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Progress, Continuity, and Constitutional Amendment: Envisaging Legitimacy in the pre-Global South's Quest for Modernity in China and Taiwan

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Abstract

This article compares constitutional amendments in China and Taiwan to explore the long shadow cast by the Chinese encounter with 'modernity' on their divergent constitutional roads. It observes that in China, preambular changes have been the characteristic of the amendments to the 1982 *Constitution of the People's Republic of China*, while the rule-conformity feature of Taiwan's multiple rounds of constitutional revision indicates that the preservation of the formal identity of the 1946 *Constitution of the Republic of China* is central to Taiwan's constitutional transformation. The article argues that the prominence of the preamble in China's constitutional amendments reflects the programmatic character of its socialist constitution, which is seen as an instrument for progress and emancipation through revolutionary forces. In contrast, Taiwan's rigorous observance of amendment rules underscores the pivotal role of legality in its constitutional development. Progress and continuity underlie the respective necessary legitimating conditions for constitutional amendment in China and Taiwan. Tracing the revolution-progress and the legality-continuity nexuses to the Chinese quest for liberation from Western imperialism, this article suggests that modernity guides both China and Taiwan in maintaining the legitimacy of their respective constitutions. China's path towards modernity tells a story of constitutional struggle in the prehistory of the Global South.

Introduction

China and Taiwan are diverging wider and wider, although both fall outside what Ran Hirschl calls the 'usual suspect' category in comparative constitutional studies.¹ Apart from the brief administration of Taiwan by the then Nanjing-seated Republic of China (ROC) government following the end of the Japanese colonial rule in 1945, the governments in China and Taiwan have taken divergent paths since 1949.² The communist People's Republic of China (PRC) has since set out for a series of

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¹Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 16.

²Taiwan, as a province of the Qing Empire, was ceded to Japan at the end of the First Sino-Japanese War under the terms of the *Treaty of Shimonoseki* in 1896. After Japan capitulated to the Allies in 1945, Taiwan was placed under the Allies' belligerent occupation led by Generalissimo Chiang Kai-shek, who immediately ruled Taiwan as a retroceded Chinese province. Chiang's followers regrouped under the banner of the Republic of China (ROC) in Taiwan in December 1949, following his

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bumpy socialist experiments, including the ongoing ‘socialism with Chinese characteristics’ engendered by Deng Xiaoping’s ‘Reform and Opening-Up’ in 1978.³ In contrast, Taiwan has evolved from a quasi-military dictatorship under the ROC regime – led by the Nationalist Party (also known as Kuomintang, KMT) – into a thriving liberal democracy in its own right.⁴ While China is being seen as returning to its socialist revolutionary road towards the restoration of China’s lost status on the world stage,⁵ Taiwan is gradually ridding itself of its Chinese baggage in all aspects, including its constitutional order.⁶ The legitimacy of the Chinese Communist Party (CCP) regime (or simply ‘Communist regime’) and its underlying constitutional order – as understood in a non-normative way⁷ – is frequently attributed to China’s economic prosperity brought about by the CCP’s latest socialist experiment,⁸ while Taiwan embraces democracy in the (re)legitimation of its Chinese-born constitutional order.⁹ China and Taiwan have apparently diverged on their constitutional roads since their split in 1949.

In this article, I compare formal constitutional amendments in China and Taiwan in order to cast light on the long shadow cast on the diverging constitutional roads taken by China and Taiwan – as manifested in their respective ‘constitutions of amendment’¹⁰ – by the Chinese encounter with ‘modernity’,¹¹ an emerging theme in the growing constitutional discourse on the Global South.¹²

defeat by Chairman Mao Zedong-led Communist insurgency in the Chinese civil war. At that time, Mao had already proclaimed the birth of New China, which assumed the title of the People’s Republic of China (PRC) on 1 October 1949. See Hsiao-Ting Lin, *Accidental State: Chiang Kai-shek, the United States, and the Making of Taiwan* (Harvard University Press 2016) 35–38, 109–121.

³William A Joseph, ‘A Tragedy of Good Intentions: Post-Mao Views of the Great Leap Forward’ (1986) 12 *Modern China* 419.

⁴Lin, *Accidental State* (n 2) 1–3.

⁵Jinghao Zhou, ‘China’s Core Interests and Dilemma in Foreign Policy Practice’ (2019) 34 *Pacific Focus* 31, 43–48.

⁶Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* (Hart 2016) 3–4. Given the inconsistent judicial interpretations of the territorial jurisdiction of the ROC, it is debatable whether the ROC Constitution has undergone a *complete* transformation of identity. Compare Chien-Chi Lin, ‘We the Taiwanese People: A Constitution with Two Antagonistic Constitutional Identities’, in Richard Albert, Menaka Guriswamy & Nischal Basnyat (eds), *Founding Moments in Constitutionalism* (Hart 2019) 179, with Ming-Sung Kuo, ‘Democracy and the (Non)Statehood of Taiwan’ (EJIL: Talk!, 3 November 2022) <<https://www.ejiltalk.org/democracy-and-the-nonstatehood-of-taiwan/>> accessed 23 May 2024.

⁷Karl Loewenstein divided constitutions into three ideal types – normative, nominal, and semantic – from an ‘ontological’ point of view, see Karl Loewenstein, *Political Power and the Governmental Process* (University of Chicago Press 1957) 147–153; cf Giovanni Sartori, ‘Constitutionalism: A Preliminary Discussion’ (1962) 56 *American Political Science Review* 853.

⁸For a critical analysis of this view, see Yun-han Chu, ‘Sources of Regime Legitimacy and the Debate over the Chinese Model’ (2013) 13 *China Review* 1.

⁹Yeh, *Constitution of Taiwan* (n 6) 36–48.

¹⁰The notion of the constitution of amendment is further expanded on in the second section of this article.

¹¹Zygmunt Bauman observed modernity as ‘an age of artificial order and of grand societal designs, the era of planners, visionaries, and ... “gardeners” who treat society as a virgin plot of land to be expertly designed’. According to him, there is ‘no limit to ambition and self-confidence’ in the project of modernity. See Zygmunt Bauman, *Modernity and the Holocaust* (Cornell University Press 2000) 113. For varieties of modernity in different societies, see Roberto Managabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press 1976) 223–237. With respect to China, its encounter with modernity has mostly been manifested in issues of sovereignty, statehood, and legal reform as part of its pursuit of modernisation. See Lydia H Liu, *The Clash of Empires: The Invention of China in Modern World Making* (Harvard University Press 2004); Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford University Press 2012) 174–178. For a critical analysis of legal modernity in China, see Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Harvard University Press 2013).

¹²On modernity and constitutionalism in the Global South, see Florian Hoffmann, ‘Facing South: On the Significance of An/Other Modernity in Comparative Constitutional Law’, in Philipp Dann, Michael Riegner & Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press 2020) 41; cf Madhav Khosla, *India’s Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard University Press 2020) 90–97 (discussing the struggle with modernity at India’s founding moment). For examples of the constitutional discourse that highlights the Global South, see Dann, Riegner & Bönnemann (eds), *The Global South and Comparative Constitutional Law* (n 12); Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and*

Despite its various usages,¹³ the notion of the ‘Global South’ connotes a shared sense of identity across national boundaries that has taken shape in political (re)imagination amid the fight against colonialism and the struggle with modernity, with a focus on economic development.¹⁴ On this view, the history of what constitutes the Global South effectively predates the emergence of the term ‘Global South’ in the literature,¹⁵ while the contested concept of modernity remains pivotal to the recent ‘Southern Turn’ in comparative constitutional studies.¹⁶ Notably, China, which continues to identify itself as part of the Global South and remains on various lists of Global South constituents,¹⁷ has struggled with modernity for more than a century,¹⁸ and the Chinese legacy remains indelible in the formation of a new identity in Taiwan.¹⁹ Thus, a comparison of China and Taiwan in their dealing with the amendments of their respective master-text constitutions helps to shed light on how modernity – ie, China’s reception of Western ideas and institutions in its quest for modern statehood²⁰ – has conditioned the way the legitimization of formal constitutional revision has been imagined in both constitutional realms.²¹ Preceding the emergence of the term Global South, China’s and Taiwan’s struggles with constitutional modernity

Colombia (Cambridge University Press 2013); see also David Bilchitz & David Landau (eds), *The Evolution of the Separation of Powers: Between the Global North and the Global South* (Edward Elgar 2018); Ran Hirschl, *City, State: Constitutionalism and the Megacity* (Oxford University Press 2020).

¹³See Anne Garland Mahler, ‘Global South’, in Eugene O’Brien (ed), *Oxford Bibliographies in Literary and Critical Theory* (Oxford University Press 2017).

¹⁴See Walter D Mignolo, ‘The Global South and World Dis/Order’ (2011) 67 *Journal of Anthropological Research* 165.

¹⁵Some scholars trace the historical origin of the term ‘Global South’ to the ‘Brandt Report’, formally entitled ‘North–South: A Programme for Survival’, published in 1980 by the Independent Commission on International Development Issues, chaired by former German Chancellor Willy Brandt; others trace its roots back to the ‘Southern Question’ raised by Antonio Gramsci in the 1920s in relation to the divide between northern and southern Italy. See Mahler (n 13) (citation omitted).

¹⁶Hoffmann (n 12).

¹⁷For China’s self-identification as a member of the Global South, see Michael Schuman, Jonathan Fulton & Tuvia Gering, ‘How Beijing’s Newest Global Initiatives Seek to Remake the World Order’ (The Atlantic Council, 21 Jun 2023) <<https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/how-beijings-newest-global-initiatives-seek-to-remake-the-world-order/>> accessed 23 May 2024; for country lists that include China as a member of the Global South, see, eg, Organization for Women in Science for the Developing World (OWSD), ‘Countries in the Global South’ <<https://owsd.net/sites/default/files/OWSD%20138%20Countries%20-%20Global%20South.pdf>> accessed 23 May 2024; Finance Center for South–South Cooperation, ‘Global South Countries’ <http://www.fc-ssc.org/en/partnership_program/south_south_countries> accessed 23 May 2024.

¹⁸The First Opium War (1839–1842) marks a watershed in China’s struggle with modernity. Federico Verly, ‘A Long-Term Revolution—Exploring Chinese History Between 1850 and 1949’ (2020) 15 (2–3) *Cambridge Journal of China Studies* 1; cf Andrew J Nathan, *Modern China, 1840–1972: An Introduction to Sources and Research Aids* (University of Michigan Center for Chinese Studies 1973) (suggesting 1840 as the beginning of modern China); Jonathan D Spence, *The Search for Modern China* (Norton 1990) (situating the continuing search for modern China in the historical context as starting from 1600).

¹⁹See Lin, ‘We the Taiwanese People’ (n 6); Hui-Wen Chen, ‘When the Temporary Becomes Indefinite: Legitimacy, Path Dependency and Taiwan’s Hybrid Approach to Constitutional Amendment’, in Richard Albert (ed), *The Architecture of Constitutional Amendments: History, Law, Politics* (Hart 2023) 105, 119–120.

²⁰Ruskola (n 11) 123; Josef Gregory Mahoney, ‘China’s Rise as an Advanced Technological Society and the Rise of Digital Orientalism’ (2023) 28 *Journal of Chinese Political Science* 1, 5 (noting ‘the crisis of Chinese modernity qua the crisis of sovereignty—from the Opium Wars to the first decades of the PRC ...’).

²¹On the relationship between the formation of the constitutional imaginary and the Chinese encounter with modernity, see Ming-Sung Kuo, ‘The Path towards Sovereign Territory: Reading China’s (Anti)Federal Idea against Its Modern Territorial Constitutional Imaginary’ (2023) 21 *International Journal of Constitutional Law* 510, 522–533. It is worth noting that modernity is not the only way to compare constitutional developments in China and Taiwan. For example, Chien-Chih Lin compares (part of) Taiwan’s constitutional trajectory and China’s constitutional development from a perspective of authoritarian constitutionalism in Chien-Chih Lin, ‘Constitutions and Courts in Chinese Authoritarian Regimes: China and Pre-Democratic Taiwan in Comparison’ (2016) 14 *International Journal of Constitutional Law* 351. For representative discussions of authoritarian constitutionalism, see Tom Ginsburg & Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014); Mark Tushnet, ‘Authoritarian Constitutionalism’ (2015) 100 *Cornell Law Review* 391. As the objective of this article is to compare China and Taiwan in terms of the legitimacy of constitutional amendment following their constitutional divergence in 1949, the conceptual framework for analysis needs to accommodate both China and Taiwan in the relevant period. Thus, modernity – or rather, the Chinese encounter with modernity – is

track the extended historical arc of the Global South and thus tell a constitutional story of what I call the pre-Global South.

Taking a close look at the formal constitutional revision in China and Taiwan through the lens of the constitution of amendment, I advance the thesis that China's encounter with modernity has not only influenced the amendments to the current *PRC Constitution of 1982*,²² but has also cast a long shadow on the transformative changes *within* the *ROC Constitution of 1946* – which continues to be Taiwan's working constitution.²³ As will be further discussed, preambular changes have been characteristic of the five amendments to the 1982 PRC Constitution, while the rule-conformity character of Taiwan's multiple rounds of formal constitutional revision – styled first as 'Temporary Provisions' and then as 'Additional Articles'²⁴ – indicates that the preservation of formal identity of the 1946 ROC Constitution has been central to Taiwan's constitutional transformation.²⁵ I argue that the prominence of the preamble in China's constitutional amendments reflects the programmatic character of its socialist constitution, which is seen as an instrument for progress and emancipation through revolutionary forces, while the meticulous observance of the amendment rules throughout Taiwan's formal constitutional revision provides a semblance of legal continuity, indicating the pivotal role of legality in its constitutional development. Progress and continuity underpin the respective necessary legitimating conditions for constitutional amendment in China and Taiwan. Tracing the revolution-progress and the legality-continuity nexuses to the Chinese quest for liberation from Western imperialism, I suggest that modernity informs both China and Taiwan in maintaining the legitimacy of their respective constitutions, despite their divergent constitutional roads.²⁶

preferred to others such as authoritarian constitutionalism and democratic transition. This also relates the present discussion to the Southern Turn in comparative constitutional studies.

²²Formally, the PRC has adopted four formal constitutions since its inauguration in 1949. Notably, the PRC functioned on an interim functional constitution – 'the Common Programme' – until the adoption of its first formal constitution in 1954. The current and fourth PRC Constitution was adopted by the National People's Congress in 1982. See Lin, 'Constitutions and Courts in Chinese Authoritarian Regimes' (n 21) 358–361.

²³The ROC Constitution was adopted on 25 December 1946 and came into effect on 25 December 1947. See Yeh, *Constitution of Taiwan* (n 6) 1–2. Since the present focus is on the legitimacy of formal amendments to the 1946 ROC Constitution, rather than the legitimacy of Taiwan's constitutional order itself, Taiwan's history, including its colonial experience and the attendant encounter with modernity under the Japanese rule, fades into the background of formal constitutional revision.

²⁴Since Taiwan set out for democratic reform in the 1980s, the 1946 ROC Constitution has been formally amended seven times, including the fifth round of constitutional revision in 1999 annulled by the Taiwan Constitutional Court under the doctrine of unconstitutional constitutional amendment. See Jiunn-rong Yeh, 'Beyond Unconstitutionality: The Public Oversight of Constitutional Revision in Taiwan', in Rehan Abeyratne & Ngoc Son Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021) 153, 154–156. These amendments are formally styled as 'Additional Articles'. Prior to the adoption of the Additional Articles, the 1946 ROC Constitution was appended with the 'Temporary Provisions Effective During the Period of National Mobilisation for Suppression of the Communist Rebellion' (Temporary Provisions) between 1948 and 1991. For a discussion of the issues surrounding the adoption of the appendative model to codify formal constitutional revision in Taiwan, see Chen, 'When the Temporary Becomes Indefinite' (n 19). I shall further discuss the Temporary Provisions and the formal revision of the 1946 ROC Constitution as the argument proceeds.

²⁵On the role that considerations of Chinese connection have played in the preservation of the 1946 ROC Constitution's formal identity, see Chen, 'When the Temporary Becomes Indefinite' (n 19) 108–109, 115–118; see also Jiunn-rong Yeh, 'Constitutional Reform and Democratization in Taiwan, 1945–2000', in Peter CY Chow (ed), *Taiwan's Modernization in Global Perspective* (Praeger 2002) 47, 63.

²⁶It should be noted that I am by no means suggesting that modernity is the cause of the constitutions of amendment in China and Taiwan. My contention is that China's encounter with modernity bears greatly on the choice of its major nationalist forces – the Communists and the Nationalists – between the rule of law (legality) and revolution in the pursuit of progress. In this light, the revolution-progress and the legality-continuity nexuses, as manifested in China's and Taiwan's respective constitutions of amendment, cannot be severed from the history of the Chinese encounter with modernity. I thank Chuck Sabel for pushing me to distinguish modernity as the cause of China's and Taiwan's constitutional developments from the informing role of the Chinese historical encounter with modernity in the formation of the constitutions of amendment in China and Taiwan.

Before I proceed, I should make clear what this article is about and what it is not about. As suggested above, the article is about the legitimacy of amendment with respect to the formal revision of the master-text constitution. Despite the importance of the legitimacy of constitutional amendment for the maintenance of a legitimate constitutional order, the article is not a disquisition about the legitimacy of the constitutional order or the master-text constitution *per se*.²⁷ Focusing on the legitimacy of constitutional amendment through the lens of the ‘constitution of amendment’ as discussed below, this article is neither a critique of the substance of individual amendments nor a commentary on the provisions of constitutional revision. It should be noted that Taiwan’s constitutional distinctiveness as manifested in its constitutional amendment does not tell us whether Taiwan’s constitution has engendered a distinct statehood for Taiwan and to what extent it displaces the Chinese legacy of the 1946 ROC Constitution in the legitimation of constitutional amendment.²⁸

This article proceeds as follows. It first offers a methodological note on how to gauge the legitimacy of constitutional amendment, and then takes a close look at constitutional amendments in China and Taiwan. The close examination of constitutional amendments in China and Taiwan reveals that the emphasis on the constitutional preamble testifies to China’s programmatic constitution, while the adherence to formal amendment procedures contributes to the preservation of the legal identity of the 1946 ROC Constitution in Taiwan. The characteristic features of the respective constitutions of amendment in China and Taiwan suggest that constitutional amendment in China is meant to reflect the new political direction under socialism, as the constitution is envisaged as a steering programme, while concerns about constitutional continuity have persistently influenced the conduct of constitutional revision across different regimes in Taiwan. Following on from this discovery, the article investigates how the Chinese encounter with modernity has cast a long shadow on both communist China and dictatorial-turned-democratic Taiwan in their continuing search for legitimacy in constitutional amendment. While the idea of revolution-induced progress at the core of modernity underpins the view of the constitution as a steering programme in China, the insistence on institutional continuity in the amendment of the 1946 ROC Constitution reflects the gravity of legality in the early quest for modernity in Chinese history. Both progress and continuity reflect the struggle of Chinese reformists in the early twentieth century to rid their motherland of the yoke of Western imperialism in China’s quest for modernity. The argument is summarised in the conclusion.

Searching for Legitimacy from Within: Legitimizing Ideology and the Constitution of Amendment

Although the concept of legitimacy is not alien to legal scholars, what legitimacy exactly means remains elusive.²⁹ In jurisprudence, it sometimes refers to moral authority; at other times it is

²⁷It is thus not considered how the material constitution in general and the informal constitution, such as the ‘mandates’ based on the party constitutional documents and the informal party rules in China’s party-state system, influence the significance and legitimacy of formal constitutional amendments. On China’s informal constitution, compare Mayling Birney, ‘Decentralization and Veiled Corruption under China’s “Rule of Mandates”’ (2014) 53 *World Development* 55, 56–57 with Ewan Smith, ‘On the Informal Rules of the Chinese Communist Party’ (2021) S1 *China Quarterly* 248. On the concept of the material constitution, see Marco Goldoni & Michael A Wilkinson, ‘The Material Constitution’ (2018) 81 *Modern Law Review* 567; Lars Vinx, ‘Hans Kelsen and the Material Constitution of Democracy’ (2021) 12 *Jurisprudence* 466.

²⁸On Taiwan’s constitutional change and the question of statehood, see Kuo, ‘Democracy and the (Non)Statehood of Taiwan’ (n 6); for a critique of the Chinese legacy of the 1946 ROC Constitution, see Chien-Chih Lin, ‘Believe in the Ideal, Not the Idol: Constitutional Literacy and Constitutional Idolatry in Taiwan’ (2024) 10 *Constitutional Studies* 93, 96–97, 100–105.

²⁹Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (Oxford University Press 1995) 134–135.

subsumed under the discussion of the normative character of the law.³⁰ When it comes to constitutional law and theory, the question of legitimacy has mostly been raised in relation to the origin and continuation of the polity and its constitution. Rooted in the long tradition of liberal democracy, the concept of legitimacy tends to be equated with democratic legitimacy in constitutional scholarship,³¹ while the question of who has the legitimacy to give the authoritative voice to the constitution has dominated the literature.³² Yet, with the very idea of the constitution extended beyond the democratic sphere, democracy and legitimacy are delinked. As long as a polity is accepted by its people, it must be vested with legitimacy.³³ The sociological fact of acceptance becomes the indicator of legitimacy, while what underlies acceptance remains unclear.³⁴

The unarticulated state of constitutional theory on legitimacy becomes even more complex when constitutional amendment comes into the equation.³⁵ It is never clear whether a constitutional amendment is just a ‘reform of existing law’ – ie, the constitution – or a disguised revolution.³⁶ With the doctrine of unconstitutional constitutional amendment pervading more and more constitutional realms, the power to amend seems to be tamed by the law.³⁷ Legality, understood in both procedural and substantive terms, is thus considered necessary for constitutional amendment to lay claims to legitimacy *as amendment* before lawyers.³⁸ Yet, apart from legality, what makes constitutional amendment legitimate in general?

Such conceptual fuzziness results from the conflation of two distinct questions of legitimacy: definition and basis, which have been conflated and concealed under the rubric of sociological legitimacy.³⁹ The equation of legitimacy with acceptance illustrates this point. When the legitimacy of a polity and its underlying constitution are questioned on normative grounds, a common response is: ‘What do you mean by legitimacy? Doesn’t the regime enjoy wide support of its people?’⁴⁰ In this way, legitimacy is not only defined but also decided by the sociological fact of popular acceptance. Yet, as Max Weber explained over a century ago, in order to analyse a polity’s successful claim to

³⁰Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press 2013) 20–42.

³¹Compare Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) with Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard University Press 2019).

³²The legitimacy of judicial (or constitutional) review has been the predominant theme in constitutional scholarship. Classic examples include Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press 1986); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1981). For a recent engagement with this subject and the related themes, see Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019).

³³See Tushnet (n 21) 452–453.

³⁴See generally Alan Hyde, ‘The Concept of Legitimation and the Sociology of Law’ [1983] *Wisconsin Law Review* 379.

³⁵Notably, in a discussion of legitimacy and constitutional change, Xenophon Contiades and Alkmene Fotiadou note the ‘constitutional culture-dependent’ character of the legitimacy of constitutional change, while making reference to ‘[j]udicial culture, referendum culture, a dialogical culture characterised by the communication between lawmaker and judge, the political culture, and so on’ that jointly impact constitutional change. See Xenophon Contiades & Alkmene Fotiadou, ‘Conclusion: The Emergence of Comparative Constitutional Amendment as a New Discipline: Towards a Paradigm Shift’, in Richard Albert, Xenophon Contiades & Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart 2017) 369, 376–377, 393. Despite the qualifiers such as ‘judicial’ and ‘political’, ‘culture’ itself remains a notion that evokes the ‘multiplicity of ... referents and the studied vagueness’ in constitutional context. See Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) 89; see also Kuo, ‘The Path towards Sovereign Territory’ (n 21) 513–514.

³⁶Paul W Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (Yale University Press 1997) 63.

³⁷See generally Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press 2017).

³⁸*ibid.* Notably, a constitutional amendment that is deemed illegal from the perspective of the existing constitution may be accepted as legitimate not as an amendment but as a move towards a new constitutional order. cf Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (Oxford University Press 2019) 24–25, 68–69.

³⁹For a critical discussion of sociological conceptions of legitimacy of legal orders, see Hyde (n 34).

⁴⁰See, eg, Lotus Yang Ruan, ‘The Chinese Communist Party and Legitimacy: What Is the Chinese Communist Party’s Official Discourse on Legitimacy?’ (*The Diplomat*, 30 Sep 2015) <<https://thediplomat.com/2015/09/the-chinese-communist-party-and-legitimacy/>> accessed 23 May 2024.

domination (*Herrschaft*), we need not only to distinguish between different types of legitimate authority, but also to examine their respective bases or sources of legitimacy.⁴¹ Notably, paralleling his classical three ideal types of legitimate authority – traditional, charismatic, and legal/bureaucratic – Weber attributed their basis of legitimacy to belief in the sacredness of conventions from time immemorial, in the personal gift of grace, and in the impersonal bureaucratic rationality, respectively.⁴² Thus, belief is indispensable to the claim to legitimate authority.⁴³ In order to dig out the basis of legitimacy in the case of constitutional amendment, we need to take into account its underlying belief, ie, the legitimating ideology of a successful claim to legitimate authority in respect of constitutional amendment.⁴⁴

It comes as no surprise that totalising doctrines such as socialism or fascism, even ‘Asian values’, spring to mind when we speak of the legitimating ideology of political systems.⁴⁵ To investigate what makes constitutional amendment legitimate in China and Taiwan, I depart from this prevalent stance. Rather, I turn to constitutional amendment itself in search of its own legitimating ideology. Specifically, multiple rounds of constitutional revision may or may not indicate enduring features in consistency. If constitutional amendments do indicate persistent characteristics in substance, process, form, or style, this may well suggest that such enduring features are constitutive of those constitutional amendments. Put differently, for such a constitutional amendment to claim legitimacy, it cannot do without its constitutive components in substance, process, form, or style,⁴⁶ which I call the constitution of amendment. Seen in this light, the consistent character of the constitution of amendment – the formal and material features constitutive of constitutional amendment – is indicative of what is believed to be indispensable to a constitutional amendment, and thus underlies its legitimacy.⁴⁷ By looking into what underlies the legitimacy of constitutional amendment from an internal point of view, the constitution of amendment as developed in these pages, together with the legitimating ideology to which it speaks, gives concrete shape to the cultural dimension of constitutional amendment.⁴⁸ In sum, the constitution of amendment embodies the legitimating

⁴¹Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth & Claus Wittich eds, University of California Press 1968) 212–215. For the relationship between the bases of legitimacy and the ideal types of legitimate authority in Weber’s theory, see Cotterrell (n 29) 137–141.

⁴²Weber (n 41) 36–38, 215–216.

⁴³Inspired by Weber, my claim is nonetheless limited: belief underlies legitimacy, but does not in itself account for legitimacy. For a strong critique of Weber’s attribution of legitimacy to belief, see Hyde (n 34) 386–400.

⁴⁴According to Giovanni Sartori, ‘the general class is “belief systems” and ... ideology is the narrower conceptualization’, which ‘only indicates the political part of a belief system’. Giovanni Sartori, ‘Politics, Ideology, and Belief Systems’ (1969) 63 *American Political Science Review* 398, 400–403. As my present discussion of the source of legitimacy centres on constitutional amendment, which is part of the political order, I am substituting ideology for belief in terminology without suggesting that the legitimacy of constitutional amendment relies entirely on ideology or belief.

⁴⁵See Tushnet (n 21) 451.

⁴⁶This statement does not make a claim to sufficiency. Rather, it points to the role of the legitimating ideology – revealed by the constitution of amendment – in formal constitutional revision in terms of necessity. For a discussion of the importance of the distinction between sufficiency and necessity in constitutional studies, see Madhav Khosla, ‘Is a Science of Comparative Constitutionalism Possible?’ (2022) 135 *Harvard Law Review* 2110, 2127.

⁴⁷Intriguing questions arise should an amendment lack such features as reflected in its predecessors: what would happen to it? Would such an amendment be illegitimate? It should be noted that my present discussion is focused on the legitimacy of constitutional amendment without answering the broader question of whether the constitution (including its amendment) is necessary for the general legitimacy of the relevant political regime. See Ming-Sung Kuo, ‘Authenticity: The Ultimate Challenge in the Quest for Lasting Constitutional Legitimacy’ (2021) 41 *Oxford Journal of Legal Studies* 265, 270–271. Thus, a *prima facie* illegitimate amendment as described above may remain unchallenged if the constitution itself has little bearing on the legitimacy of the political regime, or if the amendment is indicative of a new constitutional order resulting from a gradual regime change in the sociological sense.

⁴⁸Situated in this context, this article is far from an exhaustive or comprehensive examination of the legitimacy of constitutional amendments in China and Taiwan in terms of constitutional culture. For a discussion of the limitation of invoking culture in constitutional studies, see n 35. On attempts to measure constitutional culture in the context of constitutional amendment and the attendant challenges, see the debate between Tom Ginsburg & James Melton, ‘Does the

ideology of constitutional amendment. Taking this methodological view, I turn next to the respective constitutions of amendment in China and Taiwan.

Two Constitutions of Amendment: New Direction vs Structure Preservation

Accenting the Preamble: Constitutional Amendment and the Steering Programme in China

The current Chinese constitution was adopted in 1982 to replace the *1978 Constitution*.⁴⁹ At first glance, the formal adoption of the 1978 Constitution in place of the *1975 Constitution* – a mirror image of the Cultural Revolution – appeared to be an outright repudiation of the radical leftist ideology that had lawlessly pervaded the Chinese society in a decade of revolutionary fever.⁵⁰ In essence, however, the 1978 Constitution was more or less a continuation of the broken 1975 Constitution in terms of substance.⁵¹ As China's economic reform continued, the 1978 Constitution was eventually replaced by the current 1982 Constitution.⁵²

Even so, the original 1982 Constitution was far from driving China towards what it represents to the outside world today. Rather, it was initially seen as a return to the *1954 Constitution*.⁵³ Dovetailing with the CCP's distinctive interpretation of 'historical materialism' to the effect that China entered the early 'stage' of socialism after 1949 without becoming a full-fledged communist society, as manifested in the replacement of the *1949 Common Programme* with the 1954 Constitution,⁵⁴ the 1982 Constitution initially had no difficulty in reconciling China's preliminary limited economic reform with its socialist ideology.⁵⁵ Yet, as Deng's 'Reform and Opening-Up' sped up and penetrated deeper and further, reorienting the backward-looking 1982 Constitution was a question of when, not if. Constitutional amendment was inevitable.

From 1988 onwards, the 1982 Constitution has undergone five rounds of constitutional amendment. When it was first amended in 1988 to introduce private enterprise and to loosen the government's tight control over land use, China's economic situation was markedly different from that in

Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty' (2015) 13 *International Journal of Constitutional Law* 686 and Xenophon Contiades & Alkmene Fotiadou, 'The Determinants of Constitutional Amendability: Amendment Models or Amendment Culture?' (2016) 12 *European Constitutional Law Review* 192; see also Khosla, 'Is a Science of Comparative Constitutionalism Possible?' (n 46).

⁴⁹For a general discussion of constitutional change in China with a focus on the formal amendments to the 1982 PRC Constitution, see Ngoc Son Bui, *Constitutional Change in the Contemporary Socialist World* (Oxford University Press 2020) 304–318.

⁵⁰Chin Kim & Timothy G Kearley, 'The 1978 Constitution of the People's Republic of China' (1979) 2 *Hastings International and Comparative Law Review* 251, 278. The 1975 and 1978 Constitutions are China's second and third formal constitutions after 1949, respectively; see *ibid* 251. The Cultural Revolution, which started in 1966, ended with the arrest of the Gang of Four soon after Mao's death in 1976. Yet it was Deng's full grip on power during the Third Plenum of the 11th CCP Central Committee on 18 December 1978 that marked China's transition to the post-Cultural Revolution era. The 1978 Constitution was promulgated on 5 March 1978. Jianfu Chen, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Development* (Kluwer 1999) 66–67. See also Jerome Alan Cohen, 'China's Changing Constitution' (1978) 76 *China Quarterly* 794.

⁵¹Lin, 'Constitutions and Courts in Chinese Authoritarian Regimes' (n 21) 359–360; Cohen (n 50) 836; cf William C Jones, 'The Constitution of the People's Republic of China' (1985) 63 *Washington University Law Quarterly* 707, 712. But see Kim & Kearley (n 50) 253.

⁵²Chen, *Towards an Understanding of Chinese Law* (n 50) 67–69; Shiping Hua, *Chinese Legal Culture and Constitutional Order* (Routledge 2019) 92–95.

⁵³Hua (n 52) 92.

⁵⁴The question of whether China was in the historical stage of socialism was central to the early debate over whether China should replace the interim Common Program with a permanent constitution. See Charles Gamba, 'Constitution Making in China: A Socio-Historical Analysis' (1950) 1 *University of Western Australia Annual Law Review* 409, 430–431. Partly due to Stalin's push and partly due to the lessening of domestic and international pressure with the armistice on the Korean War in 1953, Mao decided to adopt the PRC's first formal constitution, see Hua (n 52) 62–63.

⁵⁵Hua (n 52) 99.

1982 when the Constitution was adopted.⁵⁶ Yet, by invoking the idea of the ‘primary stage of socialism’,⁵⁷ the CCP managed to reconcile the apparent contradiction between its dogmatic socialist position and the amendment of two provisions in the body of the 1982 Constitution. The 1988 amendment was not so much a fundamental change as a constitutional fine-tuning to accommodate real-world developments.⁵⁸ After all the CCP’s ‘stage’ theory of socialism had long provided the Chinese leadership with the ideological grounds for previous policy experiments since 1949.⁵⁹ However, this strategy of adaptation through constitutional fine-tuning proved to be short-lived.

Since its first amendment in 1988, the 1982 Constitution has seen another four rounds of constitutional amendment thus far, in 1993, 1999, 2004, and 2018. As with the 1988 constitutional amendment, the subsequent constitutional amendments rewrote parts of the body of the 1982 Constitution to accommodate real-world needs. To address the needs prompted by the introduction of market mechanisms to China, reforming economic institutions and building legal infrastructure were the main objectives in the three rounds of constitutional amendment from 1993 to 2004.⁶⁰ However, the latest round of constitutional amendment in 2018 stood out from its predecessors. The 2018 amendment was not only different in scale, but it also marked a shift in direction. As manifested in the dozens of rewritten provisions in the body of the 1982 Constitution,⁶¹ the 2018 amendment focused on consolidating political power and tightening ideological control.⁶² Taken together, although the 1982 PRC Constitution and China’s post-1978 economic development are closely inter-related, the 2018 amendment suggests that economic reform is not constitutive of the amendments of the 1982 PRC Constitution.⁶³ So what is the constitution of amendment in China?

Despite the marked contrast between the 2018 amendment and its predecessors in their respective emphases, the latest revision in 2018 was not a total deviation from constitutional amendments in the post-1988 period. As with other post-1988 rounds of amendment, the 2018 amendment not only changed the body of the 1982 Constitution, but also substantially rewrote its preamble.⁶⁴ While it is not inconceivable to amend a constitutional preamble,⁶⁵ it is exceptional for it to be substantially rewritten successively in such a way as has been characteristic of the amendments of the 1982 PRC Constitution over the past three decades. Four out of the five constitutional amendments to the 1982 PRC Constitution have centred on its preamble, suggesting preambular changes as the constitution of amendment in China.

⁵⁶ibid 104–105.

⁵⁷The formal adoption of the idea of the primary stage of socialism is attributed to the Third Plenum of the 11th CCP Central Committee, when Deng’s ‘Reform and Opening-Up’ became the CCP policy, although its ideological pedigree can be traced back to the early years of the PRC. See *ibid* 99.

⁵⁸ibid 105.

⁵⁹ibid 69.

⁶⁰ibid 104–117; cf Bui (n 49) 304–318.

⁶¹According to the Chinese government’s official account, the following provisions of the 1982 Constitution – apart from the preamble – were amended in 2018: arts 1, 3–4, 24, 27, 62–63, 65, 67, 70, 79, 89, 100–101, 103–104, and 107. Additionally, Section 7, ‘People’s Courts and People’s Procuratorates’ (arts 123–138) was replaced by a new Section 7, ‘Commissions of Supervision’ (arts 123–127), along with a new Section 8, ‘People’s Courts and People’s Procuratorates’ (arts 128–143) under Chapter III, ‘State Institutions’. See Amendment to the Constitution of the People’s Republic of China (adopted 11 Mar 2018) <<http://en.npc.gov.cn.cdurl.cn/constitution.html#>> accessed 23 May 2024.

⁶²Hua (n 52) 121; see also Feng Lin, ‘The 2018 Constitutional Amendments’ [2019] 1 *China Perspectives* 11–21. For a discussion of the 2018 amendment from the lawyer’s perspective, see Taisu Zhang & Tom Ginsburg, ‘China’s Turn Toward Law’ (2019) 59 *Virginia Journal of International Law* 306, 346–365; Keith J Hand, ‘Constitutional Supervision in China After the 2018 Amendment of the Constitution: Refining the Narrative of Constitutional Supremacy in a Socialist Legal System’ (2022) 23 *Asian-Pacific Law & Policy Journal* 137.

⁶³Economic reform has been regarded as the defining feature of the first four constitutional amendments of the 1982 Constitution. See M Ulric Killion, ‘China’s Amended Constitution: Quest for Liberty and Independent Judicial Review Judicial Review’ (2004) 4 *Washington University Global Studies Law Review* 43, 56–57; cf Bui (n 49) 316–317.

⁶⁴See Amendment to the PRC Constitution of 11 Mar 2018 (n 61).

⁶⁵See Liav Orgad, ‘The Preamble in Constitutional Interpretation’ (2010) 8 *International Journal of Constitutional Law* 714, 731–732.

Notably, the successive preambular changes to the 1982 PRC Constitution were far from rewriting its lengthy preamble in full. Rather, the focus has constantly been on paragraphs 7 and 10. All four preambular changes included paragraph 7 of the preamble, while paragraph 10 was only left untouched in the 1999 amendment.⁶⁶ The concentration of the preambular changes on paragraphs 7 and 10 is revealing of the role expected of the constitution and its amendments. To see what the emphasis on paragraphs 7 and 10 tells us about China's constitution of amendment, let us take a close look at the preamble to the 1982 Constitution. Comprising thirteen paragraphs, the preamble can be divided into six parts.⁶⁷ First, paragraphs 1 to 6 give an official narrative on China's modern history. Second, paragraph 7 sets out the fundamental principles guiding the direction of the state. Third, the PRC's mission in history is reiterated in paragraphs 8 to 9. Fourth, paragraph 10 provides for the organisation of political forces and designates the CCP as the leading political force. Finally, the fifth and sixth parts lay down guidelines for internal and external inter-nation relations in paragraphs 11 to 12, and the principle of constitutional supremacy in paragraph 13, respectively. As can be seen, the preambular changes to the 1982 Constitution have been focused on the fundamental principles (paragraph 7) and the designated organisation of political forces (paragraph 10).⁶⁸

Scholarship on constitutional preambles has mostly been concerned with their legal status, their role in constitutional interpretation, and their integrative function in constitutional orders.⁶⁹ Scholars typically ask: Are preambles justiciable or merely directive?⁷⁰ Is there any limit on their amendment?⁷¹ Are they just guidelines that inform constitutional interpretation, or do they constitute applicable constitutional law?⁷² How can they contribute to the constitution's function in facilitating integration?⁷³ These questions indicate that, in terms of the legal character of the constitution, the body precedes the preamble.⁷⁴ As regards the integrative function of constitutional preambles, it is mainly attached to their symbolic significance, and this explains why they are not subject to frequent amendment.⁷⁵ Yet the emphasis on preambular changes in China's post-1988 constitutional amendment practice suggests otherwise. The focus on the fundamental principles and designated political forces in the preamble indicates that who carries out the changes set out in the amended body of the constitutional text, and under what fundamental principles, is central to constitutional amendment in China. Notably, such preambular changes were made when China's economic reform embraced more and more market-economy elements after the Tiananmen Square massacre in 1989. The emphasis on the preamble in the post-1988 amendments suggests that the 1988 amendment's strategy of adaptation through fine-tuning was untenable in the face of the new political and socio-economic landscape in the early 1990s and beyond. Therefore, the theory of the primary stage of socialism, along with the CCP's other doctrines,⁷⁶ had to be constitutionally

⁶⁶In addition to paras 7 and 10, the 2018 preambular changes included paras 11 and 12. See Amendment to the PRC Constitution of 11 Mar 2018 (n 61).

⁶⁷A reliable English version of the original text of the PRC 1982 Constitution is available at <<https://www.elegislation.gov.hk/hk/A1%21en.assist.pdf>> accessed 23 May 2022. The official English version of the 1982 Constitution as amended is available at <<http://en.npc.gov.cn.cdurl.cn/constitution.html#>> accessed 23 May 2024.

⁶⁸See also Bui (n 49) 306–309.

⁶⁹See generally Wim Voermans, Maarten Stremmer & Paul Cliteur, *Constitutional Preambles: A Comparative Analysis* (Edward Elgar 2017).

⁷⁰Orgad (n 65) 722–731; Lael K Weis, 'Constitutional Directive Principle' (2017) 37 *Oxford Journal of Legal Studies* 916, 920.

⁷¹Roznai (n 37) 216–217; Albert, *Constitutional Amendments* (n 38) 74.

⁷²Orgad (n 65) 723–731.

⁷³ibid 722–723, 731–737.

⁷⁴ibid 722–731.

⁷⁵ibid 731–732, 735–736.

⁷⁶In addition to the 1993 amendment that codified the concepts of the 'the primary stage of socialism' and 'socialism with Chinese characteristics', several other doctrines have been enshrined in the preamble through subsequent constitutional amendments. In 1999, Deng Xiaoping theory was added alongside Marxism-Leninism and Mao Zedong thought as the guiding principles for national development. The guiding principles were further extended in 2004 to include the so-called 'Three

incorporated into the fundamental principles in the preamble to steer the transformative reform without risking another political unrest. In China, the preamble precedes the body in terms of constitutional significance, both structurally and normatively. What does this tell us about the constitution and its amendment in China?

In the midst of the Cold War and well before the current resurgence of comparative constitutional law, Karl Loewenstein characterised socialist constitutions as ‘action programmes’ when comparing Western democracies and communist/socialist regimes.⁷⁷ Even though the motherland of socialism has been dissolved for three decades and the Chinese socialist legal order is said to be more or less a variant of authoritarian legality,⁷⁸ Loewenstein’s perceptive observation still sheds illuminating light on constitutional amendment in China. As the constitution is meant to steer New China with its action programme, it must be capable of being reprogrammed in tandem with the progression of socialism, reflecting what Loewenstein called ‘constitutional programmatic positivism’.⁷⁹ Seen in this light, the consistent focus of China’s post-1988 constitutional amendments on fundamental principles and designated political forces in the preamble suggests that each constitutional amendment marks a new political direction under socialism that needs to be enshrined in the steering fundamental principles in the preamble. Central to the amendments of the 1982 PRC Constitution is the belief that they reflect the direction of national development in China. Being part of the project of constitutional (re)orientation, the constitution of amendment in China is programmatic in character and steering in function.

Sticking to the Rules: Formal Constitutional Change as the Preservation Project in Taiwan

Conventional narratives of constitutional amendment in Taiwan have converged on the following storyline. Democratisation in the 1980s and 1990s marks the watershed in Taiwan’s political history. Taiwan was under autocratic rule with the progressive 1946 ROC Constitution virtually suspended in the pre-democratisation era, while the 1946 Constitution has been amended seven times since 1991 in tandem with democratic reforms,⁸⁰ resulting in the current twelve Additional Articles.⁸¹ Seen in this light, the 1946 ROC Constitution seemed to have been frozen in time before

Represents Theory’, attributed to China’s former president Jian Zeming (1993–2003). Most recently, the 2018 amendment incorporated a reference to ‘Xi Jinping’s new era’. See Bui (n 49) 307–308.

⁷⁷Karl Loewenstein, ‘Constitutions and Constitutional Law in the West and in the East’ (1969) 30 *Indian Journal of Political Science* 203, 233; see also Bui (n 49) 76.

⁷⁸Mary E Gallagher, *Authoritarian Legality in China: Law, Workers, and the State* (Cambridge University Press 2017) 21–51.

⁷⁹Loewenstein, ‘Constitutions and Constitutional Law’ (n 77) 234. Since the enforcement of China’s constitution centres on the master-text constitution’s ‘coordinating role’, to understand the programmatic character of the PRC Constitution against its non-programmatic, enforceable part is not of much significance. For the PRC Constitution’s coordinating role, see Yan Lin & Tom Ginsburg, ‘Constitutional Interpretation in Lawmaking: China’s Invisible Constitutional Enforcement Mechanism’ (2015) 63 *American Journal of Comparative Law* 467. On the other hand, to say that China’s constitution is programmatic does not mean that China’s entire action plan for the future development and the attendant details are laid down in its master-text constitution. Rather, China’s constitution is programmatic in that it stipulates the guiding principle and the driving political force for the future. Notably, the addition of ‘[l]eadership by the Communist Party of China is the defining feature of socialism with Chinese characteristics’ to art 1 para 2 in the 2018 amendment consolidates the provision for the leadership of the driving political force in the preamble (para 10) into the body. I thank Ben Liebman for pushing me to tease out the programmatic character of China’s socialist constitution and think more about the relationship between the preamble and the body in the Chinese constitutional order.

⁸⁰As has been noted, one of the seven rounds of constitutional revision – the fifth amendment of 1999 – was declared unconstitutional and annulled by the Taiwan Constitutional Court. See n 24.

⁸¹See Yeh, *Constitution of Taiwan* (n 6) 31–39; Jiunn-rong Yeh & Wen-Chen Chang, ‘The Emergence of East Asian Constitutionalism: Features in Comparison’ (2011) 59 *American Journal of Comparative Law* 805, 822; Wen-Chen Chang et al, *Constitutionalism in Asia: Cases and Materials* (Hart 2014) 223–224; Chien-Chi Lin, ‘Survival of the Fittest (?): The Endurance of the ROC Constitution and the Constitution of Japan’ (2014) 52 *American Journal of Comparative Law* 775, 783, 787–788; cf Chen, ‘When the Temporary Becomes Indefinite’ (n 19) 113–118.

democratisation was set in motion in Taiwan in the 1980s. Such narratives only tell a curtailed story: not only is the life history of the 1946 Constitution obscured, but the constitution of amendment in Taiwan is also missing. To recover Taiwan's constitution of amendment, let us zoom in on the condition of the 1946 ROC Constitution in the pre-democratisation era.

Although Taiwan was placed under KMT-dominated quasi-military autocracy until the 1990s, the state of the constitution in Taiwan during this period was closer to 'semantic' than 'nominal' under Loewenstein's tripartite typology of constitutions.⁸² Specifically, prior to the enactment of the Additional Articles in 1991, the supreme law governing the land of Taiwan was the 1946 Constitution – only to be simultaneously bolstered and partially suspended by a counter-insurgency emergency regime under the terms of the Temporary Provisions.⁸³ Originating as a response to the escalating civil war in China in 1948, the Temporary Provisions replaced the limited regime of emergency powers under the 1946 Constitution with an expanded, loosely regulated state of emergency under the direction of the President.⁸⁴ It is also true that the Temporary Provisions ultimately placed a strong executive power, headed by the President, atop the constitutionally enshrined quinquepartite separation of powers, at the expense of the parliament-consented Premier.⁸⁵ Moreover, by lifting the presidential term limit, the Temporary Provisions paved the way for Chiang Kai-shek's lifelong presidency.⁸⁶ Taken together, the changes engendered by the Temporary Provisions undeniably consolidated the KMT-dominated autocratic regime at the expense of constitutionalism. Nevertheless, Taiwan was far from a state of lawlessness before it set out for democratisation. Rather, the combination of the 1946 Constitution and the Temporary Provisions formed a 'dual state' regime in Taiwan before 1991.⁸⁷ Yet the question that remains to be answered is: how did the interplay between the 1946 Constitution and the Temporary Provisions affect the constitution of amendment in Taiwan? To explore this, let us revisit the origins of the Temporary Provisions.

As noted above, the Temporary Provisions were adopted in response to the Communist insurgency in the midst of the Chinese Civil War in 1948. Of particular pertinence to the present discussion, they were enacted in accordance with the amendment procedures of the ROC Constitution.⁸⁸ Notably, as connoted by the title, the Temporary Provisions were not meant to last long.⁸⁹ Moreover, considering the symbolic significance of the then 'pristine' 1946

⁸²See Ming-Sung Kuo, 'Moving towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics' (2016) 25 *Washington International Law Journal* 597, 601; see also Loewenstein, *Political Power and the Governmental Process* (n 7) 147–153.

⁸³Tzu-Yi Lin, Ming-Sung Kuo & Hui-Wen Chen, 'Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape' (2018) 48 *Hong Kong Law Journal* 995, 1000–1001; see also Chen, 'When the Temporary Becomes Indefinite' (n 19) 107–109.

⁸⁴Temporary Provisions 1972, arts 1–2 (originally Temporary Provisions 1948, paras 1–2); see also Chen, 'When the Temporary Becomes Indefinite' (n 19) 110. The following discussion of the Temporary Provisions is mainly based on their 1972 version, available at <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=A000005>> accessed 23 May 2024. For early versions of the Temporary Provisions, I draw upon Secretariat of the National Assembly of the Republic of China (國民大會秘書處) (ed), *Records of the First National Assembly* (Secretariat of the National Assembly 1961–1991) <<https://lis.ly.gov.tw/nacgi/ttsweb?@0:0:1:dbini/lymeetingdb@@0.5829086838712811>> accessed 23 May 2024.

⁸⁵Temporary Provisions 1972, arts 4–5 (1972) (originally Temporary Provisions March 1966, ss 4–5); cf Chen, 'When the Temporary Becomes Indefinite' (n 19) 112.

⁸⁶Temporary Provisions 1972, art 3 (originally Temporary Provisions 1960, para 3); see also Chen, 'When the Temporary Becomes Indefinite' (n 19) 111.

⁸⁷Lin, Kuo & Chen, 'Seventy Years On' (n 83) 1001; cf Chen, 'When the Temporary Becomes Indefinite' (n 19) 113. For the concept of the dual state, see Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press [1941] 2017).

⁸⁸Chen, 'When the Temporary Becomes Indefinite' (n 19) 108.

⁸⁹*ibid* 109. Paragraph 4 of the original 1948 Temporary Provisions provided that the National Assembly shall meet at an extraordinary session by 25 December 1950 to debate bills of constitutional amendment and decide whether to extend or repeal the Temporary Provisions.

Constitution when the Temporary Provisions were adopted in 1948,⁹⁰ they were intentionally not incorporated into the 1946 Constitution.⁹¹ Rather, they stood as a constitutional add-on to the 1946 Constitution, with a bland but distinct preamble,⁹² aimed at maintaining the normative semblance of the 1946 Constitution.⁹³ As it turned out, the Temporary Provisions failed to quell the Communist rebellion. Instead, they migrated to Taiwan with the defeated Nationalists. In Taiwan, the Temporary Provisions further underwent four rounds of amendment in 1960, February and March 1966, and 1972.⁹⁴ Apart from the controversial provisions as discussed above, the Temporary Provisions were amended in March 1966 and 1972 to allow for democratic parliamentary elections, albeit on a limited scale.⁹⁵ With more democratically elected Taiwanese delegates sitting in the ‘Very Long Parliament’⁹⁶ elected in 1947–1948 under the terms of the 1946 ROC Constitution,⁹⁷ the legitimacy of the ROC government-in-exile appeared to be bolstered under the 1946 constitutional cloak, albeit patched up with the add-on Temporary Provisions.⁹⁸ In sum, the Temporary Provisions were an integral part of the longevity of the 1946 ROC Constitution.

As has been well discussed, the 1946 Constitution has seen seven rounds of (attempted) constitutional amendment since 1991, including the infamous amendment of 15 September 1999, which was later struck down by the Taiwan Constitutional Court (TCC) in 2000.⁹⁹ Taken together, since its migration to Taiwan in 1949, the 1946 ROC Constitution has been formally changed eleven times.¹⁰⁰ Both the amendment of the Temporary Provisions and the development of the Additional Articles are constituents of the formal constitutional revision of the 1946 ROC Constitution. Only by considering both can the constitution of amendment in Taiwan be properly

⁹⁰Chen, ‘When the Temporary Becomes Indefinite’ (n 19) 108. The 1946 Constitution came into effect on 25 December 1947. When the Temporary Provision were passed by the National Assembly on 18 April 1948, the government established under the terms of the 1946 ROC Constitution was not yet in operation. See Lin, Kuo & Chen, ‘Seventy Years On’ (n 83) 1001.

⁹¹Chen, ‘When the Temporary Becomes Indefinite’ (n 19) 108–109. This raises the question of whether the Temporary Provisions amounted to a “perforation” of the constitution (*Verfassungsdurchbrechung*) – a ‘clandestine ... textually not articulated change of the [constitution]’ – in German constitutional theory. For a discussion of the perforation of the constitution, see Loewenstein, ‘Constitutions and Constitutional Law’ (n 77) 226.

⁹²The preamble simply proclaimed that the Temporary Provisions were enacted in accordance with the amendment procedures of the 1946 Constitution.

⁹³See Chen, ‘When the Temporary Becomes Indefinite’ (n 19) 109.

⁹⁴Notably, in contrast to the *enactment*, the codification of the *amendment* of the Temporary Provisions deviated from what Richard Albert calls the ‘appendative’ model. See *ibid* 112. For a discussion of the appendative model and other models of the codification of constitutional amendment, see Albert, *Constitutional Amendments* (n 38) 23–40.

⁹⁵Temporary Provisions 1972, art 6 (originally Temporary Provisions March 1966, s 5); see also Chen, ‘When the Temporary Becomes Indefinite’ (n 19) 112.

⁹⁶See Ming-Sung Kuo & Hui-Wen Chen, “‘The Parliament Is Dead, Long Live the Court’: Thirty Years after the Rise of the Taiwan Constitutional Court from the Ashes of Taiwan’s Very Long Parliament’ (I-CONnect, 27 Jun 2020) <<http://www.iconnectblog.com/the-parliament-is-dead-long-live-the-court-thirty-years-after-the-rise-of-the-taiwan-constitutional-court-from-the-ashes-of-taiwans-very-long-parliament/>> accessed 23 May 2024.

⁹⁷According to the Taiwan Constitutional Court, the parliament under the 1946 ROC Constitution consists of the National Assembly, the Legislative Yuan and the Control Yuan. Judicial Yuan (Republic of China), *Interpretation No 76* (1957) <https://www.judicial.gov.tw/FYDownload/EN/p03_01.asp?expno=76> accessed 23 May 2024. The elections of the three chambers of the First Parliament took place on different days. Lin, Kuo & Chen, ‘Seventy Years On’ (n 83) 1009 n 65.

⁹⁸Chen, ‘When the Temporary Becomes Indefinite’ (n 19) 113.

⁹⁹Yeh, *Constitution of Taiwan* (n 6) 38–48; Yeh, ‘Beyond Unconstitutionality’ (n 24) 154–156. Notably, an attempt to amend the 1946 Constitution to lower the voting and candidacy ages failed at the ratification stage in a referendum in 2022, even though it had cleared the parliamentary stage. For a critical analysis of the high threshold for adoption of constitutional amendments set by the two-stage amendment procedure – adopted in the 2005 amendment – and its effect on the amendability of the 1946 ROC Constitution, including the 2022 amendment attempt, see Ming-Sung Kuo, ‘A Constitution’s Hollow Promise’ (*Verfassungsblog*, 3 Dec 2022) <<https://verfassungsblog.de/a-constitutions-hollow-promise/>> accessed 23 May 2024.

¹⁰⁰Not included in the post-1949 formal constitutional changes is the enactment of the Temporary Provisions in 1948 when the ROC government was still seated in Nanjing, China. Lin, Kuo & Chen, ‘Seventy Years On’ (n 83) 1001.

explained. What is constitutive of the formal revision of the 1946 ROC Constitution in light of both the Temporary Provisions and the Additional Articles?

As their content suggests, the post-1991 constitutional amendments and the Temporary Provisions are different in character. The former is oriented towards liberal democracy, while the latter is instrumental to a constitutionalised dictatorship.¹⁰¹ Yet this does not mean that they are two worlds apart with total discontinuity. Rather, in terms of style and process as well as substance, there are traces of continuity between the Temporary Provisions and the Additional Articles.

A quick survey of the two add-ons to the 1946 Constitution shows that the elements of the Temporary Provisions on the state of emergency and the presidential powers, as well as the realignment of the quinquepartite separation of powers, were transposed into the Additional Articles.¹⁰² Apart from substance, both were enacted in accordance with the amendment procedures of the 1946 Constitution and, more importantly, adopted as addenda to the 1946 Constitution.¹⁰³ Thanks to this last common feature, the original text of the 1946 Constitution has been left unchanged, although its substance was substantially amended. Choosing the ‘appendative model’ for codifying formal constitutional revision was deliberate.¹⁰⁴ As noted above, the decision to enact the Temporary Provisions in 1948 rather than amend the text of the 1946 Constitution was intended to preserve the latter’s pristine status. This decision cast a long shadow over the contentious debate on whether the body of the 1946 Constitution should be directly amended in the lead-up to the replacement of the extraordinary Temporary Provisions by a normal constitutional amendment in 1991.¹⁰⁵ Given the symbolic significance of the 1946 Constitution as the perceived sacred text of the entire Chinese nation, it was decided that the original text of the 1946 Constitution would be left untouched when Taiwan embarked on its course for democracy.¹⁰⁶ Thus, the ‘appendative model’ adopted in the enactment of the Temporary Provisions was continued in the adoption of the Additional Articles.¹⁰⁷

Another distinctive feature characteristic of both the Temporary Provisions and the Additional Articles is that both had their own preambles, suggesting their distinct status from the 1946 Constitution.¹⁰⁸ Taken together, preserving the formal identity of the 1946 ROC Constitution across different regimes through the adherence to the amendment procedures, the adoption of the appendative model of amendment codification, and the insertion of a separate preamble is characteristic of the formal constitutional revision in Taiwan. The emphasis on the continuation of formal constitutional identity as crystallised in the original and unchanged condition of the 1946 ROC Constitution’s text is further attested when the Additional Articles were first enacted to replace the Temporary Provisions in 1991 to pave the way for Taiwan’s transition to constitutional democracy.¹⁰⁹ Despite the contested legitimacy of the National Assembly as part of the notorious ‘Very Long First Parliament’,¹¹⁰ it was this body that enacted the Additional Articles to provide for the

¹⁰¹Yeh, *Constitution of Taiwan* (n 6) 30–49.

¹⁰²Additional Articles 2005, art 2 para 3 and 4; art 6 para 1 subpara 3 (2005) (originally Additional Articles 1991, arts 7–9).

¹⁰³Chen, ‘When the Temporary Becomes Indefinite’ (n 19) 107–109, 113–117.

¹⁰⁴See *ibid* 108–109, 115–118. Although both the Temporary Provisions and the Additional Articles were initially codified as addenda to the 1946 Constitution at the time of their original adoption, their amendment later deviated from the original appendative model, resulting in what Hui-Wen Chen calls the ‘appendative-invisible hybrid model’. On the evolution of the appendative model of codification into the hybrid model in the codification of the revision of the 1946 ROC Constitution in Taiwan, see *ibid* 107, 118.

¹⁰⁵*ibid* 108–109.

¹⁰⁶*ibid*.

¹⁰⁷*ibid* 115–117.

¹⁰⁸*cf ibid* 116–117.

¹⁰⁹Notably, the continuing legality of the original Temporary Provisions after 25 December 1950 is not without doubt. See *ibid* 112.

¹¹⁰Kuo & Chen, ‘“The Parliament Is Dead”’ (n 96); Simon Long, ‘Taiwan’s National Assembly Elections’ [1992] 129 *China Quarterly* 216, 221.

legal basis for a new parliament, as the National Assembly was the constitutional body that was vested with the power to decide on bills of constitutional amendment.¹¹¹ Notably, Taiwan's transition process from a dual state to a liberal democracy demonstrated remarkable constitutional choreography: although the repeal of the Temporary Provisions and the enactment of the Additional Articles were introduced in two separate constitutional amendment bills, both took effect on the same day and synchronised with the end of the Period of National Mobilisation for Suppression of the Communist Rebellion in 1991.¹¹² Thanks to this constitutional choreography, the constitutional codification of Taiwan's transition from the dual state to liberal democracy was concurrent with the virtual replacement of the Temporary Provisions with the Additional Articles. The shell of the 1946 ROC Constitution has thus been preserved even if its interior has been overhauled. In sum, the meticulous conformity with the amendment procedures laid down in the 1946 ROC Constitution has been central to the preservation of formal constitutional identity.¹¹³ The eleven rounds of formal constitutional revision from the Temporary Provisions to the Additional Articles in Taiwan amount to a project of constitutional preservation through legal continuity.

The foregoing discussion shows two distinct constitutions of amendment in China and Taiwan. Does this distinction suggest that constitutional amendment relies on different bases of legitimacy in China and Taiwan? To answer this question, we first need to find out the respective legitimating ideologies behind China's and Taiwan's constitutions of amendment, a theme to be discussed next.

The Janus-Faced Modernity and the Diverging Roads Towards Amendment Legitimacy *Progress and the Modernity of Constitutional (Re-)Programming: Liberating the Nation with Historical Forces in New China*

The frequent revision of fundamental principles in the post-1988 amendments of the 1982 PRC Constitution raises a key question: How can principles be considered fundamental if they are subject to frequent changes? The ease with which fundamental principles have been changed suggests that they are not so much normative precepts unbound by time as epistemic goods that require updating through a continuous learning process.¹¹⁴ It follows that fundamental principles in the constitutional preamble take on a cognitive function, serving as a reservoir of 'privileged knowledge' required for the steering function of the constitutional programme alongside their prescriptive role.¹¹⁵ Seen in this light, the preambular change constitutive of the constitution of amendment in China suggests that improving the fundamental principles through amendment as a result of learning is the key to the steering role of the constitution. This perspective reflects an Enlightenment-inspired belief in progress, which underlies the legitimating ideology of constitutional amendment in China.¹¹⁶

¹¹¹The National Assembly was abolished in 2005 and the amendment process is now set out in Article 12 of the Additional Articles, which replaced Article 174 of the 1946 ROC Constitution in 2005.

¹¹²See Chen, 'When the Temporary Becomes Indefinite' (n 19) 116. The Period of National Mobilisation for Suppression of the Communist Rebellion was essentially an extraconstitutional state of emergency introduced amid the Chinese Civil War. It was first declared in July 1947 when the coming into effect of the 1946 Constitution – on 25 December 1947 – was still five months away. See *ibid* 108. The Temporary Provisions, which were enacted in May 1948, were originally tied to that extraconstitutional state of emergency. Thus, the Period of National Mobilisation for Suppression of the Communist Rebellion also marked the time limit for the validity of the Temporary Provisions.

¹¹³For the ROC government's insistence on formal legality and institutional continuity after its forced exile to Taiwan, see *ibid* 106; Lin, Kuo & Chen, 'Seventy Years On' (n 83) 1002–1014.

¹¹⁴On the relationship between the advance of knowledge and the idea of progress, see Hans Blumenberg, *The Legitimacy of the Modern Age* (Robert M Wallace tr, MIT Press 1983) 32.

¹¹⁵Ulrich K Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress* (Deborah Lucas Schneider tr, Humanities Press 1995) 66; see also Larry Catá Backer, 'Crafting a Theory of Socialist Democracy For China in the 21st Century: Considering Hu Angang's (胡鞍钢) Theory of Collective Presidency in the Context of the Emerging Chinese Constitutional State' (2014) 16 *Asian-Pacific Law & Policy Journal* 29, 66–67.

¹¹⁶Backer (n 115) 39. On the relationship between the Enlightenment and the idea of progress, see Preuss (n 115) 22, 102, 110.

To say that a repressive regime of Communist China's kind pivots itself to the idea of progress in respect of the legitimacy of constitutional amendment apparently defies conventional wisdom, to say the least. Isn't repression the antithesis of progress?¹¹⁷ We need to look into the twisted liaison between the idea of progress and the pursuit of constitutionalism to better understand how progress can even be associated with a repressive regime. In an essay on the 'meaning' of constitutions and constitution-making,¹¹⁸ German constitutional scholar Ulrich Preuss attributes the prominence of constitutionalism and the continuing constitutional movements since the late eighteenth century to the desire to liberate society from political repression by means of 'strengthening mankind's moral competence to govern itself' with an eye to "the improvement of mankind".¹¹⁹ Cast in such terms, constitutionalism and progress are joined by freedom.¹²⁰ In the tradition of the Enlightenment, people with freedom are expected to fully release the potential of reason to realise progress through the institutional framework of constitutions.¹²¹ Yet history has belied such an optimistic – if not naïve – and limited view of progress and constitutionalism. Freedom is not the only liaison between progress and constitutionalism. Alternatively, power displaces freedom as the impetus for progress.¹²² On this view, freedom is the result of, not the precondition for, progress.¹²³ Here is where Karl Marx met the concept of constitution in the history of constitutionalism.¹²⁴

To make the long story short, Marx fundamentally realigned the relationship between progress, revolution, and freedom that lay at the heart of early liberal constitution-making movements.¹²⁵ Through his socialist lens, in order to progress to the stage of history where real freedom will eventually materialise, people rely on the leadership of those who have freed themselves from false consciousness with true knowledge. Only when such prescient leaders – or, rather, vanguards that have acquired knowledge of the 'objective course' of history through their 'class-consciousness' – are in power can society break free from the laws of capitalist relations of production, advancing history to the next stage, where freedom can come to pass.¹²⁶ Revolution is the means of bringing the vanguards to power, thereby enabling historical change by transforming the fundamental law of society – the relations of production.¹²⁷ In contrast to the early constitutional movements that saw progress as a result of the exercise of freedom within the normative framework of the constitution,¹²⁸ Marx suggested that progress brought about freedom under the leadership of a vanguard class guided by the science of history, to which their 'privileged knowledge' showed them the access.¹²⁹ This is why not only who leads the insurgency against the targeted repression but also under what fundamental principles such insurgency should be conducted has been central to socialist revolutions. On this view, these fundamental principles must reflect the knowledge required for progress and real freedom in the unfolding of history. Only with such knowledge can the historical forces be tapped into to liberate society.¹³⁰

¹¹⁷See Preuss (n 115) 109–110.

¹¹⁸ibid 1 (emphasis in original).

¹¹⁹ibid 124 (citation omitted).

¹²⁰See Ming-Sung Kuo, 'The Reign of Constitutional Positivism: Revolution Reconceived in the New Constitutional Age' (2022) 37 Constitutional Commentary 201, 204–207.

¹²¹Preuss (n 115) 25–37, 110.

¹²²ibid 41–53. See also Hannah Arendt, *On Revolution* (Penguin 1990) 50–55, 57–58.

¹²³Preuss (n 115) 111.

¹²⁴ibid 63–69, 75–77, 111–113. Bui offers an account of how Marxist progressivism informs constitutional change in socialist constitutions. Bui (n 49) 19–21.

¹²⁵Preuss (n 115) 109–113; see also Kuo, 'The Reign of Constitutional Positivism' (n 120) 206–207; Arendt, *On Revolution* (n 122) 61–66. This fundamental conceptual realignment underlies an instrumentalist approach to constitutions in socialist states. Bui (n 49) 75–77.

¹²⁶Arendt, *On Revolution* (n 122) 61, 63; cf Bui (n 49) 78–79.

¹²⁷Preuss (n 115) 68, 86–89; Arendt, *On Revolution* (n 122) 64–65; see also Unger (n 11) 231–232.

¹²⁸Preuss (n 115) 36–37, 109–110; see also Kuo, 'The Reign of Constitutional Positivism' (n 120) 205–206; Arendt, *On Revolution* (n 122) 35.

¹²⁹Preuss (n 115) 65–66.

¹³⁰ibid 88–89.

Yet, as history has shown, the Marxist idea of progress, propelled by the revolutionary force, did not lead to ‘instances of progress’¹³¹ – rather it was zealously moralised and amounted to political messianism, and a repressive one at that.¹³² Today’s ‘counter-revolutionary’ generation, living in an era of ‘post-political politics’,¹³³ may have a tin ear for this radical idea of progress and other pathological renderings of the idea.¹³⁴ Yet, radical as it may be, Marxist doctrine is very much attached to the idea of progress, which is just one of modernity’s many double-edged swords.¹³⁵ Notably, progress and other concepts associated with modernity did exert great influence on Chinese intellectuals in the early twentieth century, when modern China struggled to liberate itself from Western imperial powers.¹³⁶ Both the Nationalists and the Communists were born out of the Chinese quest for modernity when China sought to break free from its status of a semi-colony and join the ‘family of nations’,¹³⁷ only with the Communists turning to the Marxist tradition of radical progress and pursuing what they saw as true liberation through continuing revolution.¹³⁸

As with the Marxist revolutionary tradition of progress, the socialist variety of constitutions is almost forgotten,¹³⁹ or it is curtailed and recast in terms of authoritarianism, leaving out its distinctive legitimating ideological underpinnings.¹⁴⁰ Yet, as China’s constitution of amendment reveals, it is still steeped in the socialist tradition,¹⁴¹ despite the cooling of revolutionary fever since the end of the Cultural Revolution and the deradicalisation of the idea of historical progress.¹⁴² The emphasis on preambular changes in constitutional amendment, particularly regarding fundamental principles and the designated leading political force, give away the character of the 1982 PRC Constitution: it is less a higher law that is supposed to regulate politics normatively than a steering programme that is subject to reprogramming under the guidance of what results from progressive learning – ie, the up-to-date fundamental principles – despite the constitution’s embrace of a ‘socialist rule of law’¹⁴³ and its declaration of constitutional supremacy.¹⁴⁴ As manifested in the constant changes to the fundamental principles, up-to-date knowledge through learning – ie, progress – is believed to be indispensable to the reprogramming of the constitution. In keeping with the socialist tradition,

¹³¹See Blumenberg (n 114) 30 (distinguishing between the ‘idea of progress’ and ‘instances of progress’).

¹³²See Loewenstein, ‘Constitutions and Constitutional Law’ (n 77) 234; Preuss (n 115) 64, 88–89, 100.

¹³³Kuo, ‘The Reign of Constitutional Positivism’ (n 120) 220.

¹³⁴See Hannah Arendt, *The Origins of Totalitarianism* (Schocken Books 2004).

¹³⁵Bauman (n 11). On the role of the idea of progress in modernity, see Norbert Elias, *The Civilizing Process* (Eric Dunning, Johan Goudsblom & Stephen Mennell eds, Edmund Jephcott tr, rev edn Blackwell 2000) 461–463.

¹³⁶See Liu (n 11); Prasenjit Duara, *Rescuing History from the Nation: Questioning Narratives of Modern China* (University of Chicago Press 1995).

¹³⁷Ruskola (n 11) 200–203; Salvatore Babones, ‘The Birth of Chinese Nationalism’ (*Foreign Policy*, 3 May 2019) <<https://foreignpolicy.com/2019/05/03/the-birth-of-chinese-nationalism/>> accessed 23 May 2024.

¹³⁸Preuss (n 115) 66. On Marxist ideology and the CCP’s vanguard role in China, see NW Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) 175–176.

¹³⁹Bui (n 49) represents resurgent scholarly interest in socialist constitutions.

¹⁴⁰See, eg, Tom Ginsburg & Alberto Simpser, ‘Introduction: Constitutions in Authoritarian Regimes’, in Ginsburg & Simpser (eds), *Constitutions in Authoritarian Regimes* (n 21) 1, 6–7.

¹⁴¹See Sophia Woodman, ‘Legislative Interpretation by China’s National People’s Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law’, in Hualing Fu, Lison Harris & Simon NM Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave 2007) 229, 229–230. Notably, the 1999 amendment of the 1982 PRC Constitution inserted the concept of ‘rule of law’ into the preamble (para 7, fundamental principle) – but qualified it with the ‘socialist’ modifier. See Ruskola (n 11) 202.

¹⁴²To deradicalise the orthodox idea of progress catapulted by revolutionary forces, the notion of the ‘primary stage of socialism’ was first incorporated into para 7 of the preamble to the 1982 PRC Constitution in 1993 and later amended with the qualifier that ‘[China] will be in the primary stage of socialism for a long time to come’ (我国将长期处于社会主义初级阶段 *wǒguó jiǎng chángqí chǔyú shèhuì zhǔyì chūjī duàn*) in 1999 (emphasis added).

¹⁴³PRC Constitution 1982, preamble, para 7.

¹⁴⁴*ibid* para 13.

the belief in progress, and a revolutionary one at that, underlies the legitimacy of constitutional amendment in China.¹⁴⁵

Continuity and Transformation in Amendment: Maintaining Legality on the Road from Republican China to Democratic Taiwan

If revolutionary progress is the legitimating ideology of constitutional amendment in China, continuity seems to be what is believed to be essential in Taiwan, as evidenced by the meticulous adherence to the procedural rules governing amendment under the 1946 ROC Constitution throughout the eleven rounds of constitutional revision. I hasten to add that such a contrast does not imply that constitutional amendment in Taiwan is antagonistic to the idea of progress or modernity. Rather, the emphasis on constitutional continuity by ‘playing by the rules’ marks a break with the radical variety of revolutionary progress, while aligning continuity with the idea of progress through legal institutions in the tradition of modernity.¹⁴⁶ This brings us to the question: why has constitutional amendment in Taiwan been so deeply shaped by the idea of continuity in the guise of preserving legality? The continuing object of constitutional amendment – the 1946 ROC Constitution – holds the key.

As indicated at the outset, the ROC government – whose continued existence has been the *raison d'état* of the 1946 ROC Constitution – came to be closely identified with the defeated Chinese Nationalists after being forced to be reseated in Taipei. Although the Nationalists were criticised for corruption and perceived as succumbing to Western powers by their Communist archenemy and liberal detractors, they were nonetheless the first standard-bearers of Chinese nationalism in fighting imperialist Western powers that had reaped manifold concessions and privileges through the numerous ‘unequal treaties’ with the Qing Empire in the late nineteenth century.¹⁴⁷ Among the privileges and concessions granted was consular jurisdiction, by virtue of which nationals of Western powers were tried not under Chinese law but by consuls of their countries of nationality or other ‘treaty powers’ in China.¹⁴⁸ As foreigners were not subject to Chinese law or immune from the judicial jurisdiction of China under the imposed regime of ‘extraterritoriality’,¹⁴⁹ consular jurisdiction and the resulting extraterritorial network of foreign law in China were seen as a symbol of the encroachment of China’s sovereignty by imperial powers.¹⁵⁰ The abolition of consular jurisdiction thus came front and centre in the Chinese broader struggle to break free from the unequal treaties. Notably, consular jurisdiction was initially imposed on the grounds that the Chinese legal system and judicial proceedings were barbaric and fell well below the standards of Western law. This is why remaking the Chinese legal system on the model of Western law topped the reform agenda in the Chinese quest for modernity.¹⁵¹

¹⁴⁵On the notion of progress in socialist constitutions, see Unger (n 11) 232–233; Bui (n 49) 19–21; Loewenstein, ‘Constitutions and Constitutional Law’ (n 77) 233–234. In China, where the link between the formal constitution and the legitimacy of the political regime remains unclear, this belief primarily reflects the official ideology of the CCP, the vanguard movement party, with respect to the constitution and its amendments, rather than the reasons for the societal acceptance of the CCP’s dominance, which appear to be rooted more in economic factors. I am grateful to Kevin Tan for this crucial distinction.

¹⁴⁶Preuss (n 115) 37; see also Ruskola (n 11) 13–15.

¹⁴⁷Edmund SK Fung, ‘Anti-Imperialism and the Left Guomindang’ (1985) 11 *Modern China* 39, 46–47; see also Ruskola (n 11) 201; Cassel (n 11) 176–178. Notably, all the privileges and concessions granted to Western powers were later extended to an Asian power, Japan, following its victory in the First Sino-Japanese War (1894–1895), under the terms of the ‘most-favoured-nation clause’ in the so-called unequal treaties. See Cassel (n 11) 51, 160.

¹⁴⁸Cassel (n 11) 39–84.

¹⁴⁹Issues surrounding the jurisdiction and applicable laws of the ‘United States Court for China’ (1906–1943) illustrate the complexity of what Teemu Ruskola calls ‘exterritorial empire’. See Ruskola (n 11) 157–174.

¹⁵⁰*ibid.*; Cassel (n 11) 4–6.

¹⁵¹Ruskola (n 11) 128, 162, 201; Cassel (n 11) 174–177; Matthew Craven, ‘What Happened to Unequal Treaties? The Continuities of Informal Empire’ (2005) 74 *Nordic Journal of International Law* 335, 348.

As has been well documented, China was a keen learner of Western law soon after its encounter with Western powers in the nineteenth century. Alongside its embrace of international law,¹⁵² the enactment of legal codes modelled on Western law became a central focus of China's long process of legal modernisation.¹⁵³ This codification movement continued into the Republican era after the ROC succeeded the Qing Empire.¹⁵⁴ Meanwhile, the Chinese government, headed by the warlords in Beijing (then Peking) who were battling the then insurgent Nationalists in southern China, continued to battle against the unequal treaties inherited from the Qing Empire. It not only raised the issue at the 1919 Paris Peace Conference following World War I.¹⁵⁵ The question of unequal treaties was further taken to the 1922 Washington Peace Conference and debated at the League of Nations.¹⁵⁶ Notably, negotiation was not the only strategy China in its attempt to dismantle the unequal treaties. It even unilaterally abrogated such a treaty with Belgium, prompting the only case involving China as a party in the history of the World Court.¹⁵⁷ Although China soon returned to the negotiating table, it was persistent in its struggle against Western powers over the unequal treaties.

The Nationalists were as persistent as their rivals seated in Peking during the early Chinese republic's fight against the unequal treaties, including the issue of consular jurisdiction. Before the Nationalist insurgent forces dislodged the rivalling warlords following a military campaign, the Northern Expedition, in 1927, they had already made some inroads into eroding consular jurisdiction by occupying a number of leased territories under their control.¹⁵⁸ Soon after the unification of China in 1927, the Nanjing-seated Nationalist government reignited the codification movement, aiming to end consular jurisdiction as part of its broader effort to renegotiate the unequal treaties.¹⁵⁹ The Nationalists' effort did not come to fruition until 11 January 1943, in the midst of the Second World War, when the United States first unilaterally relinquished consular jurisdiction in China and agreed to replace the Qing-era treaties with a new agreement. The example set by the United States was soon followed by other treaty powers, marking the end of the era of unequal treaties.¹⁶⁰ To this day, 11 January is celebrated annually in Taiwan as 'Judicial Day'.

As described above, formal legality – ie, conformity with rules – was at the heart of China's long and winding path toward legal modernisation. Playing by the rules was the necessary condition for China to be recognised as an equal member of the family of nations.¹⁶¹ Furthermore, as the Nationalists positioned themselves as the leading force of the Chinese victorious struggle against imperialism, formal legality played a pivotal role in the Nationalist imagination of legitimate rule. In essence, legality is what is believed to be indispensable to the political legitimacy of the Nationalist-led ROC government.

As demonstrated in the preceding discussion of constitutional amendments in Taiwan, the defining feature of Taiwan's constitution of amendment is the insistence on constitutional continuity through adherence to formal amendment rules. To continue to claim the Taipei-seated ROC government as the legitimate government of China *vis-à-vis* the Communists-steered PRC, the Nationalists spared no effort in preserving the institutional continuity of the reconstituted ROC

¹⁵²Liu (n 11) 108–139.

¹⁵³Cassel (n 11) 175–176.

¹⁵⁴Ruskola (n 11) 201; Xu Xiaoqun, 'The Fate of Judicial Independence in Republican China, 1912–37' (1997) 149 *China Quarterly* 1.

¹⁵⁵See Charlotte Ku, 'Abolition of China's Unequal Treaties and the Search for Regional Stability in Asia, 1919–1943' (1994) 12 *Chinese (Taiwan) Yearbook of International Law & Affairs* 67, 70–73.

¹⁵⁶*ibid* 73–79; Craven (n 151) 348, 368.

¹⁵⁷*Denunciation of the Treaty of 2 Nov 1856 between China and Belgium*, PCIJ Rep Series A, No 8 (1927) 4–5; see also Craven (n 151) 368.

¹⁵⁸Harold R Isaacs, *The Tragedy of the Chinese Revolution* (Haymarket Books 2009) 103–106.

¹⁵⁹Xu (n 154) 9–27.

¹⁶⁰Ku (n 155) 82–83.

¹⁶¹Xu (n 154).

regime, even though it became little more than a rump government, with many officials and parliamentarians either stranded in mainland China or switching their allegiance to Beijing.¹⁶² Central to this effort was to maintain the functioning of the ROC Constitution, appended by the Temporary Provisions.¹⁶³

It is worth noting that the Nationalists did not merely maintain the organisational form of constitutional organs; they ensured institutional continuity without abrogating the rules. The solution to the quorum issue, which soon plagued the rump government bodies such as the parliament (including the National Assembly) and the Council of Grand Justices, illustrates the Nationalists-led ROC regime's obstinate adherence to legality-mediated institutional continuity.¹⁶⁴ Given the rump nature of the reconstituted ROC government in Taiwan, the key state organs mentioned above had struggled to function, as they lacked sufficient members to hold quorate meetings. Yet, in the face of the question of quorum, rather than simply replacing these *de facto* defunct bodies with new governing entities, the Nationalists demonstrated a steadfast determination to maintain legal continuity in their effort to reopen the relevant state organs in the ROC's new seat in Taipei. In the case of the National Assembly, they fanatically altered procedural rules to ensure its operation, while in the case of the Council of Grand Justices they simply waited for the right moment to replenish it with new appointments.¹⁶⁵ To simplify the convoluted legal stories of the early ROC government in Taiwan, no rules were broken in such desperate manoeuvres. Formal legality was strenuously upheld. Preserving formal constitutional identity through legal continuity was just a chapter in the saga of the ROC government's fight for legitimacy with formal legality.

Moreover, even if Taiwan is seen as having evolved from being a part of the republican China into a democratic polity on its own terms,¹⁶⁶ this subtle transformation of political identity has occurred under the same constitutional cloak: the 1946 ROC Constitution.¹⁶⁷ As noted above, great legal acrobatics were practiced to facilitate the smooth transition from the Temporary Provisions to the Additional Articles in 1991, even if the price was to have this shift midwived by the very long First National Assembly with little democratic representation.¹⁶⁸ In democratic Taiwan, legality remains central to constitutional amendment, and the belief in continuity through the law underlies the legitimacy of constitutional transformation in Taiwan.

Conclusion

The foregoing discussion of the characteristics of constitutional amendments in China and Taiwan by no means presents a sufficient condition for the legitimacy of constitutional amendments in these two constitutional realms. Rather, it aims to show that understanding the basis of legitimacy of constitutional amendment requires taking account of what is believed to be indispensable to constitutional amendment in each constitutional order. To uncover the legitimating ideologies of constitutional amendments in China and Taiwan, this article has taken an internal point of view to identify the 'constitution of amendment' in constitutional amendments. The persistent character of the constitution of amendment can be indicative of what is believed to be indispensable to a constitutional amendment and thereby underlies its legitimacy in a constitutional order. Thus, instead of focusing on totalising doctrines, the article has looked into the persistent characteristics – whether in substance, process, form, or style – that are constitutive of China's and Taiwan's respective constitutional amendments. By observing these characteristics, this analysis has shown that in

¹⁶²Lin, Kuo & Chen, 'Seventy Years On' (n 83) 1003–1005, 1008–1009.

¹⁶³Chen, 'When the Temporary Becomes Indefinite' (n 19) 109–110.

¹⁶⁴When the current TCC was first established as a judicial review institution in 1948, it was organised as the Council of Grand Justice under the Judicial Yuan.

¹⁶⁵See Lin, Kuo & Chen, 'Seventy Years On' (n 83) 1003–1005, 1008–1009.

¹⁶⁶Yeh, *Constitution of Taiwan* (n 6) 36–48.

¹⁶⁷Chen, 'When the Temporary Becomes Indefinite' (n 19) 119–120.

¹⁶⁸*ibid.*

China, progress turns out to be the legitimating ideology of constitutional amendment, while in Taiwan, continuity is what has been believed to be essential to the legitimacy of constitutional transformation. Yet, beneath those divergent paths in China and Taiwan lies their shared legacy of the Chinese quest for modernity: both the revolution-progress and the legality-continuity nexuses identified in China's and Taiwan's constitutional amendments are the crystallisation of the Chinese evolving strategy in seeking its liberation from Western imperialism. Navigating between the radical idea of progress and formal legality, China's one hundred years of encounter with modernity not only leave a lasting legacy on both sides of the Taiwan Strait, but also tell a story of constitutional struggle in the prehistory of the Global South.

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