



Can Citizens Vitalize China's Constitution?

by Keith Hand



OVER THE PAST year, senior Chinese leaders have published speeches that were widely interpreted as signals that the Communist Party intends to tighten its grip on legal reform. Indeed, in the run-up to the 17th Party Congress scheduled for October 2007, the Party has targeted legal institutions with a “socialist rule of law” rectification campaign, a number of rights defense lawyers have been imprisoned, and controls over mass media appear to have grown stronger. These trends are cause for concern. But they may also lead to erroneous conclusions about China’s constitutional development. Behind this repressive façade, citizens and the government are engaged in struggles—in many cases over rights to material resources—in which both sides are relying on the law to secure public support.

In the course of these struggles, citizens are shaping government action with legal and constitutional arguments and strengthening expectations that state action must have a legal and constitutional basis. Three recent citizen legal claims—

two involving tax and compensation issues, and a third involving the well-known constitutional challenge to the Property-Rights Law—illustrate this dynamic. The subtle shifts these cases highlight are no assurance of future progress on constitutional enforcement. But they demonstrate ways in which citizen legal activism is advancing China’s constitutional development, and are worthy of attention.

Drivers of China, Unite!

THE FIRST CASE involves a citizen challenge to an annual road-maintenance fee assessed on car owners. In July 2006, the fee began to attract public scrutiny after Chinese media reported that a car owner who failed to pay the fee had been charged 780,000 yuan (\$101,220) in back fees and penalties. Soon afterward, lawyers uncovered an apparent conflict between administrative regulations that authorize the fee, and two national laws: the Highway

Mr. Hand is a senior fellow at Yale Law School’s China Law Center and is currently a visiting scholar at Peking University Law School.

Law and the Legislation Law.

In mid-October, one of the lawyers sent a proposal to the National People's Congress Standing Committee (NPCSC) challenging the legality of the national administrative regulations authorizing the road fee. After the Transportation Ministry declared it would continue to collect the fees in 2007, another lawyer submitted a broader proposal to the NPCSC challenging the road fee. Both lawyers engaged Chinese domestic media, which reported actively on the issue. As the controversy brewed, other car owners filed lawsuits or withheld fee-payment. These developments created significant pressure on the Transportation Ministry and its local bureaus.

In China, the NPCSC, not the judiciary, has the power to invalidate regulations that contradict the Constitution and national law. As such, the lawyers in this case raised their legal challenges under Article 90(2) of China's 2000 Legislation Law. This provision provides citizens the right to submit proposals to the NPCSC for review of administrative regulations or local laws they believe conflict with national law or the Constitution. (Subsequent provisions extend the right to include proposals challenging Supreme People's Court judicial interpretations). People's courts do not have the power to invalidate unlawful administrative regulations, and in the past have avoided citing constitutional provisions in court cases (indeed, some Chinese experts assert that internal directives prohibit courts from doing so).

Thus, while NPCSC review of citizen proposals is discretionary and the scope of such proposals is limited, the establishment of the proposal right was a step forward for China's constitutional development. The Legislation Law provided the first concrete legal mechanism through which citizens could advance constitutional claims. Citizens have made active use of the mechanism, submitting at least 37 requests since

2000 for NPCSC review on a wide range of issues.

As public controversy over the road fee mounted, the government responded. In late November, Xinhua News Agency published an interview with NPCSC and State Council legal officials. In this interview, the officials confirmed that they had received several citizen proposals and reviewed them in accordance with legal procedures. They then offered a legal justification for continuing to assess the fee.

Although the interview did not constitute a formal legal ruling on the citizen proposals, it was nonetheless a notable development. The road fee case marked the first time that the NPCSC had publicly answered and addressed the legal arguments in a citizen proposal submitted under the Legislation Law. Moreover, while the road fee was upheld, the public controversy renewed efforts to replace the fee with a fuel surcharge. Because a fuel surcharge would be lawful under the amended Highway Law, this change would address one of the key legal arguments advanced in the citizen proposals.

Different Prices for a Life

THE SECOND CASE emerged in 2006, when three students died in a traffic accident in Chongqing. Pursuant to a 2003 Supreme People's Court legal interpretation, many local courts in China determine compensation in part on the basis of whether such accident victims hold an urban or rural residence registration. Relying on this standard, the responsible party provided the families of two Chongqing students more than twice the compensation it agreed to provide the family of a third student, who held a rural residence registration. Domestic media reported widely on the case, public controversy over the unjust compensation disparity, and related calls for amendment of the SPC interpretation.

Publicity over the issue prompted lawyers in Sichuan province and Beijing to submit three separate proposals to the NPCSC challenging the constitutionality of the SPC interpretation. These proposals cited Article 33 of the Constitution, which provides that Chinese citizens are equal before the law, and argued that the compensation standard results in unjust discrimination against rural residents. These lawyers took advantage of favorable political conditions. At the time, senior leaders had been actively promoting new policies designed to narrow China's urban-rural income gap. The citizen constitutional arguments were reported widely in the domestic media.

In the wake of these proposals, both local and national authorities announced legal reforms related to the compensation standard. In 2006, local governments in five provinces and cities adopted reforms to bring compensation for certain migrants into line with that for urban residents. The SPC also began accepting public suggestions on revision of its interpretation.

In January 2007, another citizen proposal challenging the constitutionality of the interpretation was submitted, and in March 2007, NPC delegates introduced motions calling on the SPC to equalize the standard. Shortly afterward, SPC Chief Justice Xiao Yang announced that the interpretation would be revised after the close of the NPC session. Although Justice Xiao did not directly acknowledge the citizen constitutional proposals, Xinhua reports on the announcement noted vigorous debate and extensive "discussions" with legal experts and the public. The controversy provides a second recent example of a citizen proposal that influenced government policy and reinforced constitutional norms.

Property-Rights Law

THE THIRD CASE was the constitutional challenge to the passage of the Property-

Rights Law. Originally scheduled for March 2006, the passage of the law was delayed after Peking University law professor Gong Xiantian issued an open letter arguing that the draft law violated Article 12 of the Constitution (which declares that state property is inviolable) and basic principles of socialism. This appeal, which was published on the Internet, ignited considerable controversy. In late 2006, Prof. Gong issued a second letter, this one signed by hundreds of scholars and former officials, again attacking the draft law. Both letters attracted significant attention in Chinese and foreign media.

As the NPCSC prepared to deliberate on a revised draft late in 2006, the Chinese government launched an extensive campaign to defend the draft law and its constitutionality. Xinhua and other state-run media published detailed explanations of the law and legislative process. Such reports also noted that the NPCSC had revised the draft to give greater prominence to state ownership and protect against fraudulent sales of state assets (two of Prof. Gong's key complaints).

In December 2006, the NPCSC approved the Property-Rights Law for consideration by the full NPC. At that time, NPCSC Chairman Wu Bangguo issued a public statement confirming the constitutionality of the law. Senior NPCSC staff members also held a press conference on the same topic. State-run media published scholarly defenses of the law's constitutionality, and related Web pages that included Prof. Gong's first letter.

This campaign represented an unusually vigorous if not unprecedented official defense of the constitutionality of a national law. Similar to the government response to legal arguments raised in the road fee case, this defense was notable for the degree to which it directly engaged Prof. Gong's constitutional arguments in the public sphere. Although Prof. Gong's mo-



As Chinese citizens, pictured above at a property fair in Dalian, rush to buy property, issues of property rights have become more urgent.

tives might be distinguished from those of the activists described above, the constitutional precedent set in the case is no less significant. By moving aggressively to address Prof. Gong's constitutional challenge, the government publicly reinforced the concept that legislative acts must have a constitutional basis.

Signs of Reform?

TOGETHER, THESE EVENTS signal small but significant steps in China's constitutional development. Prior to the fall of 2006, the NPCSC had not issued a direct public response to any citizen proposals filed under Article 90(2) of the Legislation Law. These three cases represent the most direct and public government responses to such claims to date. The fact that China's authoritarian government feels compelled to respond to these citizen legal and constitutional arguments publicly, rather than merely ignore or suppress them, is notable. Such responses are a sign that constitutional rhetoric is gaining influence in the realm of public opinion and conditioning state action in subtle ways.

These precedents are in turn gradually expanding space for citizen constitutional activism. All are official declarations legitimizing the concept that legislative acts must comply with national law and the Constitution. All acknowledge, directly or

indirectly, the right of citizens to call legal provisions into question on constitutional grounds. Moreover, each of these cases reinforces patterns of government-citizen interaction on constitutional issues and builds public expectations for government responsiveness to future appeals. Citizen demands to address pervasive discrimination against Hepatitis B carriers, and constitutional challenges to rules that set different retirement ages for men and women, are present controversies that may further advance such concepts.

Finally, the three cases suggest that disputes over economic interests are promising catalysts for constitutional development. This is not surprising. Economic rights provide a relatively safe zone for citizen constitutional activism. The leadership has promoted economic rights, and citizens can raise claims related to such rights without directly threatening the Party's monopoly on power or the principal pillars of its control (as, for example, an appeal to enforce the free speech or assembly provisions of the Chinese Constitution would). Because economic rights are generally less sensitive than political rights, domestic media have more leeway to report on related legal disputes. The average citizen may be inclined to dismiss a constitutional challenge to China's criminal provisions on subversion as unrealistic or of practical irrelevance to their daily lives. By contrast, legal challenges related to tax and property issues directly affect the assets of large numbers of citizens. This makes it easier to generate the broad public opinion pressures that give citizen constitutional claims influence and help to establish the types of precedents discussed above. Ironically, the government's vigorous public defense of the Property-Rights Law will only strengthen the hand of citizens advancing claims related to such interests.

Of course, such events should not be interpreted with undue exuberance. It would

be premature to suggest that the government responses described here herald the emergence of an institutionalized and independent legal process for constitutional review. China is far from establishing such a mechanism. Citizens do not have a legal right to compel review of their constitutional claims, and the NPCSC seems to be exercising great caution to avoid publicly declaring legal provisions invalid. As was the case in Taiwan and South Korea, and as Chinese legal scholars privately admit, robust constitutional enforcement is more likely to follow and consolidate, rather than force, political reform at the top.

Second, these citizen actions rely heavily on their ability to attract media coverage and generate public-opinion pressures. The Internet has made it more difficult to control information flows, but the Chinese government can still deprive these public controversies of oxygen when it deems it necessary. In the case of the Property-Rights Law, the government took steps to shut down public debate over the draft in the months before the law's final passage. The present effectiveness of citizen constitutional challenges thus depends on the degree to which there is some policy flexibility on the part of the leadership.

Finally, while we can view these events and begin to discern the outlines of institutions and rights discourses that look familiar to the Western eye, it is possible that China may follow a different constitutional trajectory. In each of the cases described above, citizens did not use constitutional and legal arguments with any realistic expectation of stimulating an institutionalized legal process. Instead, they advanced such arguments as parts of broader appeals—following the law, upholding socialist principles, ensuring fairness—designed to condition public opinion and shape government behavior. In a system with signifi-

cant political constraints and weak legal institutions, this may be the most effective way for citizens to advance constitutional arguments. Such a dynamic may represent a transitional step towards a more adversarial process in which constitutional disputes are resolved in a transparent legal forum, rather than in the realm of public opinion. There are certainly Chinese legal activists pushing for such reforms. But in certain respects, the three cases also reflect elements of a more traditional citizen-state interaction in which Chinese elites advance moral claims to guide state behavior. Such traditions could lead to a different constitutional equilibrium in China.

In short, there are many obstacles to China's future constitutional development, and we should be cautious in interpreting the significance of these cases. But they should not be ignored. The cases are evidence that concepts of rule of law and constitutionalism are strengthening in China. They illustrate ways in which public opinion and citizen action are generating pressures for reform, highlighting one path forward for China's constitutional development that is not dependent on the benevolence of an enlightened leader, but instead is a product of citizen-state interaction.

They also suggest that observers waiting for the NPCSC or people's courts to enforce free speech and other political rights enshrined in the Chinese Constitution may be focusing their attention on the wrong part of the field. If and when those events take place, the game will already be over. To understand the potential trajectories of China's constitutional development, observers should take note of a sphere in which the Constitution and law are now in play: the continuing struggles over often mundane material interests that directly impact the resources and daily lives of average citizens. ■