CHAPTER 5

“Law is One Thing, and Virtue is Another”: Vernacular Readings of Law and Legal Process in 1920s Shanghai

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The new Chinese republic, established in 1912, repositioned people as citizens in a polity governed by law. But the new state could not achieve full judicial sovereignty. How did people negotiate political and cultural identity in legal practice? And how did ideas of citizenship and Chinese judicial sovereignty influence public discussion of the law? This chapter uses trial transcripts, reportage, and commentary from a controversial case in the early 1920s to map ideas of law in the early Chinese republic, a time of draft provisional codes, new-style courts (civil and criminal), and ideas of judicial independence.

A Multitude of Laws and Institutions

Chinese understandings of law in this era were framed by a semicolonial array of legal institutions with contested and overlapping jurisdictions. This unsettled legal framework shaped the political and intellectual context for the 1922 case that is discussed here, and for the contemporary legal reform and judicial sovereignty movements that infused the rhetoric of its legal proceedings and commentary.

The partial, but multiple presence of foreign authorities across China’s landscape, and the imposition of varying degrees of extraterritoriality in different spaces created a panoply of judicial arrangements that required practicing lawyers, Chinese and foreign, to gain expertise in multiple legal systems. The legal patchwork of early twentieth-century Shanghai included areas of Chinese jurisdiction, an Anglo-American dominated International Settlement, and a French Concession. Chinese courts adjudicated in Chinese areas. Hybrid “mixed courts” in the International Settlement and the French Concession

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brought together elements of extraterritorial privilege and Chinese sovereignty in joint hearings by a foreign assessor and a Chinese judge. There were, in addition, consular courts and extraterritorial courts for foreign nationals, like the U.S. Court for China. Foreign courts on Chinese soil, the stigmata of impaired sovereignty, disadvantaged Chinese in globally asymmetrical relations of power, but also created accidental spaces and opportunities that could be manipulated in practice by Chinese groups or individuals.1

Under these circumstances, judicial reform in China was predominantly Western-modeled and linked, from its inception, to Chinese efforts to regain legal sovereignty. The legal reforms of the late Qing New Policies era (1901–11) followed several decades of translation of Western and Japanese law. Following Western notions of humanitarianism, reforms emphasized incarceration over corporal punishment, judicial independence, drafting of a civil code, and creation of independent courts.2 The creation of a republic and the touted transformation of the Chinese people from subjects to citizens brought a new emphasis on the rule of law, human rights, people's rights, and the protection of property. Although differences of opinion persisted in regard to the preservation of elements of Chinese law and notions of justice (and the selection of Chinese and Western features to be combined in the new judicial system), the New Policies reforms were generally enshrined in the new draft legal codes. Judicial independence, if elusive, was salient as a deeply felt imperative of the new republic. In the spatially differentiated political landscape, new-style courts and judicial personnel concentrated in major cities where they

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2 Chinese magistrates formerly adjudicated without civil/criminal distinctions. By 1912, 345 civil courts were established nationwide (Beijing Supreme Court, provincial high courts, county courts of first instance, urban district courts; with procuratorial courts at each level for criminal cases). Xiaoqun Xu, Trial of Modernity: Judicial Reform in Early Twentieth-Century China (Stanford: Stanford University Press, 2008), 29–31, 43.