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# FAILURE OF LAW IN NATIONALIST CHINA

## Rights of the Individual Destroyed Under the Provisional Constitution

BY DR. HU SHIH

*The following striking indictment of the absence of a law that will protect the individual and limit the powers of Government as well as of others is contributed by Dr. Hu Shih, the well-known scholar and lecturer to the Chinese monthly magazine "The Crescent Moon," from which it is here translated.*

The National Government on April 20, 1929, promulgated a decree aiming at the protection of the Rights of Man. The decree reads:

"In all countries in the world the Rights of Man receive the protection of law. The tutelage period having now commenced, a solid foundation should be laid for government by law. No persons, individual or corporate body residing within the domain of the National Government of China, shall, by an illegal act, be permitted to violate another man's person, liberty and property. Any violation of this kind shall be severely punished according to law. Let all governmental organs, executive and judicial, publish this order for general observance."

The above order issued at the present period during which personal rights are being least respected, cannot but be welcomed by the people. When, however, our first enthusiasm for its reception is over and when we scrutinize the order in a more sober state of mind, we are greatly disappointed in at least three aspects:

### Some Notable Omissions

(1) While the order recognizes the rights of man under three headings—person, liberty and property—these rights are not defined. For instance, under liberty, the order omits to say what kinds of liberty, nor does it say what will be the form of guarantee which will be given to property. The absence of definition of any sort is a serious defect.

(2) This order only forbids violation of these rights by a private individual or a corporation but fails to restrict governmental organs. It is true that a private

person or a corporation must be prohibited from attempting acts of encroachment upon another man's person, liberty and property, but the country is suffering very much more through and from illegal acts of the governmental organs, or acts done in the name of the government and the party. For example, all interference with the liberty of speech and publication, confiscation or private property, and recent attempts at nationalization (which is another form of confiscation) of electrical and industrial plants in several cities—all these have been done in the name of some government organ. The order in question seems to have accorded no protection or guarantee to the people against these acts of the government itself. "A public officer may indeed start a conflagration, but the people must not light their tiny lamps."

(3) The order is of a mandatory nature carrying a penalty, "according to law." It omits to state what law, or kind of law will be applicable in a case of this sort. There is indeed a special provision in the criminal code for an offence against personal liberty. But should an act of unlawful violation be perpetrated under and in the name of the government or the party, then the aggrieved party would be without a redress of guarantee.

### Not Affected by the Order

Shortly after the promulgation of the order, the local press in Shanghai began to question whether or not the activities of the Anti-Japanese Boycott Society would be covered by it. The Japanese press answered the question in the affirmative, but Chinese papers like the "Shih Shih Sin Pao" argued that



this order did not cover the acts of the patriotic boycotters.

The Anti-Japanese Boycott Society is not the only exception. All those who are branded as "Reactionaries," "Local Bullies and Wicked Elders," "Counter Revolutionaries" and "Suspected Communists" are not within it, so that their persons may be insulted, liberty curtailed, and property seized at pleasure. These acts would not be illegal. Any publication may be banned as reactionary and the banning would be no violation of the liberty of thought or the press. A foreign controlled school may be closed down as an organ of "cultural invasion," and a Chinese controlled school may meet the same fate, if someone sees fit to style it a reactionary centre. Are these not acts of unlawful violation of personal rights? What guarantee do people have against such unlawful acts of encroachment?

#### Demand for More Rigour

On March 26, 1929, the Shanghai papers contained in their telegram columns, a report that Mr. Chen Teh-ching of the Shanghai Municipality had submitted a proposal before the Third Congress of the Party, in which Mr. Chen moved for a stronger policy in dealing with the counter-revolutionaries. Mr. Chen felt that the courts of justice had been too lenient, having, in his opinion, too much regard for proof, and were inclined to technicalities, thus enabling many counter-revolutionaries to escape from their merited punishments. The proposal he submitted was that anyone who had been certified by a provincial branch of the Kuomintang, or of a special Municipality as a counter-revolutionary, should be accepted by all courts of justice as conclusive evidence of his guilt without further evidence being adduced. On his appeal against the judgment, a similar certificate issued by the Central Kuomintang Party would constitute a sufficient ground for dismissing the appeal. In other words, Mr. Chen wanted to vest in the party judicial authority to determine the question of guilt of one who is charged with being a counter-revolutionary, and the court had only to perform its ministerial duty in the execution of the party's order. Such a suggestion is preposterous and totally inconsistent with the doctrine of government by law.

#### A Letter That Was Banned

After reading the press report, I immediately wrote a letter addressed to Dr. Wang Chung-hui, President of the Judicial Council, asking his opinion on the subject, and inquiring if he, with his profound knowledge of the legal history of the world, had known of anything like it in the history of jurisprudence in any civilized country. I considered Mr. Chen's proposal as something deserving public attention, so I sent a copy of my letter to the Kuo Wen News Agency for publication.

The agency after a few days wrote back saying that the letter had been duly forwarded to various newspapers, but its publication had been banned by the censor, and the copy was therefore returned. I failed to see any legal grounds justifying the censor to suppress the publication of a document having no reference whatsoever to military affairs. It was written in my own name for which I was prepared to assume full responsibility. Why may not a private citizen discuss a question of national importance and interest, when he is prepared to take the responsibility? What protection have we against this kind of unreasonable interference?

A dean of the Anhui University once spoke a few indiscreet words in the course of a conference which he had had with General Chiang Kai-shek, for which the latter promptly had him incarcerated for several days. His friends had to plead with General Chiang for mercy. As to legal remedy, he had none. He could not start legal proceedings against the President of the National Government. In a country where only appeals for mercy, and not legal action for justice, are open in such a case, there is only a personal government, but no government by law.

#### Brutal Treatment by Soldiers

Again, only a few days ago, there was a strike taking place in Tangshan. The incident was precipitated by the case of one Mr. Yang Jen-pu, the manager of Liang I-cheng, a commercial concern. Mr. Yang was arrested by the garrison troops on the charge of having bought arms from runaway soldiers. He was imprisoned and cruelly flogged. The "Ta Kung Pao" (Tientsin) on April 28, 1929, reported that 12 representatives of



the Chamber of Commerce called on the quarters of the 152nd Brigade pleading on his behalf, but the military judge refused to yield his victim. As the representatives were coming out they saw Mr. Yang who was being brought in by soldiers. Mr. Yang was indeed in the most pitiful condition. His legs were swollen and blood-stained and he could hardly move about. When he saw his friends, he attempted to weep, but no tears were forthcoming. His friends were helpless being unable to assist him. Later 88 business hongs in Tangshan wired to General Tang Sheng-chih pleading for their friend's life. And when their plea failed they could only declare a general strike and closed their shops as a protest. What more can they do? Where do we see protection of the rights of man? Where is any indication of government by law?

#### Torture As in Old Days

While writing this article a later issue of the "Ta Kung Pao" dated May 2, 1929, arrived and gave the glad news that in consequence of the strike proclaimed by the merchants, Mr. Yang Jen-pu had been liberated. The victim of the maltreatment was in such a bad condition that he had to be carried out on a wooden board, not to his own shop but direct to the Chung Wha Hospital. The correspondent of that paper proceeded to the hospital to have a personal interview with Mr. Yang, and on his arrival found that Mr. Yang's clothes, full of blood stains, were stuck to the wounds of floggings and could only be removed by the doctor with careful handling. Mr. Yang described his experience as most intolerable. His legs had been put and pressed between a hard board and a wooden rack, a discarded instrument of torture used in the old days in dealing with robbers. When he was in great agony, the board broke down by the force of pressure. Then he was flogged all over his body with a piece of bamboo until the bamboo also broke. The commanding officer, one Mr. Liu, who was present during the time all this was going on, suggested that an iron piece should be brought in, which the judge, Mr. Ching, refused to use, fearing unforeseen results. Thereafter on each occasion he was brought before the judge for examination, he was flogged, until his body became a mass of wounds

and sores. The attending doctor expressed his opinion that Mr. Yang had been so badly hurt that he must have three months' treatment before he could recover.

This incident took place 11 days after the promulgation of the order for the protection of the Rights of Man. It is not known what the National Government think of it.

#### A Scrap of Paper

These two well known cases are cited here to prove that security of personal rights and supremacy of law will certainly not be achieved by a mere piece of paper containing an ambiguous order of the kind as has just been issued.

Government by law simply means that no action of a public officer should exceed the limits set by law. A government by law only recognizes the law and respects no persons. Neither the Chairman of the National Government nor the officer of the 152nd Brigade is permitted to go beyond the defined limits with immunity. If the former could imprison a private citizen at his pleasure, so might an officer of the 152nd Brigade flog a merchant.

But so far there has never been any attempt to define by law the limits of government action in China, nor has there been any constitutional provision for the protection of the rights and liberties of the people. In such circumstances, how can we talk about the Rights of Man or the foundation of government by law?

#### Need of a Constitution

If there is a real desire to protect the rights of man and to have a true government by law, the first prerequisite should be a Constitution of the Chinese Republic. The least and the very least should be the promulgation of a "Provisional Constitution for the period of tutelage."

Dr. Sun Yat-sen in his work entitled "The Revolutionary Tactics," divided his national construction programme into three distinct periods. (1) the military era, scheduled to last for three years, (2) the era of the Provisional Constitution, which is to last six years, during which "all the rights and obligations of the military government towards the people as well as the people's rights and obligations towards the government shall be definitely fixed by the Provisional Constitution. This law should be rigidly obeyed by the military



government and the local assemblies as well as private citizens," (3) the era of Constitutional rule.

"The Revolutionary Tactics" was written in 1906 and was subsequently revised. In 1919 when Dr. Sun wrote his "Sun Wen's Philosophy" the author in no mistakable manner repeatedly emphasized the importance of the transitional stage during which "the government should rule in accordance with the Provisional Constitution in order to guide the people towards local self-government." In his later work, "The History of Chinese Revolution," published in January 1923, the second stage assumed a new name and was termed "the transitional stage," which, said Dr. Sun,

"is an era of rule under the Provisional Constitution (not the one promulgated in Nanking in 1912). This stage shall devote itself to instituting local self-government, and to the development of popular government. Taking a *hsien* as a unit, each *hsien* or district shall see to it that as soon as all disbanded soldiers are expelled and all military operations ceased, the Provisional Constitution shall be proclaimed and enforced, in which people's rights and obligations as well as the authority of the revolutionary government shall be clearly defined. This era is to have a duration of three years, on expiration of which, the people shall elect their own district officials. The revolutionary government shall only exercise a tutelage supervision, within the limits of the Provisional Constitution, over all self-government functionaries."

#### Fundamental Law Indispensable

One year later, in 1924, when Dr. Sun commenced writing his "Programme for National Construction," he again divided the rehabilitation into three stages. The second stage was now called the tutelage era, but no mention was made of the Provisional Constitution nor of the length of the tutelage period. Unfortunately, another year later, Dr. Sun died. People who read the last "Programme" without a knowledge of his previous works, are likely to think that the tutelage era may be prolonged indefinitely, and may not need any convention or constitution. This I think is a grave mistake.

Dr. Sun, it is true, omitted to mention the Provisional Convention in his last book, but if we study his books published prior to 1924, we shall be convinced that Dr. Sun

could not have thought it possible to govern a country of the size of China without some kind of fundamental law.

The author made many important omissions in his last book. For example, article 21 reads, "Prior to promulgation of constitution, all chiefs of the five councils shall be appointed or discharged by the President," which implies that there shall be a president before the constitutional period, but he omitted to state in the whole programme as to the methods of presidential election. Again the Declaration of the first Party Congress of January 1924 had said that "all government powers should be concentrated in the party," but Dr. Sun, writing his Programme on April 12 of the same year, made no mention of one party dictatorship in any one of the 25 articles. These are conclusive evidence that the Programme was written at a time when a certain line of thought happened to be predominant in the author's mind and did not represent his complete plan. Certainly it does not contain all that ought to be there.

#### Government's Powers to Define

Moreover, the programme has already been revised on account of changed circumstances. For instance, article 19 stated that the establishment of the five councils is to be made at the commencement of the third era, i.e., that of constitutional rule, but as a matter of expediency they were established last year. Why then should one hesitate to advocate anything that happened to have been omitted in one of Dr. Sun's writings?

What we want to-day is a Provisional Constitution or convention, the kind which, in the words of Dr. Sun, "would define the rights and obligations of the people as well as the governmental powers of the revolutionary government." We want some law to fix the proper limits of the government beyond which all acts become illegal. We ask for a convention that will define and safeguard man's person, liberty and property. Any violator of these rights, be he the Chairman of the National Government, or the Colonel of the 152nd Brigade, may be prosecuted and adjudicated by law.