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HORIZONTAL RIGHTS AND CHINESE CONSTITUTIONALISM:
JUDICIALIZATION THROUGH LABOR DISPUTES

ERNEST CALDWELL*

INTRODUCTION

Western academics who criticize Chinese constitutionalism often focus on the inability of the Supreme People's Court, China's highest judicial body, to effectively enforce the rights of citizens enshrined within the Constitution of the People's Republic of China. Such criticism, I argue, is the result of analytical methods invested in American constitutional discourse. These approaches focus on those Chinese political issues that impede the institution of western-style judicial review mechanisms, and often construe a 'right' as merely having vertical effect (i.e., portraying them as individual rights held against the state). Drawing on recent scholarship that studies Chinese constitutionalism using its own categories and values, this article examines a series of court cases involving employer-employee labor disputes. In these cases, lower court judges actively engaged in constitutional interpretation and openly invoked and enforced horizontally oriented socio-economic rights to prosecute exploitative labor practices. This analysis demonstrates that the study of Chinese constitutionalism need not be methodologically confined by the institutional paradigms or the rights discourse of Euro-American constitutionalism. Due consideration should be given to the comparative implications of the judicialization of the constitution in lower courts, as well as the possibility of a rights discourse emphasizing the positive enforcement of constitutionally enshrined rights on a horizontal axis (as opposed to defensive, vertically oriented rights).

In this article, I first examine the problems commonly cited by scholars when criticizing China's constitutional development. I then demonstrate the shortcomings of two methodological perspectives, which inform much of this criticism. I go on to argue that to better un-

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understand a Chinese conceptualization of constitutionalism one must be willing to consider non-traditional (e.g., non-Anglo-American) techniques of constitutional engagement. Finally, I discuss three legal cases dealing with labor disputes in which the lower courts openly cited and interpreted the Chinese constitution to enforce labor rights of workers vis-à-vis employers. These three cases highlight socio-economic conflict, particularly labor relations, as a potential key area in which the Chinese government, or at least the judiciary, demonstrates a willingness to use constitutional arguments to defend the rights of Chinese citizens. The findings of this article point to new avenues for inquiry into comparative constitutionalism in general and Chinese constitutionalism in particular.

I. CHINA'S CONSTITUTIONAL DILEMMA?

In the mere 60 years since the establishment of the People's Republic of China (hereafter, PRC) on October 1, 1949, the Chinese government has promulgated a total of five different constitutions, 1949, 1954, 1975, 1978, and 1982 respectively. Each was created with the intent of displaying major shifts in political power, enshrining the socialist goals of the dominant Chinese Communist Party (hereafter, CCP), and accommodating changing socio-economic situations. The constitution of 1975, for example, was a response to the unrest caused by the disastrous Great Proletariat Cultural Revolution (1966-1976). Mao Zedong and his supporters embedded much socialist rhetoric, including direct references to Marx and Lenin, into the 1975 constitution in an attempt to bolster their diminished power, restore social and political order, reaffirm the legal power of a constitution, and cast a positive light on the tragic events occurring during the Cultural Revolution. The number of articles was reduced to thirty, and the constitu-
tion was heavily criticized in the west for its absence of individual rights. The 1982 Constitution of the People’s Republic of China, however, explicitly enshrines a fairly substantial number of individual rights. Indeed, the 24 articles (articles 33-56) constituting Chapter II, titled “Fundamental Rights and Duties of Citizens” account for nearly 17% of total article content of the document. It should also be noted that whereas in previous constitutions the chapter on “Fundamental Rights and Duties of Citizens” was positioned as Chapter III, in the 1982 constitution it has been moved to the foreground just after Chapter I, “General Principles,” and before Chapter III, “Structure of Government.” This has been seen by some scholars as an attempt by the Chinese government to show to the world that they are taking citizens’ rights seriously.

Interestingly, criticism is frequently leveled at China on the grounds that although the Chinese constitution grants such a range of individual rights (civil and socio-economic), it does not provide institutional mechanisms to enforce these rights. Such criticism typically emphasizes the Chinese government’s frequent violations of human rights, as well as violations through executive action or new legislation of other rights guaranteed to citizens by the constitution. Yet the implication that the Chinese government is unwilling or unable to enforce constitutional rights is not completely accurate.

It is true that China lacks a constitutional enforcement mechanism similar to judicial review; however, in its place one finds an alternative system which the Chinese call constitutional supervision. The constitution stipulates that the National People’s Congress (hereafter, NPC), the highest legislative body in the Chinese government, is empowered

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4. For example, during the Cultural Revolution several social groups were targeted, and in many cases severely persecuted, for being counter-revolutionaries. Even after the failure of the Cultural Revolution, legal means were utilized to prosecute ‘scapegoats’. Critics note the absence in the 1975 and 1978 constitutions of sections on the individual rights to equality under law, which they argue allowed a legal basis for such persecutions. Jones, supra note 2, 57-60.


6. Id.

7. Id.

8. Id.

“to supervise the enforcement of the Constitution,” and that the Standing Committee of the NPC (hereafter, Standing Committee) has the authority “to interpret the Constitution and supervise its enforcement.” These articles explicitly place all constitutional matters within the ambit of the legislative branch of the government to the exclusion of the judiciary. However, the constitution does not stipulate the method of enforcement nor what, specifically, enforcement actually entails. Furthermore, the meetings of the NPC are much shorter than other legislative bodies of the world. As a result, issues related to constitutional supervision are typically marginalized while its normal legislative duties are emphasized. Its Standing Committee, which functions throughout the year as the legislature when the NPC is not in session, has a total of twenty-one governmental functions, only one of which is concerned with constitutional supervision. Thus, it has been argued that constitutional supervision is often impeded by the massive workloads assigned to these two bodies.

Further complicating the matter is the complex relationship between the judiciary and the constitution, which at best can be characterized as ambiguous or at worst contradictory. The constitution creates the judiciary to enforce the laws of the PRC. However, ambiguity arises from the fact that, while the constitution stipulates that it “is the fundamental law of the State and has supreme legal authority,” (which means that the judiciary could enforce it as a law) it allocates sole power of its supervision and enforcement to the NPC. In the past this has created uncertainty among judicial officials over the applicability of constitutional provisions in cases brought before the courts. In 1955 the Supreme People’s Court (hereafter, SPC), China’s highest judicial body, issued a practice statement affirming that the


11. Id. at art. 67. For an excellent analysis of the constitutional power and practices of the NPC and its Standing Committee, see Michael Dowdle, The Constitutional Development and Operations of the National People’s Congress, 11 COLUM. J. OF ASIAN L. 1 (1997).

12. It should be noted that the PRC government is highly centralized with the NPC serving as the highest authority in the state and all other branches of government subsumed underneath it.

13. Chen Jianfu has argued that the each of the constitutions of China was meant to give structure to and empower the government (and by extension the CCP) and was not intended to provide a mechanism for challenging state authority. See J. CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE, AND DEVELOPMENT 72-73 (1999).


16. Id. at Preamble.
constitution was the supreme law of the land, but stated that its provisions could not be cited as a basis for decisions in criminal cases. This issue arose once more in 1986, and in response the SPC once again issued a statement regarding the sources of law to be used in legal proceedings. Interestingly, this statement does not explicitly prohibit citing and using the constitution as a source of law; however, the constitution does not appear on the statement's list of laws judiciable in courts. Judges and scholars alike interpreted this omission as an implicit indication that the constitution and rights issues were to remain out of the courts.

Many scholars hold the view that frequent violations of citizens' rights by the Chinese government are partly the result of the seemingly inefficient practice of constitutional supervision and absence of involvement by the judiciary. There is no governmental body independent of the NPC to hold the NPC accountable for actions that contravene the constitutional rights of Chinese citizens. Some argue that increasing the role of the judiciary in constitutional matters best solves China's constitutional rights dilemma. This is commonly framed within the rhetoric of 'judicialization' of the constitution, or xianfa sifa hua, which advocates institutionalizing a form of judicial review similar to that practiced by liberal democratic governments, especially in common law countries. By allowing concrete forms of judicial review, the ideals of constitutional supremacy and the protection of enshrined citizens' rights against the state could be upheld. This argument for constitutional judicialization frequently highlights protection of vertical rights and the actions of China's highest court, the SPC. I argue that such a bifurcated analysis manifests a certain selective myopia that too narrowly defines constitutionalism, as well as the relationship between constitutions and constitutionally enshrined rights. It fails to

18. Id. at 221.
19. This narrowness is the byproduct of an overly functionalist approach to the study of constitutionalism. The very term "constitutionalism" is defined as it developed in the west. For those taking this functionalist approach when conducting a comparative study, this western definition of "constitutionalism" becomes the dominant comparative referent and provides a 'check-list' of attributes for which structural equivalents performing analogous functions must be discovered in order for what is being compared to qualify as "constitutionalism." Yet, the limitations of such a rigid functionalist approach have been pointed out by several scholars of comparative law and comparative political theory. Many of these critiques often point to the fact that such "check-list" approaches depict specific concepts as static or fully-developed, and thus preclude the possibility future development or preclude the possibility that a transplanted concept, like constitutionalism, could not be altered, re-interpreted, or re-defined within another socio-political system. For an overview of the limitations of the functionalist approach in comparative law see,
acknowledge the existence of constitutional engagement by the lower courts in China in cases involving horizontal rights violations, in particular labor disputes.

II. AIMING LOW: ESCAPE FROM THE JUDICIAL REVIEW PARADIGM

One of the methodological issues impeding a fairer assessment of Chinese constitutional development is the high value placed on upper-level court references to constitutional issues, i.e. decisions of the Supreme People's Court. This emanates in part from a US-based common law mentality, which emphasizes a pyramidal court hierarchy and links judicial independence with a checks-and-balances function between government branches over constitutional issues. Thus, much scholarship, especially that coming from common law academics, emphasizes the role of supreme courts as defenders of the constitution. Such a methodological stance precludes consideration of the viability of alternative institutional structures of constitutional review that exist even in western democracies. However, many scholars still insist on judicial review as the sole viable solution to China's constitutional 'problems,' and view it as an essential marker indicative of 'true' constitutional development. Such a viewpoint precludes consideration of potential for China's alternative constitutional trajectory to contribute to our own understanding of constitutional development.

This preoccupation with judicial review leads to a second problem. When looking for evidence of incipient judicialization of the constitution, an emphasis on judicial review narrows the scope of


21. There are, however, some critics of judicial supremacy within Anglophone scholarship, especially advocates of the "departmental review" theory of constitutional interpretation and enforcement. In this theory, constitutional interpretation does not rest solely within the purview of the judiciary, but instead, individual branches of the government are responsible for determining constitutional controversies affecting their spheres of influence. See Susan R. Burgess, Contest for Constitutional Authority: The Abortion and War Powers Debates 1-27 (Univ. Press of Kansas, 1992).

22. These approaches often fail to consider alternative models of constitutional review, in particular that of France. There the constitution is completely outside the purview of the judiciary and a separate Constitutional Council has been established. See John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition 135 (3d ed. 2007).
scholarly inquiry to high court decisions, specifically those of the SPC. This, in turn, precludes analysis of lower level court cases, which surprisingly show a relatively high level of constitutional engagement and rights discourse when compared to the SPC. In this section, I will consider the implications of this second methodological problem and offer an example which illustrates the value of looking to lower-court decisions as sources of constitutional engagement and rights protection.

At the lowest levels of China's four-tiered judicial system—that is, the People's Courts and People's Tribunals—judicial officials accept litigation concerning the rights of individuals. Not only do they accept such cases for adjudication, but in doing so, the judges appear to be encouraging a form of weiquan, or rights argumentation to take place within the official court system. Of particular interest is the fact that much of this litigation is directed towards violations of basic rights of individuals made by quasi-official governmental offices of the elected village committees.

In 1988, small, localized village elections were instituted in much of rural China. Many political scientists interpreted this move by the Chinese government as a victory for future Chinese democratization, and concluded that once citizens found that they could vote out inefficient or corrupt village officials they would demand similar electoral rights at the township level and on up. Studies have shown that the institution of such elections has obtained a measure of success in providing a sense of empowerment to many villagers and an increase in rights-consciousness. Even if true, however, the fear of being voted out of office has not precluded village committees from making formal decisions that contravene the law and infringe upon the basic legal (and in some cases constitutional) rights of villagers. More specifically, many village committees have neglected or even denied the rights of 'married-out' women (i.e., women who marry into a family outside of

23. A brief survey of the Chinalaw Information Database for legal cases which contain constitutional references yielded 14 results. See also Kellogg, supra note 17, 228.


25. Stephanie Balme notes that of the 2,400 plus cases administered in a small People's Tribunals in a suburb of the Chinese province of Sha'anxi, nearly 15 percent deal with 'weiquan' issues. See Stephanie Balme, Ordinary Justice and Popular Constitutionalism in China, in Building Constitutionalism in China 183 (Stephanie Balme & Michael W. Dowdle eds., 2009).


their own village and thus reside in their husbands' village) to acquire compensation or benefits from collectively-owned land in their home villages or from similar lands of the villages which they married into. Some village committees have denied legally registered individuals their constitutional right to vote.

Stephanie Balme has analyzed the development of rights discourse in cases of 'married-out' women mediated in People's Tribunals. People's Tribunals are basically subdivisions of the county court system comprised of lower-level court judges and allow access to justice for people in rural areas. As such, these Tribunals accept different types of cases, have different procedures, and are typically more oriented towards mediation. The problem of 'married-out' women and their rights regarding collectively-owned village land affects most provinces of China. One of the primary reasons for discrimination against the rights of such women is economic. Income gained from collectively-owned lands is divided amongst those villagers registered as living within that particular village—thus, the fewer members within the village, the larger the share for each member. As such, it is frequently the case that women who are 'married-out' find themselves in legal purgatory when it comes to the collection of their share from collectively-owned lands. Their home village committees typically deny the women's affiliation because they live in another village, and the villages into which they married often consider them to be outsiders. Village committees sometimes even go so far as to refuse to acknowledge a valid residency registration (hukou) or the legal transfer of a residency registration (which entitles one to a share of communal earnings).

Balme examines several cases which she believes illustrate a situation in which Tribunal mediations prove to be more effective than the formal judiciary in protecting rights, and are a more likely place for the further developing of what she terms, 'popular constitutionalism.' Contrary to the formal courts, which Balme believes are overly bureaucratic and impeded by the scrutiny of the Adjudication Committee, the Tribunals, while still comprised of judicial officials, are nevertheless free from top-down scrutiny and lack rigid procedures.

29. Id. at 182-83.
30. Id. at 187.
31. Id. at 195-96.
32. Id. at 196.
Balme’s argument demonstrates several important issues related to China’s constitutional development, especially at lower-levels of government. The first is a growing consciousness by the Chinese citizens of their rights, as well as their knowledge of formal avenues of recourse should those rights be infringed upon by others, even the elected pseudo-governmental Village Committee. Second, it suggests that at the lower levels of the Chinese court structure judicial officials are more willing to openly engage in rights-based litigation/mediation, even when it involves confronting the actions of pseudo-government committees.

The next case, which concerns government infringement of the constitutional right to vote, further illustrates this point.

Violations of rights related to the election of village committee members have also found their ways into lower-level courtrooms. Unlike the above cases of 'married-out' women where conflict arose from more self-interested, economic motives of the village committee members, in the case of Wu Shaohui v Villagers' Electoral Committee of Luxia Village, Fujian33 there arose a conflict between the constitutional and statutory right to vote in village elections and official regulations promulgated from the Department of Civil Affairs in Fujian Province.

In 2003, Wu Shaohui was refused voter registration privileges by the village electoral committee of Luxia Village, Pingnan County, Fujian.34 Wu had resided in Luxia for a long time, but moved his permanent hukou-registration to Luxia Village only on June 12, 2003, thereby being considered a villager with non-agricultural permanent residency.35 For many years previous to 2003, Wu had participated in the village elections of Luxia (even being nominated for the village head position in 2000), yet in 2003 (after the formal residency transfer was completed) the village committee refused to allow him to register to vote in the upcoming village elections.36 The committee cited a provincial regulation promulgated by the Fujian Department of Civil Affairs that stated, “a person with non-agricultural permanent residency subject to the administration of a village shall not be registered to vote.”37

34. Id. at 1.
35. Id.
36. Id.
37. Id.
They further held that based on the aforementioned regulation all prior registrations of Wu were erroneous and invalid.38

Wu Shaohui brought a claim against the village committee to the People's Court of Pingnan County (the lowest court in the judiciary) and asked the court to order the village committee to register him and to void the results of the election.39 The court held in part for the plaintiff, the village committee was ordered to register Wu, but the election results were not invalidated.40 In reaching a decision, the court had to confront the problem of a provincial government regulation, which contradicted national law related to village elections as well as other provincial laws of Fujian.41 The court began by stating rather bluntly that the right to elect or be elected is a basic political right enshrined within the constitution.42 The right, as referenced by the judiciary, is found in Article 34 of the constitution, which states:

All citizens of the People's Republic of China who have reached the age of 18 have the right to vote and stand for election, regardless of nationality, race, sex, occupation, family background, religious belief, education, property status, or length of residence, except persons deprived of political rights according to law.43

This phrasing is repeated in Article 12 of the Organic Law of the Villager Committees of the PRC (1998) (hereafter, OLVC).44

The court determined that since Wu Shaohui was thirty-three years old, he was, according to national law, eligible to vote.45 The conflict, however, stemmed from the Fujian provincial government's exercise of their regulatory powers found in Article 14, paragraph 4 of the OLVC which states “specific electoral measures shall be prescribed by the Standing Committees of the People's Congresses of the provinces, autonomous regions, and municipalities.”46 Based on this authority, the legislative body of the Fujian provincial government issued one set of regulations which stated “...where a person with voter's qualification has recently moved into a village... the relevant registration for

38. Id.
39. Id.
40. Id. at 2-3.
41. Id. at 1-2.
42. Id. at 2.
43. Id.
45. Wu Shaohui, supra note 33, at 2.
46. Id.
voters shall be made." Yet another set of regulations, already stated above, revokes the right to voter registration for persons with non-agricultural permanent residency. The court held that this latter provincial regulation was in conflict with all of the above stated constitutional, national, and provincial laws just mentioned, and as such was invalid. Although the provincial legislature technically had the authority to make such a regulation, in adjudging this case, a small county court struck down its application because it violated the basic political right to vote enshrined within the constitution and in the OLVC.

These two types of legal issues handled by the People’s Tribunals and People’s Courts are significant in that they illustrate an increased consciousness of ordinary citizens of their rights, an awareness of effective means of recourse when those rights are threatened, and a willingness of these two institutions to become involved in such cases. Because these cases do not necessarily involve the participation of the SPC or the striking down of central government legislation and actions, this might not register with most legal scholars focusing too narrowly on evidence of constitutionalism within upper-levels of government. However, if one accepts as elements of constitutionalism the public consciousness of individual rights, a functioning government institution to enforce such rights, and a willingness to hold elected officials as bound by the law, then one has to see merit in Balme’s conception of a ‘popular constitutionalism’ in county Tribunals and in the constitutional interpretation of the small county court of Pingnan to uphold Wu Shaohui’s right to vote in village elections. Thus, the decisions of lower courts warrant additional consideration as potential sources for constitutional development and engagement in China.

III. Horizontal Rights and The “Indirect Effect”

The next methodological problem affecting the study of Chinese constitutionalism concerns the scholarly emphasis on vertical, defensive rights violations in China. Among many, and even Chinese, constitutional scholars, the primary criticism leveled at the Chinese government centers on its failure to protect and enforce constitutionally guaranteed individual rights against the state.

The perspective of such criticism certainly conforms to the paradigmatic “judicial power” developmental trajectory of North Atlantic
constitutionalism, in which the constitution is seen as an inviolable source of protection for the ordinary citizen against state encroachment and the judiciary is vested with the power to protect against such state engendered rights infringement. Using this paradigm to interpret China, however, inevitably conditions scholarship to focus all too narrowly on state-citizen conflict as an indicator of constitutional engagement. This is typically manifest in the form of legislation or executive regulations that conflict with constitutionally enshrined individual rights, and the potential role of the SPC in reviewing and striking down such rules. There is relatively little effort made to move beyond this vertically-orientated rights discourse and explore alternative axes of constitutional rights engagement.

When considering the development of rights discourse within the west, however, the source of this bias is fairly clear. Martin Loughlin has shown that rights discourse is intimately connected with the liberal democratic tradition that developed in Europe incrementally in response to a growing awareness of alternative configurations of power dynamics associated with the individual vis-à-vis the state.49 Within this milieu of changing power dynamics, the notion emerged that "constitutions" should be utilized to limit government power for the benefit of the people; such a notion was of course predicated on the concept of a vertically-oriented, defensive right.50 Kim Scheppele argues that such 'vertical' concerns were amplified after the atrocities associated with the Second World War and greatly affected the scope of constitutional development and the agenda of rights discourse.51 Similarly, Charles Parkinson's examination of the political rhetoric associated with bills of rights incorporation into the newly formed constitutions of post-colonial nations demonstrates an underlying concern with protecting minority rights (primarily the rights of former colonialists who decided to remain in the former colony after independence was granted) once a predictable majority (e.g., the former colonial subjects) was democratically elected.52 Thus, within the constitutional history of North Atlantic liberal democracies, the developing role of individual rights has been inextricably linked to the tension between the citizen

50. For a brief overview of the development of the concept of "constitution," see Graham Maddox, Constitution, in POLITICAL INNOVATION AND CONCEPTUAL CHANGE 50 (Terence Ball et al. eds., 1989).
52. CHARLES O. PARKINSON, BILLS OF RIGHTS AND DECOLONIZATION (Oxford Univ. Press, 2007).
and the state. Any constitutional engagement must meet the criterion of involving some form of state-citizen conflict.

This single-axis perspective of rights conflict, however, typically precludes an examination of constitutional development and constitutional engagement along alternative axes, namely the horizontal enforcement of constitutionally enshrined rights. Within horizontal conflict, constitutional norms transition from defensive to positive individual rights, and the role of the state transitions from the source of the threat to an agent enforcing the constitutional rights of a citizen infringed upon by non-governmental third parties. It is specifically along this horizontal axis that one can observe interesting interpretations and applications of constitutional provisions within the courtrooms of various constitutional systems.

Indeed, the constitutional experience of some liberal democracies provides examples of this very phenomenon of horizontal rights application. Examining several judgments from the Federal Constitutional Court of Germany, Mattias Kumm notes increasing evidence for the constitutionalization of German private law, which, he argues, depicts an ideological trend towards developing a concept of a "total constitution." Expanding on Carl Schmitt's idea of a total state, Kumm defines a total constitution as one in which "constitutional rights not only establish a comprehensive system of defenses of the individual against potential excesses of the state: Instead, a key function of constitutional rights is to provide the basis for claims against public authorities to intervene on behalf of rights-claimant in response to threats from third parties." As a further characteristic of a total constitution, Kumm states that "if a total state provides no judicial enforcement of constitutional rights a total constitution provides the constitutional resources to constitutionalize all political and legal conflicts— it constrains and guides their resolution in the name of constitutional rights. By means of its constitutional rights provisions a total constitution provides the general normative standards—even if stated in terms of abstract principles—for the resolution of all legal and political conflicts that occur within its jurisdiction."

Kumm's evidence for the development of a total constitution in Germany comes from the emerging judicial doctrine of "indirect effect"

54. Id. at 344.
55. Id.
(mittelbare Drittwirkung), as articulated in the Lueth case. The central question in this case was whether or not constitutional rights have a horizontal effect. The court held that, "constitutional rights are not just defensive rights of the individual against the state, but embody an objective order of values, which applies to all areas of the law... and which provides guidelines and impulses for the legislature, administration and judiciary."

This indirect effect shifts the axis of a constitutional provision from a defensive, vertical to a positive, horizontal orientation in that it requires, on a constitutional basis, positive action by the State to ensure the protection of individual rights from infringement by third parties. Kumm notes that the Constitutional Court has recently addressed cases in which individuals argue that the state has a constitutional duty to improve nuclear reactor safety standards for the protection of individuals living around a reactor, to negotiate with terrorists to protect the rights of those held hostage, and to provide increased university spaces to protect the right to choose a profession. In each of these cases, the third party is the source of the problem (i.e., a nuclear power plant, a terrorist, or a university admissions office), but the litigation is designed to provoke action by the state. This is a key feature of the indirect effect; that the public authorities are still the addressees of complaints, not the third party. Yet Kumm believes that in Germany the practice of this indirect effect doctrine has resulted in the constitutionalization of private law. He argues that:

The practical difference between indirect and direct effect, however, is negligible. It concerns merely the formal construction of the legal issue and has no implications whatsoever for questions relating to substantive outcomes or institutional competence... If, in a surprise

56. Id. at 346. The Lueth case began as a torts issue and soon developed into a constitutional issue over the relationship between the freedom of speech and civil code provisions. In 1950, Erich Lueth called for a boycott of a film by former Third Reich anti-semitic film producer Viet Harlan. Harlan and the studio petitioned for a court injunction against his boycott arguing that such an act was intended to cause harm (thus, granting compensation under the German Civil Code [BGB]) and qualified for an injunction against the boycott. The lower court held in favor of Harlan; yet Lueth argued that such a decision conflicted with the constitutional right to freedom of speech. The case made its way up to the German Federal Constitutional Court. For an overview of the case, see Oliver Gerstenberg, What Constitutions Can Do (But Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law (Center for European Studies Working Paper Series), available at http://www.ces.fas.harvard.edu/publications/docs/pdfs/Gerstenberg.pdf.


58. Id. (citing the Lueth case)

59. Id. at 351.

60. Id. at 352.
move, the constitutional legislator were to amend the Constitution and explicitly determine that constitutional rights were also applicable to the relationship between individuals, it would change practically nothing. There would be a difference in the way complaints could be framed: instead of naming the public authorities, which are currently the addressees of the complaints, the complainant could simply name the other private party as the defendant in the case. And the challenged act would be the act of the private individual rather than that of the public authorities.61

Kumm’s discussion of the doctrine of “indirect effect” provides useful, comparative examples of constitutional development that does not necessarily conform to archetypical -American constitutional paradigms or standard liberal democratic rights discourse.

There are interesting parallels to the German domestic concept of “indirect effect” and horizontal rights found within the realm of international law, particularly international human rights litigation. Decisions handed down from international courts, such as the European Court of Human Rights, evince an evolving concept of an individual right that is no longer understood as merely a defensive measure of individual protection, but also considered a positive right that imposes a duty on the state to enforce it. As Jean-François Akandji-Kombe points out, the European Court of Human Rights understands part of its role vis-à-vis the signing members of the European Convention on Human Rights (ECHR) as “in practice require[ing] national authorities to take the necessary measures to safeguard a right or, more precisely, to take the necessary measures to safeguard a right or, more specifically, to adopt reasonable and suitable measures to protect the rights of the individual.”62 Thus, the dynamics of rights enforcement has been altered. In the case of the European Court, the litigation frequently involves an individual bringing a human rights case to the Court against a government which is, in effect, a third party. Other scholars have noted that this third party does not necessarily have to be a government agency, but could very well be a non-governmental actor, such as international corporations, social institutions, or another individual.63 Such instances provide a conceptual foundation for the poten-

61. Id.
63. For an earlier argument over the necessity of moving constitutional rights into the private sphere, see Christoph Beat Graber & Gunther Teubner, Art and Money: Constitutional Rights in the Private Sphere?, OXFORD J. LEGAL STUD. (1998). For more on the impact of globalization and internationalization of law on the concept of horizontal rights, see Gunther Teubner, Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?, in TRANSNATIONAL
tial development of horizontal rights litigation internationally, as well as domestically.64

Unfortunately, despite these examples, the ‘vertical’ rights orientation continues to dominate both rights-based and constitutional discourse in comparative law, particularly when discussing domestic constitutional development. When aimed at China in particular, critiques of the judiciary or rights violations become inextricably linked to, and even informed by, the rhetoric of Chinese liberalization, democratization, and its citizens’ quest for individual protection from the state. As Kellogg has stated,

[i]t is the explication and elucidation of constitutional norms through jurisprudence that leads to the creation of meaningful constitutional rights doctrine and which creates concrete and binding rights obligations on states. Without the ability to interpret constitutional rights provisions in a way that limits state power, it is difficult to see how the courts can make use of the Constitution in a meaningful way. Thus, despite the existence of potentially differing conceptualizations of constitutionalism, true constitutionalism is still inextricably linked to vertical, defensive rights issues and its development requires judicial interpretation and enforcement.65

In the following section, I examine a series of Chinese lower court decisions involving labor disputes which evince interesting parallels to Kumm’s doctrine of “indirect effect.” These disputes stem from unfair contractual terms which limit the liability of employers for injuries sustained by laborers in the workplace. It is clear from the language of the decisions that when the judges openly cite the constitution and make constitutional interpretations, they are invoking a socialist rhetoric contained within the constitution aimed at protecting common laborers from exploitative practices, and by extension affirm the duty of the state to actively protect constitutionally enshrined labor rights. As such, they articulate an understanding of the constitution as functioning along a horizontal axis.


64. There is a steadily growing number of scholarly works dedicated to the development of horizontal rights enforcement within international and domestic legal spheres. An excellent collection of such studies focusing on countries ranging from France and Great Britain to Israel and Greece can be found in HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY (Dawn Oliver & Jorg Fedtke eds., 2007).

65. Kellogg, supra note 17, at 227.
CHINESE CONSTITUTIONALISM

IV. LABOR DISPUTES AND THE CHINESE "DIRECT EFFECT"

The above sections of this article argue for the need to examine Chinese constitutionalism on its own terms. That is, before criticizing, or worse condemning, Chinese constitutional development, one should demonstrate more self-reflexive consideration of the criteria used to analyze the subject. The examples given in Section II and Section III illustrate the value of looking beyond the archetypical American constitutional experience, and urge scholars to focus on the role of lower courts by considering the development of constitutional discourse, which does not focus on vertical rights enforcement. In this section, I turn my attention to three court cases dealing with labor contract disputes, which effectively combine these two new areas of constitutional inquiry.

To begin with, the institution of Deng Xiaoping's Four Modernizations during the late 1970s through the 1980s paved the way for China's massive economic growth.66 Central to these reforms was a restructuring of the Chinese economy, shifting it from the earlier socialist planned economy towards a socialist market economy.67 This included a level of entrepreneurial privatization accompanied by a "transition from the 'iron rice bowl system' to labor contracts."68 For many CCP leaders charged with guiding a government founded upon an ideology permeated with elements of Marxism and socialism, and whose authority is in part derived from their open defense of such an ideology, the introduction of a market economy and privatization of certain industries raised concerns over the potential reappearance of exploitative labor practices and unequal class development.

Indeed, at the outset Chinese law was ill-equipped to handle the new issues arising from the economic transition, such as increased wage discrepancy between employers and employees, unequal contract terms, and unregulated safety standards.69 Labor law reform was

68. RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA 6 (2010).
slow to develop alongside economic reform, and as labor laws developed their impact was unevenly distributed among the workforce. Further, China did not pass a national labor law until 1994, and even then the ambiguity of this law (including its promise for future legislation) led to much confusion and manipulation.

Interestingly, this nexus of problems—the dilemma of China's socialist ideology in the face of a thriving market economy and the underdeveloped legal realm of Chinese labor law—proves to be a fertile ground for understanding a new dimension to China's constitutional development. The three legal cases examined below demonstrate how judges in lower courts interpreted, and even cited, constitutional provisions to invalidate express contractual terms exculpating employers from any liability for employee injuries occurring at the workplace. These judgments provide insight into the ways in which judges utilized constitutional arguments, particularly socialist interpretations emphasizing the State's duty to protect workers from exploitative labor practices, to serve as legal 'stop-gaps' at a time when China's labor and contract laws lacked specific provisions protecting employees from unfair contractual terms.

A. The Case of Zhang Lianqi and Zhang Guoli v Zhang Xuezhen

In October of 1986, Zhang Guosheng was contracted to assist in the demolition of a building at the Tianjin Alkali Factory by Zhang Xuezhen (same last name, but no relation), owner of the Youth Cooperation Service Station of Workers' New Village of Tanggu District of Tianjin. On November 17, 1986, while removing concrete cross-beams, several beams suddenly cracked creating a dangerous work environment. Work was ordered to resume, but then another beam broke causing Zhang Guosheng to fall and injure his ankle. He was taken to the hospital, diagnosed with hematoma and sprain of the medial left ankle bone, and subsequently released. On November 21 he was again rushed to the hospital, but later, on December 7, died of sepsis and putrescence of tissue resulting from the previously sustained

70. Brown, supra note 68, at 3-6.
72. Id. at 1.
73. Id.
74. Id.
75. Id.
The family of Zhang Guosheng suffered a total loss of 17,600.40 RMB in medical expenses and lost wages. As a result, his father and sister, Zhang Lianqi and Zhang Guoli respectively, requested that the Labor Bureau of Tanggu District decide whether or not Zhang Xuezhen was liable to pay for the said economic loss. The Labor Bureau confirmed the liability, but Zhang Xuezhen disapproved. Thus, Zhang Lianqi and Zhang Guoli brought a civil suit against Zhang Xuezhen in the People’s Court of Tanggu District claiming compensation for economic loss arising from the work related injury and the subsequent death of Zhang Guosheng.

At the trial, the defendant claimed that there should be no liability citing, inter alia, an absence of a clear causal link between Zhang Guosheng’s work injury and his death, and also provided a registration form signed by the deceased upon agreeing to work for the defendant. It contained the clause: “Work-related injuries shall not be the responsibility (of the service station).” Medical reports confirmed the link between the work injury and Zhang Guosheng’s death, and the Court found the defendant negligent in taking steps to maintain a safe environment for workers once hidden dangers were known (i.e., once it was known that the beams were unstable). Citing Articles 106 (2) and 119 of the General Principles of Civil Law of the People’s Republic of China, which prescribe civil liabilities to individuals who cause injury to the personal safety of others, the Court held that the defendant was liable for medical expenses accrued by Zhang Guosheng’s hospitalization, loss of potential income, and living expenses of any dependants.

Before arriving at this decision, however, the Court had to address the liability exclusion clause contained within the registration form signed by the deceased. The issue at point was whether or not the aforementioned articles of the General Principles of Civil Law could be applied if the deceased had willfully released the defendant of liability. The registration form clearly stated that the defendant could not be

76. Id.
77. Id.
78. Id. at 2.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id.
held liable for any injuries suffered onsite. Surprisingly, the Court brazenly utilized a constitutional argument to invalidate the clause stating: "Our Constitution explicitly stipulates that labor protection will be provided to laborers. This is a right which is enjoyed by laborers, it is protected by the State's laws, and no individual or organization may wantonly infringe upon it."  

It should be noted that the Chinese constitution is not directly quoted in the Court's judgment. Furthermore, the constitution does not "explicitly stipulate" that labor protection must be provided to laborers. The only possible provision within the constitution which approaches the meaning of the above Court statement is found in paragraph 2 of Article 42 under Chapter II "Rights and Duties of Citizens." Article 42 states that "Citizens of the People's Republic of China have the right as well as the duty to work," and subsumed under this is the following paragraph 2: "Using various channels, the State creates conditions for employment, strengthens labor protection, improves working conditions and, on the basis of expanded production, increases remuneration for work and social benefits."  

It appears that from a constitutional right to work and the subsequent phrase, "the State ... strengthens labor protection" the judges took an interesting approach to constitutional interpretation whereby they extrapolated an additional implied constitutional right to labor protection. It is not expressly stated how the exclusion clause violated this provision, but I can see one possibility. Paragraph 2 obligates the State to strengthen labor protection and by using the limited liability contract clause, the defendant had impeded the State in its ability to provide, strengthen, or enforce that labor protection. Through judicial interpretation, a constitutional right was transformed into a positive right and the State was then constitutionally required to enforce the plaintiff's right to labor safety. Furthermore, having expanded the ambit of this right, the Court seems to have been able to reason that the exemption clause also indicated a desire by the defendant to exclude herself from the responsibility of providing the constitutionally guaranteed labor protection. As such, the Court held that the clause effectively "violated the Constitu-

85. Id.
86. Id. (author's translation)
88. Id.
tion and relevant labor laws and regulations, seriously violated socialist social morality and is classified as a null and void civil act.  

Although this decision comes very close to illustrating an instance in which the Court expressly invokes the constitution to formulate a judgment, it must be remembered that the judiciary has no authority to enforce the constitution, nor is it permitted to quote or cite the constitution. Therefore, the statement that the clause "is classified as a null and void civil act" is particularly important for understanding the subtly of judicial rhetoric associated with the constitution. The Court may claim that the clause violates the constitution, but it lacks the ability to enforce such a violation solely from a constitutional jurisdiction perspective. Therefore, reference to the constitution is immediately followed by mention of violations of labor laws and regulations as well as socialist morality. These last two items are judiciable under Article 58 of the General Principles of Civil Law which stipulates, "Civil acts falling into the following categories shall be considered null and void . . . (5) those violating the law or public interests . . . " Although the Court did not expressly cite Article 58, it is clear from the language that it provided the 'authority' with which the Court could invalidate the liability exclusion clause while the constitution provided the reasoning.

B. The Case of Liu Ming v No. 8 Engineering Company of Division No. 2 of the No. 20 Engineering Bureau of the Ministry of Railways and Luo Youmin

In August of 1998, the No. 8 Engineering Company of Division No. 2 of the No. 20 Engineering Bureau of the Ministry of Railways under-

89. The term used here is "labor regulations" or "regulations on labor" (laodong faze), yet I have been unable to find the labor laws or regulations the court is referring to. The Labor Law of the People's Republic of China was not promulgated until 1994, so I think that they may be referring either to a statute, which I am unable to find or perhaps they are referring to the Economic Contract Law of the People's Republic of China. See Economic Contract Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 13, 1981, effective Jul. 1, 1982), translated in Chinalaw Information Service. The Economic Contract Law of the People's Republic of China was replaced by the Contract Law of the People's Republic of China (effective Oct. 1, 1999).


took a construction project on the Xiaolaiyan Bridge of the Meishan section of rail line 106.93 Construction of driveway panels was subcontracted to Luo Youmin with a contract clause stating that liability for any and all accidents of injury, death, or dismemberment were the sole responsibility of Luo.94 Work began on September 2, but before starting Luo Youmin held a series of meetings emphasizing the dangers of the installing the driveway panels and the proper methods of installation so as to maintain safety.95 On October 6, Liu Ming, a hired laborer, failed to follow these proper procedures when handling the panels, which caused ten tons of driveway panels to fall and injure his left hand.96 Liu Ming was rushed to the hospital and released twenty-one days later with all medical expenses being borne by Luo Youmin.97 Later on March 5, 1999, Liu Ming's injury was examined by medical experts and an injury resulting in the loss of the use of his left hand was confirmed.98 Liu Ming brought a claim against both Luo Youmin and the No. 8 Engineering Company in the People's Court of Meishan County, Sichuan requesting compensation for, inter alia, loss of income, subsequent hospital fees, living subsidies, and legal fees.99

The Court held that both Luo Youmin and the No. 8 Engineering Company would bear joint liability in compensating Liu Ming's claims.100 As in the previous case, the Court found a legal basis for its decision by combining an implied right to labor protection for civilian workers with promulgated statutes over which the judiciary had enforcement authority. Yet, whereas the Court in the previous case merely referenced the idea of implied right to labor protection in an unnamed constitutional provision without direct quotation, in the present case the Court expressly cited Article 42 paragraph 2 of the constitution.101 Also different from the previous case, was the fact that that the Courts now had authority to enforce the Labor Law of the People's Republic of China (hereafter, Labor Law (1994)), which was officially promulgated in 1994 and entered into force in 1995. Reflecting the government's growing concern over the phenomenal economic growth

93. Id. at 2.
94. Id.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id. at 1.
100. Id. at 2-3.
101. Id. at 2.
of China and its attempts to negotiate burgeoning capitalist influences on the socialist market economy, this piece of legislation was intended to regulate employer/employee relationships and provide laborers with an adequate level of protection from 'capitalist' exploitation. This is evinced by the lead article of the legislation, which states:

[Purpose of Legislation] This Law is hereby formulated in accordance with the Constitution in order to protect the legitimate rights and interests of laborers, readjust the labor relationship, establish and safeguard the labor system suitable to the socialist market economy, and promote economic development and social progress.

Furthermore, the Labor Law (1994) expressly states and defines laborers' right to occupational safety and made its violation judiciable in normal courts. Article 3 states that "laborers enjoy the right to be employed on an equal basis, choose occupations, obtain remunerations for labor, take rests, have holidays and leave, receive labor safety and sanitation protection, obtain professional skills training..." and Article 4 states "[t]he employer shall, in accordance with the law, establish and perfect rules and regulations and ensure that laborers enjoy labor rights and fulfill their labor obligations." Indeed, it was through their power to enforce these two articles that the Court held the defendants liable.

It was held that Luo Youmin knew that the dangers of installing driveway panels with manual labor were greater than if he had used the more expensive alternative of employing cranes. His initial meetings for the purpose of promoting worker safety were insufficient and he should have provided greater safety measures and onsite supervision. Therefore, his actions failed to provide for Liu Ming's constitutional and statutory right to occupational safety. As in the previous case, the Court had to address a liability exclusion clause, yet in this case the contract was between the two defendants, Luo Youmin and No. 8 Engineering Company. The clause transferred sole liability

103. Id. (author's translation)
104. Id. (author's translation with emphasis added)
106. Id.
107. It should be noted that the negligence related to Liu Ming's personal actions was considered, yet the Court determined that since he was not a professional in railway construction his conduct did not limit the liability of Luo.
for work-related injuries or deaths to Luo Youmin. Again, the Court held that the No. 8 Engineering Company was liable because the clause violated the labor rights protected by both the constitution and the Labor Law (1994), and as such, was considered a null and void civil act according to the aforementioned item 5 of paragraph 1 of Article 58 of the General Principles of Civil Law (which it expressly cites). Here again, we see the Court employing the constitution in its judgments to affirm a particular labor right and the State's duty to enforce such a right, and then enforcing the said right through the application of statutory law.

C. The Case of Long Jiankang v Zhongzhou Construction Engineering Co., Ltd., Traffic Bureau of Yongsheng County, Yunnan, and Jiang Jianguo

In the following case, the Court was faced with a similar set of facts (i.e., a laborer was injured at the work site and claims compensation), yet the reasoning of the judges differs significantly. While still relying on the constitution in conjunction with the Labor Law (1994) for the source of a labor right, the Court does not decide the case solely according to a violation of a right to labor protection, and instead cites a failure to provide the constitutionally guaranteed right to proper vocational training.

The Zhongzhou Construction Engineering Co. contracted with Traffic Bureau to complete a proposed "Transit Line Project" and placed Jiang Jian'guo as the project leader. On January 16, 1999, Long Jiankang, a contract steel bender, incorrectly constructed a steel-reinforcing structure and was ordered by Jiang Jian'guo to reconstruct it. While tearing down the reinforced steel shelf it fell upon him. He suffered a compression fracture of his lumbar vertebra, which left him paralyzed and completely incapable of caring for himself. Long Jiankang went to People's Court of Yongsheng County requesting an order requiring the three defendants to provide compensation for,

108. Id. at 3.
109. Id.
111. Id. at 1.
112. Id. at 2.
113. Id.
114. Id.
inter alia, economic loss, life subsidies, and continuous care fees, totaling 271,306.08 RMB. All three defendants denied any responsibility for labor protection at the construction site. The Traffic Bureau maintained that it was merely a supervisory body, and since a labor contract had never been signed between it and the plaintiff, there could not exist a legal duty to provide labor protection or compensation for work-related injury. The Zhongzhou Construction Co. contended that Jiang Jian'guo was only nominally part of the company and was working on this particular project on his own. As such, there was no labor contract, nor was there an employment relationship between the company and the plaintiff so as to give rise to a statutory duty to provide compensation for work-related injury. And finally, Jiang Jian'guo maintained that he should be held to limited liability, due to the fact that he had earlier provided the materials for reinforcing the steel shelf and had warned Long Jiankang of the danger.

In deciding the case, the Court held that the Traffic Bureau did not have an official labor relationship with the plaintiff, and as such should bear no civil liability for the work injury. However, the Court decided against the defendants, Zhongzhou Co. and Jiang Jian'guo. In so doing, the Court had to address two issues. First, it needed to establish which labor right had been violated and whether or not there was a method of enforcement available in the existing Labor Laws. From the previous cases, it would seem likely that paragraph 2 of Article 42 in the constitution would be cited and that the case would be decided on occupational safety violations. To the extent that occupational safety was an issue, this is true; however, the Court found that the defendants' negligence related to occupational safety stemmed not from a violation of paragraph 2, but from paragraph 4 which states: "The State provides necessary vocational training for citizens before they are employed."

It was held that the Zhongzhou Co. assigned the project to Jiang Jian'guo and offered no further training or supervision to Jiang or any

115. Id.
116. Id.
117. Id.
118. Id.
119. Id.
120. Id. at 4.
121. Id. at 3-4.
122. Id. at 3.
of the laborers Jiang hired (including the plaintiff).\textsuperscript{123} For his part, the Court held that Jiang hired the plaintiff and merely gave random information about work issues and did not "carefully provid[e] vocational training."\textsuperscript{124} This lack of education was seen as the source of a dangerous work environment, which by extension infringed upon the plaintiff's right to occupational safety.\textsuperscript{125} The power to enforce this was found, as in the previous case, in Article 3 of the Labor Law (1994) which states that laborers "enjoy the right to be employed on an equal basis, choose occupations, obtain remunerations for labor, take rests, have holidays and leave, receive labor safety and sanitation protection, obtain professional skills training..."\textsuperscript{126} Thus, the plaintiff's right to occupational safety was violated through the inaction of the defendants in providing an adequate level of training.\textsuperscript{127}

The second issue facing the Court was the need to ascertain the validity of a contract clause between Zhongzhou Co. and Jiang Jian'guo, which stated that all work related accidents, injuries, deaths, etc. were the sole responsibility of Jiang.\textsuperscript{128} As in both of the previous cases, the Court easily invalidated the clause by concluding that it violated the constitution and relevant sections of the Labor Law.\textsuperscript{129} Thus, Zhongzhou Co. was held jointly liable.\textsuperscript{130}

Interestingly, this decision would certainly have held in the previous case, where the Court stated that the defendant Luo Youmin's failure rested in his lack of instruction and guidance at the workplace. However, in that case the Court only referred to the constitution provisions and Labor Law related to the occupational safety and the work environment and did not press the issue of education. The present case shows a much more nuanced reading of constitutional language which allowed the Court to interpret a causal relationship between the infringement of one constitutional provision (vocational training) and a subsequent infringement (occupational safety).

\textsuperscript{123} Id.
\textsuperscript{124} Id. at 4.
\textsuperscript{125} Id.
\textsuperscript{126} See Labor Law of the People's Republic of China (1995) art. 3 (author's translation with emphasis added).
\textsuperscript{127} Long Jiankang, at 4.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
CONCLUSION

The cases examined above illustrate several key issues related to Chinese constitutionalism, point to potential weaknesses in the methods commonly employed by scholars to study Chinese constitutional development, and provide fertile ground for future research.

First, the Chinese cases examined above show a need to break away from approaches predicated on American constitutional paradigms when examining Chinese constitutional law, and expanding the comparative referents within comparative constitutional law in general. Such paradigms focus narrowly on the influence of upper-level court decisions and the ideology of judicial review, specifically actions of the SPC, and fail to consider the role of lower level courts in developing and promoting Chinese constitutionalism. Balme's analysis of the growing rights discourse in local Tribunals and the constitutional arguments used by county and intermediate court judges over the legal claims made by Wu Shaohui against the village governance committee, and the labor contract disputes of the Zhang family, Liu Ming, and Long Jiankang, all demonstrate the value of examining low-level court decisions for evidence of constitutionalism, as opposed to the lack of a rights discourse within statements of the NPC or SPC.

Second, the fact that constitutional discourse is present in low-level Chinese court decisions on a much larger scale than in SPC judgments has serious implications for interpreting how different levels of the Chinese judiciary understand their interpretive/enforcement role vis-à-vis the constitution. In particular, there is evidence that constitutional discourse and rights advocacy are permitted, or perhaps tolerated, in cases that are not appealed to high-level courts. One possible explanation is that cases which do make it to the higher courts, such as the Qi Yuling case, draw a great deal of public attention to the upper levels of the Chinese government. Keith Hand notes that Chinese judges in higher courts (including the SPC) complain of increased governmental interference over cases that have drawn considerable media or public attention.131 In some cases, media attention can indeed provoke legal reforms, yet such attention can be a double-edge sword resulting negatively in a governmental backlash.132 Balancing constitutional cases and rights activism in the public sphere remains a difficult chal-

132. Id.
lenge. These judges are therefore reluctant to consider cases which might provoke media scrutiny of top-level government actions and decisions, or provoke the public’s ire and criticism. In contrast, lower courts, though still burdened by potential administrative reviews, are not necessarily impeded by media attention, and are therefore more open to making constitutional interpretations and claims, if public interest in the case is low.

Third, the rights issues involved within these cases are frequently ‘horizontally’ oriented. That is, they are civil cases in which the State (in the form of the judiciary) makes decisions concerning one individual whose constitutional rights were allegedly infringed upon by another individual. In this sense, the Chinese cases are unlike the German constitutional cases analyzed by Mattias Kumm. In the latter, the state was still the object of the litigation, and the ‘indirect effect’ was merely forcing the State to carry out its constitutional duty. In the Chinese cases, there is evidence of a ‘direct effect’ mentality in that judges are drawing on constitutional principles when adjudicating private litigation. These cases are between individuals where the judges argue that 1) the State has a constitutional duty to ensure labor safety (through training, safety regulations, etc.), and 2) if a labor contract violates a constitutionally enshrined labor right or impedes the state’s ability to enforce such a right (e.g., a limitation of liability clause for worker injuries), the state has the duty to void such a clause. Further, because of the dynamics of the case, the state is not the target of litigation, and can actually be seen in a positive light as an agent of justice. These horizontal rights cases do not call into question actions of the CCP or the Chinese central government, nor do they threaten the authority of the NPC. Lower court cases with horizontal rights orientation may therefore prove to be the ideal realm in which to witness the future development of Chinese constitutionalism.

Finally, the legal cases related to labor issues illustrate the importance of examining different types of rights which may be valued differently within political regimes not conforming to the liberal democratic paradigm. Anita Chan has written rather critically about the myopic nature of human rights discourse emanating from international organizations, governments, and scholars. She argues that the current rights discourse is dominated by concerns with vertical rights and their violations by developing nations, yet such an emphasis fails to
consider other rights which need to be protected.134 By highlighting practices of worker exploitation prevalent in China (and elsewhere in the world), Chan advocates an expansion of rights categories within the current discourse to include labor rights.135 In particular, Chan believes that socio-economic rights violations, like labor rights guaranteed by the constitution, are more likely to be horizontal in nature, and are equally as likely to be overlooked due to the scholarly emphasis on State encroachment on individual rights.136 Therefore, the cases analyzed above, and others like them, are important for understanding alternative avenues of constitutional development in China. The Chinese government has had an uneasy relationship with market economies while attempting to maintain and advocate a predominantly socialist ideology. Labor rights and the potential for labor exploitation are sources of tension between the Chinese government and the private sector. Yet, because the constitution is embedded with socialist ideology, the socio-economic rights contained therein prove to be useful tools for the government to monitor and control labor practices. Thus, when the judiciary makes a judgment based upon the constitution it can do so by portraying their act as one of promoting socialism and providing justice for the citizens caught in the grasp of the private sector. From this perspective, constitutional litigation actually strengthens the bond between the state and citizens.

This article is not intended to answer all the questions brought up in the above sections, but I hope that these questions will open the doors to future research on Chinese constitutionalism, and constitutionalism in general, that is not overly confined by Amero-centric understanding of constitutional development and design.

134. Id.
135. Id.
136. Id.