**Constitutional judicialization and popular constitutionalism in China**

Are we there yet?

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**1.1. Introduction**

I have often been told by Chinese law students that constitutional law is among the most boring subjects in their four-year curriculum. What happened (and in many respects, what did not happen) since the turn of the century seems to have proven the students wrong. Indeed, and until quite recently, the constitutional scene has been both lively and interesting, sometimes with joy and other times with disappointment. However, in all cases, there has been some considerable popular participation and support. Whether encouraged or disappointed, the significance of the various events in the last several years need to be understood in context – political and constitutional. I have earlier argued that understanding the Chinese Constitution lies in understanding what are not in the Constitution, rather than what are in it.1 In light of the development in the last ten years or so, what occurred, what did not occur and what were meant to occur but are yet to be realized, are equally important in understanding and assessing constitutionalism in China today.

The various ‘constitutional events’ since 2001 have been analysed rather extensively, and in many cases, excellently.2 This chapter does not intend to repeat those analyses. Instead, it tries to put these ‘events’ in a contextual perspective and thus sheds some light on their significance (or insignificance) for the development of constitutionalism in China. It will argue that constitutional litigation is not dead in China;3 it simply has not taken off in the first place, and constitutionalism, however it is understood, remains an illusive goal in contemporary China.

**1.2. The missing mechanisms**

A constitution, however well-crafted, means little unless it has some practical effect in reality. Constitutionalism, however defined, must ultimately be supported by practical mechanisms for checks and balances of government powers. If a reference to the constitution or the citation of it in court would arouse excitement among scholars and the general population, it indicates more the lack of constitutionalism than its existence. Though references to the constitution may also mean the emergence of constitutionalism, it, nevertheless, means a rather sad reality in that given society. Chinese constitutional law may well fall into this category. However one wishes to interpret the Chinese constitutional law, the Chinese Constitution, as it stands now, concerns itself more with state organizational structure than with the checks and balances of governmental powers, more with the future direction of the society than the protection of fundamental rights of citizens and more with general principles than with detailed rules capable of implementation. I am, however, not suggesting that we should simply dismiss the Chinese Constitution out of hand. Seen as the ‘mother of all laws’,4 the Chinese Constitution does set parameters for social and legal developments.5 And signifi cantly for the purpose of discussion here, the Constitution does contain something one may call a mini Bill of Rights,6 the provisions of which appear to be compatible with international human rights standards. Through the 2004 constitutional amendment, the protection by the state of human rights is also declared without qualification.

While there is always a gap between the law and reality in all countries, the disparity between the Chinese Constitution on paper and its reality is extraordinary in that few, in or outside China, have taken the Chinese Constitution seriously until very recently. Theoretically, the 1982 Constitution for the first time expressly declares that the Constitution has the supreme authority of law.7 It further declares that the state upholds the uniformity and dignity of the socialist legal system and that no law or administrative or local regulation shall contravene the Constitution.8 There are, however, no mechanisms or procedures established by the Constitution for citizens to challenge the constitutionality or legality of these laws and regulations, nor has the National People’s Congress (NPC) or its Standing Committee (SCNPC) ever invalidated any such laws or regulations publicly.9 Similarly, there neither is any mention of the right of citizens or organizations to challenge the constitutionality of government actions, nor is any mechanism established for the enforcement of a citizen’s constitutional rights. The Constitution vests the power to supervise the enforcement of the Constitution with the NPC and the SCNPC,10 but both authorities are legislative organs and, more problematically, there is, once again, no mechanism for either its enforcement or its supervision by these authorities. The SCNPC is further entrusted with the power to interpret the Constitution,11 yet it rarely does so.12 Finally, the Constitution reserves the power of constitutional amendment to the NPC and requires that any amendment must be proposed by the SCNPC or one-fifth of the deputies of the NPC and adopted by a majority vote of more than two-thirds of all deputies.13 However, in reality, all amendments to the Constitution have been proposed by the Party and no suggestion to amend the Constitution proposed by the Party has ever been rejected or even modified by the NPC. While many scholars insist that the 1982 Constitution is the ‘best’ among the four Constitutions adopted in the PRC, other scholars and officials do recognize the weakness in the present Constitution. As one prominent Chinese scholar concedes The supervision and enforcement mechanisms are still imperfect. ... The power of constitutional supervision has not been sufficiently exercised; constitutional interpretation has yet to be developed; education in the constitution is still being carried out, and special institutions are yet to be established.14 Not surprisingly, the question that whether the provisions of the Constitution may be directly enforced in a court of law remains a controversial issue and is yet to be settled.15 The various ‘constitutional events’ since 2001, and their significance or insignificance, can only be understood and make sense in the context of this conspicuous absence of practical mechanisms in the Constitution.

**1.3. The ‘constitutional events’**

***1.3.1. An overview***

It is not just the intellectuals who have identified the deficiencies in the Constitution; Party and State authorities have also openly acknowledged the need to address the lack of mechanisms for constitutional implementation. Thus, the SCNPC in the mid-1990s decided that one of its major tasks was to strengthen the supervision of legal enforcement,16 and some NPC deputies began a call for the making of a law on supervision.17 Discussions and debate about various proposals for strengthening constitutional interpretation and supervision, including the establishment of a Constitutional Committee within the NPC, the establishment of a Constitutional Court or the granting of constitutional review powers to the Supreme People’s Court also began in the 1990s.18 Amid these talks and discussions on constitutional implementation, attempts were made to run ‘test cases’ by the more right-conscious and reform-minded lawyers.

The *Law on Law-Making* (*Law*), adopted in 2001, is the first serious constitutional effort to address the lack of constitutional mechanisms for practical purposes. Not surprisingly, serious talk and discourse on constitutional review mechanisms occurred during the draft of that *Law* and much of the actions occurred after the adoption of the *Law*. It would, however, be misleading to suggest that efforts to make the Chinese Constitution a relevant document only occurred after 2001. In fact, the rapid development of law before 2001, especially in the administrative law areas, has the effect of translating some of the general constitutional provisions into detailed practical arrangements, with some having effect on the operation of checks and balances, others on the actual realization and protection of rights and still others filling gaps in the constitution. While, on the whole, the development has been short of aspirations of scholars, the pre-2001 legal development, especially those after 1992, on the relationship between the rule of law and market economy, had laid the foundation for signifi cant changes in judicial attitudes towards the Constitution, and in forming a short-lived consensus on the need to establish mechanisms for the actual implementation of the Constitution.

Nevertheless, it is the *Law on Law-Making* that first makes any constitutional challenge possible and the need for further reforms inevitable if the *Law’s* objectives are to be achieved. Changes in judicial attitude towards the Constitution are, to a certain extent, responses to the demand for further reforms.

***1.3.2. Constitutional mechanisms?***

The principal purpose of the *Law on Law-Making* is to establish some mechanisms to maintain consistency in law-making at central and local levels and in supervision over rule-making work of the government and judiciary (including the courts and the procuratorates). Essentially, the *Law* addresses the vertical division of central and local legislative powers and the horizontal distribution of legislative powers among legislative and administrativeauthorities;20 inter-relations among ‘laws’ issued by various authorities; supervision over law, administrative regulations and rules; delegation of legislative powers; legislative processes; and interpretation of laws.

While many of the issues had already been codified in procedural rules issued by the NPC and its Standing Committee, the State Council and its ministries and commissions and the governments and legislatures at the provincial level, they are now regulated by a higher-level unified law, indicating efforts to address some the constitutional weaknesses. Not surprisingly, the enactment of the *Law on Law-Making* was declared by deputies of the NPC as a milestone in China’s legislative history.21 While the significance of the *Law on Law-Making* is debatable, for the purpose of strengthening supervision over law and law-making, two mechanisms have been established by the *Law*. The first is Article 89 which systematically codifies the present practice and legal requirements on the filing of law and regulations for record, as already contained in various laws and regulations. With all laws and regulations fi led, largely with central authorities, Article 88 sets out provisions governing the power of a higher authority to alter or even annul laws, regulations and rules enacted by a lower authority.

The second mechanism, through Article 90, is to make the SCNPC a kind of constitutional committee responsible for review of conflicts among laws and regulations. Although the *Law* stops short of establishing a constitutional committee, as advocated by many scholars and contained in the expert draft of the *Law on* *Law-Making*,22 it is significant that some practical procedures and mechanisms have finally been instituted for the review of legislation. To implement the *Law on Law-Making*, a specialized unit within the Legislative Affairs Committee of the SCNPC was established in May 2004 which strengthen the work of the filing for record of laws and regulations and of reviewing these laws and regulations.23 In December 2005, the Working Procedures on Filing for Record and Review of Administrative Regulations, Local Regulations and Regulations of Autonomous Regions and Special Economic Zones, initially issued in 2003, were revised and a new set of Working Procedures on Filing for Record and Review of Judicial Interpretations was issued by the SCNPC.24

These working procedures further established some specific procedures for the constitutional review of regulations and rules.25 Most recently, the SCNPC decided in 2007 to transfer the task of legislative planning from its General Office to the Legislative Affairs Committee.26 Although this move is not a direct measure in the supervision of law-making, it surely has the potential to ensure the consistency of law-making. These initiatives, small steps as they might be,27 are important in ensuring some degree of unity of law, but they are far from establishing a constitutional review mechanism in its true meaning.

While little is known about the actual work for ensuring the consistency of law-making, initial efforts, at least in terms of self-examination, have been made. Thus, the State Council decided in February 2007 to undertake a comprehensive review of all administrative regulations and rules issued before the end of 2006.28 After ten months of intensive work, involving 24 legal experts acting upon 1,130 submissions,29 a total of 655 sets of administrative regulations and rules were reviewed, with 92 (14 per cent of the total) of them being repealed.30 Governments at the level of ministry and province had also undertaken self-review of ministerial and provincial rules, involving some 12,696 sets of rules, resulting in 2,173 being repealed and 395 revised.31 In 2008, the SCNPC began its own self-review, resulting in its Decision to Amend Certain Laws,32 under which 59 laws were amended. Apparently, some supervisory reviews have also been carried out. Thus, the Annual Report of Legal Construction in China (2008) reported that, in 2008, the State Council reviewed some 1,107 ministerial and local regulations and handled 44 ‘problematical’ rules and regulations. Further, legal offices at the provincial level reviewed 9,925 lower-level government rules and handled 295 inconsistent rules. However, it is unclear how these ‘problematical’ rules were ‘handled’.

There have also been efforts to establish some formal mechanisms for the exercise of the powers of constitutional supervision by the SCNPC. Under the Constitution, the supervisory power may be implemented or realized through different constitutional mechanisms and, among others, through interpreting the law, inspecting the implementation of selected laws and supervising the work of the administrative and judicial organs.33 Although the power to interpret the law is not uncontroversial, as it clearly contravenes the basic principles of the separation of powers, such a power is solidly established by the Chinese Constitution. Until quite recently most scholars have not been overly concerned about this constitutional arrangement, and criticisms of this power have been more about the ‘neglect of duty’ by the NPC and its Standing Committee in exercising the power than about its use.34 The controversy over SCNPC’s interpretation of the Basic Law of Hong Kong in relation to the right of abode in Hong Kong in 1999 led scholars, especially those outside China, to have second thoughts about this power. Clearly, the exercise of this interpretive power has the potential to interfere with judicial independence in Hong Kong.35 The inspection of the implementation of selected laws by the NPC and the SCNPC is perhaps the least controversial part of the involvement of the legislature in the implementation of law, and its practice is generally seen as positively contributing to the establishment of a genuine rule of law in China.

The most controversial aspect of the supervisory functions of the legislature in the implementation of law is the attempt by some local legislatures to ‘supervise’ individual cases handled by the judiciary. Although there were some guidelines formulated by the SCNPC in 1989 for the exercise of this supervision,36 the constitutional basis for such a power is questionable. Even though the principle of separation of powers is not formally recognized in

China, the 1982 Constitution clearly stipulates that the power of adjudication may only be exercised independently by the people’s courts. The involvement of the legislatures in individual cases thus raises serious questions and concerns about judicial independence in China.37 In a widely publicized case, now often referred to as the ‘Seeds Case’ a judge in a local court (Luoyang Intermediate Court in Henan Province) invalidated a local regulation on the basis of its being in conflict with the national Seeds Law. This decision quickly attracted intervention from the Standing Committee of the Henan People’s Congress. The intervention was extraordinary in that the local Standing Committee demanded the rectification of the decision and severe punishment for the judges even before an appeal had been dealt with by a higher court.38

This simple contractual dispute, and especially its subsequent intervention by the local legislature, reveals a great deal (though not all) of the systemic problems in the Chinese legal system concerning implementation of law, as well as the sensitivity of constitutional issues, namely the existence of a hierarchy of law but the almost total absence of mechanisms and procedures for the judiciary to deal with conflict of laws in the hierarchy, the ambiguous constitutional and institutional division of powers, the tension between judicial independence and accountability, the focus on substantive justice at the expense of due process, the conflict of local and national interests and, of course, the constant power struggles between and among institutions and personnel. Clearly, some of these issues need to be addressed through the Constitution. In this context and after some twenty years of debate and discussion, a law – the *Law on Supervision by Standing Committees of the People’s* *Congresses at Various Levels (Law on Supervision)* – was finally adopted in August 2006 to address some of these issues.39

According to the NPC, the making of the *Law on Supervision* took some twenty years.40 The difficulties in drafting this law were well summarized by the Chairman of the Law Commission of the NPC: it is a politically sensitive law concerning the political and state system. This law needs to balance the strengthening of NPC supervisory power and the maintenance of the Party leadership. The *Law on Supervision* needs to exercise supervision over, yet support the work of, the government, the courts and the procuratorates.41 As such it is not surprising that the Party leadership took a very direct interest in the drafting process: the Communist Party of China (CPC) itself formally recommended to the NPC the making of this law, and the Party Committee of the SCNPC reported, as a special topic, to the Politburo of the Central Committee of CPC three times in November 2003, December 2005 and May 2006.42

Even though the drafting work was apparently supported by the Party, the final version of the *Law on Supervision* is not an ambitious piece of legislation. As the law-makers made clear after its adoption, where experience is ‘ripe’ the Law provides detailed and concrete provisions, but where experience is not yet ‘ripe’, only certain principles are laid down for future development, and where there is no existing experience or consensus is not reached, the *Law on* *Supervision* is silent.43 Consequently, the Law manages to avoid all controversial

issues and only codifies the existing practice under the *Law on Law-Making* and other NPC procedures. Further, instead of an NPC supervision law, it isnow a law on supervision by the Standing Committees at the various levels.44While the official reasoning was that the infrequency of meetings of thepeople’s congresses (once a year for a short period of two weeks or so) makesroutine supervision impractical,45 the narrowing of the scope was perhaps

to avoid the issue of the Party–state relationship by avoiding addressing the nature of ‘supreme power’ of the people’s congresses. Finally, the *Law* *of Supervision* is largely procedural, thus avoiding any need to address the question of separation of powers.46

The end result is a major disappointment. The *Law on Supervision* codifies the powers of Standing Committees at various levels that have already been granted by the Constitution, the *Organic Law of the National People’s Congress* and the *Organic Law of the Local People’s Congresses and Local Governments*,47 albeit in a unified code. Importantly, after much debate during the drafting process, the *Law on Supervision* avoids the more contentious issue of standing committees supervising specific cases handled by courts and procuratorates by opting for inspection of specific issues48 and emphasizing the collective exercise of the supervisory power.49 The *Law on Supervision* does not specify the meaning of ‘specific issues’, though law-makers insist that ‘specific issues’ refer to issues in the nature of common concerns, not individual cases.50 This, it is claimed, represents a sensitive and practical compromise for allocating powers between the legislature and the judiciary,51 but whether this is a workable compromise will entirely depend on the prevailing political environment in the future.

While the aforementioned developments represent some progress towards making the Constitution a practical document, they are far from establishing any meaningful or independent constitutional review mechanism or other mechanisms for checks and balances in China. The Constitution continues to fail aspirations for constitutionalism in China, at least in the sense of making the constitution a genuine document with practical consequences.

***1.3.3. Test cases?***

Constitutional review of legislation, as established by Articles 90 and 91 of the *Law on Law-Making* suffers a number of serious defects. First, Article 88(1) provides that the NPC has the power to alter or annul improper laws enacted by the SCNPC, but the SCNPC is the actual reviewing authority under Article 90. How then is the NPC to actually conduct its supervision over laws enacted by the SCNPC? Secondly, organizations and citizens are entitled to make suggestions to the SCNPC for review of administrative regulations, local regulations, autonomous regulations and specific regulations, but they do not have a right to demand this, nor can they request the SCNPC to conduct a review of laws − only the State Council, the Central Military Commission, the Supreme People’s Court, the Supreme People’s Procuratorate or Standing Committees of the people’s congresses of provinces, autonomous regions or directly administered municipalities can do so.52 Finally, and more importantly, the *Law* fails to define any criteria for such a review or for making requests for such a review; Article 90 and 91 only speak of ‘contravening’ – an important term without definition, although the need for definition had been consistently advocated by scholars.53

Further, as Chinese laws are mostly written in general and vague terms, their interpretation by various authorities effectively forms an important source of law. Without these interpretations, Chinese law is unusable, if not meaningless. The Constitution provides that the SCNPC exercises the power to interpret the Constitution and laws;54 otherwise, the Constitution has little to say about statutory interpretation. Chinese jurisprudence commonly divides authoritative interpretation into three categories: legislative, administrative and judicial. Generally speaking, legislative interpretation means interpretation given by legislative authorities on laws and rules issued by themselves; administrative interpretation refers to interpretations given by administrative authorities of these rules and regulations; and judicial interpretations are those issued by the Supreme People’s Court and the Supreme People’s Procuratorate in their adjudicative and procuratorial work.55 This jurisprudential division of the power of statutory interpretation is reflected in the 1981 Resolution of the Standing Committee concerning the Strengthening of Legal Interpretive Work,56 which provides some more detailed, but still very general, provisions on dividing the power of legal interpretation.

The provisions on the interpretation of law in the *Law on Law-Making* represent one of the most disappointing aspects of this piece of legislation.Section 2.4 of Chapter 2 contains six short articles on the interpretation oflaw, only dealing with interpretation by the SCNPC. The *Law* is totally silenton administrative, adjudicative and procuratorial interpretations of law. Thereasons for these omissions are unclear.57

In short, efforts to introduce constitutional mechanisms for the supervision and enforcement of the Constitution (at least in terms of maintaining unity and consistency of the legal system) have made little inroads into achieving their objectives, and the roles of the Supreme People’s Court or any other courts in interpretation of law, especially the Constitution, are left as ambiguous as ever. At the same time, there has been a significant change of attitude towards the enforceability of the constitutional provisions, with increasing numbers of Chinese scholars shifting to an affirmative view on this point.58 Thus, with or without a practical mechanism for enforcing the supreme law, attempts have been made by Chinese scholars and the Supreme People’s Court to project the Constitution as a document with practical consequences. It is in this context that efforts have been made to launch ‘test cases’. Among these, two are particularly relevant to our discussion here: one relates to constitutional review of legislation, and the other raises some fundamental questions about constitutional judicialization in China.

In 2003, a university graduate named Sun Zhigang was detained in a city in Guangdong Province under the then State Council Measures on Detention and Repatriation and was apparently beaten to death (hence often referred to as the ‘Sun Zhigang incident’). After a public outcry and wide discussions (largely through the new media – the Internet), several scholars then petitioned the **SCNPC** to start a constitutional review of the Measures. There were hopes that this petition would test the practicality of the newly enacted *Law* *on Law-Making* and, perhaps, create a precedent for citizen-initiated constitutional review. However, the Measures were quickly repealed by the State Council before any SCNPC procedure was actually activated,59 thus ending a potential constitutional review that had yet to start. Clearly, an opportunity was lost. Nevertheless, the repeal of the Measures caused some ‘euphoria’ in the Chinese media, calling it a ‘milestone’ in and a ‘great leap forward’ to establishing the rule of law in China etc.60 What the scholars and the media did not realize at the time was that the ‘euphoria’ was soon to be dampened by strict control over the Internet and the media, the restrictions on and banning of further discussion and the apparent retributive punishment imposed on the more ‘aggressive’ reporters and lawyers.61 Thereafter, some twenty-plus petitions on various subject matters that were submitted to the SCNPC have been disregarded, neither having been acknowledged nor formally dismissed.62 The message seems to be clear: As far as constitutional review is concerned, it is not for the citizens to initiate bottom-up actions; the Party shall decide what actions, if any, should be taken for constitutional reform. This is so even though Chinese scholars involved in the petition have made clear that they did not have any intention to create any confrontation with the government or the Party.63

The second case examined here relates to a one-short-paragraph reply from the Supreme People’s Court to a Shandong High Court in a 2001. The case is widely reported as the first constitutional case in China (often referred to as ‘Qi Yuling’ case,64 but some went further to call it China’s *Marbury v* *Madison*).65 The case, however, is not a constitutional law case in a strict sense; it is, technically, a straightforward tort case. In this case, the identity of the plaintiff/appellant, together with her vocational school entry examination scores, was appropriated by another person to enter into a Chinese vocational school. The defendant/respondent, after graduation and still using the plaintiff’s identity, also took up a position in a local branch of the Bank of China. Upon discovery of this identity theft some nine years later, the plaintiff, Ms Qi fi led a civil suit for compensation and civil injunction in her local intermediate court on the basis of violation of her right to name and her right to education. There is no need to devolve into the details of the case, but suffice to say that it was a civil suit between private parties for tort remedies. The central issue relevant to our discussion is whether the violation of the right to education, a right that is contained in the Constitution but not in the *General Principles of Civil Law* or other civil laws,66 would constitute a ground for civil remedies. The Shandong High Court (the appellate court) sought advice from the Supreme People’s Court, which held that the appellant’sconstitutional right to education was violated by the respondents by means of violating the appellant’s rights to name and, because such violation had caused actual damages, civil remedies are to be granted.67

Apparently, the Supreme People’s Court seems to suggest that the Constitution could be a legal basis for private law suit and legal remedies. However, with its extreme brevity and without any reasoning for its Reply, this Reply raised more questions than answers and led to speculations as to its actual meaning and practical significance as well as heightened excitement among many scholars and practitioners.68 It is important to note that much of the excitement was further fuelled by an article published shortly after the issuance of the Reply by a Supreme People’s Court judge, Huang Songyou.69 Huang started his article by stating that courts in China were unsure whether the Constitution could be directly relied upon for judicial judgement and this issue must now be resolved. He then made it clear that the Party has now called for specific mechanisms for the actual implementation of the Constitution and, in his view,70 judicialization of the Constitution was one such mechanism that the Party has called for. He further emphasized that, without introducing the Constitution to judicial processes, there would be a major gap between the Constitution and the other ‘ordinary’ laws, leaving much of the constitutionally guarantied rights ‘sleeping’. He therefore effectively suggested that the Constitution could have a ‘gap-filling’ function in litigations. However, Huang’s reasoning for judicialization of the Constitution was fundamentally flawed. He started his reasoning by citing the *Marbury v Madison*71 case, which was about the constitutionality of a federal act which conflicted with the US Constitution, and relying on this, moved to discuss possibility and feasibility of judicial application of the Constitution in China. While the logical flaw in his reasoning is easy to identify, it could only be speculated whether the choice of a private civil suit for trying the implementation of the constitution was a deliberate and well-considered one by the Court as a tentative experiment for judicialization of the Constitution. Nevertheless, it is important to note that there is no hint, either in the Court Reply or in Huang’s article, that the Constitution might be used against the State and/or its various authorities, or against the Party. In other words, *Marbury v Madison* might be frequently invoked in the Chinese discussion, the Qi Yuling case is no *Marbury v Madison* at all. In short, Qi Yuling case was a private civil suit, neither meant to be nor in reality a constitutional litigation. While there were some public institutions (the government-run Middle School and the vocational school, the Bureau of Education of the local government) involved as defendants in the case, there was no argument about public liability or the violation of the Constitution by any public authorities. As such, as pointed out by Shen Kui, the Reply might be a well-meaning and well-intended attempt by the Supreme People’s Court, but it was a wrong case for the Court to try its effort for judicialization of the constitution.72

The foregoing two cases are the most widely publicized ‘events’ in relation to constitutional review in China, but they are not the only ones. There have also been many more cases, some successful and other not so, in which citizens attempt to use the Constitution for the protection of their rights. These issues range from labour contracts to discrimination (on various grounds and in different areas).73 Many of these cases probably fall under the label of ‘public interest law’ litigation, but none could properly be defined as constitutional litigation, even though occasionally courts made references to constitutional provisions.74 It is, however, worth noting that, in many of these cases, scholars have urged the government to consider the establishment of practical constitutional mechanisms for the protection of constitutionally guaranteed rights, but there has been no sign of government willingness to take such a route for the development of constitutionalism in China.

Although the Supreme People’s Court interpretation in the Qi Yuling case caused some considerable controversy and excitement, it was so simply because the Court had never directly dealt with issues of constitutionally guaranteed rights nor claimed to have done so until then.75 On the other hand, it has been argued for some time that the Supreme People’s Court is in fact exercising certain powers to interpret and supervise the enforcement of the Constitution, though the Court has no such powers in the Constitution. This has been done through the publication of selected cases and opinions on legal issues.76 There is no doubt that certain cases and legal opinions endorsed by the Supreme People’s Court included references to the Constitution and, hence, indirect interpretation of the Constitution.77 However, the ability of the Court to do so is a result of the lack of mechanisms and procedures for constitutional interpretation and supervision of its enforcement, rather than with any particular constitutional grounds or procedures.

The sad reality remains: there is a conspicuous absence of any intention to remedy the deficiencies in the Constitution by the real power in China – the Communist Party of China. Not surprisingly, the Court experiment was to end abruptly once the political circumstances have changed.

***1.3.4. Popular constitutionalism?***

There has been some considerable amount of online discussions as well as other forms of support for ‘public interest law’ (*Weiquan*) litigation. Are we therefore seeing some form of popular constitutionalism emerging in China?

The answer probably is negative. First, although we do not know the number of public interest law cases, we can reasonably say that the numbers are not large, at least not significant in a country of 1.3 billion residents. Second, it is clear that, with some very small exceptions, they are largely about specific rights albeit in the nature of public interests. They are also largely led by a small number of social ‘elites’ – lawyers, political scientists, academics, etc. – and an equally small number of social activists. Third, it is true many of these cases have aroused significant Internet interest, hence popular support and public debate and discourse, the lasting impact on constitutionalism in China must not be overstated. As Fu and Cullen correctly point out, ‘People in the “cyber space” become excited by the cases, debate them with great passion, but then forget about them as quickly as they attract their attention. They move on to other attractions’.78 If popular constitutionalism is referred to as ‘a form of constitutionalism that is found not so much on formal texts and documents, but in individual sentiment of justice’,79 I doubt if there is sufficient number of individuals with a consistent sentiment of justice to proclaim such a movement.80 As such, these *ad hoc* cyber discussions can hardly constitute a popular movement with any consistent theme, least that of constitutionalism.81

Perhaps the idea of popular constitutionalism does not sit well with the Chinese historical experiences. As I have discussed in some length elsewhere,82 the movement towards constitutionalism has had a troubled history ever since its inception in China at the turn of the twentieth century. The constitutions and their practice before 1949 had had little effect on the life of ordinary people in China. While this constitutionalism movement does establish firmly the idea that the legitimacy of government, be it the warlords, the Kuomintang or the Communist Party of China (CPC), must be established by a document called a ‘constitution’, it was largely an ‘elitist’ movement. In terms of constitutions after 1949, its development has been strictly controlled by the CPC rather than any popular movement. In this age of modern technologies, it is true to say that the Party leadership and state authorities are no longer the only driving forces for reform in contemporary China, and ordinary people83 and, especially, intellectuals84 are also, to a certain extent, active agents that often push against the constitutional parameters for further political, legal and economic reform, it is nevertheless largely an ‘elitist’ rather than popular movement. Realistically, constitutionalism – in its narrow meaning of checks and balances or power accountability – is by definition a hugely complicated issue involving the design of complicated constitutional mechanisms. The idea might be pushed, advocated and supported by the general populace, but the end product has perhaps always been designed and produced by the educated ‘elites’ in any country.

In any case, it is doubtful whether the current leadership of the Party,which is obsessed with the notions of stability and law-and-order, would allow any popular constitutionalism movement to develop in China. The periodical crackdown on rights movements, especially group-based movements such as the Falonggong,85 suggest that any tolerance of such movement is temporary, and there has been no tolerance towards any movement that would challenge the leadership of the Party.86 In short, it is premature to suggest that there is a popular movement towards constitutionalism; much of the push was made by elitist academics and a limited number of right-conscious practitioners.

**1.4. Concluding remarks**

The death of constitutional litigation in China was pronounced upon the quiet abolition of the Qi Yuling Reply by the Supreme People’s Court in December 2008.87 However, the reality is that constitutional litigation or constitutional judicialization in the sense of judicial review has never started. Since the Supreme People’s Court has kept silent on this matter, any analysis on the reasons for the abolition could only be speculative.88 Chinese media reports, however, seem to suggest a fundamental reversal of policy direction.

According to Sichuan News, there had been a special investigation group established upon instructions from the Party leaders on the issues relating to judicialization of the constitution and the Qi Yuling Reply. It was reported that the Reply was destined to be abolished once the Group was established.89 Most recently, on 26 October 2009, the Supreme People’s Court issued its *Provisions on the Citation in Judicial Judgements and Decisions of Laws, Regulations,Rules and Other Normative Documents*.90 While the Provisions do not explicitly exclude citation of the Constitution in judicial decisions, the Constitution is not listed as one of the sources of law to be cited as legal grounds for judicial decisions. The master of ambiguity has clearly returned and questions on the enforceability of the Constitution continue to be as unsettled as ever.91

It is plainly clear, however, that the Party is not going to allow any authority or anyone other than itself to control or push directions for constitutional reforms. These latest developments suggest that, while any positive development in constitutionalism is to be welcome, one must not read too much into those ‘incidents’ or get too excited about them. Making direct reference to constitutional provisions may be of some symbolic significance; it is not of fundamental importance.92 Constitutionalism would only develop in China if institutional weaknesses in the Constitution are addressed systematically. Even if the Qi Yuling and other public interest law cases are to be seen as tentative experiments by the judiciary, the judiciary has done so without any rule to go by. Such a practice is neither sustainable nor, indeed, particularly conducive for long-term constitutionalism development. This suggests that the educated ‘elites’ might need a new strategy – not just arousing public interest but pushing for specific designs and mechanisms. The very productive discussions, in the 1990s, on specific constitutional review mechanisms seem to have waned, but that is precisely the kind of debate that public intellectuals should seek. Politically, such a movement is perhaps more likely to be perceived by the Party leadership as being constructive rather than confrontational and, as such, may lead to more practical and sustainable results.

**Notes**

1 *See*, Jianfu Chen, *Chinese Law: Context and Transformation*, Leiden/Boston: Martinus Nijhoff Publishers, 2008: 144. I am not suggesting that we look for elements that are in Western constitutions and then examine whether they are missing from the Chinese constitutional law. This approach would unduly privilege Western constitutional law and constitutionalism that have evolved in the developed countries. What I propose to do is to revisit those elements that have been identified by the Chinese scholars, government and Party officials and the general population as necessary to be incorporated into the Chinese constitutional law for constitutionalism to develop in China.

2 A most useful starting point for a comprehensive reading of these events is the edited volume by S. Balme and M. W. Dowdle, *Building Constitutionalism in China*, New York: Palgrave MacMillan (2009). I am most grateful to Professor Dowdle who kindly provided me a set of the manuscript’s proof before publication.

3 *See*, T. E. Kellogg, ‘The Death of Constitutional Litigation in China?’, (April 2009) 9(7) China Brief, available at http://www.jamestown.org/programs/chinabrief/single/?tx\_ttnews%5Btt\_news%5D=34791&tx\_ttnews%5BbackPid%5D=414&no\_cache=1 (accessed 15 July 2009).

4 Bikun Jiang *et al*. (eds), *Constitutional Law* (*Xianfa Xue*), Beijing: China Universityof Political Science and Law Press, 1993: 5.

5 It is not unusual these days, when discussing specifi c legal reforms with Chinese scholars, to hear them arguing that certain reforms are constrained by the present constitutional arrangement.

6 *See***,** Chapter Two on Fundamental Rights and Duties of Citizens of the 1982 Constitution.

7 *See*, the Preamble of the 1982 Constitution.

8 Article 5 of the 1982 Constitution.

9 *See*, Shuwen Wang, ‘On the Guarantee of Constitutional Enforcement’, *Legal Science in China* (*Zhongguo Faxue*) no. 6, 1992: 15, 18; Jianmiao Hu and ChunyanGao, ‘Constitutional Review of Law and Regulation in China – Problems andSolutions’, in *Printed Newspaper and Journal Articles (D411 Constitutional & Administrative Law)* no. 3, 2006: 46.

10 *See*, Articles 62(2) and 67(1) of the 1982 Constitution.

11 Article 67(1) of the 1982 Constitution.

12 Jilin People’s Press in 1993–1994 published a large collection of normative interpretations of laws; the collection does not contain a section on constitutional interpretation. *See*, *A Collection of Normative Interpretations of Laws in the PRC* (*Zhonghua Renmin gonghe Guo Falü Guifanxing Jieshi Jicheng*) (Changchun: Jilin *Constitutional judicialization and popular constitutionalism in China* 17 People’s Press, 1990, further supplemented annually since 1993). However, some Chinese scholars have argued that certain decisions of the SCNPC on specific issues may be interpreted as constitutional interpretations by the SCNPC. *See*, Lei Wang, ‘On Constitutional Interpretation Organs in Our Country’, *Journal of* *Chinese and Foreign Legal Science* (*Zhongwai Faxue*) no. 6, 1993: 21; Wang, *supra note*

9, p. 19. If this interpretation is accepted, then, logically, all legislation by the SCNPC would have to be treated as constitutional interpretations by the SCNPC.

13 *See*, Articles 62(1) and 64 of the 1982 Constitution.

14 Jiang *et al*., *supra note* 4, p. 43. For a similar view, *see*, Dingjian Cai, ‘Constitutional Supervision and Interpretation in the People’s Republic of China’, *Journal of* *Chinese Law* 9, 1995: 219, 223.

15 Until quite recently, the established view was that they might not be directly enforced. Youyu Zhang and Shuwen Wang (eds), *Forty Years of PRC’s Legal Science* (*Zhonggu Faxue Sishinian*), Shanghai: Shanghai People’s Press, 1989: 160; Yunsheng Chen, ‘Ruling the Country according to the Constitution is the Core of Ruling the Country by Law’, in *People’s Daily* (*Renmin RiBao*), 15 November 1997, at p. 4. As will be shown in the next section, these views have been questioned and challenged by many scholars of younger generations. The doubt about the enforceability of the Constitution has as much to do with Chinese constitutional practice as with the provisions of the Constitution itself. Indeed, the provision ‘[a]ll acts in violation of the Constitution and the law must be investigated’ was only added to Article 5 of the Constitution at the NPC’s Fifth Session at which the Constitution was adopted. *See*, Angran Gu, *The Construction of a Socialist Legal* *System and Legislative Work* (*Shehui Zhuyi Fazhi Jianshe He Lifa Gongzuo*), Beijing: China University of Political Science and Law Press, 1989: 59; Youyu Zhang, ‘Strengthening the Research on Constitutional Theories’, in Chinese Society of Legal Science (ed.), *A Selection of Papers on the Constitution* (*Xianfa Lunwen Xuan*), Beijing: Press of the Masses, 1983: 4.

16 *See*, Major Tasks of the Standing Committee of the 8th NPC, in *People’s Daily* (*Renmin Ribao*), 3 July 1993: 4; ‘Work Report of the Standing Committee’,delivered by Tian Jiyun at the 1st Plenary Session of the 9th NPC on 10 March1998, in *People’s Daily* (*Renmin Ribao*), 23 March 1998, at p. 4.

17 *See*, *People’s Daily* (*Renmin Ribao*), 19 March 1998, at p. 5. Such a law was indeed adopted in 2006. *See*, discussions below.

18 *See*, Cai, *supra note* 14, p. 219; ‘Considerations and Proposals for Strengthening the Work of Supervision by the NPC – A Summary of Newspaper and JournalDiscussions’, *Legal Science in China* (*Zhonggu Faxue*) no. 6, 1990: 13; Xieying Wu, Zhiyong Li and Ruihe Wang, ‘On a Constitutional Ligation System in China’, *Legal Science in China* (*Zhonggu Faxue*) no. 5, 1989: 62; Wang, *supra*

*note* 9; Wang, *supra note* 12; Weijiu Zhu, *Legal Supervision Over Government* (*Zhengfu Fazhi Jiandu Lun*), Beijing: China University of Political Science andLaw Press, 1994; Chen, *supra note* 15.

19 *See*, Jianfu Chen, ‘The Transformation of Chinese Law – From Formal to

Substantial’, *Hong Kong Law Journal* 37(2): 2007, 689.

20 Judicial law-making is, however, not addressed by the Law.

21 *See*, *People’s Daily* (*Renmin Ribao*), 14 March 2000, at 5.

22 *See*, Buyun Li, ‘Explanations on the Proposed Law on Law-Making of the PRC’, in

J. M. Otto, M. V. Polak, J. Chen and Y. Li (eds), *Law-Making in the People’s Republic*

18 *Jianfu Chen*

*of China*, The Hague/London/Boston: Kluwer Law International, 2000: 157–173;

According to Chinese scholars this remained an aspirational goal among

academics after the adoption of the *Law on Law-Making*. *See*, ‘Constitutional

Experts: a major step towards constitutional review’, available at http://www1.

people.com.cn/GB/14576/14528/2590424.html (accessed 24 June 2004).

23 While the establishment of the specialized unit was widely publicized, we know

very little about the functions and working procedures of the unit, as some

Chinese scholars have pointed out. *See*, Hu and Gao, *supra note* 9, p. 52.

24 These are seen as internal working procedures (Hu and Gao, *supra note* 9, p. 52)

and none of them has been published.

25 *See*, Hu and Gao, *supra note* 9, p. 52; ‘The Standing Committee of the NPC

Clarifi es Constitutional Review Procedures’, available at http://news.xinhuanet.

com/politics/2005-12/20/content\_3944117.htm (accessed 20 December 2005).

26 *See*, ‘Major Adjustment Made by the National Legislative Authority Regarding

the Law-Making System’, available at http://www.legaldaily.com.cn/misc/2007-

03/01/content\_547023.htm (accessed 2 March 2007).

27 *See*, ‘The Establishment of the Constitutional Review and Filing for Record Unit

Should Be Reported’, available at http://www1.people.com.cn/GB/14576/14528/

2590398.html (accessed 24 June 2004).

28 *See*, ‘Person-in-charge of the State Council Legal Offi ce Answers Journalist

Questions in relation to the State Council Decision to Repeal Certain Administrative

Regulations and Rules’, available at http://www.chinalaw.gov.cn/article/

fzjd/fggzql/200801/20080100024006.shtml (accessed 16 September 2009).

29 *Ibid*.

30 *See*, State Council Decision to Repeal Certain Administrative Regulations and

Rules, State Council Order No 516, issued on 15 January 2008, available at

http://www.chinalaw.gov.cn/article/fzjd/fggzql/200806/20080600017063.shtml

(accessed 16 September 2009).

31 *See*, Annual Report of Legal Construction in China (2008), China Law Society,

June 2009, available at http://news.xinhuanet.com/legal/2009-06/02/content

\_11476146.htm (accessed 16 September 2009).

32 Adopted by the Standing Committee of the NPC on 27 August 2009.

33 For a detailed discussion, *see*, Dingjian Cai, ‘Functions of the People’s Congress in

the Process of Implementation of Law’, in Jianfu Chen, Yuwen Li and J. M. Otto,

*Implementation of Law in the PRC*, The Hague/London/New York: Kluwer Law

International, 2002: 35–54.

34 *See*, P. Keller, ‘Sources of Order in Chinese Law’, *American Journal of Comparative*

*Law* 42, 1994: 711.

35 The interpretation in 1999 of the Basic Law of Hong Kong on the right to abode

is seen by a prominent Chinese scholar, Professor Cai Dingjian, as one of the

positive examples of the exercise of the supervisory power by the SCNPC, but by

others as the fi rst perceived constitutional crisis in Hong Kong since the handover

of sovereignty in 1997. For different views on this, *see*, Dingjian Cai, ‘Functions

of the People’s Congress in the Process of Implementation of Law’ and Albert

Chen, ‘Hong Kong’s Legal System in the New Constitutional Order: The

Experience of 1997–2000’, both in Chen, Li and Otto, *supra note* 33, pp. 35–54

and 213–246, respectively.

36 Basically, such supervision may only start after a case is completed, and it may not

try to infl uence or intervene in ongoing judicial work; secondly, the supervision

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shall focus on legal procedures and interpretation; and fi nally, the supervisory

body may request the court to retry or review the case but it must not substitute

its own judgement for that of the courts. *See*, M. W. Dowdle, ‘The Constitutional

Development and Operations of the National People’s Congress’, *Columbia Journal*

*of Asian Law* 11, 1997: 1, 110. Some local authorities have also issued their rules

for implementing such supervision. *See*, *e.g. Working Rules for Supervision of the*

*Judicial Organs by the Standing Committee of the Zhejiang Provincial People’s Congress*,

adopted and issued by the Standing Committee of the Zhejiang Provincial

People’s Congress on 28 December 2000 and effective on promulgation.

37 It should be pointed out that a controversial draft law on supervision of major

violations of law in adjudication and prosecution work was submitted to the 12th

Meeting of the Standing Committee of the NPC (October 1999), but it seems to

have now been abandoned permanently.

38 Despite the controversy and major debates in legal circles, the original judgement

has not been published. There were however many media reports on the case and its

decision: ‘Judge holds local regulation invalid: a violation of law or a support for

law’, *Nanfang Zhoumo* (*Southern Weekly*), Internet edition (http://www.nanfandaily

.com.cn/zm/20031120/xw/fz/200311200861.asp) (accessed 20 November 2003);

‘Judge sows seeds of lawmaking dispute’, *China Daily*, Internet edition (http://

www.chinadaily.com.cn/en/doc/2003-11/24/content\_283973.htm) (accessed 24

November 2003); ‘Lawyers request the National Congress to undertake legislative

review over “Luoyang Seed Case”’, Phoenix TV, Internet edition (http://www.

phoenixtv.com/home/news/society/200311/21/151034.html) (last accessed 21

November 2003); and articles available at http://www.law-thinker.com (accessed

21 November 2003). After the intervention by the provincial legislature, the

Luoyang Intermediary Court Party Committee then decided to remove Judge

Zhao as Deputy Head of the Economic Chamber, Judge Li as presiding judge as

well as dismissing her from the position of assistant judge, both pending formal

legal procedures with the Standing Committee of the Luoyang People’s Congress.

However, according to follow-up reports in February 2004, the decisions to

dismiss the judges were never actually submitted to the Standing Committee of

the Luoyang People’s Congress for deliberation and approval, apparently because

of the controversy, and Judge Li, on sick leave since then, was notifi ed to resume

her work in the court. *See*, ‘Confl ict of law shall not be dealt with by “cool

handling”’, *Nanfang Doushi Bao* (*Southern Urban Daily*), Internet edition (http://

www.nanfandaily.com.cn/southnews/spqy/zy/2000402070066.asp) (accessed 7

February 2004); ‘Further controversy concerning Li Huijun Incident in Henan’,

*Zhongguo Qingnianbao*, Internet edition (http://www.cyol.com/zqb/gb/zqb/2004-

02/06/content\_813990.htm) (accessed 6 February 2004).

39 This law, adopted on 27 August 2006 by the 23rd Session of the Standing

Committee of the Tenth NPC, took effect on 1 January 2007.

40 The idea of enacting a supervision law emerged during the sixth NPC in 1986

and it has never been off the agenda for the SCNPC since then. *See*, ‘Twenty Years

in the Making – An Interview with Chairman Yang Jingyu of the Law Commission

of the NPC on the Supervision Law Draft’, available at http://www.npc.gov.cn/

zgrdw/common/zw.jsp?label=WXZLK&ID=351389&pdmc=110118 (accessed

27 August 2006); ‘Twenty Years in the Making – On the Background of the

Supervision Law’, available at http://www.npc.gov.cn/zgrdw/common/zw.jsp?lab

el=WXZLK&ID=352052&pdmc=1516 (accessed 19 September 2006).

20 *Jianfu Chen*

41 ‘Twenty Years in the Making – An Interview with Chairman Yang Jingyu of the

Law Commission of the NPC on the Supervision Law Draft’, *supra note* 40.

42 ‘Twenty Years in the Making – On the Background of the Supervision Law’, *supra*

*note* 40.

43 *See*, Zeng Wu (Legislative Commission of the Standing Committee of the NPC),

‘On Several Principal Issues of the Supervision Law’, available at http://www.npc.

gov.cn/zgrdw/common/zw.jsp?label=WXZLK&ID=352052&pdmc=110124

(accessed 31 August 2006).

44 According to the Chairman of the Law Commission of the NPC, it was in April–

May 2006 that it was decided that, instead of a Law on Supervision by People’s

Congresses at Various Levels, the scope was narrowed down to supervision by

standing committees of the people’s congresses at various levels and there was a

consequential change of the law’s title. *See*, ‘Twenty Years in the Making – An

Interview with Chairman Yang Jingyu of the Law Commission of the NPC on the

Supervision Law Draft’ *supra note* 40.

45 *See*, ‘Twenty Years in the Making – An Interview with Chairman Yang Jingyu of

the Law Commission of the NPC on the Supervision Law Draft’, *supra note* 40.

46 It is nevertheless emphasized that China does not practise separation of powers,

and all state authorities – the people’s congresses, the government, the courts and

the procuratorates – are all under one leadership, that is, the Party leadership. *See*,

the *People’s Daily* editorial on the passage of the Law: ‘Supervision Powers now

Regularised and with Procedures’, *People’s Daily* (*Renmin Ribao*), 28 August 2006,

also available at http://www.law-lib.com (accessed 28 August 2006); ‘The Leader

of the Law Commission of the NPC Answers Questions relating to the Supervision

Law’, available at http://www.law-lib.com (accessed 27 August 2006). *See also*,

deliberation speeches at the 23rd Session of the Standing Committee of the NPC

available at http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&ID=

352140&pdmc=1516 (accessed 19 September 2006); http://news.xinhuanet.

com/politics/2006-08/27/content\_5013837.htm (accessed 28 August 2006).

47 For a detailed discussion of these supervisory powers before the enactment of the

*Supervision Law*, *see*, Cai, *supra note* 35, pp. 35–54.

48 *See*, Chapter 7 of the *Supervision Law*.

49 *See*, Article 4 of the *Supervision Law*.

50 *See*, Sixi Chen (Legislative Affairs Committee of the **SCNPC**), ‘Strengthening

Supervision while Maintaining Judicial Authority’, available at http://www

.npc.gov.cn/zgrdw/commn/zw.jsp?label=WXZLKK&id=352329&pdmc=1516

(accessed 19 September 2006); ‘The Leader of the Law Commission of the

NPC Answers Questions relating to the Supervision Law’, *supra note* 46; Wu,

*supra note* 43. *See also*, deliberation speeches at the 23rd Session of the SCNPC**,**

*supra note* **46**.

51 For further background on the need for compromise, *see*, Cai, *supra note* 35,

pp. 35–54.

52 *See*, Article 42 of the *Law on Law-Making*. Article 90 of the *Law on Law-Making*,

however, provides that

[w]here … social organisations, enterprises, institutions as well as citizens

are of the opinion that certain administrative regulations, local regulations,

autonomous regulations and specifi c regulations contravene the Constitution or

laws, they may submit, in writing, suggestions to the Standing Committee of

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the National People’s Congress for review of these. The working organ of the

Standing Committee shall examine the matters and, where necessary, refer them

to relevant special committees for review and opinion.

Clearly, individuals have no right to request constitutional review of laws, but

only of administrative regulations and rules.

53 Both the 1995 Draft and the Expert Draft attempted to defi ne the meaning of

‘contravening’ and ‘inconsistency’. On scholars’ advocacy for such defi nitions, *see*,

various chapters in Buyuan Li (ed.), *Comparative Constitutional Law* (*Xianfa Bijiao*

*Yanjiu*), Beijing: Law Press, 1998.

54 Article 67 (1) and (4) of the Constitution.

55 *See*, Zongling Shen (ed.), *Studies in Jurisprudence* (*Falixue Yanjiu*), Shanghai:

Shanghai People’s Press, 1990: 224; Xianming Xu (ed.), *A Textbook on Jurisprudence*

(*Falixue Jiaocheng*), Beijing: China University of Political Science and Law Press,

1994: 241–243.

56 Adopted on 10 June 1981 by the 19th Meeting of the Standing Committee of the

5th NPC. The 1981 resolution is a revised version of the Resolution concerning

Legal Interpretation adopted by the same Committee in 1955.

57 In all drafts since 1993, including the 1999 Draft, there were provisions which

would also deal with judicial interpretation and there were also provisions to

abolish the 1981 Resolution on interpretation of law.

58 Whether the Preamble has any direct legal force remains a controversial issue in

China. *See*, Zhang and Wang, *supra note* 15, p. 181; Li, *supra note* 53, pp. 182–195.

59 For a summary of the petition, *see*, ‘Five jurists requested the Standing Committee

to activate constitutional review process on Sun Zhigang case’, in www.chinalaw.

gov.cn (accessed 12 January 2004). According to Cai Dingjian, the repeal of

the Measures by the State Council was in fact undertaken after the leaders of

the **SCNPC** transmitted the petition to the State Council for processing. Thus,

Cai suggests that Chinese politicians attempted to avoid the establishment

and use of a constitutional review mechanism. *See*, Dingjian Cai, ‘Towards a

Private Law Approach to the Implementation of the Chinese Constitution’,

originally published in *Social Science in China* (*Zhongguo Shehui Kexue*), no. 2, 2004,

republished at http://www.usc.cuhk.edu.hk/wk.asp (accessed 12 November

2004). For a detailed discussion of this ‘event’, *see*, K. J. Hand, ‘Using Law for a

Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen

Action in the People’s Republic of China’, *Columbia Journal of Transnational*

*Law* 45, 2007: 114.

60 *See*, Hand, *supra note* 59, pp. 128–129.

61 Hand, *supra note* 59, pp. 130–131. Such retributive punishment is not isolated,

but rather wide spread towards the public interest lawyers and reporters, with

hundreds of lawyers being jailed or otherwise deprived of personal freedoms. *See*,

Xiapoing Chen, ‘The Diffi cult Road for Rights Advocacy: An Unpredictable

Future for the Development of Rule of Law in China’, *Transnational Law and*

*Contemporary Problems* 16, 2006: 221, 235–238. Recent media reports suggest

that such political persecution not only continues, but is in fact intensifi ed. *See*,

D. J. Lunch, ‘Retreat in China’, *USA Today*, 10 August 2005, available at http://

www.usatoday.com/news/opinion/editorials/2005-08-10-forum-China\_x.htm

(accessed 12 August 2005); J. Kahn, ‘Chinese Crackdown on Rights Lawyers

Signals Efforts to Deter Increasing Legal Challenges’, *New York Times*, 19 August

22 *Jianfu Chen*

2006, available at http://www.nytimes.com/2006/08/19/world/asia/19china.

html?\_r=1&oref=slogin (accessed 22 August 2006); M. Sainsbury, ‘China Targets

Lawyers in Rights Crackdown’, *The Australian*, 7 August 2009, available at http://

www.theaustralian.news.com.au/business/story (accessed 10 September 2009). A

most depressing report is from John Garnaut, ‘China’s Human Rights Defenders

Pay Heavy Price’, *The Age*, 7 November 2009, 18: the 2005 Asia Week’s People

of Year (contains 14 photos of *Weiquan* lawyers) now looks like a ‘tombstone

inscription for China’s 30-year struggle towards the rule of law’. More generally,

*see*, M. Goldman, *From Comrade to Citizen: The Struggle for Political Rights in China*,

Cambridge: Harvard University Press, 2005; E. J. Perry and M. Goldman (eds),

*Grassroots Political Reform in Contemporary China*, Cambridge: Harvard University

Press, 2007.

62 Hand, *supra note* 59, p. 151. *See also*, Cai, *supra note* 59. Interestingly the Legislative

Affairs Committee of the SCNPC has insisted that it never received any petition

from citizens for constitutional review of laws and regulations. *See*, ‘The Leader of

the Legislative Affairs Commission of the Standing Committee of the NPC

Answers Journalist Questions concerning the Draft of a Law on Rights *in rem* and

Review of Laws and Regulations Filed-for-Record’, 1 March 2006, available at

http://www.lawbook.com.cn/fzdt/newshtml/20/20006030292112.htm (accessed

23 March 2006). The latest petition was the one lodged by fi ve law professors

from Beijing University Law School in July 2009, requesting the SCNPC to

either repeal or ask the State Council to repeal or revise its Administrative

Regulations on Urban Housing Demolition and Relocation (2001) after a series

of tragic incidents occurred in protests against forced demolition in China. While

the SCNPC did not formally acknowledge the receipt of the petition, in mid-

December 2009, the State Council nevertheless invited the fi ve professors to

attend a consultation meeting for the revision of the Regulations. *See*, ‘State

Council Law Offi ce Invites Five Petitioners to Participate in Discussions for the

Revision of the Demolition and Relocation Regulations’, available at http://news.

xinhuanet.com/legal/2009-12/15/content\_12647190.htm (accessed 17 December

2009). For a recent report on the tragic incidents, *see*, Zhiling Huang and

Weita Liu, ‘Tragedy Reignites Debate on Forced Demolitions’, *China Daily*,

8 December 2009, available at http://www.chinadaily.com.cn/china/2009-12/08/

content\_9137322.htm (accessed 7 January 2010).

63 Hand, *supra note* 59, p. 146.

64 The case is reported in *Gazette of the Supreme People’s Court of the PRC* 5, 2001:

158–161.

65 *See*, Kui Shen, ‘The Beginning of the Age of Constitutionalism – Questions

Regarding the First Constitutional Case’, published at the Beijing University

Law Web site: www.law-dimension.com/details.asp?id=758 (accessed 12

November 2004) (an expanded version of this article is published in English: Kui

Shen, ‘Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting

China’s “First Constitutional Case”’, *Pacifi c Rim Law and Policy Journal* 12, 2003,

199; Huawei Li, ‘A New Light in Constitutional Review in Mainland China?’

available at the China Constitutionalism Web site: www.calaw.cn/include/

shownews.asp?newsid=2001 (last accessed 12 November 2004). For a summary

of the case, *see*, *Nanfang Zhoumo* (*Nanfang Weekend*), Internet edition, 17 August

2001; *Renmin Ribao*, 5 September 2001. The Supreme People’s Court reply was

issued on 24 July 2001, as Interpretation [2001] No. 25, containing merely one

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short paragraph. An offi cial version of this Reply is contained in *Gazette of the*

*Supreme People’s Court* 5, 2001: 152. Also available at special collection of papers

on Constitutional judicialization: http://www.gongfa.com/xianfasifahuazhuanti.

htm (accessed 30 November 2008). It must be pointed out that this Reply was

abolished in December 2008: *see*, further discussion below.

66 While the right to education and civil remedies for such a violation are contained

in the *Law on Education*, the torts occurred well before the *Law on Education* was

enacted in March 1995 (and became effective in September 1995). Thus, the *Law*

*on Education* was unlikely to be applicable, though this issue was not debated

either in the fi rst instance or on appeal.

67 Full English text of this Reply from the Supreme People’s Court is available in

Shen, *supra note* 65, p. 204.

68 Technically, it is also questionable whether the Supreme People’s Court has a

proper constitutional power to undertake such implementation through

interpretation and, if so, whether there are any procedures that the Court must

follow. For detailed academic analysis of the two cases, *see*, Shen, *supra note* 65; Li,

*supra note* 65. It is also questioned whether the people’s court should instead apply

the *Law on Education* (for a right to education) and the *General Principles of Civil*

*Law* (for remedies). *See*, Cai, *supra note* 59; M. C. Dorf, ‘What a Chinese Height

Discrimination Case Says about Chinese (and American) Constitutional Law,

FindLaw’s Legal Documentary, 26 May 2004, available at http://writ.fi ndlaw.

com/dorf/20040526.html (accessed 29 May 2004).

69 Judge Huang was the Chief of the First Civil Chamber of the Court, and soon was

promoted to Vice President of the Court, but more recently disgraced for alleged

corruption. His article, entitled ‘Constitutional Judicialisation and Its

Signifi cance’, was published on the *People’s Court Daily* on 13 August 2001, the

same day when the Supreme People’s Court formally issued its Reply (although

the Reply was adopted by the Judicial Committee of the Court on 28 June 2001).

A copy of his article is currently available at http://www.gongfa.com/

shenkuixianfasifahua.dwt (accessed 2 October 2009). According to Shen Kui,

Huang was closely involved in the drafting of the Court Reply: Shen, *supra note*

65, p. 209.

70 In light of Huang’s position in the Supreme People’s Court and his involvement

in the drafting of the Reply, it could also be speculated that Huang’s view refl ected

that of the Court, or at least had the approval of the Court. *See*, Shen, *supra note* 65,

pp. 209–211.

71 [1803] 5 *U.S.* 137.

72 Shen, *supra note* 65, p. 230.

73 Many articles have been published on these issues. A most updated and

comprehensive coverage of these issues is Balme and Dowdle, *supra note* 2,

Chapters 11–14. Another updated analysis is T. E. Kellogg, ‘Constitutionalism

with Chinse Characteristics? Constitutional Development and Civil Litigation in

China’, (16 March 2009) *International Journal of Constitutional Law*, (advance

access) available at http://icon.oxfordjournals.org/cgi/reprint/mop001vl (accessed

18 July 2009).

74 It is diffi cult to determine how many courts in these cases that actually made

references to constitutional provisions. *The Democracy and Legal System* reported

that the reference to constitutional freedom of residence by Huangpu (Guangzhou)

Court as the ‘fi rst case on constitutional freedom’. *See*, ‘China’s fi rst case on

24 *Jianfu Chen*

constitutional freedom’, *Democracy and Legal System* (*Minzhu yu Fazhi*) no.9, 2008:

14–16. This clearly is not the fi rst case in which reference was made to

constitutional freedom. *See*, Kellogg, *supra note* 73, p. 2. According to Kellogg

(*ibid*, p. 17), in 2003 alone, over thirty cases made such a reference to constitutional

provisions.

75 Indeed, in the *Complete Collection of Judicial Interpretation*, the court has avoided

completely the issue of constitutional law. *See*, Supreme People’s Court of the

PRC, *A Complete Collection of Judicial Interpretation* (*Sifa Jieshi Quanji*), Beijing:

Press of the People’s Court, 1994.

76 *See*, Nanping Liu, ‘“Judicial Review” in China: A Comparative Perspective’,

*Review.of Socialis. Law* 14, 1988: 241.

77 According to Kellogg’s research, as early as 1988 some Chinese courts had already

made reference to constitutional provisions in their judgements. *See*, Kollogg,

*supra note* 73, p. 14.

78 *See*, Hualing Fu and R. Cullen, ‘Weiquan (Right Protection) Lawyering in an

Authoritarian State: Towards Critical Lawyering’, available at http://papers.ssrn.

com/sol3/papers.cfm?abstract\_id=1083925 (accessed 15 October 2009), p. 21.

79 S. Balme, ‘Ordinary Justice and Popular Constitutionalism in China’, in Balme

and Dowdle, *supra note* 2, p. 189.

80 In fact, in terms of cyber discourse, I have seen much more display of blind

patriotism and narrow-minded nationalism than demands for fair and equitable

justice.

81 I am not suggesting that Weiquan cases or their Internet discourses are not

important. Indeed, as Fu and Cullen point out, they serve an educational function

and play the role in ‘identifying, highlighting and problematising social issues’.

*See* Fu and Cullen, *supra note* 78.

82 Chen, *supra note* 1, Chapter 3.

83 For instance, barely two weeks after the adoption of the 2004 constitutional revision,

an elderly resident in Beijing had already tried to use the revised constitutional

provisions on the protection of private property to stop the demolition of

his old house that was built more than a hundred years ago. *See*, Xinhuanet: http://

news.xinhuanet.com/comments/2004-04/07/content\_1405016.htm (accessed 28

August 2006).

84 Almost immediately after the 2004 revision of the Constitution a group of 30

prominent scholars produced some 18 suggestions for constitutional reforms to

implement human rights protection as now enshrined in the Constitution. *See*,

Weifang He, *et al*., ‘Suggestions for the Improvement of the Constitutional

Protection of Human Rights in Our Country’, available at http://www.lawthinker.

com/details.asp?id=2078 (accessed 28 August 2006). Even though these

suggestions are unlikely to be implemented any time soon by the government,

such academic activities keep constitutional reform alive and on the agenda of

national debate and discussion.

85 *See*, *supra note* 61.

86 In any case, supporting the Party leadership is often taken as a constitutional

duty.

87 *See*, Kellogg, *supra note* 3. The Supreme People’s Court issued its Interpretation

( *fasi*) (2008) No. 15 through a Public Notice on 18 December 2008. This

Document No. 15 abolishes a total of 27 sets of Interpretations issued before the

end of 2007 and the Qi Yuling Reply is listed among the 27, as one of those

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‘whose application has ceased’; no further explanations were given for this sudden

yet quiet abolition.

88 For Academic debate on the abolition of the Qi Yuling Reply, *see*, special forum,

*Jurisprudence* (*Faxue*), no. 3, 2009: 3–35.

89 *See*, ‘The Abolition of the First Judicial Interpretation on the Judicialisation of

Constitution in Our Country’, available at http://www.law-thinker.com/news.

php?id=297 (accessed 28 March 2009).

90 *Fasi* (2009) No. 14, adopted 13 July 2009 by the 1470 Judicial Committee of the

Supreme People’s Court, issued 26 October 2009, and effective from 4 November

2009.

91 Whether the term ‘law’ includes the Constitution has been a controversial issue

debated ever since the fi rst Constitution (1954) was enacted in the PRC. It has

never been a settled issue. *See*, Han Dayuan, ‘The Abolition of Qi Yuling Reply

and Its Relevance to Applicability of the Constitution’, *Jurisprudence* (*Faxue*),

no. 3, 2009: 3, 4.

92 Shigong Qiang, ‘Who Is to Interpret the Constitution?’, available at http://www.

usc.cuhk.edu.hk/wk.asp (accessed 9 July 2009).