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**Constitutionalism with Chinese Characteristics?:
Constitutional Development and Civil Litigation in China**

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Introduction

What do constitutional rights provisions mean? More importantly, perhaps, which state organ is responsible for interpreting and applying those provisions? When a court cites a constitutional norm, is it not, at least implicitly, giving some legal meaning to that norm?

Consider the following case: In 2004, ethnic minority musician and prominent local artist Xuan Ke brought suit in Lijiang City Intermediate Court in Southwestern Yunnan province, claiming that his right of reputation had been infringed by an article in the Beijing-based *Arts Criticism* magazine. The author of the article, scholar Wu Xueyuan, argued that Xuan's music was in fact not a product of the local ethnic minority culture, and that Xuan's misrepresentation of his music amounted to fraud.

Though *Arts Criticism* is a scholarly journal, and though Wu's critique was based on academic research, nonetheless, his language was sharp. Wu claimed that selling Naxi music was the equivalent of "selling dogmeat as steak." He referred to Naxi music as "fake culture," and declared that "these falsehoods are patently absurd, and a fraud on the public." All of these phrases would later be cited by Xuan Ke as specific examples of personal attack. Wu and the magazine's editors defended against Xuan's charges by both pointing to their constitutional rights to scholarly enquiry and by attempting to demonstrate the factual veracity of the article's assertions, specifically that Naxi music was indeed a commercial creation of Xuan Ke.

In a verdict delivered in December 2004, the intermediate court included a reference to Chinese constitutional rights protections, and also concluded that:

(t)he criticism of Naxi classical music in this document is a scholarly question in the category of "letting one hundred schools of thought contend," and scholarly research on these questions, and publishing commentaries on that research is a right of scholars, and should be considered appropriate behavior. This court does not pass legal judgment on scholarly questions.¹

In essence, it seems that the court engaged in judicial rulemaking: there is no requirement in Chinese legislation that courts refrain from judging the truthfulness of allegedly defamatory statements merely because they occur in the academic context. In fact, under Chinese law, truthfulness or lack thereof is usually considered a key part of a defamation case.²

In creating such a rule, applicable at least to the case at hand, was not the court giving concrete substance to Article 47 of the Chinese constitution, which protects the individual

¹ Mid-level court verdict, p. 13.

² For a brief summary of defamation law in China, see Benjamin L. Liebman, Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China, *Harvard International Law Journal*, Vol. 47, No. 1, Winter 2006, pp. 40-43.

right to engage in scholarly enquiry?³ If so, what does this decision – and dozens of others like it, in which Chinese courts seem to base their decisions at least in part on Constitutional norms – say about the current state of legal and constitutional development in China? What does it say about the role and function of the constitutional text itself in relation to the body of Chinese law? Does the fact that Wu Xueyuan lost, and that he and his magazine were forced to pay significant damages, have any impact on our view of whether or not the court did in fact “interpret” or otherwise apply the constitution?⁴

In China, the constitutional governance framework is modeled on the soviet system, in which the legislature, in China’s case the National People’s Congress, is the supreme organ of state power, unchecked, in theory at least, by the other branches of government.⁵ Because it operates at the apex of the state pyramid, the NPC both creates and interprets law, and has – on paper, at least – significant formal authority over the executive and judicial branches of government. For its part, the Standing Committee of the NPC is empowered to interpret and supervise the implementation of the constitution, and exercises much of the NPC’s authority when it is not in session.

As a legal document, the Chinese constitution has generally been viewed in the West as static, primarily hortatory, and largely irrelevant. The individual rights provisions of the Chinese constitution are, in theory, implemented through NPC legislation; in practice, these rights provisions – especially those that can be viewed as protecting “negative rights,” including the basic rights to speech, association, and assembly – are viewed by many in the West as little more than empty promises. No independent mechanism for the redress of violations of these rights or for the review of lower-level legal documents that may violate the constitution is contemplated by the text itself.

Instead, the Chinese constitution has largely been viewed by many as primarily a political document, one that, instead of stating legally-binding norms, instead serves as a vehicle for the enunciation of the government’s current political philosophy. According to one

³ Article 47 of the Chinese Constitution reads as follows:

Citizens of the People’s Republic of China have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The state encourages and assists creative endeavours conducive to the interests of the people made by citizens engaged in education, science, technology, literature, art and other cultural work.

For a scholarly analysis of the Wu Xueyuan case which relies in part on Article 47, see xxx.

⁴ Wu and *Arts Criticism* appealed to the provincial high court, and the original verdict was affirmed on appeal; interestingly, the provincial high court also reiterated the lower court’s point that the courts should stay out of academic debates. For the full text of both the intermediate and the high court decisions, see xxx.

⁵ As one senior Chinese scholar of the institutional development and dynamics of the NPC put it:

According to the Constitution of the PRC 1982, the People’s Congress is an organ of state power. The nature of the People’s Congress is different from that of the Parliament in Western countries, which is an organ of legislation. The Parliament is organized in accordance with the principle of checks and balances, while the People’s Congress is organized in accordance with the principle of democratic centralism, which means that it enjoys all the state’s power, that both the administrative and judicial organs are elected by it, and that these organs are responsible to and supervised by it.

Cai Dingjian, *Functions of the People’s Congress in the Process of Implementation of Law, Implementation of Law in the People’s Republic of China*, p. 35.

scholar, “socialist constitutions like China’s serve as barometers of the state’s policies and values and reflect the current social condition.”⁶

This view of the Chinese Constitution as a political document is widespread. Another example: one of the leading contemporary political science texts on the Chinese state rejects the notion of the Constitution as a legally-binding document, pointing out that “parts of the Constitution cannot be taken at face value,” and that “rights extended in one part may be contradicted in another.”⁷ Though the legal value of the constitution may be extremely limited, the *political* value of the Constitutional text is highlighted: “it does provide a useful guide to the leadership’s thinking about the present situation and gives an indication of the way in which they would like to see it evolve.”⁸

In general, scholars, both Chinese and Western, have linked the rhetorical nature of the Chinese constitution to a lack of a meaningful – in most other countries, judicial – mechanism for the enforcement of key constitutional norms.⁹ As is discussed in more

⁶ Ann Kent, “Waiting for Rights: China’s Human Rights and China’s Constitutions,” 1949-1989, *Human Rights Quarterly* 13 (1991), 170, 182. In this way, as will be discussed in more detail below, the Chinese constitution is typical of the classic soviet-style constitutional model on which it was based. One scholar of Soviet law noted that socialist constitutions “seem to be... ‘basically action programs to be translated into political practice.’” John N. Hazard, “A Soviet Model for Marxian Socialist Constitutions, 660 *Cornell L. Rev.* 985, 986, (1974-5).

⁷ Saich, *Governance and Politics of China*, p. 110. For a particularly pessimistic assessment of the 1982 Constitution, written around the time of its promulgation, see Hungdah Chiu, “The 1982 Chinese Constitution and the Rule of Law,” *Occasional Papers/Reprints Series in Contemporary Asian Studies*, no. 4, 1985 (69). Chiu argues that, as legal documents, the three pre-1982 constitutions were virtually irrelevant; nonetheless he cautioned against “infer(ring)... that the constitution is not politically significant.” Chiu, p. 4. As for the 1982 Constitution, Chiu concludes that “one can hardly make any optimistic assessment” vis a vis the then-new Constitution’s prospects for establishing rule of law in China. Chiu cites first and foremost the absence of any constitutional review mechanism as the main reason for his own pessimism. Chiu, p. 13.

⁸ *Ibid.* Saich goes on to point out that the 1982 Constitution and subsequent amendments serve as a “good barometer for China’s political, economic, and social climate.” For another analysis that emphasizes Maoist and Leninist ideology – rather than, for example, straightforward positivist textual analysis – as the key elements that give meaning to Constitutional language, see Leo Goodstadt, “China’s New Constitution: Maoism, Economic Change and Civil Liberties,” 8 *Hong Kong L. J.* 287 (1978).

The emphasis on the policy-stating function of the Chinese constitution is by no means without basis. In 1982, for example, when the then-newly-minted Chinese constitution declared that, “(t)he basic task of the nation is to concentrate its efforts on socialist modernization along the road of Chinese-style socialism,” and that China would “develop a socialist market economy,” (Constitution of the People’s Republic of China, 1982, Preamble) the Party and the State were signaling both the final victory of the economic pragmatists under Deng Xiaoping, and also announcing a new economic policy that would privilege economic growth over adherence to ideology.

⁹ Albert Chen, *An Introduction to the Legal System of the People’s Republic of China*, Butterworths, 1992, p. 46, in Yash Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, 2nd Edition, p. 89. Chen notes that:

The theoretical supremacy of the constitution may not however mean much in practice. Constitutions in communist states have traditionally been regarded as directives or guidelines for the legislature, so that the constitutional provisions are not directly enforceable in the absence of implementing legislation. This seems to be the case in China.... Apparently courts are not allowed to rely on constitutional provisions directly in deciding a case and can only apply the ordinary legislation (if any) through which the constitution is implemented. Chinese courts do not of course enjoy the power of review of legislation with regard to its conformity to the Constitution.

detail below, the Chinese constitution is not generally regarded as having direct legal application, and is dependent on implementing legislation to give meaning to, and provide for judicial application of, its provisions.¹⁰

By general consensus and longtime practice, then, the courts have been counted out of constitutional interpretation and constitutional rights protection.¹¹ Most government officials and legal scholars have viewed Article 67 of the Constitution as granting the NPC Standing Committee exclusive authority over constitutional rights norms; therefore, the courts are generally viewed as precluded from making any use of the constitution in adjudicating cases. For close to 60 years, the protection of constitutional rights, and especially any sort of judicial review of the constitutionality of national law, has been considered by most observers to be beyond the authority of the courts.

Yet this understanding of the role of the courts, and their constitutional authority, may be undergoing a fundamental, if excruciatingly slow, shift. For close to fifteen years, a small but growing group of scholars, activists, lawyers, and judges have begun to challenge the status quo, asserting that the courts both should and do have a role to play in protecting constitutional rights. For the first time in Chinese history, Chinese citizens are attempting, through litigation, to not only assert their constitutional rights, but also to change the very understanding of the structure of their government. Rather than merely attempting to develop or improve upon the existing rights protection mechanisms inherent in the current framework, litigants are asserting that, contrary to long-established practice, the courts do have an important role to play in protecting individual rights.

This paper is the first in-depth study in English of attempts by judges, activist lawyers, and Chinese citizens to use the courts as a mechanism for constitutional litigation, and of scholars to push for what is usually referred to as “judicialization of the constitution” (*xianfa sifahua*). It challenges the conventional view of the Chinese constitution as static and unchanging, arguing instead that attempts by actors inside and outside the government to make the constitution a legally-operative document have changed the views of many as to constitution’s fundamental nature, and its potential for more active use by the courts.

While the prominent 2001 Qi Yuling case represents an important moment in the brief history of this nascent movement, the push for constitutional rights enforcement by the

¹⁰ The 1982 Constitution is no exception in this regard. One historical analysis of 20th century Chinese constitutionalism has noted that virtually all Chinese national constitutions -- which, including the four enacted by the post-1949 government, number eight -- are uniform in this regard:

“... none of the constitutions (of 20th century China) established an effective procedure for independent review of a law’s constitutionality. The organ that made the law – emperor, parliament, ruling party, or people’s congress – was considered to have the sovereign power to do so, and could not be checked by any other branch of government.”

Edwards, et al., *Human Rights in Contemporary China*, 1986, pp. 121-2.

¹¹ See Ghai, *Hong Kong’s New Constitutional Order*, p. 127: “There is little point in examining in detail either the rights [protections found in the constitution] or limitations on them, since the rights are not enforceable as such, nor is the legislation giving (or not giving) them judicially reviewable.”

courts neither began nor ended with that important case. Instead, the roots of the movement can be found in a handful of scholarly writings from the mid-1990s which emphasized the need for a judicial role in constitutional development. Perhaps responding in part to these scholarly writings, a small handful of courts began to cautiously, and sometimes only implicitly, make use of constitutional norms in deciding cases. By the early 2000s, one scholar was able to collect more than thirty cases in which courts across China had cited constitutional rights provisions in the text of their decisions.

The Qi Yuling case, in which the Supreme People's Court issued a legally thorny document that seemed to indicate that the constitution could be directly applied to civil cases, was undoubtedly a watershed: the case led to an explosion of academic and popular commentary on the issue, with many legal scholars calling for the creation of some sort of constitutional review mechanism. Strong political pressure from the central government meant that the SPC itself had to abandon its attempts to push forward on constitutional development, but litigants have continued, even in the face of government pressure in some cases, to advance constitutional claims in the judicial system, and to argue that the cases that they bring are having a transformative institutional effect. In essence, while the government is slowly groping its way toward a theory of constitutionalism and a mechanism for constitutional enforcement that it can live with, litigants are racing ahead, attempting to push the legal system to respond to increasingly complex and increasingly well-articulated constitutional rights claims.

In this paper I argue that, rather than being viewed as a static and primarily political document, the Chinese constitution should be seen as a legal-political document whose status is very much in flux. I argue that, as the Marxist legal theory on which the constitution was based has declined, an opportunity for re-interpretation of the constitution and its potential multiple meanings has emerged, and that scholars and lawyers are both exploiting this opportunity in an attempt to argue in favor of constitutional analyses that allow for a greater judicial role in rights protection. Several scholars and lawyers have chosen to bring cases on the basis of these alternative readings, attempting to push the courts to respond directly to constitutional arguments that, under a more formal reading of the constitutional document, they are not empowered to judge.

This paper is organized as follows: in the first section, I lay out some of the theoretical concerns raised by the decline of Marxist legal theory, what I refer to as the "orthodox theory" of Chinese constitutionalism. In the second section, I describe the generally accepted view – the "orthodox view" – of the allocation of authority under the Constitution. In section three, I describe and analyze some of the critiques that have been offered of the orthodox view, and dissect some of the alternative analytical reads that some Chinese scholars have offered of the Chinese constitution. Because these alternative scholarly analyses often rely heavily on the constitutional text and generally ignore the theoretical foundations on which the text was based, I refer to these alternative approaches as "technocratic textualism." I also give a brief account of some of the constitutional litigation that this alternative view has spurred, focusing in particular on hepatitis B anti-discrimination litigation. In conclusion I offer a few brief thoughts on

what this approach – which some are beginning to refer to as a nascent social movement – might accomplish, and what its most significant barriers to success are.

I. Section One: Theoretical Concerns

The orthodox theory in retreat

Both the Chinese constitution, and the state system created by it, are in many key ways products of Soviet legal theory, yet many key Western analyses of Chinese law fail to engage in any significant way with the nature of Soviet law and the ways in which Soviet legal theory has shaped the legal, institutional, and constitutional choices made by the Chinese government. This absence of discussion of Soviet legal theory is especially notable given that virtually all of the products of those key choices are still in place today.¹² This section seeks to elucidate the key concepts of Soviet legal theory as relates to the unification of state power, the role of the constitution, and the protection of individual rights within the soviet system.

According to Soviet legal theory, law exists not to order relationships between private individuals, or between private individuals and the state, but instead to maintain the dictatorship of the proletariat.¹³ Indeed, once a communist government has been installed, assuming that the State has successfully compelled the transition from a private economy to one that is organized and run by the state, the entire distinction between public and private law begins to drop away.

Just as Soviet legal theory rejects the distinction between public and private in Western law, it emphatically rejects the notion, generally associated with Montesquieu, of

¹² Over the past two decades, a vast literature has sprung up, much of it around the debate over so-called “Asian values,” seeking to explain, at least in part, the lack of rights protections in Chinese law as a manifestation of Chinese culture. According to this argument, Chinese citizens have a more communal view of society, and place less emphasis on the individual rights. Yet one could argue that the current lack of individual rights protections within the current legal framework has much more to do with the importation of the Soviet law model than with any cultural preferences or differences between China and the West. In fact, when the Communists came to power, they took great strides to eliminate certain cultural practices, such as discriminatory treatment of women, that they saw as inimical to the creation of a modern socialist society.

¹³ Crucial to this view is the notion that, in capitalist society, law is a weapon to protect the property interests of the bourgeois against the masses. Because the bourgeois is able to shape the law to suit its interests, law is a key tool in the exploitation of the proletariat and the preservation of class hierarchy. As a leading Soviet legal scholar put it:

The state was always, and still is, an apparatus of constraint – of violence – with whose aid the dominant classes ensured the obedience of their “subjects.” “The state is a machine to sustain the domination of one class over another.”

Under capitalism, as under feudalism and in ancient society, the state protects private property as the basis of exploitation and the interests of those who as exploiters hold private property. It serves to preserve and confirm the class interests of exploiters, dominant in that society. This is the part it plays, irrespective of forms of political organization. (citations omitted)

Andrei Y. Vyshinsky, ed., *The Law of the Soviet State*, Hugh W. Babb, trans., MacMillan Co., New York, 1948, p. 11.

separation of powers.¹⁴ The orthodox theory views the separation of powers as a sham, which serves not to protect individual rights and interests from possible intrusion by unchecked government power, but rather to create a tripartite system of government power, separate from the society over which it rules.¹⁵

More importantly, the separation of powers serves to dilute the power of the legislature, which, under the Soviet system, is the highest organ of state power. Because the legislature is elected by the masses themselves, it possesses democratic legitimacy, and, according to theory, is incapable of acting in a manner that deviates from the interests of society as a whole, in part because class differences – and the diversity of vested interests that spring from them – have been eliminated.¹⁶

The power of statutory interpretation also resides with the working body of the legislature – the NPCSC in the Chinese context, the Presidium in the former Soviet context – both because the Presidium has democratic legitimacy that the judiciary does not, and also because the Presidium or Standing Committee, as part of the legislature, has legislative expertise that the judiciary, which is empowered only to apply the law to specific cases, could not.¹⁷

In both the Chinese and the former Soviet context, Western scholars have puzzled over the question of why the constitutions of both countries, both repeatedly revised in the wake of successive political movements and purges, contain entire sections spelling out basic rights protections when such protections seem to be so glaringly absent from day to day life for average citizens.¹⁸ Communist legal scholars, aware of Western criticisms on the human rights front,¹⁹ reject the claim that constitutional rights provisions are merely

¹⁴ Vyshinsky, p. 312.

¹⁵ *Ibid.*, p. 318.

¹⁶ Parliamentary supremacy was viewed by Soviet scholars as central to a communist legal system. When the 1975 Chinese constitution seemed to lessen the constitutional powers of the NPC, Soviet critics lambasted the move, contrasting the change with what the Soviets claimed were innovations to the Soviet system that, they argued, allowed for even more effective exercise of legislative power. Hazard, “Marxian Constitutions,” p. 996-997.

¹⁷ Vyshinsky, p. 339. Interestingly, the 1924 Soviet Constitution vested the power to interpret statutes in the Supreme Court; this power was shifted to the Presidium of the Supreme Soviet under the 1936 Stalin constitution. Vyshinsky, p. 340. As noted above, the 1954 Chinese constitution followed the 1936 Soviet model in this regard, and the 1982 Chinese constitution more or less preserved this approach. For more on the power of interpretation in the Chinese context, see *infra*.

¹⁸ Cohen, for example, posed the following question in the wake of the promulgation of the revised 1978 Chinese constitution:

One of the major unresolved puzzles of Chinese constitutionalism is to ascertain why these freedoms continue to be asserted when to do so flies in the face of the everyday experience of the Chinese people. Would elimination of these guarantees risk too great a propaganda attack abroad? Would it doom to failure the Party’s spasmodic efforts to win the loyalty of China’s intellectuals, who are essential to the country’s modernization but who aspire to greater freedom?

Cohen, “China’s Changing Constitution,” p. 832. Such questions, though justified in light of the gap between rhetoric and practice, may also underestimate the extent to which Party and government actors in communist systems see the constitution as a legally valid and important document. Hazard, “A Soviet Model for Marxian Constitutions,” 60 *Cornell L. Rev.* 985, 986, 1974-1975.

¹⁹ Vyshinsky, p. 539.

aspirational, and instead turn the tables and attack Western governments for failing to live up to Constitutional promises on individual rights:

Soviet constitutions confirm genuinely democratic rights and freedoms in the worker's behalf. For the vast majority of the population, the rights of citizens, as proclaimed by bourgeois constitutions, are merely mythical – in bourgeois states the conditions essential to a realization of these rights in behalf of the workers do not obtain. Soviet constitutions, on the contrary, establish and emphasize material guarantees by virtue of which each citizen can realize the rights ceded to him by the state.²⁰

As the above passage suggests, traditional communist theory equates the full enjoyment of individual rights with larger economic and social conditions. Only after basic human needs have been met, so the argument goes, can true freedom be enjoyed.

Because the state is the primary protector and effectuator of individual rights, and because the possibility of a dichotomy of interests between the state and the individual is denied, communist legal systems have generally not viewed constitutional rights provisions as limiting state power, and therefore have not sought to set up mechanisms to guarantee individual rights against encroachment by the state.²¹ The concept of “negative rights,” in which the government effectuates certain rights merely by doing nothing, is denied any purchase whatsoever. Rights are not located in the inherent dignity and humanity of the individual, but rather flow from the power of the state:

(The) history of the socialist state, which from the very first days of its emergence granted to the workers rights of unprecedented breadth, proves incontrovertibly that the source of these numerous civil rights is to be sought in the socialist social organization rather than in any myth as to man's natural and inherent rights. Confirmation of the might of the socialist state, the confirmation and development of the socialist organization of society, are the basis assuring the authenticity, breadth, and systematic confirmation of civil rights and the full flowering of socialist democracy.²²

As one Chinese commentator points out, it is therefore theoretically impossible for the state to infringe on individual liberties:

Based on class analysis and class struggle, a socialist constitution deals with civil rights and human rights in a way naturally different from the capitalist constitution. The latter focuses on freedom and the right to political participation; it is formulated in light of the government's

²⁰ Vyshinsky, p. 89.

²¹ Vyshinsky, pp. 562-3. According to Vyshinsky: “Any contrasting of individual civil rights with the state is alien to socialist public law; this is a particularly clear-cut distinction between the Soviet Constitution and constitutions of bourgeois states, as Soviet public law is distinct from bourgeois public law.”

²² Vyshinsky, p. 563.

possible abuse of power. The former emphasizes the right of welfare; all the rights, including freedom and political participation, are formulated on the assumption that they have been taken away by the capitalist exploiters and the state sides with the laboring masses. *Therefore, it is impossible for the state to encroach upon the people's rights...* The constitution is designed to entrust the state with the task of taking back power from the exploiting classes and the people's enemy and returning it to the laboring people.²³

Although the theory primarily emphasizes economic and social rights, including the right to work, the right to subsistence, the right to education, and so on, under the traditional theory, no ground is given on civil and political rights.

Freedom of speech, of the press, of assembly, of meetings, of street parades, and of demonstrations are the property of all citizens in the USSR, fully guaranteed by the state upon the single condition that they be utilized in accord with the interests of the workers and to the end of strengthening the socialist social order.²⁴

Because the concept of negative rights is denied, effectuation of the right of freedom of expression, for example, quickly descends into a listing of the number of newspapers, books, and pamphlets published, the number of radio stations supported by the state, and the number of movies produced by state-run film companies.

Where the theory has most clearly shown its weakness is in the toleration of the expression of views critical of Party or government policy. As one leading Soviet legal theorist put it:

In our state, naturally, there is and can be no place for freedom of speech, press, and so on for the foes of socialism. Every sort of attempt on their part to utilize to the detriment of the state – that is to say, to the detriment of all the workers – these freedoms granted to the workers must be classified as a counterrevolutionary crime...²⁵

This, in part, explains the current low level of institutional protection afforded by Chinese law for basic rights, even in the face of significant improvement in certain areas since the start of the reform era, and the absence of any mechanism for vindicating individual rights protections found in the constitution. Against this background, proposals offered by scholars over the past few years as to the creation of mechanisms for the vindication of individual rights represent a radical departure from the very foundational ideas of the People's Republic. In order to succeed, those proposals must both overcome the

²³ Kuan Hsinchi, "Socialist Constitutions in Comparative Perspective," *Chinese Law and Government*, Summer-Fall 1983, vol. XVI, no. 2-3. Emphasis added.

²⁴ Vyshinsky, p. 617.

²⁵ Vyshinsky, p. 617.

ideological purchase that these theories still hold, at least among some scholars and officials, and also the vested power interests of Party and State.

Yet such proposals also carry one crucial advantage: the decline of the orthodox theory. Just as Marxism has declined both as an organizing principle for Chinese society as a whole, the influence, ideological purchase, and overall authority of Marxist legal theory has also dramatically declined over the nearly three decades since reform and opening began.

This change has been the most pronounced in academia. In the early 1980s, Marxist legal theory was still the only game in town, and Western theories of state organization and constitutionalism were viewed with outright hostility. Today, at least in academic sectors, the tables have turned: where Chinese constitutional law textbooks once heaped scorn on Western constitutional law theories, they now embrace them; where most texts spent dozens of pages extolling the virtues of Marxist legal theory, they now make only obligatory, minimal reference to the orthodox theory.²⁶ Even the party-state, itself seemingly of two minds over its own founding philosophy, cannot be counted on to regularly and convincingly articulate to the public the orthodox view; instead, it continues to try to fuse the old with the new, in ways, that, as of this writing, have yet to produce encouraging or coherent results.

As a result, the Chinese constitution, intelligible and reasonably coherent when read in light of its theoretical underpinnings, has become indeterminate, capable of multiple readings. Unmoored from its original theoretical basis, the Chinese constitution has become a perhaps somewhat unlikely tool for debate over the future of Chinese legal reform. Yet before we look at constitutional rereadings, we must look the system, still very much in place, that was created under the orthodox theory.

II. Section Two: historical background and current constitutional framework

The “orthodox account”

Since the founding of the People’s Republic in 1949, China has had four separate constitutions, promulgated in 1954, 1975, 1978, and 1982. Even before the founding of the People’s Republic, in the summer of 1949, Stalin urged senior Chinese leader Liu Shaoqi, then on a visit to Moscow representing the CCP, to create a constitution, one that

²⁶ Although the influence of the shift in scholarly opinion is difficult to quantify, it nonetheless should not be overlooked; the impact of a definite change in outlook and theoretical approach among constitutional law scholars – at least at China’s top law schools in Beijing, Shanghai, and elsewhere – is a significant development, one which almost certainly have an impact on constitutional development in China over the longer term. As one prominent US constitutional law scholar has pointed out, “(s)cholars and commentators wield a kind of power, too – not the direct coercive force wielded by courts and the police, but a power to affect belief and thus, to some degree, to shape social reality.” Laurence H. Tribe, *Constitutional Choices*, Harvard University Press, 1985, p. 7.

would be based on the Soviet approach.²⁷ Liu and the Chinese leadership took Stalin's advice, modeling their document after the 1936 Soviet constitution.²⁸ In many ways, the current 1982 constitution merely returned China to the status quo ante, and was the final step away from the 1975 document, which was widely viewed as an "ultra-leftist" product of the Cultural Revolution. What follows is a description of the accepted view of the constitutional structure of the People's Republic of China, or what I refer to as the "orthodox account" of the state power structure as laid out in the constitution.²⁹

Although some recent amendments have reflected at least a nascent trend away from the Soviet model, virtually all key elements of the 1982 constitution reflect the influence of the Soviet approach to constitutionalism and the division – or, more accurately, the unification – of state power. In general, the institutional reforms that the government has enacted over the past two decades have been geared toward giving substance to the constitutional framework, especially in terms of allowing the NPC to actually exercise the powers allocated to it under the constitution,³⁰ rather than rethinking or radically altering the current allocation of powers.³¹

As noted above, the constitution rejects a separation of powers approach, and instead vests supreme state authority in the hands of the legislature.³² Article 2 of the constitution states that "all power in the People's Republic... belongs to the people," and that "(t)he organs through which the people exercise state power are the National People's Congress

²⁷ Hu Jinguang, ed., *Textbook on Constitutional Law Principles and Cases (Xianfa Xue Yuanli yu Anli Jiaocheng)*, China People's University Press, 2006, p. 40. Stalin repeated his urgings to Mao during Mao's famous 1950 visit to the Soviet Union, and in 1952 even suggested a deadline of 1954 for the creation of a constitution and the holding of elections, in part as a means of deflecting outside criticism of the newly-founded People's Republic. *Ibid.*

²⁸ As one Western scholar has noted, all four of the post-1949 Chinese constitutions "were influenced by the Soviet example, especially the Stalin constitution on 1936." Edwards, Henkin, and Nathan, *Human Rights in Contemporary China*, Columbia University Press, 1986, p. 122

²⁹ As with all legal systems, there are significant differences between the formal system as delineated in the constitution and the system in practice. Although the NPC is highest organ of state power, it meets too infrequently and is too large and unwieldy to exercise all of the powers granted to it under the constitution. In practice, the NPCSC and the State Council exercise a much higher degree of authority than the NPC itself. Although the NPC is no longer quite the docile rubber stamp that it once was, nor does it serve as a fully functioning legislature. The Communist Party also exercises significant influence and oversight over all major government decisions, despite the fact that it is granted no formal powers under the constitution. For a more detailed account of China's governmental structure as it operates in practice, see Saich, *supra*.

³⁰ Hsin-chi Kuan, "New Departures in China's Constitution," *Studies in Comparative Communism*, Vol. XVII, no. 1, Spring 1984, 53, 58-59. According to Kuan, a key goal of the 1982 Constitution was to strengthen the NPC: "(t)he traditional balance of power, overconcentrated in the Party, is to be redressed in favor of the supreme organ of the state, the National People's Congress."

³¹ For an optimistic assessment on the progress of NPC institutional reforms, see Michael William Dowdle, "Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China," 35 *NYUJILP* 1 (2002). According to Dowdle, "analyses of the developmental potential of China's present constitutional system still generally dismiss the constitutionalist implications of the NPC's development." *Ibid.*, at 6.

³² As one scholar has noted, the Chinese constitution is "a formalization of existing power configurations rather than an authentic institutional framework for adjusting relations between the political forces that compete for power in a dynamic relationship." Cohen, "China's Changing Constitution," *Harvard Law School Studies in East Asian Law, China*: no. 27, p. 837.

and the local people's congresses."³³ Article 3 states that all state organs operate under the principle of democratic centralism, and that "all administrative, judicial, and procuratorial organs of the state are created by the people's congresses to which they are responsible and under whose supervision they operate."³⁴

The formal grant of authority to the NPC as the highest organ of state power is reiterated in Article 57 of the constitution. Its constitutionally-enumerated powers are many, and include the power to amend the constitution, to supervise the enforcement of the constitution,³⁵ to elect the President and Vice-President of the People's Republic, and to elect the President of the Supreme People's Court. The Standing Committee of the NPC (NPCSC) has the power to "interpret the constitution," and it too has the power to supervise constitutional enforcement.³⁶ It also has significant legislative authority, and can also issue interpretations of statutes.³⁷ Also relevant is the NPCSC's authority to annul administrative regulations and local laws and regulations that violate the constitution.³⁸

Although the similarities between the 1982 Constitution and the 1936 Soviet constitution are central to an understanding of the document as a whole, there are also important differences. Taken as a whole, these differences indicate an evolving – and, as of this writing, incomplete – institutional sense of the nature and purpose of the Chinese constitution. Perhaps the most prominent example of the changed approach can be found in the 1982 Constitution's emphasis on the rule of law, found in Article 5. Whereas the 1956 Constitution emphasized only the people's dictatorship (Article 1) and the organization of the state according to the theory of democratic centralism (Article 2), the 1982 Constitution states that China "practices ruling the country in accordance with the law" and that "(t)he state upholds the uniformity and dignity of the socialist legal system."³⁹

In an even greater departure from traditional Soviet theory and practice, the 1982 Constitution acknowledges the supremacy of the constitution, affirms that all entities, both governmental and non-governmental, are bound by the constitution, and also arguably acknowledges the possibility of unconstitutional action by governmental actors in Article 5(3), which states that "(n)o law or... regulation shall contravene the constitution." As noted above, traditional communist legal theory argues that the state, as the embodiment of the people, cannot act in a manner contrary to their interests, and the

³³ Constitution of the People's Republic of China, Arts. 2(1) and (2).

³⁴ *Ibid.*, Arts 3(1) and (3). The authority of local people's congresses over local courts is reiterated in Article 128 of the constitution; this dynamic arguably does more than any other single provision to structurally limit judicial independence in China.

³⁵ Article 62(2).

³⁶ Arts. 67(1) and (2).

³⁷ Arts. 67(2), (3), and (4).

³⁸ Arts. 67(7) and (8).

³⁹ 1982 Constitution, Article 5.

possibility of government action that would violate individual constitutional rights is not recognized.⁴⁰

The one major innovation that was seriously contemplated by the drafters of the 1982 Constitution but not finally enacted was the creation of some sort of constitutional review organ. During the constitutional drafting process, a number of different mechanisms were debated, and, in the end, the drafting committee voted in favor of the creation of a constitutional committee. The idea was eventually rejected, but its adoption by the constitution's initial drafters does indicate a sensitivity, especially in the wake of the Cultural Revolution, to the need for actual mechanisms that would enforce constitutional norms. More importantly, perhaps, it demonstrates a willingness, even at the highest levels of government, to experiment with legal forms that seem to contradict the orthodox theory. The ultimate failure of the proposal, however, demonstrates the lingering appeal of the orthodox theory's approach to individual rights, as well as the Communist Party's unwillingness to embrace legal institutions that might significantly limit its own power.⁴¹

As of this writing, there are no known instances of the NPCSC using its constitutional authority to interpret the constitution. Rather than serving as real and substantive limits on state power, constitutional rights provisions are seen as statements of principle which the NPC can make concrete by legislative enactment.⁴²

As discussed above, state-led constitutional reforms have generally focused on making the constitutionally mandated allocation of powers, including the allocation of significant powers to the NPC and the NPCSC, more of a concrete reality. The Chinese government took a first step toward both formalizing and mechanizing the NPC's authority with the passage of the Legislation Law in 2000.

⁴⁰ Vyshinsky; also cite to discussion elsewhere in the article. Some commentators have also emphasized that the 1982 Constitution's more prominent placement of the section on fundamental rights and duties – it is the second section in the 1982 Constitution; the 1954 Constitution places fundamental rights and duties third – is an implicit statement of greater government emphasis on the importance of individual rights. Hu Jinguang, *Research Reports on Constitutional Development of China*, p. 29.

⁴¹ As one scholar has pointed out, the rejection of a number of different proposals for constitutional enforcement mechanisms “demonstrates that the Chinese leadership is still not prepared to take a review of constitutionality seriously.” Hsin-chi Kuan, “New Departures in China's Constitution,” *Studies in Comparative Communism*, Vol. XVII, no. 1, Spring 1984, 53-68, 65.

⁴² In fact, in the late 1980s, the government was moving toward legislation that would give legal substance to certain provisions, including basic civil and political rights protections, but the protests of Spring 1989 meant that these initiatives were left in the dust. Liberal leader Zhao Ziyang, who would be stripped of all of his Party and government posts in the wake of the protests, was one of the leading advocates for the creation of rights-implementing legislation:

In his opening speech to the (13th Party Congress in October 1987), Zhao said that the government should “guarantee the citizens' rights and freedoms as stipulated in the constitution” and enact laws governing the press and publications, association and assembly, and freedom of belief. Discussion and drafting of these proposed laws were reportedly well under way by the end of 1988.

Ann Kent, “Waiting for Rights: China's Human Rights and China's Constitutions, 1949-1989, *Human Rights Quarterly* 13 (1991), 170, 190.

Under the Legislation Law, the NPCSC's power of "legal interpretation" is given a legislative basis, and the process by which the NPCSC can issue interpretations is explicated.⁴³

Much of what the Legislation Law covers, though important, is not relevant to constitutional review or the power of legal interpretation. The law explicitly defines the hierarchy of laws,⁴⁴ for example, and adds detail to the procedures guiding the NPC legislative process.⁴⁵ It also demarcates certain areas which are the sole province of the NPC, and can only be legislated by national law.⁴⁶ These areas include matters related to the basic functioning of the civil system and provisions relating to the deprivation of individual political rights.

The Legislation Law is notable for three reasons: first, the law repeatedly references the need for laws to conform with the constitution; second, it explicitly entertains the notion that sub-national laws and regulations could in fact be unconstitutional and have to be either "revised" or even "nullified."⁴⁷ Finally, the law attempts to set up a reporting mechanism for identifying and resolving legal conflicts.⁴⁸ Language in the Law also suggests that it could also be used to resolve constitutional conflicts,⁴⁹ but, as of this writing, that language has not yet led to a single declaration of unconstitutionality.⁵⁰

Article 63, which deals with local laws created by sub-national people's congress, is typical in its approach to unconstitutionality: the Article empowers local congresses to enact laws "according to local conditions and... needs," but also stipulates that such local laws must be in accordance with the constitution and higher laws.

Perhaps the most important provisions of the Litigation Law are those covering legal nullification, specifically Articles 87-92. In the absence of these provisions, it could be argued that the repeated references to the need for constitutionality were mere truisms, and that the NPC, in continued adherence with Soviet legal theory, continued to deny the possibility of legislative or regulatory action that did not adhere to constitutional norms.

Article 88, which spells out the ability of the NPC and the NPCSC to annul certain legal documents on constitutional grounds, eliminates the possibility of such a view. Article 88 also empowers various lower-level state organs to annul certain sub-national laws on the basis of failure to conform with higher-level laws. Equally important, Article 90(1)

⁴³ LL, Arts. 42-47.

⁴⁴ LL, Arts. 78-84.

⁴⁵ LL, Arts. 12-23.

⁴⁶ LL, Article 8.

⁴⁷ Legislation Law of the People's Republic of China, Adopted at the third Session of the Ninth People's Congress, March 15, 2000; Article 2.

⁴⁸ LL, Article 87(2).

⁴⁹ LL, Article 88.

⁵⁰ Some scholars view the invalidation of the system of custody and repatriation (shourong shencha) in the wake of the Sun Zhigang case as one example of constitutional interpretation by the NPCSC, although the government itself denies this. Many scholars have pointed to the interpretations issued by the NPCSC regarding the Hong Kong Basic Law as further examples of the use of constitutional interpretation authority albeit in a very different context. See Wang Zhenmin, *supra*, pp. 141-143.

empowers certain state organs to request a ruling from the NPCSC on the constitutionality and legality of specific laws and regulations, and Article 90(2) empowers “citizens and work units” to make similar requests to the Standing Committee. Article 91 delineates the process by which such potential conflicts are resolved. Generally, the NPC is called upon to consult with the government organ that has issued the questionable regulation; if consultation does not yield a favorable outcome, Article 91(2) indicates that the NPCSC may take further action to invalidate the offending regulation.

In perhaps one final nod to Soviet legal theory, the Legislation Law does not admit the possibility that NPC legislation itself could violate the constitution, and as a result seems to provide no mechanism for constitutional review of national law. Although it could be argued that a back-door approach to constitutional review of national law is created by the language of Article 87(1) of the Legislation Law, no such approach has yet been tried, and it is unclear which state organ – beyond the NPC itself – could possibly evaluate a claim that a particular provision of national law was unconstitutional.⁵¹

Although the language of Article 90 represents a step forward in terms of actualizing a legislative-led system of constitutional review, nonetheless the provision leaves much to be decided in terms of the review process. It is unclear, for example, to whom citizens seeking to exercise their right to petition under Article 90(2) should address their concerns. The nature and frequency of queries by government organs under Article 90(1), though assumed to be zero, is not publicly known, and the process by which they would be carried out is also not fully clear.⁵²

In May 2004, with much fanfare, the NPCSC established the Regulation Filing and Review Office (*fagui shencha bei'an shi*; hereinafter “Filing Office”). The office serves as the receiving agent for all legal documents that, under the Legislation Law, must be filed with the NPC, and also as the presumed recipient of any petitions filed under the Article 90 review mechanism. Though some government officials indicate that the Filing Office does engage in active review of the legality and consistency of legal documents, and has even, in some cases, reached out to administrative bureaux to seek legal change, there is no indication that the Filing Office has as yet engaged in any constitutional review, and prospects for the Filing Office to grow into such a role seem unlikely.

As the above overview indicates, the constitutional interpretative authority of the NPCSC is extensive, and it has taken initial steps to institutionalize its legal harmonization powers in the creation of the Filing Office. Yet as of this writing, the NPCSC has yet to engage in a single instance of constitutional interpretation, despite numerous calls for it to

⁵¹ Under Article 87(1), laws that are created that “transcend... the limits of power” can be annulled; it could be argued that, if the NPC were to pass a law that violated the constitution, such a law transcended the limits of the NPC’s power, as it, like all state organs, must act according to the constitution. This reading of Article 87(1) has yet to gain any significant traction within Chinese scholarly circles, much less within the government itself.

⁵² It is known that, in the first few years following the promulgation of the Legislation Law, no state organ applied to the Standing Committee for review of a particular law or regulation. Helen Tang memo, p. 5.

do so.⁵³ According to government sources, no government organ has ever exercised its constitutional right to ask the NPCSC for a constitutional interpretation, and the NPCSC has not yet explicitly responded to any constitutional petitions brought by private citizens. The NPCSC has not of its own accord issued a constitutional interpretation, though it would seem that it could do so if it deemed such a move necessary. If the Filing Office was intended to play a role in constitutional interpretation or supervision, as some scholars had hoped, it has not yet done so, and prospects for it taking on such functions in the near future seem extremely limited.

Standard presentations of the China's constitutional system, such as those found in university textbooks on constitutional law, generally adhere to the orthodox account. As perhaps might be expected of standard teaching texts, critique of the system is generally limited.⁵⁴ One common criticism, however, is that the current system is not fully fleshed out, and that the mechanisms and procedures for constitutional review by the NPC have not yet been fully developed. According to one widely-used constitutional text:

In the social and political life of our country, some incidents have emerged in which the question of whether certain normative legal documents violate the constitution has arisen. But neither the NPC nor the Standing Committee have yet implemented their constitutional review process under the Constitution and the Legislative Law. Our country's constitutional review system still needs institutions to assist the NPC and the Standing Committee in fulfilling their constitutional review duties. These institutions can put forward conditions and principles necessary for constitutional review, and put forward more detailed regulations for the constitutional review process, the constitutional review method, constitutional review measures, and the effect of constitutional review, among other matters. In this way our constitutional review system will be much more operational.⁵⁵

Given the lack of action by the legislature in making use of its constitutional oversight powers, it would seem that there would be an opening for the courts to play a more active role in ensuring adherence to constitutional norms by both public and private actors. Yet in order to assert a more positive role in constitutional enforcement, the courts face several hurdles: in addition to the ideological and structural barriers to judicial review by

⁵³ Some scholars have voiced the opinion that the NPCSC will refrain from the use of its authority in this area until broader political reform makes such action possible. Lubman, *Bird in a Cage*, p. 145. According to Lubman, "although the NPC Standing Committee is empowered to annul acts of the State Council and local regulations or decisions of the central bureaucracy that violate the Constitution, it has never formally exercised its powers of constitutional interpretation. The strengthening of constitutional supervision has been much debated, but its future will turn on more basic political reforms."

⁵⁴ This is not to suggest, however, that scholarly critique in general has been limited; in fact, debate and discussion of China's constitutional system, much of it critical of the status quo, as been wide-ranging and widespread, and calls for reforms, though generally answered by silence on the part of the government, have been made by a number of prominent scholars. See *infra*.

⁵⁵ Hu Jinguang, ed., *Textbook on Constitutional Law Principles and Cases* (Xianfa Xue Yuanli yu Anli Jiaocheng), China People's University Press, 2006, p. 134.

the courts discussed above, settled practice, the NPC's desire to protect its own constitutional prerogatives, and even formal statements by the SPC renouncing constitutional interpretative authority all stand in the way of enhanced constitutional adjudication by Chinese judges.

The most well-known document put out by the courts themselves denying the power to directly apply the constitution as a legal document to actual litigation is a 1955 SPC Response to Query (*pifu*):

To the Xinjiang Higher People's Court:

We have received from your Court report no. 336 (unclear). The Constitution of the People's Republic of China is the fundamental law of our nation, and it is the mother of all other laws. While delivering his report on the draft Constitution of the PRC, Chairman Liu Shaoqi noted that: "it is the most important question in the life of our nation, regulating what types of behavior are legal, or what statutes must effectuate and what they must prohibit." Regarding penal matters, (the constitution) does not regulate any issues relating to determination of guilt or punishment, and so therefore we agree with the opinion of your court, that the constitution cannot be cited in criminal decisions.⁵⁶

In 1986, the SPC again seemed to reaffirm that the courts should not directly cite the constitution as a source of law in judicial decisions. The 1986 Response to Query Regarding the Use of Legal Normative Documents by People's Courts in Judicial Decisions⁵⁷ was different from the 1955 Response in that, unlike the 1955 Response, it did not explicitly forbid citation to the constitution; instead, the document merely listed the relevant sources of law that courts should refer to in different situations; the absence of any affirmative reference to the constitution as a source of law bolstered the accepted view that courts should not cite the constitution in judicial decisions.

⁵⁶ The full text of the 1955 Response can be found in Wang Yu, *Judicialization of the Constitution in China: Selected Cases*, p. 1.

⁵⁷ The full text of the 1986 Response can be found in Wang Yu, pp. 1-2. A partial translation reads as follows:

To the Jiangsu Province Higher People's Court:

We have received your query (*qingshi*). Regarding the question of how People's Courts should cite legally normative documents in official court legal documents. After researching the question, we offer the following response: under the constitution and the relevant provisions of the People's Congress and the People's Government Organization Law, state legislative power is exercised by the NPC and the Standing Committee.

The Response goes on to list the various normative documents that can be cited in different adjudicative situations; the fact that the constitution is not affirmatively mentioned as a source that can be cited is taken by many scholars to mean that it cannot be.

Some scholars have also found Arts 52 and 53 of the ALL relevant, at least as regards the authority of courts to cite the constitution in administrative litigation cases.⁵⁸ Arts 52 and 53 list the appropriate sources of law for the courts to draw upon in adjudicating administrative litigation cases; the constitution is again absent. Article 53 also creates a mechanism – first to the SPC and then on to the State Council – for the courts to resolve apparent legal conflicts; the presence of this mechanism seriously undercuts any claim that the courts could make to being able to strike down lower level laws that are in conflict with national law or the constitution.

In addition to the barriers posed by various normative documents, courts seeking to make more active use of constitutional provisions also face significant attitudinal, philosophical, ideological, and political barriers to increased judicial use of the constitution.

One key non-legal barrier to increased judicial use of the constitution is the deep-seated notion of legislative supremacy. Even if, as discussed below, advocates of constitutional judicialization explicitly take judicial review of national law off the table, nonetheless the perception remains that the judiciary's gain would necessarily mean a loss for the legislature. A small minority of scholars, who would presumably be removed from any potential gain or loss of political power, have also supported this view.⁵⁹

Despite the deep penetration of Western scholarship on judicial review and the ways in which courts and other bodies make sense of and concretely apply vague and aspirational

⁵⁸ Wang Yu, p. 2-3. Arts. 52 and 53 read as follows:

Article 52

In trying administrative cases, the people's courts shall take the law, administrative rules and regulations and local regulations as the criteria. Local regulations shall be applicable to administrative cases within the corresponding administrative areas.

In trying administrative cases of a national autonomous area, the people's courts shall also take the regulations on autonomy and separate regulations of the national autonomous area as the criteria.

Article 53

In trying administrative cases, the people's courts shall take as reference regulations formulated and announced by ministries or commissions under the State Council in accordance with the law and administrative rules and regulations, decisions or orders of the State Council, and regulations formulated and announced, in accordance with the law and administrative rules and regulations of the State Council, by the people's governments of provinces, autonomous regions and municipalities directly under the Central Government, by the cities where the people's governments of provinces and autonomous regions are located, as well as rules and regulations made, in accordance with laws and administrative regulations of the State Council, by the larger cities approved by the State Council.

If a people's court considers regulations or rules formulated and announced by a local people's government to be inconsistent with regulations or rules formulated and announced by a ministry or commission under the State Council, or if it considers rules or regulations formulated and announced by ministries or commissions under the State Council to be inconsistent with each other, the Supreme People's Court shall refer the matter to the State Council for an interpretation or ruling.

⁵⁹ Zhai Xiaobo, *Popular Constitutionalism and Sovereignty of the People's Congress*, Tsinghua University Law Review, vol.2, 2007.

constitutional language, nonetheless many scholars and government officials continue to view constitutional language as too broad, too “abstract,” and not sufficiently “detailed” to be concretely applied by the courts.⁶⁰ Instead, they argue, constitutional provisions can only be applied through legislation that will give the abstract language of the constitution sufficient detail such that courts can make use of them.

Finally, perhaps the most important – and largely unacknowledged – barrier to greater judicial use of the constitution is the Party-State itself. It is unclear whether the Communist Party would want to encourage greater use of the constitution, as it surely must recognize that such innovations would be a first step toward first judicial review of government action, and, finally, Party activity. Although the Party has pushed forward a number of key legal reforms, it has thus far resisted the creation of real and enforceable limits on its own final authority; the Party has also preserved its own authority over all state organs, including the courts. A willingness to submit itself to constitutional norms would likely be a necessary prelude to formal recognition of the judiciary’s ability to apply constitutional norms.

III. Section Three: The rise of “atheoretical textualism”

As Western constitutional scholarship has continued to proliferate in Chinese academic circles, a number of Chinese legal scholars have used a range of analytical techniques to offer alternative readings of both the division of powers under the constitution and the constraints imposed by lower-level normative documents, including the 1955 and 1986 SPC Responses.

The most significant barrier to increased judicial use of the constitution is Article 67 of the constitution, which, as noted above, vests the NPCSC with the power to “interpret” the constitution, and to “supervise its enforcement.” One alternative reading of Article 67 proposes reading that Article in context: though Article 67 makes clear that the Standing Committee has interpretative power over the constitution, it does not make an explicit exclusive grant of constitutional interpretive authority to the NPCSC, nor does it forbid other state organs from making use of the constitution as a legal document.⁶¹

Yet, in the view of some scholars, the constitution can be read to compel judicial enforcement of constitutional rights norms.⁶² First, Article 123 of the Constitution names the People’s Courts as the nation’s sole adjudicatory body. Neither Article 123 itself, nor Arts. 124-128, exclude cases that impact on basic constitutional rights from the

⁶⁰ Wang Zhenmin, *China’s Constitutional Review System*, p. 177. According to Wang, the majority of Chinese constitutional law scholars take this view. See also Zhou Wei, *Research on the Judicial Protection of Basic Rights*, p. 123. Zhou quotes a fellow scholar’s work articulating the reasons for keeping the courts away from the constitution:

Constitutional norms are only common statements of principle, and can only be implemented through the passage of laws; constitutions are all relatively principle-laden documents, and are not easy to implement; and therefore are not normative.

⁶¹ Zhou Wei, *Research on the Judicial Protection of Basic Rights*, p. 129.

⁶² Zhou Wei, *Research on the Judicial Protection of Basic Rights*, p. 130.

jurisdiction of the people's court system. If the courts reject certain constitutional rights claims brought before them, so the argument goes, they are both neglecting their duty as the judicial organ of the state, but also failing to give substance to Article 5 of the Constitution, which states that China is a country ruled by law.⁶³

This reading does not attempt to fully undercut the NPCSC's interpretative authority; instead, the alternative reading attempts to draw a line between measuring the constitutionality of laws and regulations – which is ceded, perhaps too quickly, to the NPCSC – and applying the constitution in individual cases.

One reading of the NPCSC's Article 67 authority to “supervise the enforcement” of the constitution, for example, is that it creates a quasi-judicial review authority that is to be exercised in situations in which lower-level people's congresses or administrative agencies issue normative documents which contradict the constitution,⁶⁴ and does not relate to the adjudication of individual cases in which a violation of individual rights is alleged, which, it is argued, is properly left to the courts. This distinction is key to the development of constitutional judicialization litigation movement, as will be discussed in more detail below.

Various scholars have also argued that both the 1955 and the 1986 Responses should be read narrowly; on its face, the 1955 Response prohibits the direct use of the constitution only in criminal law cases, and the 1986 Constitution does not expressly forbid the use of the constitution in any situation, and can be read as a mere reminder to the courts that they should turn first to legislation and relevant regulations before seeking answers from the constitutional text.

One scholar has even argued that the SPC's Interpretation in the 2001 Qi Yuling case, in which the SPC seemed to openly embrace the use of the constitution by courts in some situations, effectively nullified the 1955 and 1986 documents.⁶⁵ In addition, regardless of their content, SPC interpretations cannot cancel out constitutional norms, including constitutional rights protections or the supposed constitutional authority to apply them in court.

Perhaps the boldest and most creative argument regarding the use of the constitution by courts claims that there is in fact no legislative or constitutional basis whatsoever for the keeping the courts away from the constitution; this argument holds that is only established *practice* that holds the courts back.⁶⁶ This argument, though admittedly somewhat novel in the Chinese context, does perhaps fail to fully grapple with Article 67 of the Constitution and the implicit limits set up by the Legislation Law and the ALL.

⁶³ Zhou Wei, Research on..., p. 131. Zhou approvingly cites the conclusion of another scholar that, “the supremacy of the constitution and the function of the people's courts means that people's courts do not have the authority to refuse to make use of the constitution; instead, both the constitution and laws approved by the legislature should be used by the people's courts.” Zhou, pp. 130-1.

⁶⁴ Zhou Wei, Research on..., p. 134.

⁶⁵ Wang Zhenmin, China's Constitutional Review System, p. 183.

⁶⁶ Wang Zhenmin, China's Constitutional Review System, p. 169.

What all of these counter-analyses of the Chinese constitutional structure have in common is this: they advance readings counter to the accepted understanding – what might be referred to as the orthodox view – of China’s constitutional framework, and in doing so ignore the theoretical underpinnings of the constitutional structure. For example, the constitutional interpretation authority of the NPCSC under Article 67 of the Constitution is absolute and excludes the judiciary from constitutional adjudication if it is read in light of the Marxist legal theory under which it was created.

In a sense, these scholars are dependent on the slow and steady decline of Marxist ideology as the governing value system of the PRC. As the rhetorical value of Marxism in Chinese society has declined, the willingness of the government to articulate its actions, goals, and even fundamental choices has also declined. This is true across many sectors of society: while the government may make a spirited attempt to justify marketization policies, for example, in terms of core Communist ideology, in general it embraces pragmatic and technocratic rationales for its policy choices. The same holds true for the legal system: the government is no longer as comfortable as it once was articulating the rationale for the current framework in Marxist terms.

Although it has retreated somewhat from the theoretical framework, the Party and the government have brushed off repeated calls to reform the overall structure. As a result, the formal structure – and the constitutional document itself, which lays out that structure – have become unmoored from their theoretical underpinnings. This partial theoretical vacuum has created an opportunity for scholars to shift the terms of the debate. Some scholars are now advancing a minimalist re-interpretive theory, one which might be dubbed atheoretical textualism, which tries to advance certain shifts in the constitutional structure on the basis of arguments over the plain meaning of the constitutional text itself. While the shifts contemplated by the atheoretical textualist approach are fundamental – explicit acknowledgment of the ability of the courts to draw on constitutional rights provisions, for example – they are sufficiently narrow so as to be at the very edge of political feasibility.

Although the government has yet to embrace the atheoretical textualist approach, nonetheless the contribution by this group of scholars is an important one: it succeeds in stirring public debate, raises the rights consciousness of the legal community and the general public, and, if the occasional judicial interventions in favor of constitutional adjudication are any guide, influences at least some actors within the Party-state itself.

What is “judicialization of the constitution”?

Despite the fact that the formal system would seem to prohibit the use of the constitution as a source of law by courts in adjudicating disputes, nonetheless a small but growing body of case law has either cited the constitution directly or made apparent indirect reference to constitutional norms in deciding a case. Scholarly calls for greater use of the constitution by the courts has both preceded and followed up on judicial action in this area, such that a mutually-reinforcing dynamic seems to be in play.

While mature constitutional systems vary in terms of their allocation of formal power to the judiciary to apply constitutional norms, and in terms of the processes by which constitutional claims are made and validated, nonetheless many systems grant either the courts in general or a specially constituted constitutional court in particular the power to review legislation for constitutionality, and to strike down legislation deemed inconsistent with the constitution. In some systems, courts have to power to narrowly construe legislation – and thus avoid invalidating a particular law – so as to ensure conformance with constitutional rights protections. Finally, although constitutional provisions are generally thought first and foremost to limit state power vis a vis the individual, most constitutional systems recognize the applicability of certain constitutional rights norms to circumstances that are largely “private,” meaning situations in which the government is not directly involved.

Given the government’s unwillingness to contemplate full-dress judicial review mechanisms, advocates of judicialization have generally advocated an extremely limited view of judicial authority to enforce the constitution. In part in deference to NPC authority, judicialization advocates have generally not argued that Chinese courts have the authority to strike down either national-level legislation or even lower-level laws. Indeed, in many cases, scholars have explicitly denied that judicial enforcement of the constitution necessitates the formal power of judicial review.⁶⁷

Yet the judicialization cases both present the potential for innovation and raises potential problems. Consider the following case: In 1992, two individuals, Ni Peilu and Wang Ying, brought suit against the China World Trade Center, claiming that the World Trade Center had infringed their right of reputation by searching their bags while the two were on premises, presumably over concerns that the two had stolen items. The World Trade Center defended itself by pointing to a sign that it had posted indicating bags were subject to search.

The plaintiffs had to try their luck with the right of reputation claim because there was no private cause of action for illegal search, although Chinese criminal law prohibits illegal restrictions on the individual’s freedom of person.⁶⁸ Article 37 of the Chinese Constitution also protects Chinese citizens’ freedom of person.

The court ruled in favor of the plaintiffs, though its legal reasoning was somewhat shaky: the court reasoned that all acts must have a legal basis, and that, because there was no legal basis for the World Trade Center’s decision to engage in a search of the two customers, its claim to putting them on notice with a sign had no legal effect.

⁶⁷ Wang Yu, *Judicialization of the Constitution*, p. 5: “Use of the constitution by the courts does not mean that the courts have the power to engage in judicial review, or the authority to declare laws invalid.” According to Wang, this is a reason to support greater use of the constitution by the courts; Wang argues that the use of the constitution by courts in some cases indicates that they can make use of the document without usurping the NPC’s constitutional interpretative authority. Wang, p. 212-3.

⁶⁸ Criminal Law of the PRC, Article 238.

This analysis turns the conventional approach – that an action is presumed legal unless it has been prohibited by law – on its head, and has been called into question by some legal scholars, despite the fact that the court’s decision was cited by the Supreme People’s Court, which published it in its Gazette.⁶⁹

Instead, some scholars have argued, this case is about a conflict between a private law contract and Article 37 of the Constitution. Instead of hiding behind faulty reasoning in order to reach what it felt was the right result, some scholars believe that the court should have, and should have been empowered to, cite the relevant constitutional provision, thus allowing it to present a much more strongly reasoned legal opinion.

Though somewhat flawed, the case does illustrate some key dynamics of judicialization cases. First, the case involved two private actors, and did not present questions of either abuse of state power or of the constitutionality of specific laws or regulations. Second, the court seemed to be acting at least in part out of a notion of fairness, and what it thought the “right” result should be, even in the absence of specific legal norms that would justify such an outcome. Finally, the court’s reasoning, if indeed it was implicitly importing constitutional values, was strained, and, because there was no opportunity for the court to expound on the constitutional principles involved, there was no way to enunciate a rights jurisprudence that would both define, and, more importantly, reasonably limit, the individual rights protections found under Article 37 of the Constitution.⁷⁰

Finally, the court’s ruling also depends on a bit of jurisprudential sleight of hand: both the court itself and scholars who have touted the case have attempted to draw a line between the “application” of the constitution that they are advocating and forbidden “interpretation” of the constitution. This distinction, which is key to the political viability of their approach, does not stand up under closer scrutiny, and presents an as-yet unsolved barrier to further development of the judicialization model.

At the very least, cases like this one have led scholars to cite the limited use of the constitution by courts as both evidence that the courts can be entrusted with such authority, and as support for their argument that judicial citation of the constitution is indeed permitted under the Chinese constitutional framework.

Admittedly, there is an element of “is-ism” in some scholars’ analysis of these cases: because such things have happened, they claim, that means that such actions must be permissible under the current system:

If we engage in a more in-depth analysis of these cases, it is not difficult to conclude that: beginning in the mid-1990s, courts across China have

⁶⁹ Zhou Wei, *Research on...*, p. 153.

⁷⁰ Such exposition is especially needed when, as in this case, it is unclear whether or not the right being claimed should actually apply to the facts of the case: it is unclear whether Article 37 should mean that security guards should never be allowed to search an individual; regardless, such a conclusion is not immediately apparent on the basis of the text of Article 37.

accepted a number of cases that, both formally and substantively, are in fact constitutional cases; and the courts that have accepted these cases regarding rights in dispute, have in fact issued decisions. Perhaps these cases may not meet the scholarly definition of constitutional litigation, and perhaps they cannot be compared to scholarly litigation in other countries, but no one can deny that these cases are in the category of basic constitutional rights cases resolved by the courts.⁷¹

The circular nature of the logic aside, the fact that scholars can point to a small but growing number of cases – at least one scholar has identified more than thirty cases in which courts have explicitly cited constitutional provisions – does give some indication of a growing desire on the part of some members of the judiciary to revisit the commonly-accepted division of powers under the Constitution.

Case Study: the Zhang Xianzhu case and Hepatitis B litigation

Perhaps the most successful example of judicialization litigation in China is the series of hepatitis B discrimination cases brought over the past five years. Relying on Article 33 of the constitution – China’s equal protection clause⁷² – litigants have challenged decisions by both public and private actors to ban hepatitis B-positive individuals from the workplace. Beginning in 2002, more than twenty cases have been brought by litigants across China, some of which have resulted in reinstatement of the plaintiff to his or her job or school; other cases have resulted in concrete legislative change.

The choice of hepatitis B discrimination is first and foremost a strategic one: discrimination implicates constitutional rights, but – at least in the Chinese context – does not directly challenge government power in the way that other constitutional rights claims might. Discrimination is less politically sensitive, and equality claims are more likely to be understood and supported by the general public than more abstract political rights claims. Finally, in the case of hepatitis B discrimination, the defendant’s rationale for engaging in discriminatory behavior – the protection of public health – often lacks a sufficient scientific basis, making it especially vulnerable to legal challenge.

Also crucial to the constitutional component of discrimination litigation is the fact that Chinese anti-discrimination law is under-developed, overly-vague, and generally weak on enforcement provisions.⁷³ China’s Labor Law, for example, specifically prohibits discrimination on the basis of ethnicity, race, sex, or religious belief,⁷⁴ but does not

⁷¹ Zhou Wei, *Research on...*, p. 179.

⁷² Article 33 of the Constitution reads as follows:

Article 33. All persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China. All citizens of the People's Republic of China are equal before the law. Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law.

⁷³ For a general overview of employment discrimination law in China, see Ronald C. Brown, “China’s Employment Discrimination Laws During Economic Transition,” 19 *Colum. J. Asian L.* 361 (2006).

⁷⁴ Labor Law of the People’s Republic of China, Article 12. Also relevant is Article 3 of the Labor Law, which requires employers to treat employees equally.

include any specific provisions regarding health status. The numerous gaps in the law, though detrimental to individual plaintiffs' chances for a positive outcome, nonetheless allow plaintiffs' lawyers to construct their legal arguments in part on Article 33 equal protection grounds. Equally important, courts have the chance to respond to constitutional claims, and to shape the development of the law on the basis of their reading of constitutional prerogatives.

The rise of hepatitis B litigation was spurred in part by a small handful of trailblazing lawsuits brought against employers and others alleging improper discrimination on the basis of height, place of origin, and government employment status. In perhaps the most prominent case, a Sichuan University law student brought suit against a Chengdu branch of the China Construction Bank for imposing height requirements on all new employees. In May 2001, the Wuhou District People's Court accepted the case, but the bank withdrew the requirement before the case could be fully adjudicated. The court then dismissed the case, despite protestations from the plaintiff and plaintiff's counsel, both of whom were hoping to use the case to advance constitutional arguments regarding discrimination in the workplace.

Though at first blush discrimination against hepatitis B positive persons would seem to lack the drama of the great struggles against racial and gender discrimination in the United States and elsewhere, nonetheless the problem is a serious one. More than ten percent of the Chinese population – approximately 120 million people, which is roughly equal to the entire population of France and the United Kingdom combined – are believed to be hepatitis B carriers, and the practice of testing potential employees for the disease, and excluding those who test positive, is believed to be widespread. Before the government issued new regulations which prohibited discrimination against hepatitis B positive persons in public employment, many government agencies had adopted formal rules that prohibited the hiring of people with hepatitis B. Hepatitis B carriers have also been barred from primary schools, secondary schools, and universities.⁷⁵

From a public health standpoint, workplace bans against people with hepatitis B would seem to make little sense. Hepatitis B cannot be transmitted through casual workplace contact; it is only transmitted through bodily fluids.⁷⁶ Yet discrimination persists, in part due to social attitudes and widespread misunderstanding about the actual health risks that the disease poses. According to one survey of hepatitis B carriers conducted by experts from Beijing University Law School, 56% of hepatitis B carriers have been refused employment; of those, 72.3% were rejected on the basis of being classified as “substandard” (*bu hege*) on their physical exam.⁷⁷ 56.3% of survey respondents believed

⁷⁵ For a brief account of hepatitis B discrimination in the public education sector, see Thomas E. Kellogg, “Courageous Explorers?": Education Litigation and Judicial Innovation in China,” 20 Harv. Hum. Rts. J., 141, 185-187 (2007). See also, “B is for bigotry: one-tenth of China's population risks discrimination,” The Economist, November 16, 2006.

⁷⁶ United States Centers for Disease Control, Hepatitis B Fact Sheet, <http://www.cdc.gov/ncidod/diseases/hepatitis/b/fact.htm>.

⁷⁷ Ye Jingyi and Shi Yuxiao, “Discrimination on the Basis of Health and Disability: An Analysis of Chinese Employment Discrimination Law Through The Lens of Hepatitis B Discrimination Cases,” Employment Discrimination: International Standards and National Practice, Law Press, 2006, p. 319.

that they had been subject to various forms of discrimination or mistreatment on the job. Perhaps most tellingly, 32% of respondents had been dismissed from a job at least once; of those, 70.8% were specifically told that the reason for dismissal was their hepatitis B status. An additional 18.8% believed that the actual reasons given for their dismissal were a pretext for removing them from the workplace on the basis of their hepatitis B status.

The Beijing University study's survey of the general public obtained similarly troubling results. 36.6% of survey respondents indicated that they did not believe that refusing to hire a hepatitis B carrier constituted discrimination.⁷⁸ When asked whether, if given responsibility for hiring and firing decisions, individuals would either refuse to hire or dismiss someone with hepatitis B, 40% of respondents indicated that they would in fact make hiring and firing decisions on the basis of hepatitis B status. While these numbers were counterbalanced by larger numbers of respondents who answered in favor of employing individuals regardless of their hepatitis B status, nonetheless the significant percentage of respondents willing to keep persons with hepatitis B out of the workplace speaks to the significant social barriers to implementation of fair and effective legislation barring such practices by public and private employers.

Some experts believe that prejudice against hepatitis B carriers has been fed by false and misleading product advertisements by companies selling hepatitis B treatments; these advertisements often propagate the belief that, if left untreated, hepatitis B can be extremely contagious. As a result, a large number of private employers test for hepatitis B in their workers; according to one survey by the government-run China Hepatitis Prevention Fund, a full 77% of multinational employees test for hepatitis B, and reject potential employees who test positive.⁷⁹

Despite all of these barriers, a number of different actors are attempting to fashion a coherent legal response. A key factor in the rise of hepatitis B discrimination litigation in China has been the active engagement of civil society groups. Without the active assistance of non-governmental organizations, it is unlikely that the small wave of lawsuits that has been launched would have gotten underway; nor would the government likely have been as aggressive as it has been in its legislative and regulatory responses to the problem.

One group in particular, Yirenping, has played a crucial role in focusing public attention on the problem of hepatitis B discrimination, and in attempting to generate an effective legal response that includes both litigation and legislation. Founded in September 2001, Yirenping started out as a forum for persons with or carrying hepatitis B to communicate with each other, share experiences, and exchange information about treatment. In April 2003, the group began to focus on strategies to protect the legal rights and interests of hepatitis B-positive persons, and has played a direct role in many of the cases that have gone to court over the past five years, including encouraging certain of its members to take legal action; helping to put individuals who have been discriminated against in touch

⁷⁸ Ibid., p. 320.

⁷⁹ China Labor Bulletin, "Responding to Hepatitis B discrimination in the workplace," no date. Available online at: <http://www.china-labour.org.hk/public/contents/article?revision%5fid=49833&item%5fid=46945>.

with activist lawyers willing to take their cases; and providing medical information and experts to the lawyers involved in anti-discrimination litigation.

Yirenping has also actively lobbied the government: in November 2003, for example, it sent a petition signed by more than 1600 individuals to the Standing Committee of the NPC, the Ministry of Health, and the State Council Office of Legislative Affairs, requesting that the NPCSC review the constitutionality of various provincial and local laws relating to civil service recruitment that limited or prohibited recruitment of persons with or carrying hepatitis B.⁸⁰ The group has also directed its public action efforts toward private sector actors: in August 2007, Yirenping submitted a petition to the Beijing office of Hewlett Packard, signed by more than 5000 persons, protesting the alleged firing of 22 employees with the hepatitis B virus from a key supplier based in Suzhou.⁸¹ Many experts view these acts of public mobilization as crucial to sustaining government attention to the issue.

Another key factor in the rise of hepatitis B discrimination litigation was an unfortunate incident which took place in April 2003: after being rejected from government employment on the basis of his hepatitis B status, 22-year-old college senior Zhou Yichao attacked two local government officials in Zhejiang province he viewed as responsible for his rejection, killing one and seriously wounding the other.⁸² Zhou was executed in March 2004, but the impact of his case was significant, helping to shape public and government perceptions of the problem of hepatitis B discrimination and influencing the public's view of Zhang Xianzhu's lawsuit, which came just months after Zhou's attack.

The Zhang Xianzhu case

On June 30, 2003, Zhang Xianzhu, a 22-year-old university graduate looking for a job, took the civil service exam offered by the Wuhu City Personnel office in Anhui province. Zhang passed both the written and the oral examination with flying colors, getting the highest test grade among the thirty applicants in Wuhu City for that recruitment cycle.⁸³ Zhang believed that he had landed a job in economic administration for the District Committee Office in Wuhu.⁸⁴

⁸⁰ "I have hepatitis B, but I am not a second-class citizen" (wo shi yigan huanzhe, dan wo bushi yideng gongmin), Southern Weekend (nanfang zhoubao), December 25, 2003.

⁸¹ China Labor Bulletin, "Five thousand petitioners demand Hewlett-Packard take action against Hepatitis B discrimination," no date. Available online at: <http://www.china-labour.org.hk/public/contents/news?revision%5fid=49837&item%5fid=49836>.

⁸² "Dismantling Discrimination," China Daily, March 9, 2004. For an extended account of the case, see "Why do college graduates kill?" ("Daxue biyesheng heyi dongshaji?"), Southern Weekend, April 21st 2003.

⁸³ "The secluded life of the central protagonist in the first hepatitis B discrimination case" (yigan qishi diyi an zhurengong de yinju shenghuo), Yangcheng Evening News, June 18, 2004.

⁸⁴ Shen Wulingfeng, "Verdict announced today in China's first hepatitis B discrimination case: court does not support plaintiff's request for employment," China News Net, April 2, 2004. Available online at: <http://news.sohu.com/2004/04/02/32/news219713299.shtml>.

It was then that Zhang's troubles began. Zhang submitted to a physical in the 2nd half of September, 2003, at which time it was discovered that he was hepatitis B positive. On the basis of his hepatitis B status, he was denied a spot in the local bureaucracy. He was verbally informed of the decision, and was told that the basis of the decision was his hepatitis B status.

In November, after an attempt at administrative reconsideration failed, Zhang filed suit in Xinwu District People's Court in Wuhu City. Zhang's lawyer in the case was prominent legal scholar and constitutional lawyer Zhou Wei. Zhou's involvement in the case would prove to be crucial, and the attention that his participation garnered would play a key role in generating a legal response from the central government.

Zhang's involvement in the case came in a somewhat non-traditional manner, and illustrates the more advanced ways in which activist lawyers and litigants whose cases raise important constitutional concerns are beginning to find each other: Zhou, who is based in Chengdu in central Sichuan province, was fresh from his success in the Jiang Tao case, and looking for a way to continue his constitutional litigation work, which, as he put it, was one method of "marrying theory and practice."⁸⁵

Zhou began looking at hepatitis B discrimination as a potentially fruitful area to move into. Although the Zhou Yichao tragedy had garnered nationwide attention, and despite the fact that other, less spectacular accounts of individual workplace dismissals on hepatitis B grounds had made it into the papers, as of mid-2003, no successful legal claim had yet been brought challenging the legality of refusing to employ an otherwise qualified applicant on the basis of his or her hepatitis B status.

But for the online support groups set up by civil society organizations, Zhang and Zhou might never have connected. Zhang had joined an online chat support group hosted by a website devoted to needs and concerns of hepatitis B positive persons, and Zhang and Zhou initially met online.⁸⁶ After hearing about his case, a number of fellow hepatitis B carriers urged Zhang to take legal action; Zhou and Zhang began communicating soon thereafter. Zhou, seeing the potential opportunity to continue to push legal development through litigation, agreed to take the case:

After being in regular contact (with Zhang Xianzhu), I decided to take the case on a pro bono basis. I had long ago concluded that medical standards like this one violated the constitution, and hoped through this case to challenge various provincial regulations of this type, and in so doing to ensure fairness for hepatitis B carriers and to avoid a repeat occurrence of the Zhou Yichao tragedy. This is a part of the population that a civilized society should respect, tolerate, and understand. Society should allow them regular participation in labor and employment, and safeguard their

⁸⁵ Zhou Wei, *Employment Discrimination in China: legislation and reality* (Zhongguo de laodong jiuye qishi: falu yu xianshi), China Law Press, 2006, p. 1.

⁸⁶ Zhou Mu, "Hepatitis B discrimination case begins: an interview with lawyer Zhou Wei," *Chengdu Evening News*, December 20, 2003.

own basic needs. Also... this was a chance to fuse theory and practice, to use facts to demonstrate the theoretical value and social benefits of my research.⁸⁷

With the active assistance of Prof. Wang Yunwu of Southwest University of Politics and Law, Zhou began to craft Zhang's legal strategy, emphasizing both Zhang's constitutional claims and his right to relief under existing law.

Media attention to the case was intense: from the time Zhang filed his complaint and continuing for months after the final verdict, Zhang's lawsuit received extensive media attention, including from China's top electronic and print outlets, such as *Southern Weekend*, *Southern Metropolitan Daily*, and *Caijing*. Both CCTV and China Central Broadcasting also ran numerous reports on the case, and the Wuhu city courtroom was packed with both hepatitis B carriers and journalists on the day the verdict was announced. Much of the media reporting and commentary was extremely positive, and highlighted Zhang's constitutional rights. Even the longtime Party mouthpiece *People's Daily* reported favorably on Zhang's suit, declaring the verdict a "victory" for both Zhang and for China's 120 million hepatitis B carriers.⁸⁸

Presumably suspecting that no court would rule in his client's favor solely on the basis of constitutional claims, in his statement to the court, Zhou Wei first and foremost argued that the cancellation of Zhang's employment qualifications was illegal, and only after a full enunciation of the legal arguments available to him did Zhou Wei turn to Zhang's constitutional claims. First, Zhang argued that the cancellation process was illegal, and that the evidence upon which it was based, because technically flawed, was insufficient.

Interestingly, in addition to attacking the constitutionality of the Anhui Province National Civil Service Recruitment Physical Examination Implementation Rules, Zhang also attacked the local government's application of those rules, essentially arguing that the test results provided by the hospital, and its conclusion that Zhang was unfit to serve, was in fact not supported by the provincial regulations. Because the provincial regulations, which listed various test results which would lead to a conclusion that the individual was unfit, did not specifically stipulate that persons who received the result that Zhang received – which indicated that he was a chronic carrier of hepatitis B, though not actively infected – on the particular test he was given could be declared unfit, the hospital's conclusion had no legal basis, and was therefore invalid.⁸⁹ In fact, the hospital's declaration that he was unfit involved an act of interpretation of the provincial

⁸⁷ Zhou Wei, *Employment Discrimination in China*, p. 2-3. Just before Zhou decided to involve himself in the Zhang Xianzhu case, he had received a grant from the Chinese Social Sciences Foundation to continue his research on constitutional review mechanisms; he viewed the Zhang case as a key part of that research work. Zhou, pp. 1-3. In a way, the government was funding research on systems, innovations, and litigation strategies that could undermine its own unchecked authority.

⁸⁸ Du Wenjuan, "Zhang Xianzhu safeguards the rights of 120 million people," *People's Daily* (renmin ribao), May 13, 2005.

⁸⁹ Court submission, Zhang Xianzhu case, in Zhou Wei, *Employment Discrimination in China: Legislation and Reality*, p. 330-331. The provincial regulations were geared toward excluding individuals who had active hepatitis, which can be more easily transmitted to others.

rules, an act which exceeded the authority entrusted to it by the local government, which further weakened the legal viability of its conclusion that Zhang was unfit, and also the Wuhu City Personnel office's decision to expel Zhang from the employment process on the basis of that conclusion.

Also compelling was Zhang's argument that the hospital's conclusion that Zhang was unfit violated various national laws and regulations.⁹⁰ Article 14 of the Law on the Prevention of Infectious Diseases, for example, listed various occupations from which individuals who had not yet been definitely cleared of being carriers of certain types of hepatitis could be prohibited from holding, including various jobs related to the handling of foodstuffs and the treatment of public water supplies. Article 26(2) of the Food Safety Law also prohibited persons with some types of hepatitis from certain jobs related to the importation of food. Zhang, of course, was applying for an office job, and he argued that, in the absence of a specific prohibition, that the central government meant to allow him to hold the job he was applying for, or at least not be excluded from it on the basis of his hepatitis status.

Zhang's primary constitutional argument was that the provincial recruitment physical exam regulations violated his right to equality under Article 33 of the constitution. Specifically, Zhang argued that, since the exclusion of some individuals on the basis of Hepatitis B status under the provincial regulations lacked "rationality, appropriateness, or necessity," and since it was not connected to any "government, public, or societal interest," those provisions violated the constitutional principle of equality.⁹¹

Zhang also argued that, because they lacked a sufficient legislative basis, the provincial recruitment physical exam regulations undercut the NPC's constitutional duty to administrate the country according to law under Article 2(3) of the Constitution, and infringed the exclusive authority to legislate on matters affecting citizens' rights and interests allocated to the NPC under Article 8(5) of the Legislative Law. Finally, Zhang argued that the local government had infringed his right to work under Article 42 of the Constitution, and his right to personal dignity under Article 38 of the Constitution.

Finally, in a move that was somewhat rare in the Chinese litigation context, perhaps with an eye to future legislative debates within the halls of government, Zhang also provided extensive arguments as to why the standard enunciated by the provincial regulations was in fact irrational.⁹² Zhang argued, for example, that the exclusion of hepatitis B positive persons from employment lacked a sound basis in medical science, given that hepatitis B is generally not communicable in an office environment, and the employment of persons with hepatitis B creates no risk for the employee's colleagues.⁹³ Zhang also argued that

⁹⁰ Court submission, Zhang Xianzhu case, in Zhou Wei, *Employment Discrimination in China: Legislation and Reality*, p. 332-333.

⁹¹ Court submission, Zhang Xianzhu case, in Zhou Wei, *Employment Discrimination in China: Legislation and Reality*, p. 338.

⁹² Court submission, Zhang Xianzhu case, in Zhou Wei, *Employment Discrimination in China: Legislation and Reality*, pp. 339-344.

⁹³ Court submission, Zhang Xianzhu case, in Zhou Wei, *Employment Discrimination in China: Legislation and Reality*, pp. 340-341.

the exclusion lacked a basis in “social reality”: given that roughly 10% of the Chinese population is believed to have or be a carrier of hepatitis B, it would be impossible to isolate more than 120 million people from the rest of the population.⁹⁴ Social contact between hepatitis B carriers and the rest of the population takes place in a number of different ways – including in restaurants, on public transportation, in movie theaters, and in a range of other public spaces – such that merely choosing to exclude them from the workplace seems to make little sense.

Zhang even used a phrase that rarely appears in Chinese court documents: he argued that the exclusion of persons like himself lacked a basis in “public morality.” First, the exclusion of hepatitis B carriers by public employers the professional space available to them, both directly through their exclusion from all public sector employment, and also indirectly through the influence of government policy on the recruitment policies of private actors. Zhang argued that the social cost of such exclusion, both in terms of the overall social environment and in terms of the impact on social trust, was likely significant.⁹⁵

Finally, Zhang put forward a detailed argument as to the court’s jurisdiction over the case under the Administrative Litigation Law, which the court accepted as part of its ruling.

In its ruling, issued to a packed courtroom on April 2, 2004, the court declined to find that the local regulations were in conflict either with national-level regulations or the constitution. Instead, it found that the provincial health test standards – the Anhui Province National Civil Servant Recruitment Physical Examination Implementing Rules – were created in accordance with the State Council’s National Civil Servant Temporary Regulations, and neither went beyond the scope of the temporary regulations nor violated any specific prohibition found in those regulations. The court did, however, find that the People’s Liberation Army No. 86 Hospital failed to fully adhere to the provincial regulations in reaching the conclusion that Zhang’s health was substandard. Therefore, the court held, the local personnel bureau’s adoption of that conclusion, and its decision to remove Zhang from the recruitment process, lacked a factual basis. However, given that the recruitment period had ended, and the job had been filled by the number two person on the list, the court held that it was powerless to order any remedy.⁹⁶ Zhang had won a symbolic victory, but he left the courtroom as he started: with no job, and no court order compelling the local personnel bureau to give him one.⁹⁷

⁹⁴ Court submission, Zhang Xianzhu case, in Zhou Wei, *Employment Discrimination in China: Legislation and Reality*, pp. 341-2.

⁹⁵ Court submission, Zhang Xianzhu case, in Zhou Wei, *Employment Discrimination in China: Legislation and Reality*, p. 342. In addition to the policy arguments listed above, Zhang also argued that the provincial regulations were contrary to the goals of national law; that they violated the proportionality principle; that they were unnecessary; and that they violated the principle of legal equality.

⁹⁶ Court verdict, in Zhou Wei, *Employment Discrimination in China: Legislation and Reality*, p. 355-6. The court did, however, order the defendant to pay RMB100 in court costs.

⁹⁷ The local personnel bureau appealed the decision, but decision was upheld in a one-paragraph decisions issued by the Wuhu City Intermediate People’s Court on May 13, 2004. Zhou Wei, *Employment Discrimination in China: Legislation and Reality*, p. 384-5.

Perhaps unsurprisingly, the court did not rule on the constitutional arguments put forward by Zhang, although it did note in its decision that Zhang had raised constitutional claims to equality, the right to work, and the right to privacy.⁹⁸ Overall, the court's approach was extremely moderate: it did not attack the viability of the provincial rule itself; instead, it merely attacked its application to Zhang. Although the court's mention of the plaintiff's constitutional rights claims can be interpreted as a tacit embrace of the idea that the courts should be judicially actionable, nonetheless the court's failure to more explicitly grapple with the constitutional argument put forward by Zhang, though typical, was regrettable, and undercuts the claims of some scholars that the Zhang case is an important *constitutional* case (see discussion below).

Some scholars have argued that the Zhang Xianzhu case represents a missed opportunity: if the court had found the provincial regulations to be without basis in national law, then, instead of merely declaring the regulations invalid, the court could have reached out to the constitution to see if the regulations passed constitutional muster.⁹⁹ It could then have – assuming it agreed with Zhang's arguments about the viability of the regulations under China's equal protection clause – declared the regulations inoperative due to the constitutional conflict. In so doing, the court would have certainly exposed itself to potential political risk, but it would have also have created the possibility for a breakthrough moment in China's constitutional development: such a decision would have been the first time that an administrative rule was declared inapplicable on constitutional grounds.¹⁰⁰

After Zhang: legislation, litigation, and social awareness

Although the court ruled in favor of Zhang,¹⁰¹ it neither prescribed a remedy nor ruled on the constitutional arguments presented by Zhou. Nonetheless, the fact that the court ruled in Zhang's favor was viewed as a victory, and the verdict in the case received nationwide attention.¹⁰² The April 2004 verdict has been widely discussed in academic and

⁹⁸ Court verdict, in Zhou Wei, *Employment Discrimination in China: Legislation and Reality*, p. 354.

⁹⁹ Author interview, September 17, 2007.

¹⁰⁰ It is possible that the risk created by such a decision would have been much less than the pressure created in cases – including the famous so-called “seed case” – in which local courts declared invalid laws created by local people's congresses that were read as in conflict with national law. In the Zhang Xianzhu case, the normative document in question was an administrative regulation, one that, presumably, the local government and the local people's congress had little interest in protecting. How such dynamics would play out in practice, and even whether or not there would be any difference between the political furor generated by the seed case and the circumstances presented by the Zhang case is of course an open question, given that no court has yet openly invalidated an administrative regulation due to conflicts with constitutional norms. For more on the seed case, see Jim Yardley, “A Judge Tests China's Courts, Making History,” *New York Times*, November 28, 2005.

¹⁰¹ “Court confirms rights of hepatitis B carrier,” *China Daily*, April 3, 2004.

¹⁰² Zhang himself told a journalist after the verdict that the final outcome of the case was less important than the attention that his lawsuit brought to the issue. Speaking to the a reporter from the Yangcheng Evening News, Zhang said: “Actually, even before the verdict was announced, I already felt that the final result of the lawsuit was unimportant. The case had already gotten the attention of NPC representatives, the media, medical doctors, and various segments of society, and the country had already begun to take this problem seriously.” “The secluded life of the central protagonist in the first hepatitis B discrimination case” (yigan qishi diyi an zhurengong de yinju shenghuo), *Yangcheng Evening News*, June 18, 2004. Available

professional legal circles, and is generally regarded as one of China's first successful constitutional litigation cases. Other lawyers following in Zhou Wei's footsteps have brought more than thirty hepatitis B discrimination cases, against both private and public actors, in cities across China in the three years since the Zhang Xianzhu verdict was announced.

The case, and the public attention that it garnered, had several effects: first, it helped to galvanize and strengthen a nascent social movement, which itself would play a key role in continuing to push the issue, both in the courts and in society as a whole. The case brought significant media attention to the issue for the first time, thus creating public pressure for a response from the government. Finally, the case captured the attention of senior government officials, who demanded an immediate response from the bureaucracy, which responded with new rules to limit the ability of local governments to make personnel decisions on the basis of hepatitis B status.

Perhaps the most tangible result of the Zhang case was the relatively quick response from the government. Government officials were open about the influence that both the Zhang case and the Zhou Yichao tragedy had on the government's decision to act:

The 2003 Zhejiang Zhou Yichao case and the Anhui Zhang Xianzhu case caused people to pay attention to the health examination standards for civil servants, and led to a multi-faceted discussion. Senior leaders within the State Council attached great importance to this issue, and issued specific orders, asking the personnel bureau, in coordination with other relevant bureaus, to research the question and put forward some suggestions for reform. After that, the personnel bureau and the ministry of health got in touch, and started the work of drafting the notice and standards on physical examinations for recruitment of civil servants.¹⁰³

Some observers have analyzed the government response to such litigation in constitutional terms:

When courts accept hepatitis B cases, this can lead state and society, including both legislative and administrative organs, to pay significant attention to the problem, and spur the legislature to take seriously the authoritative position of the constitution, and also to take seriously the specificity and the actual protectiveness of constitutional basic rights provisions. Such cases can also spur administrative agencies to comprehensively and thoroughly discuss their own behavior, and to quickly change those discriminatory practices that violate the spirit of equality of the constitution. To do so would realistically establish the idea of putting people first in public administration.¹⁰⁴

online at: <http://www.china.org.cn/chinese/2004/Jun/589167.htm>.

¹⁰³ China Personnel News, <http://www.rensb.com/showarticle.php?articleID=343>.

¹⁰⁴ Southern Metropolitan Daily, "Applause for the Court Accepting the 'Hepatitis B Discrimination Case,'" NO DATE.

In the wake of the case, provincial governments in Zhejiang, Sichuan, Fujian, Guangdong and elsewhere began to revise their regulations in light of the court's holding.¹⁰⁵ In May 2005, Guizhou province announced new regulations for public sector recruitment that eliminated many of the prior restrictions on employment by individuals with hepatitis; under the new rules, as long as the applicant's liver function was normal, his or her hepatitis status would not affect the recruitment process.¹⁰⁶ Other employment requirements, including those related to height, were either relaxed or eliminated.

The first response from the central government on hepatitis B was a revision, in August 2004, of the Law on the Prevention and Control of Infectious Diseases. The government added a provision prohibiting discrimination against "individuals with infectious diseases, infectious disease carriers, or those suspected of having infectious diseases."¹⁰⁷

A more direct response to the Zhang case was the issuance of new national-level regulations, jointly issued by the Ministry of Health and the Personnel Ministry, on medical examinations for public servants. Under the new regulations, circulated for public comment in August 2004,¹⁰⁸ and then issued in January 2005, hepatitis B carriers are specifically declared to be eligible for employment, subject to additional testing to confirm that their hepatitis is not "active."¹⁰⁹ The issuance of the regulations marked the first time that the national government had put forward comprehensive and unified standards for physical exams for public sector recruitment.¹¹⁰

Most recently, in August 2007, NPC Standing Committee passed the Employment Promotion Law,¹¹¹ which explicitly banned discrimination against both employees and job seekers, thereby eliminating an ambiguity in the law by clearly covering job seekers who had yet to enter into an employment relationship with their prospective employer.

Under Article 30 of the law, employers are banned from refusing to employ infectious disease carriers on the basis of their disease. The law extends the protections offered to

¹⁰⁵ "'The First Hepatitis B case' continues: local government bureaus amend their regulations," China Youth Daily, April 5, 2004.

¹⁰⁶ He Yunjiang, "Guizhou unified recruitment exam for national civil service eliminates regulations that discriminate against persons with hepatitis," Xinhua, May 14, 2005. Available online at: <http://news.sohu.com/2004/05/14/98/news220129865.shtml>.

¹⁰⁷ Law on Prevention and Control of Infectious Diseases, Article 16. The Law was revised on August 28, 2004.

¹⁰⁸ Chang Ailing, "Chinese government adopting measures to protect the rights and interests of hepatitis B pathogen carriers," Xinhua, August 10, 2004.

¹⁰⁹ National Standards for Medical Exams for Public Servants, January 20, 2005. Article 7 reads as follows:
Article 7: Various types of serious, chronic cases of hepatitis, such cases are not standard. For hepatitis B carriers, once they have been tested to eliminate the possibility of active hepatitis, then they are standard.

¹¹⁰ "Casting aside 'hepatitis discrimination' reflects respect for popular will," Beijing News (Xin Jing Bao), August 2, 2004. Available online at: <http://tech.163.com/04/0802/10/OSP95LOG0009153U.html>.

According to the Beijing News' analysis, the new standards reflected government responsiveness to the will of the people, which was itself reflected in the public's response to the Zhang Xianzhu case. Ibid.

¹¹¹ Employment Promotion Law of the People's Republic of China, passed August 30, 2007, effective January 1, 2008.

public sector employees by the National Standards for Public Servants to private sector workers. The anti-discrimination content of the law is further strengthened by Article 3, which states that “(w)orkers have the right to equality and autonomy in seeking employment.”¹¹²

The Employment Promotion Law’s focus on discrimination against individuals with infectious diseases was brought about in part by extensive commentary from the public, organized in part by non-government organizations dedicated to public health issues, all of which were calling for inclusion of such provisions in the final version of the law.¹¹³ Active public participation in the legal drafting process – the NPCSC received thousands of comments and suggestions from the public on the draft law during the commentary period – was crucial to the inclusion of strong anti-discrimination provisions in the text of the law itself.

Had the Zhang Xianzhu case begun and ended with Zhang himself, it would have been an important, if limited, victory: Zhang had his day in court, and his framing of his plight as a constitutional anti-discrimination issue reached a nationwide audience. But Zhang’s case also served as an important progenitor of a small wave of follow-up litigation, focused on both public and private actors, in an attempt to force employers to change their hiring practices related to hepatitis B carriers.

Between 2003 and 2007, more than twenty hepatitis B discrimination cases have been filed against a range of defendants, including, as in the Zhang case, public sector employers, private sector employers, and public schools and universities. Given that the law has been in constant flux, as noted above, since the decision in the Zhang Xianzhu case, statistical analysis of litigation trends based on the results of the litigation is difficult; however, the fact that more than twenty cases have been brought in a five year period – when such litigation was non-existent as late as 2002 – does speak to the aggressive approach that a relative handful of lawyers have taken to advancing the cause of rights protection and constitutional development through the courts.

As noted above, more than twenty cases have been brought since the first handful of litigants began to dip their toes into these legal waters in 2002. Taken as a whole, the cases, though few in number, do present some interesting dynamics. First, the cases have sprung up nationwide, in locales as diverse as Shanghai, Beijing, Xinjiang, and rural Anhui. The defendants in the case also represent a wide range of actors, both governmental and non-governmental, indicating both the scope of the problem and the vibrancy of the litigation response.

More recent cases against private employers, many of them in China’s booming southern provinces, indicate a change in the stakes of the game: whereas early cases were more focused on securing the right of the individual to return to work or school, more recent cases have made significant claims for emotional damages, often as high as several

¹¹² Article 3 further states that, “(w)orkers seeking employment cannot be discriminated against on the basis of ethnicity, race, gender, or religion.”

¹¹³ Xinhua, “Public Responds to Draft Employment Law,” April 5, 2007.

hundred thousand *yuan*. Whether these significantly larger damages claims will have a positive or negative impact on litigation going forward is as yet unclear: significant damages awards, if indeed they are granted by the courts, could much more highly incentivize hepatitis B discrimination litigation, leading to more cases, and possibly greater compliance by fearful employers. On the other hand, the introduction of large sums into these cases could submerge the constitutional and social justice goals that were an integral part of the early stages of litigation in this area.

Each of the cases brought thus far have raised different legal issues, and litigants have chosen different legal strategies. In one case brought in Tianjin in 2006, for example, prominent Beijing lawyer Li Fangping chose to highlight his client's social exclusion, focusing first on the individual's social experience before turning to the legality of the employer's policy and actions. His client, referred to by the alias Yang Mou in court documents, was dismissed by his employer, the China Railways Electrification Survey Design Research Institute, after tests revealed that he was a hepatitis B carrier. Although Yang, who had been recruited from Southwest Transportation University to work at the Rail Institute, had not yet signed a labor contract, he had signed a labor agreement, to which his university was also a signatory.

Yang's account of his treatment after he tested positive was compelling:

Originally, after (we started working at the Institute), we all ate together at the same table. But then Director Wang (who was in charge of human resources for the Institute) instructed the cafeteria to prepare separate dishes for us (a total of four persons had tested positive for hepatitis B), and told us to pack up the food and eat it in the dormitory! Good god, ... this is the first time I have been discriminated against. To be isolated while eating! Obviously that wasn't the worst of it; the most extreme measure was when she immediately arranged for the staff of the dorm to isolate the three of us in a special room. After that the three of us from Transportation University steadfastly disagreed, and so initially she was not able to prevail.¹¹⁴

Although Ms. Wang was temporarily delayed from isolating Yang and the other hepatitis B carriers in the dormitories, she eventually was able to have them removed entirely: the Institute refused to sign labor contracts with all four individuals, and all four were asked to leave the institute.

Yang and the others decided to take legal action, bringing suit in Tianjin City Hedong District People's Court on May 24, 2006. Yang asked the court to order the Institute to

¹¹⁴ Court submission, Yang v. China Railways Electrification Survey Design Research Institute. On file with author.

issue an apology and to reinstate him to his prior position. Yang also asked for emotional damages of RMB1, and actual damages in excess of RMB20,000.¹¹⁵

Yang's legal arguments were twofold: first, he argued that the Institute's action violated his rights under Article 16 of the Law on Prevention and Control of Infectious Diseases, which, as noted above, prohibits discrimination against persons with infectious diseases.¹¹⁶ Second, Yang argued that his dismissal violated the terms of the labor agreement, which, though it did provide for dismissal in the case of serious disease, did not specify hepatitis; given that Yang could still fulfill his duties, he argued that that contractual language did not apply.

Yang also raised a constitutional argument, based on Article 33 of the Constitution, but, perhaps because the action in question was not based on a stated government policy, his submission to the court contained precious little elaboration of why the Institute's action implicated his right to equality. In addition to citing Article 33 as relevant law, Yang also argued that his right to equality, and constitutional rights more generally, served as a check on the general autonomy of employers in questions of hiring personnel.¹¹⁷

In the end, how the court would have responded to Yang's constitutional arguments – or even his legal ones – would remain unknown. Apparently with some nudging from the court itself, the Institute reached a settlement agreement with Yang.¹¹⁸ Even in the absence of a final judicial verdict, nonetheless the case received significant attention as one of the first cases in which an individual had sued a non-civil service employer and had won at least a partial victory. Nonetheless, the absence of a response from the court meant that any opportunity to develop the constitutional agenda had gone by the wayside.

In an indication of the extent to which civil society groups are playing an important role in keeping up the momentum on litigation and thereby contributing to legal development, Yang's case is also noteworthy in that he was encouraged to take legal action by the Hepatitis B rights group Sincerity. According to Yang, the support of Sincerity's members was a key part of his decision to take legal action.¹¹⁹ A number of Sincerity members also traveled to Tianjin from Beijing, Hebei, and elsewhere to stand outside the court and offer moral support on the day of the trial. According to one member of the group attending the trial, the presence of so many people with Hepatitis B was an

¹¹⁵ "Tianjin's First Hepatitis B Discrimination Case Opens Today: dismissed university student sues his work unit," China Consumer Net, June 14, 2006. Available online at: <http://finance.sina.com.cn/xiaofei/consume/20060614/0736744018.shtml>.

¹¹⁶ Supra. Although the Institute was a state owned industry, it was not a civil service employer; therefore the Institute was not obligated to adhere to the National Standards for Medical Exams for Public Servants, which offered the most comprehensive protections against discrimination against hepatitis B carriers. In media interviews, the Institute explicitly cited its exemption from the National Standards as a partial justification for its dismissal of Yang and his colleagues. See "A Perspective on Tianjin's First Hepatitis B Discrimination Case," Tianjin Daily, June 12, 2006. Available online at: http://www.yn.xinhuanet.com/employment/2006-06/12/content_7235122.htm.

¹¹⁷ Court submission, Yang v. China Railways Electrification Survey Design Research Institute, p. 8. On file with author.

¹¹⁸ Author interview.

¹¹⁹ "A Perspective on Tianjin's First Hepatitis B Discrimination Case," Tianjin Daily, June 12, 2006.

indication of the broader meaning of the case: “Yang’s decision to sue to protect his rights and interests is not just about him. It is about striving for the right of all of us with hepatitis B to live as equal members of society.”¹²⁰

All of the developments in hepatitis B discrimination litigation are significant, and are indicative of the ways in which activists and legal advocates are trying to use the legal system in new and creative ways to protect the rights of ordinary Chinese citizens. Yet the extraordinary success of the lawsuits that have been brought are indicative of the limits of the current strategy that legal advocates have adopted: though the litigation strategy has been successful in terms of generating real and ongoing legislative change to better protect the rights of individuals with hepatitis B, neither the courts nor the government have responded in any significant way to the constitutional arguments that lawyers and activists have raised. In other words, the lawyers bringing these cases have yet to make any progress – beyond, of course, the important success of stirring public debate – on the transformative structural constitutional goals that are very much at the heart of their work. As these activists and lawyers continue to build on their recent work, the question of how to achieve structural constitutional change – and even whether such change can be achieved at all in the present political environment – needs to be revisited on a regular basis in order to ensure that any opportunities to maximize progress in this area are not missed.

IV. Conclusion: further barriers ahead?

This paper has argued that constitutionalism in China is, at present, in a theoretical vacuum, one that the party-state, despite initial efforts in this area, has yet to fill. This paper has also argued that this vacuum has real-world impact: if and when the government is drawn into a debate over the current constitutional structure and the need for constitutional reforms, it will face the difficulty of trying to articulate support for the status quo without being able to rely on a Marxist theoretical framework that no longer has significant public or scholarly support.

Yet scholars and legal activists also face significant barriers of their own: though they have offered alternative readings of the Chinese constitution, and have even offered innumerable constitutional reform proposals, they have yet to fully articulate a successful theory of their own – beyond the recitation of various platitudes asserting the importance of constitutional rights protection – to justify their calls for a fundamental change in China’s governance structure. This may be a prerequisite to progress.

Also, in part due to obvious reasons of political sensitivity, there has been no real conversation about political barriers to constitutional reform, and no significant debate as to how those political barriers might be overcome. While such conversation of course raises difficulties in the Chinese context, nonetheless, effective and impactful strategic

¹²⁰ “Tianjin’s First Hepatitis B Discrimination Case Opens Today: dismissed university student sues his work unit,” China Consumer Net, June 14, 2006. Available online at: <http://finance.sina.com.cn/xiaofei/consume/20060614/0736744018.shtml>.

thinking about how to move the ball forward can only come about through intensive and critical debate.

In 1927, prominent scholar Wang Shijie offered the following assessment of China's constitutional developmental needs:

The rights mandated in the constitution cannot necessarily be fully regulated by common (basic) laws. On occasion, there is no law that implements a constitutional right. Also, common laws cannot violate the constitutional principles; if they do, the person whose rights have been violated should go to court. From this vantage point, the constitution should be seen not only as a statement of beliefs (isms) or ideals, but instead as a document that has real legal effect.¹²¹

Were he alive today, Wang would find that his pleas, made eighty years ago, are still valid today. In order for China to count itself, finally, as one of the family of nations fully embracing the rule of law, the institutional shortcomings raised by Wang and countless other scholars need to be addressed, at long last.

¹²¹ Zhou Wei, *Research on...*, p. 128.