

MODERN CONSTITUTIONAL DEVELOPMENT IN CHINA

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TO MY MOTHER

PREFACE

In the following pages modern Chinese history, from the constitutional point of view, is treated as a continuous development since the inception of reform in 1898 under the Emperor Kuang Hsü. It was only gradually that China was brought to a realization of the necessity for change in her political structure. During the years prior to 1898, it became apparent to a few in the country that the Chinese house must be repaired if it was to remain standing. The "Hundred Days" of reform in 1898 marked the attempt to patch up, without seriously altering, the existing structure. The fundamental nature of the alterations necessary, however, was not appreciated at that time. With the failure of the reform movement came a reaction against change. This reaction against the 'new' culminated in the Boxer uprising. The disastrous termination of the anti-foreign movement brought a deeper realization of the need for radical reforms. The reforms undertaken involved the introduction of a measure of representative government into China. But although committed to the idea of change, the rulers of China were not prepared to move rapidly enough to satisfy the radical element in the reform party and revolution resulted. The revolutionary ideas marked a decided break with the past. Since the revolution of 1911, the history of China has been the attempt to find a middle ground, suited to the needs of the country, between the old traditional life of the State, and the new conceptions of governmental relationships brought to the East from the West. No change,

whether in the nature of progression or retrogression, stands by itself, but each links itself naturally with the antecedent and the subsequent condition. That fact of itself justifies the attempt to trace the threads of constitutional development in modern China. The endeavor is further justified by the outstanding importance to the world of the Far Eastern question which cannot be divorced from the internal history of China.

The material for the first two chapters has been drawn largely from such authoritative secondary works as H. B. Morse's "International Relations of the Chinese Empire," Smith's "China in Convulsion," and "China under the Empress Dowager," by Bland and Backhouse (1910 edition). The succeeding chapters have been written from a study of the documents, and from knowledge of the situation gained during residence in China. Where the interpretation of a fact or event has been given in the form of a quotation, it has been because the words quoted have expressed the point of view of the present writer.

It is impossible here to make more than a general acknowledgment of the aid given by friends both in China and the United States in the preparation of this study. Grateful acknowledgment is due, however, to the aid given and suggestions made by Professors W. W. Willoughby and W. F. Willoughby, and Professor Henry Jones Ford, who read and criticised the entire manuscript; to Dr. S. K. Hornbeck who read and gave valuable suggestions as to the first half of the book; and to Professor E. S. Corwin. The writer is under a further debt of gratitude to his wife for her aid in the gathering of materials, in the preparation of the manuscript, and in the reading of the proofs of the book.

HAROLD MONK VINACKE.

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CHAPTER I

For generations prior to the end of the nineteenth century China had been politically in a state of suspended animation. Life had continued but there had been little growth and to the casual observer, almost no perceptible decay in her institutions. Dynasties rose and fell without seriously affecting the political organization of the country. One barbarian rule after another was imposed on the "sons of Han," yet, after the conquest, the conquerors ruled according to the accepted customs and traditions. Then, within a period of less than twenty years, the whole political system was outwardly and rather ostentatiously changed. The form of a constitutional monarchy was substituted for the paternal despotism of the past, and, almost immediately, the limited monarchy gave way to a republic. Political change does not come unheralded in any country, certainly not in a State ruled by custom and tradition as China had for so long been. But it is not easy to show why any change comes in the life of a nation, and it is not always profitable to undertake such a task. In order to follow the course of modern constitutional or political development in China, however, it is necessary: (1) to appreciate the conditions which created the necessity for reform and change; and (2) to discover why those conditions led to a change in the political structure instead of a simple change of dynasty. This understanding can be best gained by means of a brief description of the organization of the government under the Manchus, together with a discussion of some of the new problems the Empire had to face during the last years of Manchu rule.

At the head of the governmental organization stood the Emperor. In theory he wielded the absolute power of life and death over his subjects. In him were vested all of the prerogatives of government: executive, legislative, and judicial. The Imperial Mandates had the force of law; the Emperor was the highest court of judicial appeal in the land, the stroke of the "vermillion pencil" being final; he had the absolute power of appointment and dismissal. In short, he was the typical despot of the Oriental Court. Practically, however, he was limited in the use of his powers by the strength of custom over the minds of the people; by the laws established by his predecessors; and because he could enforce his will only so far as his agents were willing to carry out his commands. The Emperor ruled as the "Son of Heaven," but if he was unable to preserve order in the Empire, or if he failed to respect the customs of the people, it was felt that he had exhausted the "mandate of Heaven," and the people held themselves justified in deposing him. "The Chinese confer on their Emperor absolute power, but argue that when they are oppressed it does not proceed from the absolute power of the Emperor, but rather from a want of proper appreciation of his high duties, and that when the Emperor is thus guilty, they are under no obligation to countenance or obey him."¹

Assisting the Emperor in the performance of his extensive duties was, at first, the Grand Secretariat (Nei Ko); to which was added about 1730 the Grand Council (Kun Ki-chu). It was the duty of the Grand Secretariat to deliberate on matters connected with the government of the realm; to find out the will of the Emperor and to see that it was proclaimed throughout the Empire. The Grand Council, which usually

¹ Jernigan, "China in Law and Commerce," p. 56.

consisted of five members, gradually displaced the Grand Secretariat, becoming the actual Privy Council of the Emperor.² Its duties also were to deliberate and advise on the affairs of the State in the presence of the Emperor. While the advice of the Grand Council was always sought, it was not always followed, the Throne having the final decision of every question. The actual administration of the affairs of the nation was not, however, carried on by the council but was in the hands of the six Boards (increased to seven by the creation of the Tsungli Yamen,³ or Foreign Board, in 1861) i.e. the Boards of Civil Office, Revenue, Rites, War, Punishment, and Works.

Before passing on to the provincial system one branch of the central administration deserves especial mention. The only body in the Empire with the right directly to criticise the Emperor was the Censorate. The duty of the Censors was to criticise, and "this duty they exercised without fear, though not always without favor."⁴ No question affecting the interest of the State was too great, and none too small for their scrutiny. The scope of their work can be judged from the name, "The All Examining Court." Thus the Censorate, says Williams, had "the care of manners and customs, the investigation of all public offices within and without the capital, the discrimination between the good and bad performance of

² Membership in the Grand Secretariat continued to be the highest honor attainable, however, although in later years, when it had been superseded by the Grand Council, it had come to be a mere Court of Archives. Morse, *Trade and Administration*, pp. 42-43.

³ The Tsungli Yamen (Foreign Board), dealing with the problems of foreign intercourse, the most pressing questions of the day, was gradually increased in size and power until, in 1876, its membership included all of the members of the Grand Council, and none who were not at least President or Vice-president of a Board. Morse, *Trade and Administration*, p. 42.

⁴ Morse, *"Trade and Administration of China,"* p. 46.

their business, and between the depravity and uprightness of the officers employed in them.”⁵ It was largely through the Censors that the Emperor was able to keep in touch with public sentiment throughout his domains, and because they did give an expression, albeit imperfect, to public opinion they constituted one of the few effective checks on the exercise of the Imperial power. But the effectiveness of the check was greatly lessened by the fact that the Censorate did not act as an organic whole, but that each member acted independently of the others.⁶ Thus the censors lost the force that goes with united action. It was also lessened by the fact that in the later days of the Dynasty, under the Empress Tzu Hsi, criticism of the Government was liable to subject the critic to severe punishment for his temerity. In spite of the limitations of the Censorate, however, it is important to note that there was a way by which the sovereign could keep informed of the actions of his officials and could be reminded of his own obligations to the people.

While the power of the Emperor was supreme its exercise was delegated to his personal representatives throughout the Empire. For administrative purposes the provinces were grouped into viceroyalties. In two of the provinces, Chihli

⁵ Williams, “The Middle Kingdom,” vol. I, p. 430. In theory and practice the action of the censorate often differed. In theory the Censors held before the Emperor the ideals of government set forth by Confucius and his followers. In practice it was unfortunately often true, as Weale says (*Reshaping of Far East*, p. 220) that the “Censorate stands, censoring those acts which are not acceptable because no bribe had been paid.” But even in the last years of the Manchu rule there were Censors who put their duty before even their lives. Men were always to be found of the type of Wu K'o-tu who committed suicide as the highest protest against the act of Tzu Hsi (the Empress Dowager) in not providing the proper heir for the Emperor T'ung Chih.

⁶ See Colquhoun, “China in Transformation,” p. 287.

and Szechuan, the Viceroy had only the administration of the one province. In all other cases he had supervision over two or more. In addition to the Viceroy each province had a Governor, except where the Viceroy himself exercised direct control. Both Viceroy and Governor were responsible to the Crown and had the right of directly petitioning the Emperor.⁷ Both were honorary members of the Censorate and had the right of criticism that went with membership in that body.

Subject only to the final supervision of the Emperor and the central administration, these highest provincial officials exercised as absolute a power in the government of their provinces as the Emperor did over the whole country. As Morse says: "The Provinces are satrapies to the extent that so long as the tribute and matriculations are duly paid, and the general policy of the central administration followed, they are free to administer their own affairs in detail as may seem best to their own provincial authorities."⁸ From this it follows that the administration of the laws, and the carrying out of the Imperial orders varied from province to province in accordance with the interests and the initiative of the Governor or Viceroy. This was true as late as 1900, when Yuan Shih-kai in Shantung, and Liu K'un-yi in the Liang-Kiang, refused to carry out the anti-foreign policy of the Court, while in other parts of the Empire foreigners were being murdered and their property destroyed.

So long as he sent in his apportionment of the Imperial revenue, then, and did not come openly into conflict with the policy of the central government, the Governor of each province exercised an absolute control over the territory assigned to him. His power was limited only by his fear of the removal power of the Emperor, and by his ability to have his will

⁷ In position the Governor ranked with, but after the Viceroy.

⁸ "Trade and Administration," p. 46.

carried out in the province. He was directly responsible to the Emperor for the maintenance of peace and order in his province, and because of this responsibility, he was careful, in most cases, not to take any action antagonistic to the desires and interests of the people. In order that he might not be able to establish himself so firmly in his post as to be tempted to set up an independent rule, a Governor or Viceroy was commonly appointed for a term of three years, with the possibility of one renewal, after which he would be transferred to another province. Li Hung-chang provided one of the notable exceptions to the rule, being maintained as Viceroy of Chihli province for over twenty years. A high provincial official was never appointed to a post in his native province.

Assisting the Governor in the actual administration was the provincial treasurer, who was the head of the civil service, as well as the chief fiscal agent of the province; the provincial judge, who was the final (provincial) court of appeal; the salt comptroller; and the grain intendent. These four officials constituted the deliberative and executive council of the provincial government, and, with the Governor and the Viceroy, formed the general provincial administration residing at the capital of the province.

For administrative purposes each province was divided into Hsien, Chow or T'ing; several Hsien together formed a department or prefecture; and two or more Prefectures would be united in a Circuit. Thus the largest subdivision was the Circuit and the smallest the Hsien. "The unit for administrative purposes within the province is the Hsien or District;—two or three or more (up to five or six) Districts collectively form a Fu or Prefecture; and two or more Prefectures are placed under the jurisdiction of a Taotai. . . . The Chow and the T'ing proper are a superior kind of Hsien, being component parts of a Fu; the Chihli-chow and Chihli-

T'ing are an inferior kind of Fu, both having as direct a relation to the provincial government as a Fu, but the latter distinguished from the Fu by having no Hsien subordinated to it."⁹

All the provincial officials, down to the Hsien magistrate, were appointed directly by the central government. The Prefect exercised the delegated authority of the Governor in his prefecture, and was held responsible for its share of the revenue of the province, as well as for the maintenance of order in his jurisdiction. However, he dealt more with the external relations of his Fu than with its internal administration, and was rather a channel of communication than an executive officer. He acted as the court of appeal from the Hsien's court.

The Hsien (district magistrate) was the foundation of the administrative system. He was the lowest official appointed by the central government and in many ways was the most important officer of the administration. His work brought him into direct touch with the people and thus he came to personify the power of government to the mass of the population. In the transference of responsibility it all came ultimately to the Hsien. Just as the Governor was responsible for his province, so the magistrate was responsible for the proper exercise of all of the prerogatives of government in his district. An enumeration of some of his functions will serve to show his importance. He was police magistrate, deciding ordinary police cases; and was court of first instance in civil and criminal cases. In addition to being the agent of the provincial government and the Imperial administration in collecting taxes and the grain tribute, he was the registrar of land, the famine commissioner, and the representative of the Board of Works in the oversight of public buildings, etc. In fact everything

⁹ Morse, p. 52.

pertaining to the conduct of government came under his charge.¹⁰ He alone had no one on whom he could shift the responsibility for his acts.

This delegation of responsibility is well illustrated by the specimen proclamation given by Parker: "The magistrate has had the honor to receive instructions from the prefect, who cites the directions of the Taotai, moved by the Treasurer and the Judge, recipients of the commands of their Excellencies the Viceroy and Governor, acting at the instance of the Foreign Board, who have been honored with his Majesty's commands."

"Politically the government of China turns on the reciprocal duty of parents and children. The Emperor is the head of the government but the family is its base, and it is not from the central head at Peking, but from the family unit that the building of the governmental fabric proceeds. In the family life may be seen the larger life of the Empire, and it is the family unit that gives the semblance of unity to the Empire."¹¹ The family was the social unit, just as the Hsien was the administrative unit of the Empire. And the family organization was based on the custom and tradition of centuries. This being so, the magistrate was able to perform his duties, and carry out the Imperial commands only so far as they did not come into conflict with the custom and tradition of his district. The greatest objection to a new law or tax, or to any innovation was that it had not been in existence before. "In the administration of the affairs of the Empire,"

¹⁰ "In Chinese official documents the district magistrate is frequently referred to as the father and mother of his people. And as the head of a household can make it happy or unhappy according to his disposition, so the rule of a good or bad magistrate promotes order or disorder among the people of his district." Jernigan, p. 35.

¹¹ Jernigan, p. 34.

says Jernigan,¹² "the principle is recognized that laws are the particular institution of the legislator, while customs are the institution of a nation in general, and that nothing tends more to produce a revolution than an attempt to change a custom by a law."

The village itself was organized, entirely apart from the general administration, on the basis of the family. The several families united in a village organization selected one of their number to serve as the village headman (Tipao).¹³ He acted as the intermediary between the Hsien and the village. Because of the pressure this semi-political organization could bring to bear on him, it was possible to force the magistrate to adjust his execution of the law to the customs of the locality.¹⁴

¹² Jernigan, p. 33.

¹³ Morse says (*Trade and Administration*, p. 60), that the headman was nominated by the magistrate from among the village elders, "but dependent upon the good will of his constituents." On the other hand, Jernigan (p. 34), finds that the Tipao was selected by the families, but that "it is sometimes required, after the headman of a village has been selected, that he receive the confirmation of the district magistrate." This latter view is more nearly correct, although the selection of the Tipao varied in different localities.

¹⁴ The pressure that the Tipao could bring to bear on the magistrate may be understood, when the extent to which the magistrate was forced to rely on these extra-official functionaries for the administration of his district, is considered. "The Tipao," says Morse, "acts as constable, and is responsible for the good conduct and moral behavior of every one of his constituents; he is also responsible for the due payment of land tax and tribute," etc. (p. 60). Since this village headman was not known to the official administrative system he could not be fully controlled by it. And since the magistrate could not conduct the work of his district except through the Tipao, who represented the people, it can be seen how powerful an influence the village could exert on the administration.

Applying this to the actual administration of the Empire, remembering that the customs and traditions of one Hsien were by no means identical with those of any other Hsien in the Empire, it is clear that the carrying out of the law would vary from province to province, and from Hsien to Hsien. not only with the personnel of the official hierarchy, but with the difference in habits and customs.

More than any other country, the old China was governed by the class of scholars, the literati. Membership and preferment in the official system was based on a series of examinations open to all classes. Beginning with the district examinations, a candidate passed through the prefectural examination, and that of the province, finally coming to the Metropolitan examination in Peking. Success in these examinations gave admission to a distinct class in the state, the literati, the class given the highest place in the popular esteem. Such success meant even more than individual prestige. It threw its reflected light on the whole village from which the successful candidate had come, so that frequently the inhabitants of a village would unite to give a promising student every possible opportunity to prepare himself for the examinations, and his progress would be watched with interest by all the villagers. There was no national system of education, but a man who had established himself in the opinion of his fellows as a scholar would gather a few disciples around him and impart his knowledge to them. As the whole plan of education was based on the Confucian Classics, it was possible for one teacher to conduct a student through the entire curriculum, thus fitting him for examination. Fortunate was the village which had an able expounder of the Classics!

This system would seem to promise an unusually intelligent administration. But while examination was the basis of official preferment, the practice of buying and selling office had