

## Constitutional Enforcement: Who Should Do It and How?

-Paul Gewirtz<sup>1</sup>

The enforcement of constitutions has been a high profile topic in the United States for over 200 years. And it has been a high profile topic all around the world since the end of World War II, when countries world-wide adopted new constitutions and set up mechanisms for constitutional enforcement. But the topic of Constitutions and their enforcement has only recently become a very high profile topic in China – and it is currently a very high profile topic indeed.

China's leaders have recently addressed this subject extensively at the 30th anniversary of the 1982 Constitution, the Third Plenum and the Fourth Plenum of the 18th Party Congress, as well as the most recent inaugural Constitution Day. Xi Jinping's "Explanation" of the Fourth Plenum's Decisions on this topic is lengthy. Of course it is only words on a page, and no one yet knows how these words will actually be implemented. But President Xi's words are emphatic, and their content has certainly raised expectations among scholars and others that China's Constitution and constitutional enforcement will have a newly enhanced place in the Chinese political-legal landscape.

For example, President Xi Jinping says not only that the Chinese Constitution is "law" but that it's "fundamental law." He repeatedly emphasizes the Constitution's "authority," and thus addresses the view of some people that China's Constitution is not "authoritative" but merely "nominal." He insists there must be "real efforts" to implement the Constitution, not just words on paper. He describes constitutional enforcement as inseparable from the broad project of advancing the rule of law in China and achieving the many instrumental benefits China sees in "governing the country according to law." And he emphasizes that actual enforcement of the Constitution is important not only to assure that government officials remain "loyal" to the Constitution but also to "strengthen constitutional consciousness in the whole society."

That last passage about the importance of "strengthening constitutional consciousness in the whole society" is particularly interesting. A Constitution embodies a society's foundational beliefs and ideals. But a Constitution can also define the country to itself, reflecting back to the whole society those foundational beliefs and ideals. A Constitution can give the people of the country a sense of shared identity and values, a sense of unity and purpose—and thus be an ongoing source of a country's values. It certainly plays this role in my own country, the United States. Every country today needs a source of values and shared national values. I am aware that some in China worry today that, particularly given its rapid pace of change, Chinese society faces a challenge in its search for a shared source of values and a consensus about values. In fact, the visible enforcement of a country's Constitution can greatly help to provide this source of shared values. It has definitely done so in my own country and many countries around the world.

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In short, there is new interest in China about the subject of constitutional enforcement. Thus, as a foreign law scholar who has spent most of my career studying the U.S. constitution and its enforcement, and also studying constitutions world-wide, I may have something to contribute by sharing some of this knowledge about how constitutional enforcement is practiced outside of China.

In fact there are many varieties of constitutional enforcement around the world. There are basically three different forms of constitutional implementation that can occur in any society. First, “popular constitutionalism”. Second, “political constitutionalism”. And third “judicial constitutionalism”.

“Popular constitutionalism” is currently a fashionable phrase in U.S. legal circles. In the context of the United States, it reflects the idea that our Constitution belongs most centrally to the people and that its meaning, vitality, and even enforcement should rest in significant part with the people.<sup>2</sup> This idea has always had currency in the United States – the very first words of the Preamble to our Constitution are “We the People,” underscoring that the Constitution is literally a creation of the People, with the pervasive purpose of benefitting the People as well as the nation as a state.

But the recent currency of the idea of “popular constitutionalism” in U.S. academic circles has a more specific cause. It’s largely a response of more “liberal” constitutional scholars who’ve been disappointed by recent “conservative” interpretations of our Constitution by our Supreme Court, and thus they’ve sought to give greater stature and responsibility to what others believe the Constitution means – and they’ve tried through public arguments, media publicity, and social movements to push institutions of government to accept their understandings of the Constitution’s meaning as the actual meaning of the Constitution. In the United States, of course, the judicial mechanism of constitutional enforcement remains, remains strong, and remains authoritative in a practical sense. So “popular constitutionalism” is a kind of supplement or corrective to judicial enforcement.

A second kind of constitutional enforcement is “political constitutionalism”. “Political constitutionalism” emphasizes the ways that institutions of government other than the courts give meaning and force to the Constitution.<sup>3</sup> This can happen in many ways. Most obviously, when some legislation is introduced in the U.S. Congress, some legislators might oppose it on constitutional grounds – the proposed legislation, they argue, would violate the Constitution – for example, they might argue that the proposed legislation interferes with free speech rights guaranteed by our Constitution, or interferes with defendants’ rights under our Constitution, or interferes with the prerogatives of the President of the United States under our Constitution. Congress has staff members who are

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<sup>2</sup> LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (reviewing KRAMER, *supra*); Larry D. Kramer, Letter to the Editor, *Kramer vs. Tribe*, N.Y. TIMES BOOK REV (Nov. 21, 2004), <http://query.nytimes.com/gst/fullpage.html?res=9A00E2DE1F3CF932A15752C1A9629C8B63>; Robert C. Post, *Foreword: Fashioning the Legal Institution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004); Symposium, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1341 (2005).

<sup>3</sup> *Congress and the Constitution: Hearing Before the H. Comm. on the Judiciary*, 105th Cong., 2d Sess. 17-56, 108, 118, 121, 133-23, 125-49 (1998) (testimony of Louis Fisher); CONGRESS AND THE CONSTITUTION (Neal Devins & Keith E. Whittington eds. 2005); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001).

specialists on constitutional law to assist Congressmen in this process. Scholars and others may also testify before Congress about the constitutionality of the legislation to provide further guidance. And in the end, significant numbers of members of Congress may vote against the legislation because they're convinced it's unconstitutional – and they will publicly give their reasons and write public reports about why it's unconstitutional. Congress, in short, can vote down a law because Congress itself concludes that the law is unconstitutional, and the law is dead.

Alternatively, suppose Congress ends up passing the law. Then another form of “political constitutionalism” is possible. The law must go to the President, who may sign the law but is allowed to veto the law. And the President may veto the law for the reason that he thinks the law is unconstitutional – and his veto statement will say that.<sup>4</sup>

These are both certainly forms of constitutional enforcement – but they are done by political entities not by the courts.

A third kind of constitutionalism is “judicial constitutionalism”. This is probably the best known form of constitutional enforcement world-wide. “Judicial constitutionalism” is not at all a Western institution. It's practiced in South Korea, Japan, Taiwan, in South Africa and other African countries, in numerous Latin American countries, as well as most Western countries – indeed in most countries that have written constitutions around the world.

The basic logic of “judicial constitutionalism” is simple, which is why it is so widespread. Here is the logic: Step 1: The constitution is law, and it is higher law – law that's superior in authority to any other type of law. Step 2: The job of courts is to apply the law. Step 3: So if one party in a case relies on a statute or regulation and another party in a case argues that this statute or regulation conflicts with the higher law of the Constitution, the court is obligated to apply the higher law of the Constitution – even if that means invalidating the statute or regulation.<sup>5</sup> Another, and more functional, argument for “judicial constitutionalism” is that you cannot rely on the political process to be a sufficient check on the political process. The political process often has certain biases in favor of certain groups or institutions and against others, and the political process may sometimes distort the institutional arrangements made in the Constitution.<sup>6</sup> Since the purpose of a Constitution is to constrain day-to-day political behavior, you need to have an independent entity such as a court to rule on constitutional questions. The fact that constitutional questions are legal questions makes the appropriateness of the judicial role even clearer. To be sure, in democracies there is often worry that this power of judicial review is undemocratic because it frustrates the will of majorities or because judges sometimes read constitution too broadly. But on balance “judicial constitutionalism” has been embraced by the people of a very large number of countries around the world as the best way to ensure the implementation of the country's Constitution, to preserve the institutional structures of government that are essential parts of our system, and to protect the people's rights.

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<sup>4</sup> Sarikrishna B. Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81 (2007).

<sup>5</sup> This is the logic of Chief Justice Marshall in the foundational case of *Marbury v. Madison*, which justified judicial review in the United States. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>6</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

It is important to appreciate that “judicial constitutionalism” comes in many different forms.<sup>7</sup> In places like the United States and Japan, courts of general jurisdiction have constitutional enforcement powers, with the Supreme Court at the top of the hierarchy. In places like Germany, South Korea and South Africa, there is a special purpose Constitutional Court that has constitutional enforcement powers.

There are numerous other variations within the judicial constitutionalism model. Some courts only have the power of “abstract review” – assessing the constitutionality of some legislation as a general matter rather than how it’s applied in concrete cases. In some countries, such as the United States, it is the other way around: judicial review of a law’s constitutionality is only possible in concrete cases brought by specific litigants claiming concrete injury.

Constitutional enforcement in two countries is worth special mention here because as China considers what mechanisms it will use for better constitutional enforcement these two unusual varieties may be of special interest. The two countries are France and Canada.

First, France.<sup>8</sup> For much of its history, France had no form of Constitutional enforcement outside of France’s legislature. Then, in the 1950s, a Constitutional Council was established, the “Conseil Constitutionnel.” It’s not a court. Its members are almost all former senior political figures. Until recently, it reviewed the constitutionality of legislation only at the request of the Prime Minister, the President of the Senate, and then starting in 1974, a request of at least 60 members of the legislature – a very limited power that could only be initiated by government officials themselves. It did not hear any concrete cases and did not use procedures like litigation in court. But it did have the power to declare legislation unconstitutional. Recently, France’s Constitutional Council has taken on more characteristics of a court – but for most of its history, it’s been perhaps closer to political constitutionalism than judicial constitutionalism, except for the important fact that it operated independently of the legislature. If China is considering political constitutionalism as its enforcement approach, then the experience of the France is worth study, particularly in the way that it mixes political elements with independence from daily politics. Canada’s system of constitutional enforcement is surprisingly little known, but is another interesting variant. The Supreme Court of Canada may declare legislation unconstitutional under Canada’s Charter of Rights and Freedoms (Constitution). But, for a substantial range of Charter rights, the Canadian Parliament may set aside that judicial decision by simple majority for a period of five years, “notwithstanding” the Charter rights that the Supreme Court has concluded would be infringed. The legislature retains ultimate control.<sup>9</sup> It is a very interesting hybrid of “judicial constitutionalism” and “political constitutionalism”.

With this background concerning constitutional enforcement world-wide, and the three approaches I’ve discussed of “popular constitutionalism”, “political constitutionalism”, and “judicial constitutionalism” worldwide, let me conclude by making 8 very tentative observations about the relevance of all of this to China.

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<sup>7</sup> NORMAN DOSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2d ed. 2010); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2d ed. 2006); Paul Gewirtz, *Global Constitutionalism: Annual Volumes of Reading and Commentary* (1996-2005) (unpublished).

<sup>8</sup> Olivier Dutheil de LaMothe, *Sherrill Lecture: The Transformation of Judicial Review in France: From Corneille to Racine*, <https://vimeo.com/114560226>.

<sup>9</sup> STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM* 97-128 (2013); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 31-33 (2009).

First, the most visible efforts to implement the Chinese Constitution in China in the last 15 years have been examples of “popular constitutionalism.” Scholars, lawyers, citizens, and the media – none of whom have any official enforcement authority – have made highly visible public arguments that certain government actions violate the Chinese Constitution. The Sun Zhigang case and the resulting abolition of the system of “custody and repatriation” is just one of many examples. In the field of employment discrimination, in the *Zhang Xianzhu* court case extensively covered by the media, the court declined to rule on the plaintiff’s claim that employment discrimination against Hepatitis B carriers violated the Chinese Constitution; but the lawyers’ arguments and wide media coverage were surely factors leading to new laws and regulations prohibiting much of the discrimination. In the field of private property, public the constitutionality of procedures for the “takings” of property was challenged by public arguments, court cases, and filings with the NPC Standing Committee, and these actions undoubtedly contributed to significant statutory and regulatory revisions in “takings” law. In short, arguments from society, particular when reinforced by strong media coverage, have in some instances had remarkable impact. As a result of public opinion, the government has changed the policy being challenged. But in no case that I am aware of has the government publicly stated that the policy was being changed because it violated the Chinese Constitution. Nevertheless, the rhetoric and leverage from society that produced the policy change was in significant part rhetoric about the Chinese Constitution, so this can be seen as “popular constitutionalism” – enforcement of the Constitution by means of popular and media pressure rather than government mechanisms.

Second, although “popular constitutionalism” will not disappear, the Fourth Plenum suggests that there’ll now be considerably more “political constitutionalism.” My old friend Professor Chen Duanhong of Peking University Law School is a major theoretician about “political constitutionalism.” in China.<sup>10</sup> And another old friend, Dean Wang Zhenmin of another law school in this town, might be considered a proponent of a form of “political constitutionalism” in China’s current circumstances.<sup>11</sup> The Chinese Constitution states that the NPC Standing Committee, a political body, has the power to interpret the Constitution, supervise its enforcement, and annul State Council and local government regulations and decisions that contravene the Constitution. There is no express constitutional prohibition on the courts undertaking some forms of constitutional interpretation and constitutional review, but China’s courts have not exercised this power in contemporary times except for a now-revoked *pifu* in the 2001 *Qi Yuling* case. So it is understandable that a lot of creative practical thinking in the period ahead will focus on what mechanisms of effective constitutional enforcement might be developed within the NPC Standing Committee system. (The NPC can also take steps that address the place of the Constitution more generally, legislature, such as the “constitutional oath” legislation effective January 1, 2016, requiring officials to take a public oath when assuming their posts “to be allegiant to the Constitution of the People’s Republic of China, safeguard the Constitution authority, [and] perform obligations given by the laws...”)

Third, a lot of important issues will need to be resolved if the NPC and its Standing Committee are going to strengthen its role in constitutional enforcement as Xi Jinping has suggested. It will be necessary to go beyond the recent amendments to the Legislation Law, which are a positive development but are still rather vague and incomplete. Will a permanent and specialized body be established within the NPC or SC to conduct constitutional review, and, if so, what kind of body? How professional and independent will it be? How public will the process be? Will constitutional enforcement decisions be accompanied by formal public opinions that give the reasons? Will

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<sup>10</sup> 陈端洪《论宪法作为国家的根本法与高级法》，《中外法学》2008年第4期。

<sup>11</sup> 王振民《宪法政治：开万世太平之路》，《人民论坛·学术前沿》2013年第15期。

constitutional review be “abstract review” or “concrete review” or both? Will citizens be able file constitutional complaints and be assured of receiving substantive decisions in response?

Fourth, in a system of “political constitutionalism” that is connected to the NPC and its Standing Committee, the experience of other countries suggests that the decision-making body must be adequately professional, and also must be independent from political decision-makers at the NPC and at the other government entities whose decisions they’re reviewing. Constitutional enforcement without the professional expertise to interpret law and without independence from ordinary politics is not real constitutional enforcement. France’s historic experience with the Conseil Constitutionnel shows that a quite political body closely tied to the government can nevertheless develop adequate independence and professionalism to enforce a Constitution. But the Conseil Constitutionnel was never embedded within the French legislature itself. If China’s leaders are serious about developing “political constitutionalism” embedded within the NPC/SC structure, they will have to design mechanisms that seek to assure the necessary independence of the constitutional enforcers.

Fifth, the experience of other countries suggests that effective “political constitutionalism” also requires that the decision-making body makes its decisions public and gives legal reasons for its decision. This is the only way that the people in society will understand that the Constitution is indeed the highest authority and highest law in the land and that constitutional enforcement is genuinely taking place. To the best of my knowledge, thus far there has never been a formal and public opinion by the NPC Standing Committee that some government action is unconstitutional.

Sixth, “judicial constitutionalism” should continue to be deliberated and debated by scholars and others. A significant number of Chinese scholars have already made important contributions to this debate within China. “Judicial constitutionalism” is nearly a global practice, and that is for two basic reasons: (a) the job of the courts is to declare what the law is, and since the Constitution is law and is higher law, the courts seem necessarily drawn to constitutional interpretation; (b) constitutional enforcement requires decision-makers who act independent from ordinary politics, and courts are usually more independent than political entities themselves. Nevertheless, “judicial constitutionalism” similar to that of most other countries will be difficult to establish in China in the foreseeable future. But perhaps a hybrid idea that takes account of the distinctive attributes of courts is not altogether implausible. Nothing in the Chinese Constitution would forbid a court from issuing declarations about the constitutionality of laws or decisions. The court could issue its “declaration”, but not have the final word. The NPCSC would then have to approve or disapprove the interpretation and actually take the enforcement steps – so even if under the Chinese Constitution only the NPC and its SC can annul laws, regulations and normative documents, that would still be the case under this hybrid arrangement.

Seventh, there will need to be further theoretical consideration of what some consider the apparent paradox of affirming the supremacy of the Party and also affirming the supremacy of the Constitution. Some have said that the existence of one Party rule in China makes any constitutional implementation impossible because the Constitution can never be seen to embody truths that have any superiority to what the Party says on any given day. But my premise in these remarks is that this may not necessarily be true. In his “Explanation” of the Fourth Plenum Decisions, Xi Jinping seems to propose a possible way to cut through this apparent paradox and to establish coexistence of the supremacy of the Party and supremacy of the Constitution. Said Mr. Xi: “The Party leads the people in formulating the Constitution and the law, the Party leads the people in implementing the Constitution and the law, and the Party itself must act within the scope of the Constitution and the law.” This pairing, in one sentence, of both the Party’s leadership role and a concept of constitutional constraint on the Party has not always been said

before and is perhaps significant now. Additional significant comments by Xi Jinping that have been made public recently addressing the relationship between the Party and the Constitution will add some further complexities to his earlier statements and will undoubtedly keep this important issue a matter of ongoing discussion.

Eighth and last: Except in revolutionary times, constitutional development is usually an incremental process. Sun Yat-sen spoke famously of 3-stages a hundred years ago.<sup>12</sup> But even without a self-consciously phased approach to constitutional development, the most realistic way to view modern China's reforms in any field, including the rule of law, is that every step is tentative and transitional in some sense. And so it may be with constitutional enforcement in China. Limited but more public NPCSC review may be the only approach that's possible now. But because this step legitimates the idea that the Constitution is higher law that should constrain all institutions, and because constitutional review is itself being legitimated, other forms of stronger constitutional review may evolve over time. Today's limited reform may turn out, in retrospect, to have been only a "transitional" step towards deeper reform.

In short, we may be on the verge of a new era of "constitutionalism with Chinese characteristics". China's top leaders seem to have concluded that some form of constitutional enforcement is inseparable from advancing the rule of law in Chinese society, will entrench certain fundamentals in China's governing system as higher law and authority, and will underscore a core set of values for the entire country to embrace as national ideals – just as Constitutions have done so successfully in other countries.

If these latest actions by China's leaders indeed mean what they say, an extraordinarily interesting experiment in constitutional development may be starting. And the rest of the world will be watching with great interest as this experiment unfolds.

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**From: Xi Jinping, "Explanation" Concerning Fourth Plenum Decisions, October, 2014**

"[T]o rule the country according to the law, we must first rule the country according to the Constitution; the crux of governing according to the law is governing according to the Constitution."

"The Constitution is the fundamental law of the country.... In comprehensively moving forward ruling the country according to the law we must make propagating and establishing the authority of the Constitution a major task to be completed urgently and effectively and spend real efforts on constitutional implementation and supervision, ... [We must] raise the requirements to implement the Constitution to a new level...This Plenum Decision further puts forward that we must improve the constitutional supervision system of the National People's Congress and its Standing Committee, and establish sound procedures and mechanisms for constitutional interpretation;.... December 4 is designated as National Constitution Day; [and we must] broadly carry out education about the Constitution across the society and uphold the spirit of the Constitution.... We must establish a constitutional oath system. This is a sort of system that the vast majority of countries with a written constitution worldwide have....Doing these things demonstrates the authority of the Constitution, strengthens the constitutional consciousness of public officials, and encourages public officials to be loyal to and support the Constitution, [and]

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<sup>12</sup> 邹鲁：《中国同盟会》，载《辛亥革命》丛刊第2卷，上海，第15-16页，上海人民出版社1957年版。

it also helps strengthening the constitutional consciousness and establishing the Constitution's authority in the whole society.”

“The Party leads the people in formulating the Constitution and the law, the Party leads the people in implementing the Constitution and the law, the Party itself must act within the scope of the Constitution and the law.”