

The Development of Constitutions in China

The constituent power and the power of amendment

Content

The history of the development of the constitutions in China.

- The formation of a constitution
- The amendment of a constitution

Constituent power

Two basic questions:

1. Who has the power to write the constitution?
2. How should the constitution be written?

The theory of **constituent power** (制憲權):

- Emmanuel Joseph Sieyès
- Carl Schmitt
- Nobuyoshi Ashibe (蘆部信喜あしべのぶよし)



Source of picture: https://www.publicbooks.org/wp-content/uploads/2017/10/Scene_at_the_Signing_of_the_Constitution_of_the_United_States.jpg

The theory of constituent power

Emmanuel Joseph Sieyès

- Constituent power is a **popular power**, a political authority resided in the people but limited to the authorization **of the constitution-writing process carried out by elected representatives**.
- Constituent power has no limit.
- The powers authorized by constituent power are different from constituent power.
- The power of constitution-amending is part of constituent power, thus, there is no limitation.

Carl Schmitt

- Constituent power refers to a political will which is capable of deciding on the type and the form of its own political existence.
- Constituent power is unlimited and can do anything because it is not subordinate to the constitution.
- The subject of constituent power can be the king or the people. (Gods constituent power)
- **The power of constitution-amending is a power authorized by constituent power, thus, there are limitations.**

Nobuyoshi Ashibe

- Constituent power is restricted, not by legal legitimacy, but its own natural normative ties: the popular sovereignty, the protection of citizens' rights, and above all, the people's dignity.
- The subject of constituent power is the people, who can be represented by an elected group, such as the parliament, the constitution convention, etc.
- The power of constitution-amending is the result of the legalization of constituent power, thus, there are limitations.

Development of constitutions in China: The three periods

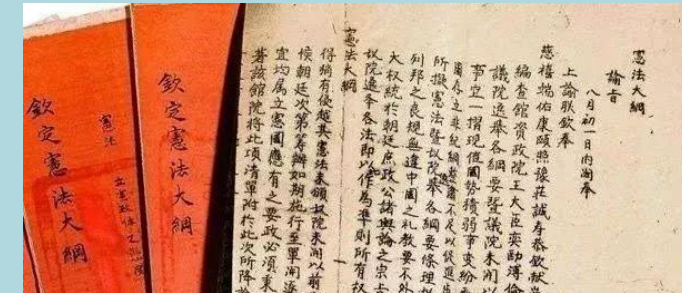
Three periods of development

The late Qing Dynasty (1908-1911)	The Republic of China (1911-1949)	The People's Republic of China (1949-)
<p>1908 <i>Outline of Imperial Constitution</i> 《欽定憲法大綱》</p> <p>1911 <i>Doctrine of Nineteen Articles</i> 《重大信條十九條》</p>	<p>1911 <i>Outline of the Provisional Government of the Republic of China</i> 《中華民國臨時政府組織大綱》</p> <p>1912 <i>Provisional Constitution of the Republic of China</i> 《中華民國臨時約法》</p> <p>1914 <i>Convention of the Republic of China</i> (Yuan Shikai Convention) 《中華民國約法》 (袁記約法)</p> <p>1923 <i>Constitution of the Republic of China</i> (Cao Kun Constitution) 《中華民國憲法》 (曹錕憲法)</p> <p>1925 <i>Draft on Constitution of the Republic of China</i> (Duan Qirui Constitution) 《中華民國憲法草案》 (段祺瑞憲法)</p> <p>1931 <i>Provisional Constitution of the Political Tutelage Period of the Republic of China</i> 《中華民國訓政時期約法》</p> <p>1946 <i>Constitution of the Republic of China</i> 《中華民國憲法》</p>	<p>1949 <i>Common Program of the Chinese People's Political Consultative Conference</i> 《中國人民政治協商會議共同綱領》</p> <p>1954 <i>Constitution of the People's Republic of China</i> (1954 Constitution) 《中華人民共和國憲法》 (五四憲法)</p> <p>1975 <i>Constitution of the People's Republic of China</i> (1975 Constitution) 《中華人民共和國憲法》 (七五憲法)</p> <p>1978 <i>Constitution of the People's Republic of China</i> (1978 Constitution) 《中華人民共和國憲法》 (七八憲法)</p> <p>1982 <i>Constitution of the People's Republic of China</i> (1982 Constitution) 《中華人民共和國憲法》 (八二憲法)</p>

The Late Qing Dynasty (1908-1911)

Outline of Imperial Constitution 《欽定憲法大綱》 (1908)

- An attempt of making a constitution;
- The first ever legal document with features of modern constitutionalism in the history of China;
- Constituted by Empress Dowager Cixi (慈禧太后);
- Basically a copy of the 1889 *Meiji Constitution* of Japan, but the Outline of Imperial Constitution took away all the articles that restricted the power of the emperor;
- Despotic law in the name of constitution;
- Divided into two parts: the powers of the emperor, the rights and duties of the people;
- **Importance: Rights of people are formally taken into consideration by the ruler.**



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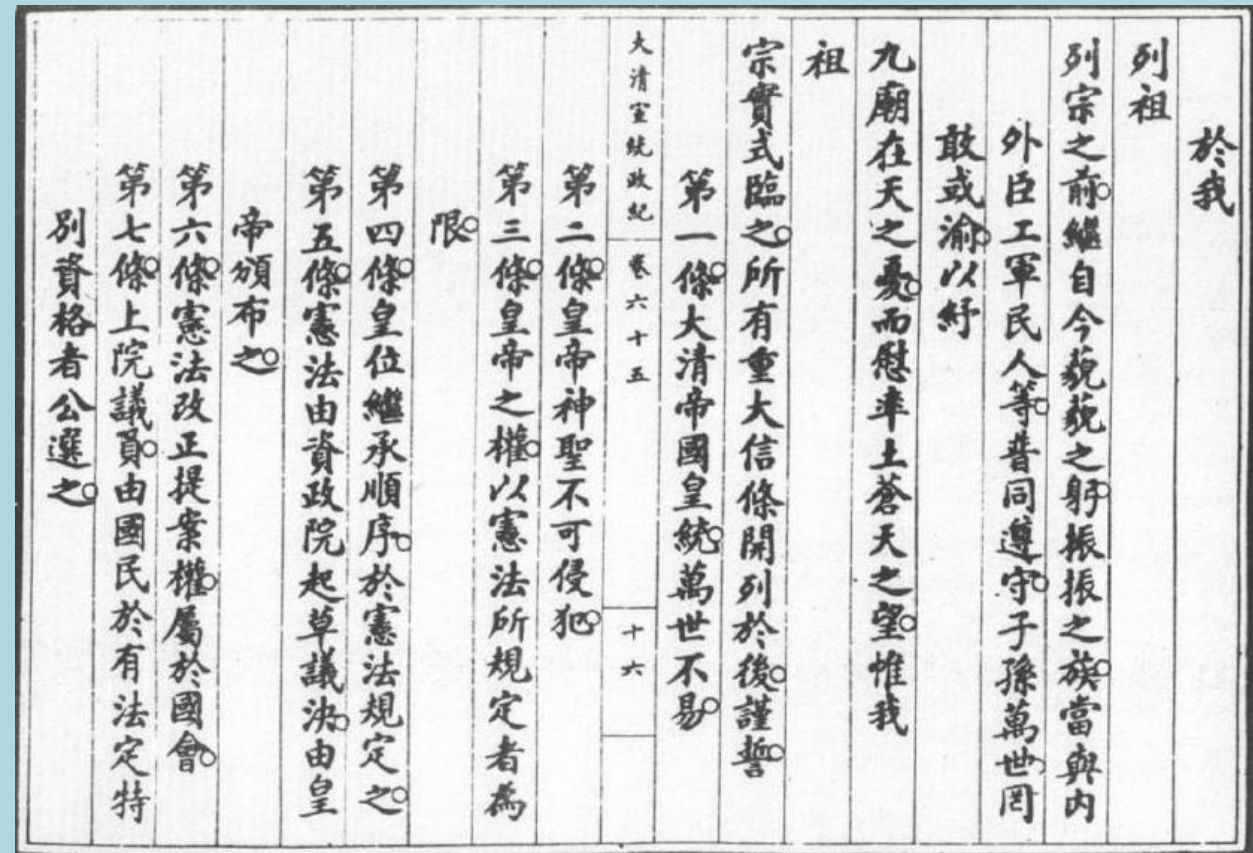


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The Late Qing Dynasty (1908-1911)

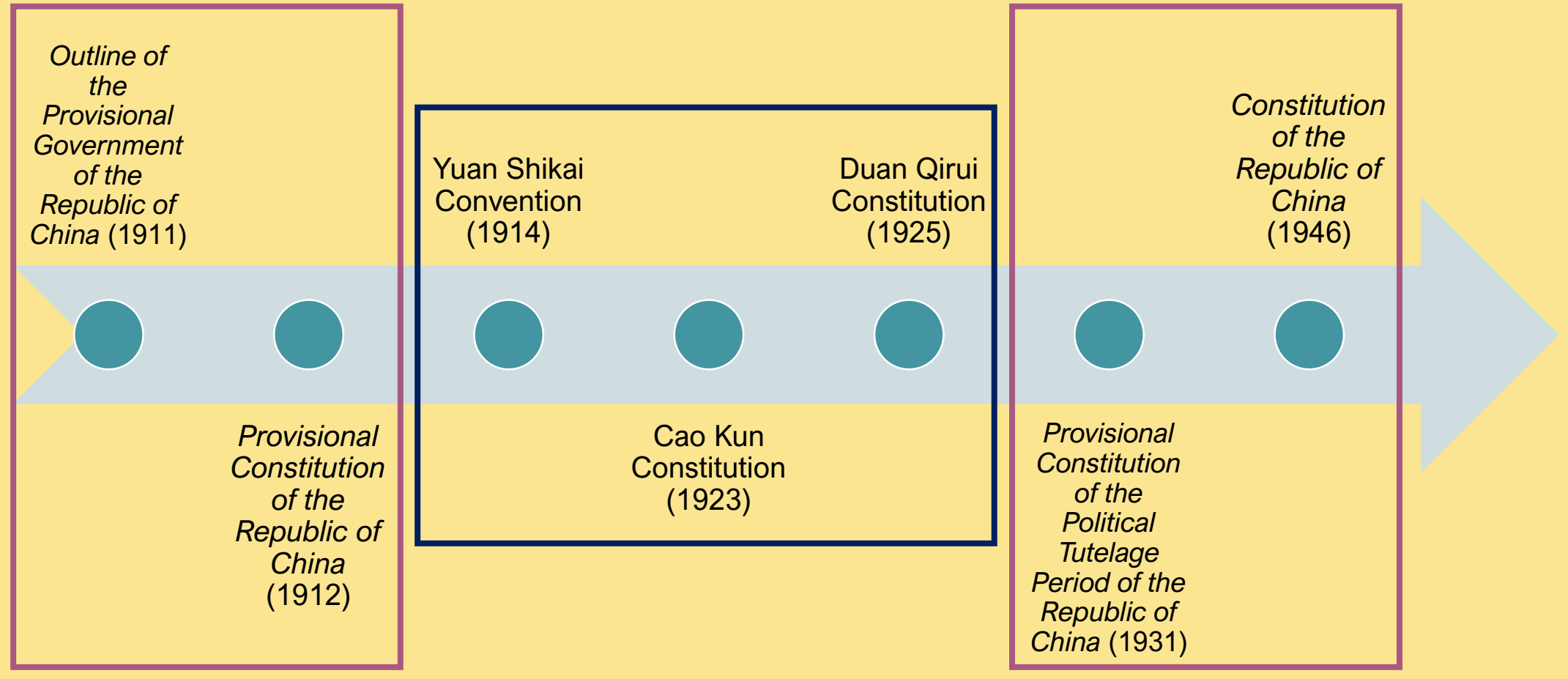
Doctrine of Nineteen Articles 《重大信條十九條》(1911)

- Promulgated by Qing Government on 3rd November 1911, after the start of the 1911 Revolution (辛亥革命);
- An attempt to establish a British style constitutional monarchy;
- Failed to stop the fall of the Qing Dynasty.



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The Republic of China (1911-1949)

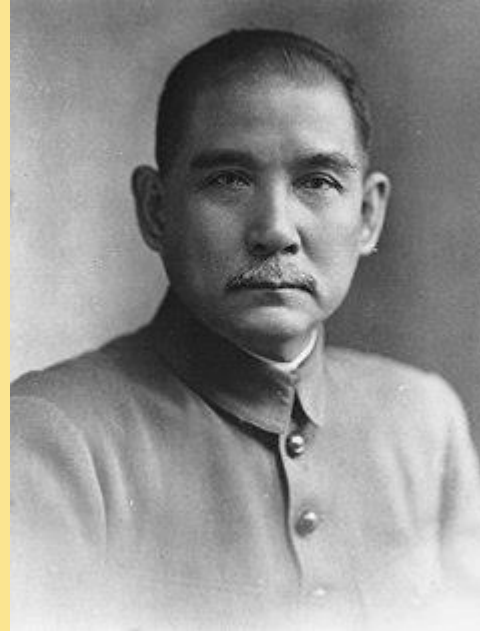


The Republic of China (1911-1949): After 1911

Outline of
the
Provisional
Government
of the
Republic of
China (1911)



Provisional
Constitution
of the
Republic of
China
(1912)



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Source of picture: https://revivingroc.files.wordpress.com/2020/09/main-site_5000_0122_5_header_v1_0.jpg

Three Principles of the People (三民主義) by Sun Yat-sen

- Civic Nationalism (民族主義)
- Governance Rights (民權主義)
- Welfare Rights (民生主義)

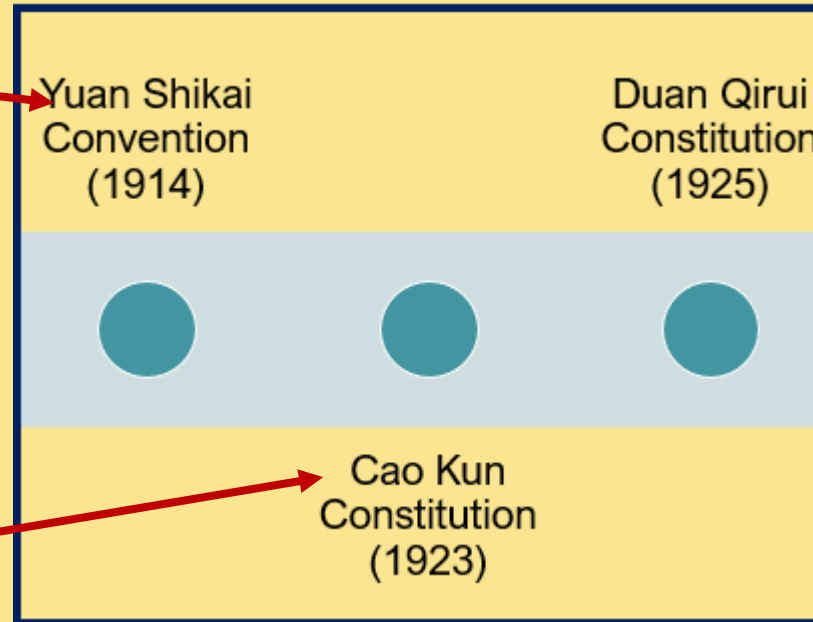
The Republic of China (1911-1949): Warlord Era



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Source of picture: <https://s.zimedia.com.tw/s/fmeDZX-0>

The Republic of China (1911-1949): KMT Era

Chiang Kai-shek



Source of picture:
https://upload.wikimedia.org/wikipedia/commons/thumb/1/19/Jiang_Jieshi2.jpg/235px-Jiang_Jieshi2.jpg

Constitution of the Republic of China 《中華民國憲法》

- ratified by Kuomintang (KMT) during the Constituent National Assembly on 25th December 1946, without the presence of any representatives from the Communist Party of China (CPC);
- Repealed by the CPC after the establishment of the PRC in 1949;
- with a few amendments, it serves as the constitutional legal document in the Taiwan Region.

*Constitution
of the
Republic of
China
(1946)*



*Provisional
Constitution
of the
Political
Tutelage
Period of the
Republic of
China (1931)*

The People's Republic of China (1949-)

1949

Common Program of the Chinese People's Political Consultative Conference 《中國人民政治協商會議共同綱領》

1954

1954 Constitution 《五四憲法》

1975

1975 Constitution 《七五憲法》

1978

1978 Constitution 《七八憲法》

1982

1982 Constitution 《八二憲法》

The People's Republic of China (1949-)

Common Program of the Chinese People's Political Consultative Conference *《中國人民政治協商會議共同綱領》 (1949)*

- adopted and promulgated by the first Chinese People's Political Consultative Conference (CPPCC) in September 1949;
- consisted of 60 articles in 7 chapters;
- functioned as a provisional constitution;
- stated the organization of the government of the PRC;
- provided legitimacy for the new government of China.



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The People's Republic of China (1949-)

1954 Constitution 《五四憲法》

- adopted and promulgated by the first National People's Congress (NPC) on 20th September 1954;
- consisted of 106 articles in 5 chapters;
- 5 major contents:
 1. It established the fundamental systems of the country. It stated that “The People's Republic of China is a people's democratic state led by the working class and based on the alliance of workers and peasants.” (Article 1) The unitary government system was also assured.
 2. It declared that the PRC would built a prosperous and happy socialist society.
 3. It set up the economic system in the transitional period.
 4. It stated the organizations of the government.
 5. It declares the basic rights and duties of the people.



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The People's Republic of China (1949-)

The making of the 1954 Constitution

1. The **Constitution-drafting Group of the Central Committee of the CPC** (中共中央憲法起草小組) proposed the first draft.
2. The **Central Political Bureau of the CPC** (中共中央政治局) discussed and preliminarily approved the draft.
3. The draft was proposed to the **Constitution Drafting Committee** (憲法起草委員會).
4. The Constitution Drafting Committee discussed and approved the draft.
5. The draft was approved by the **Central People's Government Committee** (中央人民政府委員會) and then it was announced in the whole nation and discussed by the **people** (for around 3 months).
6. The 1954 Constitution was approved by the first **NPC**.



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The People's Republic of China (1949-)

The period of the Cultural Revolution

- The 1975 Constitution
- The 1978 Constitution

~~rule of law~~

rule of man



Source of picture: <https://images.chinaitimes.com/newsphoto/2016-05-18/656/20160518001094.jpg>

The People's Republic of China (1949-)

1982 Constitution 《八二憲法》

- adopted and promulgated by the 5th meeting of the Fifth NPC in 4th December 1982;
- consisted of 138 articles in 4 chapters;
- with 5 amendments, it is **the current constitution of the People's Republic of China**;
- 6 major contents:
 1. It states in the Preamble that the CPC leads the nation and the people, and together, the whole nation observe and act according to the Constitution and all other laws.
 2. It puts the fundamental rights and duties of citizens before the structure of the states, which shows the modern rule of law concept of popular sovereignty and protection of human rights.
 3. It resumes the post of President of the PRC, the Central Military Commission and other state organs, which shows the separation of state administration and the party (CPC).
 4. It complies with the Reform and Opening-up (改革開放) policy.
 5. It states that “the State may establish special administrative regions when necessary” (Article 31), which becomes the basis of the “One Country, Two Systems” Policy.
 6. It establishes the convention of constitution amendment.

The People's Republic of China (1949-)

Five Amendments of the 1982 Constitution

- **1988 Amendment**
Private economy and the transfer of the use rights of land were allowed.
- **1993 Amendment**
The “Socialist Market Economy” (“社會主義市場經濟”) system was formally established. The system of multi-party cooperation and political consultation led by the CPC was written into the Preamble.
- **1999 Amendment**
“Deng Xiaopeng Theory” was added as the guiding ideology for the development of the nation. The status of private economy was further enhanced. “Counter-revolutionary crime” was changed to “endangering state security crime”.
- **2004 Amendment**
“Three Represents” was added as the guiding ideology for the development of the nation. The sentence “The State respects and preserves human rights.” was written into the Constitution (Article 33). *March of the Volunteers* was given constitutional status as the national anthem.

The People's Republic of China (1949-)

Five Amendments of the 1982 Constitution

- **2018 Amendment**

The sentence “The leadership of the Communist Party of China is the most essential feature of socialism with Chinese characteristics.” was written into the main body (Article 1) of the constitution.

The limit of serving no more than two consecutive terms of the President and Vice-President of the PRC was abolished.

Commissions of supervisions as state organs are added.

Legislative power is granted to cities divided into districts.

The system of public pledge is established.

Brief summary on making a constitution

The reason for the appearance of a constitution

- **To provide the legitimacy of the governing political entity**

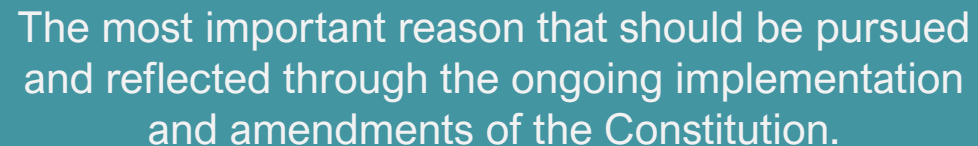
Taking China as an example, from the attempts of having a constitution by the late Qing Dynasty to the establishment of the People's Republic of China and the appearance of the *Constitution of the People's Republic of China*, the primary reason for writing a constitution is to provide the legitimacy of the governing authority at the moment.

- **To establish the foundation of the state**

A constitution is made with the task to establish the mechanism of how a state is organized and operated.

- **To safeguard the rights and dignity of the people**

The rights and dignity of the people are getting respected when modern constitutionalism is taking place.



The most important reason that should be pursued and reflected through the ongoing implementation and amendments of the Constitution.

Who and How?

Two basic questions:

Who has the power to write the constitution?

How should the constitution be written?

Who: the people

How: by representatives

The making of the 1954 Constitution

1. The **Constitution-drafting Group of the Central Committee of the CPC** (中共中央憲法起草小組) proposed the first draft.
2. The **Central Political Bureau of the CPC** (中共中央政治局) discussed and preliminarily approved the draft.
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6. The 1954 Constitution was approved by the first **NPC**.

The changes of a constitution

The changes of a constitution

Theoretically speaking, there are three ways of changes of a constitution:

1. Constitution amendment

Amending the text of the constitution. Normally, the power of amending the constitution is believed to be authorized by the ultimate constituent power, thus, who and how a constitution should be amended is stated in the constitution.

2. Constitution interpretation

It normally happens through the judgment of legal cases.

3. Constitution transformation

The constitution is amended through no actual amendment of the text.

Constitution amendment

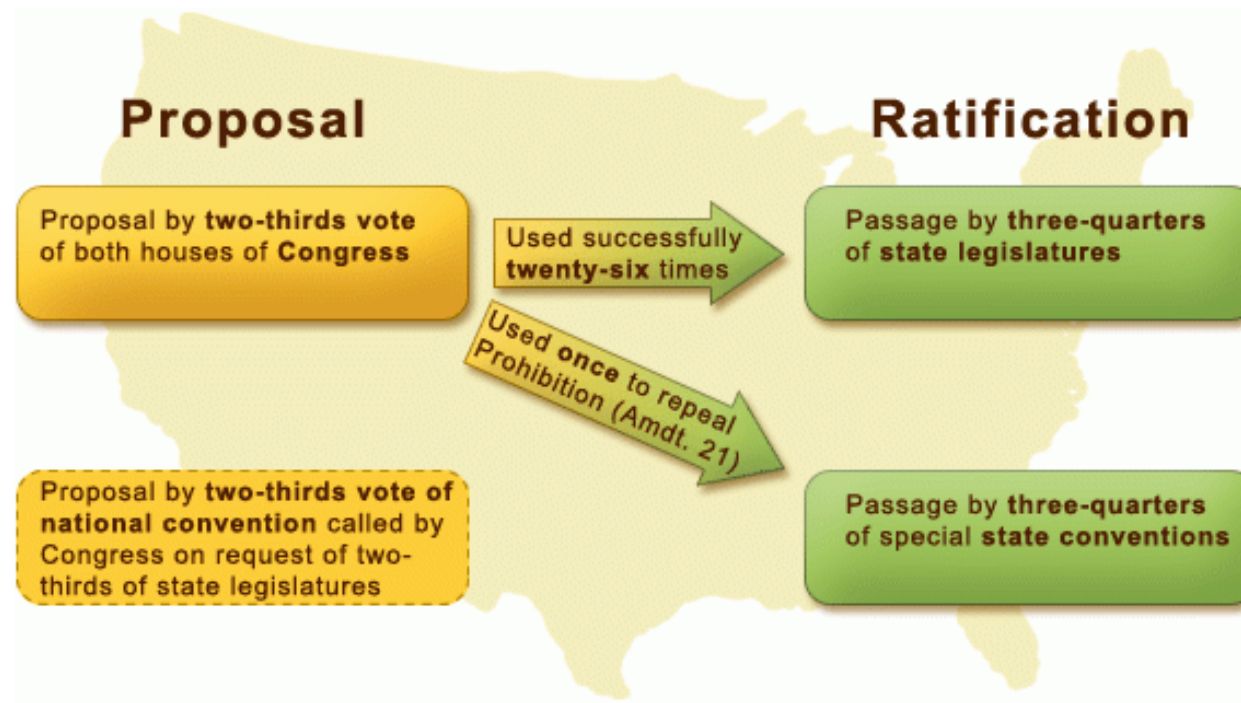


Source of picture:
<https://www.uc.edu/news/articles/2021/08/n21026012/jcr:content/image.img.cq5dam.thumbnail.500.500.jpg/1629488951853>

Article V, the Constitution of the United States of America

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Constitution amendment




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Constitution interpretation

CONSTITUTION ANNOTATED
Analysis and Interpretation of the U.S. Constitution

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Examples: "due process", search AND warrant, "First Amendment"



Read About the Constitution in Plain English

The Constitution Annotated provides a comprehensive overview of how the Constitution has been interpreted over time and is now available on this new site with upgraded search capabilities. The online Constitution Annotated includes discussions of the Supreme Court's latest opinions. In the coming months, we will be making broader changes to further modernize the Constitution Annotated.

[Browse the Constitution Annotated >](#)

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Constitution transformation



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Article 9, the *Constitution of Japan*

CHAPTER II RENUNCIATION OF WAR

Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

The case of the Constitution of PRC

1. **Constitution amendment**

It is almost the only way of change of the constitution in China.

2. **Constitution interpretation**

The Constitution states that interpreting the constitution is one of the functions and powers of the NPC Standing Committee.

3. **Constitution transformation**

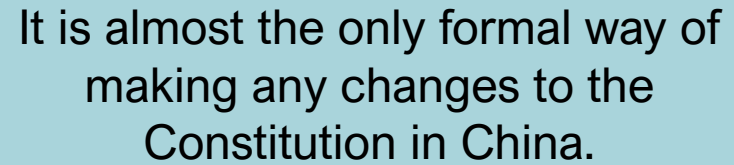
It might have happened, but even if so, it is not common.

The case of the Constitution of PRC

1. **Constitution amendment**

2. **Constitution interpretation**

3. **Constitution transformation**



It is almost the only formal way of making any changes to the Constitution in China.

The case of the Constitution of PRC

1. Constitution amendment

2. Constitution interpretation

3. Constitution transformation

Article 67 of the Chinese Constitution states that interpreting the constitution is one of the functions and powers of the NPC Standing Committee.

- The provisions in the Constitution are not directly invoked in the judicial decisions in legal cases in China.
- The Standing Committee of the NPC has never interpreted any provisions in the Constitution. But the Committee has interpreted two laws related to the Constitution – the ***Hong Kong Basic Law*** and the ***Macao Basic Law***

The case of the Constitution of PRC

1. Constitution amendment

2. Constitution interpretation

3. Constitution transformation

Paragraph 4, Article 10, *1982 Constitution* (without amendment)

- No organization or individual shall unlawfully transfer land through seizure, sale and purchase, or in any other form. Land-use rights may be transferred in accordance with the provisions of law.
任何組織或者個人不得侵佔、買賣或者以其他形式非法轉讓土地。

In the 1980s, under the Reform and Open-up Policy, land-used rights were allowed to transferred through renting.

After the 1988 Amendment:

- No organization or individual shall unlawfully transfer land through seizure, sale and purchase, or in any other form.
任何組織或者個人不得侵佔、買賣或者以其他形式非法轉讓土地。土地的使用權可以依照法律的規定轉讓。

Amendments of the Constitution of PRC

Article 62, the *Constitution of the People's Republic of China*

The National People's Congress shall exercise the following functions and powers:

(1) amending the Constitution; ...

《中華人民共和國憲法》第62條

全國人民代表大會行使下列職權：

(一) 修改憲法；



Source of picture:
<http://www.npc.gov.cn/npc/c30834/202005/4f82d46272c24583a8b77a57d780505e/images/99e17660fabe45aaadc511bc2e14046b.jpg>

Amendments of the Constitution of PRC

Article 64, the *Constitution of the People's Republic of China*

Amendments to the Constitution must be proposed by the National People's Congress Standing Committee or by one-fifth or more of National People's Congress deputies and be adopted by a vote of at least two-thirds of National People's Congress deputies.

Laws and other proposals shall be adopted by a majority vote of the National People's Congress deputies.

《中華人民共和國憲法》第64條

憲法的修改，由全國人民代表大會常務委員會或者五分之一以上的全國人民代表大會代表提議，並由全國人民代表大會以全體代表的三分之二以上的多數通過。

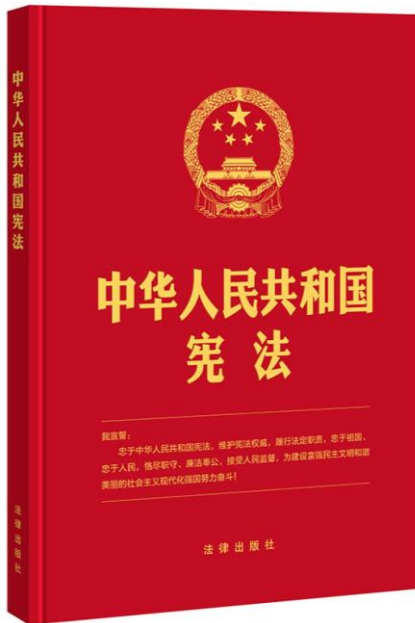
法律和其他議案由全國人民代表大會以全體代表的過半數通過。

Process of amending the Chinese Constitution

3 main steps of amending the Constitution in China

- **The CPC submits a proposal for amending the Constitution to the NPC Standing Committee**
The CPC consults various members of the society while they form the proposal for the amendment, and the proposal is formally approved by the National Congress of the CPC.
This step is not stated in the Constitution nor any other laws. It can be considered as a kind of conventions of constitution in China.
- **The NPC Standing Committee discusses the proposal and after approving it, submits a draft of constitution amendment to the NPC**
According the Constitution, amendments to the Constitution may also be proposed by 1/5 or more of NPC deputies, but it has never happened.
- **The NPC discusses the draft and adopts the amendments**
According the Constitution, amendments are adopted by a vote of at least 2/3 of NPC deputies.

The Constitution of the People's Republic of China



Source of picture: <https://images-na.ssl-images-amazon.com/images/I/61PEEcGYJML.jpg>

1954 Constitution

1975 Constitution

1978 Constitution

1982 Constitution

- 1988 Amendment
- 1993 Amendment
- 1999 Amendment
- 2004 Amendment
- 2018 Amendment

English version:

<http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml>

Chinese version: http://www.gov.cn/guoqing/2018-03/22/content_5276318.htm

Key knowledge points

1. The constituent power: who and how
2. The three periods of development in the constitution history of China
3. The first *Constitution of the People's Republic of China* was enacted in 1954.
The current *Constitution of the People's Republic of China* was enacted in 1982. There have been 5 amendments for the current Constitution.
4. The Constitution of the People's Republic of China:
1954 Constitution – the formation of a constitution
1982 Constitution – the amendment of a constitution
5. The 3 ways of changes of a constitution: amendment, interpretation and transformation
6. The process of amendment of the Constitution of the People's Republic of China



Source of picture: <http://www.historyforkids.net/images/constitution.jpg>

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