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Nils Peterson
University of Wisconsin-Madison

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A Question of Law:

The Chinese Legal Discourse under the Guomindang in the 1920s and 1930s

Nils Peterson

University of Wisconsin-Madison

As the Qing Empire crumbled in 1911, a new era of uncertainty dawned to fill the void in China. In the absence of a strong central authority, the coming two decades would witness China devolving into separate realms ruled by warlords. As the 1920s drew to a close, the Guomindang, led by Chiang Kai-shek (1887-1975), stood poised to launch an effort to unite China under the party's banner. During the 1920s and 1930s, Chinese legal discourse revitalized itself. Questions about the rule of law and democracy occupied central points in these discussions. In this essay, I argue that Chinese discourse concerning the role of a national constitution turned from being premised on the rule of law in the late 1920s to an increasing acceptance of an authoritarian government in the early 1930s. The famed Chinese scholar and diplomat Hu Shih's (1891-1962) writings exemplify the changes in this discourse.

From Sun Yat-sen to Warlords

Sun Yat-sen (1866-1925), the founder of the Guomindang, was born in 1866 in China but moved to Hawaii, where he received his education and lived with his older brother. He later

graduated from the College of Medicine for the Chinese in Hong Kong in 1892.¹ Due to his non-traditional Chinese education, Sun Yat-sen realized that "the doors to fine Chinese society and the paths to influence and power were to remain closed to him."² This reality led him to strive for revolutionary change and the power that accompanied it.

Unfortunately for Sun Yat-sen, all the revolutionary schemes that he led turned out to be unmitigated disasters. These schemes relied principally on foreign money combined with Chinese secret societies, similar to criminal gangs.³ It made sense that when the 1911 Revolution broke out in Wuchang in 1911, Sun Yat-sen found himself in the United States searching for foreign donors to fund his next revolutionary plan. He then flew to London and Paris to try, unsuccessfully, to obtain a loan for his soon-to-be government. Upon returning to China in late December 1911, Sun ascended to the Presidency of the Republic of China as the compromise candidate who was supposed to alleviate factional infighting.⁴

Before he could get his feet firmly planted beneath himself, Sun Yat-sen relinquished power to Yuan Shikai (1859-1916) in February 1912 after only a month of being the President of the Republic of China. Sun did not have the military or political capacity to unify China after coming to power via a revolution he worked his whole life to achieve. Yuan rose from a failed minor noble to a military reformer under the Qing dynasty who successfully molded the Chinese

¹ Marie-Claire Bergère, *Sun Yat-Sen*, trans. Janet Lloyd (Stanford, CA: Stanford University Press, 2000), 27.

² *Ibid.*, 41.

³ *Ibid.*, 136.

⁴ *Ibid.*, 207-209.

army into a modern fighting force. His reform efforts led to his proteges controlling critical divisions in the army, valuable connections during Yuan Shikai's rise to power.⁵

Once in power, Yuan Shikai worked to consolidate his power at the expense of the rule of law. He played American pro-Christian sentiment to gain recognition for his administration while offering various land acknowledgments and business deals to other foreign powers in exchange for recognizing his government as legitimate. On the internal front, Yuan purged Guomindang party members from the national parliament in 1913 and created a puppet cabinet to lend legitimacy to his rule. Ironically, Yuan did work towards the development of an independent judiciary during this period since this would allow for inching closer to "ending the hated system of extraterritoriality."⁶ His commitment to this legal endeavor soon faltered as his popularity declined in 1914 due to increased Japanese demands on China. Yuan crushed any remaining dissenting opinions in the press. To put the icing on the cake, Yuan declared himself emperor in 1915, a move that led to public discontent and his military proteges abandoning him. In response to the outcry, Yuan canceled the monarchy in March 1916 amid warlords declaring independence from Beijing. In June of that year, Yuan died, marking the beginning of the Warlord Era.⁷

Yuan Shikai ultimately left the rule of law in China in a sorry state upon his death. No longer did former Qing courts retain even nominal authority over Chinese subjects. Yuan subverted the rule of law by his authoritarian actions and unintentionally splintered China into various autonomous territories ruled by warlords, each with his own version of "law" and

⁵ Jonathan D. Spence, *The Search for Modern China*, 3rd ed. (New York, NY: W.W. Norton Company, 2013), 263-265.

⁶ *Ibid.*, 270.

⁷ *Ibid.*, 267-273.

"justice." As the central government in China remained heavily limited in power and scope during the Warlord Era, we shall not delve into a deep discussion of law during this period. The main reason for this is that each warlord's territory had its own set of laws by which individuals abided. An analysis of each warlords' conceptualizations of justice and law remain beyond the scope, and are tangential to, this paper.

While the Warlord Era did not end at a specified date, the rise of the Guomindang signaled a power shift in Chinese politics. This shift in power is not to argue that warlords absorbed into the Guomindang began to operate according to a party-wide legal conception of justice. Power dynamics played its role in the actualization of laws during the near-constant state of war that China found itself in over the 1920s and 1930s. The Guomindang's increasingly national hold on power, however, lent weight to its legal reforms that prior efforts did not enjoy.

Beginning in 1929, the Guomindang led by Chiang Kai-shek began manipulating the judicial exams to suit party interests. In that year, it introduced the Guomindang Party Principles and Programs section to the exam. Four years later, the Guomindang removed the exam's power as a precursor to advanced judicial training. In 1935, the party introduced a special judicial exam for Guomindang party members, which led to judicial training being altered to fit these new recruits, and by extension, the party's needs. Party membership was not a necessity for judicial training, but it certainly helped one's chances at obtaining a position in the judicial system.⁸ Despite the Guomindang politicization of the judiciary, when compared to 1929, "academic standards in the judiciary did rise over the 1930s."⁹

⁸ Glenn Douglas Tiffert, "Judging Revolution: Beijing and the Birth of the PRC Judicial System (1906-1958)," PhD diss., (University of California-Berkeley, 2015), 11-14.

⁹ *Ibid.*, 13.

This relative increase in judicial standards did not cover up the damage done to the judiciary by the Guomindang. Judges remained inexperienced and tied heavily to the party. Far from the ideal of a scholar-official, Chinese judges in the 1930s eviscerated the "judiciary's founding mission to independently promote rule of law" by becoming subservient to Guomindang party interests.¹⁰ The Guomindang further impaired judicial independence by requiring ideological classes on the Three People's Principles, espoused by Sun Yat-sen, in law schools.¹¹ While this indoctrination proved problematic for lawyers ostensibly trained to uphold the rule of law, the majority of law school graduates did not study law but rather social sciences within law schools.¹² Most law school graduates were ultimately not lawyers.

Throughout the Guomindang's rise to power in the late 1920 and 1930s, the party hurt the judicial rule of law within China. Before the Guomindang came to power, the rule of law did not exist in large swaths of Chinese territory. During the 1920s, the Guomindang found China in a state of corruption and civil war fueled by independent warlords. The party solidified its hold on power by indoctrinating the judiciary throughout the 1930s. It is within this context that we now turn to the debates, paying particular attention to the influential scholar Hu Shih, regarding the rule of law in the 1920s.

The Constitution and Rule of Law in the 1920s

¹⁰ Ibid., 19.

¹¹ Ibid., 21.

¹² Ibid., 26.

Hu Shih was an impactful scholar and reformer during his lifetime, eventually rising to become ambassador to the United States. He became an influential figure in the New Culture Movement during the 1910s and 1920s that critiqued the Confucian classics with ideas like democracy. Out of all his achievements, I begin by arguing that Hu Shih premised his law-oriented writings, reflecting the Chinese national legal discourse in the 1920s, on a national constitution and the rule of law.

This discourse may be seen most prominently via Hu Shih's discussion of the constitution as a fundamental law. As far back as 1923, Shih complained of the "shameless politicians who cannot themselves obey the law" and the need for a fundamental law embodied in a constitution.¹³ The discussion of the constitution as a fundamental law demonstrated that at this point, Shih argued for a government subordinate to the law. A government could not go against what it was fundamentally founded upon, a fundamental law, and retain legitimacy. Via this reasoning, the Chinese legal discourse centered around the rule of law.

Hu Shih fused together legal discourse and questions of Chinese governance in the late 1920s. The Warlord Era began to come to an end with the rise of the Guomindang by 1929. Around that year, Hu Shih wrote in his essay "When Shall We Have a Constitution" that "the basic idea underlying a democracy is that the common sense of the common man is essentially dependable."¹⁴ Bringing the question of China's future government to bear, Shih understood that democracy demands the rule of law. Without it, the common man's sense, especially after the uncertainty of the Warlord Era, would be to reject the turbulence of democracy in favor of stability. One may not escape that Hu Shih's argument for democracy implied that the ruling

¹³ Henrietta Harrison, *China: Inventing the Nation* (London, UK: Hodder Education, 2001), 204.

¹⁴ T'ang Leang-Li, ed., *China's Own Critics: A Selection of Essays* (Arno Press, 1931), 33.

faction, likely the Guomintang, would be subordinated to the rule of law via a constitution. He believed that only by government submission to a constitution could it be considered legitimate.¹⁵ Throughout the 1920s, Hu Shih adamantly argued for the subordination of the leading party to a constitution and the rule of law that theoretically comes along for the ride.

Authoritarianism in the 1930s

I argue that Hu Shih's writings changed, as did the Chinese national legal discourse, beginning in the early 1930s to one of an increasing acceptance of an authoritarian government. It is helpful to trace the roots of this change back to 1929 when Shih's writings exemplified the view that a government must subordinate itself to a constitution. He wrote in 1929 that at a bare minimum, there should be "a Provisional Constitution for a period of tutelage."¹⁶ Tutelage refers to Sun Yat-sen's view, adopted by the Guomintang, that the Chinese people were not ready for democracy and needed to be tutored by the party before achieving democracy. The Guomintang never specified any metrics as to when this period of tutelage would supposedly end. Shih's concession, that the most realistic possibility he could hope for would be a provisional constitution, marks his nascent thoughts concerning nondemocratic ruling governments, like the Guomintang.

Chinese legal discourse in the 1930s would expand to focus on questions surrounding the rule of law under authoritarian governments. In 1931 the Guomintang declared their

¹⁵ Jerome B. Grieder, *Hu Shih and the Chinese Renaissance: Liberalism in the Chinese Revolution, 1917-1937* (Cambridge, MA: Harvard University Press, 1970), 276.

¹⁶ Pei-kai Cheng, Michael Lestz, and Jonathan D. Spence, eds., *The Search for Modern China: A Documentary Collection* (New York, NY: W. W. Norton and Company, 1999), 274.

"Emergency Laws" that gave the government increased powers over the people's liberties. One of these laws declared that "whoever, with a view to subvert the Republic [of China] ... [conducts] a campaign of propaganda against the State by writing, sketching, or speech-making" shall be punished by death or life imprisonment.¹⁷ This law should be understood in the context that the Guomindang found itself in the midst of a civil war with the Chinese Communist Party (CCP) and a burgeoning Japanese invasion of Manchuria. Such context reveals that the legal discourse's shift towards an acceptance of authoritarianism did not come out of theoretical hocus pocus, but rather the need to confront the questions posed by the Guomindang's non-liberal governance.

The embrace of authoritarianism is seen by the rhetoric surrounding the education of the Chinese people. Hu Shih argued that the mass's failure to "not love the nation is partly that they are inadequately educated and therefore unable to imagine a state and partly that the state has not bestowed any benefits upon the people."¹⁸ The rhetoric of loving the nation does not directly demonstrate a shift towards embracing authoritarianism but rather the attempt by Chinese leaders and intellectuals to create a nation in the minds of the people. Shih's message reveals that authoritarian governments like the Guomindang could usurp the project of Chinese nation-building for their own ends since the people did not yet have a clear relationship to a national authority. As the Guomindang continued to propagate their political ideology in the judicial system and schools,¹⁹ the legal discourse became coopted by the party. Love of nation turned into the Guomindang's demand for obedience to the party, the people's legal rights falling by the

¹⁷ Cheng, *Documentary Collection*, 275-276.

¹⁸ Wm Theodore de Bary and Richard Lufrano, *Sources of Chinese Tradition: From 1600 Through the Twentieth Century*, 2nd ed., vol. 2 (New York, NY: Columbia University Press, 2000), 337.

¹⁹ Harrison, *China: Inventing the Nation*, 198.

wayside. Hu Shih's great hope for the constitution as a fundamental law gave way to begrudging acceptance of Guomindang authoritarianism in the 1930s.

The 1920s and 1930s saw the rise of the Guomindang and a shifting legal discourse in China. Hu Shih began in the 1920s by believing in the constitution as a fundamental law to which a legitimate government needed to submit itself. As the Guomindang became increasingly authoritarian, the 1930s gave way to a begrudging acceptance of its government style in Chinese legal discourse. The power held by the Guomindang and the worsening war conditions in China throughout the 1930s did nothing to mitigate the acceptance of authoritarianism. Hu Shih's hope for a democratic Guomindang that abided by the rule of law ultimately faded into the mists of history during the 1930s.

About the author

Nils Peterson studies history and Chinese at the University of Wisconsin-Madison. His research interests include Chinese legal and religious history.

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