

# 東方雜誌

第十九卷

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( 1922年11月—1922年12月 )

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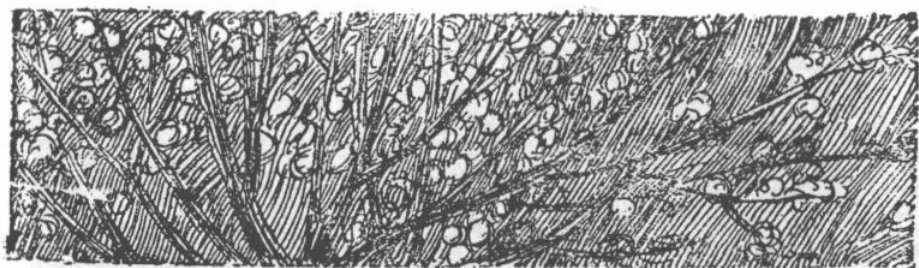
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# 東方雜誌

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憲法研究  
上冊





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▲憲法研究號(上)

憲法上一般問題的建議

中國憲法問題 (錢智修譯) ..... 芮恩施

The Chinese Constitutional Problem from the American

Point of View ..... P. S. Reinsch

中國之制憲 (錢智修譯) ..... 鮑惠爾

Constitution Making in China ..... J. B. Howell

我理想中之中國國憲及省憲 ..... 陳啓修

制憲問題底理論和實際 ..... 孫幾伊

依基督教國主義擬商權之憲法要點 ..... 徐謙

關於中國國憲之建議 ..... 劉文海

憲法問題與中國 ..... 李三无

憲法宜採聯省民主制 ..... 甯協萬

聯邦制及委員會制之研究 ..... 董修甲

中華基爾特社會主義國憲法導言……………徐六綏

憲法上特殊問題的建議

憲法上的議會問題……………張東蓀

國憲上之外交權問題……………周鯁生

我對於國憲的三個建議……………鄧飛黃

我國憲法應明定國民之生存權……………史維煥

輓近憲法上婦女權利問題……………何覺余女士

憲法草案批評

天壇憲法應該怎麼樣改正……………林可彝

評國是會議所擬憲法草案……………朱經農

國是會議所擬憲法草案評議……………董修甲

附錄

▲中華民國臨時約法

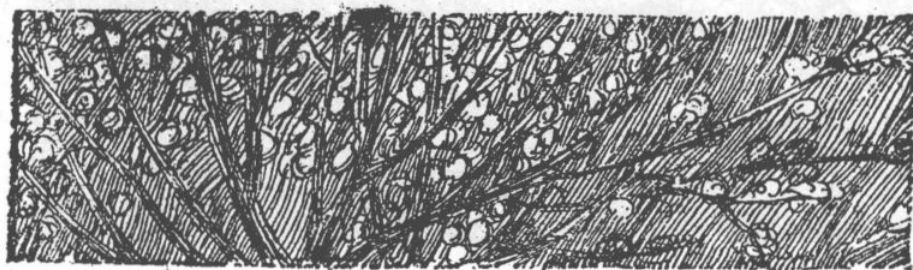
▲大總統選舉法

▲國是會議憲法草案甲種

▲中華民國國會組織法

▲天壇憲法草案

▲國是會議憲法草案乙種



# 中國憲法問題

——由美國人見地觀察——

芮恩施

合衆國成文憲法者，美利堅政制中最顯著之一特徵也。以美國有史以來，既無世及之君權，又無貴族的社會組織，故惟憲法得稱爲安民定志之要素。蓋自美人視之，所謂憲法，非直一政治綱領而已，實通國人民實質上所公認之根本法也。

因此故憲法之爲物，必須爲一至簡之典章，所規定於中者，但能以關於政府及公共行爲最根本之原則爲限。

美國憲法向稱剛性憲法，所以別於不列顛之柔性憲法也。實則此種名稱初不甚當，僅能標示大凡而已。其真正之區別，乃在變更美憲，須經過一特殊手續，中有各種公團，參預其事；至英國憲法不然，但

以國會之簡單行爲，即可得而變更之也。

因不列顛國民之政治經驗，及英人富於保守性故，英之政治生命，亦遂綿延不斷，以至於今。雖國會於法有改憲之權，然就事實而言，其視歷世相承之慣例，固至爲鄭重，不敢輕易更張也。

反之，美國憲法亦非墨守其法文之字句者。美之憲法慣例，亦因實行以後，積先例而發展，此與英國同者也；然其發展，乃由於法院之解釋，則與英憲異者也。法院之具此解釋憲法之權也，甚至國會所定法律，亦得宣告爲違憲，此尤美制中最特殊之現象矣。

此種以法院之行爲發展憲法之方法，果適用於

他國否，實爲一有味之問題。在美之本國言，近亦有反對法院之擁此大權者，以此不啻使法院之權超過立法機關，在理想上固不爾爾也。然其於根本法之憲法及尋常法律間立此區別，殊亦具有深意。蓋無論何國，凡未具英國之政治習慣及數百年之政治經驗者，每易以立法機關之行爲，使其法律循黨派政治之要求，時時劇變，如是則法律將失其安全穩定之本旨矣。夫憲法之最終解釋，原不必定出於法院，然欲授此權於其他之一機關或數機關者，則此之機關，必當爲可以修改憲法者而後可。舉例言之，如兩院議員三分之二之投票，可以修改憲法，則因此定一辦法，使解釋憲法之問題，亦得提出於議院，是固合於論理而便於實行者也。

根本法之簡單，於強有力政府之建設，並不相妨。政府之強弱，以實施其所有之權之能力而定，與權之多寡無關也。假如有一憲法，以管轄外交、鐵路、

政、幣制、國軍及某種固定歲入之權，授諸中央政府，則以之建設強有力政府，已綽有餘裕。而且謂此種憲法利於強有力政府之產生，尤覺允當。即實而論，憲法之所有事，亦祇能粗具大綱，俾政治家之處置實際問題者，於其範圍之內，應國家生活之需要，定行爲之方法而已。設在一七八七年之美國憲法會議，有人主張授美政府現在所操之權力，則其人必爲衆所反對。庸詎知由此簡單根本的權力，爲當時之人之所樂於授予者，經歷代政治家之施爲，竟演成一強力充分之政府有如今日耶？

上述一點，在今日之中國，最宜謹記。設吾人制憲，欲鉅細并包，一無遺憾，則其勢將永無完工之日。惟少數根本事實，爲任何政府所憑之以發動者，則大多數領袖必能予以同意。須知吾人斷不能恃其先見之明，逆料後世無窮之事變。將來之需要，政治家及議會，自能變更國憲之法文及慣例以應付之也。

吾人之謂憲法之應簡單也，其意并指地方團體之通常生活不宜干涉而言。向來中央政府以地方事務之責任，謾諸省縣及地方團體，其立意蓋至善。人民聚處一方，能自治其本土之事務，此中國政治上最大之寶藏也。設人民知中央政府並不欲得權以干涉或妨礙彼等，其必要之大權，乃用爲彼等之保障，以便利其事業之進行，而非阻遏其事業焉，則其對於政府，未有不樂於擁護者。惟地方單位之政治意識，當更進一步，使對其代表在較高單位之政府中之動作，亦知負擔責任耳。

制憲時之最要條件，在認明國民之根本需要與可能性。在對於本國之現行行政制與慣例有完全之智識。使憲法不從此種原料而成，則必爲一徒具形式之死法。至外國經驗之智識，則其效用，僅居次要之地位而已。夫吾人得外國智識之助，固可使所知之本國情形，因互相比較而更爲確切。且一面可教

訓吾人避免某種之錯誤，一面可示吾人以與國情不甚相遠而可供模倣之良法。然其效用亦至此而止，若憲法而全出於模倣，則未有不偏於學理而不適於實行者也。

憲法之觀念，即所謂各種政治行爲所必須遵守之抽象的固定根本規則者，其在中國哲學，亦並非創見。惟中國大儒所注重之根本原則爲「禮」，禮者正當公平之道也，此則與著爲定本之成文法不同耳。當此種觀念之成立也，中國正受治於君主政治及家族制度之下；其所謂合法與正當之觀念，均人格化而附着於一定之社會關係中，如孔子所謂五倫，其尤著者也。故對人的忠心由此養成，而對於抽象物之忠心，如法律思想，公共主權，愛國精神等，則不如西洋之發達，以其附屬於制度而不附屬於個人也。

是故但就政治而言，則法律最高權之觀念，如能

輸入中國，必可爲代替舊日對人忠心之元質。惟就社會生活而言，則此種舊道德實至關重要，所望不以近代之政治組織擾之耳。

憲法對於今日之中國，蓋有兩重功用：其一則擬一固定目標，使國民愛國愛政府之心，咸有所歸宿，以憲法可爲國民之集中點也。其二則於世界視線

集注之時，預呈中國統一之保證。故凡屬中國良友，莫不望此項工作，早日告成。誠以此種政治組織，雖不能各部份俱臻完善，然欲政府權力之施行，將來得徐徐發展，則此固其必要之出發點也。

（錢智修譯）



# THE CHINESE CONSTITUTIONAL PROBLEM

## FROM THE

### AMERICAN POINT OF VIEW

BY PAUL S. REINSCH

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The written Constitution of the United States has been the most distinguishing feature of the American political system. In the absence of monarchical power and an aristocratic social organization, the Constitution has been considered the chief stabilizing factor in American history. To the American mind the Constitution is not a political platform, but the fundamental law upon which all the people of the state are in substance agreed.

The Constitution ought to be a very simple document, laying down only the most fundamental principles of Government and of public action.

The American Constitution has been called rigid, as distinguished from the British, which is flexible. These terms are not accurate, but only descriptive in a general way. The true distinction lies in the fact that to change the American Constitution, a special procedure is necessary, involving the participation of various public bodies; whereas, the British Constitution may be changed by the simple action of Parliament.

It is due to the political experience of the British nation, and also, in no small degree, to the conservative qualities of English character, that British political life has been so continuous. Though Parliament has the legal right to change the Constitution, it is in fact exceedingly slow to modify in any way the traditional practices.

On the other hand American Constitutional Law has not remained within the strict literal language of the Constitution. American Constitutional practice, as in England, has grown through action, from precedent to precedent, and unlike the British Constitution, it has been augmented by the interpretation of the courts. This power of the courts to interpret the Constitution, to the extent even of declaring a law of Congress unconstitutional, is the most distinctive feature of the American system.

It is interesting to inquire how far this method of developing the Constitution by court action would be applicable to other countries. In America itself there has been of late some opposition to this great power of the courts, which seems to set it almost above the Legislature, although in theory it would not be so considered. However, there does seem to be a great deal of wisdom in distinguishing between the fundamental law of the Constitution and ordinary law. In any country which lacks the political traditions and the century-long political experience of England, it would be easy for the action of successive legislatures to change the law so frequently and radically, in accordance with demands of party politics, that the sense of security and stability would be endangered. It is not necessary that the final interpretation

of the Constitution should be made by a court but if that power is intrusted to some other body or bodies, it should be to the same authority that may amend the Constitution. If, for instance, the Constitution may be amended by a two-thirds vote of the members of both Houses of Parliament, then an arrangement by which a question of interpretation can be submitted to this same authority, would be logical and practical.

Simplicity of the fundamental law is quite compatible with the establishment of a strong government. In fact the strength of a government is not determined by the number of its powers but by its ability to exercise those which it has. A Constitution which would give to the central government control over foreign relations, the railway and telegraph system, currency, the national army, and certain definite revenues, would be sufficient to constitute a strong government. It would be more correct to say that it would give the opportunity for the creation of a strong government. As a matter of fact, the Constitution can only afford the framework within which statesmen dealing with practical problems work out the methods of action which the life of the state requires. If any member of the American Constitutional Convention of 1787 had advocated the granting of the powers which the American Government now actually exercises, he would have found no support. But out of the simple and fundamental powers which the people at the time were willing to grant, there developed through the action of several generations of statesmen the powerful and efficient government which now exists.

I believe that this point should be particularly remembered in China at the present time. If we should attempt to work out a Constitution which settles every detail satisfactorily, we should never finish the task. The few fundamental things which any government would have to start ought to be capable of the consent of the great majority of leaders. We cannot anticipate the future by foreseeing every possible contingency. Future needs will be worked out by the action of statesmen and Parliament in modifying constitutional law and practice.

When we speak of the necessary simplicity of the Constitution, we refer also particularly to the desirability of not interfering with the normal life of local communities. It was wise for the central government to repose all responsibility for local affairs on the provinces, districts, and local communities. The greatest political treasure of China is the capacity of the people in their own neighborhood to manage their own affairs. When the people realize that the central government seeks no power to meddle with them or obstruct them, but that its great and necessary powers will be exercised solely for their protection and for favoring, not retarding, their own business activities, they will be willing to support the government. The political consciousness of the local units should be developed by making them realize their responsibility for what their own representatives in the higher units of government may do.

In constitution making an appreciation of the fundamental needs and possibilities of the citizens and a thorough knowledge of existing political institutions and practices in the country are the first requisites. Unless the Con-

stitution is built of these materials it will be only a dead form. The knowledge of foreign experience is useful only in the second order. However, it does help us to understand our own situation better, by comparison with others. It teaches us to avoid certain mistakes, and it shows us certain desirable modes of action which may not be so far removed from our own, but that we may imitate them. But a more general imitation of the Constitution is purely academic and unpractical.

The idea of constitutional law, that is, of an abstract definite fundamental rule to which all political action must conform, is not foreign to Chinese philosophy. But the fundamental principle which the great teachers emphasize is *Li*, the right or equitable way, rather than a fixed body of written rules of law. When these ideas were formed in China the country was living under a monarchical and patriarchal system. All ideas of what is lawful and right were in a sense personified and attached to definite social relations, particularly five classic relations of Confucius. Thus, personal loyalty grew, while the loyalty to abstraction, such as the idea of legality, public sovereignty or patriotism, did not develop in the same sense as in the West, that is, abstractly and attached to institutions rather than to persons.

The introduction of the idea of the sovereignty of law in China would therefore serve to introduce an element which might take the place of the old personal loyalties, as far as government is concerned. In matters of social life, however, the old loyalties are very essential, and it is to be hoped that no modern political arrangement may disturb them.

The value of the Constitution to China at the present time would be two-fold. It would afford something definite about which the loyalty of the nation to its country and government could gather. It would be a rallying point. It would be an earnest of the unity of China, in the eyes of the world. So the friends of China hope that this work may soon be completed. For though no such political arrangement can be perfect in all its parts, it is the necessary starting point from which the future action of the powers of government may develop.



# 中國之制憲

密勒氏評論報記者 鮑惠爾

中國負共和國之名，幾十二年矣，顧至今尙不能制一永久之憲法。試問中國政治領袖所以不能起草一憲法而採用之者，果何故歟？

此一問題，即中國之友所焦急不置者，而以美國人爲尤甚。美人之於中國，固恆持友愛同情之誼，且屢曾於急難之時，與以物質上之助力者也。彼仇視中國者，每謂中國人無自治能力，謂徵諸過去歷史，中國人時時爲外族所征服而受其統治，此等論調，吾人已聞之熟矣。獨美之對華外交，則以與中國以自由發展之機會爲職志。當今之世，無自衛能力之民族，殆已無人注意，其常爲中國人仗義執言者，獨有美國耳。

普通美國人，於中國問題之實際，所知綦渺。彼輩對於中國之意見，大都本其自己之過去經驗，或得諸於少數有教育之中國友人。此等人固深冀中國有自由發展之機會，顧在一方面，又不解中國所以不速定其國家根本法——憲法之理由。試觀美國近日報紙，即多譏評中國之言。此非出自惡意，亦純緣中國不急起直追，組織其國家於現代基礎之上，因而失望憂愁，發爲責言而已。如何以中國不能了此一大事業？何以中國年內亂，幾使商業分崩，國家破產，然經過種種流血戰亂之後，而大局卒未底定？此皆美國人所百思莫解者也。

美國人之受治於共和政體也，於今已百五十年

矣。然共和政體之行於美國，實猶可視為一種試驗。且據美國人一般之感想，欲平民政治之在美國，永保其安全，實與其在他國之安全有不可分解之關連。此即美國人所以格外關心於中華民國之故也。彼輩知美國憲法之觀感與其憲法上所含之理想，其於產生中國革命，視他種勢力為多，故其望中國制憲之成功亦綦切。蓋彼輩知非中國人有一永久憲法而工作於其下，則中國必無秩序與統一之可言；且知中國漂泊於無憲法之時間愈久，則無政府與無秩序之危險亦愈大，勢必產生一萬應良藥之新激進主義，如現在全歐所均受其害之鮑爾希維主義也。

著者於憲法非專家，惟於美國建設統一政府時所經之困難，則略有所知。美利堅殖民地之離英獨立也，實以一七七六年發表獨立宣言時為其開國之期。然此亦僅僅一開國之期而已。其制定憲法而

採用之，尙需時日也。至中央政府之權力，則更在八十七年以後，經一次血戰而後確定。當日美洲殖民地所遭之難題，中有多種，今已發現於中國。初當一七八七年五月二十五日憲法會議開幕時，最初之十三州，雖均有代表出席，然以猜忌爭雄之故，幾陷於永久之分裂。蓋其時富庶之州，欲統治貧弱之小州，而小州亦非其權利確有保障，不願加入聯邦也。時出席會議之代表凡七十五人，在會場中亦無非常可怪之事。彼輩大抵皆平常之商賈、農人、醫士、教育家及軍人、律師等，亦有少數銀行家在內，而尤以少年人居多數。此等代表，多熟知歐洲情形者，其唯一之宗旨，則在新大陸上創建一政體，使迫其國人所由避居至美之弊政，得以永永免除也。彼輩以此為背景，遂起而從事新政府之組織。計憲法會議開會八十一日，其辯論亦常甚激。據言若將辯論之詞，完全記出，可成一百九十冊之巨帙。顧及其成功，乃

僅制一寥寥四千字之簡單憲法，此之憲法，則即今日世界最大民主國且以財政經濟稱霸一時之美利堅國家，所猶受治於其下者也。

佩克君者，前之美國司法次長也，近在英演說，當追述美國制憲時之情形，其言曰：

「信用去矣，商業停矣，無法律得勢矣，不特一階級與一階級間，即一州與一州間，亦發生劇烈之爭，而於精神上呈一可怖之分裂。」

勃拉斯爵士，英之歷史家也，其敘美國制憲時之情狀，則謂：

「設在今日，雖美國人，亦不易推想當時之困難——其時國家各部分，無論大州若小州，均有其不同之情感，不同之利益，以是所遭之困難亦甚鉅，屢使工作瀕於失敗之危境——蓋憲法會議，不特當於原有國民制度極微弱之基礎上，為散居是州之人，別設一國民政府，且於建設國民政

府時，當顧及十三共和國互抱恐懼嫉妬之心，時生利害衝突之點，為諸政府留一自由活動之範圍，以滿足根深柢固之地方感情，而一面則範圍又不可過大，致妨礙國民之統一也。」

中國之情形，大致如下：其自由派政治領袖，以受他國共和政治之觀感，——尤以受自美國者為最多——業已推翻舊日之君政，蓋君主政治，年衰力弱，弊政叢生，其基礎亦已動搖也。然自由派初未竟其全功，組成一新政府，即與反動分子和解，以是時反動分子之勢力，猶未全墜也。自由分子既允反動分子復權，故彼輩今日遂襲取新名義而遍布勢力於全國。反動分子常得外國之助力，且不惜賣其國民天賦之權利以得之。夫仇視中國之外國利益，固不願中國成統一之強國者，彼輩之慣技，則玩弄甲派以反對乙派也。乃中國不愛國之官吏，為得權計，竟亦不惜以關係國命之利權，易得物質上之助力。

總之中國今日之政界，秩序紊亂，黨派紛歧，實無異於一局棋枰。各省獨立矣，而省之中又有對其本省之長官而獨立者。有時各派互相聯合而結爲一派，然未幾而反對之聯合起，彼勢力較強之分子，卽又爲所顛覆矣。

此種情形，或者有命運之神操縱其間，俾中國人於逆境中受自由之教育，亦未可知。然自友愛中國之外人觀之，殊未見黑暗之中，有幾多希望之光線。普通中國人，就各個人而言，其私人品性，其私人自由與國民文化之背景，固在在與人以良感；然就集合體而言，則中國人——尤其是中國之政客，實與無主將之軍隊無異，亦與無隊長及運動規則之運動員無異。中國今日約有六七人，設假以年月，或能解決統一之問題。顧此六七人者，並不通力合作，以完成其事業，而日惟從事個人之競爭，且爲個人之私利互相反對，以增國家之困難。此等官吏，各有一

大隊無用之兵，卽就江蘇一省而論，其所有軍隊，已抵美國全國陸軍三分之一。夫中國者，固夙以平和之國聞於世者也，不謂今日擁兵之多，竟駕世界各國之上；且此等軍隊，不特無益於中國而已，而爲害尤滋烈，爲其以不能忍受之負擔，加諸於國中生產社會也。

數月以前，世界各大國代表，嘗集會於華盛頓，各願限制其本國之軍備。此種限制軍備之辦法，完全由平等之基礎而定，故今日各國咸得節省金錢，而於其國力聲威仍毫髮無損。今試假定江蘇督軍須有陸軍四萬人保護其地位，而浙江督軍之自保地位，其所需人數亦如之，則此二人者，何不可互相聯合，各減其軍隊至五千之數。斯時彼輩之實力，就比較而言，並不遜於從前，而國家則受益無窮矣。使此種裁兵限度，能推行於通國，則中國已得統一之保證。使此種過剩軍隊，能用諸於國家所需要之大事