

Dr. Sun Yat-sen's Five-Power Constitution: Theory and Practice

Frederick Tse-shyang Chen

Professor of Law Emeritus, Quinnipiac University

In the late 19th century, Dr. Sun Yat-sen led a revolution in China aimed at the overthrow of the Manchu Dynasty and the creation of a republic. He led a revolutionary party which, after several reorganizations and changes of name, came to be known as the Kuomintang (hereafter "KMT") until the present day. The guiding ideology of the KMT has been Dr. Sun's Three Principles of the People (hereafter "TPP"), which seek to realize for China internal and external equality, democracy and the advancement of people's livelihood. Dr. Sun also envisioned the new republic to have its people act collectively as the new "emperor" of China and to have a government that would be all-capable, all-competent in the service of the people and yet respectful of their authority and individual rights. It was for the purpose of achieving these twin goals of making the people the emperor and establishing an all-powerful government that he devised the five-power constitution (hereafter "FPC").<sup>1</sup>

In 1911, exactly a century ago, the revolution scored its first victory, though by unexpectedly, when the Wuchang Revolt succeeded in declaring independence from the Manchu Dynasty and establishing the first military government for Hupeh. The victory was followed by the declaration of independence of many other provinces and cities, some achieved by forcible action and others by the switch of loyalty of the local governor, and by the abdication in the following year of the Manchu Emperor. Since the Wuchang Revolt, a number of constitutive documents have officially taken effect in China. Did they follow the model designed by Dr. Sun?

In the following pages, I first elaborate the theory of the FPC, pointing out four characteristics.<sup>2</sup> I next survey the actual practice with respect to the same characteristics, before I conclude.

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<sup>1</sup> The relationship between the TPP and the FPC is, according to the orthodox view of the revolutionary party, the Kuomintang (hereafter "KMT"), that the former represents the ultimate goal of the revolution and the latter, the means to achieve that goal, thereby making realization of the FPC a condition precedent to the realization of the TPP. See 喬寶泰著: 中國國民黨與中國民主憲政, 第 210 頁 (1994) (引蔣中正言). But, it would seem, even a government organized under a constitution that follows a three-fold separation would have no difficulty in carrying out the TPP.

<sup>2</sup> Unfortunately, his own written exposition of the FPC was destroyed by a fire during the mutiny of General Jiong-min Chen of June 16, 1922. As a result, authors have been able to present no more than an incomplete construct of the FPC by relying on bits and pieces of information gathered from Dr. Sun's other writings and published utterances.

## A. THE THEORY OF THE FIVE-POWER CONSTITUTION

Dr. Sun Yat-sen first publicly announced his proposal of the Five-Power Constitution (hereafter “FPC”) in 1905 and elaborated on it somewhat later. The theory of the FPC contains four essential parts:

### 1. The Stages for Completing the Revolution: Military Rule, Tutelage Rule, and Constitutional Government

To Dr. Sun, a complete revolution involves two tasks: extraordinary destruction, and extraordinary construction. For the Chinese revolutions, the task of extraordinary destruction was the overthrow of the Manchurian Dynasty, and the task of extraordinary construction was the realization of the FPC and the TPP. He devised a plan of orderly progression from the overthrow of the Manchurian Dynasty to the creation of a constitutional government for the new republic consistent with the FPC. This plan was first enunciated in 1906 in the Revolution Plan of the Alliance for Chinese Revolution<sup>3</sup> and has been reaffirmed in subsequent KMT pronouncements. It divides the revolution into three successive stages: a military stage; a tutelage stage; and a constitutional government stage. The transition from one stage to the next is to be province by province. Thus, at any given time during the transition, it is possible to have some province already having reached the third stage, while others remain in the second or even the first stage, as the speed of progress necessarily varies from province to province.

The first stage was the stage of “military (forcible) operations,” a stage destructive in nature. During this stage, which was estimated to last three years,<sup>4</sup> the revolutionary party would function after the fashion of a military ruler in order to eliminate by force all domestic counter-revolutionary forces and other obstacles to the revolution. A parallel operation of the revolutionary party during this stage was the dissemination of the TPP to the people in order to win their support. During this military stage, the revolutionary party, acting as a military authority, was to enforce martial law.

The second stage was the stage of “tutelage.” This stage was to commence, province by province, when a province had been brought under the complete control of the revolutionary party. During this stage, the revolutionary party, acting as a “tutor,” so to speak, would provide the people of every county with a lengthy course in propaedeutics on their political rights as the “emperor” and let them institute home rule, while the revolutionary party managed the affairs of the state. During this stage, the tutelage government was to enforce a “tutelage covenant,” a document that provided for the rights and obligation respectively of the tutelage government and the people in relation to each other. It should

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<sup>3</sup> The Alliance was a predecessor of the KMT.

<sup>4</sup> The estimated period of time of three years for bringing to an end the military stage first appeared in the “Declaration of the Military Government” of the Alliance for Chinese Revolution in 1906. The Declaration also set an estimated period of six years for the second stage. These estimated time periods were later dropped by Dr. Sun in “The Fundamentals of National Reconstruction,” drafted by him.

be mentioned that the tutelage government was to be a continuation of the military authority set up at the beginning of the revolution.

The tutelage stage was a transitional stage from military to constitutional government. But why a tutelage stage? Dr. Sun thought it to be particularly important for a people who had for millennia lived in a condition of subordination under autocratic rule and consequently suffered from a “syndrome of ‘obedientism,’ to coin a word.” The people were, further, overwhelmingly illiterate, uneducated, poverty-stricken, backward and ignorant of what went on beyond their individual parochial communities and indifferent to politics, so that they respected and readily submitted to authority but not truth, identified with the family or the clan but not the state, and remained under the spell of the royal autocratic system,<sup>5</sup> had no exposure to democracy, were accustomed to shirk responsibility and involvement in civic affairs, and were prone to be passive.<sup>6</sup> Moreover, the large majority of the people cared little about the difference between autocracy and democracy; all they cared about was a government, dynastic or constitutional, that would attend to the basic needs of their lives. The revolution led by Dr. Sun was meant to transform the people from being “passive subjects” of the emperor to being an “active emperor.” The sudden reversal of role from the ruled to the ruler could render the people to be at a loss as to what they were to do and how to act. A people at loss might either revert to their old habits and eschew their newly acquired responsibilities or fall prey to the

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<sup>5</sup> Even in present day Taiwan, the news media used expressions associated with the emperor and his family, such as 欽, 御, 駙馬, to describe former president Chen Shui-bian and his family. The Government and the KMT used similar expressions to refer to the death of President Chiang Kai-shek.

<sup>6</sup> In Taiwan, one hears a proverbial remark: “The more you do, the more likely you will be found to be wrong; the less you do, the less likely you will be found to be wrong; if you simply don’t do anything, you can never be found wrong.”

manipulation of the unscrupulous and unwittingly became counter-revolutionaries. Therefore, Dr. Sun thought that the revolutionary party should undertake the responsibility to ready the people.<sup>7</sup>

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<sup>7</sup> Dr. Sun wrote: "The Republic of China belongs to the people. During dynastic rule, one person alone wielded supreme power. Now, sovereignty resides in the people and therefore all 400,000,000 of them become the emperor of today. The hundreds of officials, from the president on the top to the runners, are all public servants of the people. And the 400,000,000 of the Chinese people, ever since their first distant ancestor, who have always been subservient to the autocratic emperor, who have not known how to be a master, who have not dared to be a master, and who have not been able to be a master, are now all properly masters. To whom did they owe this status? It is the result of the success of the revolution which destroyed autocracy. This is a change unprecedented in the history of our country and an original accomplishment of our nation. Therefore, the masters of the republic are in reality like a new-born baby, and the revolutionary party, its mother. After giving birth to the baby, the mother is obligated to protect and educate it so as to discharge the responsibility of the revolution. This is why in the plans for the revolution, there is a period of tutelage prescribed for the protection and education of this master. When the master attains adulthood, the governing power will be returned to him. Even during autocratic times of the past, there were the cases of Yi Yin and the Duke of Chow who, respectively, practiced tutelage while the masters of the state, King Tai-Jia and King Cheng, were unfit to rule the state. Since this was done even by the servant-ministers during autocracy, how could the revolutionary party, which laid a new foundation of the state, shirk the responsibility by not following their examples?" SUN YAT-SEN, THE PLANS FOR THE RECONSTRUCTION OF THE NATION, ch. 6 (1924) (translation mine). Both Yi Yin and Duke Chow were sagacious prime ministers who "tutored" their respective kings, never usurped the pupil's authority, and enabled the latter to be successful.

The third and final stage was the stage of “constitutional government.” This stage was to be reached province by province and would be reached by a province when all the counties of the province had attained complete home rule. When a county had achieved home rule, its people should elect one delegate who should participate in the work of the National Assembly, the organ that the people employed to oversee the operation of the central government. Nationally, the stage of constitutional government would be deemed reached when more than one half of all the provinces had reached the stage of constitutional government. The formation of the constitutional governments would involve a five-step process: (i) At the inception of the third stage of the revolution, a five-power central government structure, consisting of the Legislative Yuan, the Executive Yuan, the Judicial Yuan, the Examination Yuan and the Control Yuan, would be established as an experiment; (ii) the Legislative Yuan would prepare a Draft Constitution for consideration by the National Assembly; (iii) after the National Assembly adopted and promulgated the Constitution, the first national election should be held in all the counties that had attained home rule for the purpose of electing, by direct vote, the President for the organization of the Executive Yuan and the Representatives for the organization of the Legislative Yuan; (iv) the President, acting with the consent of the Legislative Yuan, would appoint the heads of the Judicial, Examination and Control Yuans, who were to be answerable neither to the President nor to the Legislative Yuan but to the National Assembly; (v) three months after the first national election, the tutelage Government was to transfer its powers to the newly elected government, thus completing the revolution.

A number of points should be noted: First, at the inception of the third stage of the revolution there was to be a brief experiment period. It is not clear what would happen if the experiment should reveal undesirable trends. Secondly, although the third stage formally ended when the new government became invested with all the powers previously held by the tutelage government, the third stage still could not in reality end. This is because the third stage was designed to begin, as already alluded to, not all at once for the whole country, but province by province and after more than one half of all provinces had achieved complete home rule. At that time, there would still be less than one half of the provinces that had remained in the second or even the first stage. Presumably, the new central constitutional government would have to assume the responsibilities of tutelage over all those counties that were lagging behind in order to assist them to evolve into home rule. Thirdly, as more counties achieved home rule, more delegates would be added to the National Assembly, a body continuing to increase in size. Fourthly, heads of provinces were to be elected by the delegates representing the counties of the respective province.

## 2. The Division of People’s Political Power (政權) and Government’s Performance Power (治權)

The division between people’s power and government’s power is the heart of Dr. Sun’s constitutional theory. Dr. Sun considered it important for China to have a government so strong that it would be capable of effectively managing the affairs of the state but that would fully respect private rights. In Dr. Sun’s opinion, such a government could be attained by a judicious allocation of certain powers to the people, known as “political powers,” and others to the government, which may be referred to as “performance powers.” The powers to be allocated to the people were the powers of election, recall,

initiative and referendum, and those to be allocated to the government were the legislative, executive, judicial, examination and control powers. The election and removal powers will enable the people to oversee government “actors” (officials), and the initiative and referendum powers, their “actions.” With legislative, executive, judicial, examination and control powers in hand, the officials were adequately equipped to run the government in the public interest effectively and properly. Thus, the political powers enabled the people to oversee the government, and the performance powers enabled the government to govern and serve the people.

Dr. Sun illustrated the division of people’s and government’s powers by referring to a story familiar to many from China’s most famous historical novel, *San Kuo Chih Yen-I*.<sup>8</sup> When Liu Pei (221-223), King of the State of Shu (221-263) was dying, he entrusted his eldest son and heir apparent, Liu Chan (207-271), then aged 16, to the care of Chuko Liang (181-234), the prime minister, a person of legendary and unsurpassed intelligence and competence, instructed the son to follow the guidance of the prime minister and treat him as a father. Liu Chan, a degenerate, was dubbed in subsequent centuries as “the un-proppable.” The King also told Liang: “If my son can be helped, help him. But if he prove a fool then take the throne yourself.”<sup>9</sup> After the death of Liu Pei, Liu Chan relied on Chuko Liang, who acted like a regent, for the management of all matters of state, large and small. From this story, Dr. Sun pointed out that Chuko had all the performance powers of the state, yet he was subject to removal by the king, and, further, that the king could at anytime override or supplement his policies. Thus, Liu Chan possessed political powers while Chuko Liang wielded performance powers.<sup>10</sup> Dr. Sun concluded: “If the government is a good one, we, the [then] 400,000,000 people of China, shall treat it as if it were a Chuko Liang and confide the full power of managing the state to it. If the government is not good, we shall exercise the sovereign power of the emperor, recall the responsible officials, and retrieve from them the strong power of government.” Dr. Sun was a firm believer in direct democracy. He thought that China should not imitate indirect democracy under a system of representative government as practiced in the West. Under such a system, such as the one prevailing in the U.S.A., the people normally enjoy only the power of election. When an elected official fails to live up to the expectations of the people, he cannot be replaced and therefore usually is not replaced, unless he is convicted by impeachment for treason, bribery or other high crimes and misdemeanors.<sup>11</sup> From this practical point of view, therefore, the

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<sup>8</sup> 羅貫中, 三國誌演義. An English translation is available in LO KUAN-CHUNG’S ROMANCE OF THE THREE KINGDOMS: *SAN KUO CHIH YEN-I* (C. H. Brewitt-Taylor trans., 1971).

<sup>9</sup> 2 *Id.* at 256-58.

<sup>10</sup> Dr. Sun used still other analogies to explain his point, including shareholders (people) and management (government), engineer and machines, car owner and chauffeur, user and power switch or water faucet.

<sup>11</sup> At the federal level in the U.S.A. the list of impeachable conduct is short and narrow. Throughout history, impeached officials have included only some high officers, and included two presidents, one cabinet secretary, one senator and a relatively larger number of federal judges. The Senate has convicted only eight times, all involving federal judges. Although two presidents (Andrew Johnson and William J. Clinton) were impeached, none has ever been convicted.

people need to have the power of recall as well as that of election.<sup>12</sup> But, unlike Switzerland or a state of the U.S.A. which practice the power of recall, China is geographically a huge country with a large population. To implement direct democracy there, Dr. Sun devised two systems, one for use at the local level and the other, at the central level. At the local level, the people exercise the four powers directly in a county or a city. At the central level, the National Assembly exercises these powers on behalf of the people as they may direct. Is this not representative democracy? Dr. Sun's notion of "representation" is different from the notion familiar in the West. In the West, once a person is elected a representative, he may vote in accordance with his own opinion even if it differs from the known wishes of his constituents, so long as he acts in good faith. Such a representative acts like a trustee, not a mere delegate.<sup>13</sup> By going against the wishes of his constituents, for example, by siding with national rather than local interest, he may run a risk of failure of reelection but not of removal. Dr. Sun regards the inability to remove such a representative a weakness of the Western practice. He said: "Supreme political power resides in the people. Representatives of the people, therefore, are authorized only to act on behalf of the people and not to usurp their power. It is the people who remain seized with the power of decision." Under this notion, a representative would have failed in his duties if he were to substitute his personal judgment for that of his constituents'.<sup>14</sup> The representatives, in other words, should perform the role of delegates, not trustees.<sup>15</sup> Of course, Dr. Sun enunciated his plans for direct democracy for China early in the 20<sup>th</sup> Century. With the development of modern means of communication and transportation, neither time nor distance seems to pose as much of a challenge for direct democracy today. With new information technology, is it now still physically impracticable to conduct a simultaneous direct popular vote to elect or remove the president even in China?<sup>16</sup>

As to the power of election, it is important to mention that Dr. Sun made it conditional upon the fulfillment of a number of contingencies. In the *Fundamentals for National Reconstruction*, he wrote:

"During the period of tutelage, the central government shall dispatch officials, properly qualified by training and examination, to the several counties to assist the people therein in readying for home rule. Upon the completion of a census, a survey of all the lands of the county, the arrangement of police and security measures, and the repair

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<sup>12</sup> In 王寵惠、張知本著: *五權憲法研究*, 第 5 頁 (1952), Dr. Wang Chung-hui offered a theoretical rationalization for the recall power. In a republic, according to Dr. Wang, all sovereign power resides in the people. Therefore, the government does not come innate with performance power. Besides, the government is expected to be answerable to the sovereign people. For the sovereign people to recall an official originally elected by them is to facilitate the free exercise of their political powers.

<sup>13</sup> See generally <http://thisnation.com/textbook/congress-rep.html>.

<sup>14</sup> 謝瀛洲, *國民大會之本質及其應有之職權*.

<sup>15</sup> Note that Dr. Sun named the assembly "National Assembly," not "Assembly of National Representatives." See CHAO PAO-TAI, *supra* n. 1, at 231.

<sup>16</sup> During his campaign for president in 1992, Ross Perot advocated e-Democracy and "electronic town halls."

and construction of roads connecting the county in all four directions, those people of any county who have received training in the exercise of the four political rights, fulfilled their duties as nationals, and firmly committed to the realization of the TPP may elect county officials who shall manage the public affairs of said county, and may elect county council members who shall deliberate on and adopt ordinances for said county, thereby rendering the county one under complete home rule.”<sup>17</sup>

One condition is that an elector be committed to the TPP before he is eligible to vote.<sup>18</sup> The condition originated from the Charter of the China Revolutionary Party, a predecessor of the KMT, wherein it was provided that during the revolution non-members of the Party might not have the status of full citizenship, and that the status of full citizenship might only be acquired upon the promulgation of the constitution, after which all nationals shall be equal.<sup>19</sup> Thus, full citizenship and full power of election derive from the constitution. Once a province had attained the stage of constitutional government, all its citizens enjoyed equal power of election, whether or not they were party members.

At the central level, as has been mentioned, the four political powers are to be exercised by the National Assembly. This Assembly is to be convened upon the attainment of the stage of constitutional government by more than one half of all the provinces. Its mission is to adopt and promulgate the Constitution. After the promulgation of the Constitution, The National Assembly’s power, as Dr. Sun advised, included: (1) Election of officials of the central government; (2) removal of said officials; (3) initiative over central legislations; (4) referendum over central legislations; (5) conviction of officials of the Legislative, Executive, Judicial and Examination Yuans upon impeachment by the Control Yuan; (6) impeachment and conviction of officials of the Control Yuan; (7) amending the Constitution. In the discharge of its functions, the National Assembly was answerable only to the people who retained the power to remove members of that Assembly.

### 3. The Five-fold Separation of Government Power

The five powers of the government were the legislative, executive, judicial, examination and control powers. The idea of the first three was borrowed from the West and that of the remaining two was adapted from institutions distinctive in the history of China. The five powers were to reside in five distinct branches of the government, to be known as “Yuans.” Some of the features peculiar to the five-fold separation are discussed below.

#### a. Coordination and Cooperation of Performance Powers:

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<sup>17</sup> Fundamentals of National Reconstruction (1924), art. 8 (translation mine).

<sup>18</sup> I translated the original Chinese clause, 誓行革命之主義者, into “firmly committed to the realization of the TPP.” A more literal translation would replace “firmly committed” with “committed by oath.” Since firmly committed has a broader denotation than committed by oath, I opted for it.

<sup>19</sup> Charter of the China Revolutionary Party, art. 13.

Dr. Sun championed a strong government that could take action to achieve the public good. He believed that a government endowed with the five powers would be one adequately strong to so perform; but that to be able to perform to the fullest, the five powers needed to be exercised in coordination and cooperation with, not as checks and balances upon, one another. Should the government fail to live up to the expectation of performance, or, worse, should it attempt to violate private rights, the people, with their political powers, would be in a position to rectify the situation. Presumably, when each branch realized that its own success would depend on the collaboration of some other branch, then in the face of the political powers of the people, the leaders would find it an incentive to remain in office, and potential repeal or modification of their policy a deterrent.

#### b. Harmonizing Initiative and Referendum with Legislative Power

Since the National Assembly exercises initiative and referendum over legislation, how do these powers reconcile with the legislative power of the Legislative Yuan? Are the powers of the National Assembly limitless? Can it initiate any law and review all laws? Dr. Sun provided some useful guidance. Thus, the initiative power is to be exercised either to enable the realization of a specific pursuit demanded by public consensus or to repeal a specific law enacted by the Legislative Yuan but regarded as inappropriate by public consensus. In other words, it is not to be exercised simply because a sufficient number of delegates to the National Assembly desire to initiate a new law. As for the referendum, Dr. Sun's recommendation was that it be exercised by the National Assembly when a proposed law was demanded by public consensus but rejected by the majority of the Legislative Yuan. It was not to be used on all laws enacted by the Legislative Yuan.<sup>20</sup> In short, the initiative and referendum powers of the National Assembly were subject to the limitation of "specific public consensus." This is consistent with the theory that delegates to the National Assembly were not trustees, whereas the representatives who formed the Legislative Yuan were trustees.

#### c. The Examination Power:

The civil service examination of China is the world's oldest. Chinese folklore has for centuries venerated those born poor and unimportant who studied hard, passed examinations step by step until taking first place at the examination held in the imperial capital, and eventually became prime ministers thereby bringing immeasurable honor to their parents and ancestors. Historically, the ancient institution of government-sponsored examination contributed to the values of equality and merit.<sup>21</sup> Dr. Sun was determined to integrate it as a separate and independent branch of the government of the new republic. As a separate branch of the central government, the Examination Yuan was to hold examinations to qualify all officials, whether central or local, whether high-ranking or low-ranking, and whether appointed or elected. Participants in the examinations were to be tested not just for their

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<sup>20</sup> 楊粹, 五權憲法答問. 民主憲政, 第 19 卷, 第 9 期, 第 17 頁 (1961).

<sup>21</sup> Of course, the examination system was also used by the emperor to exchange government positions for loyalty.

competence but also for their integrity. By requiring elected officials to pass the requisite examinations, Dr. Sun hoped to help not only to identify those who were moral and competent but also to reduce the influence of money, influence, party affiliation, sentimentality, and spoils. The Chinese institution of examination, it should be mentioned, has been introduced into the United Kingdom.

d. The Control Power:

The control power was an adaption principally from the age-old institution of the Board of Censors of China. The board has been described as a “unique creation of Chinese political genius.”<sup>22</sup> Historically, the typical image of an official endowed with the power of control was a man of authority, prestige, probity and integrity, who had direct access to the emperor. The duties of these officials were rather variegated, displaying a hodgepodge of administrative and judicial work, and included, most significantly, discovering and reporting cases of treason, misgovernment and maladministration, transmitting complaints, acting at times as judges at large, criticizing and censoring officials and policies, impeaching officials, and even remonstrating with the emperor at their own risk. However, the control officials were never truly “independent,” since no matter how high their individual position in the government hierarchy might be, even as high as that of a prime minister, they still fell under the power of the emperor and served as his tool of supervision.<sup>23</sup> The effectiveness of influence of these officials, thus, waxed and waned in relation to the assertion by the emperor of his supreme power.<sup>24</sup> Under a dynastic rule, “political rights” of the people was, of course, unknown. Dr. Sun’s five-power constitution would make the control officials an “independent” branch of the government, answerable only to the National Assembly, the surrogate of the people. Dr. Sun argued if the judges who judge litigants should be independent, then the control officials who judge officials should also be independent. The control branch, as he contemplated, would principally exercise the power of impeachment of all officials at the central level, whether appointed or elected, except its own officials, whose impeachment fell within the purview of the National Assembly, and except members of the National Assembly, who were directly under the oversight of the people. With the power of examination to be exercised prior to the selection of all officials, and with the power of control to be exercised after selection, the two powers, together with the legislative, executive and judicial powers, rendered the government under the five-power constitution complete.

4. A Balanced Division of Powers Between Central and Local Governments

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<sup>22</sup> EDWIN O. REISCHAUER & JOHN K. FAIRBANK, EAST ASIA: THE GREAT TRADITION 168 (1958).

<sup>23</sup> The Yuan Dynasty had a tripartite premiership. The three co-prime-ministers exercised authority over administration, armed forces and supervision, respectively. Khubilai Khan, the founding emperor of Yuan Dynasty, referred to the three “as his left and right hands and his means of keeping both hands healthy.” *Id.* at 297.

<sup>24</sup> But this shortcoming is the result of autocratic rule. It therefore does not detract from the value of the institution of impeachment and censorship itself. WANG CHUNG-HUI, *supra* n. 14, at 9.

Dr. Sun's approach to achieving a balanced division of powers between the central and local governments was by looking at the nature of the subject-matter to be dealt with. Matters that were of common interest to the entire nation should fall within the competence of the central government. Those that were more appropriately dealt with on a local basis should fall within the competence of the local governments. The test is obviously ambiguous.

## B. THE FIVE-POWER CONSTITUTION IN PRACTICE

### 1. In Relation to the Stages for Completing the Revolution

The three stages for attaining constitutional government were not gone through according to plan. In practice, the military stage ended twice, in the sense of formal discontinuance of military operations, while obstacles to revolution continued to exist. For example, in 1911, while the Manchu Dynasty, Yuan Shi-Kai, Manchu bureaucrats, and constitutional monarchists still existed, a provisional government was created. And, when the Northern Expedition formally ended, the quondam warlords still effectively controlled their armed forces and territories even as they were being nominally designated and paid as units of the government force. Each time a military stage concluded prematurely, its ensuing tutelage period commenced prematurely. And also as the tutelage period ended prematurely, the constitutional period began prematurely.

#### a. The Ambiguous Stage Following the Uprising of 1911:

While the uprising of 1911 may have led to the establishment of the Provisional Government of the Republic of China and the abdication of the Manchu Emperor, it also ended with the ceding of the new republican government to the Manchu Prime Minister and military strongman Yuan Shih-Kai. Yuan promptly replaced the "Provisional Covenant," promulgated by Provisional President Sun as the constitutive document for the provisional government, with his own "Covenant of the Republic of China," transformed himself into an autocratic president, and finally institutionalized a constitutional monarchy with himself as the new emperor. Meanwhile, a "second revolution," led by Dr. Sun and his KMT comrades, broke out but was readily crushed. Following the death of Yuan in 1916, the country plunged into political anarchy under which warlords, numbered "dozens, if not hundreds,"<sup>25</sup> ruled territories they controlled and fought against one another for the opponent's territory. Meanwhile, in Peking, the capital, one warlord even briefly restored the Manchu Emperor to the throne. These events hardly portrayed a situation in which all "obstacles to the revolution" had been cleared. When the decision to form the provisional government was made in 1911, the military stage could hardly be said to have been over.

Obstacles to revolution need not all be armed ones. Political obstacles can be as counter-revolutionary as the warlords, if not more effectively so. Unfortunately for the revolutionaries, they encountered plenty of them. The revolution of 1911 was begun by the firing of the first shot in Wuchang ahead of schedule. But the Wuchang revolt won an easy and surprising victory because the Manchu

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<sup>25</sup> DUN J. LI, *THE AGELESS CHINESE: A HISTORY* 447 (1965).

Governor-General and the garrison commander fled rather than fought. The ensuing Hupeh Military Government was set up with a colonel of the local Manchu army as the Governor-General at the motion of a Manchu official and a member of the Constitutional Monarchy Party. Other provinces succeeded in declaring independence from Manchu rule and forming military governments either by defeating the local Manchu forces or by securing a switch of royalty of the local Manchu governors. With the capture of Nanking, the revolution became stabilized. The Provisional Government of the Republic of China was created in Nanking as of the beginning of 1912 with Dr. Sun as the Provisional President. At the time, the Manchu Dynasty was still in existence, and its prime minister, Yuan Shih-Kai, personally controlled the most modern and the largest armed force in China. The Provisional government and the Manchu government were not in a position to eliminate one another, but Yuan was in a position to influence both. Since the revolution could not, or at any rate could not as quickly, have accomplished as much as it did without the sympathy and help of Manchu army officers, Manchu bureaucrats, the Constitutional Monarchy Party, and local civilian leaders, all of these elements as well as the revolutionary party together shaped the political structure of the new republic. Thus, of the 32 governor-generals, only nine belonged to the revolutionary party, with the balance tipped in favor of the remnants of the old order. In the Provisional Government, while Dr. Sun was the provisional president, the vice president was a former Manchu colonel, and of the ministers five were either former Manchu high officials or constitutional monarchists and only three belonged to the revolutionary party. Each of these elements had its own political interests. Even within the revolutionary party, members held different views.<sup>26</sup> Thus, dissensions beset the governing structure of the new republic.

In December, 1911, while on his way to Shanghai from abroad, Dr. Sun transited through Hong Kong, and there he was met and advised by Hu Han-Min, Governor-General of Kwangtung, to abort the trip and stay in Canton. Hu's view was that a credible armed force was indispensable for the revolution to succeed. He believed that, if Dr. Sun went to Shanghai, he would unquestionably be made the president of the provisional government, that with no credible force in Nanking to back him up and with the governing structure so riddled with political differences, he would be unlikely to be able to accomplish anything in the interest of the revolution, and that Yuan was shrewd and untrustworthy. He advised, therefore, that Sun should remain in Kwangtung and concentrate on building up a powerful revolutionary force first. Dr. Sun was not persuaded. He went ahead with the trip and was elected the Provisional President by the representatives of governor-generals. Shortly afterwards, he yielded the provisional presidency to Yuan Shi-Kai, without accomplishing anything significant to advance the cause of the revolution.<sup>27</sup> Yuan took over the provisional government and the presidency, replaced the

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<sup>26</sup> For example, over the Organic Outlines of the Government of the Republic of China of December 5, 1911, two prominent members of the Alliance, 馬君武 (who drafted it) and 宋教仁 (who criticized it), seriously disagreed. When their disagreement became publicized, it touched off an uproar and further controversies within and without the Alliance. 秦孝儀主編第一冊, *supra* n. 22, at 218-21.

<sup>27</sup> Even the draft covenant for the organization of the provisional government of the Republic of China he authored for the new government was returned by the Council of the Provisional Government on the ground that it was more appropriate for it to draft the document itself. Dr. Sun remarked on this incident in 1920: "When I was in

Provisional Covenant with a new covenant suitable for an autocratic presidency, and eventually made himself a new emperor. Dr. Sun wrote in a letter in 1914: "Though I was the president of the provisional government, I was like a marionette, since nothing was up to me to decide."<sup>28</sup>

In 1924, in reviewing the cause of the failure to implement the TPP since 1911, Dr. Sun wrote in the Declaration on the Enactment of the Fundamentals for National Reconstruction:

It is because after the destruction [of the Manchu Dynasty] there was a failure to observe the original procedure for reconstruction. Without following through the military stage, the counterrevolutionary forces were not yet swept away and the TPP could not be propagated to the population to win their sympathy and belief. Without following through the tutelage stage, the great majority of the people, who were suddenly freed from bondage, did not know how to conduct their activity, so that they would either return to the old habit of abandoning responsibilities or be exploited and fell into the counterrevolutionary trap without realizing it. The great evil of the former was in the lack of thoroughness of destruction; that of the latter, the impossibility to proceed with reconstruction.<sup>29</sup>

Hu Han-Min's view seemed to be entirely consistent with Dr. Sun's own view regarding the three stages of the revolution. Dr. Sun, however, rejected Hu's view. His explanation was that Shanghai and Nanking were the "front" where "active operations" were being carried on, that he needed to lead in the forefront, and that any disputes within the anti-Manchu camp should be resolved rather than ignored, and that Yuan might be untrustworthy but could be exploited to help overthrow the Manchu Dynasty without the use of troops. Did Dr. Sun, in the above quoted passage, think that in 1911 the revolutionary camp failed to follow through the military or the tutelage stage? If he thought the military stage was ended too soon, then why did he not continue to explore forcible means as Hu had suggested. Were his expressions, "front" and "charge" euphemisms to portray the non-forcible as forcible? Did he have a change of strategies? At any rate, Dr. Sun's exploitation of Yuan was not entirely without success, in that, by enticing Yuan with the position of the president, Yuan was at least trapped into a

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Nanking, I asked the Council to adopt a five-power constitution. But the members of the Council did not know what a five-power constitution was. Later they adopted the Provisional Covenant." Under the circumstances, it would appear to be impracticable for Dr. Sun to undertake the implementation of the TPP, the goal of the national revolution.

<sup>28</sup> Letter to Teng Tse-Ru, quoted in *id.* at 230.

<sup>29</sup> Translation mine.

republican structure, if no more than merely a matter of illusion and very briefly. But, Yuan also exploited Dr. Sun by feigning a dedication to republicanism in order to get the presidency.<sup>30</sup>

#### b. The Post-Northern Expedition Stage

The Northern Expedition of 1926-28 against the warlords, led by Chiang Kai-Shek, though commonly hailed as having unified the country, also did not eliminate all obstacles to the revolution, for warlords continued to exist, though in a different guise.<sup>31</sup> Thus, when the KMT's National Congress announced the successful conclusion of the military stage and the commencement of the tutelage stage in March of 1929, it acted prematurely, for even as the Congress made the announcement it also decided to quash an armed revolt of the Kwangsi warlords which had started in the previous month. In addition, armed conflicts also took place in western Honan, western Hupeh, Hunan, Kwangsi and Kwangtung between troops of the tutelage government and various quondam warlords. In the following year, 1930, the tutelage government fought in the "Great War of the Central Plains" against the forces of major warlords, a war that spanned a geographical area of thousands of kilometers and ended with the dead and the wounded from forces on both sides numbering around 240,000. The loss of life and limb and property suffered by the civilians was immense and immeasurable.<sup>32</sup> The war significantly weakened the tutelage government's capability to maintain domestic order and to resist the invading Japanese forces. Yet, even after the Great War, unrests continued one after another until the Sian Incident of December of 1936 when Generalissimo Chiang Kai-Shek, then acting Director-General of the KMT and Chairman of the Nationalist Government's Military Commission, was seized by a quondam warlord.<sup>33</sup> Shortly, on July 7, 1937, the tutelage government entered a full-scale military resistance against the Japanese aggressors. The domestic post-Northern Expedition condition certainly did not convey the impression that the military stage was over.

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<sup>30</sup> In a letter to the President Sun, Vice President Li, all Ministers and the Council before he assumed the presidency, Yuan even wrote: "A republic is the best form of a state. . . . The end of dynastic rule represents the founding of the republic. From this point on, we shall strive to fulfill republicanism to our satisfaction and forever make the system of dynastic government never to prevail in China again."

<sup>31</sup> Of course, it was during the Northern Expedition that the Chinese Communists staged its first armed revolt, the Nanchang Revolt, on August 1, 1927.

<sup>32</sup> 秦孝儀主編: 中華民國政治發展史, 第二冊, 第 973 頁(1985).

<sup>33</sup> The fact that the Nationalist Government created a number of general headquarters for the eradication of communist rebels also attest to the proposition that the military stage was prematurely declared over. These include the General Headquarters for the Three Provinces of Honan, Hupeh and Anhwei (1932), the General Headquarters for the Remote Region of Kiangsi, Kwangtung and Fukien (1932), Special Headquarters of the Chairman of the Military Commission for Kiangsi, Kwangtung, Fukien, Honan and Hupeh (1933), and the Chairman's Relief Bureau for Hopeh and Charar of the Military Commission (1935). Covering large areas of the country, these headquarters wielded party, government as well as military powers. For an account of unrests and rebellions, 見李守孔: 訓政時期的政治. 載秦孝儀主編: 中華民國政治發展史, 第二冊, 第 999-1058 頁 (1985).

At all events, the tutelage period did not accomplish much in the nature of tutelage. To begin with, domestic dissension and armed conflict placed large areas of the territory, e.g., northeastern and southwestern China or anywhere there were on-going military operations, outside of the effective control of the government. Next, foreign invasion, intensified after the Mukden Incident of 1931 and the Shanghai Incident of 1932, ultimately led to the Sino-Japanese War in 1937, resulting in enemy occupation of immense areas of the territory. In areas not within its effective control, the tutelage government was, needless to say, not in a position to conduct its tutelage work. But, even in areas within government control, for reasons both pre-dispositional and environmental, the tutelage government's progress was limited. I have already mentioned the pre-dispositional reasons.<sup>34</sup> The environmental reasons include: shortage of trained KMT members to undertake training, shortage of funds and resources, and the large number of counties that differed in geographical remoteness, density of population, and material advancement.<sup>35</sup> Further, the KMT itself and the Nationalist Government seemed concerned more with the perpetuation of their own power and control than with tutoring the people.<sup>36</sup>

### c. The Entrance into the Stage of Constitutional Government

If the tutelage stage was declared too soon, it also ended too soon. The ensuing stage of constitutional government began, correspondingly, prematurely. As planned by Dr. Sun, the constitutional stage was to arrive, province by province, until more than one half of the provinces had achieved full home rule, and, at that time, the Legislative Yuan was to draft the constitution for adoption and promulgation by the National Assembly. When the Legislative Yuan embarked upon the drafting of the constitution in the 1930's, and, later, when the constitution took effect in 1947, not a single province had achieved home rule, let alone more than half of them.

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<sup>34</sup> See *supra* p. \_\_\_\_.

<sup>35</sup> For a summary of some of the tangible progresses made in local home rule, including the substantial number of laws and regulations governing home rule, and the specific accomplishments of the Special Municipality of Nanking (Nanjing) in implementing home rule, 見李守孔: 訓政時期的政治, *supra* note 27, at 937-40.

<sup>36</sup> For example, in Peiping (Peking or Beijing), when a local election made the KMT the minority party in the Municipal Council, the Council refused to cooperate with the Mayor, a KMT member, and the KMT on important matters. This led to the adoption of the Principles Governing the Improvement of Home Rule, which set up a three-period approach for the development of home rule. During the first period, mayors and county executives were to be appointed by the tutelage government and members of municipal and county councils were to be appointed by the mayor or county executive. During the second period, mayors and county executives were to be appointed by the tutelage government but municipal and county council members were to be elected by the people. During the third period, mayors, county executives and council members were all to be elected by the people. Other tangible progresses include the building of schools, organization of training institutions, and the establishment of experiment areas and counties to serve as potential models. 見\_\_\_\_: \_\_\_\_\_ ( ) (國立\_\_大學博士論文).

With the country plagued by prolonged internal armed conflicts and political contention, and with the ever-intensifying and expanding Japanese invasion, many in and outside of the KMT and government urged the early implementation of constitutional government as a means of uniting the country for the resistance of foreign invasion. Many public-opinion leaders began agitating for constitutional government, some arguing against the continuation of the tutelage period by saying that one could learn about democracy while experiencing constitutional government, just like one could learn swimming by plunging into the water. A Conference on National Exigency, convened in 1932 officially to discuss the stated topics of “protection against foreign invasion, pacification of unrest areas, and disaster relief,” concluded with the adoption of an off-agenda resolution calling for the termination of the tutelage period, convening of the National Assembly, promulgation and implementation of a constitution. The pivotal recommendation came when Sun Fo, son of Dr. Sun and a leader of the KMT, publicly pushed for the early institution of constitutional government. His sole reason for deviating from Dr. Sun’s plans at a time when there was but scant accomplishment in the tutelage work to show was to unite and save the nation against a foreign invader. Under tremendous pressure the KMT Central Committee decided to complete the tutelage work regarding home rule in the shortest time in order to ready for constitutional government, to convene the National Assembly in March of 1935 for the adoption of the Constitution, and to instruct the Legislative Yuan to forthwith draft, publicize and adopt a Draft Constitution for public discussion. Sun Ko was promptly appointed President of Legislative Yuan, and he, in turn, immediately formed the Committee for the Drafting of the Constitution within the Legislative Yuan to embark on the drafting work. After informal public comment and approval of the KMT, the Draft Constitution was officially announced by the Nationalist Government on May 5, 1936.

#### a. The 5-5 Draft Constitution

Since it was on May 5 that the Draft Constitution was formally announced, it came to be popularly known as the “5-5 Draft Constitution.” The Draft Constitution declared the republic to be a “Republic of the TPP.” It protected individual rights subject to limitation by law in case of a necessity to protect national security, avert an imminent crisis, maintain social order, or promote public welfare. It followed, in form, the design of Dr. Sun with respect to the division of power. Thus, it provided for the people the power of election and recall of county officials and initiative and referendum on matters pertaining to county home rule; and it provided for a National Assembly, to be composed of delegates elected by the people, which would have the power to elect the President, Vice President, Presidents, Vice Presidents and Members of the Legislative and Control Yuans, to recall not only the foregoing officials but also the Presidents, Vice Presidents of the Judicial and Examination Yuans, to exercise initiative and referendum over laws of the central government, to amend the Constitution, and to exercise other powers as the Constitution may provided. The power of electing members of the Legislative and Controls Yuans was limited to electing only from among those candidates selected by a vote of delegates of the people of each and every province. As to the five-fold separation of enforcement powers, the 5-5 Constitution did create a structure of five Yuans to exercise the five powers, but it also superimposed the President as a separate unit on top of the five Yuans. The President was made the head of the state, to command all

armed forces, to promulgate law and orders, to declare wars, conclude peace, enter into treaties, declare martial law, and grant pardons. The President was authorized to appoint and remove the President and Ministers of the Executive Yuan, appoint the Presidents of Judicial and Examination Yuans, call a meeting of the Presidents of the five Yuans for discussion of matters that concerned two or more Yuans or for consultation on matters on his motion. These are immense powers and for the exercise thereof the President would be answerable to the National Assembly. On the division of powers between the central and local governments, the Draft Constitution merely provided that “matters that are appropriately amenable to be dealt with locally shall be subject to home rule,” and that “matters subject to home rule shall be provided by law.”<sup>37</sup> The Draft Constitution, as a unique feature, devoted a chapter, entitled “national economy,” to incorporate Dr. Sun’s injunctions regarding people’s livelihood.

The Draft Constitution failed to conform to Dr. Sun’s plans in a number of important respects. First, the relevance of the National Assembly was greatly, if not completely, reduced because it was made to meet for one month, extendable by another month, once every three years. The remarkable infrequency of meeting in effect made the National Assembly only capable of asserting minimal, if any, pressure on those officials who would be responsible to it. This rendered the political power of the people meaningless. Secondly, the 5-5 Draft Constitution did not completely follow Dr. Sun’s injunctions with respect to the election or appointment of the heads of Yuans (called “presidents”). Thirdly, the superimposition of the President above the five Yuans was strange. It is nowhere to be found in Dr. Sun’s teachings, except when he mentioned the President who was supposed to organized and head the Executive Yuan. This strange feature, unfortunately, was carried into the Constitution of 1947.

#### b. The Council for National Political Participation: An Interlude

The Council was organized to unite the country and to advise the government during the Sino-Japanese War, and therefore its membership consisted of representatives of various political parties, including the Chinese Communist Party, and well-known members of society. It appointed a Committee for the Promotion of Constitutional Government to review the 5-5 Draft Constitution. In 1940, the Committee recommended fundamental changes with regard to the National Assembly and the Legislative Yuan that would transform the structure of the central government into basically a representative system which Dr. Sun sought to avoid. The Council blurred the distinction between political and performance powers, and recommended that the National Assembly establish a semi-standing Committee to meet every six month for the exercise of legislative power on behalf of the National Assembly during recess, and that the Legislative Yuan be turned into a technical organ solely concerned with the drafting of legislation. The Council had two shots at reviewing the 5-5 Draft Constitution. In 1943, an Association for the Implementation of Constitutional Government was jointly formed by the Council and the KMT Central Committee. Members of this committee included members of the Council, members of its Presidium, members of the KMT Central Committee, and others who were “learned and experienced.” In 1946, the Association reported to the Council with recommendations for changes to the Draft Constitution. The principal recommendation was that, in

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<sup>37</sup> Draft Constitution, art. 104.

addition to delegates of counties and comparable geographical units, the National Assembly should also have delegates from various professions and vocations. This recommendation was later incorporated into the Constitution of 1947

#### c. The Political Consultative Council

The Political Consultative Council (hereafter "PCC") was organized in 1946, on the basis of an agreement between the KMT and the Communist Party. Its members consisted of representatives of the KMT, the Communist Party, the Democratic Union, the Youth Party, and well-known personalities of society. The Council, a highly politically charged body, recommended fundamental changes to the 5-5 Draft Constitution. The Legislative Yuan considered and, for political reasons, grudgingly accepted these recommendations. At the National Assembly, the final Draft Constitution, containing the PCC recommendations, was pushed through by Chiang Kai-Shek over the strenuous opposition of KMT delegates. The Communist Party and the Democratic Union boycotted the National Assembly. Chiang supported the modified version of the 5-5 Draft Constitution in order to appease the delegates of the Democratic League, recently separated from the Democratic Union, and the Youth Party who threatened to pull out. In the end, the Constitution as approved by the National Assembly strongly reflected the views of the Democratic Union and the Youth Party. Dr. Sun's views were seriously eroded.

#### d. The Adoption of the Constitution

The Constitution of the Republic of China was adopted in 1946, promulgated in 1947, and entered into force on December 25, 1947. The period of tutelage formally ended and that of constitutional government began following the orderly transfer of power from the Nationalist Government to the new constitutional government. Meanwhile, the Communist armed rebellion expanded, intensified, and became all out. In 1949, the Communist forces drove the constitutional government from China proper to Taiwan.

In sum, the sequence of events, sketched above, portrayed the premature beginning of the period of constitutional government.

## 2. The Official Constitutive Documents

Dr. Sun defines a constitution as "a document that constitutes the government and guarantees the rights of the people." By a "constitutive" document, I mean a document that definitely constitutes the government but that can, but is not required, to contain provisions regarding the protection of the rights of the people. Such a document can be called a "constitution," but it does not have to be. An example of the former is the U. S. Constitution before the Bill of Rights amendments were added to it. An example of the latter is the Basic Law of the Federal Republic of Germany (Bundesverfassungs). Since 1911, China has seen a number of constitutive documents. Some were not meant to be the constitution to be produced at the inception of the stage of constitutional government, and therefore they did not

need to be a five-power constitution. Others were drafts that corresponded more or less to the model sketched by Dr. Sun.<sup>38</sup> I briefly discuss those documents that were formally promulgated.

a. The Organic Outlines of the Provisional Government of the Republic of China (1911)

After 10 provinces declared independence from the Manchu Dynasty, it was decided that a joint national organization be set up in order to coordinate military and foreign affairs. Hence, the Outlines. The document was never meant to be the constitution of the new republic. As its title indicated, it was to outline the organization of a provisional government appropriate for the military condition then prevailing.<sup>39</sup> It was therefore somewhat unjust to criticize it simply because it was adopted by Representatives of Governors-General, not the people, of the provinces, or because it provided for the appointment of members of the Council (legislature) by the Governors-General and for the election of the President by representatives of Governors-General, or because it failed to provide for the protection of individual rights. Basically, it was a three-power constitution in form.

b. The Provisional Covenant of the Republic of China (1912)

The Provisional Covenant, promulgated on March 31, 1912 by Provisional President Sun before his tendered resignation took effect,<sup>40</sup> was adopted mainly to provide for a cabinet system in order to constrain the power of the incoming provisional president, Yuan Shih-Ka, who had just taken the oath on March 10 but not yet assumed office, and for the protection of individual rights. The Provisional Covenant superseded the Organic Outlines and operated like an “as if” constitution.<sup>41</sup> It had a number of notable features: (i) For the first time in China a document constitutive in nature provided equality for all people without regard to ethnicity, class and religion and for the protection of individual rights for a people who had lived for thousands of years under autocratic rule; (ii) the structure of the government was based on a three-fold separation of powers, with the State Affairs Council responsible to the Council, with the State Affairs Council rather than the President controlling the executive power, with members of the Council selected in accordance with methods as the several provinces would decide, and with a judiciary exercising the judicial power independently; and (iii) the President was to be elected by the Council, not the people. In wishing that the Provisional Covenant would constrain Yuan, its proponents either had illusions about some magical quality of laws or no other alternatives were available to them.

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<sup>38</sup> The more well-known drafts included: (1) Hupeh Military Government Covenant; (2) “Temple of Heaven” draft constitution of 1913-20; (3) An-Fu draft constitution of 1919; (4) a series of provincial constitutions adopted during 1920-21; (5) Draft Constitution of 1925; and (6) Taiyuan Draft Covenant of 1930.

<sup>39</sup> In fact, one prominent revolutionary leader suggested that the title of President should more properly have been Marshal.

<sup>40</sup> President Sun’s resignation took effect on April 1, 1912.

<sup>41</sup> Provisional Covenant, art. 54 provided: “The Constitution of the Republic of China shall be enacted by the National Assembly. Before the Constitution enters into force, the present Covenant shall have effect comparable to that of the Constitution.”

Dr. Sun's idea of a five-power constitution was in fact rejected by the Council, which returned a draft submitted by him, as the Provisional President, on the ground that it was more appropriate for the legislature to do the drafting.

c. Covenant of the Republic of China (1914)

This Covenant replaced the Provisional Covenant and completely deferred to President Yuan Shih-Kai's wishes. The deliberate constraints of the Provisional Covenant on the president's power all evaporated in thin air. The new Covenant was drafted in accordance with seven principles issued by Yuan. They were: (i) The President shall solely decide on the declaration of war and on the conclusion of peace or treaties without the participation of the Council; (ii) the President shall alone enact regulations of government officials and appoint Ministers and Ambassadors without the consent of the Council; (iii) the presidential system of government shall be adopted; (iv) the Constitution shall be enacted, not by Congress, but by the National Assembly and promulgated by the President, and drafted by the President and the Governing Council; (v) the President shall have the authority to deprive and restore political rights of individuals; (vi) the President shall have the authority to issue emergency orders with force equal to law; (vii) the President shall have the authority to take emergency financial measures.<sup>42</sup> In addition, the law governing the election of the president was amended to provide for a 10-year term without term limits and for the power of the president to nominate his successor by naming three candidates for the presidential election assembly to choose.<sup>43</sup> Not content with being, in effect, president for life, Yuan proceeded to make himself emperor.

d. Constitution of the Republic of China (1923)

The Constitution, known as "Tsao Kun Constitution" and "Bribery Constitution," was associated with Tsao Kun, who bribed the Congress into promulgating the document and electing him the President. The document, like all those preceding it, basically followed a three-fold separation of power. After listing the powers respectively of the central and local governments, it gave a nod to Dr. Sun in providing that with respect to unlisted matters, those that were by nature related to the state should fall within the power of the central government, and those that were by nature related to the province should fall within the power of the provincial government, and that in case of dispute the decision should be made by the Supreme Court. On individual rights, the Constitution introduced the institution of habeas corpus. One interesting feature was the Constitution's provision for the "freedom of respecting Confucius," along with the freedom of religion.<sup>44</sup> This bribery constitution lasted less than a year.

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<sup>42</sup> 見張知本著：憲法論，殷嘯虎、李莉勘校本，第 89 頁 (2004)。

<sup>43</sup> *Id.* at 90.

<sup>44</sup> 參芮和蒸、徐炳憲：護法運動與民主憲政的波折。載秦孝儀主編：中華民國政治發展史第一冊第 640-44 頁 (1985)。

e. The Covenant for the Tutelage Period of the Republic of China (1931)

The Covenant was enacted by the National Assembly and promulgated by the Nationalist Government. It was the basic law for the tutelage period that had been officially declared by the KMT a little over a year before. The Covenant provided for the protection of individual rights but, with the exception of freedom of religion, the rights were all subject to limitation by law. Under the Covenant, the National Congress of the KMT was to act as the National Assembly and exercise the four political powers of the people at the central level,<sup>45</sup> and the Nationalist Government was to exercise the five performance powers. The Nationalist Government was structured with five Yuans plus a Committee of the Nationalist Government, including a Chairman, that was superimposed on them. The Chairman of the Committee was, under a previous amendment to the Organic Law of the Nationalist Government had been made, in effect, like a CEO.<sup>46</sup> The amendment to the organic law was made at the time when Chiang Kai-Shek, freshly emerged victorious from the Northern Expedition, was about to become the Chairman. At any rate, the Chairman of the Committee in fact wielded either supreme or little power, depending on who occupied the position. The Covenant required the Nationalist Government to provide training in the exercise of the four political powers for the people. The division of power between the central and local governments, under the Covenant, was to follow the system of balanced division as advocated by Dr. Sun. The Covenant also provided that the counties should forthwith establish quasi-self-governing units for the exercise of administrative and finance powers, subject only to express limitations of the central government. The final authority of interpretation of the Covenant was vested in the Central Executive Committee of the KMT.

f. Constitution of the Republic of China (1947)

The Constitution was adopted by the National Assembly on December 25, 1946 and, after promulgation by the Nationalist Government on January 1, 1947, came into force on December 25, 1947. It ushered in the stage of constitutional government. The Nationalist Government, which had previously issued a Law Governing the Procedure for Ending Tutelage, transferred its various performance powers to the new constitutional government as it began to function.<sup>47</sup> The Constitution provides for the

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<sup>45</sup> The Covenant provided that when the National Congress of the KMT was not in session, its power should be exercised by the KMT's Central Executive Committee.

<sup>46</sup> "Strangely" because Dr. Sun had made clear that the future constitution of the republic would have a president who should form, and presumably head, the Executive Yuan, and the Executive Yuan, further, were supposed to be a coordinate branch of the other four Yuans. Under this scheme, and it would seem logical, no other official or organ should be above the five Yuans. Only the emperor had all branches of the government under him. Moreover, the future constitution was supposed to be drafted in the light of the experience to be derived from the tutelage period. It would seem important to give the five-fold separation a test run during the tutelage period, for experience derived from the design of the Covenant would seem to have little relevance for the future constitution in which no one was supposed to be above the heads of the five Yuans according to Dr. Sun teachings.

<sup>47</sup> The Nationalist Government proper and all organs under its direct jurisdiction ceased to function on the day the President under the Constitution assumed office. The tutelage Legislative and Control Yuans ceased to function on

protection of individual freedoms and rights, including even some modern human rights under the future U. N. Covenant on Economic, Social and Cultural Rights. The rights and freedom are not to be restricted by law unless it is “necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare.” The political powers of the people, so much emphasized as so crucial by Dr. Sun, seem vastly curtailed. Under the Constitution, the people are deprived of the power to elect the President and, unless granted by law, also of the powers of initiative and referendum.<sup>48</sup> The Constitution granted the power to elect and recall the President and the Vice President and also the power of referendum over constitutional amendments proposed by the Legislative Yuan to the National Assembly. The delegates to the National Assembly are to come from geographical units, ethnic groups, overseas Chinese, vocations and professions and women’s groups. The special treatment accorded vocations and professions seems to fly in the face of the principle of equality. As to the performance power, the Constitution provides for a structure of five Yuans and superimposes the President on top of them. This superimposition seems de hors Dr. Sun’s teachings and smacks of emperor redivivus. According to Dr. Sun:

The central government shall consist of the five-Yuans, thus: First, the Executive Yuan; second, the Legislative Yuan; third, the Judicial Yuan, forth, the Examination Yuan; fifth, the Control Yuan. After the Constitution is promulgated, the people of every county shall vote to elect the President for the organization of the Executive Yuan and the Legislators for the organization of the Legislative Yuan. The heads of the remaining three Yuans shall be appointed by the President with the consent of the Legislative Yuan, and these heads shall not be responsible to the President or the Legislative Yuan. All five Yuans shall be responsible to the National Assembly.<sup>49</sup>

The President of the new republic as described by Dr. Sun in the above quotation appears to resemble the president of the United States of America, being the head of the executive branch alongside the other coordinate branches, two in the U.S. and four in China.<sup>50</sup> Just like the president of the U.S who

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the day their newly elected counterparts were, respectively, first convened. The tutelage Executive, Judicial and Examination Yuans ceased to function on the day their new counterparts completed their reorganizations respectively.

<sup>48</sup> A statute governing initiative and referendum is yet to, but probably will never, be enacted by the Legislative Yuan. As to the National Assembly’s power of initiative and referendum over laws, the Constitution set a condition requiring more than one half of all the counties in the country have instituted initiative and referendum. The “counties in the country” include those on Mainland China. Has the condition become impossible to fulfill? Although in 1966, the National Assembly froze the condition and adopted procedures for the exercise of the two powers of initiative and referendum, there has been no known exercise of the two powers in fact.

<sup>49</sup> 孫文學說, 第六章 (1918) (translation mine).

<sup>50</sup> U. S. Constitution art. II provides: “The executive Power shall be vested in a President of the United States of America.”

appoints the chief justice of the supreme court with the consent of the senate, the president of China appoints the heads of the three Yuans with the consent of the Legislative Yuan. A President on top of the five Yuans smacks of the emperor on top of all branches of his autocratic government. It has been suggested that the President under the R.O.C. Constitution is largely “nominal,” although he may still be powerful owing to his influence within his own political party.<sup>51</sup> But, if the President has the power to make decisions on personnel, he usually also has effective control over his appointees, and through them, the businesses committed to their respective charge. Textualists sometimes run the risk of overlooking the reality.<sup>52</sup>

g. Temporary Provisions Effective During the Period of Communist Rebellion (1948)

With the Communist Party’s ever-expanding military strength and activity since the end of the Sino-Japanese War, the Nationalist Government issued a nation-wide mobilization order to facilitate the suppression of the Communist rebellion in July of 1948, after the promulgation but prior to the coming into effect of the newly adopted Constitution. The Constitution placed restrictions on the President’s power to declare martial law in Article 39<sup>53</sup> and to impose emergency measures in Article 43.<sup>54</sup> In April of 1948, the post-Constitution National Assembly met for the first time and adopted the Temporary Provisions, granting the President the power, during Communist rebellion, “by resolution of the Executive Yuan Council, take emergency measure to avert an imminent danger to the security of the State or of the people, or to cope with any serious financial or economic crisis, without being subject to the procedural restrictions prescribed in Article 39 or Article 43 of the Constitution.” Since the Temporary Provisions were adopted in compliance with the procedural requirements for amending the Constitution, they have the same force as a constitutional amendment. Thus, many provisions of the Constitution eventually became frozen. In 1949, following military defeat by the Communists, the government fled China proper to Taiwan. Following the settlement of the government in Taiwan, the

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<sup>51</sup> *E.g.*, 荊知仁: 制憲與行憲, 載秦孝儀主編: 中華民國政治發展史, 第三冊, 第 1305 頁 (1985).

<sup>52</sup> In a recent case, a judge held that the president of R.O.C., even if he talked to the Minister of Finance and sought the latter’s support in a particular matter involving merger and acquisition of financial institutions, did not commit the crime of corruption because M & A of financial institutions did not fall within the list of the president’s constitutional powers and the payment he received from a private party could therefore not be consideration for official action. Judgment, Third Criminal Section, District Court of Taipei, 裁判字號: 98 年矚金重訴字第 1 號 (November 5, 2010). Was discussing a particular case on M & A of financial institutions within the president’s constitutional authority and an exercise of the presidential power?

<sup>53</sup> The Constitution, art. 39, requires “approval of, or subject to confirmation by, the Legislative Yuan.”

<sup>54</sup> Under the Constitution, the President may decree emergency measures only “in case of a natural calamity, an epidemic, or a national financial or economic crisis that calls for emergency measure.” The President is authorized to act only “during the recess of the Legislative Yuan [and] by resolution of the Executive Yuan Council, and in accordance with the Law on Emergency Orders.” R.O.C. Constitution, art. 43. To my knowledge, no Law on Emergency Orders was ever enacted.

Temporary Provisions were amended four times, and some of the more important amendments are: (1) To freeze the Constitutional provision so that the President can be re-elected without regard to the two-term limit; (2) to authorize the President to establish an organ for making major policy decisions concerned with national mobilization and suppression of the Communist rebellion and for assuming administrative control in war zones; (3) to authorize the President to make adjustment in the administrative and personnel organs of the central government; and (4) to freeze certain provisions of the Constitution to enable the President to make changes as to the election of delegates to the National Assembly and of members of the Legislative and Control Yuans so as to replenish these elected officials. Meanwhile, in July of 1987, the President repealed martial law rule. The Temporary Provisions were finally repealed as from May 1, 1991.

Betraying its own title, the Temporary Provisions lasted more than 40 years. It enabled the President and the elected branches of the central government to perpetuate their respective terms of service.<sup>55</sup> It provided opportunities for power-grabbing. Thus, the President re-structured and was enabled to exercise greater control over the central government structure by, for example, creating a National Security Council which overshadowed the Executive Yuan. The Bureau of Personnel Administration of the Executive Yuan took away power from the Examination Yuan. The National Assembly tried to snatch power from the Legislative Yuan by attempting to set in operation its initiative and referendum powers under the Constitution.<sup>56</sup> The regime of the Temporary Provisions also led to abuse and the semblance of corruption. The period has been described as one of “white terror.” Every time there was about to be a presidential election, the National Assembly delegates would, mayhap coincidentally, receive either a raise or some fringe benefit. The Temporary Provisions were adopted, as its title suggests, for the suppression of Communist rebellion. However, since an announcement of the U.S. President Harry Truman on June 27, 1950, the practicability of that enterprise seemed clearly non-existent for the R.O.C. government. President Truman said:

In these circumstances the occupation of Formosa by Communist forces would be a direct threat to the security of the Pacific area and to United States forces performing their lawful and necessary functions in that area. Accordingly I have ordered the 7th Fleet to prevent any attack on Formosa. As a corollary of this action I am calling upon the Chinese Government on Formosa to cease all air and sea operations against the mainland. The 7th Fleet will see that this is done.

R.O.C. military operations to suppress the Communists on the mainland would, in other words, be greeted by the 7th Fleet and blocked. Further, since February 9, 1955, when the Sino-American Mutual Defense Treaty was ratified by the U.S. Senate, even the security of Taiwan was no longer threatened. Taiwan no longer needed mobilization, martial law or Temporary Provisions to suppress or even protect

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<sup>55</sup> The National Assembly, Legislative and Control Yuans together were pejoratively referred to as the “thousand-year congress” and their members, “old thieves.”

<sup>56</sup> See the discussion in 陳新民著: 憲法導論, 第 445-52 頁 (修訂六版 2008).

against the Communist rebellion. Autocratic and dictatorial rulers are known to invoke internal or external threats to reduce resistance to, and perpetuate, their rule.

#### h. Additional Amendments to the Constitution (1991-2005)

As the title suggests, these additional amendments contain both additions and amendments. The Additional Amendments refer to a series of seven constitutional events started in 1990, when Lee Teng-Hui became the President, and ended in 2005, while Chen Shui-Bian was the President. They fundamentally transformed the Constitution. While the effect of the Additional Amendments is stipulated to last until the unification of Taiwan and the mainland, the time of the unification is all but foreseeable. A number of changes under these Additional Amendments are particularly notable: (1) The National Assembly has been abolished; (2) the President and the Vice President are elected by direct vote of the people; (3) the President and the Vice President are recalled upon a motion by the Legislative Yuan and by approval of more than one half of the total number of electors; (4) amendment of the Constitution is to be by a proposal of the Legislative Yuan and approval of more than one half of the total number of electors; (5) the President has the sole power to appoint the President of the Executive Yuan, and the Executive Yuan is responsible to the Legislative Yuan; (6) the Judicial Yuan is composed of 15 Grand Justices, one of whom to be the President and another the Vice President of the Judicial Yuan, and the Grand Justices are to be nominated appointed by the President with the consent of the Legislative Yuan; (7) the President, Vice President and Members of the Examination Yuan are nominated and appointed by the President with the consent of the Legislative Yuan; (8) the Members of the Control Yuan, one of whom to be the President and another the Vice President of the Control Yuan, are nominated and appointed by the President with the consent of the Legislative Yuan; (9) the Control Yuan no longer has the power to impeach the President and the Vice President.

#### C. CONCLUSION

Through a five-power constitution, Dr. Sun aspired to make the people of China collectively her emperor and to create a constitutional government that would be all-powerful and all-competent in their service. It has been a century since the founding of the Republic of China. Have these aspirations been fulfilled?

To exercise the authority of the emperor, the people were to rely on the four political powers. As regards the power of election, the people in Taiwan now elect the Members of the Legislative Yuan, as Dr. Sun had planned. They also elect the President, but a president different from the one that Dr. Sun had in mind. The president Dr. Sun had in mind was to be the head of the Executive Yuan, a body coordinate with the other four Yuans, and therefore, just as the heads of the other Yuans, was to be responsible to the National Assembly. The president that is elected in Taiwan is above the five Yuans, most powerful but responsible to no one, except the electorate at the next election if he is still eligible to run. Since the abolition of the National Assembly, the people no longer elect delegates to that Assembly. However, for a long time, the people in Taiwan have been electing their county executives and council members and the functional equivalents of both in municipalities. As to recall, the recall of the President now requires initiation by the Legislative Yuan, and the recall of other major office-holders is subject to a very high threshold requirement, perhaps indicating a lack of enthusiasm for this power.<sup>57</sup>

As to the powers of initiative and referendum, though the Constitution authorizes the National Assembly to exercise these powers over legislation at the central level, the Assembly in fact never did. With the abolition of the assembly, these powers have of course become moot. A statute governing the exercise of initiative and referendum by the people has been “under consideration” by the R.O.C. government for a while, which reportedly would institutionalize direct democracy at the county level for matters concerning home rule.<sup>58</sup> In the meantime, a Statute on Plebiscite has authorized nation-wide and local initiative and referendum on a number of listed subjects. Under the statute, a specified number of citizens, the Legislative Yuan, or the President may set in motion an initiative or a referendum. The President’s power to propose a plebiscite is, however, limited to situations “where the country is under a threat of foreign force which is likely to lead to a change in national sovereignty.” The first citizen vote proposed by President Chen Shui-Bian, however, was arranged to take place on the presidential election day, in violation of the statute, and at a time when there was no foreign threat in existence. The people in Taiwan now seem to enjoy a measure of direct democracy. But, of course, they have not had the benefit of tutelage. One eminent scholar recently described them as “reason blind.”<sup>59</sup>

Dr. Sun’s aspiration regarding the government has not been fulfilled. The heart of his theory, namely the division of political and performance powers, was crushed when the National Assembly was abolished. With the sidelining of the Examination<sup>60</sup> and Control<sup>61</sup> Yuans, the system of central government in Taiwan now resembles more a government founded on a three-fold, rather than a five-fold, separation of powers. Representative democracy, so much disfavored by Dr. Sun, is now practiced in Taiwan. Without an effective Examination Yuan to screen all of the appointed and elected officials, and without an effective Control Yuan to remedy incompetency of, and improper or illegal exercise of power by, these officials, Sun’s all-competent government is far from existing.

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<sup>57</sup> See *id.* at 150-51.

<sup>58</sup> *Id.* at 154.

<sup>59</sup> Professor Chih-Yung Chien remarked: “台灣從下到上都是「理盲」.”  
<http://zh.wikipedia.org/wiki/%E9%8C%A2%E8%87%B4%E6%A6%95>.

<sup>60</sup> The power of personnel administration has been transferred to the Executive Yuan for a long time.

<sup>61</sup> The Control Yuan no longer has the power of impeachment of the President, a major blow to its powers.

The Constitution of the Republic of China proclaims that it is established “in accordance with the teachings bequeathed by Dr. Sun Yat-sen in founding the Republic of China.” Among the most important of the teachings is, of course, the Five-Power Constitution. The foregoing record of implementing this teaching is, obviously, a mixed one. When I was growing up in China and Taiwan, a portrait of Dr. Sun hung in every hall for public gathering. On each side of the portrait, there always was a vertical line carrying a message from him. Dr. Sun’s portrait continues to appear in Taiwan,<sup>62</sup> but the lines no longer accompany it.

By way of conclusion here they are: --

“The revolution has not succeeded yet;  
Strive on, Comrades!”

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<sup>62</sup> And, occasionally, even on the mainland.