

Pertinent Views On The Latest Constitution

By LIN YU (林 幽)

WHEN Dr. John C. H. Wu completed his First Draft of the National Constitution, he was modest enough to apply to Mr. Sun Fo, President of the Legislative Yuan, for the permission to submit it to public discussion and criticism. It was released early in June, and criticisms it surely has had aplenty, some favorable and others adverse. Certain commentators disagree with Dr. Wu in the fundamental attitude adopted in the draft toward important phases of government, while others criticise the text in its technical aspects. I shall only try to give a brief résumé of these diverse opinions without including numerous direct quotations, because space does not permit.

The first point of controversy centers, of course, around the acceptance of the San-Min-Chu-I as the basis of the draft constitution. The best defence, curious though it may seem, has come from one of the severest critics, Mr. Chang Chi-pun, who has offered a draft of his own. This is not to be wondered at, for Mr. Chang is an ardent adherent of Dr. Sun's principles. In his article "Constitution and Revolution" in the September issue of *The Current Events*, he asserts that every constitution is merely a written code of the creeds of the revolution which precedes the founding of the new state. The American constitution embodies the individualism of the Americans in the latter half of the eighteenth century, and in the constitution of Soviet Russia, needless to say, is Marxian communism writ large. Therefore, it would be ignoring the forces of history which have been at work during the last two or three decades in China, if San-Min-Chu-I were to be excluded from the constitution.

But this able defense does not satisfy critics who take Dr. Wu to task for proclaiming, in Article I of the Draft, that "the Republic of China is a San-Min-Chu-I Republic." Both "Ching Yuan" writing in the August number of *The National Renaissance Monthly* and Mr. Chu Ching-lai writing in the July 1 issue of *The New Society Semi-Monthly* argue against it in a most frank manner. If the constitution, they contend, sets down in black and white that China is "a San-Min-Chu-I republic," then it follows that it would be unconstitutional for the people to hold any other isms or even to criticise the San-Min-Chu-I. Mr. Chu further maintains that Article I and Article 198, (which provides that "the freedom of thought and study in the pursuit of learning shall be protected in so far as it does no harm to the order of society") are contradictory one to the other. One of these two articles must go.

In his draft, already referred to, Mr. Chang Chi-pun is even more thorough in the adoption of the San-Min-Chu-I than Dr. Wu, because he persists in providing for the removal of obstacles which may prevent China from becoming a free and unfettered nation—the goal of nationalism, the first principle of San-Min-Chu-I.

The next point of controversy revolves around the rights of the people. "Kuan Ou" comparing the John Wu draft and the Chang Chu-pun draft in *The Shih Tai Kung Lun* of August 4, highly praises Article 24 of the former which, for the purpose of guaranteeing the people the right to the writ of *habeas corpus* specifically stipulates that "the court may not reject such petition (for the writ of *habeas corpus*) and the responsible authority may not reject the court's demand for trial."

The consensus of opinion, however, seems to be adverse to the phrase, "except in accordance with law," which appears in nearly every article granting the "constitutional rights." As the antiquated *Yueh Fa* (約法) also guarantees us these rights under the same condition the present draft affords little improvement. The critics seem agreed, too, that the limitations on these rights, whenever necessary, should be specific. "Ching Yuan" illustrates what he means by citing articles from constitutions of other countries. Thus the constitutions of Finland, Poland, and Turkey guarantee the freedom of speech and of press by a provision that no writing is subject to censorship before publication though the writer may be prosecuted for criminal intent. The German constitution also provides that no permit need be obtained from the government for a meeting of unarmed citizens, and that parades and demonstrations may be restricted only by the court. Further, associations may be formed freely provided the aims are not in conflict with the criminal code, and this right may not be restricted by law aiming at the prevention of disturbances or because of political, social and religious beliefs. "Kuan Ou" further informs us that the Chang Chih-pun draft is superior to John Wu's in this respect, because it states the specific conditions, under which these rights may be restricted.

In the discussion of this topic, Mr. Chang Chih-pun desires to introduce two measures to guarantee the rights of the people. First, any military man in active service shall not be allowed to express his opinions on political questions of the day with a view to influencing their solutions. Second, a military man may be elected president of the republic only after he has retired from active service for over three years.

Next, we come to the organization of the government, national, provincial, and local. A word of explanation is perhaps necessary here. According to the teachings of Dr. Sun Yat-sen, there are two different kinds of powers in a state: the political or policy-forming powers, and the administrative powers. The former belong to the people and are four in number, viz. election, recall, initiative, and referendum; and the latter belong to the government and are five in number, giving rise to the five-power government, which consists of the legislative, the executive, the judicial, the examination, and the

control *guan*. But the conduct of the government is to be based on the system of committees and commissions.

But the committee system has been found lacking in efficiency and the sense of responsibility. All the critics, therefore, welcome Dr. Wu's departure from it and his endorsement of a responsible chief for each department of government, be it the governor of a province or the president of the executive *guan*.

Of the organization and function of the National Congress (corresponding to the parliament in other countries) most of the critics are highly dubious. It will meet, according to the First Draft, once in three years for only one month, unless by a notice of one-third or more of its membership or by summons of the national government, extraordinary session is convened. Whether or not the congress can, in the circumstance, perform its ten weighty duties as enumerated is truly questionable.

Further, it is to this congress that the national government is responsible. What chance is there for the congress to check the acts of the government when it is not in session? asks the critic in *The National Renaissance Monthly*. But on the other hand, there is, as pointed out by Mr. Chin Ming-sheng in the September issue of *The Current Events*, no check as to what it might or might not do during its session. The only safety device seems to be embodied in the government's unconditional obedience to its wishes, since it has not the power to dissolve the congress as the executives of certain countries do.

According to Mr. Chin's interpretation of Dr. Sun's political teachings, the congress should act as the representative of the people to watch the government and to coordinate the five *guan*, and hence it is unnecessary to create the State Council, as provided by Dr. Wu in the First Draft. Moreover he does not believe that part of the powers properly belonging to the congress should be, as it is, given to the Legislative Yuan. In this, Mr. Chin is probably referring to the powers to pass budget, amnesty, the declaration of war, and the conclusion of peace and other treaties. But another critic, Mr. Li Ti-chun, writing in the August number of *The Current Events*, criticises the First Draft for the provision that the members of the Legislative Yuan shall be elected by the Congress, who, he holds, should be elected only by the people.

This conflict of opinion is, without doubt, due to the lack of definite and clear conception of what the Legislative Yuan should do. If we are to have the Legislative Yuan retain the powers given it by the First Draft, then its members must be elected by the people to whom they shall be answerable. If we want to restrict the Legislative Yuan within the realm of legislation alone, then we have to give those powers other than legislation to the Congress. In this question, perhaps, Mr. Chin is right in holding that the last alternative is what was taught by Dr. Sun Yat-sen, viz.,

the separation of the policy-forming powers from the administrative powers.

Regarding the provincial government, critics are of the opinion either that the Provincial Assembly should be elected directly by the people and not by the district and municipal councils, (Chang Jui and Tong Siu-chia in *The Current Events*, August) or that it has no right to exist, because it does not tally with Dr. Sun's doctrine. (Tien Ching-chin *The Current Events*, August).

Mr. Tong also desires to see that the terms of the governor and the district magistrates be extended from three years to six, that each provincial governor be elected by the people, not by the provincial assembly, that the power of recall be restricted so that no official may be recalled within the first year of his tenure of office, and that the district magistrate need not be appointed by the national government.

Mr. Chang Jui is inclined to grant greater measure of autonomy to the provinces, but Mr. Tien prefers to have each provincial government, as an agent of the national government, merely supervise the self-rule of the districts and municipalities. He also pointedly asks: If, as provided in the First Draft, the national government shall not station its army in the provinces except for national defence, and shall have no control over the provincial gendarmes, what shall the national government do, in case the gendarmes of one province are mobilized to invade another province?

Such criticisms get us nowhere except pointing out clearly that we must decide whether we want a strong centralized government or we desire to give a larger measure of autonomy to the local governments before we can draw up a satisfactory constitution.

The provisions concerning the "Livelihood of the People," another principle of San-Min-Chu-I, have aroused the least criticism. Mr. Chang Chi-pun advocates the limitation of private capital so that one day Dr. Sun's aspiration that "the land shall be owned by one who tills it" may be realized, and that the key industries shall be owned by the state.

For education Article 192 sets forth that "the national and local governments shall adequately provide and guarantee the necessary educational funds," but it may be properly asked: How can one determine whether the money needed is "necessary" or not; what is the standard of adequacy; and what, if the government fails to provide the necessary funds?

Last of all is the guarantee for the constitution itself. Though the provision is highly praised by Mei Ju-ao in the August number of *The Current Events*, it seems to me that the people are going to get only as much constitutional rights as they can force the officials and soldiers to respect them, and no more. In their own power after all lies the best guarantee.