

Foreword: Symposium on Constitutional Review in China

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Professor Larry Catá Backer organized a superb symposium on Constitutional Review in the People's Republic of China for the *Suffolk University Law Review*. The topic is clearly an important one not just in China, but throughout the world, which witnessed a flowering of constitutionalism in the latter part of the twentieth century. Although constitutionalism in the United States remains curiously and stubbornly different from the norm around the globe,² the ideas born in the forge of the American Revolution have clearly played a role in shaping constitutionalism around the world.³

The title of the symposium—"Constitutional Review in China"—provides the key to understanding the participants' contributions. Although constitutional judicial review has become the norm throughout the world's democracies,⁴ the spread of judicial review has been accompanied by institutional variation.⁵ The idea of *Marbury v. Madison*,⁶ but not the form it took in the United States, has become the norm—for good or ill—throughout the world's democracies. The articles and the title of this symposium make it abundantly clear that whatever form constitutionalism might take in China, it will look different from the form it has taken in the United States and in other polities around the globe.

It is a mistake, moreover, to conclude that authoritarian regimes receive no pay-off from some form of constitutionalism.⁷ Constitutionalism and judicial review can play an important role in the survival or failure of authoritarian regimes:

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2. See generally ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009); Miguel Schor, *Judicial Review and American Constitutional Exceptionalism*, 46 *OSGOODE HALL L.J.* 535 (2008).

3. See generally GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD, 1776-1989* (2009); Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 *TEX. L. REV.* 1463 (2009).

4. Miguel Schor, *Mapping Comparative Judicial Review*, 7 *WASH. U. GLOBAL STUD. L. REV.* 257 (2008).

5. Schor, *supra* note 3.

6. 5 U.S. 137 (1803).

7. One of the more successful authoritarian regimes of the twentieth century, for example, was Mexico and its 1917 Constitution played an important role in legitimating the regime. Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Colombia and Mexico*, 16 *IND. J. GLOBAL LEGAL STUD.* 173 (2009).

Authoritarian leaders with long time horizons turn to courts to deal with the dysfunctions that plague such regimes. Courts in authoritarian regimes do many of the same things that they do in democratic ones such as bolstering regime legitimacy, facilitating economic growth, and providing oversight over the bureaucracy. The leash afforded courts in authoritarian regimes is obviously shorter than the leash they are afforded in democratic regimes but dictators who desire a payoff from courts have to provide them some space.⁸

Professor Backer, in *A Constitutional Court for China Within the Communist Party*,⁹ offers the provocative argument that “for judicial review . . . to be successfully implemented in China, judicial review ought to be constituted within an organ of political rather than state power within the CCP apparatus.”¹⁰ The article provides a thoughtful analysis of the scholarly debate within China over how best to implement constitutionalism. Professor Backer questions whether Western understandings of constitutionalism and the role of courts as guardians of the constitutional order make sense given the social, economic, political, and cultural terrain in China. Professor Backer’s article dovetails nicely with socio-legal insights into the emergence of institutions. Successful constitutional review can take many forms, but the one constant both in democracies and authoritarian regimes is that elites are likely to devolve power only to institutions that they trust.¹¹ Fashioning the rule of law requires that linkages be crafted between political and legal actors.¹² Locating a constitutional court within the Communist Party would help provide a new court (or a court-like institution) with the legitimacy it would need to operate. The independence of this new institution might be undermined by its relationship to the party hierarchy, but this is not an intractable problem.

The other contributions to the symposium deal with the problem of the migration of ideas.¹³ Li Li, in *Nulla Poena Sine Lege in China: Rigidity or Flexibility?*, notes that when the notion that crimes must be defined by legislation migrated to China, it was also domesticated by positive legislation that provides some of the flexibility which in Western legal systems is provided

8. Miguel Schor, *Rule by Law: The Politics of Courts in Authoritarian Regimes*, 43 LAW & SOC’Y REV. 241, 242 (2009) (book review).

9. Larry Catá Backer, *A Constitutional Court for China Within the Chinese Communist Party: Scientific Development and a Reconsideration of the Institutional Role of the CCP*, 43 SUFFOLK U. L. REV. 593 (2010).

10. Backer *supra* note 9, at 597.

11. See generally RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); ANTHONY PEREIRA, POLITICAL (IN)JUSTICE: AUTHORITARIANISM AND THE RULE OF LAW IN BRAZIL, CHILE, AND ARGENTINA (2005).

12. Miguel Schor, *The Rule of Law*, in 3 ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES 1329 (David Clark ed., 2007).

13. See generally THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2007).

by judicial discretion in sentencing.¹⁴ The relationship between autochthonous and syncretic elements provides a rich source for comparative legal inquiry.

Perhaps no American constitutional idea has migrated and been domesticated more successfully than *Marbury*. Zhiwei Tong, in *A Comment on the Rise and Fall of the SPC's Reply to the Qi Yuling Case*, criticizes a bold attempt by the Chinese Supreme People's Court to domesticate *Marbury*.¹⁵ The Supreme People's Court in its *Reply to the Qi Yuling Case*¹⁶ reasoned that it had the power to fashion remedies for constitutional violations. One of the justices of that court published an article arguing that the Supreme People's Court intended to emulate *Marbury* in its *Reply*.¹⁷ Professor Tong concludes that the *Reply* was unconstitutional as evidenced by its annulment in a subsequent decision by the Supreme People's Court. While conceding that the Chinese Constitution has not been "sufficiently enforced," Tong maintains that the role of constitutional guardian in China is given to the National People's Congress and its standing committee, not the courts.¹⁸

Guobin Zhu, in *Constitutional Review in China: An Unaccomplished Project or a Mirage?*, elaborates on the important role that could be played in constructing constitutional review by the National People's Congress.¹⁹ The Constitution makes the national legislature the watchdog of the Constitution. It has the power to examine whether laws and regulations violate the "Constitution, laws, and resolutions and decisions of the people's congresses."²⁰ He concludes that strengthening the review powers of the National People's Congress is the key to constructing an adequate system of constitutional review in China.

Manuel Delmestro, in *The Communist Party and the Law*, makes a valuable socio-legal contribution by providing a power map of China's political system that elucidates the hold that the Communist Party has on economic, social, and political power.²¹ While all written constitutions exhibit gaps between political

14. Li Li, *Nulla Poena Sine Lege in China: Rigidity or Flexibility?*, 43 SUFFOLK U. L. REV. 655 (2010).

15. Zhiwei Tong, *A Comment on the Rise and Fall of the SPC's Reply to the Qi Yuling Case*, 43 SUFFOLK U. L. REV. 669 (2010).

16. Zui gao ren min fa yuan guan yu yi qin fan xing ming quan de shou duan qin fan xian fa bao hu de gong min shou jiao yu de ji ben quan li shi fou ying cheng dan min shi ze ren de pi fu, [The Official Reply of the Supreme People's Court on Whether the Civil Liabilities Shall Be Borne For Infringement upon a Citizen's Basic Right of Receiving Education Which Is Under the Protection of the Constitution by Means of Infringing upon His/Her Right of Personal Name], Fa shi 25 hao si fa jie shi, [No. 25 [2001] of the Interpretations of the Supreme People's Court of the People's Republic of China] (promulgated by the Supreme Court of the People's Republic of China, July 24, 2001, effective Aug. 13, 2001) LAWINFOCHINA, available at <http://www.lawinfochina.com>.

17. Zhiwei Tong, *supra* note 15, at 672.

18. *Id.*

19. Guobin Zhu, *Constitutional Review in China: An Unaccomplished Project or a Mirage?*, 43 SUFFOLK U. L. REV. 625 (2010).

20. *Id.* at 628.

21. Manuel Delmestro, *The Communist Party and the Law*, 43 SUFFOLK U. L. REV. 681 (2010).

practices and formal institutions,²² the issue is exacerbated in authoritarian regimes that typically proclaim freedoms in their constitutional text while denying them in practice.²³ Any attempt to implement constitutional review in an authoritarian regime must start—as Professor Delmestro reminds us—with a cold hard look at the reality of existing power arrangements.

The articles that Professor Backer gathered for the symposium on Constitutional Review in China clearly make an important contribution to the scholarly dialogue over how best to effectuate constitutional guaranties in The People's Republic of China. This debate has for too long centered on Western ideas of constitutionalism; these articles are a powerful reminder that successful constitutional regimes may and do take many different forms around the world.

22. See generally Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

23. This problem has been particularly acute in Latin America. See Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1 (2006).