

## 5 The 22 Frimaire of Yuan Shikai

### Privy councils in the constitutional architectures of Japan and China, 1887–1917

*Egas Moniz Bandeira*<sup>1</sup>

*It was indeed a grand political idea whereof even England could be jealous of us, this Council of State, which was heard over all big questions, conserved from the great political traditions of the Empire. ... This admirable creation of the Brazilian spirit, which completed the other, no less admirable one taken from Benjamin Constant, the Moderating Power, united, thus, around the Emperor the political heads of the one and the other side, all of their consummated experience, whenever it was necessary to hold consultations about an important public interest.*<sup>2</sup>

Joaquim Nabuco (1849–1910)

*This can be dealt with by a completely new invention of my own devising. When you inquire into the basic principles of our Constitution, you will see that sovereignty resides firmly in the imperial house, and that in a crisis His Majesty's judgment is to be the basis for the final decision. ... There must be conscientious imperial advisers who can clearly ascertain the state of the nation and the sentiments of the people, and in the end secure what is in their best interests. I am convinced that only a Privy Council can provide the place where such advisers may be found.*<sup>3</sup>

Itō Hirobumi 伊藤博文 (1841–1909)

#### **Introduction**

Advisory bodies to monarchs are among the most traditional forms of collective decision-making, but as institutions of modern states, they are among the least conspicuous ones. As monarchs had their powers limited by constitutional governments or even became symbolical figures in parliamentary political systems, their advisory bodies lost their legislative attributions to parliaments and their executive attributions to the cabinet. Since the nineteenth century, a privy council might seem like a relic from the autocratic past to an observer from Central Europe, the British Isles or her former colonies in North America. It was in this sense that Kenneth Colegrave wrote that the Japanese Privy Council had “almost no counterpart in contemporary Europe,” and belonged to the “England of the Stuarts or the France of Louis XVI.”<sup>4</sup>

But is that really so? Whoever, by whatever strange whim, decides to complement his reading of the Constitution of the Empire of Japan of 1889 by the Constitution of the Empire of Brazil of 1824, will find a parallel between the two of them which he will not find between the Japanese Constitution and the constitutions from which it is thought to be derived. Title V, chapter 6, of the Brazilian Constitution stipulated that the Ministers of State shall countersign and be responsible for all acts of the executive branch of the government, while the next chapter institutes a Council of State to be heard in all “important matters” as well as in cases in which the Emperor “propose to exert any of the attributions of the Moderating Power.”<sup>5</sup> While much more laconic, the Japanese Constitution had the same structure: art. 55 stipulated that the Ministers of State countersign all Laws, Imperial Ordinances, and Imperial Rescripts of whatever kind, while art. 56 laid down that the Privy Council “deliberate upon important matters of State.”<sup>6</sup> Constitutional thought has also described both institutions in very similar terms: While the Brazilian Council of State has been claimed to have been the “brain of the monarchy,”<sup>7</sup> the Japanese Privy Council was the “palladium of the constitution and of the law.”<sup>8</sup>

In both cases, it has been claimed that the consultative council was a specifically national element of the respective constitutional architecture. While the Brazilian statesman Joaquim Nabuco (1849–1910) claimed that the Council of State was an “admirable creation of the Brazilian spirit,”<sup>9</sup> the Japanese statesman Itō Hirobumi (1841–1909) spoke of a “completely new invention of my own devising.”<sup>10</sup> But as a matter of fact, Brazil and Japan were by far not the only constitutions to show such a parallel treatment of the executive body of ministers and of the advisory body to the monarch. Next to the Portuguese Constitutions of 1822 and 1826,<sup>11</sup> closely related to the Brazilian one, and the Spanish constitutional charters, such as those of 1808 and 1812,<sup>12</sup> the feature came up in other seemingly unrelated constitutions around the world, such as articles 41 and 42 of the 1845 Constitution of the Kingdom of Hawai’i and articles 54 and 55 of the 1875 Constitution of the Kingdom of Tonga.<sup>13</sup>

Did these privy councils and councils of state appear around the globe coincidentally and spontaneously? Using the example of three East Asian polities – the Japanese Empire, the Qing Empire, and the Republic of China – this chapter shows that they did not.<sup>14</sup> By the nineteenth century, privy councils were all but a moribund relic of the past. Rather, they were building blocks of global constitutional architecture which surfaced and were adapted in various parts of the world according to local needs. As Lorenz von Stein (1815–1890) explained to his Japanese interlocutors, the old privy councils of pre-constitutional times were transformed in three ways: some of them disappeared completely, others retained ceremonial roles, while some were transformed into significant organs counterbalancing the cabinet or the parliament, being it within monarchic or republican constitutional frameworks.<sup>15</sup> The first development occurred in many German states, while England is a prime example for the second type. Although these two types might lead to the impression of the institution being an anachronism, the third type also had a prominent representative in the middle of Europe, and one

which proved to be rather influential: the Napoleonic reinterpretation of the pre-constitutional *curia regis* in the form of the constitutional *Conseil d'État*.

As the chapter shows, Japan and China opted for the third type, adapting the constitutional idea in a variety of local variants designed to meet the needs of the constitution-makers. Meiji Japan opted for the strong Privy Council through the mediation of German constitutional advisors, for such an institution promised additional constitutional stability in a context where the Emperor was to occupy a role at the top of the constitutional architecture. While the strong role of the Japanese Privy Council is well-known, the various Chinese refractions of the institution seem to have been inconspicuous in the formation of the modern political institutions of the Chinese state. Carrying a host of differing names not only in Chinese, but also in English translations, it is easy to overlook that not only the imperial “constitutional preparation” from 1906 to 1911 created a Privy Council, but that early republican constitutional architectures also frequently foresaw such bodies. While, as most other new institutions, they were modeled on foreign institutions, mostly but not exclusively Japanese, they also played the role of being a traditional element within the new system, seen as a successor for indigenous institutions and as a way to accommodate old elites. The chapter shows that not only the late Qing *Bideyuan* 弼德院 (Privy Council), but also Yuan Shikai’s 袁世凱 (1859–1916) *Canzhengyuan* 參政院 (literally Political Participatory Council) were refractions of the concept. Thereby, it also highlights political continuities and discontinuities between the Qing Empire and Republican China. A privy council could be formed in both polities due to the structural similarity between constitutional monarchy and presidential republics, but it fell into oblivion when it came to be too strongly associated with monarchic and presidential strongmanship.<sup>16</sup>

### **From *curia regis* to *pouvoir neutre***

In Europe, perhaps the first place where the privy council lost its power to a responsible subset of itself was England, and later by extension, the United Kingdom. In the mid-seventeenth century, during the English Civil War, the Privy Council was first abolished, but was then replaced with a Council of State, which again became a Privy Council to Lord Protector Oliver Cromwell (1599–1658). After this episode, the royal Privy Council was reinstated, but lost most of its powers to the Cabinet, which is formally a committee of the Privy Council. Except for its main ceremonial functions, the British Privy Council has retained some residual executive, legislative, and judicial functions: it may issue royal charters to grant powers to body corporates, and its Judicial Committee acts as the court of appeal in cases concerning crown dependencies, overseas territories, and certain Commonwealth states.

Similar developments also took place in continental European processes of constitutionalization, but they tended to go a step further: As these processes, beginning from the late eighteenth century, all engendered full-blown written constitutions, the constitutional charters now tended to leave out these institutions.

For example, the Belgian Constitution of 1831 – an internationally influential document – does not mention the Crown Council (*Conseil de la Couronne*) at all. Although it continued to exist as a customary institution, it was only convened five times since the adoption of the Constitution in matters of supreme importance. In Germany, some constitutions mention the Privy Council, such as that of the Kingdom of Bavaria (1818)<sup>17</sup> and of the Kingdom of Hannover (1833),<sup>18</sup> but they often do so only in passing, and in many places, the institution was gradually sidelined during the century. This was the case, for example, in the most powerful of German states, Prussia. Although the institution saw a few short-lived revivals until the end of monarchy, the Constitution imposed by the King in 1850 does not mention the *Staatsrat*.<sup>19</sup>

However, as mentioned, the third type of advisory council – which paralleled the cabinet in the constitution – not only occurred in Brazil, Japan, Hawai'i, and others, but also in a very different central European context. The Council of State (*Conseil d'État*) of the French *ancien régime* was inherited by the Napoleonic *Conseil d'État*, founded in 1799 with the so-called *Constitution of 22 Frimaire, Year VIII*. In articles 52 and 53, the charter instituted the new *Conseil d'État* as part of the government, tasking it with devising draft laws and resolving administrative difficulties. Articles 54 and 57 set down the role of ministers, including their responsibility. The legislative power, on the other hand, was fragmented into three assemblies (Conservative Senate, Tribunal, and Legislative Corps). In the post-Napoleonic restoration, the *Conseil d'État* was sidelined, but it regained its importance in the July Monarchy installed in 1830 and was again constitutionally regulated in the Constitution of the 1848 Republic.

The text of the French Constitution of 1799 was not a perfect blueprint for subsequent constitutions. The attributions of the council of state varied, as, e.g., it was not necessarily tasked with administrative adjudication, and the 1799 stipulation that three orators be chosen from the *Conseil d'État* to represent the government in the *Corps Législatif* remained very specific to Consulate France.<sup>20</sup> However, the strong position of the postrevolutionary French *Conseil d'État* next to the Ministers of State – who were not necessarily yet united in a cabinet – was key in inspiring similar constitutional architectures in Euro-America and beyond.<sup>21</sup> As will be shown, it also figured as a significant element in the considerations that led to the adoption of the Japanese Privy Council.

Furthermore, the constitutional theory which came to underpin the constitutional architecture of a Council of State alongside the State Ministers directly in Brazil and, in a more fuzzy way, in Japan, was also of French origin. Basing himself on Stanislas de Clermont-Tonnerre (1757–1792), the liberal French philosopher Benjamin Constant (1767–1830) had conceived of the royal power as of a separate branch of government next to the executive branch of government, even though the monarch was at the head of both:

One will be astonished that I distinguish the royal power from the executive power. This distinction, still unknown, is very important. It is, perhaps, the key of every political organization. There are, says he (Clermont-Tonnerre),

two distinct powers within monarchic power: executive power, vested with positive prerogatives, and royal power, which is supported by memories and religious traditions.<sup>22</sup>

Although Benjamin Constant did not comment about the Council of State, this consultative council attached to the person of the monarch was soon conceived as the epitome of royal power itself. The Brazilian (1824) and Portuguese (1826) Constitutions expressly conceived the Council of State as being the instrument of the monarch's "moderating power" (*poder moderador*), which, as expressed in art. 98 of the Brazilian Constitution,

is the key of the while Political organization, and is delegated exclusively to the Emperor, as Supreme Chief of the Nation, and its First Representative, that he incessantly watch over the maintenance of independence, equilibrium, and harmony of the further Political Powers.<sup>23</sup>

Hence, although privy councils had become at most ceremonial institutions in the Germanic-speaking parts of the world, it was far from an anachronistic rudimentary institution on a global level. In the form of councils of state, advisory bodies to heads of state continued to flourish and be productive in new constitutional formations, especially in cases where they were deemed necessary for the constitutional equilibrium between the several branches of government.

### **Japan: "The Cabinet executes, the *Conseil d'État* deliberates"**

When, more than half a century later, Japanese leaders devised a constitution as a basis for the government of Japan, they encountered a situation which was in a way the opposite of the one to be found in many Euro-American polities. Real political power had laid with the Tokugawa family in Edo (present-day Tokyo) until the second half of the nineteenth century, while the Emperor had merely had a powerless symbolic function in Kyoto.<sup>24</sup> The so-called Meiji Restoration abolished the power of the Tokugawa and at the same time nominally "restored" the position of the Emperor, who would thenceforth be the "head of the Empire, combining in Himself the rights of sovereignty," and exercise "them according to the provisions of the present Constitution" (art. IV of the 1890 Constitution).<sup>25</sup>

However, the combination of sovereignty in the hands of the Emperor did not necessarily mean that he would be the main political operator of the Empire. The oligarchy which had just seized power from the Tokugawa government would not want to give up its position, and it deemed that entrusting too much power on the single person of the Emperor would be dangerous. Furthermore, constitutionally attributing the exercise of sovereignty to the Emperor was also a risky move for the stability of the constitution itself, for it made the Emperor highly vulnerable in case he became involved in political struggles. Again, the Emperor had to be elevated above daily politics and put into a role less prone to controversies. Regular constitutional organs would take political responsibility and thus shield the Emperor from blame.<sup>26</sup>

It is well-known that the creators of the Meiji Constitution opted to adapt German models to address these constitutional challenges.<sup>27</sup> Yet, the question of the Privy Council shows that constitutional law adopted by the Japanese government by suggestion of German advisors was not exclusively of German extraction, but drew from a broader pool of European statecraft. Although the Meiji Constitution did not expressly recognize the “moderating power” such as the Brazilian one did, the position of the Emperor under the Constitution came quite close to it. Albeit far from identic to it, the Japanese Privy Council came much closer to a Napoleonic Council of State than to the contemporary British or Prussian Privy Councils.

But what exactly gave the impulse for the creation of a Privy Council in Japan? Scholarship on the matter is divided.<sup>28</sup> The first instinct of observers would be to see in it a vastly modified adaptation of the British Privy Council.<sup>29</sup> Takii Kazuhiro 瀧井一博 attributes the idea to Itō’s “study of European statecraft, especially under (Lorenz von) Stein.”<sup>30</sup> Takii’s footnotes refer to Sakamoto Kazuto 坂本一登, who describes the Privy Council as the result of a debate between Itō – who favored a strong institution, supported by the German constitutional advisor Hermann Roesler (1834–1894) – and another pivotal figure in the constitutional drafting process, Inoue Kowashi, who favored a weaker council.<sup>31</sup> Ernst Lokowandt contends that it was “broadly modelled” on the Bavarian *Staatsrat*.<sup>32</sup> Junko Ando’s detailed study of the German origins of the Japanese Constitution reports stark differences of opinion between the various advisors of the Japanese government, including Stein, Roesler, Rudolf von Gneist (1816–1895), and Gneist’s student Albert Mosse (1846–1925).<sup>33</sup> According to Ando, Stein rejected the idea of a Privy Council as not compatible with a constitutional state (*Verfassungsstaat*) in which responsible ministers would counsel the Emperor, and at most approve of a Privy Council as a ceremonial body.<sup>34</sup> Instead, she writes, the Japanese Privy Council largely conformed to the suggestions of Rudolf von Gneist, which she interprets as stemming from an “anachronistic” ideal image of the English political system.<sup>35</sup> According to Ando, the Gneistian position was reluctantly supported by Roesler, who was favorable of a limited Privy Council to deliberate on draft laws and ordinances.<sup>36</sup>

The divergences between Stein, Gneist, Roesler, Itō, and Inoue are supported by the primary sources. Gneist – a professor in Berlin – and Stein – a professor in Vienna – had advised a large number of Japanese statesmen on their trips to Europe, most notably Itō Hirobumi in 1882–1883.<sup>37</sup> They were thus instrumental in forming the constitutional worldviews of the Meiji elites, and the trip to Vienna undertaken but many a leading Japanese statesman came to be known as the “Stein pilgrimage.”<sup>38</sup> The concrete constitutional drafting process, however, began in 1886 and involved a small circle of Japanese drafters – apart from Itō and Inoue, Itō Miyoji 伊東巳代治 (1857–1934) and Kaneko Kentarō 金子賢太郎 (1853–1942) – who would pose questions to Mosse and Roesler and deliberate about their answers, choosing what model to follow.<sup>39</sup>

Itō’s conception of the monarch as an arbiter between the powers was Steinian, but the vision of a strong Privy Council which he introduced into the drafting

process was not. The Constantian idea of the Emperor as a neutral power had quickly become popular in German liberal political philosophy, including with Lorenz von Stein.<sup>40</sup> Von Stein devoted a large part of his scholarly attention to the legal, political, and social history of France and exclaimed “that nowhere the world knows a more profound and inexhaustible source of greater truths about constitution and society.”<sup>41</sup> Next to several works on French social movements, he also published a three-volume history of the French state and French law. Von Stein deemed that a purely democratic solution would exacerbate social tensions and that only a class-independent monarch standing above the other powers would be able to create a “kingdom of social reforms” (*Königthum der socialen Reform*).<sup>42</sup>

Stein’s conception of the monarch as a neutral, mediating power transpires in the lectures he gave to his Japanese guests in Vienna. On 15 February 1887, he told Prince Komatsu-no-miya Akihito 小松宮彰仁 (1846–1903) that the monarch should “thoroughly consider the positions of both sides and decide on the possibility of determining which of them is right.” The monarch, Stein maintained, should “stand above the legislative and executive branches and oversee all affairs of the state.” On that occasion, Stein also told Prince Komatsu that the Emperor would permanently need “people personally loyal to His Majesty” to act as advisors. Prince Komatsu noted that the advisors should be united in two consultative bodies: one for military matters (*junji naikyoku* 軍事内局) and one for political matters (*seiji naikyoku* 政事内局).<sup>43</sup>

But Stein’s conception of monarchy required a much less prominent monarch than Benjamin Constant’s, and he did not see the Constitution of the Year VIII as a realization of the monarch’s neutral power. When he spoke about the neutral power in his books about France, he did so to argue that it had been but halfway introduced in France with the July Monarchy installed in 1830.<sup>44</sup> Stein’s words to Prince Komatsu about the monarch needing capable advisors did not refer to a privy council but rather to the cabinet, for the task of giving counsel to the monarch would behoove his ministers. In his conversations with Japanese statesmen, Stein consistently cautioned against a separate privy council to advise the Emperor aside the cabinet. In a lecture to the Elder Statesman (*Genrō* 元老) Kaieda Nobuyoshi 海江田信義 (1832–1906), he warned that such a constellation would “give rise to conflicts between the ministers and the privy council.”<sup>45</sup> To Itō Hirobumi and his entourage, he declared even more adamantly:

A council of state<sup>46</sup> is not the office to respond to consultations by the king. The right to take up consultations from and give advice to the king shall necessarily reside with the government, i.e. with the *ministry*. When the ministry is staffed by its members and able to be a pillar (of the governmental structure), the Council of State will be an entirely superfluous institution. The Council of State shall only be established while it is provisorily needed and shall serve the function of memorializing in necessary matters to the monarch while the ministry is exchanged. ... This is also the result of the historical development. Therefore, when the constitutional system shall once be fixed,



the Council of State shall lose fixed functions and become a merely honorary office.<sup>47</sup>

Rather, Itō's ideas about the Privy Council stemmed from Rudolf von Gneist, which he then defended in the drafting process. Detailed records of Gneist's conversations with Itō himself are not extant, but they seem to coincide with what Gneist told another Japanese visitor, Prince Fushimi-no-miya Sadanaru 伏見宮貞愛 (1858–1923), three years later.<sup>48</sup> Some other sources also give a glimpse of what Gneist told Itō. In a letter to the German minister in Japan, Karl Eisendecker (1834–1934), Gneist narrated that he had put his emphasis on “constructing a strong municipal constitution from below and installing a Council of State and Upper House from above.”<sup>49</sup> In one point, however, Gneist differed markedly from European models with strong Councils of State: although generally favorable of including administrative judication into its responsibilities, he deemed it too early for Japan to do so.<sup>50</sup>

*Prima vista*, it would be natural to understand Gneist's conception as an “anachronistic” understanding of England. If Stein concentrated his energies on the study of France, Gneist devoted much of his academic attention to English history, publishing several books on English constitutional law and constitutional history.<sup>51</sup> Gneist is known to have created an “English utopia,” writing about the Victorian United Kingdom as if it was still governed the same way as Elizabethan England.<sup>52</sup> Yet, neither were his recommendations to Japanese politicians an entirely “anachronistic” reverberation of Elizabethan England nor did the Japanese drafting process build on such a limited understanding of England.

For one, Gneist used a historically based comparative approach.<sup>53</sup> Thus, he shows awareness that the Privy Council had lost much of its real importance in England, but retained it elsewhere, e.g., when he speaks of the Prussian *Generaldirektorium* (1723–1808) as a “collegially organized Council of State, in which the conduction of the highest affairs of state is connected with the decision about complaints by the subjects, similarly to the older English Privy Council and as in the French *Conseil d'État*.”<sup>54</sup> Furthermore, when giving recommendations to Prince Fushimi, it seems that his reference is not so much the English Privy Council but the French *Conseil d'État*, for he defines the institution with a sentence attributed to none other than Napoleon Bonaparte (1769–1821): “The Cabinet executes; the *Conseil d'État* deliberates” (*Naikaku wa kore o okonai; Sanjiin wa kore o gisu* 内閣ハ之ヲ行ヒ參事院ハ之ヲ議ス).<sup>55</sup> It also seems that at least Prince Fushimi understood the proposed organ to be closest to the French model, for his records constantly use the common Japanese translation for the *Conseil d'État*, *Sanjiin* 參事院.

When drafting the final constitution, Itō's Gneistian view clashed with Inoue's and Roesler's. Roesler's written statement on the question did “not support the establishment a Council of State with the status of a constitutional organ,” for it would be a source of conflict with the Cabinet.<sup>56</sup> However, Roesler conceded that Cabinet ministers might not have the time and specialized knowledge for their decisions on laws and that legislative drafts were often “rough and imperfect.”<sup>57</sup>



Hence, he still could imagine a Privy Council limited to give counsel on laws and ordinance, even if he did not deem it to be necessary.<sup>58</sup>

Accordingly, Roesler's draft Constitution of 1887 included no mention of the Privy Council.<sup>59</sup> However, commissioned by Itō, he also drafted an organic law for the Privy Council, dated 6 April 1888, which gave the institution far-reaching powers. These included not only the power to interpret laws, but also to decide on budget and accounting conflicts between parliament and government.<sup>60</sup> Inoue protested against this accumulation of powers, essentially arguing against the position of the Emperor as a separated branch of government, i.e., implicitly rejecting the Constantian model:

In political matters, it is not possible to make a difference between Cabinet and Imperial House. ... Should the Emperor now decide about divergences between the government and the parliament with the further assistance of the Privy Council, this will distinguish clearly between the government and the Emperor, and will serve as a proof to distinguish their characteristic intentions. This will not be confined merely to the matters were they conflict with each other, but all actions of the government will be able to be explained as coming into existence outside of the Emperor's pleasure.<sup>61</sup>

However, Inoue's alternative proposal also explicitly adduced the French *Conseil d'État* as its model, for that institution, too, had no direct bearing with the parliament. In other words, Inoue did not see the Council of State as an instrument of the neutral power, but as a provider of services for the executive branch of government:

In sum, the Privy Council should not have this power and be put on top of the Cabinet and the Parliament. Therefore, the Privy Council's legal interpretations should be restricted to answering questions from within the executive (including about the constitution). I reckon that it should not have a connection with the Parliament (i.e., the same as the French *Conseil d'État*).<sup>62</sup>

Itō's letter to Inoue, which serves as an epigraph to this chapter, was a reaction to Inoue's criticism. Therein, he defended his conception of the monarch as an arbiter in constitutional crises and of the Privy Council as the monarch's helper in this task, which he claimed to be of his own devising. The new organ created after this exchange of opinions was a compromise between the two positions. The especially controversial responsibility in budgeting matters was withdrawn, as was the mention to resolving conflicts with the parliament, making it close to Inoue's proposed *Conseil d'État* structure. Yet, in other ways, the new organ was also palpably Itōesque.

Itō's hand can not only be seen in the name of the organ. Rather than *Sanjiin*, the organ was called "Agency for the Important and Confidential" (*Sūmitsuin* 樞密院). At the same time as this was the name used to translate the English and constitutionally invisible German institutions and came close in meaning to the

English term “Privy Council,” it was also a reference to East Asian tradition of statecraft. In AD 765, the Tang Empire had created an “Agency for the Important and Confidential” to coordinate and supervise the Emperor’s paperwork. Now, more than a millennium later, the agency became a constitutional organ on the same level as the Cabinet, being thus separated from the administrative branch of government.

According to the Constitution, the Emperor would be relieved of daily political business to be conducted through responsible ministers of state. While the Privy Council served for the Emperor not to potentially give away all his powers to the Cabinet, it also provided additional checks on Imperial power. First, it took away his decision-making from the intransparent workings of the Inner Palace and institutionalized it.<sup>63</sup> Second, the fact that the Privy Council would give recommendations by majority decision could reduce the Emperor to a “state notary public.”<sup>64</sup> The Cabinet and the Privy Council were closely intertwined, for the members of the former were always also members of the latter (but not vice versa). In a “division of labor,” however, the Privy Councillors would be tasked with “planning far-sighted schemes of statecraft and of effectuating new enactments, after a careful deliberation and calm reflection, by instituting thorough investigations into ancient and modern history, and by consulting scientific principles.”<sup>65</sup>

The provisions concerning the Privy Council were so flexible that it could accommodate for a strong Emperor, but that it could also function as an organ of its own even with an absent monarch.<sup>66</sup> Thereby, the organ itself, rather than the Emperor personally, came close to being a fourth branch of the state, for, in the words of Itō’s commentary, it would be “the palladium of the Constitution and of the law.”<sup>67</sup> Constitutional reality went beyond what the maxim “The Cabinet executes; the *Conseil d’État* deliberates” suggested. The Cabinet would ask the Privy Council for “counsel” on new draft laws twice: first before passing them to the legislative branch – which the fathers of the Meiji Constitution did not want to be too strong – and then again at the end of the legislative process. Hence, the Privy Council could *de facto* decide on draft laws. In spite of their close entanglement, the “third chamber,” as it came to be known, developed a tense relationship with the Cabinet and clashed with it several times before it was dissolved after the Second World War.<sup>68</sup>

### **Qing Empire: An “Academy of Worthies” as “retirement home”?**

While literature often stresses the strong position of the Japanese Privy Council as a “third chamber,” the Qing Privy Council has been commonly described as an “honorable, but powerless” organ.<sup>69</sup> How can this be if the Qing Privy Council was widely thought to follow the model of the *Sūmitsuin*?

The imperial Privy Council, instated in 1911, only existed for a few months before the fall of the Qing Empire, and for a few days in 1917 during a short attempt at imperial restoration. Given this short period of existence, the conclusion that the Qing Privy Council was an unimportant part of late Qing constitutional

architecture is somewhat premature. It certainly stood in the shadow of both the legislative Political Consultative Council (*Zizhengyuan* 資政院) and the executive Cabinet (*Neige* 內閣): while the *Zizhengyuan* was being a catalyst of political opposition from provincial elites and the Cabinet was the object of sharp criticism for consisting mainly of imperial kinsmen, the Privy Council did not enjoy much independent protagonism. Qing mainstream position was concerned about creating a dignified organ which would be a home to high officials in the transition from absolute to constitutional government. However, while debates on the institution showed some Qing specificities and emphasized different aspects than Japanese Constitution-making had, there was no shortage of voices calling for the Council to have a strong position independent of the Cabinet, and its structure closely resembled that of the Japanese *Sūmitsuin*. The council, thus bore the seeds of becoming an institution comparable in significance to the Japanese *Sūmitsuin*.

By the turn of the twentieth century, when a large-scale movement to demand constitutional reforms in China was taking shape, the encyclopedias of modern knowledge and textbooks of international law based on Japanese sources defined privy councils as bodies that “replied to consultations by the Emperor” and debated “important affairs of the nation.”<sup>70</sup> Although such descriptions were often limited to monarchies and did not accordingly include France’s *Conseil d’État*, the equivalence of these institutions irrespective of the form of state was not completely lost in China either. This can be seen from the very imperial ordinance establishing the Privy Council in 1911, which declared that the institution would be equivalent to the privy councils and councils of state of the various countries of East and West.<sup>71</sup>

Late Qing literature unanimously stated the practical irrelevance of the English Privy Council, but reflected different assessments of the importance of the Japanese Privy Council. One of the more cautious assessments was offered by Wang Rongbao 汪榮寶 (1878–1933), who later became one of the members of the drafting team for the final constitution of the Qing Empire. The *New Erya* (*Xin Erya* 新爾雅), a seminal encyclopedia coedited by him in 1902, stressed that the Japanese Privy Council was not an administrative organ and that it was “only the highest consulting organ of the Tennō.”<sup>72</sup> However, Wang Hongnian 王鴻年 (1860–1911), who later became an assistant to the Chinese constitutional commission in Tokyo, gave a stronger assessment of the institution. In the first systematic Chinese textbook of constitutional law, published in 1902 and based on lectures given by Hozumi Yatsuka 穗積八束 (1860–1912), he stressed that the Japanese constitutional charter differed from European Constitutions by expressly mentioning the Privy Council, and that its powers competed with those of the Cabinet ministers.<sup>73</sup> It is quite possible that such descriptions later created the misunderstanding that the cabinet and the privy council were strictly separated organs, which was not the case.

From the earliest proposals to establish a constitutional Privy Council in 1906, the central aim associated with it was creating a dignified space to accommodate the old élites who would otherwise have no place in the new constitutional system. This concern eclipsed the possible rivalry of the Privy Council with the

Cabinet and created the impression still prevalent in scholarship that the privy council would be a powerless organ. In 1906, Prince Duanfang 端方 (1861–1911) submitted a proposal for a provisional reorganization of central administration, which would precede the eventual constitution. His suggestion for the creation of a *Shumiyuan* (the same term as Japanese *sūmitsuin* 樞密院) actually gave it a more active position than the Japanese model, for it postulated that it actively convene every ten days to provide counsel for the Emperor.<sup>74</sup> However, his plan also could be understood as mainly aimed at the accommodation of those members of the Qing Grand Council (*Junjichu* 軍機處) and Grand Secretariat (*Neige* 內閣) who would not make it as prime ministers or ministers of the new government. For Duanfang, the original Grand Council had performed advisory functions such as those of a privy council,<sup>75</sup> but should be integrated into the Grand Secretariat to form a powerful executive office. The supernumerary officials, in turn, would receive “a sense of dignity” (*youchong zhi yi* 優崇之意)<sup>76</sup> from the “good method and beautiful meaning” (*fa liang yi mei* 法良意美)<sup>77</sup> of the new Privy Council (*Shumiyuan*).

Prince Yikuang 奕劻 (1838–1917) submitted a similar proposal, which figured in the first official plan for political reforms in 1906 and remained influential throughout the period of late Qing constitutional preparation.<sup>78</sup> Although it was not included in the reforms announced on the basis of this plan, it contained the only draft of an organic law for the organ and served in constitutional scholarship as a blueprint for the design of the Privy Council as late as 1910.<sup>79</sup> Yikuang’s proposal differed in two main points from Duanfang’s. First, it did not foresee regular meetings of the Council. In itself, this did not necessarily mean much, for the passiveness of consultations just followed the Japanese model.<sup>80</sup> However, the second difference indeed indicates that Yikuang saw the accommodation of no longer needed officials as the main function of the Privy Council. It also showed another important concern of late Qing constitutionalists: the Privy Council was justified with Chinese traditions and thought to be a traditional element in the *nouveau régime*. Although *shumiyuan/sūmitsuin* also had a Tang precedent, it had now become the official name of the Japanese council and the standard translation for privy council. Instead, Yikuang sought to give it a distinctively Chinese flavor by “using the name ‘Academy of Worthies’ (*Jixianyuan* 集賢院) of the Tang era and adopting the content of the Japanese Privy Council (*Shumiyuan*).”<sup>81</sup> While the name chosen by Yikuang, “Academy of Worthies,” referred to an institution of “court-patronized litterateurs who engaged in compiling imperially sponsored scholarly works,”<sup>82</sup> he described its function as being that of the “temple salary” (*cilu* 祠祿) system of the Song era, whereby retiring high officials were appointed to service at religious institutions.<sup>83</sup>

If the function of the Privy Council was really that of giving some “temple salary”-like position to retiring officials, it would not necessarily be an isolated element within constitutional architecture, but was possibly a significant factor in the constitutional balance. Allocating this function to the Privy Council could strengthen the other constitutional institutions by enabling them to fulfill their substantial functions. This was at least the argument of the pro-constitutional activist

Meng Sen 孟森 (1868–1938), who ran a column in the widely read magazine *Eastern Miscellany* (*Dongfang zazhi* 東方雜誌). In 1909, the constitutional commissioner to Japan, Li Jiaju 李家駒 (1871–1938), submitted a report about the Japanese institutions to the throne, wherein the recommendations about the Privy Council conformed to the other examples discussed above. At the same time as he wrote that it should “roughly follow the example” of the Japanese *Sūmitsuin*, Li discussed it in the light of several sinecure positions in China’s administrative history, making clear that the body’s main function would be to “distinguish former high officials” and to provide counsel to the court.<sup>84</sup> Meng’s comment on Li’s report painted one of the most vivid pictures of what Qing élites hoped the Privy Council to be. According to Meng, Li’s proposed Privy Council was a “retirement home” similar to “posts such as that of postal director” in other countries.<sup>85</sup> Was that a bad thing, however? No. Meng pointed out that the projected proto-parliament, the *Zizhengyuan*, could otherwise be misused for the same purpose, and argued that Li’s suggestion was apparently designed to “remove this function from the *Zizhengyuan* to the Privy Council in order to rescue the *Zizhengyuan*’s actual purpose.”<sup>86</sup>

Nonetheless, on the other side of the spectrum, there were also various calls to make the Privy Council strong and truly cabinet-rivaling. In 1910, when the call of the day was the “speedy introduction of a national assembly,” a censor called Qingfu 慶福 (dates unknown) submitted a memorial to the court, urging to speedily introduce the Privy Council instead of the National Assembly and even before the Cabinet.<sup>87</sup> He argued for a four-branch government system in the Constantian sense, with a “ruling branch” (*tongzhi quan* 統治權) being located above the three other branches. To this effect, he envisioned a Privy Council similar to the line defended by Rudolf von Gneist and Itō Hirobumi, composed of close aides and confidants who would be responsible to the Emperor in the same manner as the Cabinet would be to the parliament. In sum, the Council would serve to solidify the Emperor’s power as constitutional organ.

What policy did the court pursue in view of these recommendations and pressures on both sides? When the government unveiled its concrete plans for constitutional transformation in the summer of 1908, the Privy Council was not included in the hastily prepared *Outline of a Constitution by Imperial Decree* (*Qinding xianfa dagang* 欽定憲法大綱),<sup>88</sup> indicating that the government did not see the Privy Council as an organ of the same level of significance as the Cabinet. However, the nine-year roadmap published at the same time foresaw the establishment of a Privy Council in the last year of “constitutional preparation” (1916), together with the promulgation of the constitution and the convening of a parliament.<sup>89</sup> The document did not go into any details, but gave the institution a different name. It was not named “Agency for the Important and Confidential” as its Japanese counterpart, nor “Academy of Worthies” like Yikuang had proposed, but “Council to Assist (the Ruler’s) Virtue” (*Bideyuan*, an abbreviation for the expression *fubi junde* 輔弼君德). Gao Fang 高放 suggests that the new name reveals a different concern of the Court in creating the Privy Council, this time aimed at specifically Qing political circumstances. The Guangxu Emperor had

been held captive since a botched attempt at radical political reforms in 1898, whereas real power was residing with the Empress Dowager Cixi. Hence, Gao argues that the term “assist the (ruler’s) virtue” was aimed at Guangxu, for Cixi had come to understand the Privy Council as a way to restrict the Emperor, particularly in case she died and he came to power again.<sup>90</sup>

This concern became well-nigh immediately obsolete, for both Cixi and the Emperor died three months after. Nonetheless, the government did not abandon the idea. Following strong pressures to accelerate the constitution-building process, it established the Privy Council the same day as the Cabinet, on May 8, 1911. Both the organic law and the detailed regulations issued in July were closely modeled on the Japanese equivalents.<sup>91</sup> Besides deliberating on and interpreting the Constitution and related laws, the Council would have to deliberate on international treaties and on imperial orders and decrees issued in cases of emergency. Given these attributions, the Privy Council could well have evolved to take a strong position as the Japanese model.

The Privy Council would consist of 34 members, including the president and the vice president, and additionally count on ten consultants with “political knowledge and experience,” a provision not contained in the Japanese model. All the 13 ministers of the new Cabinet, as well as the heads of the Court of the Imperial Clan (*Zongrenfu* 宗人府) and of the Imperial Household Department (*Neiwufu* 內務府) would become Privy Councillors (art. 4 of the organic law). Possibly due to an incomplete understanding of the Japanese model as provided by Wang Rongbao in his *Xin Erya*, this point turned out to be especially controversial and drew immediate criticism that the Privy Council could not perform its constitutional duties because it was not independent enough from the Cabinet. The censor Fan Zhijie 范之杰 (1872–1957) categorically wrote that both institutions were supposed to be “independent organs, not having jurisdiction over nor interfering with each other,” arguing that the 16 Privy Councillors hailing from the Cabinet, the Imperial Household Department, and the Court of the Imperial Clan would impossibilite any independent majority in the Privy Council.<sup>92</sup> He claimed that

now, although the establishment of the Privy Council in our country allegedly adopts Japan’s new institution, the Cabinet ministers are allowed to concomitantly serve as Privy Councillors, which seems to be drawing from the English system.<sup>93</sup>

His colleague Chen Shantong 陳善同 (1876–1942) was better aware of the Japanese laws. He tried to argue that the Japanese organic law actually did not design the Cabinet ministers as full members of the Privy Council, but only stipulated that they should participate within the bounds of their respective areas.<sup>94</sup> However, Chen’s argument was not much more convincing than Fan’s: in Japanese constitutional practice, all Cabinet ministers were also created Privy Council members. While the number of Privy Councillors expanded over time, the proportion was not much lower than in China (in 1890, 10 out of 25; in 1911, 10 out of 28).



The few months of its existence were too short to show how the Privy Council would really have fared in constitutional practice, and it is impossible to say how the final constitution would have treated the Privy Council, for its draft has been lost. The extant private constitutional drafts do not foresee any Privy Council, charging the Cabinet with the task of counseling the Emperor.<sup>95</sup> Cao Rulin 曹汝霖 (1877–1966), a member of the Constitutional Office, although not one of the officially designed main drafters of the final constitution, writes in his memoirs that the (no longer extant) constitutional draft established a Privy Council (*Shumiyuan*).<sup>96</sup> However, the diary of Wang Rongbao, which is the main source on the aborted drafting process of the final constitution, does not record the inclusion of a Privy Council, neither under the name *Shumiyuan* nor under the name *Bideyuan*.<sup>97</sup> In 1911, the question does not seem to have attracted much attention from the group devising the final constitution.

Nevertheless, since the *Bideyuan* was established together with the Cabinet and as its organization closely followed the Japanese model, it could also well have lived up to a role of “third chamber” with the power to veto legal drafts coming from the Cabinet and demand alterations to them. Perhaps the most realistic assessment of the upcoming Privy Council was given in 1911 the *Journal of Introductions to Law and Administration* (*Fazheng qianshuo bao* 法政淺說報). In a detailed commentary on the new organic law, it explained that although privy councils were nominally the most important constitutional organ, they were in practice less significant than the cabinet. The significance of the emergent Privy Council in China, however, would largely depend on the clout of its members. If some figure of utmost importance came to preside over the Privy Council, the Privy Council would naturally take center stage in Chinese politics.<sup>98</sup>

### **Republic of China: the *Consejo de Estado* and the “fortune of the Republic of China”**

As the *Bideyuan* disappeared with the fall of the monarchy, one could suppose that the institution of an advisory council to the head of state became obsolete. Indeed, neither the “Organizational Charter” (*Zuzhi dagang* 組織大綱) of the Provisional Government of the Republic of China, issued in November 1911, nor the Provisional Constitution (*Linshi yuefa* 臨時約法) of the Republic of China, issued in March 1912, contained anything else than provisions for a legislative body and the ministers of state.<sup>99</sup> However, early Republican constitutional scholarship was divided on whether the newly founded Republic of China should adopt such a body. Of 18 private and party-sponsored constitutional drafts presented in the first years of the Republic, 5 included provisions for an advisory Council of State, while the 13 others did not.<sup>100</sup>

Whereas the transition from autocracy to constitutional rule within the Qing prompted many to think about how to accommodate the old élites, this was much less of a concern in the Republic. The Nationalist Party’s (*Kuomintang* 國民黨) constitutional position paper (*Zhuzhang quan’an* 主張全案) of July 1913 at first supported the establishment of an Advisory Council (*Guwenyuan* 顧問院)



Table 5.1 Early Republican constitutional drafts containing proposals for Councils of State

<i>Draft</i>	<i>Norms</i>	<i>Name</i>	<i>Model (according to draft)</i>
Kuomintang position paper (before revision) ( <i>Zhuzhang quan'an</i> 主張全案) <sup>101</sup>	Suggestions n° 3 and 4	Advisory Council ( <i>Guwenyuan</i> 顧問院)	<i>Conseil d'État</i> and <i>Sūmitsuin</i>
Progressive Party ( <i>Jinbudang</i> 進步黨)/ Liang Qichao 梁啟超 1873–1929) <sup>102</sup>	Chapter 7 (art. 68–72)	Advisory Council of State ( <i>Guojia guwenyuan</i> 國家顧問院)	<i>Consejo de Estado</i> of Chile
Kang Youwei 康有為 (1858–1927) <sup>103</sup>	Chapter 7 (art. 59–61)	Consultative Council of State ( <i>Guoxunyuan</i> 國詢院) (alternatively: Political Participatory Council ( <i>Canzhengyuan</i> 參政院)	N/A
Wang Dengyi 王登乂 (1876–1955) <sup>104</sup>	Chapter 6 (art. 61–67)	Political Participatory Council ( <i>Canzhengyuan</i> 參政院)	<i>Conseil d'État</i> ; refers to Liang Qichao's draft
Li Chao 李超 (?–?) “Constitutional draft by an overseas Chinese” ( <i>Huaqiao xiancao</i> 華僑憲草) <sup>105</sup>	Art. 68	Advisory Council ( <i>Guwenyuan</i> 顧問院)	N/A

modeled after the French *Conseil d'État* and the Japanese *Sūmitsuin*.<sup>106</sup> The revision of the position paper issued in August, however, rejected this proposal, for two reasons:

Suggestion no. 4 supported the establishment of an Advisory Council. This is extraordinarily unimportant. As deliberative institutions and a responsible government are already established, all important matters have to undergo deliberation before they are executed, without leading to rash decisions. If yet another Advisory Council is established, it will excessively delay things, and only increase the number of superfluous officials. Hence, (suggestion no. 4) shall be struck.<sup>107</sup>

More than the problems of government efficiency and of creating possible sinecures, however, the fault line of the debate lay in the position of the head of state. Of the remaining four drafts, it is remarkable that two were drafted by the paramount figures of the late Qing constitutional movement: Kang Youwei and

Liang Qichao. Now that there was no longer an Emperor, it was the President of the Republic who would be the head of state acting above the other branches of government.

In order to be able to perform such a role as a moderating power, the head of state would need a council of his own, just as Napoleon had needed in postrevolutionary France and Itō Hirobumi had needed in Japan. In the most thoroughly worked out example of this kind of constitutional architecture, Liang Qichao drew from a wide knowledge about global constitutionalism and tapped a hitherto unused source of constitutional inspiration. Although a great number of translations of foreign constitutions had been published in late Qing times, it was only in 1912 and 1913 that the *Political Science Magazine* (*Fazheng zazhi* 法政雜誌) began publishing translations of various South American constitutions.<sup>108</sup> These included the 1833 *Political Constitution of the Republic of Chile*, based on an English translation by Charles Wesley Tooke (1870–1943), which Liang chose as the model for his draft.<sup>109</sup> The well-read Liang aptly connected the dots and understood that both the Japanese *Sūmitsuin* and the Chilean *Consejo de Estado* were phenomena of the same global constitutional element, choosing the latter as his model. His words make clear that the purpose of such a council had nothing to do with the form of state as a monarchy or a republic:

France had a Council of State in the past, and Japan has an Advisory Privy Council, both of which are constitutional organs. Many of the various states of Germany and the various states of the United States also have similar organs. Their functions are to restrict part of the executive power and to be able to carry on the attributions of the National Assembly when it is not in session. Its purpose is utterly good! The constitution of Chile is the most complete one as to the organization of this institution, which is why we now roughly follow the model of that institution.<sup>110</sup>

Through Chilean intermediation, Liang's draft, such as Kang's and Wang Dengyi's, followed the structure rooted in the *Constitution of 22 Frimaire, Year VIII*: it had one chapter devoted to the Ministers of State (*Guowuyuan* 國務員) and another one dedicated to the Advisory Council of State.<sup>111</sup> The three drafts – Li Chao's differed by only having a short article on the Council of State – shared other similarities. Perhaps responding to the criticisms of the *Bideyuan*, they did not commingle the Council with the Cabinet, expressly forbidding the Councillors of State to concomitantly be Ministers or Members of Parliament (Liang, art. 71; Kang, art. 59; Wang, art. 63). They also strengthened the republican over the monarchic element, for the President would only appoint five of the thirteen (Liang, art. 68, and Wang, art. 61) or fifteen (Kang, art. 59) members of the Council. Yet, the President had to hear it when taking a number of measures roughly comparable to those ere enumerated in the organic law of the *Bideyuan*. These included the appointment of the Prime Minister, the dissolution of the National Assembly, the promulgation of emergency measures, declarations of war and peace treaties, as well as proposals for constitutional amendments. In

sum, the Council would still basically be the advisory body to the President in a similar way as the *Sūmitsuin* was in Japan and as the *Bideyuan* had been thought to become in the Qing Empire.

Even though the idea of such an advisory council to the President only occurred in a minority of the constitutional drafts presented at the time, it had considerable appeal in midst of the chaotic parliamentary politics of the early Republic, and was particularly attractive to one person – namely, the ambitious President himself, Yuan Shikai. In midst of the political struggles of the inchoate Republic, Yuan Shikai had dissolved the National Assembly by the turn of 1913–1914, and installed two provisional assemblies instead: a Political Assembly (*Zhengzhi huiyi* 政治會議) dealing with legislative matters, and a Constituent Assembly (*Yuefa huiyi* 約法會議).<sup>112</sup> New institutions had to be created for a new constitution.

In this situation, Yuan not only promoted the idea of an advisory council, but also applied it to a greater extent than any of the five constitutional drafts. Yuan's immediate basis was none of these, but rather an idea suggested by one of his foreign constitutional advisors, namely, the Japanese Ariga Nagao 有賀長雄 (1860–1921). Ariga had undertaken a trip to Europe from 1886 to 1888, where he studied in Berlin and in Vienna. In his 1889 *System der Staatswissenschaft* (*Kokkagaku* 國家學), he based his comments about advisory councils on Lorenz von Stein's lectures, including the doctrine of the monarch as a “moderating” (*chōwa* 調和) power as one of the rationales for the Council of State (*kokuji komon* 國事顧問, glossed as *Sutātsurāto* スターツラート).<sup>113</sup> His own opinion on the institution, which he added after his comparative exposition of the various types of advisory councils, was that “one should definitely institute it before it happens that either the legislature or the executive hold excessive powers.”<sup>114</sup>

When a constitutional government became an option for the Qing Empire, Ariga devoted great attention to the movement, an interest which persisted after the proclamation of the Republic.<sup>115</sup> The change from monarchy to republic did not matter much for him, for what China needed was a virtuous man at the helm, no matter whether that man was an emperor or a president.<sup>116</sup> After Yuan Shikai made him his constitutional advisor in 1913, he worked out a memorandum calling for a Republican Advisory Council (*Gonghe guwenyuan* 共和顧問院). The Council was modeled after the *Sūmitsuin* and should be tasked with counseling and giving suggestions to the President, drafting the final constitution, interpreting the constitution, and resolving problems between the legislative and executive branches.<sup>117</sup>

Yuan Shikai's execution of the idea went much further than this. In May 1914, he promulgated another provisional constitution, which gave him far-reaching powers.<sup>118</sup> The basis had been a constitutional draft by another foreign advisor of Yuan's, the US American Frank Johnson Goodnow (1859–1939).<sup>119</sup> Goodnow's draft had not included an advisory council, but it favored a strong position of the president, and Goodnow himself wanted the Constitution to “adopt more fully the French system of government.”<sup>120</sup> An advisory council to the President was a fitting addition to his draft. Besides the legislative branch (the *Lifayuan* 立法院), art. 49 of the resulting Constitutional Compact determined the establishment of a

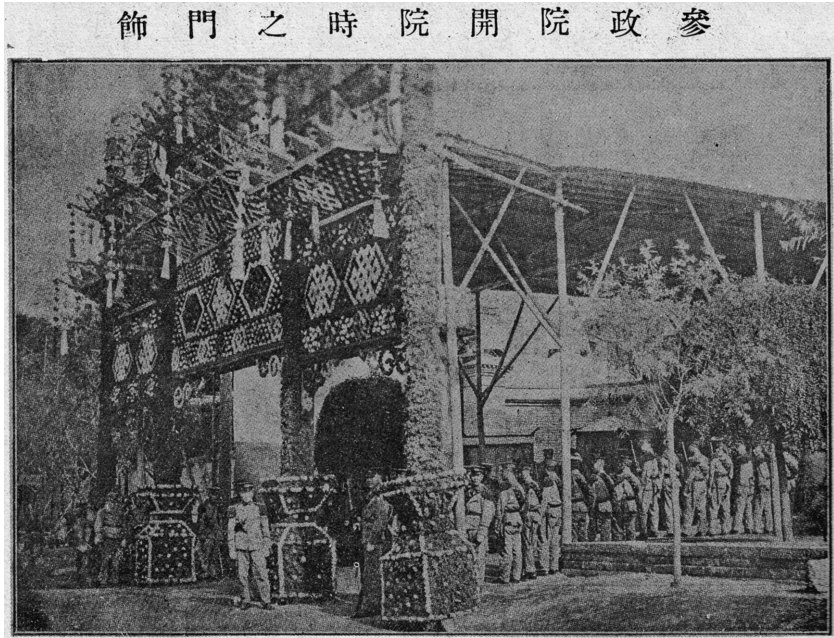


Figure 5.1 Canzhengyuan kaiyuan shi zhi menshi [Decorated gate at the opening of the Political Participatory Council]. *Dongfang zazhi* 東方雜誌 11, no. 2 (Minguo 3 [1914]).

Political Participatory Council (*Canzhengyuan*, see Figures 5.1 and 5.2), which replaced the Political Assembly.

According to art. 49, the Council should “respond to consultation by the President and deliberate on important political matters.”<sup>121</sup> Its organic law, promulgated by the Constituent Assembly in May 1914, i.e., nearly 10 months before the organic law of the National Assembly, gave it the right of constitutional interpretation and extensive advisory rights in important areas of politics (articles 2 and 3 of the organic law).<sup>122</sup> The most far-reaching powers of the Council, however, were scattered through the Constitutional Compact: with the consent of the Political Participatory Council, the President would be able to pass emergency ordinances (art. 20), overrule parliamentary legislation (art. 34), and close the National Assembly (art. 17).

Taken in isolation, these rights were not necessarily uncommon; but their elaboration in the Constitutional Compact made for quasi-dictatorial powers of the President. For example, other drafts, such as Liang Qichao’s, also contained the President’s right to dissolve the National Assembly (art. 50).<sup>123</sup> However, the Constitutional Compact contained two aggravating factors, which strengthened the President even more. In contrast to Liang’s proposal, all of the Political Participatory Council’s 50–70 members (see Figure 5.3) should be selected by the



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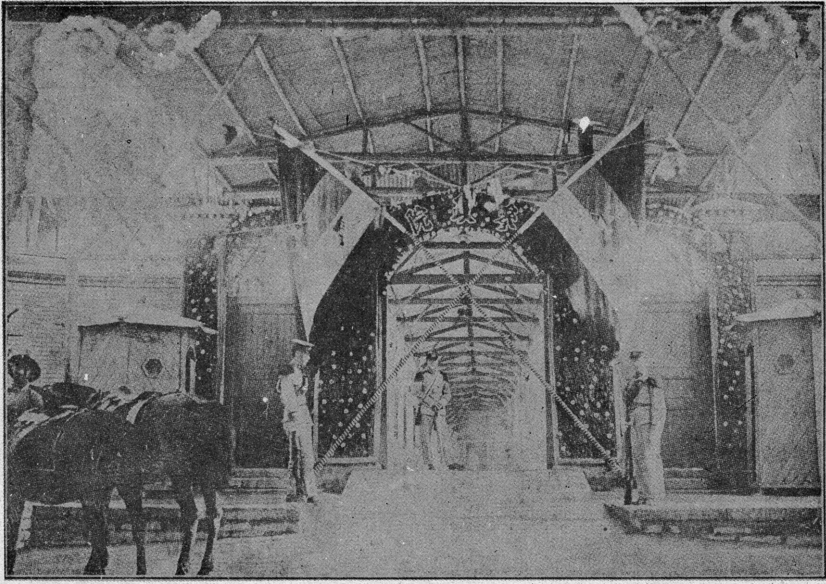


Figure 5.2 Canzhengyuan mennei zhi yongdao [Corridor within the premises of the Political Participatory Council]. *Dongfang zazhi* 東方雜誌 11, no. 2 (Minguo 3 [1914]).

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Figure 5.3 Canzhengyuan quanti sheying [Group photo of the Political Participatory Council]. *Dongfang zazhi* 東方雜誌 11, no. 2 (Minguo 3 [1914]).

President personally, and after the dissolution of the parliament he would have an extraordinarily long time (six months vs. one in Liang's draft) to call new elections.

The consent of the Political Participatory Council for such presidential measures was such a matter of course that Frank Goodnow did not even mention that it was required when commenting on the new constitutional document two weeks later in the *Peking Gazette*. In Goodnow's words, "a real controlling power of legislation is vested in the President and the legislature is regarded ... almost to the position of an advisory body." Not mentioning the *Sūmitsuin* either, Goodnow explained that the powers of the President were the same as those of the Japanese Emperor, as was the relationship to the legislature. Such a status befitted China's status of development, for "Chinese traditions" were "executive rather than legislative." Just as in Japan, however, Goodnow saw room for constitutional change toward the legislative following the political maturing of the Chinese people.<sup>124</sup>

Although the *Peking Daily News*, the unofficial mouthpiece of the government, found the idea "useful," because "the trial" of parliamentary government "in the past has proved a failure,"<sup>125</sup> a large part of Chinese public opinion quickly denounced the Political Participatory Council. For them, the Council was a "museum of antiquities and a collection of old paintings"<sup>126</sup>; it was Yuan's personal instrument to further his dictatorial ambitions and to deprive the National Assembly of its rights.<sup>127</sup> One Shanghai magazine published a particularly scathing pseudonymous article on this institution filled with "drunkards, gluttons, alphabets, punks, and living clay puppets."<sup>128</sup> Whereas the Qing had operated the *Zizhengyuan*, it was "utterly weird, utterly odd, and truly unimaginable" that a "republic claiming to be democratic" also had such a thing.<sup>129</sup> The article ended with the ironic remark:

Hurray! How blessed it is, the Political Participatory Council of the Republic of China! Hurray! How blessed they are, the Political Participatory Councillors of the Republic of China! Having the such an organ and having such people is a characteristic of the Republic of China, and it is the fortune of the Republic of China! Now that I've finished writing I can't help but laughing out loud.<sup>130</sup>

The *Canzhengyuan* was disbanded after the failure of Yuan Shikai's monarchic experiment and his subsequent death. In 1916–1917, the Peking government still proposed a State Council of Elders (*Guolaoyuan* 國老院), which did not take off because of fierce opposition to the idea particularly in southern China.<sup>131</sup> Sun Yat-sen 孫逸仙 (1866–1925), for example, addressed a telegram to President Li Yuanhong 黎元洪 (1864–1928), arguing that a third chamber was superfluous in China's republican context.<sup>132</sup> Later, the institution of a Privy Council (Council of State) was reenacted in monarchic contexts – first as a short revival of the old *Bideyuan* for a few days during an attempt at imperial restoration in 1917,<sup>133</sup> and second from 1932 to 1945 in the Japanese-backed Empire of Manchuria.<sup>134</sup>

Although Republican China saw several other consultative organs at the level of the central government, these occupied a different place in the constitutional architecture than the monarchic and presidential privy councils of yore. When

the Republic reutilized the term “political participation” in the 1930s, it did so in the form of a National Political Participatory Assembly (*Guomin canzhenghui* 國民參政會). As China was officially in an era of “political tutelage” by the ruling *Kuomintang* and there was no regular national assembly, such participatory assemblies should provide a modicum of popular representation and consultation.<sup>135</sup> The Napoleonic idea of an advisory council to the head of state, however, survived in rudimentary form. Since 1948, the Law on the Office of the President of the Republic of China provides for a body of up to 30 “senior advisors” (*zongtongfu zizheng* 總統府資政). As a constitutional organ on the level of the cabinet and the parliament, the Privy Council had become too strongly connected to Yuan Shikai’s strongmanship to survive.

## Conclusion

Advisory councils to the head of state have been a common element of modern constitution-building across the world. They have developed in different forms across time and space. Whereas in some places they have become merely ceremonial or disappeared altogether, they have proved to have considerable appeal in others. Both their loss of importance and their continuing appeal were due to their position outside of the three-branch scheme of government. Being subordinated to the monarch, they tended to lose their importance where the monarch’s powers waned in favor of legislative parliaments and executive ministers of state. In some constitutional orders, however, the institution served as a counterbalance to precisely these emerging powers, and in particular as an instrument of the monarch’s “neutral” or “moderating” power on top of the other branches of government.

In Central Europe, this model of a strong privy council persisted most notably in the Napoleonic reinterpretation of the old *curia regis*, the *Conseil d’État*, but it also became very popular in non-European constitution-building. In Japan, the Privy Council – *Sūmitsuin* – was a central element in ensuring the influence of the Meiji oligarchy. It served as a supplement to a deliberately weak parliament and as a balance to the Cabinet, to which it was at the same time intimately connected. While it strengthened the monarch vis-à-vis other powers, it also provided a check to the monarch’s absolute autocracy, and could even accommodate a politically absent Emperor.

As in many other aspects of constitution-building, Japan’s *Sūmitsuin* served a model for constitution-building in China – both for the Qing Empire and for the Republic of China. This particular Japanese element is not often recognized: the late Qing Privy Council – the *Bideyuan* – did not exist for long enough to be politically active, and was readily classified as “honorable, but powerless.” Indeed, accommodating old élites who would otherwise find no place in the *nouveau régime* was a significant element in Qing debates, but as the system was laid out in the same way as in Japan, it bore the seeds for a more powerful role of the Privy Council. Such a powerful council emerged in the Republic of China. Several of the early constitutional drafts espoused the idea, and Yuan Shikai ended up using it in order to further his personal ambitions.



In both Japan and China, the institution became obsolete because it became associated with obsolete political systems. In Japan, the *Sūmitsuin* was abolished after the cataclysm of the Second World War and the adoption of a new Constitution in 1947. In China, Yuan Shikai's ambitions, which culminated in his attempt to secure emperorship for himself, ended the constitutional trajectory of the institution, relegating the presidential advisors to a secondary nonconstitutional role. Yet, the fate of East Asian privy councils shows that the *Sūmitsuin* was far from being a mere Japanese idiosyncrasy. The concept was a global element of constitutionalism, which, locally adapted, played a significant role in modern East Asian constitution-building.

## Notes

- 1 The author is grateful to Joachim Kurtz, Orion Klautau, David Mervart, Ian Neary, Xu Guoqi 徐國琦, Stanley Ong Gieshen Setiawan, Asanuma Chie 淺沼千恵, Chou Pei-chih 周培之, Lucas Eduardo Maldonado, Ann-Sophie Schöpfel, Lee Kyonghee 李京憲, David Malitz, Kōno Yūri 河野有理, Clemens Büttner, Lena Foljanty, Zülâl Muslu, Sofya Lobataya, and Ian Hillesheim for their helpful comments and suggestions.
- 2 “Foi com efeito uma grande concepção política, que mesmo a Inglaterra nos podia invejar, êsse Conselho de Estado, ouvido sôbre tôdas as grandes questões, conservado das grandes tradições políticas do Império, . . . Essa admirável criação do espírito brasileiro, que completava a outra, não menos admirável, tomada a Benjamin Constant, o Poder Moderador, reunia, assim, em tórno do Imperador as sumidade políticas de um e outro lado, tôda a sua consumada experiência, sempre que era preciso consultar sôbre um grave interesse público. . .” Joaquim Nabuco, *Um Estadista no Império: Nabuco de Araujo*, 4 vols. (São Paulo: Instituto Progresso Editorial, 1949), 4:114. All translations are by the author, unless otherwise noted.
- 3 Inoue Kowashi denki hensan iinkai 井上毅傳記編纂委員會, *Inoue Kowashi den: shiryō hen* 井上毅傳: 史料篇, 6 vols. (Tokyo: Kokugakuin Daigaku toshokan, 1969–1977), 5:37 (N° 58, Letter of April 20, Meiji 21 [1888] from Itō Hirobumi to Inoue Kowashi). Translation by Takii Kazuhiro, *The Meiji Constitution: The Japanese Experience of the West and the Shaping of the Modern State*, tr. David Noble (Tokyo: International House of Japan, 2007), 93.
- 4 Kenneth Colegrove, “The Japanese Privy Council,” *American Political Science Review* 25, no. 3 (1931): 593.
- 5 See Octaciano Nogueira, ed., *A Constituição de 1824* (Brasília: Escopo Editora, 1987), 75–77, with commentary in pp. 23–28. On the Brazilian Council of State, see further José Murilo de Carvalho, *A construção da ordem: a elite política imperial. Teatro de sombras: a política imperial* (Rio de Janeiro: Civilização Brasileira, 2008), 357–390, and Maria Fernanda Vieira Martins, “A velha arte de governar: o Conselho de Estado no Brasil Imperial,” *Topoi* VII, no. 12 (2016): 178–221. The Brazilian Council of State was abolished by constitutional amendment of 1834, but reinstated by law of 1842.
- 6 Itō Hirobumi 伊藤博文, *Teikoku kenpō gige, Kōshitsu tenpan gige* 帝國憲法義解. 皇室典範義解 (Tokyo: Kokka gakkai, Meiji 22 [1889]), 82, 91. Translated as *Commentaries on the Constitution of the Empire of Japan*, tr. Itō Miyoji 伊東巳代治. 2nd ed. (Tokyo: Chū-ō Daigaku [Central University], Meiji 39 [1906]), 93, 107–108.
- 7 João Camilo de Oliveira Tôrres, *A democracia coroada: teoria política do Império do Brasil* (Rio de Janeiro: Livraria José Olympio Editôra, 1957), 188.
- 8 Itō, *Teikoku kenpō gige*, 92. Translated in *Commentaries on the Constitution of the Empire of Japan*, tr. Itō, 109.

- 9 Nabuco, *Um Estadista no Império*, 4:114. However, Nabuco showed elsewhere that he was well-aware of the origins of the Council of State, which “for a long time conserved the flavor and prestige of an old aulic council within the new democratic structure, ... a precious inheritance of the colonial regime.” *Ibid.*, 3:8–9.
- 10 Inoue Kowashi denki hensan iinkai, *Inoue Kowashi den*, 5:37 (Letter of Meiji 21/04/20 from Itō Hirobumi to Inoue Kowashi). Itō’s remark was made in the private context of a dialogue with Inoue Kowashi 井上毅 (1844–1895), in which he rejects a suggestion by Inoue and counterposes his own idea.
- 11 On the Portuguese Council of State, see Pedro Tavares de Almeida, “O Conselho de Estado na Monarquia Constitucional: uma reflexão preliminar,” *Cultura: Revista de História e Teoria das Ideias* 22 (2006): 1–16.
- 12 See Tomás de la Quadra-Salcedo, “El Consejo de Estado en las Constituciones de Cádiz y Bayona,” *Documentación Administrativa*, no. 244–245 (1996): 13–88.
- 13 On the constitutional history of Tonga, see Laki M. Niu, “The Constitution and Traditional Political System in Tonga,” in *Law, Politics and Government in the Pacific Island States*, ed. Yash H. Ghai (Suva: University of the South Pacific, 1988), 304–309.
- 14 The Siamese Council of State, founded in 1874, was inspired on the French *Conseil d’État* as well. However, it was established long before the adoption of a written constitution, which happened in 1932. The Siamese Constitution of December 1932 drew heavily from the Meiji Constitution, but departed from its model in not giving the Cabinet and the Council of State parallel textual treatment. On the Siamese Council of State, see Kullada Kesboonchoo Mead, *The Rise and Decline of Thai Absolutism* (London: Routledge, 2012), 54–58. On the Siamese Constitution of 1932, see Eugénie Méricau, “The 1932 Compromise Constitution: Matrix of Thailand’s Permanent Constitutional Instability,” in *Constitutional Foundings in Southeast Asia*, ed. Kevin Y. L. Tan and Bui Ngoc Son (Oxford: Hart Publishing, 2019), 297–318. On the relations between Japan and Siam, see David Michael Malitz, *Japanese-Siamese Relations from the Meiji Restoration to the End of World War II: Relations and Representations* (Bochum, Freiburg: Projektverlag, [2016]).
- 15 See the explanations given by Stein to Kaieda Nobuyoshi in Kaieda Nobuyoshi 海江田信義, *Sutain-shi kōgi* 須多因氏講議 (Tokyo: Kunaishō, Meiji 22 [1889]), 147, 452. On Kaieda’s interpretations and adaptations of Stein, see Kim T’aejin 金泰鎮, “Kukkaranün sinch’eesō chōnt’onggwa kūndaenün öttök’e mannanün’ga? Kaieda Nobuyosūi inch’e kūrīmūl chungsimūro” 국가라는 신체에서 전통과 근대는 어떻게 만나는가? 가이에다 노부요시의 인체 그림을 중심으로. *Ilbon pip’yōng* 일본비평 19 (2018): 96–127.
- 16 Indeed, forms and institutions too closely associated with monarchy tend to be eschewed in republics. See, e.g., on the presidential title, Kathleen Bartoloni-Tuazon, *For Fear of an Elective King: George Washington and the Presidential Title Controversy of 1789* (Ithaca, NY: Cornell University Press, 2014).
- 17 On the Bavarian *Staatsrat*, see Max von Seydel, *Bayerisches Staatsrecht*, 7 vols. (Freiburg i. B. and Leipzig: J. C. B. Mohr, 1896), vol. 1, 499–504.
- 18 On the Hannoveran *Geheimrathscollegium*, see Michael Wrage, *Der Staatsrat im Königreich Hannover 1839–1866* (Hamburg: Lit, 2001).
- 19 On the Prussian *Staatsrat*, see Hans Schneider, *Der preussische Staatsrat 1817–1918: Ein Beitrag zur Verfassungs- und Rechtsgeschichte Preußens* (Munich: C. H. Beck, 1952).
- 20 For a synopsis of constitutional provisions on the matter, see “Privilege of the Floor to Cabinet Officers: Reports Made to the Congress of the United States Relative to Measures Providing that Heads of the Executive Departments Occupy Seats on the Floor of the Two Houses of Congress,” in *63rd Congress: Special Session of Senate (March 4–17, 1913)*, *Senate Documents*, vol. 1. US Congressional Series Set, vol. 6507 (Washington, DC: Government Printing Office, 1913), 23–25.

- 21 See Wagner Silveira Feloniuk, *A Constituição de Cádiz: Análise da Constituição Política da Monarquia Espanhola de 1812* (Porto Alegre: DM Editora, 2014), 121; who also attributes a secondary influence of the Spanish Constitution of 1812 on the Brazilian Council of State. Some Brazilian literature, however, attributes the Council of State generally to the medieval royal councils, without mentioning Napoleon, e.g., Vieira Martins, “A velha arte de governar,” 179.
- 22 Benjamin Constant, *Cours de Politique Constitutionnelle*, 2 vols. New edition (Paris: Didier, 1836), 1:1–2.
- 23 See Nogueira, ed., *A Constituição de 1824*, 71. Nogueira assumes that the moderating power only was only ever instituted in Brazil. *Ibid.*, 24.
- 24 See Yuri Kono’s chapter in the present volume.
- 25 Translation adapted from *Commentaries on the Constitution of the Empire of Japan*, tr. Itō, 7.
- 26 On these problems, see Ernst Lokowandt, “Die Stellung des Tennō in der Staatsführung: Die rechtliche Regelung der Herrschaftsbefugnisse des Kaisers unter der Meiji-Verfassung,” *Oriens Extremus* 33, no. 1 (1990): 49–64. See also Asakawa Kan’ichi, “The New Regime in China,” *Proceedings of the American Political Science Association* 6 (1909): 145.
- 27 See Ando Junko, *Die Entstehung der Meiji-Verfassung: Zur Rolle des deutschen Konstitutionalismus im modernen japanischen Staatswesen* (Munich: Iudicium, 2000), 47–57.
- 28 Besides the authors discussed infra, see from the perspective of constitutional adjudication also Shishido Jōji 穴戸常寿, “Nihon kenpōshi ni okeru kenpō saibanken: ‘Kenpō saibanken no dōtai—Doitsu kenpō kenkyū nōto’ horon” 日本憲法史における憲法裁判権: 「憲法裁判権の動態——ドイツ憲法研究ノート——」補論, *Tōkyō Toritsu Daigaku hōgaku gakkai zasshi* 東京都立大学法学会雑誌 45, no. 2 (2005): 17–36.
- 29 *The Japan Times Year Book* (Tokyo: Japan Times & Mail, 1933), 28.
- 30 Takii, *The Meiji Constitution*, 94.
- 31 Sakamoto Kazuto 坂本一登, *Itō Hirobumi to Meiji kokka keisei: “Kyūchū” no seidoka to rikensei no dōnyū* 伊藤博文と明治国家形成: 「宮中」の制度化と立憲制の導入 (Tokyo: Yoshikawa kōbunkan, Heisei 4 [1992]), 247–248.
- 32 Ernst Lokowandt, “The Imperial House Law of 1889 and Its Meaning for the Position of the Tennō in the Meiji State,” in *Leaders and Leadership in Japan*, ed. Ian Neary (Richmond: Japan Library, 1996), 137.
- 33 No comments by Mosse about the Privy Council are extant, but judging from the rest of his constitutional thinking, it seems that he rejected such an institution. See Ando, *Die Entstehung der Meiji-Verfassung*, 160.
- 34 *Ibid.*, 72.
- 35 *Ibid.*, 62, 191.
- 36 *Ibid.*, 124–125.
- 37 *Ibid.*, 59–75.
- 38 See Takii, *The Meiji Constitution*, 107–108, and Takii Kazuhiro 滝井一博, *Doitsu kokkagaku to Meiji kokusei: Shutain kokkagaku no kiseki* ドイツ国家学と明治国制: シュタイン国家学の軌跡 (Kyoto: Mineruva shobō, 1999), 134–136.
- 39 See *ibid.*, 78–79.
- 40 See Lothar Gall, *Benjamin Constant: Seine politische Ideenwelt und der deutsche Vormärz* (Wiesbaden: Franz Steiner, 1963).
- 41 Lorenz von Stein, *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage*, 3 vols. (Leipzig: Verlag von Otto Wigand, 1850), 1:340.
- 42 *Ibid.*, 3:49. On Stein and Benjamin Constant’s neutral power, see Dirk Blasius, “Lorenz von Steins Lehre vom Königtum der sozialen Reform und ihre verfassungspolitischen

- Grundlagen,” *Der Staat* 10, no. 1 (1971): 43–45 (also discussing the significant differences between Constant’s and Stein’s conceptions). See also Markus Prutsch, *Caesarism in the Post-Revolutionary Age: Crisis, Populace and Leadership* (London: Bloomsbury Academic, 2020), 39–43, 71–73, and Norbert Waszek, “Aux sources de l’État social à l’allemande: Lorenz von Stein – et Hegel,” *Revue Germanique Internationale* 15 (2001): 211–238.
- 43 Horiguchi Osamu 堀口修, “Komatsu-no-miya Akihito shinnō to Shutain oyobi Gunaisuto kōgi” 小松宮彰仁親王とシュタイン及びグナイスト講義, *Shoryōbu kiyō* 書陵部紀要 54 (Heisei 14 [2003]): 42. See also Takii, *The Meiji Constitution*, 94.
- 44 Stein, *Geschichte der sozialen Bewegung in Frankreich*, vol. 2, 53.
- 45 Kaieda, *Sutain-shi kōgi*, 451.
- 46 The records here use the word *sanjiin* 參事院, which was already (and still is) the standard translation for the French *Conseil d’État*, not the word *sūmitsuin* 樞密院, which was the word used to translate the British Privy Council and became the name of the Japanese Privy Council. Stein’s conversations with Kaieda Nobuyoshi show that these were thought of as structural equivalents. *Ibid.*, 147, 452.
- 47 Itō Miyoji 伊東巳代治, *Daihakase Sutain-shi kōgi hikki* 大博士斯丁氏講義筆記, in *Meiji kenpō seiteishi* 明治憲法制定史, ed. Shimizu Shin 清水伸, 3 vols. (Tokyo: Hara shobō, 1971–1974), 1:355.
- 48 See Ando, *Die Entstehung der Meiji-Verfassung*, 61.
- 49 Archives of the German Foreign Ministry, Berlin, AA/PA, Nachlaß Eisendecker 3/5, 1.10 (Bl. 181), apud Ando, *Die Entstehung der Meiji-Verfassung*, 60.
- 50 On Gneist’s position on administrative justice in Germany, where he proposed a middle way between the English and the French models, see Stephan Gerstner, *Die Drittschutzdogmatik im Spiegel des französischen und britischen Verwaltungsgerichtsverfahrens: eine vergleichende Untersuchung zur öffentlich-rechtlichen Klagebefugnis am Beispiel des Umweltschutzes* (Berlin: Duncker & Humblot, 1995), 130, and Marina Künnecke, *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Berlin, Heidelberg: Springer, 2007), 23.
- 51 See, among others, Rudolf von Gneist, *Englische Verfassungsgeschichte* (Berlin, Heidelberg: Springer, 1882).
- 52 Frank Lorenz Müller, “Before the West: Rudolf von Gneist’s English Utopia,” in *Germany and ‘The West’: The History of a Modern Concept*, eds. Riccardo Bavaj and Martina Steber (New York: Berghahn, 2015), 152–166. See also Heinrich Heffter, *Die deutsche Selbstverwaltung im 19. Jahrhundert: Geschichte der Ideen und Institutionen*, 2nd ed. (Stuttgart: Koehler, 1969), 372–403; Reinhard Lamer, *Der englische Parlamentarismus in der deutschen Theorie im Zeitalter Bismarcks (1857–1890)* (Lübeck: Matthiesen, 1963).
- 53 Erich Hahn, *Rudolf von Gneist 1816–1895: Ein politischer Jurist in der Bismarckzeit* (Frankfurt: Klostermann, 1995), 59; Jakob Zollmann, “German Colonial Law and Comparative Law, 1884–1919,” in *Entanglements in Legal History: Conceptual Approaches*, ed. Thomas Duve (Frankfurt am Main: Max Planck Institute for European Legal History, 2014), 253–294, 258.
- 54 Rudolf von Gneist, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland* (Berlin: Julius Springer, 1872), 65.
- 55 *Seitetsu Yumemonogatari* 西哲夢物語 (N.p.: Meiji 20 [1887]), 26–27. Another version of the sentence is given on p. 71. Also recorded in *Meiji bunka zenshū* 明治文化全集, ed. Henshū Meiji bunka kenkyūkai 編集明治文化研究会, 31 vols. (Tokyo: Nihon hyōronsha, 1992–93), 4:244; 265. The version in *Meiji bunka zenshū* provides an unreferenced French version of the sentence: *Le Ministère, c’est l’état en action; le Conseil d’État, c’est l’état en délibération* (The Ministry is the state in action; the Council of State is the state in deliberation). This version, however, seems to be an imprecise back-translation from the Japanese. The sentence goes back to Napoleon’s diaries from his

- exile in St. Helena as compiled by Emmanuel, Count of Las Cases (1766–1842). There, the Count comments on a diary entry from November 4, 1815: *L'Empereur employait individuellement les conseillers d'État à tout, disait-il, et avec avantage. En masse, c'était son véritable conseil, sa pensée en délibération, comme les ministres étaient sa pensée en exécution.* (The Emperor employed the councillors of state individually in every case, and with advantage. As a whole, they were his real council – his mind in deliberation, as the ministers were his mind in execution.) See Emmanuel Comte de las Cases, Barry Edward O'Méara, and François Antomarchi, *Mémorial de Sainte-Hélène; suivi de Napoléon dans l'exil et de l'historique de la translation des restes mortels de l'empereur Napoléon aux invalides* [Memorial of Saint Helena; followed by Napoleon in exile and the history of the translation of the mortal remains of the Emperor Napoleon to the Invalides], 2 vols. (Paris: Ernest Bourdin, 1842), 1:153. The English translation follows Emmanuel Comte de De las Cases, *Memoirs of the Life, Exile, and Conversations, of the Emperor Napoleon*, 4 vols. (London: Henry Colburn, 1836), 1:177. The author would like to thank Clemens Büttner for his help in tracing the origins of this sentence.
- 56 Kokugakuin Daigaku Nihon bunka kenkyūsho 國學院大學日本文化研究所, ed. *Kindai Nihon hōsei shiryōshū* 近代日本法制史料集, 20 vols. (Tokyo: Tōkyō Daigaku shuppankai, 1977–1999), 2:23.
- 57 *Ibid.*, 23.
- 58 *Ibid.*, 23–24.
- 59 The German original is reproduced in Ando, *Die Entstehung der Meiji-Verfassung*, 227–239. For the Japanese version, see Hermann Roesler, *Rōsureru-shi kian Nippon teikoku kenpō sōan* ロエスレル氏起案日本帝國憲法草案 (Meiji 20 [1887]), Itō Miyoji kankei monjo shorui no bu 2 伊東巳代治關係文書書類の部 2, Modern Japanese Political History Materials Room, National Diet Library of Japan.
- 60 See Shishido, “Nihon kenpōshi ni okeru kenpō saibanken,” 19–20.
- 61 Inoue Kowashi denki hensan iinkai, *Inoue Kowashi den*, vol. 2, 14–17.
- 62 *Ibid.*
- 63 Takii, *The Meiji Constitution*, 94.
- 64 Lokowandt, “Die Stellung des Tennō in der Staatsführung,” 53–54.
- 65 Itō, *Teikoku kenpō gige*, 91. Translation in *Commentaries on the Constitution of the Empire of Japan*, 108.
- 66 Lokowandt, “Die Stellung des Tennō in der Staatsführung,” 64.
- 67 Itō, *Teikoku kenpō gige*, 92. Translation in *Commentaries on the Constitution of the Empire of Japan*, 109.
- 68 The characterization of the Privy Council as a “third chamber” played a significant role in one of the cases dealt with at the Tokyo Tribunal, i.e., that of the Council’s president Hiranuma Kiichirō 平沼騏一郎 (1867–1952). See David Cohen and Yuma Otani, *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence* (Cambridge: Cambridge University Press, 2018), 114–115.
- 69 Gao Fang 高放, *Qingmo lixian shi* 清末立憲史 (Beijing: Huawen chubanshe, 2012), 419; Xia Xinhua 夏新華 et al., eds., *Jindai Zhongguo xianzheng licheng: shiliao huicui* 近代中國憲政歷程：史料薈萃 (Beijing: Zhongguo Zhengfa Daxue chubanshe, 2004), 143. Considerations on the *Bideyuan* can be found in Gao, *Qingmo lixian shi*, 419–430.
- 70 Wang Rongbao 汪榮寶 and Ye Lan 葉瀾, *Xin Erya* 新爾雅, 3rd ed. (Shanghai: Wenming shuju, Guangxu 32 [1906]), 12, 15. See also Wang Hongnian 王鴻年, *Xianfa falu yaoyi* 憲法法理要義 (Tokyo: Wang Tizhai, Meiji 35 [1902]), cap. V.5, fasc. xia 下, 21b, with nearly identical wording. For a Korean version with nearly identical wording, based on Hozumi as well, see Yu Ch’i-hyōng 俞致衡, *Hōnbōp* 憲法, ed. Han’gukhak Munhōn Yōn’guso 韓國學文獻研究所 (Seoul: Asea Munhwasa, 1981), 74–75.



- 71 Gugong Bowuyuan Ming-Qing dang'anbu 故宮博物院明清檔案部, ed., *Qingmo choubei lixian dang'an shiliao* 清末籌備立憲檔案史料, 2 vols. (Beijing: Zhonghua shuju, 1979), 1:567.
- 72 Wang and Ye, *Xin Erya*, 15.
- 73 Wang, *Xianfa falì yaoyi*, cap. V.5, fasc. xia 下, 21b-22a. See also Zhang Bolie's 張伯烈 (1872–1934) constitutional draft, which stressed that the privy council was only really important in Japan, and deemed the institution not to be needed in China. Zhang Bolie 張伯烈. *Jiading Zhongguo xianfa cao'an* 假定中國憲法草案 (Tokyo: Dokusō bessho, 1909), 54.
- 74 Duanfang 端方, *Duan Zhongmin gong zougao* 端忠敏公奏稿, 4 vols. ([Taipei]: Wenhai chubanshe, [1967]), 2:738–739.
- 75 *Ibid.*, 2:723.
- 76 *Ibid.*, 2:724.
- 77 *Ibid.*, 2:738.
- 78 “Jixianyuan guanzhi cao'an (xianlie shuotie jin bu she)” 集賢院官制草案 (先列說帖今不設), *Dongfang zazhi* 東方雜誌 3, linshi zengkan xianzheng chugang 臨時增刊憲政初綱 (Guangxu 32 [1906]): *Guanzhi cao'an* 官制草案, 53–56. See also Gugong Bowuyuan Ming-Qing dang'anbu, ed., *Qingmo choubei lixian dang'an shiliao*, 1:470 (mentioned within Yikuang's proposal for reorganization of the central government).
- 79 Bao Tingliang 保廷樑, *Daqing xianfa lun* 大清憲法論 (Tokyo: Shūkōsha, Xuantong 2 [1910]), 308–313.
- 80 Gao, *Qingmo lixian shi*, 421, writes that the ambitious Yikuang wanted to deliberately weaken the institution, for he was the natural choice for becoming prime minister and was not interested in a different deliberative organ undermining the position of the cabinet presided by him. This speculation is not backed up by the sources, as Yikuang's omission simply reflects the Japanese model.
- 81 “Jixianyuan guanzhi cao'an,” 54.
- 82 *Ibid.*; Hucker, Charles, *A Dictionary of Official Titles in Imperial China* (Taipei: Southern Materials Center, Minguo 77 [1988]), 131.
- 83 On the “temple salary” system see Hou Tijian 侯體健, “Nan Song cilu guanzhi yu diyu shiren qunti: yi Fujian wei zhongxin de kaocha” 南宋祠祿官制與地域詩人羣體：以福建為中心的考察, *Fudan xuebao (shehui kexue ban)* 復旦學報 (社會科學版), no. 3 (2015): 40–47.
- 84 Gugong Bowuyuan Ming-Qing dang'anbu, ed., *Qingmo choubei lixian dang'an shiliao*, vol. 1, 536.
- 85 Meng Sen 孟森, “Xianzheng pian” 憲政篇, *Dongfang zazhi* 東方雜誌 6, no. 7 (Xuantong 1 [1909]), *jizai* 1 記載一, 377 (Speaking about the Political Consultative Council, of which this function could however be taken over by the Privy Council).
- 86 *Ibid.*, 376–377.
- 87 Gugong Bowuyuan Ming-Qing dang'anbu, ed., *Qingmo choubei lixian dang'an shiliao*, 1:544–545.
- 88 *Ibid.*, 1:58–59.
- 89 *Ibid.*, 1:67.
- 90 Gao, *Qingmo lixian shi*, 421–422.
- 91 For the organic law see Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 143–144 and Gugong Bowuyuan Ming-Qing dang'anbu, ed., *Qingmo choubei lixian dang'an shiliao*, 1:567–571. For the detailed regulations, see *ibid.*, 1:580–584.
- 92 Gugong Bowuyuan Ming-Qing dang'anbu, ed., *Qingmo choubei lixian dang'an shiliao*, 1:584–586.
- 93 *Ibid.*, 1:584.
- 94 *Ibid.*, 1:588–590.

- 95 Kitaoni Saburō 北鬼三郎, *Daishin kenpōan* 大清憲法案 (Tokyo: Keisei shoin, Meiji 42 [1909]), 283–284 and 310–311 (Art. 51); Zhang, *Jiading Zhongguo xianfa cao'an*, 54 (Art. 65). On the third draft, which was noncommercial and is only extant in the First Historical Archives of China, see Cui Xuesen 崔學森, “Qingting zhixian yu Mingzhi Riben” 清廷制憲與明治日本 (Ph.D. diss., Peking University, 2015), 204–205.
- 96 Cao Rulin 曹汝霖, *Yi sheng zhi huiyi* 一生之回憶 (Beijing: Zhongguo dabaikē quan-shu chubanshe, 2009), 62.
- 97 Wang Rongbao 汪榮寶, *Wang Rongbao riji* 汪榮寶日記, eds. Han Ce 韓策, Cui Xuesen 崔學森, and Wang Xiaoqi 王曉秋 (Beijing: Zhonghua shuju, 2013). See also Cui, “Qingting zhixian yu Mingzhi Riben,” 140.
- 98 “Sheshuo: Shuo Bideyuan” 社說: 說弼德院, *Fazheng qianshuo bao* 法政淺說報, no. 5 (Xuantang 3 [1911]): 1–6 (see here p. 6 in particular).
- 99 Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 153–155; 156–159. Art. 10 of the Provisional Constitution, however, provided for an Administrative Court (*Pingzhengyuan* 平政院).
- 100 In Addition to the 15 early republican drafts, this number includes a position paper by the Kuomintang 國民黨, which contained detailed suggestions for a constitution, and a revision of the paper. Furthermore, it includes the only monarchic constitutional draft written in Yuan Shikai's time. Sixteen of the seventeen republican documents are recorded in Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, except for the draft by Li Chao, for which see Li Chao 李超, “Huaqiao ni xianfa cao'an” 華僑擬憲法草案, *Xianfa xinwen* 憲法新聞 22 (Minguo 2 [1913]): (II) *xianshi* (乙) 憲史, no. 5: 1–14. For the monarchic draft by Ma Jifu 馬吉符 (1876–1919), see Ma Jifu 馬吉符, “Xianfa guanjian” 憲法管見, in *Huizu dianzang quanshu* 回族典藏全書, ed. Wu Haiying 吳海鷹, 235 vols. (Lanzhou, Yinchuan: Gansu wenhua chubanshe; Ningxia renmin chubanshe, 2008), 119:413–437. On the republican constitutional drafts, see Xia Xinhua 夏新華 and Liu E 劉鄂, “Minchu sini xiancao yanjiu” 民初私擬憲草研究, *Zhongwai faxue* 中外法學 19, no. 3 (2007): 318–338.
- 101 [Guomindang 國民黨], “Zhenghai xianchao: Guomindang xianfa zhuzhang quan'an” 政海憲潮: 國民黨憲法主張全案, *Xianfa xinwen* 憲法新聞, no. 13 (Minguo 2 [1913]): (II) *xianshi* (乙) 憲史, no. 3: 1–13. The relevant part is contained in pp. 7–8; the draft is continued in the next edition of the journal. See also Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 230–245, in particular pp. 232–233.
- 102 [Jinbudang 進步黨], “Xianfa ni'an huilu: Jinbudang xianfa taolunhui huiyuan ni xianfa cao'an” 憲法擬案彙錄: 進步黨憲法討論會會員擬憲法草案, *Xianfa xinwen* 憲法新聞, no. 18 (Minguo 2 [1913]): (II) *xianshi* (乙) 憲史, no. 5: 1–36. Also recorded in Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 251–264.
- 103 Several versions with varying commentaries circulated in the Republic. For a consolidated version, see Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 318–327.
- 104 Wang Dengyi 王登義, “Xianfa ni'an huilu: Wang Dengyi ni Zhonghua Minguo xianfa cao'an” 憲法擬案彙錄: 王登義擬中華民國憲法草案, *Xianfa xinwen* 憲法新聞, no. 19 (Minguo 2 [1913]): (II) *xianshi* (乙) 憲史, no. 5: 1–19. Also recorded in Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 354–362.
- 105 Li, “Huaqiao ni xianfa cao'an.” A commented version began to be published in Li Chao 李超, “Huaqiao Li Chao yuni Zhonghua Minguo xianfa cao'an” 華僑李超預擬中華民國憲法草案, *Jilin jingcha zazhi* 吉林警察雜誌 1, no. 1 (Minguo 2 [1913]): 1–20. This second version contains extensive commentaries, but only comprises articles 1–30 of the draft. The part on the Advisory Council never appeared.
- 106 “Guomindang xianfa zhuzhang quan'an,” (II) *xianshi* (乙) 憲史, 7–8; Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 232–233.
- 107 [Guomindang 國民黨], “Zhenghai xianchao: Guomindang xianfa taolunhui duiyu qi xianfa zhuzhang quan'an zhi xiuzheng” 政海憲潮: 國民黨憲法



- 討論會對於其憲法主張全案之修正, *Xianfa xinwen* 憲法新聞, no. 15 (Minguo 2 [1913]): (II) *xianshi* (乙) 憲史, no. 3: 1–5 (in particular p. 2); Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 246.
- 108 See Egas Moniz Bandeira, “China and the Globalisation of Constitutions: Constitutional Thought in the Qing Empire (1838–1911)” (Ph.D. diss.: Heidelberg University/Tohoku University, 2019), 463–482, in particular p. 476.
- 109 “Zhuanjian: Zhili Minzhuguo xianfa La Cnstitution [sic!] de Chile (1833 nian 5 yue 25 hao zhiding ju Tuoke M.C.W. tooke [sic!] 1899 nian chuban zhi yiben chongyi)” 專件: 智利民主國憲法 La Cnstitution de Chile (一千八百三十三年五月二十五號制定據託克 M.C.W. tooke 一千八百九十九年出版之譯本重譯), tr. Qian Zhixiu 錢智修, *Fazheng zazhi* 法政雜誌 2, no. 8 (1913): 157–183. The English intermediary is Charles Wesley Tooke, ed. *Political Constitution of the Republic of Chile: Promulgated May 25, 1833, with the Amendments down to May 1, 1899* (Urbana: Press of the Herald, 1899).
- 110 [Jinbudang], “Xianfa ni’an huilu: Jinbudang xianfa taolunhui huiyuan ni xianfa cao’an,” 27–28; Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 260–261.
- 111 [Jinbudang], “Xianfa ni’an huilu: Jinbudang xianfa taolunhui huiyuan ni xianfa cao’an,” 27–31; Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 260–262.
- 112 See the chapter “Duma, yuan, and beyond: Conceptualizing parliaments and parliamentarism in and after the Russian and Qing Empires, 1900s–1920s” in the present volume.
- 113 Ariga Nagao 有賀長雄, *Kokkagaku* 國家學 (Tokyo: Makino shobō, Meiji 22 [1889]), 257–271 (in particular pp. 261–266).
- 114 *Ibid.*, 271.
- 115 Matsui Naoyuki 松井直之, “Shinmatsu-Minsho-ki no Chūgoku ni okeru rikkenshugi no keiju: Ariga Nagao no Tennō-kikansetsu ni chakumokushite” 清末民初期の中国における立憲主義の継受: 有賀長雄の天皇機関説に着目して, in *Nitchū ni okeru Seiō rikkenshugi no keiju to henyō* 日中における西欧立憲主義の継受と変容, ed. Takahashi Kazuyuki 高橋和之 (Tokyo: Iwanami shoten, 2014), 93–122.
- 116 See *ibid.*, 115, and Akiyama Hisa 秋山ひさ, “Ariga Nagao no Chūgokukan” 有賀長雄の中国観, *Lotus: Nihon Fenorosa gakkai kikan shi* Lotus : 日本フェノロサ学会機関誌 14 (1994): 1–19.
- 117 “Guanyu yuefa huiyi zhi xin jishi: Youhe Changxiong zhi tiaochen” 關於約法會議之新紀事: 有賀長雄之條陳, *Shenbao* 申報, 9<sup>th</sup> April 1914: 3; “Gonghe guwenyuan zhi zuzhi shuo” 共和顧問院之組織說, *Shenbao* 申報, 11<sup>th</sup> April 1914: 3. See also Zhang Xueji 張學繼, “Youhe Changxiong, Gudenuo yu Minguo chunian xianzheng tizhi de yanbian” 有賀長雄、古德諾與民國初年憲政體制的演變, *Dang’an yu shixue* 檔案與史學 4, no. 4 (1997): 44–52, 50.
- 118 Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 471–476.
- 119 On Frank Goodnow and his role in China, see Xu Guoqi, *Chinese and Americans: A Shared History* (Cambridge, MA: Harvard University Press, 2014), 139–203; Noel Pugach, “Embarrassed Monarchist: Frank J. Goodnow and Constitutional Development in China, 1913–1915,” *Pacific Historical Review* 42, no. 4 (1973): 499–517; Patrick Fuliang Shan, *Yuan Shikai: A Reappraisal* (Vancouver: UBC Press, 2018), 212–213; Jedidiah Kroncke, “An Early Tragedy of Comparative Constitutionalism: Frank Goodnow and the Chinese Republic,” *Washington International Law Journal* 21, no. 3 (2012): 535–590.
- 120 The Chinese version is to be found in Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 390. The English original is from “China’s Constitution: Dr. Goodnow’s Draft with His Explanatory Note,” JHU Archives: Frank Johnson Goodnow Papers, box 25, as quoted in Xu, *Chinese and Americans*, 179.
- 121 Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 474.
- 122 *Ibid.*, 479–480.

- 123 [Jinbudang], “Xianfa ni’an huilu: Jinbudang xianfa taolunhui huiyuan ni xianfa cao’an,” 19–22; Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 257–259 (including long commentaries on the norm).
- 124 Frank Goodnow, “The Amended Provisional Constitution,” *Peking Daily News*, May 14, 1914: 5–6.
- 125 “Republican Advisory Council,” *Peking Daily News*, 24<sup>th</sup> February 1914: 4.
- 126 As summarized by the French Embassy in Peking, “M. A. R. Conty Ministre de France à Pékin à S. E. M. Doumergue Président du Conseil, Ministre des Affaires Étrangères,” report n° 214, 1<sup>st</sup> June 1914, Pékin Série A 227 bis, 42-V (Constitution), Archive du Ministère des Affaires Étrangères, Nantes.
- 127 See the standard interpretation in both Republican and People’s Republican China, given in Chen Ruxuan 陳茹玄, *Zengding Zhongguo xianfashi* 增訂中國憲法史 (Shanghai: Shijie shuju, Minguo 36 [1947]), 69–77. The text is reproduced in Xia et al., eds., *Jindai Zhongguo xianzheng licheng*, 476–479.
- 128 Gu Jian 孤劍 [“lonely sword”; pseudonym], *Bukesiyi zhi Canzhengyuan* 不可思議之參政院, *Huanghua xunbao* 黃華旬報, no. 2 (1914): 11–15. This sentence is to be found twice in pp. 14–15 and is attributed to Wang Kaiyun 王闔運 (styled Wang Renqiu 王壬秋, 1833–1916), a conservative scholar who was a member of the Political Participatory Council between 1914 and 1915, but critical of Yuan Shikai’s ambitions. On Wang and Yuan, see Stephen Platt, *The Hunanese and Modern China* (Cambridge, MA: Harvard University Press, 2007), 169–171.
- 129 Gu Jian, *Bukesiyi zhi Canzhengyuan*, 12.
- 130 *Ibid.*, 15.
- 131 Guojian 國鑑 [pseud.; “Mirror of the country”], “Shiwen linzhua: Guolaoyuan nanwang chengli” 時間麟爪：國老院難望成立, *Wanhang Zhoubao* 萬航周報 1 (1916), *zazu* 雜俎 27.
- 132 Sun Wen 孫文, *Guofu quanji* 國父全集, eds. Qin Xiaoyi 秦孝儀 and Guofu quanji bianji weiyuanhui 國父全集編輯委員會, 12 vols. (Taipei: Jindai Zhongguo chubanshe, Minguo 78 [1989]), 4:459.
- 133 It is noteworthy that the only extant monarchic constitutional draft written when Yuan Shikai tried to make himself Emperor did not contain a Privy Council. See Ma, “Xianfa guanjian.”
- 134 See George Ephraim Sokolsky, *The Tinder Box of Asia* (London: Allen & Unwin, 1933), 275.
- 135 For the National Political Participatory Assembly (*Guomin canzhenghui*) see Henrike Rudolph’s chapter in the present volume.

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