

THE CONSTITUTIONAL STRUCTURE  
OF MODERN CHINA

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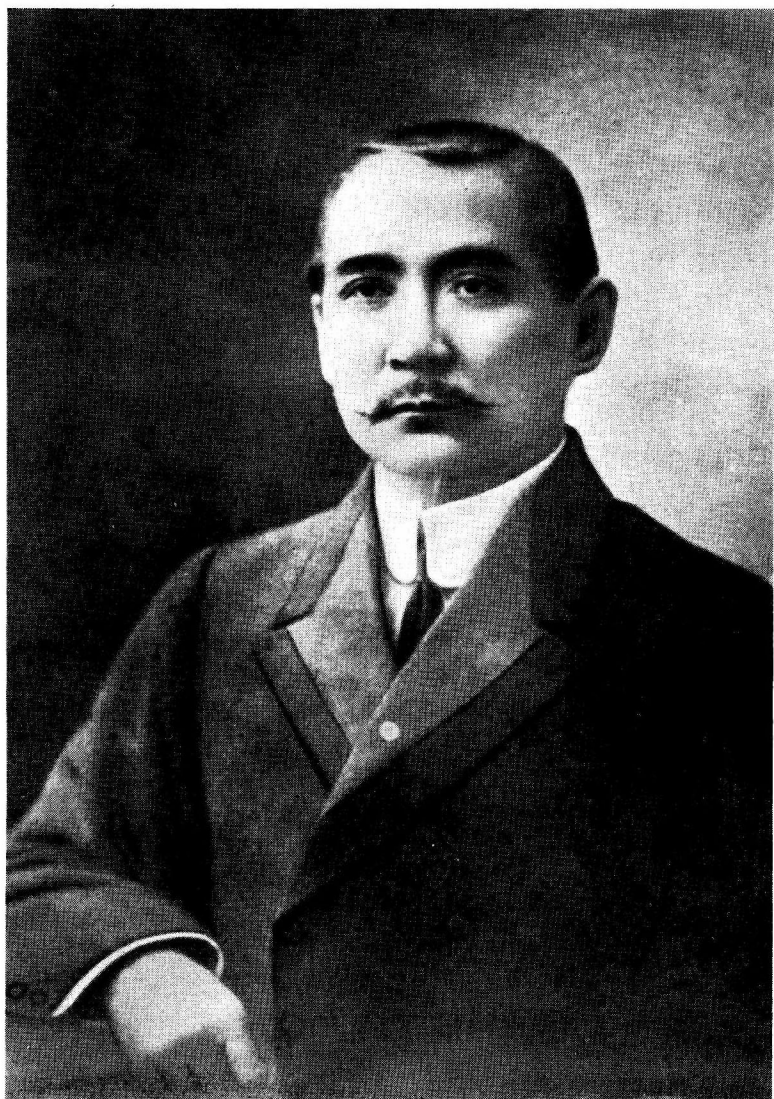
W. Y. TSAO

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DR. SUN YAT-SEN  
Father of the Republic

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W. Y. TSAO

## INTRODUCTION

A PERMANENT CONSTITUTION, designed to meet the needs of modern government, such as China hopes to achieve, must be the result of experience, based upon prolonged trial and error. Between the years 1908 and 1928 China, in her endeavour to develop a system of government that would keep abreast of modern thought, made various attempts to frame her political institutions upon the patterns adopted by western powers. Finding that western methods were not altogether applicable, she has, since 1928 and under the influence of Kuomintang, set herself to achieve a constitution based upon her own experience and suitable to the peculiar needs of her people.

Although China still lacks a permanent written constitution in the form of a single document, nevertheless modern China has been, and is, governed by a system which has unique constitutional value, and which has given rise to a new and interesting outlook on future democratic government. Indeed, 'we know now that in no nation, not even in the United States, is the whole constitution to be found in any document; just as in no nation, not even in the United Kingdom, is the constitution wholly unwritten.'<sup>1</sup> The political institution which has been gradually but steadily developed in China toward a certain idealism has fully qualified her as one of the modern democracies, with or without a permanent written constitution.

In fact, a constitution is the effect of the political, economic, social and cultural achievements of the nation. It is said that the English constitution has not been made but has grown. It 'was marked by more than one transcendent quality which in the eyes of our fathers raised it far above the imitations, counterfeits, or parodies which have been set up during the last hundred years throughout the civilized world.'<sup>2</sup> Therefore, a constitution, in the real sense of the word, should not be merely a body of articles in written form as the masterpieces of a genius's pen-work. No written document, however perfect its letter may be, could assume the position of the supreme law of the land, if it were not compatible with and applicable to the nation. A constitution is like the costume of an individual. Clothing of a certain quality, size

1. Sydney and Beatrice Webb, *Soviet Communism, A New Civilization*, p. 4.

2. Dicey, *Law of the Constitution* (9th edition), p. 3.

and style may suit one, but not suit another. Before 1928 China copied constitutions from western countries; at one time a Presidential system; another, a Parliamentary system. There was no spirit of initiative. There was an unfortunate disregard of China's existing conditions. The revolutionary leaders of the Kuomintang realized these faults, and accordingly they demanded and insisted that China must have a constitutional suit made to order.

The Draft of Constitution of the Republic of China which was finally released by the National Government on 30 April 1937 was not, therefore, merely the brain-work of the leading jurists of the Legislative Yuan, but was the reflection, to a great extent, of the constitutional structure that had already been in existence and practice. In the course of formulating the Draft Constitution the Legislative Yuan took every care that the meritorious achievements during long years of hard experience in political experiments must be given serious consideration. Pending the required endorsement the Draft Constitution, though devoid of validity, will be the groundwork for the forthcoming People's Congress, the major duties of which will be to frame the constitution and decide its date of execution.

Regardless of whether the constitution be flexible or rigid it tends to stabilize the governmental system. Once the constitution is established it will stand firm, although it may be subject to minor alterations. In the case of a written constitution, such as China is to adopt, revision necessarily requires specific procedure which is different from ordinary legislation. It is, therefore, wise that before the constitution is made, due caution should be taken and any impulsive or imprudent steps as far as possible avoided. While there is still ample time the writer hopes that the present work may serve the purpose of throwing light on some vital problems of constitutional significance. Such problems may have been overlooked or underestimated by the Legislative Yuan. The writer has endeavoured to weigh each of these problems on its merits and make some propositions for a reasonable and justifiable solution.

However, it must be admitted, in the words of Dicey, that the major duty of the student of the constitution is to perform the part neither of a critic nor of an apologist, nor of an eulogist, but simply of an expounder. In explaining the Chinese constitutional structure in being, as well as that under contemplation, to foreign readers, it is necessary that the present work must be developed from a comparative study between Chinese institutions and those

of the leading democratic countries. The writer strongly believes that China will be benefited by a study of such a nature. She can assimilate whatever is meritorious and avoid the faults pertaining to political systems of modern democracies.

On the other hand, such a study will also help arouse the interest of constitutional lawyers of other nations with the hope that they may review their respective political systems and make proposals for improvement. It is irrefutable that no constitution can be established for all time because no human institution is perfect. It may, in fact it will, need revision. A constitution, to be vital, must march with the times.

As far as the Chinese governmental system is concerned, it can be claimed that since its inception in 1928 it has achieved some distinct features which are in conformity with democratic theory and spirit and which may have made contribution in no small measure to the vast sea of public law. These features can be found, among other things, in the embodiment of the three Principles of the People, enunciated by the late father of the republic, Dr. Sun Yat-sen, in the constitutional structure.

The first Principle of the People, the principle of nationalism, speaking briefly, does not only aim at the liberty and independence of the Chinese nation, but also at co-existence and co-prosperity amongst all members of the family of nations, with world tranquillity and universal peace as its ultimate goal.

The second principle is that of democracy. One of the major differences between democracy and fascism lies in the fact that the former tolerates free discussion, whilst the latter denies it. By free discussion is meant discussion governed by self-control and the spirit of compromise. When a man enters into a discussion with other men, if he adopts a dogmatic attitude, believing that whatever he says is absolutely correct and needs no alteration, there is no room for discussion. Discussion can only be carried on in an atmosphere in which all parties involved are ready to give and take. From such a give-and-take spirit very comprehensive and applicable methods may evolve. In a fascist country, on the other hand, there is not such an atmosphere. The so-called truth or facts are one-sided. They are dictated to, and imposed upon, the people.

Another striking feature of democracy is that democracy and legalism must be compatible. If democracy is a civilized form of government it cannot tolerate the existence of arbitrariness, of



prerogative or even of wide discretionary power on the part of the government. As far as the people are concerned absolute freedom is not allowed. It may have existed in jungle life but not in civilized communities. Therefore, liberty can only be interpreted in the light of law. In a real democracy, in contradistinction to fascism, both the government and people, state and individual must be law-abiding.

It is admitted that there may not always be justice in the law. On the contrary, viewed from our bitter experiences in human history there have been numerous instances which prove that there are injustices in law. Nevertheless, a bad law is better than no law. Especially in a modern state, wherein human relationships are extremely intricate, it is all the more necessary that it must be governed by law. With the strict application of law, which must be unbiased in its nature, both the government and people know exactly their respective positions. In the fascist states, on the other hand, dictators and their satellites may alter laws and regulations by issuing orders at their convenience and pleasure. Liberty of the person and property, and all civil freedoms, may be unlawfully restricted and infringed. In a democratic country this absolutism is rarely encountered, and if it is, it must be destroyed.

Democracy, in the true sense, is not enough if it is viewed from the political angle alone. Therefore, Dr. Sun Yat-sen struck at the root of the problem and advocated the Principle of People's Livelihood. To him, the people should have the right to be supplied with the four essentials of life, namely, food, clothing, shelter and the means of communication. The state should be given the power to undertake a nation-wide economic plan and to produce wealth and capital—not for the interests of a few, but for the nation as a whole. When economic security is achieved, social justice is automatically maintained. Then, educational facilities will be open to all, in order that the natural endowments of the individual may be fully developed. The aim of life should be happiness, and happiness is not obtained from material things alone. Therefore, when material comforts are reasonably ensured the artistic and aesthetic desires of the people must be encouraged and developed.

From time immemorial these three problems, national, political and economic, have existed. According to European history, the nineteenth century may be considered as a period of nationalism. During that period Italy and Germany emerged as great powers. In turn they became menaces to world peace. This pattern of

nationalism is not what the world desires because it will cause bloodshed and destruction. During the American and French revolutions political development took the shape of democracy, but what they achieved was a democracy of representation and there they halted. Ever since the latter part of the last century a great tide has flowed in the direction of economic reform. Modern thinkers, be they socialistic or capitalistic, all agree that the economic problem is the major problem to be tackled and solved in order to maintain social stability and general well-being for the people. Nevertheless, these three problems have been viewed separately, and measures have been taken to cope with each of the problems separately. It is the greatness and the wisdom of Dr. Sun that he viewed these three great problems together, attempting to solve them at the same time.

The nation, as well as the individual, must have a vision that will lead it in the right direction. Without vision it will wander in bewilderment, knowing not which way to turn, and getting nowhere. The three great principles bequeathed by the father of the republic are the vision of the Chinese, and the new constitution will be definitely moulded by these principles. It can be said with confidence that the Chinese nation, guided by such a broad and brilliant vision, will certainly exert itself to become one of the most progressive nations of the world. Not only will it attempt to improve itself—claiming a rightful place in the family of nations—but it will also play a major part in world politics and contribute, along with other members, to prosperity and a lasting peace. With such a vision in view, the duty of the Chinese government is to administer public affairs in accordance with these three principles. To govern is not to rule, but to administer. A responsible official, in a real democracy, has to serve, and not to exercise his power to dominate the mass of the people. Here again we find the difference between democracy and fascism.

Volume after volume has been published dwelling upon the nature of an ideal government. In this introduction the writer does not propose to comment upon the various theories enunciated by different schools of thought. He would like to state briefly the essential points necessary for an ideal government in the light of the Chinese constitutional theory. Firstly, the government and the public functionaries must be competent. It is admitted that influence and favouritism have played a major part in officialdom. A man who occupies a high official position may not be the right man in the right place.

The main idea of the Chinese Civil Service is two-fold: (a) that a department which takes charge of the Civil Service should be separate from and independent of other departments; (b) that competitive examination is necessary if the best brains of the nation are to be obtained for the Civil Service.

It is open to controversy whether competitive examination is the only way of testing the capacity and ability of a man. Nevertheless, it is, at least, a reasonable and just means of selecting candidates for the Civil Service. If the competitive examination system is strictly adhered to, the practice of influence and favouritism will, eventually, be done away with. The independence of an examination department—'Examination Yuan'—has given that department full authority and dignity to maintain and uphold the principle that no incompetent man will be allowed to hold office. It is also interesting to note that in the democratic China of to-morrow the Examination Yuan will exercise its power, by examination and registration, to determine the qualifications required for candidates for public office. It is an abuse of democracy that candidates for election should be intellectually or politically unfit. Representatives and delegates should be the cream of the people. If they are no better than 'the man in the street' it is no wonder that the prestige of legislatures has disgracefully deteriorated.

There is, secondly, the principle of integrity. The public servant may be competent, capable and able, but he may commit some act violating a law or fail to carry out his duties due to negligence. What department of the government can exercise power to check him? According to the Five-Power-Governmental-System, advocated by Dr. Sun, an independent body which takes charge of this function is called the 'Control Yuan.' It performs its duties as would a detective or a watch-dog, supervising government officials in their general conduct both as private citizens and in their official capacity. The officials of this department are given the power to impeach any public servant who may abuse his position. No corruption is permitted or tolerated in a true democracy.

Last, but not least, democracy's weakest point is its inefficiency. At the conclusion of the last world war, new constitutions were introduced in most European countries with a view to adopting democratic principles in governmental machinery, but the general feature of these constitutional governments was the weakness and instability of the executive, resulting in inefficiency and maladministration. In war-torn Europe economic and social problems were immense. Social and economic disorder needed urgent and

appropriate action no less than during time of war. It was no wonder that in post-war Italy and Germany there emerged Fascist and Nazi parties respectively. The then existing conditions of these two countries demanded a strong hand and the emergence of such relentless leaders as Mussolini and Hitler and their satellites was but a natural corollary.

If democracy is to survive, it is necessary that the government must possess executive and administrative powers large enough to cope with the task of the increasing magnitude in a modern state. However, it should only be allowed to exercise its full authority to administer on one condition, that is for the welfare of the nation in accordance with the principle of legalism (which is the counter-word to absolutism). If it exercises its power against the wish and the welfare of the people unlawfully, and if there is no remedy for this blunder, the government will become no less despotic than that of the fascist regime. Therefore, the people who are the masters of the state should have the power to check the government in case it should deviate. A good rider naturally prefers a powerful horse, but he must have both bit and bridle to control the horse. In the Chinese Draft Constitution that power of check is held by the People's Congress in which the authority of the people as a whole is vested. The English people may still think of the supremacy of parliament, but the Chinese may have to evolve a system which may well be called the supremacy of the People's Congress.

It is beyond any shadow of doubt that when a constitution embodies the Three Great Principles and the three essential factors of an ideal government, together with an effective safety valve in the form of the People's Congress, it must be necessarily a perfect document. However, the writer must admit the limitations of the law. A brand new constitution may appear perfect as far as the letter and the spirit are concerned, but there is also the human factor, which cannot be over-emphasized. As the Chinese saying goes, 'Law alone cannot practise itself.' If the Chinese people, when they are given this brand new constitution, are not prepared or are not competent enough to exercise it, the constitution will inevitably become but a scrap of paper, and at its best only be useful as an exhibit! It is, therefore, most essential that the people should be thoroughly trained to know how to practise the supreme law of the land. In this connection education and democracy must go hand-in-hand. Enlightenment of the people is one of the major qualifications necessary for the exercise of a democratic institution.

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## CHAPTER I

### HISTORICAL BACKGROUND

#### A. *Political Chaos (1908-1928)*

A THOROUGH UNDERSTANDING of the constitutional development in China is not possible without a short review of the past efforts made by the Chinese in this direction.

The unenviable position, politically, of China at the end of the nineteenth century requires no elaboration at this stage. The latter part of the Manchu regime was marked by foreign aggression which, by unequal treaties, subjected the people to humiliation and indignity. Though this fact became increasingly evident to the Chinese people generally, there seemed to be no means of redress. The Empress Dowager, in whose hands the Emperor was a mere puppet, was autocratic in the extreme, and the high officials surrounding the throne were corrupt to the last degree.

Gradually, however, a revolutionary spirit began to manifest itself and under the leadership of Dr. Sun Yat-sen showed evidence of increasing strength, until the mutterings of the storm even penetrated to the throne.

With a view to stemming the tide rising against the regime, the Empress Dowager promulgated in 1908 the so-called General Plan of Constitution which was a plagiarism of the Japanese constitution of 1889. As indicated by the name, it included only the fundamental points upon which a future permanent constitution would be based. Prior to the promulgation of such a permanent constitution, to be made presumably in a period of nine years, the General Plan of Constitution was devoid of any validity.

When revolution broke out in October 1911, the Manchu government promulgated the Nineteen Dogmas, aiming at a governmental system similar to constitutional monarchy. But this remedy proved to be of no avail in face of the stormy situation brought about by a movement unprecedented in Chinese history.

The revolution of 1911 paved the way for the establishment of the republic and ushered in a very brief constitution which was called the 'General Plan for the Organization of the Provisional Government.' This document was promulgated on 3 December 1911 (according to the Chinese Lunar Calendar, the 13th day of the Tenth Month, 1911). It had only twenty-one articles, provid-



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ing, *inter alia*, that every military government of the revolutionary provinces was entitled to send three delegates to form a Council of the State which was to exercise the legislative power, and that a Provisional President was to be elected by the delegates. Subsequently, Dr. Sun was elected, possessing adequate power to cope with the situation. Apparently the Provisional Government, to a certain extent, resembled a Presidential system.

As the name suggested, this document was to meet the urgent requirement and necessity at a time of emergency. Republic was but a name and democracy was in embryo.

The inadequacy of the General Plan for the Organization of the Provisional Government to serve as a governmental instrument was keenly felt by revolutionary leaders of the time. Therefore, the Council of the State set its hand on a new document, which was the historic 'Provisional Constitution of the Republic of China' promulgated by Dr. Sun Yat-sen on 11 March 1912.

This new document had seven chapters and fifty-six articles. In the second chapter it comprised eleven articles stipulating the rights and obligations of the people.

The most significant feature of this document was the legislative control of the State Council over the President by the exercise of its right of concurrence. The powers of the President were restricted in many ways. On such important matters as appointment or removal of cabinet ministers and diplomatic representatives, declaration of war and conclusion of peace, the President could not act on his own authority without the advice and consent of the State Council. It is evident that this document was to change the government from Presidential system to Cabinet system.

It is due to the fact that the members of the Council of the State were aware that Yuan Shih-kai, the most powerful warlord of the time, was to succeed Dr. Sun as President of China, and were afraid that the former might abuse his powers, that they made the fundamental change of governmental system.

According to Article 53, Chapter VII, under the heading of 'Supplementary Provision of the Provisional Constitution,' it was required that the Council of the State should make the Law of the Organization of Parliament and the Election Law of Parliament.

The above-mentioned laws were duly promulgated on 10 August 1912. The Parliament was to be divided into two chambers, namely, the Senate and the House of Representatives, and the Senators and Representatives were elected accordingly. According