be inferred that the proposal by the reformists to replace monarchy with joint-rulership was exactly following the pattern of historical development and falling within the order of human evolution. This way, Liang Qichao demonstrated the legitimacy of implementing civil power in China from both the vertical and horizontal aspects of historical development and global circumstance. First, he thinks that there is a necessary connection between despotism and obscurantism, and between government of the people and education of the people. Civil power is directly proportional to the education of people, "this is why power and education are mutually dependent. In the past, when you want to depress civil power, the first and foremost is to obscure the education of people. Today, when you want to promote civil power, the first and foremost is to extensively educate the people." Liang Qichao (梁启超), *Xinmin Shuo* (新民说) [*History of Modern Chinese Democratic Philosophy*], in *XINMIN CONGBAO* (新民丛报) [XINMIN SERIES] (1936).

and instituted a centralized structure. It also reformed the land system and encouraged the development of industry and commerce, which all contributed to the establishment of a uniform market in Japan. Therefore, it is appropriate to understand the Meiji Constitution as protecting the power of the emperor solely on this basis. However, the issues faced by China during late Qing were different. The developmental barrier in Qing originated from the centralization of power in the hands of the emperor himself. The Qing government emphasized farming and suppressed commerce and closed its borders to the outside world. These policies resulted the lack of vitality in the country. Blindly following Japan's centralization of power was not only simply useless in solving the developmental problem; it also further exacerbated the social conflicts and ultimately endangered the authority of the emperor.

Second, even though Japan also revered Confucianism, they also worshipped *Bushido* (the way of the warrior). Samurai may carry weapons (Samurai sword), suggesting that before the Meiji Restoration, the Japanese central government was not capable of controlling the armed forces or legitimately monopolizing the force. The Meiji Restoration stripped away the privileges of the Samurai class and prohibited the carrying of weapons by Samurai, making the government the sole legitimate armed force. This measure facilitated social equality in Japan as well as provided labour resources to the new markets. China did not face such problems as the Qing government practiced centralization. The Central government was the sole owner of legitimate armed force. The emergence of privileged class in the Qing Dynasty was the result of its tribal rule, which led to the special status of Manchu both politically and economically. However, the New Policies in Late Qing were not devoted to the removal of the racial privileges in the beginning. Instead, the conflict between Manchu and Han people was intensified because of the widespread discontent among the scholars and gentry class, which primarily consisted of Han people, with the abolition of the imperial examination system. Even though the Self-Strengthening Movement introduced advanced Western technology and production, they were always led by the government. The vast majority of the new industries were either state-operated monopolies or with governmental background. Therefore, they were incapable of stimulating economic development of the market or generating much public benefit.

Third, although Japan was also facing threats of colonialism at the time of the Meiji constitutional movement, the threat came from the United States alone. In 1853, Matthew Calbraith Perry, Commodore of the United States Navy, led his ships into Uraga, Kanagawa and demanded Japan to establish diplomatic relations and

trade with the United States. In 1854, Japan signed the “Japan–US Treaty of Peace and Amity” with the United States, agreeing to open up trading ports to the United States and offering it the Most Favoured Nation treatment. This unequal relationship between Japan and the United States was the triggering event for the “movement to overthrow the shogunate.” However, unlike China’s negative attitude towards foreign relations after mid-Qing, Japan had actively facilitated legal reform to establish the principle of judicial independence. Therefore, the United States did not insist on its original demand of extraterritoriality. In contrast, the Qing government adopted an ostrich policy. It was neither willing to fundamentally accept the rules of modern international relations nor reform its legal system. Rather, it chose to give away its extraterritoriality on a silver platter, not only damaging the judicial sovereignty of the country but also creating legal inequality between Chinese people and foreigners. It thereby protected the privilege system of foreigners in China.

Fourth, the basis for legitimacy for the Japanese government was different from that of the Chinese government. Japan had a uniform ethnic group thus it had only class conflicts but no racial conflicts. The timeless, unbroken lineage of the Japanese emperors was both the legitimacy and reality basis for achieving reform and restoration. In contrast, China had been through many dynasties. The emperors claimed to be under the mandate of Heaven, but it is believed that “the Heaven’s mandate is not constant” since the ancient times. The highest power was not attached to a single family or a family name. “The most virtuous one will have it.” Therefore, to emphasize a timeless and unbroken lineage in the Chinese Constitution has no real substantive basis and can have nothing but a declarative purpose. This declaration only revealed the naked truth that the Qing government was merely greedy for power and did not intend to devote to the good governance of China. Hence, it in fact weakened the legitimacy of Qing’s regime.

In summary, the problem faced by Japan was the excessive decentralization of power, whereas China needed to solve the problem of power centralization. The merit that China could take from Japan was the reform on its legal system, and the undesirable portion should be Japan’s reform on its constitutional system. Unfortunately, the constitutional movement in Late Qing did not consider the actual circumstances in China at that time. Ultimately, Qing’s New Policies not only failed to realize the wealth and prosperity in China as Meiji Restoration did in Japan, it further exacerbated all aspects of social conflicts and accelerated the fall of Qing.

V. THE LEGACY OF THE LATE QING CONSTITUTIONAL MOVEMENT

Although the constitutional reform movement in Late Qing ended in failure, the concept of constitutionalism and civil rights found their way into the people's minds. The period of the New Policies began the amendment of laws, making them more responsive to the demands of the modern spirit of the rule of law. These helped to lay the cornerstone for the founding the Republic of China and the Chinese constitutional system.

A. *The Concept of the Constitution as the Fundamental Law*

Etymologically, the characters “宪” (*xian*) and “法” (*fa*) can both be found in Chinese historical documents. The character *xian* itself has meanings of “law” and “decree,” as in the word “宪令” (*xian ling*, which means decree). Another example is the phrase “Reward the good and punish the evil. This is the law (宪法, *xian fa*) of the state” from *Discourses of the States* (《国语》). However, even though the word constitution (宪法, *xian fa*) exists in traditional China, there was no constitutionalism in the political sense. Using the word constitution to refer to the supreme law of a country actually originated from Japanese. In the Qing dynasty, constitutionalism was also called state law, and the study of state law was “the study of the pure legal principles of the state. Its scope is quite large. It is called the study of state law because it is about the laws on the organization and function of state governance.”³³ Thus, this shows that the most central issue in the study of constitutionalism at the time was the organization of state governance.

From the popular constitutionalist books at the time, we can see that Chinese understanding of the constitution in Late Qing was already quite similar to that in the West. This includes understanding that the constitution is the fundamental law of a state and that the contents of a constitution roughly contain the allocation of state power, the composition of state institutions, the principles governing the exercise of state power, and the basic rights and duties of citizens. The categorization of constitutions in Late Qing went beyond written and unwritten constitutions as there was an emphasis on the distinction between imperial constitutions and constitutions by agreement. Among the category of constitutions by agreement, there are constitution by concerted agreement (negotiated between and made by the emperor and the officials, such as the case in Great Britain), constitution by people's agreement (negotiated and made by the people, such as the case in France), and constitution by state

³³ Luo, *supra* note 26, at 5.

agreement (negotiated and made by agreement of several united states, such as the case in the United States of America). Based on methods of amendment, constitutions can also be categorized into fixed constitution and flexible constitution. It is obvious that the original intent of the constitutional movement in Late Qing was to create and make a so-called constitution by agreement, or more specifically, a constitution by agreement between the monarch and his subjects, and not a constitution by agreement of the people. However, there were controversies over which type of constitution by agreement was the most appropriate for China.

Establishing the constitution as the fundamental law of the state and within the legal system has great significance. In particular, the affirmation of supremacy of the legal effects of the constitution can set the theoretical foundation for implementing constitutional guarantees, just as what Albert V. Dicey stated in his book, *Introduction to the Study of the Law of the Constitution*: “The theory propounded aims only at proving that when constitutional understandings have nearly the force of law they derive their power from the fact that they cannot be broken without a breach of law. No one is concerned to show, what indeed never can be shown, that the law can never be defied, or the constitution never be overthrown.”³⁴ The meaning of a fundamental law can be understood from different perspectives. First, a fundamental law means that the Constitution has the status of supreme law within a state’s legal system. Second, a fundamental law is a law that can terminate state actions. Finally, a fundamental law means that it is the source of legitimacy for all laws. The concept of fundamental law during the constitutional period in Late Qing was limited to the first meaning. When discussing the characteristics of a constitution, Bao Tingliang (保廷梁) pointed out that “[a] constitution is the fundamental law of a state or the general law for all state laws. Its status is elevated just like the North Star in the sky. The other laws are the stars surrounding it. Just as when a tree has roots, its branches and leaves would flourish, and when water has a source, it will flow endlessly, when a country has a constitution, all laws will have a source. This is the inevitable truth. Therefore, if you want to know the main principles of a country’s political system, you must examine its constitution, for the constitution is the foundation of a country. If you want to understand the main purpose of a country’s laws, you need to read its constitution, for the constitution is the general principle of all state laws. If you want the country to be in order without laying down its foundation, or if you want the laws to integrate into a system without

³⁴ ALBERT. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, 300–01 (1982).

setting out a general principle, it will be like expecting a tree to bloom without its roots or water to flow endlessly without a source. How will it be possible?”³⁵ This passage precisely expressed the basic feature of the constitution as a fundamental law.

The concept of the constitution as a fundamental law should be reflected institutionally. Specifically, it should be reflected in the rules governing the amendment and application of the constitution. First, as the fundamental law, the procedures for amendment, curing, and repeal of the constitution is different from those for other laws. In regard to the procedure for constitutional amendment, the authority for initiating an amendment proposal is different in a monarchy and in a parliamentary democracy – the former rests with the monarch whereas the latter with the parliament and the people. There are also two ways of curing the constitution, either through appointing a special commission or through the legislature. Both methods contain various restrictions including (A) quorum required for members in attendance and members in approval; (B) restrictions with respect to the elapse of time between multiple resolutions; (C) restrictions with respect to bring a matter for resolution twice; and (D) restrictions with respect to time duration. In terms of the repeal of constitutional provisions, there were criticisms about the existing two perspectives in the Japanese constitutional jurisprudence at the time. It was argued that the theory of non-repealability was overly rigid, whereas the repealability theory was overly neglecting of reality. The latter only took into consideration the overarching power of the Crown. Therefore, scholars advocated for the adoption of the doctrine of limited repealability.

Secondly, as the fundamental law, the legal effects of the constitution are not only superior to that of the private laws, but also superior to that of all other domestic public laws. Particularly in a monarchy system, all non-constitutional laws are only binding on the people but not the Crown, whereas for the constitution, it is binding on both. Even for scholars who believed that constituent power was vested in the Crown and that the Crown is not accountable constitutionally, they agreed that the Crown would “voluntarily submit himself to restrictions for the sake of the greater good of the country.”³⁶ With respect to the status of the constitution within the entire legal system, the relationship among all other laws is an interdependent relationship. The different departmental laws have different scopes of application; the nature or substance of one law cannot be changed for another law. The making of the constitution, on the other hand, will impact all other laws as all laws must follow

³⁵ Bao, *supra* note 15, at 30.

³⁶ Bao, *supra* note 15, at 45.

the spirit of the constitution. If a law was in conflict with the constitution, it would either need to be amended or it would lose its legal effects. Thus, it is clear that, as opposed to ordinary laws, the constitution has a stronger legal effect. Amendments to ordinary laws only require the approval of the Two Houses and the Crown. The procedure was also fairly simple. The procedure to amend the constitution is much more complex and solemn, requiring multiple resolutions. Furthermore, scholars have also elaborated in detail on the scope of application of the constitution both in terms of timing, subjects, and territorial jurisdiction.

However, the two constitutional documents of Late Qing show us that the main features of the constitution as a fundamental law were not fully realized. Not only was the *Outline of the Imperial Constitution* of 1903 drafted under the oversight of the Crown, the entire contents of the document had only established the overarching power of the Crown (the rights and duties of the people are only found in the supplementary clauses in the appendices). In addition, there was no mentioning of the status of the Constitution itself and its amendment procedures. It was in the *Nineteen Important Constitutional Articles* of 1911 that we begin to see the fundamental nature of the Constitution. In particular, the concept can be reflected in provisions such as “The power of the Emperor shall be limited by a Constitution” (Article 3), “The order of succession to the throne shall be prescribed in the Constitution” (Article 4), “The Constitution shall be drafted and adopted by the Provisional Assembly and promulgated by the Emperor” (Article 5), “The power of amending the Constitution belongs to the Parliament” (Article 6), as well as “Regulations in connection with the Royal Family must not conflict with the Constitution” (Article 16).

Finally, in terms of the application of the Constitution as the fundamental law, its legal effects are not only superior to private laws but also superior to all other domestic public laws. This is in the nature of the Constitution as limiting rights. For the Crown, having a Constitution means that the emperor shall “voluntarily submit himself to restrictions for the sake of the greater good of the country.”³⁷ However, from the constitutional reality in Late Qing, the paramount status of the Constitution within the entire legal system was not recognized in practice. In other words, although scholars recognized the substantive significance of the Constitution, within the governance order of the entire country, the Constitution was still inferior to the power of the Crown and was not the supreme order. This reflected the disjointed reality between constitutional theories and actual political practice in Late Qing.

³⁷ Bao, *supra* note 15, at 45.

B. The Evolution of the Thinking of Civil Rights

The concept of civil rights in the Late Qing and early Republic era was a combination of the 18th and 19th century European democratic theories and the traditional Chinese people-oriented philosophy. During the Hundred Days' Reform, the reformists, starting from the objective of the reform, used the civil rights theory of the Western bourgeoisie class as the ideological weapon to galvanize the reformist constitutional movement. The reformists praised the Western bourgeoisie's proposition of natural civil rights, believing that natural civil rights conformed to the "truth." They advocated for the rise of civil rights and opposed absolute despotism. After the failure of the Hundred Days' Reform, the entire reform efforts come to nothing and the social atmosphere turned extremely depressing. Reformists advocating for civil rights were attacked by conservative die-hards. This oppressive atmosphere and the overwhelming sense of losing freedom (especially the freedom of thought and freedom of speech) made more and more people realize that to change the traditional feudal despotic system, it not only required an institutional reform, but more importantly, it required an ideological revolution that allows all citizens to realize the value of their existence and recognize the rights they naturally deserve. In an article called "The Study of Country" (《原国》), the author pointed out that, "The so-called country...from an external perspective, means that it can survive the cession of land, the change of dynasties or the cycling of governments, but the only event that it cannot survive is the loss of sovereignty...From an internal perspective, the people, the Crown and the officials are under the country...For the so-called country, who really owns it? The answer is: it belongs to everyone, even the street peddlers and menial labourers can own it; it does not belong to anyone, even the emperors and lords cannot own it. It belongs to everyone because for any person that owes a duty to the country, he is a citizen of that country, that is to say he cannot escape from that duty within the country. It does not belong to any one because every person in the country enjoys rights that they deserve, that is to say if all powers fall in the hands of one individual and that person abuses his despotic power, the country will not tolerate it."³⁸ Therefore, rights are related to the independence of an individual within the country and the vesting of state power.

However, this concept of linking rights with the independent personality of citizens was not a mainstream thought. Yan Fu (严复),

³⁸ See *Yuan Guo* (原国) [*The Study of Country*], GUOMIN BAO (国民报) [NATIONAL], May 10, 1901, at A1, reprinted in 1 *Xinhai Geming Qian Shinian Jian Shilun Xuanji* (辛亥革命前十年间时论选集 上) [Collection of Commentaries in the Decade Before the Xinhai Revolution 1] 64 (Zhang Zhan (张枬) & Wang Renzhi (王忍之) eds., 1960).

the most prominent scholar in the area of the study of freedom and rights, did not fully agree with this view. In his 1903 translation and edit of John Stuart Mill's *On Liberty* (Yan Fu's version was titled "On the Power Boundaries between the Group and the Self" 《群己权界论》), Yan gave a detailed account of his views on freedom: We must understand that the freedom of speech is simply to tell the truth for the truth, to first not be deceived by earlier works and to also not bend due to power and coercion, making the truth truthful and the facts factual. It means that if it is truthful, to not abandon it even if it comes from our enemies and if it is absurd and false, to not follow it even if it comes from our emperor or our father. This is what freedom really is.³⁹

Clearly, the freedom Yan was concerned with was not the freedom of economic activities advocated by Spencer and Smith; rather, he concentrated more on the significance of Mill's idea of individual freedom as the fundamental value.

However, the freedom promoted by Yan actually differed from the freedom Mill described in *On Liberty* in many aspects, with two particularly important ones. First, Yan Fu added concepts from Spencerism, namely, social Darwinism, to Mill's concept of liberty. For example, Mill claimed that individual freedom was not just the means to achieve economic growth or to liberate and improve individual abilities; rather, it is an end in and of itself. Benjamin Schwartz, a biographer for Yan, once pointed out that "[Mill] defends the liberty not merely of businessmen nor of men of superior faculties and talents to make their way in society, but presumably even of the ineffectual and talentless to carry on their own mode of existence."⁴⁰ Yan Fu, however, had added Spencer-Darwinism ideas into Mill's concept of liberty and those ideas had connotations of "survival of the fittest." In other words, the concept of liberty was seen as the tool for improving social efficiency and the ultimate means to achieve wealth and prosperity. Therefore, for Mill, liberty means the freedom of individuality, whereas Yan had linked individuality with what he understood from Spencerism as the "people's virtue" (民德). This concept of the "people's virtue" included the requirement to devote one's entire body and soul to facilitate the wealth and prosperity of the country. Thus, when translating *On Liberty*, Yan Fu did not use the literal meaning of "freedom"; instead, he defined freedom through the relationship between the "group" and the "self." Similarly, Liang Qichao's

³⁹ See Yan Fu (严复), *Qunji Quanjie Lun Yi Fanli* (群己权界论译凡例) [Translation of *On the Power Boundaries between the Group and the Self*], in YANFU JI (严复集) [COLLECTION OF THE WORKS OF YAN FU] 134 (Wang Shi (王拭) eds., 1986).

⁴⁰ BENJAMIN SCHWARTZ, IN SEARCH OF WEALTH AND POWER, 133 (1964).

concept of the “new people” also centered on the “group,” believing that the essence of morality was to strengthen the cohesion and promote the interests of the group.

On a related note, Kang Youwei had also understood the concept of civil rights as the recognition of social status of an individual. When discussing the Constitution, Kang said:

“During the Spring and Autumn period, there were schools of thought that only govern a family and there were schools that govern a country. From the rights and obligations of the citizens to the rights and obligation of the Crown and the officials, to the rights and obligations of all countries in the world, they were all set out. The so-called ‘rights and obligations’ are what Zhuang Sheng called ‘name and status’ in the *Spring and Autumn Annals*. If everyone stays in their proper name and status, they will all have their proper place.”

Although understanding the constitution as the “school of thought that govern a country” did come close to the concept of the constitution as the “fundamental law,” interpreting the core of the constitution – rights and obligation – as “stay in their proper name and status and they will all have their proper place” still reflected an affirmation of the pre-existing feudal orders.

The famous 20th century Japanese constitutional theorist Tatsukichi Minobe classified rights into three types: the right of political participation, the right of petition and the right of liberty. This concept had wide influences during the Qing dynasty. However, the ruling class of constitutional scholars in support of imperial sovereignty in Late Qing believed that citizens may only have the latter two types of rights. The right of political participation in Tatsukichi Minobe’s theory included administrative and military officials as well as parliamentary councillors. For the imperial sovereignty constitutionalists, “only the administrative officials that are involved in executive administration or discussion of government affairs can be said to be participating in politics. The others such as the judiciary or the officials outside of the judicial administration cannot be said to be participating in politics.” They also claimed that “the right of political participation is not a natural human right, but the duty of the few public personalities. It is only a natural human right in the sense of holding the position of public personality.” In other words, although officials and citizens have the right to occupy positions of administrative and military officials, the right of political participation was not a general right. It was a duty arising from the position of administrative and military officials and was established to enable the Crown to fully exercise the state power. It was under

the control of the main body of state power (i.e. the Crown). “The natural person only needed to serve their loyalty.”⁴¹

The concept of civil rights in the West originally stemmed from the recognition of individuality of the citizens and their ability citizens to resist the abuse of power by the government. Its philosophical meaning lies in its recognition of the binary opposition between the state and its citizens. When civil rights were introduced into China, however, it gradually became associated with state construction and turned into a rewards mechanism for and component of achieving state power.

Following a critical review of the awakening of nationalist thinking in Late Qing, evolving from “Westernizing weapons and technology” to “learn from the foreigners in order to resist their invasion” to the “institutional reform” of “adopting the central principle of Peter the Great of Russia as its central principle, and the governance system of Meiji of Japan as its governance system.” Although the latter was finally accepted by the conservative Qing government, the Japanese model could not solve issues brought about by the centralization system of China. To save the country from peril, to survive and to achieve civil rights and constitutionalism, the long-lasting and deeply embedded problems would only be removed from a much more aggressive ideological revolution.

⁴¹ Bao, *supra* note 15, at 96.