International Tendencies In The Draft Constitution*

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BY its very nature not iron-clad and immutable, a constitution can claim no validity from ever-lasting to ever-lasting. A constitution is, perhaps, not so much a motive force that invariably deflects the stream of politics as the crystallization of the political forces during a given period. It is true that every constitution embodies certain rational elements which modern German jurists characterize as "Naturrecht", elements considered necessary or desirable as tested by the touchstone of human reason. But as we examine the important constitutions in history, we are led to the conclusion that every one of them has been a product of the spirit of the age, representing the ideals and aspirations of the central figures in politics during a certain age. If it is correct, as the jurists of the Historical School insist, that law is the expression of the *Volksgeist*, it may not be incorrect to suggest that a constitution is, pre-eminently, the expression of the *Zeitgeist*.

A student of constitutional history can hardly deny that the meaning of most constitutional provisions is susceptible to more swift and more drastic change than that of the fundamental conceptions in private law. Take, for instance, the phrases "due process of law" and "police power" as contained in the United States Constitution, and we shall discover that during the past century, they have undergone, insidiously indeed, changes that quite escape any effort to attribute to them a definite meaning. I think the truth is never more convincingly uttered than by a layman in the law, Lytton Strachey, who, in describing the English Constitution, had the following to say:

"The English Constitution—that indescribable entity—is a living thing, growing with the growth of men, and assuming ever-varying forms in accordance with the subtle and complex laws of human character. It is the child of wisdom and chance."[1]

On the other hand, if we take one of the most common phrases in private law, "juristic act", and trace its origin, we can see that its meaning has not changed to a considerable extent since its beginning as a fundamental concept in Roman law. For while law is the norm of politics, the latter is really the force that moulds the former. Particularly is this true in the law of constitution for the reason that politics is intimately bound up with the constitution. Magna Carta has been traditionally regarded as the guarantee of the rights of the people. But a more profound student of English Constitutional history knows that the people at large had little to do with Magna Carta; it was nothing but the outcome of a struggle between an Angevin king and Norman barons and represented merely the political triumph of a particular class as distinguished from the common people.[2]

We have to throw overboard the traditional but erroneous conception that a constitution is an eternal and immutable thing before we can appreciate and evaluate the content of the Draft Constitution. We know that the drafting of the present Constitution is born of a peculiar political background and the spirit of the Constitution suggested by a peculiar political force. If we overlook the background of the Constitution and merely discuss its merits *in abstracto*, we should be in the position of a *connoiseur* who in evaluating an ancient painting, stops short at squaring it with certain canons in the law of painting and at admiring the display of extraordinary technical skill. In any criticism of a constitution, we naturally do not consider it a mere piece of art; we wish to enquire whether it represents the spirit of the age, whether it is responsive to our needs.

It is generally acknowledged that at the present time, China is confronted with more dangers from without than from within. At the same time, it is also generally realized that it is not possible for China to attain a position of prominence in the family of nations simply through the realization of narrow nationalistic ideals. "Nationalism" as preached by Dr. Sun Yat-sen is not contrary to the aims and purposes of the tendency of Internationalism which has been growing apace since the end of the Great War. It is, on the contrary, the high-road to Internationalism and World-Community. To draft a constitution in this *milieu*, therefore, regard must be had to the fundamental conditions that make for the prosperity of the nation, and what is more, to the transformations in international thought after the Great War.

Conspicuous evidence of such transformations in international thought is not lacking in the new constitutions of the world. Publicists have, with good reason, characterized such evidences as international tendencies in constitutional law.[3] These tendencies did not, however, manifest themselves in the several drafts of the Chinese Constitution that were prepared during the past decade. At a time when the National Government is making strenuous efforts to obtain a deserved seat in the community of states and especially when the foreign relations of the government demand close attention, it seems natural that a constitutional draft now should take full account of these tendencies. Such is indeed what we find in the Draft Constitution by Dr. John C. H. Wu, published four months ago for public criticism.

Professor S. R. Chow has ably written: "The international tendencies in a constitution represent in a political sense the movement toward peace and popular

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1. Strachey, **Queen Victoria.**

2. A point established by the researches of Maitland, Vinogradoff, and McKechnie; see, particularly, Morris R. Cohen, "**The Conservative Lawyer's Legend of Magna Carta,**" in **Law and the Social Order**, (1933), p. 19.

3. Mirkine-Guetzevitch, **Les Constitutions de l'Europe Nouvelle**; Mirkine-Guetzevitch, **Les Nouvelles Tendances dans Droit Constitutional**, p. 48-80.

government and in a legal sense the introduction of the principles of international law into the body of the constitution so as to give them the guaranty of municipal law and to demonstrate the unity of the public law system."[4] There are quite a few forms which such tendencies assume in the new constitutions. The most important of these forms are: (1) the declaration, based upon contemporary peace ideals, of the renunciation of war as a national policy, (2) the express incorporation and guaranty of the principles of international law in the constitution, and (3) the limitation upon the treaty power of the state and the condemnation of secret treaties.

The peace movement consequent upon the Great War has, as its purpose, the substitution of peaceful means for forcible methods in the settlement of international disputes. As the League Covenant still tolerated certain wars, (Clause 1 of Article XII), the Pact of Paris was concluded to fill the so-called loop-holes in the Covenant. Though before the conclusion of the Pact of Paris, certain states, in response to the international tendency against war, had imposed rigorous limitations on the constitutional right of declaring war, there was general agreement that certain wars were not illegal. The right of a state to declare war was, however, categorically denied by the Pact of Paris, stipulating, "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another." True, certain writers hold that the Pact of Paris is only a moral exhortation to the signatories, and, as it is not provided with sanctions, it does not impose any legal obligation. This is, however, contrary to the responsible opinion in the various states, as for instance, the epoch-making address of Mr. Henry L. Stimson on August 8, 1932, which emphasized the legal nature of the Pact and declared that the Pact as a legal instrument was the source of positive rights and duties.[5] The commentary of Mr. Stimson evoked warm reception and support from the other governments and particularly from world public opinion. The recent Spanish Constitution provides, in Article 6, that "Spain renounces war as an instrument of national policy." According to a publicist, "such a provision limits not only the act of the declaration of war on the part of a government, but also the right of war on the part of the state itself. Its purpose is to render the national policy of a state in consonance with the spirit of the League Covenant and especially with the obligations in the Pact of Paris."[6]

China is a signatory both of the League Covenant and of the Pact of Paris. For four years since the signing of the Pact of Paris, the Pact has been subjected to repeated and difficult challenges which are still going on, as Mr. Stimson put it a year ago.[7] China has been the victim of such challenge and is still in the throes of its after-effects. The series of tragic happenings is sufficient to make all disbelievers in international organization more skeptical of the tendency toward the renunciation of war, particularly those in China who themselves see their compatriots suffer from an implicit faith in and reliance on international peace instruments. It would not, indeed, be at all strange if in the present Draft Constitution a provision were found exhibiting intense nationalism or nascent militarism. Happily, such is not the case. Article 10 of the Draft Constitution reads: "The Chinese nation observes righteousness and peace as its principle, but as against external aggression the National Government shall have recourse to arms for resistance." The first part of the Article abounds in the spirit against war, though as a matter of language it may be suggested that abstract ideas such as "righteousness" and "peace" may be difficult to interpret in a legal instrument. Would it not be possible that the drafter, disillusioned as to the potency of the Pact of Paris as an instrument for the interdiction of war, advisedly preferred abstract language to a reiteration of international obligations such as are prescribed in Article 6 of the Spanish Constitution? The second part of the Article in the Draft is, as can be expected, inspired by the flagrant violation of Chinese territory by an aggressive neighbor. At this time when our ability of self-defence has not been too well availed of, the incorporation of such a provision has undoubtedly the effect of a stimulus. Again, self-defence is considered by many publicists as not only a right but a duty of the state. The *Selbstverteidingungspflicht*, especially on the part of the members of the League of Nations,[8] has formed the subject of serious study both in and outside the League. Its incorporation in the Chinese Constitution is indeed based upon different grounds, but it can not be denied that the fundamental idea is the same in both cases.

A general belief seems to prevail that international law is invariably superior to municipal law. But in strict legal view, this is not the case. For example, in England, when a rule in municipal law on a certain point is peremptory and categorical, the court will refuse to apply a rule of international law that is positively derogatory thereto. In America, only treaties are deemed as the law of the land; and we have to remember that besides treaties international law comprises as its sources at least the following: (1) international custom, as evidence of a general practice accepted as law; (2) the general principles of law recognized by civilized nations; and (3) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[9] Except for those sources expressly recognized by the law, the

4. S. R. Chow, **International Tendencies in the Law of Constitution** (in Chinese), **Wu-Han Quarterly Journal of Social Sciences,** Vol. III, No. 3, p. 617.
5. **The Pact of Paris: Three Years of Development,** Address of Henry L. Stimson before the Council on Foreign Relations, August 8, 1932.
6. S. R. Chow, op. cit., p. 625.
7. **Supra,** note 5.
8. Paul Weber, **Die Verteidingungspflicht der Gliedstaaten des Voelkerbundes,** Zurich, 1932; Clyde Eagleton, **The Attempt to Define Aggression,** New York, 1930.
9. Statute of the Permanent Court of International Justice, Article 38.

American judge has therefore the discretion not to apply a certain rule cited as international law. While the government as the societal agent of the state may incur international responsibility as a result of the refusal of a judge to apply a rule of international law, there may be no further remedy open to the party as far as the judicial process is concerned. Recent constitutions of Europe particularly give express recognition to international law as possessing the same force as municipal law. Article 4 of the Weimar Constitution provides: "The generally recognized rules of the law of nations are considered as binding components part of the German imperial law." Similar provisions are found in the Constitution of Austria (Article 9) and in the Constitution of Estonia (Article 1, Clause 4). Though the question of primacy as between international law and municipal law is one about which considerable controversy prevails among the theorists,[10] it is clear that once international law is recognized as part of the law of the land, the court may not refuse its application in a national court on the theory, long ago exploded, that international law is not law, but what John Austin calls "positive international morality."

The study of international law in China dates back to the time when W. P. Martin published his Chinese translation of the celebrated treatise on the subject by Wheaton. The application of international law in national courts, however, is a phenomenon with which the Chinese judge and the profession are hardly familiar. With the ultimate abolition of extraterritoriality in China, the occasions for the application of international law in Chinese courts will be rapidly increased. Article 14 of the Draft Constitution provides: "The generally recognized principles of international law which are not contrary to the spirit of this Constitution shall be treated as of equal validity with the law of the Republic." This is a provision which conforms to the international tendency regarding the incorporation of international law into the body of municipal law, and serves as an effective corrective of the misconception among our people as to the true nature of international law. While the exception contained in the provision seems a little too abstract, it will be found on closer examination that its inclusion is a necessity. It can not be denied that traditional international law is still tinctured by the spirit of imperialism; many of its provisions are weapons which are at the disposal only of the so-called Great Powers. This is true particularly as regards the rules concerning the responsibility of states in relation to the damages claimed by the aliens.[11] At the sessions of the Hague Conference for the Codification of International Law in 1930 there was apparently a great divergence of views on the part of the so-called Great Powers and on the part of the so-called Small Powers regarding the question of state responsibility. Vehement discussions prevailed at almost every meeting of the commission specially in charge of this question. For example, as regards the question, what is the standard according to which foreigners in a country should be treated, the delegates of the Great Powers insisted that there was a standard of the so-called civilized states and that if a state did not measure up to that standard, it was to be responsible for any damages suffered by the foreigner even if the foreigner was treated on exactly the same plane as the native. The delegates of the Small Powers, on the other hand, pointed out that the so-called standard of a civilized state was incapable of exact definition and in actual cases it would be the strong nation armed, and not the weaker one, who was to take advantage of the "convenient ambiguity" in the interpretation. The delegates of China were naturally opposed to the thesis of the Great Powers in this regard.

Again, in traditional law, a treaty signed under duress is still considered valid even though it lacks the consent necessary to the formation of an agreement. Despite the more rational views as shown in the writings of recent publicists, who oppose strenuously the theory that submission under duress is true consent, the majority of writers still adhere to the time-worn conception which an American publicist has aptly described as a rationalization of force.[12]

Also in regard to the question whether a citizen of dual nationality can claim the protection of one state as against the other,[13] traditional international law is deplorably lacking in appropriate provision in cases where, as with the Chinese residents abroad, the inhabitants of the state, though possessing dual nationality, constitute a vast majority of the population and are united to their parent state by many racial, religious and social ties. The Chinese abroad really constitute a nation in many places where they reside, and as such ought to be distinguished from individual residents in a foreign state. This explains why China at the Hague Conference stood firm on its right to extend diplomatic protection to Chinese residents in foreign countries, even though these Chinese possess in addition the nationality of the state of their residence. Article 16 of the Draft Constitution provides: "The state shall protect and assist overseas Chinese according to their needs," a provision apparently inspired by the earnest desire of the state to see to the full protection of Chinese citizens abroad.

The above examples serve to show that certain rules in traditional international law affect unfavorably the very existence of China as a modern state, and for this reason will not perhaps enjoy the constitutional guarantee accorded to international law in general. This is no exhibition of narrow nationalism or chauvinism on the part of China. But, if there is such a thing as American or Latin-American international law, we may hope that our view may receive endorsement from states of the same mind and ripen into a body of rules having particular application pending the maturity of an international or-

10. Georges Scelle, Precis de Droit des Gens, p. 31 et seq.
11. Proceedings of the Hague Conference for the Codification of International Law, 1930, Records of the Third Committee.
12. Remarks of Professor Charles G. Fenwick, Proceedings of the American Society of International Law, 1932; Also Fenwick's International Law, p. 327-330 Reut-Nicolossi, Zur Problematik der Heiligkeit der Vertraege, Innsbruck, 1931.
13. Proceedings of the Hague Conference for the Codification of International Law, 1930. Records of the First Committee.

ganization which will give assurance of security and protection to the weak states.

A very prominent characteristic of the post-War constitutions is found in the provision for the democratic control of foreign policy. This is best seen in the constitutional limitations placed upon the treaty power of the executive department of the state. Before the War, there was practically no constitution, that of the United States apart, providing that the executive was to be subject to the checks of the legislative in this regard. No such checks exist in England, and they are quite inadequate in France. The legislative checks of foreign policy constituted a step toward the realization of pure democracy and represent an advance in municipal law. And the exercise of supervision by the Legislative Department over the conclusion of treaties tends to bring national legislation more in accord with international legislation, thus leading to the unity of international law and national law, the ideal of most publicists.

In the new constitutions of Europe, we find thoroughgoing provisions concerning the limitations upon the treaty power. The German Constitution (Article 45), the Polish Constitution (Article 49), the Austrian Constitution (Article 50), and the Estonian Constitution (Article 60) all provide for the control by the Legislature of the treaties made by the Executive.

The condemnation of secret treaties is another feature of post-war constitutions. The new Spanish Constitution (Article 76) provides: "Spain shall assume no responsibility as to secret treaties or the secret parts of treaties." The Greek Constitution of 1927 also provides, in Article 82, "The secret clauses in a treaty shall in no case have the effect of modifying other clauses in the treaty, which are not secret."

The significance of the condemnation of secret treaties is two-fold. In the first place, one of them is that secret treaties constitute a flagrant violation of the principle of popular control of foreign policy. In the second place, the condemnation of secret treaties is in consonance with a positive rule in international law. Secret treaties were early condemned in the First of the Fourteen Points of President Wilson. Later, it was provided in Article 18 of the League Covenant that "every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered." With this article, the condemnation of secret treaties has advanced from the stage of moral disapproval to that of positive prohibition.

The limitation upon the treaty power as provided in the Draft Constitution may be discussed from two standpoints. First, as to the substance, we find the provision (Article 13) that "treaties concluded between the Republic and other states shall be based upon the principle of international equality and mutual respect for each other's sovereignty," and "measures shall be taken to revise or abolish any treaty contrary to this principle." This article starts from the premise that in order to elevate China to the position of a modern state, the so-called "unequal treaties" should be done away with at the earliest possible moment. As a restriction on the treaty power, it emphasizes on the substantial conditions which have to be fulfilled before a treaty becomes the law of the land.

From the procedural point of view, the Draft Constitution provides that the Executive Yuan is to propose to the Legislative Yuan bills concerning the conclusion of treaty (Article 99, Clause 1), the Legislative Yuan shall have the power to pass bills concerning the conclusion of treaty (Article 85), and that the President represents the National Government to conclude treaties or agreements with other states, which acts shall not be valid without the concurrence of the Legislative Yuan (Article 77). On a close analysis, it will be found that while these provisions bespeak much painstaking planning, they are liable to the criticism of being too circuitous and tending to the duplication of functions. As envisaged by the present draft, the National Congress is composed of the delegates of the people elected from the electors of the districts or municipalities (Article 43). As such its nature is quite different from the electorate as understood in Europe or in America. As the delegates of the National Congress are elected for a term of three years, and as their functions are quite similar to those of the legislature in a republic, the Legislative Yuan as its appointee is only equivalent to a parliamentary committee in a modern legislature. If we regard the Legislative Yuan as the organ through which the people exercise their control over foreign policy, there are at least two stages which must be traversed before the popular will can make itself felt. That is to say, the electorate must run the gamut of the National Congress and the Executive Yuan before the Legislative Yuan can be reached. Needless to say, this is an unnecessary hindrance to the exercise of popular control. If we compare this proposed system to the 1913 amendment to the Swiss Constitution providing for the exercise of referendum over treaties of an indefinite period or of more than fifteen years' duration,[14] we shall have reasons to regret that the provisions in the Draft Constitution fall short of our craving for a system that will best facilitate the popular control of foreign policy.

In regard to secret treaties, the Draft Constitution provides, "secret treaties are incompatible with the principle of nationalism and shall be deemed null and void." (Article 12). While it is true that not all secret treaties are incompatible with the principle of nationalism, it nevertheless remains that in a weak state secret treaties are generally the means through which a government yields important concessions, quite oblivious of popular will. The present provision is naturally a warning against unreserved surrender to an invader during the present crisis in China.

A most novel and, withal, important article in the Draft Constitution is found in Article 11, providing, "No

14. Edward George. Le Controle du Peuple sur la Politique Extereure, Geneve, 1916.

CHIEF EVENTS

THE SINO-JAPANESE CONFLICT

DIRECT NEGOTIATION DISCREDITED

Oct. 21.—Rumours that direct negotiations would be opened shortly between China and Japan are discredited by Mr. Sun Fo, President of the Legislative Yuan.

Speaking at a press interview, President Sun admitted that there had been an easing in the tension between China and Japan, as the latter, due apparently to the increasingly strained relations with Soviet Russia, appear to be adopting a more conciliatory attitude towards China.

This did not mean however that there was any foundation in the reports that China would open direct negotiations with Japan and accord formal recognition to "Manchukuo" in exchange for the abolition by Japan of her extra-territorial privileges in China. The Government is fully aware that such a step would result in the permanent loss of the four North-eastern provinces, Mr. Sun said.

ARIYOSHI DENIED PARLEY

Oct. 21.—Mr. Ariyoshi, Japanese Minister to China, through his secretary, Mr. Arino, formally denied yesterday that he had come to the North to hold parleys with the Chinese authorities at Peiping for a settlement of the Sino-Japanese dispute.

NATIONAL AFFAIRS

THE LOCAL AUTONOMY OF MONGOLIA

Oct. 22.—General Huang Shao-hsiung, Minister of Interior, who has been appointed by the Government as a special envoy to deal with the question of the proposed local autonomy for Inner Mongolia, left for Peiping yesterday *en route* to Chahar and Suiyuan.

Oct. 23.—Mr. Chao Pei-lien, Vice-Chairman of the Mongolian and Tibetan Affairs Committee, who has been appointed by the Central Government to assist General Huang Shao-hsiung, Minister of Interior, to inspect conditions in Inner Mongolia, left Nanking for Peiping by the Peiping-Pukow through train yesterday.

Oct. 25.—Since their arrival in Peiping a few days ago, General Huang Shao-hsiung, and Mr. Chao Pei-lien have been occupied in exchanging views with various quarters regarding the autonomous movement in Inner Mongolia.

Oct. 27.—It is understood that a set of general principles for dealing with the Mongolian autonomy movement has been adopted at a recent meeting of the Central Political Council.

While details are not yet available, it is learnt that the present Mongolian and Tibetan Affairs Committee will be converted into a Ministry of Border Affairs to be placed under the direct jurisdiction of the Executive Yuan. General Huang Shao-hsiung will probably be made Minister with Messrs. Pai Yun-ti and Chao Pei-lien as Vice-Ministers.

A Mongolian Political Affairs Committee will be organized to attend to local affairs.

IMPORTATION OF JAPANESE RICE

Oct. 23.—Measures for curbing the importation of Japanese rice by unscrupulous merchants are recommended by the Shanghai Rice Merchants Guild, in a petition to the Shanghai Special City Party Headquarters and the Bureau of Social Affairs.

The Guild reports that eight rice stores in Nantao recently purchased a total of 24,986 bags of Japanese rice. As this will not only aggravate the distress of the rural population but also endanger the foundation of the nation, the Guild, following an emergency conference, has decided to request the Party and Government authorities to confiscate the "enemy rice" imported by the unscrupulous merchants.

Oct. 25.—Following protests and warnings from various quarters, it is learnt that the eight rice stores in Nantao responsible for the recent importation of Japanese rice cancelled their contract today with the American Import firm, to which they paid a sum of $10,000 as compensation.

EN BLOC RESIGNATION OF KANSU PROVINCIAL GOVERNMENT

Oct. 23.—The resignation *en bloc* of the members of the Ninghsia Provincial Government Committee, headed by General Ma Hung-kuei, the Chairman, has been submitted to the Central Government by telegraph. This move is intended to emphasize opposition to the passage through Ninghsia of the 41st Army under General Sun Tien-ying, which is

territory of the Republic forcibly occupied by another state shall be ceded through peace negotiation or as a result of a peace treaty." This article is symbolic of a momentous tendency in current international law. It has, of course, as its background our national policy of refusal to surrender in the Sino-Japanese dispute. The incorporation of such a provision in the Draft Constitution is, in a political sense, a step forward in the consolidation of Chinese public opinion. But it is in the relation between international law and municipal law that this provision most claims our attention. This provision is a crystallization of the so-called Stimson doctrine of non-recognition, or rather a device that makes possible the reception of the doctrine in municipal law. And as such it is an ingenious device. While the Stimson doctrine has gathered overwhelming support in the family of nations and in world public opinion, this is the first time when it finds concrete incorporation in a municipal law system. It is not improbable that in the near future, many governments, having the promotion of international peace at heart, will follow our example in introducing this principle into their municipal law. The suggestion for its incorporation in the Chinese Constitution is indeed based upon nationalistic grounds, but when other states follow suit, it will at once acquire the force of an important international tendency.

When we have surveyed the *ensemble* of the Draft Constitution with particular reference to its provisions regarding the international relations of our country, we are led to recognize its character as an embodiment of the time-spirit, although its restrictions upon the treaty power—and for that matter, the power to declare war and to negotiate peace—are still inadequate as an instrument for the popular control of foreign policy. At this time when hundred and one problems in our foreign relations clamor for our unremitting attention, the provisions above-discussed, carefully formulated out of an abundance of new material, are worthy of our meticulous selection. I remembered very vividly the words of Professor Laski, who, lecturing in Geneva, said that in a state like China where there did not exist a constitutional machinery for the popular control of foreign policy, the popular demonstrations and petitions were the only consoling substitute. I was deeply moved by his words. Let us hope that our people will soon be equipped with constitutional and legal means to make their influence felt in the supervision over foreign policy. It is only by this way that emotional and impulsive and extra-legal actions can be prevented.