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A Textual Analysis of the *Imperial Constitutional Outline* and *The Nineteen Creeds*

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From a Japanese Transplant to a British Imitation:

A Textual Analysis of the *Imperial Constitutional Outline* and *The Nineteen Creeds*

Prof. Dr. Li Xiuqing*

I. An Overview of Constitutional Practice in the late Qing Dynasty

After the Hundred Days Reform and the Boxer Rebellion, the rule of the Qing Dynasty headed by Empress Dowager Cixi (1835-1908) was in even greater jeopardy. Nationwide movements against the Qing Dynasty and the Manchu were rapidly escalating. Forced by the circumstances, Cixi had an abrupt change in attitude concerning constitutional reform – in 1901, she successively issued three imperial edicts in the name of the Qing government, admitting that “If laws and decrees do not change, nor do old habits, it is impossible to achieve revitalization”. She decreed the establishment of the Bureau of Government Affairs which is “dedicated to formulating programs and upholding general principles”. She further emphasized that “The constitutional reform which empowers us is the lifeblood for our nation’s safety and also offers a favourable new direction for the Chinese people”. The fact that the conservative party headed by Cixi underwent such a dramatic change in attitude such a short time was unexpected to the common people, yet it could be explained with due analysis. Firstly, the constitutional reform could mitigate the troubled relationships between China and the imperialist powers. Secondly, Cixi believed that this could eliminate the hostility towards the Qing Dynasty and the Manchu. Thirdly, when she returned to Peking in 1902, Cixi attempted to restrict Emperor Guangxu (1871-1908)’s powers and still gain the upper hand over him by implementing this reform.¹ The imperial edicts issued with these purposes were sure to be sneered at by revolutionaries and be coldly received by common people. However, for some government officers and reformists, these edicts re-kindled their visions

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¹ See Cang Fu, “The Proceeding of the Constitutional Movement”, *The 1911 Revolution (IV)*, edited by the Association of Chinese Historians, published by Shanghai People’s Publishing House, 1981.

for a constitutional monarchy and a nation strengthened by constitutional reform – some people like Zhang Zhidong (1837-1909) and Liu Kunyi (1830-1902) have presented memorials to the throne, and others like Kang Youwei (1858-1927) and Liang Qichao (1873-1929) have published articles – and all of them have expressed propositions or suggestions for constitutional reform. Reflected in the academic sector, the enthusiasm for introducing foreign constitutions, regulations and treatises as well as the passion for studying constitutionalism have been maintained up ever since.

When the Russo-Japanese War ended in 1905, the Qing government was greatly shocked by the result that though being a much smaller country, Japan eventually won the victory. It was generally believed that the victory owed much to the achievements of Japan's constitutionalism in modern times. Before the *Treaty of Portsmouth* was signed, Zhang Jian (1853-1926), a celebrity from Jiangsu Province, had already advocated constitutionalism in "A Letter to Yuan Shikai", saying that "It is not helpful to pay attention to trivialities instead of changing the present regime. If we do not change the regime before the Russo-Japanese situation is settled but still be so obstinate in our own ways, it might be too late for any change after all. ... The result of the rivalry between Japan and Russia is indeed one between constitutionalism and autocracy. Currently in the world, which country is still in complete autocracy? If this one autocratic country is challenged by all the constitutional ones, will it still survive?"² Widely cited by modern constitutional treatises, Zhang Jian's argument was echoed by most of the intellectuals at that time.

After the Russo-Japanese War, the discussion about constitutionalism was again raised in the Qing government. In the same year, the government issued the *Decree of Dispatching Zai Ze et al. Abroad for Political Investigations*³, and five ministers – Zai Ze (1868-1929), Dai Hongci (1853-1910), Duan Fang (1861-1911), Shang Qiheng (1859-1920) and Li Shengduo (1859-1937) – were mandated to travel to foreign countries.⁴ This was an imitation of the Japanese practice: before the Meiji government formulated Japan's first modern constitution, i.e. *the Meiji Constitution*, they dispatched a group of statesmen, including Ito Hirobumi (1841-1909), to different countries in Europe to investigate the current trend in constitutionalism. The five ministers dispatched by the Qing government travelled to 15 countries including

² Pan Shufan, ed. *The Constitutional History of the Republic of China*, The Commercial Press, 1935, p. 4.

³ See *Archives of the Preparation for Constitutionalism in the Late Qing Dynasty (Volume One)*, edited by the Ming Qing Archives Department of the Palace Museum, published by Zhonghua Book Company, 1979, p. 1.

⁴ The *Decree* stated clearly that Zai Ze, Dai Hongci, Duan Fang, Xu Shichang were dispatched abroad, and later Shao Ying was added to the group. On August 26, 1905, when the five ministers were about to board the train at Peking Station, Wu Yue, a revolutionary, attacked them with a bomb, and several were injured or killed. Later Shang Qiheng and Li Shengduo took the place of Xu Shichang and Shao Ying. See the "Memorial of the Situation Where Ministers Zai Ze et al. Were Bombed at the Train Station on Going Abroad for Political Investigations", *Archives of the Preparation for Constitutionalism in the Late Qing Dynasty* (Vol. 1), edited by the Ming Qing Archives Department of the Palace Museum, published by Zhonghua Book Company, 1979, pp. 2-3.

Japan, America, Germany, Britain, France and Russia in more than 7 months.⁵ During their exploratory trip, they presented several memorials to the throne, and later, envoys stationed abroad also presented memorials for constitutionalism. In June 1906, the investigating ministers returned home in succession. “Empress Dowager Cixi and Emperor Guangxu have summoned the ministers and carefully inquired about their investigations – Prince Zai Ze twice, Minister Duan thrice, Minister Dai and Minister Shang once respectively. They all lamented the disadvantages of China’s lack of constitutionalism, and dwelt on the advantages of adopting constitutionalism.”⁶

At that time, objections to constitutionalism, though with various reasons, were widely held within or outside of the Qing government. Cixi, however, having pondered over the problems, called in her trusted followers successively and convened a series of imperial conferences, finally issued the *Decree of Declaring the Preparation for Constitutionalism and the Antecedent Settling of the Official System* on Sept. 1, 1906⁷:

... The reason why those countries are prosperous and powerful is indeed due to the fact that they all practise constitutionalism and highly respect public opinions; monarchs and people unite as one, sharing their feelings and ideas; they learn widely from other countries’ successful experience and set clearly their own domestic limits of authority; reports of revenues, expenses, and government affairs are all accessible to common people. Meanwhile, those countries constantly revise their own policies while referring to others’ progress; it is no wonder that they enjoy a sound political environment and a harmonious society. At the present time, in order to establish a solid foundation for a promising future of our nation, we must carry out a circumstantial examination for the practice of constitutionalism; state power should be centralized in the imperial court, and all policies be revealed to the public. However, regulations are not yet prepared for the time being, nor are the people ready for a complete change; so if we rush to make a transformation, the efforts will only prove to be futile, and how can we gain trust from our people? Therefore, we must sweep away all chronic defects and instruct our people with new perspectives. It has to be done with the Official System first. Positions in the Official System

⁵ As for the investigation conducted by the group, besides the accounts in the group members’ diaries like Dai’s *Journal of the Investigation in Nine Countries* and Zai’s *Journal of Political Investigation*, several historical studies have also introduced the investigation in detail, including “An Overview of the Five Ministers’ Overseas Investigation” (Wei Qingyuan, Gao Fang, Liu Wenyuan. *The Constitutional History in the late Qing Dynasty*. China Renmin University Press, 1993. pp. 118-132.); “A Prelude to Constitutionalism: Investigating the Constitutional System” (Zhu Yong, ed. *A Comprehensive History of the Legal System in China* (Vol. 9). Law Press China, 1999. pp. 51-76.); “Investigating Constitutionalism Abroad” (Zhang Hailin. *Duan Fang and New Policies in the Late Qing Dynasty*. Nanjing University Press, 2007. pp. 105-141.); and Xia Baige’s *Secret Palace Archives: A Documentary of the Westward Political Investigation by Ministers dispatched by Emperor Guangxu in 1906* (The Ethnic Publishing House, 2000.). In addition, Pan Chong’s “A Research Review of the Five Ministers’ Overseas Investigation in the Late Qing Dynasty” (*Review of Social Sciences*, No. 4, 2008) has also provided a historical and recent development of relevant studies. Chen Dan’s *Research Conducted Overseas by the Policy-Investigating Ministers in the Late Qing Dynasty* (Social Sciences Academic Press (China), 2011.) and Chai Songxia’s *Overseas Investigation and Constitutionalism in the Late Qing Dynasty* (Law Press China, 2011.) are two monographs in this field; they are superior to previous academic achievements thanks to their systematic and elaborate research work.

⁶ Quoted from “The Situation Where Investigating Ministers Presented Their Memorials and the Courtier Meeting Formulated the Constitution.” *The 1911 Revolution* (IV), p. 14.

⁷ *New Decrees of the Qing Dynasty (1901-1911)* (Annotated Version), Vol. 1, annotated by Li Xiuqing, Meng Xiangpei, Wang Shirong. The Commercial Press, 2010, pp. 37-38.

are to be agreed on respectively in the first place, followed by revisions of other aspects. Every piece of legislation should be drafted with great care and elaboration. Besides, education should be widely encouraged; government finance be carefully checked; the armed forces be consolidated; and policemen be placed in greater abundance. In this way, people of different social status will all have a clearer view of our national policies, which forms the basis of constitutionalism. Those with ability, whether home or abroad, should all work hard for China's revitalization. By the time that the system begins to take shape, we will check the overall situation, refer to other countries' established constitutions, negotiate the time for implementing constitutionalism, and finally announce our decisions to the whole country. The time for implementation is determined by the pace of progress ...

As soon as the Decree was issued, some showered it with praise,⁸ others protested vehemently.⁹ Nevertheless, the Qing government gradually carried out its measures for reform afterwards. In September, the inner-court officer system was revised. In April 1907, the outer-court officer system was announced; in July, the Political Investigation Bureau was changed into the Constitutional Compilation Bureau; in August, Da Shou (1870-1939) was sent as an envoy to Japan, Wang Daxie (1859-1929) to Britain and Yu Shimei (1853-1916) to Germany, all of whom were to investigate constitutionalism overseas. In June 1908, the regulations on the Provincial Assemblies and its election of members were drafted, which was an early practical action for constitutionalism; in August, the Constitutional Compilation Bureau and the National Assembly together presented a memorial to the throne, suggesting an agenda for preparing the outline of the constitution and laws concerning parliament elections.¹⁰ In the same month, the *Imperial Constitutional Outline* was promulgated.

Although the *Imperial Constitutional Outline* had already been promulgated, the preparation time was set to be nine years, and thus the realization of constitutionalism was not anytime soon. Later, Emperor Xuantong (1906-1967) ascended the throne. Due to his young age, his father, Prince Chun (Zai Feng, 1883-1951), acted as regent and formed the Cabinet with his royal family members. This was met with great public discontent. Members of the Provincial Assemblies called for an immediate convention of the parliament. The *Regulations on the National Assembly* were issued in July 1909 as the foundation of the establishment of the two Houses. In August 1910, the first regular meeting of the National Assembly was convened: the meeting lasted for nearly four months and eventually ended in December. According to the minutes of the meeting, it was already popular sentiment that a parliament

⁸ In the month when the Decree was issued, students from Yangzhou wrote "A Welcome Song to Constitutionalism": "Long live the Emperor, for establishing constitutions. The autumn of 1906 is filled cheer and happiness. Fortune comes, the time is ripe, civilization advances so fast. Holy decrees as solid foundation, our nation is bound to be powerful. What a peaceful reform, the constitutional monarch. ... Ancient as Yangzhou, new as the academia, both respect constitutionalism. If you hear my song, don't idle away anymore, a happy future is waiting for us!" It is evident that people complimented the Decree and looked forward to constitutionalism.

⁹ The special columns of "A Glimpse of the Public Opinion" and "Selected Translations of Foreign Reviews" in *The Eastern Miscellany* (Temporary supplement, 1906) have provided detailed coverage in this respect.

¹⁰ *New Decrees of the Qing Dynasty (1901-1911)* (Annotated Version), Vol. 1, annotated by Li Xiuqing, Meng Xiangpei, Wang Shirong, The Commercial Press, 2010, pp. 115-118.

should be convened and a constitution be promulgated as soon as possible.¹¹ Under these circumstances, the Qing government issued a decree, dictating the change that a parliament would be convened in 1913. Pu Lun (1874-1927) and Zai Ze were specially appointed as constitution-drafting ministers; they were required to immediately draft constitutional articles in accordance with the *Imperial Constitutional Outline*. At that time, the Qing government even attempted to reinforce its supreme monarchy with the *Imperial Constitutional Outline*. In the year 1911, the cabinet system was settled and the Grand Secretariat was formed, with Yi Kuang (1838-1917) being appointed as the Prime Minister. In October, the Wuchang Uprising took place, and many provinces followed suit and declared independence one after another. The Qing government was completely at a loss and again summoned the National Assembly for temporary meetings; they decided to lift the Party-ban, and issued the imperial decree for penance, hoping that they could regain the support from their disappointed people; they dismissed the monarch's trusted followers like Yi Kuang, and appointed Yuan Shikai (1859-1916) as the Prime Minister who should directly report to the National Assembly; they also dictated that the Assembly should assist in the constitutional practice. During this time, Lan Tianwei (1878-1921) et al. presented a memorial to the throne by telegram, demanding that the constitution be established immediately under the supervision of the two Houses. And thus the National Assembly was mandated to draft the constitution. On Nov. 3rd 1911, as soon as *The Nineteen Creeds* were formulated, the assembly promulgated it right away.

Although the promulgation of the *Imperial Constitutional Outline* and *The Nineteen Creeds* is only part of the constitutional practice in the late Qing Dynasty, the two edicts are undoubtedly of the greatest significance: the former is the very first constitutional document in the history of China, while the latter is China's very first written constitution. In recent years, Chinese scholars have paid even closer attention to both of the documents, especially to the *Imperial Constitutional Outline*; accordingly, criticisms related to them have become more reasonable and equitable. In the year 2008, on the centenary of the promulgation of the *Imperial Constitutional Outline*, scholars not only organized a seminar,¹² but also contributed several treatises to this field before and after this centenary.¹³ In the following discussion, this

¹¹ At the meeting on Sept. 20, the central topic for discussion was the vote for or against the immediate convention of parliament. "All representatives gave the idea a thunderous standing ovation and shouted thrice 'Long live the great Qing Empire! Long live His Imperial Majesty! Long live constitutionalism!' It caused such a sensation." "Shorthand Minutes of the First Regular Meeting Held by the National Assembly (Assembly No. 9)." *Shorthand Minutes of Meetings Held by the National Assembly: A Memoir of Debates Concerning the Preparation for Parliament in the Late Qing Dynasty*, revised by Li Qicheng, published by Shanghai Joint Publishing Company, 2011, p. 77.

¹² See Qin Qiang, "An Account of the Seminar on the Centenary of the Promulgation of *Imperial Constitutional Outline*," *Legal Daily*. <http://www.legaldaily.com.cn/bm/content/2008-07/27/content_910019.htm>. Last access: Nov. 4, 2011.

¹³ Major treatises that have been consulted include: Zhang Jian, "An Analysis of *Imperial Constitutional Outline*," *Journal of Henan Administrative Institute of Politics and Law*, No. 5, 2007; Zhang Jian, "Imperial Constitutional Outline and the Political Game in the Late Qing Dynasty," *Journal of Historical Science*, No. 6, 2007; Zhang Shunchang, "Revisiting of *Imperial Constitutional Outline* After a Hundred Years," *Guizhou*

thesis will mainly focus on the textual analysis of both the *Imperial Constitutional Outline* and *The Nineteen Creeds*: the former has transplanted articles from *the Meiji Constitution* of Japan, and the latter has captured the essence of British constitutionalism. This thesis will then examine the underlying reasons for such transformation of reference within three years with the aid of evidence mostly from out of the text.

II. More Similarities than Differences: A Comparison between the *Imperial Constitutional Outline* and the Japanese *Meiji Constitution*

The *Imperial Constitutional Outline* (hereafter referred to as *the 'Outline'*)¹⁴ contains 23 articles, which fall into two categories. The first category (14 articles) defines the power of the emperor; the second category (9 articles) defines the rights and duties of the subjects. Judging from the contents of the articles, we could come to the conclusion that *the 'Outline'* is an incarnation of the *Japanese Meiji Constitution*.¹⁵ In the following part of this paper we list a parallel comparison between articles of *the 'Outline'* (from the first article to the last) and their counterparts in the *Japanese Meiji Constitution* (if available) on an item-by-item basis.

1. Articles Concerning the Power of the Emperor

The 'Outline': The emperor of the great Qing dynasty shall reign over and govern the great Qing empire with his majesty's unbroken line of succession for ages eternal.

Meiji Constitution: The Great Japanese Empire shall be under the rule of the Mikado, unbroken for ages eternal. (Article 1)

Historical Studies, No. 4, 2008; Ma Ling, "When Did the Monarchs Start to Yield?: Enlightenments from *Imperial Constitutional Outline*", *The Jurist*, No. 4, 2008; Chen Xiaofeng, Bi Yuling, "To Refresh and to Accumulate: Reflections on the Centenary of the Promulgation of *Imperial Constitutional Outline*", *Law Review*, No. 6, 2008; Ma Jianhong, " *Imperial Constitutional Outline*: A System Carrier of Constitutionalism in the Late Qing Dynasty", *Hunan Social Sciences*, No. 6, 2008; Guo Shaomin, "The 'New Monarchy' During the Constitutional Reform in the Late Qing Dynasty: A Memorial to the Centenary of *Imperial Constitutional Outline*", *Tribune of Social Sciences*, No. 10A, 2008; Han Dayuan, "On the Influences of Japan's Meiji Constitution on *Imperial Constitutional Outline*: Dedicated to the Centenary of the Promulgation of *Imperial Constitutional Outline*", *Tribune of Political Science and Law*, No. 3, 2009; Xu Shuang, " *Imperial Constitutional Outline* and the Fate of the Qing Dynasty", *Tribune of Political Science and Law*, No. 5, 2009.

¹⁴ Quotes from *Imperial Constitutional Outline* in this paper are excerpted from *New Decrees of the Qing Dynasty (1901-1911)* (Annotated Version), Vol. 1, annotated by Li Xiuqing, Meng Xiangpei, Wang Shirong, The Commercial Press, 2010, pp. 119-120.

¹⁵ Quotes from *the Meiji Constitution* in this paper are excerpted from *Collection of New Translated Version of Japanese Laws* (Annotated Version), Vol. 1 (annotated by He Jiaxin), the Commercial Press, 2007, pp. 53-59.

- The 'Outline':* The emperor shall be sacred and inviolable.
Meiji Constitution: The Mikado is sacred and inviolable. (Article 3)
- The 'Outline':* ... the right to promulgate laws and to submit bills. (Any parliament-consented statute, if yet to be ratified by the Emperor, shall not be promulgated.)
Meiji Constitution: The Mikado may adjudicate, promulgate and implement statutes. (Article 6)
 The upper and lower houses shall adjudicate bills proposed by the government and may draft bills. (Article 38)
- The 'Outline':* ... the right to assemble, declare open and close, suspend and resume, and dismiss sessions of the parliament...
Meiji Constitution: The Mikado shall assemble, declare open and close, suspend and dismiss sessions of the parliament. (Article 7)
- The 'Outline':* ... the right to formulate the official as well as the remuneration system and the right to dismiss officials. (Decisions concerning official appointment shall be made by the emperor alone, with the minister's assistance and without interference from members of parliament.)
Meiji Constitution: Unless otherwise stipulated in this constitution or other statutes, the Mikado shall formulate official system for administrative ministries, appoint and dismiss civil and military officials and determine their remuneration. (Article 10)
- The 'Outline':* ... command the formulation of military systems of the army and the navy. (Decisions on the dispatch of military forces in any part of the country and the number of standing army and navy soldiers shall be exclusively made by the Emperor. Members of parliament shall not interfere in any military affairs.)
Meiji Constitution: The army and the navy shall be in the command of the Mikado. (Article 11)
 The Mikado shall design military systems of the army as well as the navy and decide on the number of standing army and navy soldiers. (Article 12)
- The 'Outline':* ... the rights to declare war, negotiate peace, sign an agreement, send envoys or acknowledge an incoming envoy. (Diplomatic affairs shall be adjudicated by the Emperor himself other than members of parliament.)
Meiji Constitution: The Emperor shall be in charge of declaring war, negotiating peace and signing of agreements. (Article 13)

- The 'Outline':* ... the right to impose curfews. In emergencies the Emperor may order restraints on the freedom of the subjects.
- Meiji Constitution:* The Mikado shall have the right to impose curfews. The precondition and effectiveness of the curfew shall be made in law. (Article 14)
- The 'Outline':* ... the right to grant royal titles or amnesty. (This grace of the Emperor shall not be usurped by subordinating officials.)
- Meiji Constitution:* The Mikado has the right to grant royal titles, medals, and other honorary titles. (Article 15)
- The Mikado has the right to grant amnesty, pardon and commutation, and the right to reinstate an official. (Article 16)
- The 'Outline':* ... endowed with supreme judicial power. The Emperor shall appoint judicial offices in accordance with the imperial statutes, and shall not order any changes by imperial edicts at any time. (The judicial powers are entitled to the Emperor alone. He shall appoint judges, who will assume judicial responsibility on behalf of the Emperor. The law should not be changed by imperial edicts at any time. Since criminal cases are vitally important, they should be subjected to trial in accordance with present imperial statutes in case of any disputes.)
- Meiji Constitution:* Judicial rights should be implemented by tribunals in the name of the Mikado. The constitution of tribunals shall be defined by the law. (Article 57)
- The 'Outline':* Present laws should be abided by in giving orders or in this type of authorization. Unless approved by the Emperor after submission to the parliament, these laws shall not be altered or abolished by any orders. (Laws are adopted as a guideline for the Emperor to exercise judicial power, while orders are issued by the Emperor to exercise administrative power; these two types of power are independent, therefore laws shall not be altered or abolished by orders.)
- Meiji Constitution:* The Mikado may issue orders, by himself or by others, to execute laws, maintain public serenity and order, and improve the people's well-being. He should not, nevertheless, modify laws with His orders. (Article 9)
- The 'Outline':* In the case of emergencies, the Emperor shall issue orders instead of law, to undertake necessary financing methods during intersession of the parliament. And such orders shall be submitted to the parliament for discussion next year when the parliament returns.
- Meiji Constitution:* For the protection of social security and the prevention from social crisis, the Mikado can issue orders in emergencies on behalf of the parliament

when the latter is in intersession. This order shall be subjected to deliberation in the coming session of the parliament. If the parliament disapproves this order, the Emperor shall make an announcement informing the public of invalidity of the order. This order shall be deemed invalid thereafter. (Article 8)

Acts of financing in emergencies for the protection of social security shall be ordered in executive respect by the Emperor in cases when the government, having considered conditions domestic and foreign, is unable to assemble an imperial parliament in time. This matter shall be subjected to ratification in the coming session of the parliament. (Article 70)

The 'Outline': The amount of imperial spending shall be determined by the Emperor and paid by the treasury, which is above discussion of the parliament.

Meiji Constitution: Imperial spending shall be paid at present amount by the treasury. Except for future augmentations of the amount, matters concerning imperial spending shall not be subjected to discussions of the parliament. (Article 66)

The 'Outline': Imperial ceremonies, determined by members of royalty and special-assigned ministers under the command of the Emperor, shall remain beyond the interference of the parliament.

Meiji Constitution: Any changes in imperial ceremonies shall not be subjected to the parliament's resolution. And the articles of this Constitution shall not be altered by imperial ceremonies. (Article 74)

2. Articles Concerning Subject's Rights and Duties

The 'Outline': Subjects, qualified according to law and order, can become civil and martial officials and members of parliament.

Meiji Constitution: Any Japanese national, qualified according to law and order, can be appointed as civil and military officials or as other public officials. (Article 19)

The 'Outline': All subjects, within the boundary of law, shall enjoy freedom of speech, writing, publication, assembly and association.

Meiji Constitution: All Japanese subjects, within the boundary of law, shall enjoy freedom of writing, publication, speech, assembly and association. (Article 29)

- The 'Outline':* Subjects shall not be arrested, imprisoned or punished without due legal procedure.
- Meiji Constitution:* No Japanese subjects shall be arrested, imprisoned, interrogated or punished without due legal procedure. (Article 23)
- The 'Outline':* Subjects can petition the judges to put the cases they filed to trial.
- Meiji Constitution:* Japanese subjects shall not be denied legitimate right to file cases for the judgment of the magistrates stipulated by law. (Article 24)
- The 'Outline':* Subjects shall be put to trial by respective courts stipulated by law.
- Meiji Constitution:* Article 24.
- The 'Outline':* Property and estate of the subjects shall not be harassed for unlawful reasons.
- Meiji Constitution:* Ownership rights of the subjects shall not be infringed. Treatments on behalf of public interests shall be conducted by law. (Article 27)
Estate of Japanese subjects shall not be trespassed or searched without legal authorization, unless otherwise stated by law. (Article 25)
- The 'Outline':* Subjects shall pay taxes and perform military duties according to law.
- Meiji Constitution:* Japanese subjects shall pay taxes according to law. (Article 21)
Japanese subjects shall perform military duties according to law. (Article 20)
- The 'Outline':* The present rate of taxes imposed on the subjects shall remain the same if unaltered by new laws.
- Meiji Constitution:* No corresponding articles.
- The 'Outline':* Subjects have the responsibility to abide by national laws.
- Meiji Constitution:* No corresponding articles.

Since its very promulgation, the *Imperial Constitutional Outline* has become the target of much criticism. For example, it was criticized for having “principles intended for the consolidation of the monarchy” and possessing “only the hide and skin of a constitution in terms of style and form, with a view to living up to the expectation of the ruled”¹⁶. The first issue of the *People's Voices*¹⁷ magazine (1910) published A Discussion on the *Imperial Constitutional*

¹⁶ Quoted from Zhu Yong, ed. *A Comprehensive History of the Legal System in China* (Vol. 9), Law Press China, 1999, p. 97.

¹⁷ Started semimonthly publication in Shanghai in May, 1910 by Chen Qu.

*Outline*¹⁸ by Sun Lou. This article pointed out three absurdities in the *Imperial Constitutional Outline*, claiming that the 'Outline' was against justice, judicial logic and the living reality. For a long period of time, when talking about the 'Outline', most works and articles in legal history used to describe it as "bogus constitutionalism", "sugar-coating constitutionalism" and "upholding the monarchy in the name of the constitution". Nevertheless, this situation has been much changed up to this day, and the number of blind attacks on the *Imperial Constitutional Outline* has dwindled in academia.

In case of any deviation from the theme, I do not intend to make a value appraisal on *the 'Outline'* here. The point is no matter why the Qing government stipulated and promulgated *the 'Outline'*, and how devoid of typical contents and characteristics of a modern constitution it was, it remains undeniable that the *Imperial Constitutional Outline* is the first constitutional document officially promulgated with a title containing the word "constitution" in Chinese history. That is to say, any statement that stands in complete denial of the historical significance of this document should be deemed subjective and partial. What's more, as the first constitutional document in modern China, its promulgation was very much under the influence of foreign constitutions. When we compare the 'Outline' with the *Japanese Meiji Constitution* item by item as above, it is obvious that these two constitutions are very much of the same sort.

In the prolonged history of China, there was no fertile soil for the implementation of a constitution. The door to China remained closed to the outside world in the 17th and 18th centuries when America and European countries were adopting constitutionalism. In the middle of the 19th century, when the door was finally forced open, little by little, by foreign guns and canons, the ideological trend of constitutionalism began to sweep the land of China, a place with no basis of a constitution ever before. At the beginning of the 20th century, in the clamour between proposition of a constitution and the opposition against it, backed respectively by confronting powers, as well as in the reluctance and procrastination of the Qing government with Dowager Cixi as its head, the first constitution in modern China finally came into being. This document was formed "by the Constitution Compilation Bureau and legal experts from the National Assembly, in a compromise with reference to well-stipulated constitutions of foreign countries."¹⁹ From this quote we can learn an obvious characteristic of *the 'Outline'* - it was a transplant from the *Japanese Meiji Constitution*. The two constitutions shared such a remarkable similarity that some commentators believe that the word "plagiarism" would be more appropriate. Back then in China, there was an array of foreign constitutions for the reference of *the 'Outline'* (as is mentioned above), so why was the *Meiji Constitution* in such particular favour? Though seemingly difficult to understand, the reasons for this fact could be listed as follows:

¹⁸ This paper was included in *Collection of Commentaries on the Decade before the Xinhai Revolution*, Vol. 3, SDX Joint Publishing Company, 1978.

¹⁹ See "Memorial of Drafting the Outline of the Constitution, or of Parliamentary Law and Election Law and Its Year-by-Year Preparation by the National Assembly and the Constitution Compilation Bureau", *Archives of Constitutional Preparation in Late Qing Dynasty*, Vol. 1, p. 55.

The course of the promulgation of the *Imperial Constitutional Outline* obviously reveals that it was more of an expedient ruling policy after repeated weighing of interests at a time of both domestic and foreign pressure rather than a document brought about as a result of self-inspired and active choice of the Qing government. It was promulgated on a promise of “eternalized monarchy”, “alleviated foreign threat” and “appeased domestic riots”²⁰. Therefore, how to guarantee the monarchy and sustain the autocratic rule was the paramount concern for the legislators. It was the premise and baseline for the Qing government to make a promise to prepare constitutionalism and also the basic standard first to be considered by the members of royalty and aristocracy assigned to the task of selecting among foreign constitutions the most “well-stipulated” constitution.

The most influential and widely introduced constitutions are those of America, France, the UK, Germany and Japan. Among them, America, being the first country ever to promulgate and implement a written constitution, adopted presidential republic system under *The Constitution of the United States* promulgated in 1787. France, in its Third Republic, also adopted presidential republic under *the French Constitutional Laws of 1875*. A presidential republic was of course unpalatable to the Qing government, as clearly indicated in the summary report of the two countries by five ministers after their outbound investigation on foreign constitutionalism.

In “Memorial on the General Situation of America and the Date for the European Visit by Dai Hongci et al., Ministers Assigned to Investigate the Politics of Foreign Countries”, though Dai Hongci and Duan Fang lavishly eulogized the advantages of the congress system and America’s advanced industry and commerce, they explicitly pointed out that “America was to a large extent founded on the cornerstone of industry and commerce with its people fully endowed with rights. It adopts a form of government that is essentially different from that of China.”²¹ In “Memorial on the General Situation of France and Re-Visit to the UK for Presenting Letter of Credence by Zai Ze et al., Ministers Assigned to Investigate Politics of Foreign Countries”²², Zai Ze, Shang Qiheng and Li Shengduo praised the French constitution as “well-organized, intact and consistent”, pointing out that “there is a lot to take as reference if we distinguish the good articles from the bad ones”. However, their opinions were formed based on their discovery that “we thus learn that the political system of France, though bearing the name of democracy, was in fact an imperial system”. Being “good” according to Qing ministers was merely being close to “the sovereignty of an empire”. It did not mean any intention to adopt a presidential and republican system as France did.

Different from America and France, the UK, Germany and Japan at that time were all monarchical empires. In “Memorial on the General Situation of the UK and the Date for the

²⁰ These were three major advantages for China’s constitutionalism, proposed in “Confidential Memorial on Petitioning Constitutionalism” by Zai Ze after returning from the investigating tour. For details please see the afore-mentioned *Collection of Commentaries on the Decade before the Xinhai Revolution* Vol. 4, pp. 27-30.

²¹ See *Archives of Constitutional Preparation in Late Qing Dynasty*, Vol. 1, p. 7.

²² See *Archives of Constitutional Preparation in Late Qing Dynasty*, Vol. 1, pp. 14-15.

France and Japan Visit by Zai Ze et. al., Ministers Assigned to Investigate Politics of Foreign Countries”²³, Zai Ze, Shang Qiheng and Li Shengduo made a summary of British constitutionalism that “in terms of politics, legislation was the duty of the parliament, administration the duty of the ministers, the interpretation of the constitution and other regulations the duty of judicial departments, and the king was above all those bodies, regulating their overall performance”. They also pointed out that the essence of British constitutionalism lay in “the integrity of regional autonomy”. However, they do not recommend copying the British system either, partly because “in our study we discovered that the British system was formed after several hundred years of revision; the complexity of it was beyond our mastery during such a short visit” and partly because “the complicated system of official structure was not compatible with the Chinese political system. Choices remain to be made if we are to distinguish the advantageous articles from the disadvantageous ones.”

The emphasis on the complexity and difficulty of adopting British constitutionalism was just an excuse. The hidden reason was that the constitutional system in Britain, a place where modern constitutionalism took root, originated with a confinement on the power of the crown. In constitutional monarchy adopted after the bourgeois revolution at the end of the 18th century, the king’s power was further limited. Up to the beginning of the 20th century, the king’s power had been reduced to symbolic value and ritual routines. Though these investigating ministers who are royalty members and aristocracy advocated constitutional governance, judging from their standpoint and the interests they represent, they would never, and in fact, dared not, propose to follow the example of the UK with the background of the feudal autocracy of the Qing government and the fact that the ruling class were only putting on an ostentatious constitutional show back in the early 20th century. Further still, even if these ministers had suggested it, their proposal would never be accepted.

In 1871, shortly after the German empire was established, the Constitution of the German Empire came into being. As the very first constitution in modern united Germany, it has a unique trait. The emperor, being the supreme administrative leader of the empire, was entitled to a wide range of power. He had the right to appoint ministers and other officials, and call in a federal assembly. He could declare war, negotiate peace, make alliances, enter into agreements, send diplomatic envoys to foreign countries and announce a state of war in any part of the empire. He was also given the right to veto certain categories of legislation, such as those involving constitutional amendments, military affairs, tariffs and consumption taxes. Though federalism was established under the constitution, central federal power was still in a dominant position over the power of the states. Besides, this constitution maintained the superiority of the Junkers and promoted the Prussian military system.

The Constitution of the German Empire was a unique one in the European continent for the above traits. It was a reflection of the difference between Germany and countries like France and the UK in terms of social reality. Dai Hongci and Duan Fang, in their “*Memorial on the General Situation of Germany and the Date of Demark Visit by Dai Hongci et. al., Ministers*

²³ See *Archives of Constitutional Preparation in Late Qing Dynasty*, Vol. 1, p. 11.

*Assigned to Investigate Politics of Foreign Countries*²⁴ pointed out that “judging from the root of its establishment, we see that Germany very much attended to military training. Therefore all German people share a martial spirit, especially featured by a sense of obedience... We also realized that the German people are diligent, frugal and prudent, which is quite similar to Chinese people.” Therefore it seemed to be a sudden epiphany to them that “ever since Japan took to revolution three decades ago, it has learned from Germany everything that significantly contributed to its growing prosperity. Though we admire the rise of Japan, we are clueless as to how Japan has gone this far. Now we shall make Germany our mirror.” Thus they proposed that “now that we are aware of their course of prosperity, though we do not need to follow everything in their system, it is urgent that we apprentice ourselves to the Germans for their well-stipulated and effective methods.” However, they also acknowledged that “since the German language was complex and difficult to understand, there are few translated German books in Chinese.” Fearing that some of the important knowledge might escape us, the only method we could undertake was to purchase as plentiful books as we possibly can for future study.” Therefore, though the investigating ministers arrived in Germany during a difficult time when bilateral ties were extremely endangered, the delegation received a hospitable reception and full support as the latter was trying to break the diplomatic isolation caused by its forced leasing of Jiaozhou Bay and its rude and rampant behaviour in the Boxer Rebellion. The ministers stayed in Germany for over forty days, almost the same number of days as spent in France, Austria, Russia and Belgium in total.²⁵ They demonstrated strong interests in Germany’s specific systems including its constitutionalism. However, the final choice for constitutionalism mode was that of Japan instead of Germany for reasons stated above by the ministers alongside a number of other reasons, both subjective and objective.²⁶

After the Meiji Reform, Japan first imitated the system of France, but it turned out unsatisfactory. Then Japan shifted its role model to Germany. The first constitution in modern Japan, *the Constitution of the Empire of Japan*, also known as *the Meiji Constitution*, was a result of imitating German constitutionalism. Based on *the Constitution of the Kingdom of Prussia* (1850), *the Meiji Constitution* was practically a copy of *the Prussian Constitution* especially for the fact that *the Meiji Constitution* features the crust of constitutional monarchy and the core of imperial autocracy. Before *the Meiji Constitution* was stipulated, the Japanese delegation headed by Ito Hirobumi especially favoured *the Prussian Constitution* in their investigation of foreign constitutionalism, holding the belief that this constitution was more compatible with the then still feudalism-dominated Japanese society. In the meantime, this also stuck a chord in the heart of the Meiji Emperor, who had just regained the throne. Therefore, *the*

²⁴ See *Archives of Constitutional Preparation in Late Qing Dynasty*, Vol. 1, pp. 9-10.

²⁵ See Chen Dan: *A Study on Ministers’ Investigation of Foreign Constitutionalism in Late Qing Dynasty*, Social Sciences Academic Press, 2011, pp. 128,140; Iketa Motome (Japanese): “A Study on Investigating Ministers’ Oversea Tour from the Perspective of China-Germany Relations – Centered on the Germany Investigation and German Policies to the Qing Government”, *Social Sciences Studies*, No. 2, 2011.

²⁶ See Hu Kai: “A Discussion on Weighing of the German Model in Constitutional Reform of Late Qing Dynasty”, *Philosophy and Social Sciences Edition of Beijing University Journal*, 2009, Vol. 4.

Meiji Constitution was in consistency with *the Prussian Constitution* both in form and content, featuring the safeguarding of the monarchy and the confining of freedom and rights.

The success story of Japan's imitation of the German constitutional governance was soon circulating among Hundred Days Reform supporters and later among constitution advocates and Japanese returnees. Thus the ministers were highly attentive during their investigative visit in Japan. "For several days non-stop, accompanied by their subordinates," they were "visiting Japan's Upper and Lower Houses, public and private schools, barracks, weaponry factories, police departments, tribunals and post offices." They "carried on a detailed survey of these places to study the administrative organs and their management and regulation modes." They also "discussed freely with Japanese government ministers including Ito Hirobumi, Okuma Shigenobu (1838-1922) as well as erudite scholars in the field of political studies to learn the principles of legislation and the advantages and disadvantages of its constitutionalism." The Japanese ministers and scholars were mainly talking to the investigating ministers about the Japanese Tennoism.

For example, in the afternoon of January 28th, 1906, Ito Hirobumi explained constitutionalism to Zai Ze, Shang Qiheng, Li Shengduo and the rest of the delegation in the Kyu Shiba Rikyu Garden. He first declared that there were two kinds of political systems – monarchy and democracy. Monarchy could be divided into two categories – autocratic monarchy and constitutional monarchy. The difference between constitutional monarchy and democracy lay in the possession of sovereignty. In constitutional monarchy, sovereignty belongs to the emperor; while in democracy, sovereignty belongs to the people. He then pointed out that similar to Japan, China for thousands of years had been a country of autocratic monarchy, a country where sovereignty belonged to the emperor rather than the people. After the promulgation of the constitution, the nature of the monarchy would remain undisturbed. China would still be a monarchy, and that the sovereignty would still be in the hand of the emperor alone. Ito Hirobumi went further to explain the first chapter in *the Meiji Constitution*, which is dedicated to the detailed explanation of the specific power invested in the emperor. He also expressed his attitude on what kind of constitution China should adopt, saying that "your country, being a monarchy, must invest the powers previously mentioned in the emperor alone; no alternatives should be allowed. I wish from the bottom of my heart that China could become a constitutional monarchy, that's why I explain this chapter to you in particular." His lecture hardly touched upon topics concerning freedom and rights during two and a half hours, only a few quick words were heard. "If China is to introduce civilization, it has to take people's rights into consideration, such as the freedom of speech. These rights must be stipulated by the law and authorized by the government rather than stemming from people's own free will."²⁷

Dr. Hozumi Yatsuka (1860-1912), a Japanese J.D. also explained the Japanese constitution to Zai Ze and his delegation, giving particular focus on the power of the monarch. "The

²⁷ See "Travel Journal of Minister Ze, Shang and Li – An Account of Ito's Lecture on Constitution", *Eastern Times*, No.605, February 18, 1906.

system of Japan has been one of monarchy for thousands of years. People are attached to and favour this system, as we can see from the first chapter of the constitution. Though constitutionalism was adopted in the Meiji Reform, the sovereignty of the emperor remains unhindered at the initial stage of the reform. As this chart shows (a simplified chart of the monarchy system was hanging on the wall during the lecture), the monarch is the ultimate ruler of the country. The Mikado has been placed at the top of the sovereignty for thousands of years, unchanged by the constitution. The Mikado was given all the powers required to rule a country, this is the essence of the Japanese constitution.”²⁸

The Japanese lecturers had devoted their primary attention to the introduction of imperialism and constitutional monarchy. This is partly caused by pride and contentment with their constitutional theory and their system. Apart from that, there is another important factor. They realized that the Chinese ministers had been very persistent in seeking the balance between constitutionalism and monarchical sovereignty. The Japanese lecturers seemed to have spotted their listener’s preference and they exploited this knowledge to the fullest as a way of meeting the psychological demand of the listeners. The same thing happened during the Chinese delegation’s second visit to Japan. From 1907, Da Shou, Assistant Minister of the Ministry of Education, was sent by the Qing Emperor to study Japanese constitutionalism. He attended with great care the constitutional lectures given by Ariga Nagao (1860-1921). One scholar categorized Ariga’s lectures and constitutional theory into four categories. One of them is advocating a royal constitution and constitutional monarchy while tactfully coordinating the relationship among the royal family, the empire and the army.²⁹ Da Shou, having inherited Ariga’s theoretical system, wrote to the emperor “if we want to maintain the stability of the empire, we must keep holding on to the supreme power. If we are to keep holding on to the supreme power, we must contrive a constitution in the interest of imperial rule.” He then provided five reasons defending his opinion, which is that “a constitution stipulated by the Mikado would ensure the stability of the empire as well as strengthen sovereignty.”³⁰

Through the study of the Japanese constitutional monarchy system, or more likely under the influence of the lectures on the Japanese constitution given by Ito Hirobumi and other scholars, Zai Ze, together with other members of the delegation, came to the following conclusion. “We thus came to believe that what’s remarkable in the Japanese political system is the fact that the general public are entitled to the right for freedom of speech, while the Mikado is the ultimate arbitrator of politics. In this case, people can have their voices heard, while the Mikado can keep the supreme power all to himself.”³¹ When the ministers sent for

²⁸ See the afore-quoted Zhu Yong, ed. *A Comprehensive History of the Legal System in China* (Vol. 9), pp. 58-59.

²⁹ See Han Dayuan: “On Meiji Constitution’s Influence on Imperial Constitutional Outline – in Commemoration of One-Hundred-Year Anniversary of Imperial Constitutional Outline’s Promulgation”, *Forum of Political Science and Law*, No. 3, 2009.

³⁰ See Xia Xinhua et al. compiled “Memorial on Japanese Constitution Investigation by Da Shou, Minister Assigned to Investigate Foreign Constitutionalism”, *The Course of Modern China Constitutionalism – A Collection of Archives*, China University of Political Science and Law Publishing House, 2004, pp. 55-66.

³¹ See *Archives of Constitutional Preparation in Late Qing Dynasty*, Vol. 1, p. 6.

political studies returned, they explicitly pointed out in their “*Memorial on the Appeal of Constitutional Promulgation Presented by Investigating Ministers*”³², that “constitutionalism is beneficial both for the imperial rule and for the people. However, it could be quite demanding for the officials because when we were studying the constitutions of foreign countries, we discovered that these constitutions all contain the following articles: that the majesty of the emperor shall not be tainted, that emperor’s rule shall remain unchanged for thousands of years, and that the emperor’s majesty is sacred and inviolable, which means that the emperor exclusively enjoys all the power that endows him with stability and dignity; as for the rest of the daunting and hazardous tasks, he is not obliged to put all the weight upon his shoulders”. He then proposed, after an analysis on the diplomatic and domestic dilemmas confronting China, that “after careful consideration and repeated weighing, these ministers sadly came to the conclusion that it is inevitable for China to promulgate a constitution for safeguarding and ruling the Empire, given the fact that constitutionalism is now a global trend”. This was followed by three concrete suggestions: first, announce and poster *Imperial Constitutional Outline* on “yellowish imperial papers (a typical indication of the emperor’s order)”, like the Japanese did in the initial stage of constitution promulgation; second, give autonomous rights to local governments, following the practice of foreign countries, allowing them to choose those suitable and convenient among all the articles to make a specialized draft for the final compilation of legislation. Laws that concern freedom of assembly, speech and publication should also be drafted according to the present laws of monarchies such as the UK, Germany and Japan and be promulgated as soon as possible.

Besides constitutionalists’ praise and advocacy of modern Japan’s political theory and practice, the wide range of works and articles on Japanese constitutionalism in China and the investigating ministers’ recognition and appreciation of Japanese constitutional governance, the deeper cause lies in the fact that the Qing government, still being a mighty empire at that time, failed to fully recognize the real threat confronting its rule. Also, the weakness and immaturity of the capitalist class at that phase in history helped contribute to the adoption of the *Meiji Constitution system*, a modern Japanese constitutionalism originating from and sharing great similarities with the Prussian political system, at the particular point of drafting *Imperial Constitutional Outline*.

Nevertheless, *Imperial Constitutional Outline* is different from *the Meiji Constitution* in the following aspects.

First, *the ‘Outline’* is stricter than *the Meiji Constitution* in terms of safeguarding the emperor’s power. For example, both *the ‘Outline’* and *the Meiji Constitution* impose regulations on the setup of the official system and payroll. The former requires that “the parliament shall not intervene”, while the latter reads “unless otherwise stipulated in this constitution or other statutes”. The former puts emphasis on non-interference in the emperor’s power; the latter implies that the emperor’s power is limited by certain laws. *The ‘Outline’* grants the emperor

³² See the afore-mentioned *Collection of Commentaries on the Decade before the Xinhai Revolution*, Vol. 4, pp. 24-26.

the right to impose a curfew; and “in emergencies the Emperor may order restraints on the freedom of the subjects”. *The Meiji Constitution* also gives the emperor the right to impose a curfew, but on condition that “the precondition and effectiveness of the curfew shall be made in law”. *The ‘Outline’* makes one thing very clear, that is, “imperial ceremonies, determined by members of royalty and specially-assigned ministers under the command of the Emperor, shall remain beyond the interference of the parliament”; the Meiji Constitution, though claiming that “Any changes in imperial ceremonies shall not be subjected to the parliament’s resolution”, emphasize that “the articles of this Constitution shall not be altered by imperial ceremonies”.

In the meantime, *the ‘Outline’* leaves out the organization of the cabinet. There is only one article mentioning the minister-assisting system, that is, “decisions concerning official relocations shall be made by the emperor, with the minister’s assistance”, mentioning the minister-assisting system. Unlike *the ‘Outline’*, Article 55 of *the Meiji Constitution* reads “ministers in the State Department shall be responsible for assisting the emperor. Matters concerning legal edicts and other state orders shall also bear the signature of the ministers”. In this way, the powers given to the Mikado under the constitution have to be exerted with the assistance of the ministers. It is true that in practice, the face value of this limitation on the Mikado’s power is more obvious than its real value; however, compared with (*the ‘Outline’*), which imposes no limits on the power of the Emperor, *the Meiji Constitution* is evidently a different one.

Apart from the above, *Imperial Constitutional Outline* includes the “Essentials of the Parliament Law” and “Essentials of the Voting Law”³³. One remarkable article in “Essentials of the Parliamentary Law” reads, “the speech of the senators shall not imply a tone of irreverence on the majesty of the imperial court”, “any slander or humiliation of persons or things shall be punished accordingly”. “When the parliament is in session, the chairperson shall have the right to deploy the police force or to restore order for the assembly whenever he sees imperative. If anyone shall violate the regulations of the Parliamentary Law, the chairperson shall prohibit this person from utterance or evict this person from the assembly.” These two articles deny the members freedom of speech in the parliament, discouraging them from any criticism of the government. Contrarily, Article 9 of British *Bill of Rights* (1689) states “the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”³⁴. Since the promulgation of *Bill of Rights*, this system has been widely adopted by modern constitutions for the sake of protecting the senators’ freedom of speech. Article 52 of *the Meiji Constitution* was also dedicated to the protection of freedom of speech. “Members from both the Upper and Lower Houses shall not be held accountable elsewhere for opinions and votes made in the parliament. However, if any member of parliament delivers a speech, publishes his notes, or publishes through any

³³ See *Archives of Constitutional Preparation in Late Qing Dynasty*, Vol. 1, pp. 59-61.

³⁴ For more information about *the Bill of Rights*, see E. C. S. Wade and A. W. Bradley, *Constitutional and Administrative Law*, London and New York, 1985, pp. 14-15.

other channel his remarks in the parliament, he shall be tried according to law generally applied.” Article 53 stipulates special safeguard measures on the human rights of parliament members. “Members of parliament shall not be arrested without the approval of respective Houses during the parliamentary assemblies, unless caught *flagrante delicto* or for felonies concerning domestic riot and foreign threat.”

On the other hand, there are also some differences in the definition of rights and duties. Though *the ‘Outline’* simulates *the Meiji Constitution* on the rights of the “subjects”, it did not contain several rights that are stipulated for the benefit of the subjects in *the Meiji Constitution*. These are freedom of immigration (Article 22), protection of the privacy of mails and letters (Article 26), religious freedom (Article 28) and the right to petition (Article 30). Instead, *the ‘Outline’* stipulated that “the present rate of taxes imposed on the subjects shall remain the same if unaltered by new laws”, and that “the subjects have the responsibility to abide by national laws”, which are not present in *the Meiji Constitution*. When talking about *the Japanese Meiji Constitution*, scholars usually mention the limited scope, variety, and thoroughness of rights and freedoms entitled to the subjects. However, in the above comparison we can see that *the Outline* is not only more deficient in terms of the scope and variety of freedoms and rights, but also imposes more obligations than *the Meiji Constitution*.

It is of course not an adequately scientific approach to compare the *Imperial Constitutional Outline*, which is only a constitutional sketch, to *the Japanese Meiji Constitution*, which is a full fledged constitution, and try to discover their differences. Nevertheless, we can form the following image after comparison, that in the modestly numbered articles of *the ‘Outline’*, a lavish amount has been devoted to the powers of the majesty and the obligations of the subjects, leaving little room for the endowment of rights and freedoms to the subjects. This shall not be seen as negligence on the part of the legislative body, rather an act of deliberate intention instead. *The Meiji Constitution*, compared to contemporary European and American constitutions, is constantly subject to criticism for its deficiencies. There’s one thing to keep in mind namely that *the Meiji Constitution* was formulated in 1889, two decades after the Japanese Meiji Reform. Part and parcel of the legislative modernization of Japan, the Constitution must meet the political demands of the bourgeois in a background of developing capitalism after a bourgeois regime was established in Japan. However, when China first promulgated *Imperial Constitutional Outline*, the bourgeois class was in its budding stage, and the bourgeois regime was not well established. The purpose of the promulgation by the Qing government, which still wielded absolute rule, had nothing whatsoever to do with the modernization of legislation, if words like trick or gimmick over-exaggerate. Therefore, the difference between *the ‘Outline’* and *the Japanese Meiji Constitution* in terms of complexity and content reflects the difference in the objectives and the social backgrounds of the two countries.

The reason for this in-depth comparison and analysis of the difference between *Imperial Constitutional Outline* and *the Meiji Constitution* is to explain that China’s first constitutional document is transplanted from foreign constitutionalism with certain mutations which appeared in the process. No intentions were meant to assault its techniques of copying nature

or the hypocrisy of its content, less still to criticize it as a political gimmick. Though the constitution was imperfect in form, inadequate and unrealistic in content, insincere in objective, insignificant in value at the time of promulgation, invalid in term of the force of law, and the imitation of *the Japanese Meiji Constitution* had been ridiculed and deemed useless by the revolutionists headed by Dr. Sun Yat-sen (1866-1925) and Song Jiaoren (1882-1913),³⁵ it does not negate *Imperial Constitutional Outline* the status as China's first constitutional document.

As China's first constitutional statute in history, *Imperial Constitutional Outline* declared the legal status of the constitution, defined rights and duties in the form of legal documents, stipulates constraints on the power of the emperor (though this constraint is more of a show), etc., the significance of it far exceeded the content itself. Therefore, I agree with some scholar's argument that any assault on the "lack of sincerity" of the Qing government's imperial constitutional movement including the promulgation of *Imperial Constitutional Outline* is subjective and lacking in the solemnity and impartiality of a proper historian. Firstly, the word "sincerity" is too subjective on the part of a historian to form a concrete and objective standard. Secondly, the constitutional movement of the Qing government lasted for five years, concerning persons of various levels and matters of great complexity, which is more than a matter of "sincerity". If the Qing government really lacked sincerity, it is unnecessary for the government to take all the trouble of pursuing a "fake constitution". Lastly and fairly importantly, it is beyond denial that every ruler of China undoubtedly wished to bring prosperity and strength to China, be it Empress Dowager Cixi, or later the Regent.³⁶

From the perspective of the incorporation of foreign constitutions into *the 'Outline'*, activities such as sending investigating ministers and envoys to foreign countries, allowing debate between constitutional advocates and opponents, and imitating the contents of *the Meiji Constitution* advocated by the Qing government have brought forth the first climax of transplanting foreign constitutionalism in the history of China's constitutional practice. This is not only a continuation and extension of decades-old foreign constitutional theory and system in China, but also a solid foundation for future transmission. Besides, this also sets up a monument and heralds the reference of foreign modes and experiences for constitutional as well as other legislative activities in modern China.

³⁵ For instance, Song Jiaoren published "Issues Concerning the Regius Constitution", *People's Independence Newspaper* on February 11, 1911, mockingly commenting that "The constitution drafted by the government is an imitation of principles in the Japanese constitution. The government believes that the constitution promulgated by the Japanese Emperor, who rules his subjects for eternity, has to be the one best for safeguarding the monarch. However, there recently emerged people like Kotoku Shusui who plotted to overthrow the royal rule with bombs. How shall this incident be interpreted? Aye, the Japanese stuff isn't that good after all."

³⁶ See Gu Weiying: *Constitutional Movement of Qing Government, A Last Choice to Deal with Change*, Taiwan Bosom Friend Publishing House, 1989, pp. 5-6.

III. *The Nineteen Creeds*, an Imitation of the British Constitutional System

Compared with the 'Outline', *The Nineteen Creeds* promulgated in 1911 is a very different constitutional document. In terms of efficacy, the 'Outline', being only a constitutional guideline document, was not legally enforceable; while *The Nineteen Creeds*, being a number of important pre-promulgated constitutional articles, are legally binding. In terms of content, the 'Outline' was a transplant of the *Japanese Meiji Constitution* in defense of the Emperor's power, while *The Nineteen Creeds* are a reflection of the system and principles of British constitutionalism.

Britain, the cradle of modern constitutionalism, features a constraint on the power of the monarch from the birth date of its constitutionalism.³⁷ After the Glorious Revolution in the last decades of the 17th century, Britain established a constitutional monarchy, imposing further restrictions on the king's power. Later with the promulgation of a series of constitutional documents and the formation of constitutional conventions, the king's dominion further diminished, and the titular monarch system came into being. In the history of modern British constitutionalism, with the birth of the titular monarch system, legislative and administrative powers gradually began to be executed in reality by the parliament and the cabinet respectively. The titular monarch system and the parliamentary cabinet system of the British constitutionalism in 20th century was, to a certain extent, a source of reference for *The Nineteen Creeds*.

Although *The Nineteen Creeds* states "The Great Qing Emperor shall be the ruler of the Great Qing Empire, unbroken for ages eternal" (Article 1) and "The dignity of the Emperor is sacred and inviolable" (Article 2), it clearly stipulates that "The power of the Emperor shall be bound within the limits of the Constitution" (Article 3), and "The order for the inheritance of the throne shall be stated by the Constitution" (Article 4). Though the constitution must be promulgated by the Emperor, "the National Assembly shall draft and determine the contents of the constitution" (Article 5); and "the right to propose amendments of the constitution belongs to the parliament" (Article 6). Though the Emperor can appoint the Prime Minister and other ministers, he did not have actual decisive power over appointment and dismissal of officials since "the Prime Minister shall be elected by the parliament", and "other ministers shall be nominated by the Prime Minister" (Article 8). Though the Emperor is commander-in-chief of the army and navy, he should "abide by particular conditions at parliament's resolution when making deployments for domestic operations" (Article 10). Other articles that impose restrictions on the Emperor's power are "members of royalty shall not be appointed Prime Minister, other ministers or provincial administrators" (Article 8), "The Emperor shall not replace the law with his orders except when he has to give orders in an emergency and he shall act within the boundary of law and its authorization" (Article

³⁷ For more information about the origin and development of the British constitutionalism, see Section 1-2, Chapter 2 of *The History of British Legal Development* by He Qinhua, Law Press China, 1999.

11), “budgeting, augmentation and reduction of imperial spending shall be at Parliament’s resolution” (Article 15), and “Imperial ceremonies shall not be in confliction with the Constitution” (Article 16). Judging from these articles, we notice that though the Emperor’s power still exists, it has already been significantly restricted. If these articles can be adequately implemented, the Emperor can be basically regarded as a titular monarch.

According to the stipulations of *The Nineteen Creeds*, the parliament was granted not only the right to propose constitutional amendments, elect the Prime Minister and decide on the Imperial budget, but also the right to make resolutions for international treaties (Article 12) and an annual budget (Article 14). In the meantime, *The Nineteen Creeds* state that “when the Prime Minister is impeached by the parliament, either the parliament shall be dismissed, or the Prime Minister shall resign. However, one term of cabinet shall not survive when it is twice impeached by the parliament” (Article 9), “the official system and official regulations shall be defined by the law” (Article 13), and “the judicial bodies shall be organized by the two houses” (Article 17). Article 7 stipulates that “members of the Upper House shall be elected by the people from those qualified according to specific law. Article 7 and Article 17 reveal that *The Nineteen Creeds* established a dual-house system, while articles such as Article 6, Article 10, Article 12 and Article 14 reflect the principle of parliament as the national political centre. Particularly, Article 8 and Article 9 have established a cabinet responsibility system in which the cabinet is politically responsible for the parliament.

It is of course understandable that certain mutations occurred while trying to adhere to the principles of the British constitution.

One of the manifestations is the practice of a vote of no confidence. Under the cabinet responsibility system, a vote of no confidence plays a greater role than an impeachment right for the parliament to supervise administrative bodies of the government. Impeachment, usually imposed on law-breaking administrative officials, is itself a legal action that has to go through an arduous procedure. However, a vote of no confidence, a political action, requires fewer preconditions and a simpler procedure. It is therefore adoptable even in situations where policy opinions conflict or cooperation becomes jeopardized. That explains why even in presidential countries such as America, the parliament might have the right to impeach as well;³⁸ while a vote of no confidence is the privilege of cabinet parliaments exclusively. For example, in Britain, impeachments have to be submitted by the Lower House and then consented to by the Upper House, while a vote of no confidence is bound within the scope of the Lower House. Therefore, compared with impeachment, a vote of no confidence requires fewer preconditions as well as a simpler procedure, which facilitates the parliament’s control over the cabinet. As a result, impeachment has long been abandoned by the British parliament in practice. For parliamentary cabinet countries the impeachment right of the parliament is not a matter of vital importance; what is indispensable for these countries is a vote of no confidence. Though *The Nineteen Creeds* tried to confine the cabinet within the

³⁸ Section 3, Article 1 of *the Constitution of the United States of America* (1787) stated that “the Senate shall have the sole Power to try all Impeachments”.

power of the parliament, it did not empower the parliament with a vote of no confidence. Consequently, the parliament's supervision of the cabinet was limited to only pecking at some administrative officials with criminal offenses. As for general policy issues, the parliament had no control. The parliament thus became deprived of the solid basis for supervision, which was obviously against the principles of the parliamentary cabinet system.

The second demonstration of mutations is that *The Nineteen Creeds* did not require orders of the Emperor to bear the countersignature of a Minister of State. Though Emperor Xuantong required his orders to be countersigned by the Grand Councillor before they could be implemented when he first took the throne, this system was very different from the above mentioned minister countersignature system.³⁹ Since *The Nineteen Creeds* did not state the necessity of signature by the ministers, it is judicially reasonable to make the conclusion that the Emperor could freely wield his power within the scope of his authority. This flaw rendered *The Nineteen Creeds* a coarse duplicate of the titular monarch and cabinet system. These mutations in the course of imitation are generally regarded as the result of the promulgator's inadequacy in fully understanding the spirit of the British constitution.

Apart from the above, Article 14 stipulates that "the annual budget, unless approved by the parliament, shall not follow the budget plan of the previous year; expenditure items that have not been included in the budget bill shall not be listed as unconventional fiscal items". Particularly, if the first item of this article is strictly implemented, severe hazard will definitely occur because in times when the parliament or parties are in heated debate or conflict, government offices will have to be shut down simply for the reason that the budget plan might not be passed in time with majority approval. For this consideration, constitutions of countries such as Japan and Spain authorized governments to temporarily apply the budget plan of the previous year under such circumstances.⁴⁰

Since the guideline document for the future constitution - *Imperial Constitutional Outline* has copied the *Japanese Meiji Constitution* practice in sustaining the power of the Emperor, why did the later *The Nineteen Creeds*, which entered into force as a constitutional document, affirmed the principle of the British titular monarch and cabinet system instead of following the trail of the 'Outline'? Just when the ministers were studying British constitutionalism they still believed that "the complexity of it was beyond our mastery during such a short visit" and that "choices remain to be made if we are to distinguish the advantageous articles from the disadvantageous ones." Does this mean that after just a couple of years the minister had decided to shift the role model from Japanese constitutionalism to British constitutionalism after they had gained a complete "mastery" of British constitutionalism and learnt how to make the right "choices"? This notion hardly seems convincing. If we want to investigate the

³⁹ For more information, see "Signature of the Grand Councillor versus Countersignature of Ministers in Constitutional Countries" and "The Imperial Edicts versus Constitutionalism" included in *Treatises Collection of Collection of Works in the Yinbing Study* by Liang Qichao.

⁴⁰ See *A History of Chinese Constitutionalism* by Chen Ruxuan, Taiwan Wenhai Press, 1985, p. 16.

cause of this shift, it is advisable to start from analyzing the background for the promulgation of *The Nineteen Creeds*.

When the Qing government announced the preparation and promulgation of *Imperial Constitutional Outline*, the constitution's supporters who had been advocating constitutional monarchy were greatly encouraged. At their petition and demand, in 1907, the Qing government established the National Assembly, the Provincial Assemblies and the Local Assembly sequentially, and later announced regulations on the National and Provincial Assemblies as well as the regulations on the election of parliament members. After a series of planning, by 1909, twenty-one provinces, except Xinjiang, which filed a postponing memorial, had set up Provincial Assemblies.⁴¹ the National Assembly was officially established in 1910. In the same year, when the National Assembly was having its first general meeting, the Provincial Assemblies filed several petitions to the government to promptly assemble the parliament, which were rejected by the Qing government time after time for reasons of preparatory inadequacy. After the establishment of the National Assembly, at the demand of a number of council members and the petition by the Union of Provincial Assemblies, "*the Memorial on the Convening of the Parliament by the National Assembly*" was soon passed.⁴² During the twelve months from early 1910 to early 1911, four waves of parliamentary petition, led by constitutional advocates with the Provincial Assemblies as the core centre, swept all over the country.

Forced by the above events, the Qing government gave up its condition that nine years of preparation must come before the actualization of the constitution. Thus on November 4th, 1910, the Qing government issued "*Order of Advancing the Assembly of Parliament to the Fifth Year of Xuantong's Reign*"⁴³, expressly ordering the convening of parliament in the fifth year of Xuantong's reign (1913). The order also stated that this date, "once announced, shall not be open to discussion for change... If anyone should be so ignorant and reckless as to incite the public, or to undermine or exceed the boundary of this order, he should be punished according to law for disturbing public security". However, when later the National Assembly reported cases to the Emperor, for instance, the Governor of Hunan province issued government bonds without the approval of the Provincial Assemblies, the Viceroy of Yunnan and Guizhou Province raised the price of salt without the approval of the Provincial Assemblies, and the bickering between the Provincial Assemblies of Guangxi Province and the Governor of Guangxi over the Provincial Higher Police School's restrictions on foreign students, the Qing government had such issues addressed by the Salt Administration Minister and the Ministry of the Interior.

⁴¹ See *Wave of Political Reform in Early Twenty-First Century China – A History of Constitutionalism in Late Qing Dynasty* by Hou Yijie, China Renmin University Press, 2009, pp. 175-185.

⁴² For information about the ratification of this memorial, see "Stenography of Session Ten of the First Annual Assembly of the National Assembly" in *Stenography of the National Assembly Meetings – An Account of Parliament Preparatory Debates in Late Qing Dynasty* corrected by Li Qicheng, SDX Joint Publishing Company, 2011, pp. 79-82.

⁴³ See *Archives of Constitutional Preparation in Late Qing Dynasty*, Vol. 1, pp. 78-79.

In the opinion of the National Assembly, the fact that cases reported by the Assembly were re-addressed by administrative departments could be interpreted as administrative departments trampling on legislative departments. They therefore consented to impeach Yi Kuang, the Grand Councillor. However, their impeachment was condemned by the Qing government. "As is stated in *Imperial Constitutional Outline* promulgated during the reign of the preceding Emperor, rights concerning setting up of official and remuneration systems and appointment and dismissal of officials belong to the central government. As for the duties of the Grand Councillor, or the setting up of a cabinet responsibility system, the imperial court has independent judgment, and the President of the National Assembly shall not interfere. No more discussions shall be allowed."⁴⁴ This aroused tremendous indignation among the councilmen in the Assembly. After that, there was a continuation of conflicts between the National Assembly and the administrative departments of the Qing government. Amidst these conflicts, the National Assembly and the Provincial Assemblies had also played a very crucial role in restraining the power of the Emperor, impeding power centralization and promoting open politics, which to some extent defined the progress of constitutional preparation.

When the rule of the Qing government was coming to its end, the revolutionists, another significant force in shaping the course of the late Qing history, accelerated the action with their consistent revolutionist attempts. In October of 1911, shortly after the Wuchang Uprising broke out, an array of provinces followed suit to declare independence. At this urgent point when the whole country was out of joint, Pu Ting, Mayor of Rehe City, Sun Baoqi (1867-1931), Governor of Shandong Province and Cheng Dequan (1860-1930), Governor of Jiangsu Province tried to come up with solutions for the government by jointly petitioning the Qing government to reform the cabinet and announce the promulgation of constitution. In the petition, they proposed that "we should apply treatment to the flesh as well as to the skin: suppressing and appeasing are our treatment to the skin, while undertaking constitutionalism according to the will of the people is our treatment to the flesh."⁴⁵ In the National Assembly's second general meeting, which took place against the background of the Wuchang Revolution, though the council members strongly requested constitutionalism, and later the President of the Assembly repeatedly petitioned for constitutionalism, the Qing government was still reluctant to make any tangible moves.

In the meantime, Yuan Shikai and Liang Qichao also filed written reports advocating an immediate peace negotiation with the Wuchang Revolution Army and convening the parliament. At the point when suppression of the revolutionary army proved futile and the constitutional advocates' demand for a constitution mounted to a climax, a final epiphany suddenly dawned on the Qing government. In the October of 1911, the ninth month of the lunar calendar in the third year of Xuantong's reign, the Qing government successively issued in one day "Order on Removing the Restraint on Political Party Establishment", "Order on the Implementation of Constitutionalism" and "Order on Immediate Drafting of Constitution Creeds

⁴⁴ See Zhu Yong, ed. *A Comprehensive History of the Legal System in China*, (Vol. 9), p.114.

⁴⁵ See *Collection of Commentaries on the Decade before the Xinhai Revolution*, Vol. 4, p. 48.

by Pu Lun for the Deliberation of the National Assembly”⁴⁶, demonstrating its acceptance of suggestions to cancel the royal cabinet and assemble the parliament. Even these concessions failed to meet demands. “*Twelve Articles: A Political Outline*”, a request submitted by Zhang Shaozeng (1879-1928), Lu Yongxiang (1867-1933), Lan Tianwei, Wu Xiangzhen and Pan Juying, five Army officers, demanded that the Qing government “immediately address the matter and issue orders so as to consolidate the unity of the army and reaffirm the faith of millions of people... If Your Majesty should think our petition deceptive or disrespectful, we shall plead guilty accordingly. If we can be judged in the light of law, we shall accept our penalty, even death, without any complaints.”⁴⁷

The Qing government, taking for granted that it could have the situation under control by issuing a few orders as a gesture to show their resolution on implementing constitutionalism, was quite astounded at the ultimatum of these army officials. On the same day, Li Jiaju (1871-1938), President of the National Assembly, together with other colleagues, submitted “*Memorial for Promulgating the Major Creeds of the Draft Constitution and for Petitioning of Military Involvement in Drafting the Constitution*”, clearly stated that “After a close survey, we have discovered that Britain is the mother of the rest of the constitutional monarchs. This draft of the constitution shall be laid down in statutory law based on British constitutionalism.”⁴⁸ Later that day, “*Order on the Date for Promulgating Major Creeds of the Monarch Constitution*” was announced, stating that *The Nineteen Creeds* were “all of vital importance, and therefore should be promulgated exactly as it is drafted”. This order also fixed November 26th as the date for announcing *The Nineteen Creeds* in the Imperial Ancestral Temple. It is against this particular background that *The Nineteen Creeds* came into existence.

⁴⁶ See *Archives of Constitutional Preparation in Late Qing Dynasty*, Vol. 1, pp. 95-97.

⁴⁷ According to *Collection of Commentaries on the Decade before the Xinhai Revolution*, Vol. 4, p. 96, “*Twelve Articles: A Political Outline*” stated that “First, the Emperor of the Great Qing Empire shall rule for ages eternal. Second, parliament shall be assembled immediately; the first assembly shall be held within the year. Three, amendments to the constitution shall be resolved by the parliament and promulgated in the name of the Emperor. However, the Emperor shall not invalidate the constitution. Forth, proposals of constitutional amendments shall be exclusively formulated by the parliament. Fifth, the army and the navy shall be commanded by the Emperor. However, military operations for domestic purposes shall be made in accordance with specially resolved conditions. Operations beyond these conditions shall be nullified. Sixth, shoot-to-kill and summary execution shall not be executed by order. The innocent shall not be illegally seized or imprisoned. Seventh, all party-affiliated persons who have been held in prison for felonies against the country shall be given amnesty and selected to perform public service. Eighth, the responsibility cabinet system shall be established. The Prime Minister shall be elected by the parliament and appointed by the Emperor. Other ministers shall be nominated by the Prime Minister. Royal members shall not be appointed Prime Minister or other ministers. Ninth, international treaties concerning increase on the burden of the people and peace with foreign countries shall be resolved by the parliament and signed in the name of the Emperor. Tenth, annual budget, if unresolved by the parliament, shall not apply the budget plan of the previous year. Eleventh, members of the Upper House shall be elected among nationals who have special legal qualification by law. Twelfth, military presence shall be included in drafting the constitution and the parliament election law, and in solving any matter of importance of the country.”

⁴⁸ See *Archives of Constitutional Preparation in Late Qing Dynasty*, Vol. 1, p. 101.

As we can see, from transplanting the Meiji Constitution for the sake of sustaining the power of the Emperor at the time of preparing *Imperial Constitutional Outline*, to imitating the titular monarch parliamentary system of British constitutionalism at the time of preparing *The Nineteen Creeds*, the Qing government had never done anything of its own will. *The 'Outline'* was drafted at a time when the Emperor's power still overwhelmed people's power, while *the Creeds* were promulgated at a time when the revolutionist armies, holding a republic banner, had occupied most of China, and when the constitutionalists had lost faith in the Qing government's sincerity in promulgating a proper constitution. *The Nineteen Creeds*, which reproduced the British constitutional system, was the last resort for the Qing government in such a dire situation. After all, imperial power was the ultimate thing that mattered. They had by then completely put behind their back the "complexity" of the British constitution and its "incompatibility with the Chinese political system caused by its complexity". As long as there was still hope for sustaining the monarchy, the Qing Government would not hesitate to make an attempt. Who cared about the appropriateness of reference? What would matter even if freedom and rights were utterly left out from *the 'Outline'*? Pitiably *the 'Outline'* failed to live up to the Qing government's expectation. Shortly after the promulgation of *the 'Outline'*, the death knell of the Qing government tolled anyway, marking the end for imitating foreign constitutional theory and practice in the course of constitutionalism in the last days of the Qing dynasty.