A constitution without constitutionalism? The paths of constitutional development in China

Qianfan Zhang*

This article will focus on the recent constitutional developments in China along two paths. One is the official path initiated by the Supreme People's Court's judicial interpretation for the Qi Yuling case in 2001, which opened up the possibility, met with enormous enthusiasm, for the judicial application of the 1982 Constitution. The other is the unofficial, populist path symbolized by the Sun Zhigang incident in 2003, when the public, for the first time since 1989, expressed strong protest largely via the internet against the mischief of a local government. The article will review the key constitutional developments achieved along both lines and will examine the causes of their successes or failures. Finally, it will point out the inherent limitations in a populist path toward constitutionalism when pursued within an institutional structure where governments at various levels view the Constitution more as a threat to the status quo pertaining to a small minority than as a protection of basic rights for all.

1. Introduction

It is commonly understood that the enactment of laws is not to be confused with the rule of law, and that having a constitution is not the same thing as making it work. Mainland China exemplifies this conventional wisdom. Over the past three decades, since the initiation of the economic and legal reforms in 1978, Chinese lawmakers at all levels have enacted a variety of laws and regulations, yet the country is still grappling with the application of these laws to reality. For the current Chinese Constitution, enacted in 1982, the disparity between words and deeds is even greater for a

* Professor of Law, Peking University. I thank the participants of the Conference on the Changing Landscape on Asian Constitutionalism held by the National University of Singapore on February 17–18, 2010, for raising valuable comments that helped improve this article and, particularly, Professor Li-ann Thio for carefully editing and commenting on the earlier version of the article. Email: qfz@pku.edu.cn.
simple reason. Although civil and criminal laws are enforced by the courts, and even though the courts have entertained administrative litigation against officials since 1990, the “supreme law of the land,” ironically, has been left undefended, at least judicially.

Hence, having a constitution without constitutionalism is a condition in which China has long been stuck, and for good reasons. If the absence of judicial review is the most obvious and direct cause for the lack of constitutionalism—a system of government committed to the enforcement of rules spelled out in the constitution—it is also a superficial cause: Why not establish judicial review, then? At least since 2001, when the Supreme People’s Court (SPC) explicitly applied the 1982 Constitution for the first time, in one of its activist decisions (the Qi Yuling case), many constitutional scholars have argued the necessity of establishing a form of judicial review, but to no avail. In fact, that case was never followed up on by any later decisions and, by 2009, the SPC itself put an end to any prospect of judicial review by repealing its own decision. The short life of the Qi Yuling decision illustrates that the failure to establish judicial review is itself an effect rather than the root cause of constitutional deficiencies, and that the efforts of a few enlightened judges or administrators are insufficient to produce sustained constitutional progress. If judicial review is necessary for constitutionalism, and constitutionalism is good for the interests of the vast majority of people, then “the people themselves” are the ultimate driving force for constitutional progress. Compared with the people in the United States or Western European countries, who can rely on working constitutional mechanisms for their protection, at least during non—“constitutional moments,” the people in authoritarian states like China have nothing of that kind to protect them and have no choice but to take things into their own hands—sometimes, even, to risk their own lives.

This article delineates and analyzes recent constitutional developments in China along two lines of inquiry. One is the official judicial development initiated in 2001 by the SPC’s interpretation of constitutional provisions in relation to the Qi Yuling case, which opened up the possibility—greeted enthusiastically—for the judicial application of China’s Constitution in deciding cases. By the end of 2008, however, this path was foreclosed by the SPC itself when it announced that judicial interpretation had lost its legal effect. The second development is the nonofficial, populist path symbolized by the Sun Zhigang incident, in 2003, when the public, for the first time since 1989, strongly protested, largely by means of the internet, against the mischief of local officials followed by frontal attacks on the now-infamous Detention and Repatriation Regulation, which severely limited freedom of movement and discriminated against the peasants. As expected, this route has been difficult enough;

1 Response Regarding Whether One Who Violated the Constitutionally Protected Basic Right to Education of the Citizen Should Bear Civil Obligation, 25 JUDICIAL INTERPRETATION (2001).
however, since 2003, it has brought about several progressive constitutional developments in China.

The article will review the key constitutional events achieved by both developments, official and unofficial, and will examine the causes of their success or failure. Finally, it will point out the inherent limitations thwarting a populist path toward constitutionalism when it is forced to grow within an institutional structure where various governing bodies view the Constitution more as a threat to the political power of a small minority than as a protection of the basic rights for all. First, I shall explain why China’s constitutional provisions are necessarily left unenforced and why such a judicially unenforceable Constitution may still possess some utility.

2. Why an unenforced constitution still may be useful

2.1. The Constitution is dead

By Western standards, China’s Constitution is a dead letter. Contrary to a “living constitution,” which virtually “grows” as it is applied and adapted to a changing social reality, China’s Constitution lacks any meaningful mechanism for implementation and is left unguarded against official violations; it declares a long list of good ideals without the capacity to fulfill any. One can easily find unfulfilled promises and positive violations of the stated constitutional norms in daily life. To use Giovanni Satori’s term, it is simply a “façade,” which seems to be useful, if at all, only for improving the government’s image.

Stark as it seems from the Western perspective, the disparity between the constitutional norms and reality is anything but extraordinary in the context of Chinese history. China had never enacted anything equivalent to a modern constitution until 1908, when the Qing dynasty promulgated an Outline of the Imperial Constitution, which consisted, chiefly, of imperial laws and edicts, and these suffered, more often than not, from the same problems of implementation.

Some of these ambiguities become clearer with a historical glance backward. It was reported that the Emperor Jing of Han (156–140 B.C.) once repealed cruel corporal punishments and replaced these with flogging. Had this measure been faithfully implemented, China would have been the first nation in the world that came

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5 For a distinction between different type of constitutions, see Giovanni Sartori, Constitutionalism: A Preliminary Discussion, 56 American Political Science Review 853 (1962).
6 It has been argued, of course, that ancient China always had constitution-like norms embodied in “rituals” or rules of propriety (li); see e.g., Chaihark Hahm, Ritual and Constitutionalism: Disputing the Ruler’s Legitimacy in a Confucian Polity, 57 Am. J. Comp. L. 135, 151–161 (2009). However, hardly anyone disputes that these ancient “higher laws” were fundamentally different from modern constitutions not only in contents but also in their basic purposes; see e.g., Zhang Qianfan, Between the Natural Law and Ordinary Law: A Constitutional Analysis of Confucian Propriety, 2001 China University of Politics and Law Review 336–368 (2001).
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close to abolishing cruel and unusual punishments. Yet the apparently benevolent edict resulted in even more deaths because the officers enforcing the edict abused their power in carrying out the flogging. This situation was abated only after the emperor reduced the number of floggings for each individual crime, defined the size and shape of the bamboo whips in detail, and prohibited a change of persons charged with carrying out each enforcement.\(^7\) Not every type of law enforcement task can be narrowed down to bamboo sizes, however, and the ambiguities and vagueness inherent in any law had provided the enforcement officers ample opportunities to misuse their discretion, producing effects contrary to what the letter of the laws would dictate. The duality of law and its real-world consequence is aptly captured by the term “latent rules” (qian guize), namely, the rules operating in reality as opposed to rules laid out in law books.\(^8\) The omnipresence of these latent rules has perplexed China not only throughout its long dynastic periods but also during the legal reforms of the past three decades.

I venture to claim that such a phenomenon is not peculiar to China but is applicable, generally, to certain types of authoritarian states. In a sense, it is in the interest of any autocratic regime to maintain a splendid façade by enacting good laws without giving them substance. In a democracy, where the government is held responsible by the electorate by means of regular elections and judicial review, the disparity between laws and reality would not be long tolerated since it means withholding from the people the public good promised in the laws. In an authoritarian state, however, where the electoral or judicial checks against the government are absent, the government is isolated from popular pressure and, thus, left with broad discretion to decide whether to execute the laws. Often, these laws have not been faithfully executed where the interests of the existing regime in maintaining the status quo are affected. For example, if the local governments are benefitting from land takings without just compensation, it is counterintuitive to imagine that the officials involved will enforce the constitutional requirement of just compensation. Without an institutional mechanism able to compel such enforcement, effectively, this part of the constitution will surely be left unenforced. Thus, as long as the government finds an incentive in enacting good laws but a disincentive in enforcing them, then laws and reality will never coincide. They have never been wholly congruent in any country; however, in an authoritarian state, where the enforcement of laws is systematically discounted, the laws and the reality they pertain to will diverge by several orders of magnitude.

This does not mean that an authoritarian state will never enact laws that are to the detriment of the public interest; on the contrary, since neither the processes of lawmaking nor the laws’ implementation are subject to electoral accountability,

\(^7\) See Annals on Emperor Jing and Criminal Law Report in Book of Han (Hanshu). For an introduction to the penal reform during this time, see Yan Xiaojun. The Penal System of Early Han Dynasty. 4 LEGAL SCIENCE 160–180 (2004).

\(^8\) The term was coined by Wu Si. in his LATENT RULES: REAL GAMES IN CHINESE HISTORY (2001).
regulations positively harming public goods not only will be made but, usually, will be carried out with considerable efficacy, indeed, with impunity. Even the most recent constitutional amendment of 2004, commonly regarded as reflecting rapid progress in the developing public consciousness concerning human rights, has failed to prove all that satisfying, since it requires only "compensation" for the taking of properties, which, if literally interpreted, is meaningless; any unjust compensation would seem to satisfy such a lax requirement. Yet, clearly, the incentive for making attractive law is present in China, a country that has been committed to the Confucian doctrine of benevolent government (renzheng) for over two millennia. As Mencius aptly put it, in a true kingdom "the people are the most important, the gods of the land and grain are the next, and the king is of least importance." It has been China's unchallengeable social consensus that a legitimate government is to do everything for the people. The "three represents" (sange daibiao) theory, advocated by the former general secretary Jiang Zemin, for example, claimed that the Chinese Communist Party (CCP) should represent the "most fundamental interests of the most numerous people." Yet, in making such a claim, it merely reiterated the long-held Confucian tradition of treating the people as the foundation (minben) of the state, albeit without affording them meaningful opportunity to participate in governance. Why should laws and regulations enacted by government appear contrary to the public interest, given that they are not meant to be seriously implemented?

Thus, more often than not, laws and regulations in China appear to be enacted in the best interest of the people, either out of the rulers' goodwill—for example, the benevolent consideration of the Emperor Jing of Han—or as a result of political constraint; for example, the electoral system of the People's Congresses that operates at different levels and through which the people may exercise their power over the state. While this latter constraint is provided for under article 2 of the 1982 Constitution, the elections are always carefully manipulated in practice. That the laws are only ostensibly enacted in the people's best interest may occur, simply, out of the need to appear more appealing to the people; for example, the human rights provision in the 2004 constitutional amendment, which was in response to the rising popular demand for rights and freedom, is undercut because the institutional mechanisms for safeguarding rights remain unimproved.

When it comes to the implementation stage—when laws or regulations are to be given true meaning and impact—matters take a radically different turn, because implementation would trigger pervasive conflicts of interests. Just compensation to the people means a reduction in government revenues and personal gains for officials; taking elections seriously means not only that the current representatives will risk

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10 Mencius, 7B14, id. 81.
11 The CCP itself, of course, has always claimed that it has been following Mao's famous slogan of "serving the people."
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losing their positions and that elected representatives will exert greater effort in checking official corruption and abuses of power but also that the superior cadres will lose control over the appointments process and sources of personal profit that come with it. And even merely enhancing judicial capacity, as apparently required by the constitutional amendment on governing the state according to law (yifa zhiguo) and establishing a socialist state according to the rule of law (as amended in 1999), will offend the status quo, since effective recourse to the law would tend, naturally, to circumscribe the discretion of officials at various levels and reduce opportunities for exacting bribes. It is, perhaps, fair to say that the framers of these laws never meant that they should be seriously enforced but, rather, would keep them as perpetually harmless decorations with which to make the regime look good.

An enlightened regime with reasonable foresight should realize that the serious enforcement of constitutional or legal norms and the availability of institutional checks against official misconduct would be beneficial to its own interest in the long run, chiefly, by reducing social strife and maintaining political stability. This is precisely the point that Confucians used, repeatedly, to persuade the emperors and kings to practice humanity and righteousness. Yet this slightly more sophisticated version of rationalist arguments is likely to fail for several reasons. First, the limited success of Confucian tenets themselves illustrate that these arguments, persuasive as they may seem to a rational person with a long-term perspective for net gains, might well fail to persuade a mediocre ruler with limited foresight and ability to weigh uncertain, distant gains and losses. Second, holding such a far-sighted perspective is inapplicable to the present regime. A monarch who drew his authority from a traditional hereditary kingship might preserve a long-term view of his state, whose subjects and properties were owned, as it were, by himself and his family for an indefinite period of time, at least so long as his family successfully kept the crown. A contemporary ruler has no such privilege, however, and is obliged to yield the power after his term expires—a regular and foreseeable event. The 1982 Constitution of China, for example, expressly limits the tenure of the state president and vice president, the premier and the vice premiers, the chairman and vice chairmen of the Standing Committee (SC) of the National People's Congress (NPC), and the presidents of the SPC and the Supreme People's Procuratorate to two consecutive five-year terms, a model followed by virtually all local governments. These term limits have been applied

12 See, e.g., Mencius' opening dialogue with King Hui of Liang, where he argues that narrow pursuit of self-interest is self-defeating. Mencius. 1A1. Id. at 50–51.

13 For this point, see China's classical legalist's critique of Confucianism. Hanfeizi. 50: 8, "Prominent Doctrines," id. at 254.

by the party leadership ever since Deng Xiaoping initiated the cadre retirement re-
form in 1982. The apparently democratic limitation on terms coupled with the
authoritarian mode of governance, in essence, helps to maximize the short-term
incentive for abusing power while it is within one’s grasp: after all, who cares
about the future of the regime or the party as long as it does not fall within my
term—as a mediocre, self-interested cadre might think?

Finally, even if a few enlightened leaders in the topmost circle are willing to con-
sider the long-term well-being of the party and the country and express their good
will by enacting benevolent laws and regulations, they share with the ancient
emperors the same incapacity for enforcing them in person or effectively overseeing
their enforcement by inferior officials. The latter have every incentive to resist
enforcing any law or regulation that would benefit the people at their expense. For
an empire as vast as China’s, it has been extremely difficult to carry out laws and
regulations to the same effect at so many levels and locations. and the problem of
“the superior passes policies, the inferior uses strategies [of resisting enforcement]” has always been acute.

Since 1908, this has been the fate of virtually every one of the dozen written con-
stitutions—and of the many laws promulgated in their name—that have governed
China in the past century.

2.2. Long live the Constitution!

Since China’s constitutionalism has remained dead or, at best, dormant, so far, does
it make any sense to talk about its constitution at all? Well, it does and does not. It is
true that many people are understandably frustrated by the deplorable state of
China’s constitutionalism, and that the current Constitution is a mere façade with
many unenforced, decorative norms; however, that does not mean that the Constitu-
tion is of no use. If self-interested officials are inclined, naturally, to ignore the Constitu-
tion, more people may begin to take it seriously, because, after all, it is supposedly
for their interest that the Constitution was made in the first place. The gist of this idea
is caught, vividly, by the story of an old man who held up the Constitution in resisting
gangsters hired by the developer to demolish his house. It is also true that, without
adequate institutional support, most people would fail to realize their constitutional
claims. Nonetheless, a prime purpose of this article is to show that the popular

16 Shangyou zhengce, xiayou duice. For example, China’s central government has experimented numerous
ways to relieve the peasants of tax burden since early 1980s, but in vain: ultimately it had to repeal the
agricultural tax altogether in 2006, a dramatic measure that did reduce the peasant burden, to some
extent, but also aggravated the debt crisis of the local governments, especially those in poor, remote
areas. See e.g., Zhang, Qianfan A Constitutional Analysis of China’s Peasant Problems, 4 Cass Law Journal 39
17 Bao Liming, An old man in Beijing held the Constitution in resisting compulsory moving, China Youth Daily, 5
April 2004.
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consciousness and support for the Constitution, however minimal the impact, has made a decisive difference in certain situations.

For several reasons, an unenforced constitution can still serve useful purposes in protecting the people’s rights and interests. First and fundamentally, most governments care about their own image, and authoritarian governments are no exception. In fact, the outward image is all the more important to an authoritarian government, precisely because it lacks—and knows it lacks—democratic legitimacy as a basis for the confident exercise of power; this is especially the case where democracy is, purportedly, a vital part of its own ideology. An elected president may not care that much (though he does care, necessarily) about his popularity ratings sliding below 50 percent; however, in an authoritarian state long used to polling numbers indicating well over 90 percent support, such a decline would amount to a sufficient cause for revolution.

Nor would it be difficult to find reasons for a slide in the government’s ratings. Non-compliance with the Constitution and the excessive abuse of unchecked power will cause hardships and tragedies for the common people, thus inciting massive social dissatisfaction and resentment and, eventually, tarnishing the government image, unless, of course, the government is powerful enough to prevent any unfavorable news from becoming widespread. The government in China, like its totalitarian neighbor in North Korea, used to wield omnipotent power and took away virtually every freedom from its people; however, matters have dramatically changed ever since it embarked on “reform and opening” (gaige kaifang) over three decades ago. During this time the media have undergone considerable liberalization, especially as China is interacting, now, with a world where national geographical barriers are effectively transcended by the internet. It is true that the Chinese government has never ceased in its effort to maintain a tight grip over the traditional media and upgrade its ability to control internet communications; Google’s recent exit from China is but a skirmish between the open world and a nervous state, where the former is devoted to excluding “pernicious information.” Still, few could gainsay that China’s new media, as a whole, display a world of difference from the party’s mouthpieces in the 1960s and 1970s; China today is, undeniably, an information-rich, albeit content-biased society. Even though the local governments have tried, consistently (occasionally at the behest of the central government), to conceal negative incidents of official corruption, social conflicts, and such calamities as mine explosions, environmental disasters, and scandals relating to poisonous food or adulterated drugs, for which the local officials will be held responsible due to their dereliction of duty, it has become increasingly more difficult to hide these truths from the people. In fact, almost on a daily basis, one easily can find on the internet reports of new incidents where fault is imputed to government

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18 For example, most laws are passed by the National People’s Congress with a majority of well over 90 percent; its approval of the work report of the State Council is approved by a comparable percentage.

19 Google is set to abandon its business in China, WALL STREET JOURNAL, 14 March 2010.
officials. These frequent episodes cannot fail to pressure the central government to take some actions to restore its damaged image.

Second, it is not entirely accurate to picture an authoritarian regime as a narrowly selfish organism, purely interested in its own self-preservation and perpetuation. Although government officials are not elected, in any meaningful sense, neither are they completely isolated from the people, since every regime needs to replenish itself with new blood through certain mechanisms. In imperial China, for example, the examination (keju) system helped to bring youths of ordinary birth, well versed in the Confucian classics, into the ruling class, a process that helped to maintain at least a tenuous connection between the government and society. The same process operates in China today, where the government absorbs talent from academic, business, and professional elites. Additionally, virtually all important laws and regulations are the products of collaboration between the various governments and academics, and the latter are more familiar than ordinary people with Western models of governance. It is not to be denied, for example, that the central government and the social elites have been the active moving force behind most of the legal and constitutional achievements so far.

In fact, although the yoke of the People’s communes was first broken by eighteen peasants who signed a mutual agreement for dividing up the land in the Xiaogang village of Anhui province in 1978, wholesale national economic reform was carried out by the central government, under the leadership of Deng Xiaoping, which quickly recognized the legitimacy of the Xiaogang reform in the Third Plenum of the Eleventh Party Central Committee. When the Administrative Litigation Law was promulgated in 1989, authorizing citizens to sue officials for violating legally protected rights or interests for the first time in the Chinese history, the ordinary people had hardly heard of terms like administrative litigation (xingzheng susong). Nevertheless, this law was enacted by the government to circumscribe its own discretionary power.

The 1982 Constitution itself was drafted by a committee of constitutional scholars and was liberalized, increasingly, through four major revisions that incorporated such fundamental principles as recognizing the legitimacy of and providing equal

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20 Just during the week of April 11–17, 2010, there were no fewer than five national reports on serious human rights violations in detention centers or labor education camps; also there was a minor mine accident, questioning the government’s dereliction in implementing the safety regulations. See e.g., Men from Hubei were sent to mental hospital for taking pictures of petitions, YANGCHENG EVENING News, April 11, 2010; Kaijeng labor education trainee died of cold shower, XIAOGANG MORNING News, April 13, 2010; Wang jiafeng mine accident was obviously due to dereliction, JINAN TIMES, April 14, 2010; Inmate in Tangshan labor education camp died as a skeleton, NEW BEIJING DAILY, April 14, 2010; Shenzhen blacklisted irregular petitioners and other six categories of persons as unwelcome, GUANGZHOU DAILY, April 16, 2010; Suspect in Weihai (Shandong province) detention center died of pin prick, NEW BEIJING DAILY, April 17, 2010.


22 For an interview with a senior constitutional scholar, see Xu Chongde: Witness the development of Chinese constitutions, People’s Daily, October 29, 2003. Of course, the scholars drafted the constitution under political direction. see Deng Xiaoping himself directed the drafting of 1982 Constitution, LEGAL DAILY, March 15, 2010.
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protection for private enterprises (1988 and 1993), establishing rule of law (1999), and respect for human rights and private property (2004). These progressive developments were the joint product of officials and scholars. It is also to be remembered that the central government itself has made openness and transparency an objective to be achieved by government at all levels, a project culminating in the Regulation on Disclosure of Government Information, which imposes a positive duty on all local governments to disclose local calamities. Moreover, it provides punishments for those willfully withholding information. Thus, the fact that the regime, as a whole, is concerned with preserving the status quo does not mean that the ruling party lacks factions inclined toward progressive developments for building a more accountable government; indeed, one can easily find capable, open-minded, and conscientious leaders at both the central and local levels, who are willing to improve China’s governance and rule of law.

Finally, although it is true that the government becomes more grudging when it comes to implementing these benevolent laws and the Constitution it enacted, this does not mean that these laws are utterly useless, only that their practical effects are largely offset by various vitiating factors that would be found unacceptable in a state committed to rule of law. Still, they do produce some beneficial effects, however small. If legally made claims are not effectively enforced, the presence of these laws, at least, lends moral force to the people whose interests they are supposed to protect and helps to illustrate to society at large that the government is acting in a wrongful manner. Particularly, in recent years, as the popular consciousness of the rule-of-law concept and constitutionalism has risen to the point where ordinary people begin to see the connection between the norms defined in these documents and their practical interests, they are learning to apply the Constitution and laws, consciously, for their own protection. The story of that old man holding up the Constitution to resist demolition was but one example; many similarly situated individuals or households have resorted to legal or extralegal means to challenge official actions.

In summer 2007, shortly after the Property Law (Wuquan Fa) came into effect, a couple in Chongqing municipality determinedly guarded their “nail house” against compulsory demolition and, thus, successfully forced the local government to bow

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23 Zhengfu xinxi gongkai tiaoli, promulgated by the State Council in 2007.
24 Arts. 39, 63. Emergency Response Law (promulgated in 2007). On September 9, 2008, for example, in a serious dam collapse accident in Xiangfen county (Shanxi province), the local officials managed to conceal the number of casualties and were later investigated by the Central Bureau of Safety and Supervision. See Dam collapse accident in Xiangfen, Shanxi, was concealed, NANCHONG EVENING NEWS, September 18, 2008.
25 For instance, the Central Bureau of Compilation and Translation (Zhongyang Bianyiju), a central government think tank, has sponsored the Award for Local Government Innovation in China, which has been won by a number of genuinely progressive local governments, see http://www.chinainnovations.org/index5.html?no=1.
26 Dingzi hu, referring to a single or small minority of residents who refused to move out while the majority of neighbors had followed the order of the local government or developer, making their houses resemble nails standing out in the demolished flat area.
to public pressure and increase compensation to a satisfactory level. Thus, when the central government promulgates progressive laws and constitutional amendments, it comes under some degree of popular pressure to enforce the new norms. It is as if these new norms formed a compact between the government and the citizens, the breach of which would be viewed, widely, as wrong and treacherous. A new law may not come equipped with an effective implementation mechanism; still, it represents the normative consensus of Chinese society, insofar as this is reflected in the media, and against which the clock cannot be turned back. Once it enacts a new, benevolent law, the government enters a one-way street, as it were. It cannot repeal human rights, private property, rule of law, or any other highly popular provisions of the Constitution without inciting major protests from the intellectuals, media correspondents, and other public commentators; it cannot repeal administrative litigation, information disclosure, procedural justice, or any other of the principles or mechanisms commonly seen as vital to the legal protection of citizens. Its only option is to enforce these provisions and mechanisms to its best capacity and, to the extent they are not enforced, the government is to be blamed.

In this sense the Constitution, particularly its subsequent amendments, plays a vitally important role in China today.

3. The rise and fall of official constitutionalism

3.1. The rise of the “first constitutional case” as a surprise

The case of Qi Yuling v. Chen Xiaoqi et al. has now become a desolate milestone in the constitutional history of China. In 1990, Qi passed the provisional examination for entrance to a specialized profession (zhongzhuan) and was admitted by Jining Commercial School. Her admission letter was stolen by her classmate Chen, who then studied under her name and went on to get a decent job in a bank upon graduation. Qi found out the whole plot only ten years later, during which time she suffered hardship in finding good jobs, owing to her lack of technical education. After she brought the litigation, the middle-level court of Tengzhou, Shangdong province, ordered the defendants to pay 35,000 yuan for the mental damage caused by infringing Qi’s right to her name but declined to provide a remedy for the alleged violation of her right to education provided for under article 46 of the 1982 Constitution.

On appeal, in an extremely succinct reply to the request of the Shandong High Court for judicial interpretation, the SPC held that the plaintiffs “basic right to education

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27 In September 2010, for example, the NPCSC published a draft revision for the Law on Deputies to the National People’s Congress and to the Local People’s Congresses at Various Levels, which contains a number of provisions seeking to limit the deputies’ power and independence in carrying out supervisions. The draft has been sharply criticized by many legal scholars and political scientists, though the impact of such criticisms on the lawmaking remains to be seen.

28 Right to education is not be violated: The topic introduced by the first case on violation of right to education, GUANGMING DANSY. 4 September 2001.
provided by the Constitution was violated. This was the first case in which the SPC explicitly cited a constitutional provision as the legal ground for a judicial decision or interpretation. The Shandong High Court went on to order the defendants to pay 100,000 yuan for the loss that Qi suffered from the infringement of her constitutional right to education. The decision, often hailed as China's "first constitutional case," since it formally "judicializes the Constitution" for the first time, hit the legal community by surprise and generated a large body of academic literature debating the propriety of "constitutional judicialization." Despite minor technical problems, the first constitutional case did offer some hope, not only for the right to education, specifically, but for the promotion of constitutionalism as a whole. The Western experience suggests, almost unanimously, that the words of a constitution do not count unless they are somehow "judicialized"—in the United States, by the ordinary courts; in France, by the special Conseil Constitutionnel; and in Germany, by the federal and state constitutional courts. Had it been allowed to develop its own momentum, the Qi Yuling case could have paved the way for China's Constitution to evolve along the same track, for Qi Yuling to become China's Marbury v. Madison.

3.2. Limitations and demise

Unfortunately, subsequent developments quashed the prospect of developing constitutionally enforceable rights. Chinese judges have not taken any steps to consolidate their powers based on the first constitutional case; on the contrary, they have chosen to avoid invoking the Constitution. Since 2001, there has not been a single "constitutional case," so to speak. This is not to say that mainland China has not made any progress on constitutional issues. Indeed, in recent years there were several cases on equality, in which the plaintiffs won either in or outside the courts, though none were decided on constitutional grounds.

For example, the recruitment of civil servants in China used to be subject to a variety of discriminatory limitations. Frequent complaints were made against the criterion of excluding noninfectious hepatitis-B virus carriers, which has given rise to tragic cases, where, for example, a rejected applicant committed manslaughter out of sheer fury. In the Hepatitis-B Virus Case (2004), the government of Anhui province was sued for maintaining such a restriction in admitting civil servants. The victim charged that such a health criterion constituted a violation of his equal right to hold a public post as protected by article 33 of the Constitution, which provides that "all citizens..."
are equal before law.” The court of Wuhu city held the rejection of admission invalid on the ground of “insufficient evidence,” but it avoided the constitutional question altogether. In fact, the chief judge of the administrative section of Anhui High Court seemed to believe that the Constitution was inapplicable because the equality clause is limited only to the erroneous application of laws rather than to the legal classifications themselves. Such a limited interpretation, once taken for granted by China’s legal community, has been discarded for at least two decades. The decision shows, simply, that the ordinary courts in China lack both the courage and knowledge to apply the Constitution properly.

More fundamentally, judicial application of the Constitution has been viewed as potentially threatening to the party leadership. It was rumored that the SPC had circulated an internal directive forbidding courts from following the Qi Yuling decision, which might have explained the de facto demise of that decision’s potential for judicializing the Constitution. In any case, the new SPC president, who assumed the post in 2007, seemed to be dissatisfied even with the ruling’s dysfunctional existence and moved to delete it, explicitly, from the case book. In December 2008, the SPC published a document that officially voided the legal effect of several judicial explanations made in the past, among which the Qi Yuling case was the only one without even a brief explanation.44 In retrospect, the demise of the Qi Yuling case came as no surprise. It was the product of the progressive judge Huang Songyou, the chief judge of the civil section of the SPC when the case was decided, and who was under investigation for corruption by 2008,35 and the official line of constitutional progress he helped to initiate came to an end, along with his judicial career.

Indeed, the rise and fall of the Qi Yuling decision can be understood, properly, only in the broader context of judicial reform, which the former SPC president, Xiao Yang, initiated in 1999.36 Undertaking to make China’s judges “judges in [a] real sense,”37 this ambitious reform aimed to professionalize the hitherto politicized courts, and it did manage to modify the judicial image somewhat, from army uniform and starred epaulets to gavel and black gauntlet. However, it failed to change the judges’ basic thinking and, more fundamentally, the power structure both within and outside the courts, particularly the relationship between the courts and the ruling party. Just as the judges are under the leadership of their court president, the president is under the leadership of the party, making the judicial structure, as a whole, prone to political interference. This is, of course, opposed to the requirement, clearly laid out in

33 ZHOU WEI, A STUDY OF JUDICIAL REMEDIES OF CONSTITUTIONAL FUNDAMENTAL RIGHTS (XIANFA JIBEN QUANLI SIFA JIUJI YANJU) 100 (2004).
34 The 7th Decision of the Supreme People’s Court to Repeal Relevant Judicial Interpretations Released before 2007. December 18, 2008.
35 Recently he was sentenced to life imprisonment. see Zhu Yan, Disagreeing with the trial sentence. Huang Songyou will appeal. New BEIJING DAILY. 29 January 2010.
37 Words expressed by the former SPC president. Xiao Yang, who was instrumental in hammering out the first five-year plan for the judicial reform. see XINHUA DAILY. 25 October 1999.
the Constitution, that “the People’s Courts are to try cases independently, free from interferences of administrative organs and social groups.” Now, more than ten years since its inception, judicial reform in China is at a crossroads, apparently having lost both momentum and direction. While professionalization was the goal over a decade ago, the SPC, now allied with several legal scholars in advocating the “popularization” of the People’s Courts, has returned to an outdated mass-trial model once practiced in the Communist base (Yan’an) during 1940s. In effect, far from inviting ordinary people to participate in the People’s Court, this line of judicial reform—if worthy of that name, at all—will only further undermine judicial fairness and invite even more political interference in activities that properly belong to courts.

The fate of China’s judicial reform, in general, and the Qi Yuling decision, in particular, attests vividly to the fact that, without popular consciousness and support, express provisions of the Constitution and laws will remain dormant, with little practical effect. After all, since the crux of any modern constitution is to protect the people’s rights and interests, it is common sense that constitutional protection will be ineffectual unless and until the people themselves demand it. Unlike the Sun Zhigang case (discussed below), which aroused massive public reactions, the demise of the legal effect of the Qi Yuling decision was contested only by a few legal scholars; it never met with any mass protest from society at large. The judicial reform did gain overwhelming support in the legal community but was single-handedly initiated by the SPC and lacked popular support, without which progressive reforms are doomed to fail as soon as they confront powerful opposition supporting the status quo.

4. The emergence of populist constitutionalism: The Sun Zhigang incident and its legacy

The judicial innovation illustrated in the Qi Yuling case is representative of the official efforts to improve institutional performance or to correct official wrongs; however, such efforts are few and far between, and without popular support, they usually die out, with little sustained impact. Still, this does not mean that China has failed to achieve any constitutional progress during the last three decades. From the abolition of the People’s communes, which reduced nearly a billion peasants to serfdom, and the establishment of the family responsibility (jiating lianchan chengbao) system, which recognized their basic right to use the farmland and produce for their own profit, to the abolition of the Detention and Repatriation (DR) scheme and the reform of the household-residence system, which had tied Chinese peasants to the land they toil for over a half century, China has made tremendous progress in human rights ever since economic reform was initiated. In addition, the primary driving force of these reforms

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38 Const. Art. 126.
39 Named after Ma Xiwen, a Yan’an judge who conducted itinerary trials among the peasants at the time, the resolution mechanism without employing formal adjudicatory procedure model was essentially a dispute ure.
40 See, e.g., Zhang Qianfan, Are Chinese Courts Authorized to Interpret the Constitution? 4 JOURNAL OF LEGAL STUDIES 39 (2009), and articles published in the same issue: even there, the constitutional scholars’ voices were very much mixed.
has not been a few enlightened and conscientious government officials but the ordinary men and women the Constitution was designed to protect.

The first in this line of incidents is the Sun Zhigang tragedy that took place two years after the Qi Yuling case; unlike the latter, the Sun Zhigang situation not only sustained its own social impact but also created a rich progeny of populist scenarios evincing the same pattern of interactions between the people, the media, and the central and local governments. This sequence of events constituted what became known as the Sun Zhigang "model," which will continue to develop and repeat itself, indefinitely, at least for as long as the basic power structure and the prevailing mode of political interaction remain unchanged.

4.1. The tragedy and its immediate institutional impact

In March 2003, when China and the rest of the world were grappling with the SARS crisis, a personal tragedy struck Guangzhou and eventually triggered a public outcry against the age-old system for treating the migrant populations in Chinese cities. Sun Zhigang, a twenty-seven-year-old graduate from the Wuhan Science and Technology College (Hubei province), came to work as a fashion designer in that economically booming city. On the night of March 17, he went to visit an internet café as usual, without bringing his temporary residence permit as an identification document. He was detained, mistakenly, by police as an illegal immigrant to the city and was brought to the Guangzhou Detention and Repatriation transfer center. Apparently, having quarreled with the management personnel about his treatment, he was battered by fellow inmates and died a few days later. The medical record in the official report asserted that he died of "heart-attack" and a "cerebrovascular accident," a claim belied by the autopsy report that displayed massive bruises on his back. For over a month following, despite strenuous efforts by Sun's relatives and friends, the Guangzhou city police refused to explain the true cause of Sun's death.

The silence was broken, first, by a news report of the then-outspoken South Metropolitan Daily entitled "Who should be responsible for a citizen's abnormal death?" which triggered a mounting public outcry, mainly on internet. Although similar events occurred quite routinely—if not always as dramatically—the Sun Zhigang incident shocked the conscience of the entire nation. After the event was first publicly reported, the Guangzhou police received a storm of condemnation by way of the internet, a rapidly developing medium for expressing a variety of ideas in China. For a short time, the local government adamantly insisted that Sun had died of natural causes, and that the local police had acted impeccably throughout the process. Such responses only fueled more public dissatisfaction and scolding. Eventually, the

41 There were disputes as to where the battery actually took place, and some proposed that it occurred in the police bureau, instead; however, this paper adopted the official report due to the lack of other reliable sources.
42 See report on South Metropolitan Daily, 25 April 2003.
43 See report on Beijing Youth Daily, 1 May 2003.
accident and the public criticisms attracted the attention of high-level leaders in the central government as well as the Guangdong provincial government, which then demanded a thorough investigation and expressed the intent to punish, severely, the culprits. Under the political pressure from above, the Minister of Public Security (gōng'ān bu) was reported to have given instructions, on at least seven occasions, that the persons responsible be apprehended. When the central government intervened, justice was quickly served.

Although the Sun Zhigang tragedy inspired intensifying moral condemnations, the Chinese public did not stop at condemning the official mischief but took the further step of questioning the legitimacy of the DR system itself, an institution that had caused many past tragedies by authorizing the local police to detain and repatriate those without adequate documents proving their local resident status. In addition to its moral iniquity, the DR regulation, enacted in 1982, also ran into legal trouble with the promulgation of the Legislation Law in 2000. This law was passed to curb the pervasive legislative-fighting (lǐfǎ dājià) phenomena, referring to the widespread conflicts between the different orders of legal norms instituted by the national and local legislative bodies, by the State Council and its departments and commissions, as well as by the provincial and local governments. It aimed to do so by reserving certain powers to the National People’s Congress (NPC) and its Standing Committee (SC). Among these reserved powers is the “deprivation of the political rights of citizens, or compulsory measures and penalties that restrict personal freedom.” Thus, neither the State Council nor the provincial people’s congresses are authorized to create “compulsory measures ... that restrict personal freedom”; such freedom can be limited only according to the laws enacted by the NPC or NPCSC. The DR regulation obviously involved compulsory powers that limited personal freedom; however, the lack of NPC or NPCSC authorization in the form of a law called its legality into question.

It was against this background that three young legal scholars initiated a constitutional review process, provided for under article 90 of the Law on Legislations, and sent to the Legal Works Committee (fágōngwèi) of the NPCSC a recommendation for reviewing the constitutionality and legality of the DR regulation, which received overwhelming public support. The NPCSC failed to take any action, as usual, but the State Council, now under severe national pressure and under the leadership of the new premier Wen Jiabao, moved promptly to repeal the DR measure that authorized

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44 The Sun Zhigang Case Has Achieved A Breakthrough, Xinhua Daily. 14 May 2003.
45 For a concise explanation of the Chinese legal structure, see Albert (Hongyi) Chen. An Introduction to Legal System of the People’s Republic of China (3rd ed. 2004), especially at Chs. 1–2.
46 Law on Legislations, art. 8, para. 5.
47 Art. 9 of the Legislation Law does allow the State Council to develop certain legislation in the prohibited areas if it is authorized by the NPC/NPCSC; nevertheless, matters regarding compulsory measures and penalties that restrict personal freedom, along with deprivation of the political rights of citizens, crimes and criminal penalties, and the judicial system are explicitly excepted.
48 Art. 90 of Law on Legislations confers a sort of “citizen standing” that allows ordinary persons to request the NPCSC to review the constitutionality or legality of an administrative or local regulation even though they are not directly related to a particular dispute.
the compulsory deportation of "vagrants and beggars." On August 1, 2003, less than five months after the Sun Zhigang tragedy and within three months after its becoming a public event, the State Council promulgated a new regulation of an entirely different nature, as revealed simply by its title: Measures for the Administration of Relief for Vagrants and Beggars without Assured Living Sources in Cities. Based on the principle of "receiving aid of one's own free will, and giving help gratis," relief for vagrants and beggars should be administered to with compassion and in accordance with the individual circumstances and needs of the recipients. The goal should be that they receive relief in terms of food, lodging, medical care, communications, and transportation to their hometowns. In a surprisingly short period, a system enforced for a half century and fraught with local interests was leveled to the ground, and an entirely new relief system was built up.

4.2. Significance and legacies

The Sun Zhigang incident did more than end a notorious system, which had arbitrarily limited personal freedom, particularly that of the peasants who constitute the overwhelming majority of this populous country; it triggered a series of civil rights movements that resulted in or had a significant impact on a number of important legal and institutional reforms in China. These included ongoing reforms of the household-residence system,\(^49\) the education-through-labor program, criminal justice and capital punishment,\(^50\) and land-taking and city renovation projects that involve the compulsory demolitions (qiangzhai chाँqian) of residential houses. Indeed, most of these events can be characterized as the progeny, as it were, of the Sun Zhigang model, since they share, in essence, the same process that triggered the resolution of the Sun Zhigang incident. The model involves three consecutive steps: first, an institutionally caused tragedy is reported by the media; next, the report triggers mounting public reactions; and, finally, the central government, apparently shocked and out of fear that further developments could tarnish its image and governing legitimacy, decides to take the actions necessary for resolving the wrongs caused.

The very end of 2009 witnessed the Sun Zhigang model at work again, this time in the area of property rights and the governments' power to confiscate, forcefully, and demolish immovable properties. Since the early 1990s, China has accelerated its pace of urbanization and city renovation. These developments have been facilitated by the public land-ownership scheme or, more precisely, the unchecked power of local government in regulating the right to use land and the lack of a constitutional requirement for just compensation. This state of affairs created an enormous official incentive for overdevelopment and the excessive takings of properties.\(^51\) Takings without just


\(^{50}\) For a publicly influential correction of an erroneous judgment, see She Xianglin was wronged for 11 years, the chief culprit being presumption of guilt? *New Beijing Daily*, 14 April 2005.

compensation deprived many peasants and city residents of their basic means of living and contributed to the vast majority of complaints and appeals to the superior jurisdictions (shangfang); they became the primary cause of violent social conflicts on a massive scale.\footnote{Zhao Xiaojian. The political economy behind the “Land New Deal”, FINANCE. 1 November 2004 (No. 21), pp. 90–93.}

In 2004, China amended its Constitution, requiring, for the first time since 1949, that the state “protect lawful private property” and “provide compensation” for the taking of property for the purpose of some public interest. Although the 2004 amendment marked major progress in China’s human rights cause, it was obviously deficient in failing to require just compensation for takings. In 2007, the NPC passed the landmark Property Law without alleviating this deficiency. Although many tend to interpret these legal developments as indicating a new and benevolent tendency to respect private property, the institutional loopholes and the lack of teeth in both the Constitution and Property Law have contributed to the unfettered application of the Administrative Regulation for Management of City House Demolition (the “Demolition Regulation”), which caused many personal hardships by authorizing local governments or developers to confiscate and demolish city houses.\footnote{See, e.g., An old man held a Constitution in resisting demolition, CHINA YOUTH DAILY. 12 April 2004. Ultimately, the Constitution was unable to resist the demolition army which brought down his house.}

On December 23, 2009, when the demolition group arrived in front of an allegedly illegal construction (weizhang jianzhu) owned by Tang Fuzhen and her husband in a rural district in Chengdu (the capitol of Sichuan province), a tragedy of the Sun Zhigang type occurred. After physically pitting herself against the demolition for several hours, Tang lost emotional control, poured petroleum over her body, and set herself on fire. Despite prompt rescue, she died in hospital several days later.\footnote{Demolished family died of self-immolation after resisting city management for three hours. 2 December 2009. http://news.163.com/09/1202/10/5PH8QC3K00011229.html.} The news spread instantly on internet, accelerated by a section of videotape taken by a neighbor using mobile phone, which vividly recorded the scene of self-immolation. As was the case with the Sun Zhigang event, the news had a massive public impact, and five law professors from Peking University petitioned the Standing Committee of the NPC to review the constitutionality of the Demolition Regulation. Although the Tang Fuzhen incident was the wrong case for applying the City Demolition Regulation, since her house was an illegal construction located in the countryside, this detail made little difference, and there was mounting public pressure for abolishing the Demolition Regulation.

This time, the Office of Legal System, the State Council’s legal department, responded promptly to the public pressure, in fact, on the very same day that the scholars petitioned. Following several meetings with legal scholars invited to express opinions, the office managed to publish a draft revision of the old regulation that eliminated
a number of its constitutional infirmities; however, the final version is still pending, apparently awaiting the resolution of the center–local differences, particularly regarding the terms of alternative revenues for localities once the fiscal contribution from land sales is dramatically reduced by the new regulation. Unlike the Detention and Repatriation Regulation, however, the revision of the Demolition Regulation is a much more difficult task since it meets serious resistance from the local governments, which have derived a significant portion of their revenues from lucrative takings by paying compensation at below-market values. Although the Office of Legal System expressed its willingness to require just compensation and to narrow the definition of “public interest” in the new regulation, it did not appear confident enough to withstand the pressure of local governments, which are in charge of implementing most of the central laws and policies and enjoy considerable discretion in deciding the extent of implementation. It remains to be seen whether or to what extent the Sun Zhigang model will work, again, in providing meaningful protection for people’s property right and basic livelihood.

5. Limits of the Sun Zhigang model and beyond

Despite the demise of constitutional activism on part of the judiciary represented by the Qi Yuling case (2001), China’s constitutional progress continued along the populist line initiated by the Sun Zhigang incident (2003). From the Sun Zhigang to the Tang Fuzhen incident (2009), China’s constitutionalism is moving forward at an extremely slow and difficult pace. Despite my overall positive evaluations, it remains to be seen whether the spirit of the Sun Zhigang tragedy and its popular impact will continue to fuel initiatives for constitutional reforms, eventually eradicating the root cause of the tragedies caused by the unjust actions of institutions.

5.1. Limitations of the Sun Zhigang model

Even if the Sun Zhigang model continues to operate in a social environment with limited freedom of speech and press, it still suffers from several serious limitations. First, the cost of constitutional development has been extremely high. It usually takes the sacrifice of human lives in order to arouse enough public awareness, creating sufficient social impact, to move the central government to take any action. Both Sun Zhigang and Tang Fuzhen lost their lives in dramatic tragedies, and only tragedies

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55 For example, art. 4 of the draft new regulation requires that taking and compensation should follow the principles of democratic policy making, due process, just compensation, among others. Regulation on Taking of and Compensation for Houses on Nationally Owned Land (Version for Soliciting Opinions). See Zhang Qianfan. The Shining and Blind Points of the Draft Regulation on Taking and Compensation, SoUtWEnO. 4 February 2010.

of their magnitude created the degree of public impact needed to bring about limited institutional reforms.

Second, the results have been highly uncertain. Consider the convoluted way that the Sun Zhigang model works. First, there has to be a case of sufficient social impact, which, admittedly, is not too difficult to find, given that the problematic nature of the existing institutional framework creates many such “cases” on a daily basis and with respect to a variety of activities. Next, the facts of the incident must be disseminated within the context of a regulated media environment in order to produce broad impact on public consciousness. The social impact thus created must move the central government to act, where it is politically confident enough to undertake institutional reform in the relevant area, and, finally, the measures taken by the central government need to be implemented not only by the particular government or department that caused the particular tragedy but also by all lower governments, at all levels. Impediments at any stage are likely to stall the entire chain reaction for reform: thus, reports of the incident simply may be suppressed by an order from the central government; the central government may stand aloof to public reaction when it feels less than prepared to undertake systemic reform or, more likely, may undertake a symbolic reform just to appease public outrage; or the local governments may “use local strategies against central policies,” a common phenomenon in China’s central-local relationship.

In fact, many victims of institutional injustice have died before Sun Zhigang and Tang Fuzhen did, but these deaths either were unreported or had insufficient social impact as to move the central government to take further actions. In this respect, the case of Sun Zhigang was fortuitous since the central government happened to agree with society at large that something needed to be done about the DR system, and, here, the central government was able to adopt a clear measure, which abolished the coercive scheme altogether and left the local government with little room for maneuvering—just as Emperor Jing of Han was able to define the shape of bamboo whips precisely enough to reduce abuses in enforcements. In other areas, even if the central government has made up its mind, the reform policies may not be carried out everywhere with the same effect. For example, although extortion has been expressly prohibited, at least since the She Xianglin case was corrected, it has reemerged in several detention centers, where suspects in custody died of unexplained causes. In fact,

57 The superior government makes policies [shangyou zhengce], the inferior governments use strategies [xiayou duice] to leave central policies unimplemented.

58 She Xianglin was sentenced to 15 years imprisonment after he was forced by torture to confess a murder of a woman suspected to be his disappeared lunatic wife. His wrongful conviction was corrected after serving his sentence for 11 years, when his wife reappeared, and obtained a substantial amount of state compensation.

59 The most infamous of these events involved a young man who died in custody, allegedly during a hide-and-seek (duomaomao) game with other inmates; see Man in custody died in hide-and-seek, net surfers claimed beyond their imagination, CHINA YOUTH DAILY, 28 February 2009. For others, see A Shan’xi student died in investigation, the chief of county public security bureau was suspended for investigation, JINGHUA TIMES, 22 March 2009; Shan’xi procuratorate published autopsy report for the high school student who suddenly died during investigation, http://news.163.com/09/0328/11/55G5U3V00001124J.html, 28 March 2009; A suspect of over 70 years old died in custody, NEW FAST DAILY, 7 April 2009.
an even more egregious judicial error remains uncorrected to this day. In 1995, the High Court of Hebei province approved the death sentence for Nie Shubing, who was convicted and then executed for murder, only to discover Nie’s innocence ten years later, when the real murderer was caught in another offense. The facts of the case were simple enough, and the Supreme Court had expressly ordered a retrial, yet the provincial high court firmly declined to acknowledge the grave error it committed. As a result, hardly any substantive progress has been achieved in the many years since the miscarriage of justice was discovered.

The uncertainty in constitutional progress is rooted in the lack of institutional support for causes popular with the people. Unlike liberal democracies, where government at any level is held responsible to its constituencies through periodic elections, governments in China are not directly subject to electoral pressure and, thus, are not obliged to undertake popular actions. Not only are their actions immune to effective legal checks but the laws and policies themselves are often found to favor the status quo against the interests of the majority. The correction of even the most egregious policies depends on a complicated balance of factors, such as self-interests, public image, and the social risks of withholding the necessary reforms. The result of such weighing of considerations is necessarily uncertain, and it varies with the local circumstances and idiosyncrasies of individual local leaders. Despite the massive public reaction to the Tang Fuzhen case, the revision of the city demolition regulation has proved to be a difficult process, fraught with resistance from local governments. In fact, the uncertainties, while awaiting the revised regulation, have prompted local governments to speed up planned confiscations and demolitions, and these have already caused several tragedies comparable to that of the Tang Fuzhen event. The fact that many of these tragedies have occurred in rural areas indicates, clearly, that even the successful reform of housing demolitions in cities will do nothing to improve the rural situations.

Finally, the resistance to reform comes not just from the government; more fundamentally, the Chinese public, in general, is not always prepared to accept some modern constitutional principles, particularly in the area of criminal justice—as is illustrated in the following two cases.

60 The real murderer of the Nie Shubing case wanted to exculpate the innocent before execution, SOUTH WEEKEND, 10 January 2010.

61 Zhao Lei and Deng Jiangbo, The Supreme Court retrial of the Nie Shubing case is listed as the most important case, SOUTH WEEKEND, 8 November 2007. The eminent defense lawyer, Mr. Zhang Sizhi, told the author personally that the Supreme Court refrained from “pushing too far” to avoid potential retribution from Hebei province, whose delegates to the NPC might refuse to approve its work report, quite an unexpected way in which “democratic” power is exercised by what is usually a “rubber stamp.”

62 See, e.g., Demolition company suspected to intentionally destroy house and force moving, killing an 80 year old, JINGHUA TIMES, 11 February 2010; An old women in 70s resisted compulsory demolition and died of burying, XIAOXIANG MORNING NEWS, 5 March 2010; Father and son in Donghai, Jiangsu province, burned themselves to prevent compulsory demolition, relatives sent to suburb in custody, SOUTH DAILY, 29 March 2010; Kong Pu, Land taking led to self-cremation by Sichuan villagers and large gathering, NEW BEIJING DAILY, 24 April 2010.
Liu Yong was a rich merchant involved in gangster activities. In the past seven years his gang killed one person and injured forty-two, including sixteen serious injuries. In April 2002, he received a death sentence in a trial by the Middle Level Court of Tieling city, Liaoning province. In August 2003, apparently after having consulted eminent defense lawyers and legal scholars, and having considered the possibility of procedural irregularities in the trial, the Liaoning High Court changed the sentence to death with two-year reprieve, which, ordinarily, would turn into life imprisonment. As Liu Yong had already been painted by the media as a devil-gangster, the public expected that he would be put to death to serve justice; this sudden modification sparked sharp criticisms. A deluge of protests flooded internet; the vast majority of the messages accused the judges, lawyers, and scholars of colluding to exculpate Liu, some even suspecting that the new judgment was a result of bribery. Such suspicion was not wholly devoid of plausibility, as judicial corruption has been rampant in China; however, in this case there was no evidence that such irregularities had occurred at all. Confronting enormous social pressure, however, the Supreme Court, in an unprecedented decision, directly took the case into its own hands, through judicial supervision, and changed the judgment back to the death sentence in order to quell public anger.

More recently, the Chongqing municipality made a “strike gang” (dahei) campaign against underground societies and their official protectors. In order to deter any aggressive defense of the alleged criminals, the procurators prosecuted a Beijing defense lawyer, Li Zhuang, for illegally encouraging his client to deny his confession, and the court convicted him in a summary trial, during which the evidence raised in the prosecution was not thoroughly examined and none of the eight witnesses even appeared on the court.63 The controversial judgment was supported initially, however, by nearly half of the internet users polled. These cases show that the ordinary Chinese will support the right to life and due process only conditionally. They lend unswerving support for victims, especially those from weak groups or of arbitrary abuses, but to someone like Liu Yong, who has been portrayed as a public enemy, they have little patience for due process. And the court, too weak to stand on its own feet, is susceptible to both political interferences and public pressure.

5.2. Beyond Sun Zhigang?

The major defect of the Sun Zhigang model is apparent in the fact that the general public plays a passive rather than an active role, giving its approval or disapproval to certain events, as these arise, and which, typically, involve grave concerns, such as housing. Even if the public reaction has made a difference and succeeded in prodding the central government to take corrective actions, these post facto corrections inevitably come too late. Rather than improving the institutional capacity of the regime to prevent abuses of power, the Sun Zhigang model, in essence, provides only a trigger for initiating a remedial process. The process itself is not only too late, in view of the

63 Zhao Lei, The Li Zhuang case: Fights in and outside the court. South Weekend, 7 January 2010.
occurrence of the tragedy and the inability to prevent conflict, but is seriously limited, as well. In its capacity to correct the wrongs produced by an anachronistic institutional arrangement naturally prone to corruption and abuses of power. In fact, even the Chinese public has suffered from "fatigue in appraising the ugly" (shenchou pilao). The public reactions to misuse of funds was shocking when the Audit Commission published its first report around 2005; now, the reports reveal as many (if not more) problems today but this hardly causes an eyebrow to be raised. As a Chinese maxim says, if stream is not cut off from its source, it cannot be stopped however many plugs are used. In order to cure the problems at their root, the people themselves need to stand up and actively participate in public decision making and to play a role in overseeing their implementation.

Very recently, a new and more promising trend of public participation has emerged in China, in which the citizens play more active roles in local (occasionally national) policy making. Among three of the examples cited here, two are environmental actions initiated by local residents against local decisions that might seriously affect their health and safety; the other is an equal protection action taken by a group of hepatitis-B virus carriers loosely organized on the internet against discriminatory administrative policies and local practices. As mentioned above, a victim of discrimination did win a favorable court decision, which further prompted the central government to eliminate discrimination against hepatitis-B virus carriers in the civil service, although it stopped short of putting an end to hepatitis-B discrimination, in general. In college admissions, for example, examinees were still required to undertake health examinations, among which a check for the hepatitis-B virus was one item; a positive test result constituted sufficient ground for rejection. It was only through the continuous efforts of such NGOs as Yirenping, led by Lu Jun and other activists, that the Ministry of Hygiene eventually moved to abolish hepatitis-B discrimination in the educational and occupational areas altogether. This time the NGOs did not even bother to go to court, even if they do use litigation, occasionally, as a threat to initiate policy changes or to implement desirable policies. Since the courts are not reliable guardians of constitutional equality, it is often more effective to influence the administration directly in pursuit of policy reforms.

Four years after the Sun Zhigang incident, a historic event occurred in Xiamen, the capitol of the southern coastal province Fujian, when thousands of residents gathered before the city government building to protest its decision to install a plant producing PX chemical, a toxic and potentially carcinogenic substance, less than seven

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64 Repeated auditing, repeated violations: the Auditor General is mired in tug of audit wars, China Industry and Commerce Times, 30 September 2005.
65 See Wei Mingyan, Healthy Hepatitis-B virus carriers can be admitted as civil servants, New Beijing Daily, 1 August 2004.
66 Usually the examinees would be advised to spend some time in recovery, during which the qualification for admission would be reserved; however, after the grace period, e.g., of one year, if the examinee fails to recover, the qualification would be revoked.
kilometers from the densely populated central city area.68 A few months earlier, over one hundred members of National Consultative Committee,69 led by senior toxicologist Professor Zhao Yufen of Xiamen University, petitioned to stop this project during the high-profile “two meetings,”70 but to no avail. The opponents were advised to renounce negative statements and keep silent, and the project received a favorable evaluation regarding its environmental impact and was approved by the National Environmental Protection Bureau. Having witnessed the failures of the political elite, when seeking redress through official channels, the Xiamen residents took the matter into their own hands.

While the constitutions of China have always provided for freedom of speech, press, assembly, and association, there has not been a single successful application for public assembly since 1949, with the one possible exception of when the Chinese embassy in Yugoslavia was bombed by American missiles in 1999, and it was suspected that even this demonstration was covertly organized by the government. The Law on Assemblies and Demonstrations, enacted in 1989 partly to tighten the regulation of popular assemblies after the Tiananmen incident, provides that citizens may apply for permission to hold an assembly; however, whenever an application is submitted to a local public-security bureau, it is invariably rejected for security reasons, among others.71 Anticipating the fate of an application, the Xiamen residents decided to do away with the procedural niceties legally required for a demonstration; instead, they communicated among themselves via mobile phones and took a “collective walk” (jiti sanbu) to the city hall, which eventually succeeded in pressuring the city government to give up the project.72 It was the first successful event organized by spontaneous efforts of local grassroots bodies in the history of the People’s Republic.

Local decisions with environmental impacts have sparked civil protests and participation nationwide. Several months after the Xiamen “walk,” for example, the Shanghai residents resorted to similar actions against the maglev train project that would generate electromagnetic pollution for nearby residents, some residing within

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68 See reports on South Metropolitan Daily, May 31, 2007; June 9, 2007. Whether exposure to PX chemical will produce cancer is apparently a subject of dispute. While the city government claimed that its investigation showed no positive carcinogenic evidence, the experts and city residents disagreed and insisted that the project met safety standards only if it was relocated at least one hundred kilometers from the living area. See e.g., Xiamen’s chemical project, worth 10 billion (yuan), which invoked safety disputes and 105 committee members petitioned for relocation, China Management Daily, March 16, 2007.

69 Quanguo zhengzhi xieshang huiyi, an elite consultative body without formal constitutional status, whose primary responsibilities are participation in policy making through raising bills and recommendations, supervision of implementation of laws and regulations, and friendly criticisms of official misbehaviors, see art. 2, Charter of Chinese People’s Political Consultative Committee.

70 Lianghui, i.e., the annual meetings of the National People’s Congress and National Political Consultative Committee, which usually take place at roughly the same time in March every year.

71 Dr. Xu Zhiyong, one of the petitioners in the Sun Zhigang case, applied several times to hold a six-person demonstration against nonfeasance of the Public Security Bureau and Supreme Court. But all applications were rejected because of the likelihood of “seriously disturbing public order”: see Decision No. 56 of Beijing Public Security Bureau for Disallowing Assembly and Demonstration (2005).

three kilometers of the site; they succeeded in pressuring the city government to suspend the project.\(^7\) In 2009, when the city government in Guangzhou decided to construct a garbage treatment plant in the Fanyu district, many local residents began to worry about the deterioration of their immediate environment caused by the burning of garbage. They debated alternative scenarios of garbage treatment and held massive protests before the city government. After some hesitation, the Guangzhou government openly expressed a willingness to consider alternative plans that appeared to have wider public support.\(^7\) These instances point to the possibility of a more positive and promising approach to curbing the arbitrary discretion of the local governments in policy making. Together with the collective actions against the discriminatory treatment of the hepatitis-B carriers, these examples illustrate that, whenever the vital interests of an identifiable group is injured seriously, it is likely to take positive actions to deal with its members’ own concerns and to use the internet as well as traditional media, effectively, to give greater impact to its voice.\(^7\)

Yet even these successful instances of civic participation share, by and large, the same limitations shown in the Sun Zhigang model. Indeed, the Xiamen event itself had undergone tortuous developments;\(^6\) in retrospect, its success was somewhat inexplicable and was fraught with uncertainties. Fundamentally, since there is nothing in the current institutional arrangements that guarantees its success, the Xiamen model inevitably lacks predictability and reproducibility; it has so far been replicated only in similarly “civilized” cities like Shanghai and Guangzhou, where the local governments exhibit more respect for their residents’ freedom of expression and exercise more restraint in using force against them. Of course, such limited respect and restraint are not guaranteed elsewhere.

In fact, the PX chemical project was driven out of Xiamen city but was not given up on by Fujian province; rather, it was relocated to another city, Zhangzhou, where the local government repackaged the project to give it a better appearance and then took deliberate precautions to prevent similar popular gatherings.\(^7\) A year later, a similar PX chemical plant was to be installed in an upstream location relative to the even more densely populated city of Chengdu, the capitol of Sichuan province. Here, the

\(^{73}\) Cui Huiqun, *State yet to define standard for electromagnetic pollution of maglev trains. Shanghai residents took a walk to express worries*, South Weekend, January 18, 2008.


\(^{75}\) For example, Yirenping basically relies on internet news distributions and informal publications (as formal publications are tightly restricted) of their monthly gazette to propagate antidiscrimination appeals.

\(^{76}\) The “collective walk” was denounced by the city government as an “unlawful demonstration,” and local university students were prohibited from leaving campuses; the city public security bureau even required the participants to turn themselves in within three days to relieve themselves of severe penalties. In fact, myself had experienced the effect of media control when the newspapers declined to publish my commentary on the event, apparently because a general prohibition on media reports had been issued by the central propaganda department; after a month or so, however, the event somehow received more favorable treatment, with the Xiamen government eventually yielding to the popular pressure.

residents imitated their Xiamen compatriots by organizing a collective walk to the city government; however, the result was exactly the opposite. The organizers of the walk not only failed to persuade the Chengdu government to change its decision but were arrested and convicted. The Xiamen line of events did not follow the Sun Zhigang model, but it was limited, nonetheless, by the same institutional impediments.

6. Conclusions: The future of popular constitutionalism

China's constitutional experience corroborates Larry Kramer's thesis regarding popular constitutionalism, since it proves that constitutionalism will not come out of a constitution if the people do not participate actively in its making and enforcement. As Madison points out, "the people themselves" are the best keeper of their own liberty. As soon as the people disappear from the scene and relegate the protection of their rights entirely to the governments, they find the constitution but a useless piece of paper; indeed, every good law is more likely to serve as a façade for covering iniquities than as an instrument for remedying them. The failure of China's Supreme Court to establish a meaningful mechanism of constitutional review nicely illustrates this point; the absence of the popular support meant that the Qi Yuling case was destined not to become China's Marbury v. Madison. It is true that the Constitution still serves a useful purpose in protecting the people's rights, but, as this article has shown, only by incurring extremely high costs, in an unpredictable and unsystematic manner.

However, the case of China also illustrates the limitations in the popular constitutionalism argument. Normatively, no doubt, the people are the ultimate authority from which the government derives its powers, which are to be exercised solely in the people's interest. The failure to do so is explained by faults lying somewhere in the constitutional framework through which the people participate in government. However, this argument is too general to provide a useful answer to the key question: Exactly how do the people realize their rights and liberty? Judicial review in itself is insufficient without popular support, yet it is, nonetheless, an important, concrete mechanism by which the people protect their rights against government abrogation. As Mencius pointed out over two millennia ago, "laws cannot carry themselves into effect," and this is precisely why we need a government morally and institutionally bound to execute the laws faithfully. The few successes, such as the Sun Zhigang case, the Tang Fuzhen incident, the Xiamen collective walk, when measured against the far greater number of failures in China's daily public life, illustrate that the struggle for rights can be a battle up an extremely steep hill without adequate institutional support. Although the people are the final moving force behind all good causes, they do

78 Six activists were punished in the Chengdu walk event. NEW BEIJING DAILY, 12 May 2008.
80 James Madison, National Gazette, 22 December 1792.
not achieve any of these objectives in anarchic protests; rather, protests, demonstrations, and other ways of expressing and vindicating their interests need to be protected through such effective institutional arrangements as the periodic election of officials, freedom to form political groups competing for the support of constituents, checks and balances among the various seats of powers, and judicial review by impartial tribunals. Far from challenging the people’s political and constitutional supremacy, these institutions frame the context that would give popular participation some concrete substance and effect within the constitutional order.

To turn its constitution into constitutionalism, China needs a set of institutional arrangements that holds its government responsible to the citizens so that it will faithfully enforce the Constitution and laws; even more important, it needs active citizens who are mature and courageous enough to demand their own rights through these institutions.