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(Un)Doing Constitutionalism: the Cases of Liu Xiaobo and Xu Zhiyong

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Abstract: *Based on the cases of Liu Xiaobo and Xu Zhiyong, this article reviews the court judgments and discussions about the criminal charges of “inciting subversion of state power” and “disrupting public order” used against Liu Xiaobo and Xu Zhiyong respectively. Through a review of the discourses of Chinese legal scholars surrounding the two cases, we focus on the conflicting arguments regarding the Chinese Constitution and the Constitutional right to freedom of expression. This article concludes with an analysis of the political meaning of the two cases by revisiting the debate about the implementation of a constitutional review and by reflecting upon the political contention between the government's recent re-ideologization of the Constitution against the growing calls of Chinese citizens who advocate Constitutionalism as a proxy for political reform.*

Key words: China, Chinese constitution, law, courts, justice, Liu Xiaobo, Xu Zhiyong, dissent, constitutionalism, freedom of expression, freedom of assembly, inciting subversion

Introduction

On 25 December 2009, Liu Xiaobo, the 2010 Nobel Peace Laureate, was sentenced to eleven years imprisonment by the Beijing No. 1 Intermediate People's Court for “inciting subversion of state power”.¹

Five years later, on 26 January 2014, Xu Zhiyong, a human rights activist and university law professor, was sentenced to four years in prison for “gathering a crowd to disrupt public order” by the same court.

Although the two cases occurred five years apart and were judged according to different rules under the Criminal Law of the People's Republic of China (hereafter referred to as Criminal Law), the activities that caused each prosecution are both related to specific basic rights as stated by the Chinese Constitution i.e. the freedom of expression and the freedom of assembly. And both cases have reflected the different interpretations and understandings of judges, lawyers, and legal scholars on how the Chinese Constitution should be taken into consideration in criminal cases. These different discourses have conflicting political implications. Furthermore, both cases have reflected the wider Constitutional debate that has been ongoing in China.

What are the similarities and differences between the two cases? How do the two cases reflect and relate to the political background of China's Constitutional debate? And how do the two cases contribute to the ongoing Constitutional debate in today's China?

Examining the interpretation and application of the law as reflected in the cases of Liu Xiaobo and Xu Zhiyong, this article reaffirms that the different discourses reveal the complexity and politicization of interpreting Chinese law in politically sensitive cases. It also emphasizes that while the authority opposes the application of the Constitution and refuses to

respect constitutional rights, the pro-Constitutionalists have never ceased fighting for the reverse. However, by revisiting the political background behind China's Constitutional debate, this article argues that the authorities adopted the strategy of re-ideologizing the Constitution in order to forestall its judicialization and that this has continued to jeopardize the prospects of Constitutionalism in China.

First, this article briefly introduces the two crimes and the court rationales in the two cases. Second, it examines the different discourses about the application of the Constitution in the two cases, and thirdly, it analyzes how the two cases relate and reflect China's ongoing Constitutional debate.

1. The Two Crimes and the Two Cases

1.1 Inciting Subversion of State power

Under the section of "Endangering State Security Crimes" (*weifan guojia an'quan zui*) in the Chinese Criminal Law, two crimes are stipulated in Article 105. The first subsection - Article 105(1) - sets out the crime of subversion of state power (*dianfu guojia zhengquan zui*):

Among those who organize, plot or carry out the scheme of subverting the State power or overthrowing the socialist system, the ringleaders and others who commit major crimes shall be sentenced to life imprisonment or fixed-term imprisonment of not less than 10 years; those who take an active part in it shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years; and other participants shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights.

The second subsection - Article 105(2) – stipulates the crime of inciting subversion of state power (*shandong dianfu guojia zhengquan zui*):

Whoever incites others by spreading rumours or slanders or any other means to subvert the State power or overthrow the socialist system shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights; and ringleaders and others who commit major crimes shall be sentenced to fixed-term imprisonment of not less than five years.

Although the two crimes are closely related, they differ from each other. The first crime relates to direct "organizing, plotting, or carrying out" subversive acts; and the second crime relates to "inciting others" to subvert state power by "spreading rumours or slanders or any other means". In other words, "subversion" refers to a situation where individuals are personally involved in actions that are aimed at overthrowing the political system; and "inciting subversion" is "an offense of expression in which the danger lies in the alleged potential for that expression to lead others to want to overthrow the political system" (Rosenzweig, 2012). Therefore, "inciting subversion of state power" relates to the expression and the words. The crime Liu Xiaobo was charged with is "inciting subversion of state power".

There are two conditions that constitute the crime of "inciting subversion of state power": (1) the actions of using rumor or slander or other means to incite subversion of state power and overthrow the socialist system; (2) the intention of the actor to incite the public to subvert state power or overthrow the socialist system (Peng, 2014, p. 97). The punishment for this crime includes two degrees: less than five years and longer. Ringleaders or those whose crimes are "severe" (*yanzhong*) are to be sentenced to a fixed-term imprisonment of not less

than five years.² Liu Xiaobo was sentenced to 11 years for “inciting subversion of state power”. According to the court judgment, his actions of inciting subversion of state power “lasted for a long period, his articles were widely spread and had vile influence, and he should be given severe punishment according to law.”³

The evidence on which the court sentenced him to a long-term imprisonment is his role in Charter 08, and six of his articles⁴ which were published on websites⁵ hosted overseas. According to the Court Verdict, certain words⁶ from the titles of his articles were interpreted as evidence of “fabricated rumours” and “defamation”⁷, and other words⁸ were used as evidence of “incitement”. The prosecution also used the number of page views Liu Xiaobo’s texts received on the Internet to prove that they were widely disseminated and thereby incited many others to “subvert state power” and “overthrow the socialist system.”⁹

1.2 Gathering a Crowd to Disrupt Public Order

Under the section of “Crimes of Obstructing the Administration of Public Order” (*fanghai shehui guanli zhixu zui*) in the Criminal Law, Article 291 sets out the crime of “gathering a crowd to disrupt public order” (*Juzhong raoluan shehui zhixu zui*) on which Xu Zhiyong's sentence was based. Article 291 stipulates that:

Where people are gathered to disrupt order at railway stations or bus terminals, wharves, civil airports, marketplaces, parks, theatres, cinemas, exhibition halls, sports grounds or other public places, or to block traffic or undermine traffic order, or resist or obstruct public security administrators of the State from carrying out their duties according to law, if the circumstances are serious, the ringleaders shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention or public surveillance.

According to the Court's verdict, Xu Zhiyong's sentence of four years imprisonment was based on the following reasons: “Xu used social issues of great public concern to repeatedly organize and plan congregation in public venues that disrupted public order by resisting and obstructing public security administration personnel to perform their lawful duty.”¹⁰ The social issues were an equal right to education, and the disclosure by government official of their assets.¹¹

The court sentenced him to four years imprisonment for acting as the “ringleader” who organized other citizens to take action in circumstances deemed “serious.” The Police and Prosecution used his calls for assembly through his Tencent Weibo account as evidence that he committed the crime of “gathering a crowd to disrupt order in a public place.”¹²

2. Arguments about the Application of the Constitution in the Two Cases

Both Liu and Xu were exercising their Constitutional rights to freedom of expression and, in Xu’s case, freedom of assembly as well. In both cases, constitutional rights are clearly involved. However, courtroom arguments from the defendants’ lawyers showed great contrast to those of the prosecution and judges. While the lawyers endeavored to connect the Constitutional rights with the defendants’ actions, the Court did just the opposite.

2.1 Liu Xiaobo's Case

An article written by two Taiwanese scholars has shown that in practice Article 105 was initially implemented by the Chinese government as a political tool to control public opinion and freedom of expression; following the amended Criminal Law which went into force on 1 October 1997 (Xu and Chen, 2014).

Liu's lawyers (Ding Xikui and Shang Baojun) stated in their defense that freedom of expression¹³ is a crucial issue that should be taken into account in the defendant's case. They specifically called attention to the fact that the difference between the prosecution and the defense was that Liu Xiaobo's incriminating words should fall under the scope of the freedom of expression guaranteed by the Chinese Constitution.¹⁴

In the whole defense statement, freedom of expression is cited eleven times, and the Constitution of the People's Republic of China (Hereafter referred to as Constitution) is mentioned thirteen times.¹⁵ The defense lawyers further argued that the charges against Liu blurred the boundary between a citizen's freedom of expression and a criminal offence. Moreover, they argued that "[e]ven if the critical opinions published by Liu Xiaobo directed at the Communist Party of China and state organs prove to be wrong, they still fall under the category of a citizen's freedom of expression".¹⁶

Although the actions of Liu Xiaobo clearly relate to the freedom of expression, a basic right stipulated by Article 35 of the Chinese Constitution, it is only mentioned three times in the First Instance Court Verdict. The first two mentions are in the Court's restating of the arguments made by the defendant and his lawyer.¹⁷ The third mention is the Court's concluding statement that Liu Xiaobo's actions exceed the limit of freedom of expression and constitute a criminal offense.¹⁸

Although it is not surprising that the defense lawyers' opinion differs from the public prosecutor and the court, their divergent attitudes towards taking the Constitution into consideration – or not in Liu Xiaobo's case, clearly show the unwillingness of judicial authorities to discuss the scope of the Constitutional rights.

In contrast, Liu's lawyers also used Article 33, Article 35, Article 41 and Article 47 of the Chinese Constitution which stipulate, respectively, that the State should respect and protect human rights, that citizens have the right to freedom of expression, to free publication, and to criticize the government. While the Chinese Constitution is not supposed to be directly recognized in Chinese Courts, especially in criminal cases, Liu's lawyers chose nonetheless to deliberately refer to these Constitutional articles. By doing so, they acted "as if" the Court's application of the Constitution was the generally accepted norm and thereby strategically challenged the interpretation of Article 105(2) imposed by the political authorities. Nevertheless, while the lawyers argued that their client's actions and freedom of expression should be constitutionally protected, the authorities nevertheless asserted that "state security" prevails over citizens' constitutional rights.

2.2 Xu Zhiyong's Case

In Xu Zhiyong's case, his lawyers (Zhang Qingfang and Yang Jinzhu) first chose not to express any defense statement in/as a silent protest against what they considered a show trial.¹⁹ Although his case is clearly related to Constitutional rights and Xu Zhiyong himself cited them in his closing statement,²⁰ the first-instance Court verdict did not mention them. Xu argued that although the accusation by the prosecutor of "disrupting public order" appears to be an issue on the limits of a citizen's right to freedom of expression, it is in fact an issue of whether a citizen's Constitutional right are to be recognized or not.²¹

In contrast, Xu's third defense lawyer Liu Shuqing cited freedom of expression nineteen times in the appeal statement of the second instance trial. In addition to pointing out that there were unclear issues and major procedural mistakes in the first instance court judgment, he specifically emphasized that freedom of expression was the main issue involved in Xu's case.²² He pointed out that freedom of expression should include the "more meaningful freedom to criticize, which in the modern society is the right to criticize the government" and

that freedom of expression and its derivative rights should all be guaranteed by the Constitution.²³

Similar to Liu Xiaobo's defense lawyers, Xu's lawyer, Liu Shuqing, quoted Article 35 of the Chinese Constitution and Article 19 of the Universal Declaration of Human Rights²⁴, both of which express the importance of a legally protected freedom of expression as a domestic and international principle.²⁵

Moreover, Liu Shuqing discussed in detail how the limits of freedom of expression should be assessed i.e. whether it caused a "clear and present danger" (jinpo de xianshi de weihai), echoing the doctrine established by Justice Holmes of the Supreme Court of the United States in *Schenck v. United States* when assessing the limits to freedom of expression and the scope of the First Amendment of the United States Constitution. That is, only expression intending to result in a crime and that poses a "clear and present" danger of succeeding shall be punished.²⁶ In his appeal statement, Liu Shuqing further argued that *the Law of the People's Republic of China on Assemblies, Processions and Demonstrations* (Hereafter referred to as the Assembly Law) violates the Constitution and should be abolished. During Xu Zhiyong's trial on 22 January 2014, seventy-seven Chinese lawyers and scholars also called for a judicial review of the Assembly Law.²⁷

2.3 Post-Trial Discussion

Although censorship directives issued to the media by government authorities have prevented both cases from being widely reported or discussed by the Chinese public, a circumscribed discussion of each case still took place outside the courtroom. On the one hand, several Chinese legal scholars of liberal persuasion published their legal arguments in defense of Constitutional rights on websites hosted overseas, and partly accessible in China. By contrast, the views of pro-establishment legal scholars were quoted and reposted on several state media websites hosted in China.

After Liu Xiaobo's trial in December 2009, legal scholars such as Jiang Ping²⁸ and He Weifang²⁹ defended Liu Xiaobo's innocence and criticized his sentence as a "punishment because of speech" (*yinyan huo zui*). Conversely, the state-owned Xinhua News Agency quoted three Chinese law professors' comments in support of the Court's verdict. Since censorship directives instructed that "authoritative sources must prevail" on all websites under China's jurisdiction by "rooting out and deleting"³⁰ any speech in support of Liu and Xu, any critical opinions of Chinese internet users about the Court's judgment were censored. As a result, the "authoritative sources" represent the main information about both cases that is available in China.

One of the comments relating to the Constitution and freedom of expression was made by Professor Gao Mingxuan, the president of the International Association of Penal Law China Branch and the honorary Chairman of the Criminal Law Research Association of the China Law Society. He stated that "[a]lthough freedom of expression is an extremely important right of Chinese citizens and protected by China's Constitution and laws (...), citizens could not exercise this right without any restrictions whatsoever."³¹

The other two law professors (Chen Weidong³² and Zhao Bingzhi³³) quoted by the Xinhua News Agency did not mention the Constitution but instead asserted that the trial did not violate any due process and that the sentence was made according to the Criminal Law because "Liu Xiaobo's file shows that he has engaged in agitation activities for a long time (...) through the Internet by using the network's speed and its ability to grab vast public attention".³⁴

After Liu was awarded the Nobel Peace Prize, the Xinhua News Agency also published an interview with Professor Gao Mingxuan entitled "So-Called 'Punishment Because of Speech'

is a Misreading of the Judgment in the Liu Xiaobo Case” in which he reiterated that limits to free speech are consistent with China’s Criminal Law. He added that because Liu’s words had the “goal of inciting this so-called ‘new power’ of the people” with “the motive and intention to overthrow our nation’s state power and existing social system,” his speech “no longer belongs in the category of ordinary critical speech and should be considered activity that poses a real threat to society.”³⁵

In the case of Xu Zhiyong, after the first instance court delivered its verdict in 2014, the Constitutional Law Professor of Peking University, Zhang Qianfan, wrote a long article (Zhang, 2014). In this article, Zhang argued that Xu Zhiyong’s case should be decided according to Article 35 of the Chinese Constitution. He specifically discussed the relationship between the Criminal Law and the Constitution and pointed out the following: first, the court mistakenly adjudicated Xu Zhiyong guilty by only applying the Criminal Law without mentioning the Constitution; second, all Chinese laws should be interpreted according to the Chinese Constitution; third, if an action itself concerns a citizen’s basic rights, even if it affects public order and causes a traffic jam, it should be tolerated by the government and society because repression of basic rights in lieu of tolerance could possibly cause even more serious social consequences. Zhang further stated that the Criminal Law protects a country’s public order, social security, and other public interests, while the Constitution protects basic human rights such as freedom of expression. If the Constitution does not protect freedom of expression, the Criminal Law can easily be turned into a tool for abridging citizens’ rights and maintaining autocracy, corruption, and power abuse. (Zhang, 2014)

In response to Zhang’s article, a legal researcher named Tang Xuhui criticized Zhang’s argument that “if some rules under the Criminal Law clearly conflict with the Constitution, these rules shall be invalid”³⁶ by counter-arguing that such a kind of judicial review is not appropriate for Chinese courts to apply. By citing Jiang Shigong³⁷ who argued that “judicial judgment” (sifa panduan) and “judicial review” (weixian shencha) are different, he further counter-argued that hiding a “judicial review” under the concept of a “judicial judgment” is like turning the “judicialization of the Constitution” (xianfa sifahua) into a Trojan Horse. This Trojan Horse would then make it possible for Chinese judges and legal scholars to introduce an American-style Constitutionalism into China. Considering that liberal legal scholars often denounce the politicization of the judiciary in China, it is noteworthy that for Tang Xuhui the judicial review is “not about law or justice, but about politics and power.”³⁸

While this discussion is limited to a few individual opinions and cannot be seen as a representative sample of China’s public opinion, it shows that a fundamental disagreement persists between liberal and pro-establishment legal scholars concerning the judicialization of the Constitution as a way to protect constitutional rights.

3. Analyzing the Political Meaning of the Two Cases

Both the Chinese Constitution and the International Covenant of Civil and Political Rights (Hereafter referred to as ICCPR) stipulate that everyone shall enjoy freedom of expression.³⁹ According to General Comment No. 34, States parties shall guarantee the right to freedom of expression, and expression includes “political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse.”⁴⁰ While freedom of expression is not an absolute right and shall be limited to “respect of the rights or reputation of others or to the protection of national security or of public order or of public health or morals”, the General Comment on ICCPR explicitly states that “when a State party impose restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.”⁴¹ In the cases of Liu Xiaobo and Xu Zhiyong, the Chinese state has put in jeopardy the constitutional

and international legal right to freedom of expression because they do not see these legal norms they committed to as imposing limits on their uses or abuses of state power.

While liberal voices advocate the implementation of China's Constitution, ultimately, they believe that only a constitutional government (*xianzheng*) could possibly clear a pathway to holding accountable a party-state whose power to intervene in the judiciary is causing repeated violations of constitutional rights.

In contrast, the *gongjianfa* authorities⁴² and pro-establishment legal scholars clearly oppose the idea of a constitutional government. In defense of the existing politico-legal system (*zhengfa xitong*), pro-establishment voices reject the application of the Constitution by China's Courts.

In order to clarify the political meaning of the two cases, it is necessary to move beyond these highly polarized positions over the judicial application of China's Constitution⁴³ and to understand their relationship to the wider debate about constitutional review, as well as the political context behind the two cases.

3.1 The Debate about a Constitutional Review

Over the last two decades, many Chinese legal scholars, lawyers, and human rights defenders have been pushing for the implementation of Constitutional rights by calling for a system of Constitutional review, if not a Constitutional court.

According to Zhu Guobin, the different positions of Chinese legal scholars regarding the application of the Constitution can be grouped into four different categories: (1) the negative theory : the constitution should not constitute the direct source according to which a judgment is to be made by the courts; (2) the positive theory / hypothesis / argument : the constitution is a law and should thus be implemented in trial practice; (3) the compromising theory : the courts in China cannot apply the constitution when adjudicating criminal cases, but can do it in a restrained manner in civil and administrative cases; (4) the middle-way approach: "the breakthrough of the application of the constitution can be achieved in the sphere of private law" (Zhu, 2013, p. 6). While Zhu believes that the Courts must cite the Constitution in order to protect citizens' rights, he argues nonetheless that the "middle-way approach" would be the most feasible because it requires less constitutional reform.

However, the "compromising theory" also seems feasible if the findings are considered from a study about anti-discrimination litigation cases. In these cases, state actors had to respond to the underlying substantive issues raised by Chinese lawyers, academics, and rights defenders who had pushed for a more active application of the Constitution by the Courts (Kellogg, 2009). Although such efforts from civil society did not generate enough pressure to trigger any formal constitutional reform, they did much to raise the public's rights awareness.

While the "middle-way approach" would exclude the application of the constitution in the sphere of public law, legal scholars who endorse the "negative theory" would exclude it all together. To justify their position, those scholars often cite two decisions from the Supreme People's Court (Hereafter referred to as the SPC). One is the 1955 "Reply" (*pifu*) to Xinjiang Higher People's Court stating that "in criminal judgments, the Constitution shall not be cited for the basis of determination of offence and sentencing."⁴⁴ Another is the 1986 "Reply"⁴⁵ to Jiangsu Higher People's Court that excluded the Constitution as a basis for court decisions. However, whether these two replies can be considered as a sufficient justification for judges and legal scholars to exclude the application of the Constitution is questionable. Do they mean that China's more than 3,000 courts should never refer to the Constitution in deciding cases? In fact, there have already been dozens of cases where Constitutional rights were referred to in China (Zhang, 2004, pp. 44-45; Zhu, 2013, pp. 23-26). In addition, if a Constitutional issue arises in a case but the Chinese courts feel they cannot cite the

Constitution in their judgments, the Legislation Law passed in 2000 authorizes them to refer to the National People's Congress (Hereafter referred to as the NPC) and its Standing Committee (Hereafter referred to as the NPCSC) or the SPC for a constitutional review, who in turn can either refer it to the NPCSC for clarification or interpretation, or use its own judgment (Zhu, 2013, pp. 30-31).

This is what happened in 2001 when a Shandong Court submitted Qi Yuling's case to the SPC⁴⁶, who interpreted that the Constitutional right to education was abridged in this case. Such an unprecedented interpretation indicated that the Constitution could be referred to in civil cases and raised hope for a “judicialization of the Constitution” or for a “reference (*yuanyin*) to the Constitution” in court decisions as a first step towards building a constitutional review system. In a discussion of his Court's decision in the Qi Yuling case, Judge Huang Songyou argued that the judiciary had an “inflexible understanding” of the judicial application of the Constitution in the past and hoped by reinterpreting the two replies as neither “thoroughly negating” nor “completely excluding” the possibility of applying the Constitution (cited in Shen Kui, 2003) that Chinese courts would use the Constitution.

In 2003, after the Sun Zhigang tragedy,⁴⁷ Xu Zhiyong, Teng Biao, and Yu Jiang used the “Review proposal” of the Legislation Law by sending a letter to the NPCSC that challenged the legality and constitutionality of the 1982 Measures on Detention and Repatriation of Urban Vagrants (Hereafter referred to as the Repatriation Law). Their action was widely reported and aroused much discussion in China. Eventually, the Repatriation Law was abolished by the State Council without any constitutionality review by the NPCSC. Xu Zhiyong later stated that their proposal aimed not only to have the Repatriation Law abolished, but also to initiate a constitutional review procedure by the NPCSC.⁴⁸ Encouraged by this partial success, and the 2004 amendment that included “human rights” in the Constitution, Xu Zhiyong's NGO “Open Constitution Imitative” (*Gongmeng*) went on advocating for a greater rule of law. In the following years, as a rights-defense movement (*weiquan yundong*) was emerging, many Chinese citizens also tried, in vain, to use the “Review proposal” to challenge the constitutionality and legality of several draconian measures and regulations that were drafted without public input. At the same time, the growing use of the new media helped to increase rights consciousness among concerned citizens.

In response, a guiding opinion (*zhidao yijian*)⁴⁹ issued in 2005 by the Beijing High People's Court on the regularization of written verdicts (*guifan panjueshu*) yet again clearly stated that there should not be any direct references to the Constitution (*bude zhijie yinyong xianfa*) in court decisions, be it administrative, civil, or criminal. In April 2006, a clampdown on the rights-defense movement coincided with a campaign launched by Luo Gan, the head of the Politico-legal committee (*zhengfawei*), to re-solidify the Party's leadership over the legal field.

In December 2007, the policy goal of “judicial independence” (*sifa duli*) further regressed with Hu Jintao's “Three Supremes” (*san ge zhishang*) speech, which subordinated the law to the basic strategic interests of the Party.

Eventually, the SPC formally withdrew its “Qi Yuling reply”⁵⁰ in 2008, further blocking the way for the Constitution to be used in Chinese courts. This move took place after the reform-minded SPC President, Xiao Yang, was replaced in March 2008 by the more conservative Wang Shengjun, who re-asserted Party interests and “stability” as priorities over judicial independence or judicialization of the constitution.

While it remains unclear whether or how the Constitution should be referred to in court decisions, it does not mean that the development of Constitutionalism in China is at a standstill either. In practice, many lawyers, intellectuals, and concerned citizens have been

trying to “reactivate the Constitution” (*jihuo xianfa*) (Teng, 2012a) by engaging in rights advocacy and promoting a Constitutional government.

For example, the drafters of Charter 08 emphasized that “Constitutionalism is the principle of guaranteeing basic freedoms and rights of citizens as defined by the constitution through legal provisions and the rule of law, restricting and defining the boundaries of government power and conduct, and providing appropriate institutional capability to carry this out”.⁵¹

At a Beijing workshop in 2008 on constitutionalism, Xu Zhiyong also encouraged Chinese citizens to continuously use the Constitution in order to shape and mobilize public opinion as a force that could affect government power in the long run (Hand, 2011, pp. 49-50).

The dispersal of this trend in the wider community was supported by a study of the social media monitoring company Crimson Hexagon that located 490,000 Chinese social media posts between Jan. 1, 2013 and Feb. 1, 2014 mentioning “constitutionalism”, “anti-constitutionalism”, or “socialist constitutionalism” with 84 percent of the comments evincing a pro-constitutionalism view (Caragliano, 2014).

3.2 The Political Context behind the Two Cases

Around the time of Liu Xiaobo’s trial in 2009, there were signs of a “turn against the law” (Minzner, 2011). Compared to 2007, the number of Chinese citizens arrested for “endangering state security” had more than doubled in 2008 and 2009.⁵² Individuals facing such criminal charges could not have their constitutional or legal rights protected, and their lawyer’s arguments were always disregarded because their client’s fate was already decided by Party-dominated adjudication committees.

In 2011, as the Arab Spring was unfolding, the NPCSC chairman Wu Bangguo delivered his “five no’s” (*wu bu gao*) speech at the NPC, repudiating “diversification of ideological guidelines” and “separation of powers,” warning that any loosening of the Party’s power could undermine “stability” and bring about dire consequences. This speech coincided with a clampdown on dozens of rights defenders, including criminal defense lawyers who were either disappeared, detained, or charged. It signaled that the leadership regarded severe “stability maintenance” (*weiwen*) measures like the use of draconian criminal laws as superior tools for stability maintenance than building the rule of law by implementing the Constitution. Conversely, Deng Yuwen warned that “the government has failed to build an effective and convincing value system that can be accepted by the majority of its people.”⁵³

Xu Zhiyong’s trial in January 2014 took place in the middle of an anti-Constitutionalism campaign that started in early 2013. After Xi Jinping said on the 30th anniversary of the 1982 Constitution that “the life of the Constitution lies in its implementation” and that it should be “the legal weapon for people to defend their own rights,” many voices expressed hope of seeing such words translated into action. However, when the New Year’s editorial of Southern Weekend (*Nanfang zhoumo*) entitled “China’s Constitutional Dream” was abruptly censored, it became clear that Xi Jinping only saw the Constitution as a political slogan that did not need to be implemented. Meanwhile, the progressive journal *Yanhuang chunqiu* whose New Year’s wish was “The Constitution is the Consensus for Political Structural Reform” also came under pressure. Although its editor Wu Si observed in late 2012 that “even the people who oppose constitutionalism do not oppose the implementation of the 1982 Constitution,”⁵⁴ it appeared that the political situation had changed under the new leadership.⁵⁵

In mid-2013, a Party directive known as Document No. 9 warned cadres about “problems related to the current state of the ideological sphere.” Listing “seven perils that should not be discussed” (*qi bu jiang*), it first attacked “Western constitutionalism” as “an attempt to undermine the Party’s leadership” and to “bring about a change of allegiance by bringing

Western political systems to China.”⁵⁶ Anti-constitutionalist views regarded Constitutionalism as “an alien concept that is dangerous for China’s reform trajectory and political stability.” (Creemers, 2014) However, Zhang Qianfan asked how calling for an implementation of the Constitution could be opposed since it “naturally does not mean implementing the US Constitution or the constitution of any other foreign country, but means implementing China’s own Constitution, the Constitution that the governing party took the initiative to formulate in 1982.”⁵⁷

While Xu Zhiyong was busy co-organizing initiatives such as the equal education campaign for children of migrant workers and the disclosure of officials’ assets as part of the emerging New Citizens Movement (*xin gongmin yundong*), the anti-Constitutionalism campaign continued. Pro-Party voices proclaimed in official journals and major state media that constitutionalism is a “discursive trap” (Zheng, 2013) and “a means of abolishing the leadership of the CCP and the socialist system” (Wang, 2013) backed by external “hostile forces” (*didui shili*) that “belong to capitalism” (Yang, 2013). The conspiratory overtones of these official voices became more ominous when the legal scholar Zhang Xuezhong was sacked by East China University of Politics and Law after publishing a text entitled “The Origins and Perils of the Anti-Constitutionalism Campaign in 2013” (*2013 fan xianfa niliu de genyuan weixian*).

As the Re-education through labor system was to be abolished by the end of the year, in June 2013 a directive was issued by China’s national prosecutor’s office asking local prosecutors “to pursue activists harboring political intentions by using charges of disrupting public order rather than subversion.”⁵⁸ In its annual report on the situation of Chinese human rights defenders, an NGO documented for 2013 “the most severe level of suppression in over a decade”⁵⁹ with 220 criminal detentions and arrests, a nearly three-fold increase from 2012.

While “subversion”⁶⁰ charges are most commonly used as a “pocket crime” targeting veteran dissidents such as Liu Xiaobo, “disrupting public order” charges are increasingly used against the political views⁶¹ of a younger generation of rights defenders like Xu Zhiyong, who usually focus on the law by widening their social reach through the new media.

If, as Teng Biao phrased it, the degree of tolerance of the authorities is basically determined “by the average level of those already imprisoned” (quoted by Eva Pils, 2014), then the increasing number of arrests indicates that the political space for voices expressing different political views than the regime became much tighter in recent years, as shown by the silencing of Xu Zhiyong’s voice.

For over a decade, Chinese rights defenders have aimed at defusing various politically sensitive issues by trying to peacefully resolve them through non-ideological uses of the law and the constitution. They acted “as if” those “inside the system” (*tizhinei*) had already discarded the ideological legacy of Mao’s era that promoted an enemy mentality. However, the authorities eventually reverted back to a Maoist mind-set by seeing or framing the emergence of rights defenders as a threat. As a result, they suppressed them in the name of “state security” and “public order.”

4. Conclusion

The two cases discussed in this article have occurred during a Constitutional debate and have contributed to this debate through the lawyers and scholars’ advocacy for the application of the Constitution. On the government side, however, a trend against constitutionalism has been prevailing and impeding the attempt to apply Constitutional rules in each case.

While there were hopes in late 2012 that the Constitution could provide a basis to re-build some consensus around a political reform agenda, the campaign against constitutionalism aimed at re-ideologizing the constitution in order to reduce it to a political slogan. Thus

quarantining off from public debate the very goal of constitutionalism as a proxy for political reform.

As Party leaders perceived a decline in their power to “guide public opinion” (*yulun daoxiang*) and in the privileges they drew from treating the judicial system as an administrative body, they came to see themselves as increasingly embattled in a “public opinion struggle” (*yulun douzheng*) over the meaning of China’s laws and Constitution. As a result, they responded by mobilizing the Party’s “stability maintenance” and propaganda apparatus with the goal to regain control over emerging civil society forces. Consequently, “public opinion supervision” (*yulun jiandu*) in traditional and new media became more unpredictable.

Instead of responding to the aspirations of a pluralizing Chinese society, Xi Jinping’s government has been employing increasingly repressive measures such as arbitrary arrests and detentions that incite fear and self-censorship. The revival of a Maoist language reminiscent of the Cultural Revolution also re-activated a friend/enemy worldview that has been used as a justification to discard the principle of equal individual rights before the law.

Ultimately, the “dream of constitutionalism” largely depends on the Party leaders’ willingness to engage in political reforms. At the same time, if they continue their obsessive quest for “rigid stability maintenance” (*gangxing weiwen*) and “discursive power” (*huayu quan*) as the main governing tools to respond to domestic calls for the implementation of their own Constitution, the problems raised by constitutional advocates will not just disappear because they are jailed or silenced. For instance, as the lawyer Fu Minrong observed as regards the problem of corruption, “if Xi gets his way in the name of ‘sweeping away corruption’ while he is also ‘sweeping away constitutionalism,’ the root causes of corruption won’t be addressed until laws get in line with the constitution and institutions implement them. Instead a new anti-corruption agency, it would be better if the courts could start doing their job: apply the Constitution under the supervision of watchful citizens.”⁶²

For the time being, while an increasing number of Chinese citizens seem to find Constitutionalism ever more important, it is clear that the Chinese authorities regard Constitutionalism as a dangerous vision that has the potential to challenge the very foundations of their political system. But as long as those in power choose to repress the fundamental constitutional rights in cases such as Liu Xiaobo and Xu Zhiyong, the voices of Chinese citizens advocating for Constitutionalism are unlikely to remain silent.

¹ Liu Xiaobo First Instance Verdict, Beijing Municipal No. 1 Intermediate People’s Court, Criminal Division, First-Instance Verdict No.3901, 25 December 2009 ; Liu Xiaobo represents one case among many other human rights defenders prosecuted under “inciting subversion of state power” with long imprisonment sentences, including *inter alia* Tan Zuoren (5 years) in 2010, Liu Xianbin (10 years), Chen Wei (9 years), Chen Xi (10 years), Li Tie (10 years), Zhu Yufu (7 years), Cao Haibo (8 years) in 2012 and Liu Benqi (3 years) in 2014. According to the Supreme People’s Court’s verdict database, several cases involving Falun Gong were also prosecuted under this charge. For cases before 2010, see e.g., Guo, 2008.

² Criminal Law, Article 105 (2).

³ Liu Xiaobo First-Instance Verdict, Beijing Municipal No. 1 Intermediate People’s Court, Criminal Division, First-Instance Verdict No.3901, 25 December 2009. English translation of Liu Xiaobo’s First-Instance Verdict cited in this article is all made by Human Rights in China, available at: <http://www.hrichina.org/en/content/3209>, accessed 10 January 2015.

⁴ These six articles include: “Can It Be that the Chinese People Deserve Only ‘Party-Led Democracy’?”, “Further Questions about Child Slavery in China’s Kilns”, “The Dictatorial Patriotism of the Communist Party of China”, “To Change the Regime by Changing Society”, “The Multiple Faces of the Dictatorship by the Communist Party of China” and “The Negative Effects of the Rise of Dictatorship on World Democratization.”

⁵ The Court Verdict cites websites such as “Observe China” (*guan cha*) and “BBC Chinese Net” among others.

⁶ For example, when the CCP regime is described as a “dictatorship” (*ducai*).

⁷ The official interpretation of the meaning of “rumour”, “defamation”, “libel” or “slander” has been very much contested in recent years since they became constitutive elements of the prosecution to “justify” limits on the right to freedom of expression. For a more detailed discussion, see Yan, 2011.

⁸ For example, it cites Charter 08: “abolish the special privilege of one party to monopolize power” and “aim ultimately at a federation of democratic communities of China.” It is important to bear in mind that those statements were taken out of context, as if it was possible to interpret their meaning without considering the overall argument of the author. In other occasions, Liu Xiaobo also wrote passages about the importance of gradual, peaceful, orderly approach to reform (an argument Liu Xiaobo articulated in “My self-defense”, see Link, Martin- Liao and Liu, 2012, p. 316). Despite this fact, as his lawyers argued in the first instance of his Court trial, the prosecutors Zhang Rongge and Pan Xueqing extrapolated Liu Xiaobo's thought out of 330 characters, without taking into account the five million characters that constitute his work. This quantitative argument of the defence responds to the prosecution's efforts at quantifying the “damage” or “social harm” of his articles by citing as evidence the number of page views each article received on the Internet as if it was a reliable “forensic data” to measure a potential to “incite subversion.”

⁹ Liu Xiaobo First-Instance Verdict, Beijing Municipal No. 1 Intermediate People’s Court, Criminal Division, First-Instance Verdict No.3901, 25 December 2009. English translation of Liu Xiaobo’s First-Instance Verdict cited in this article is all made by Human Rights in China, available at: <http://www.hrichina.org/en/content/3209>, accessed 10 January 2015.

¹⁰ Xu Zhiyong’s First-Instance Verdict, Beijing Municipal No. 1 Intermediate People’s Court, Criminal Division, First-Instance Verdict No. 5268 (2013), 26 January 26, 2014, The English translation done by a group of volunteers available at <http://www.hrichina.org/en/citizens-square/xu-zhiyongs-first-instance-verdict-english-translation>, accessed 10 January 2015.

¹¹ Xu Zhiyong Closing Statement to the First Instance Court, 22 January 22, 2014, English translation is made by volunteers for China Change, <http://chinachange.org/2014/01/23/for-freedom-justice-and-love-my-closing-statement-to-the-court/>, accessed 12 January 2015.

¹² Xu Zhiyong’s First-Instance Verdict, Beijing Municipal No. 1 Intermediate People’s Court, Criminal Division, First-Instance Verdict No. 5268 (2013), 26 January 26, 2014, The English translation done by a group of volunteers available at <http://www.hrichina.org/en/citizens-square/xu-zhiyongs-first-instance-verdict-english-translation>, accessed 10 January 2015.

¹³ In this article, we consider Freedom of Expression and Freedom of Speech interchangeable in the Chinese legal context, since distinctions between the two do not matter as much as in other jurisdictions.

¹⁴ Defence Statement of the First Instance, The Beijing Municipal No. 1 Intermediate People’s Court, Criminal Justice Court No. 11, Translation by HRiC, <http://www.hrichina.org/en/content/3206>, accessed 12 January 2015.

¹⁵ This statistic is calculated based on the defence statement in Chinese. In the first instance defence statement, Freedom of Speech (*yanlun ziyou*) is mentioned 11 times, Freedom of Expression (*biaoda ziyou*) one time, and Constitution (*xianfa*) 13 times. In the appeal defence statement, much shorter than the first instance defence statement, Freedom of Expression (*biaoda ziyou*) is mentioned 8 times.

¹⁶ Defence Statement of the First Instance, The Beijing Municipal No. 1 Intermediate People’s Court, Criminal Justice Court No. 11.

¹⁷ Liu Xiaobo First-Instance Verdict, Beijing Municipal No. 1 Intermediate People’s Court, Criminal Division, First-Instance Verdict No.3901, 25 December 2009.

¹⁸ *Ibid.*

¹⁹ See BBC, Zhang Qingfang talk about Xu Zhiyong First-Instance Verdict, 26 January 2014, Audio file available at http://www.bbc.co.uk/zhongwen/simp/multimedia/2014/01/140126_aud_china_xu_verdict.shtml, accessed 12 January 2015. A day after the trial, Ai Xiaoming interviewed Zhang Qingfang who described the trial as the “monologue” of a “one-party’s performance” where “the prosecutor takes a deer to court and says it is a horse, and asks the court to confirm it is a horse.” See, Ai Xiaoming blog, <http://aixiaomingstudio.blogspot.fi/2014/02/blog-post.html?spref=tw>, accessed 12 January 2015.

²⁰ Xu in fact did not finish reading his closing statement, which was abruptly terminated by the trial panel after he started to present it during the trial.

²¹ Xu Zhiyong Closing Statement to the First Instance Court, 22 January 22, 2014, English translation is made by volunteers for China Change, <http://chinachange.org/2014/01/23/for-freedom-justice-and-love-my-closing-statement-to-the-court/>, accessed 12 January 2015.

²² Appeal Defence Statement for Dr. Xu Zhiyong’s second instance trial by Liu Shuqing, 11 April 2014. <http://xgmyd.com/archives/1486>, accessed 12 January 2015.

²³ *Ibid.*

²⁴ In response to petitions submitted to the UN Working Group on Arbitration Detention on behalf of the Liu Xiaobo and Liu Xia by the NGO Freedom Now, the Chinese government replied on 13 April 2011 that free

speech is limited by articles 51 and 54 of the PRC Constitution, in line with article 19, paragraph 3, of ICCPR, arguing that it justifies restrictions on freedom of expression.

²⁵ Since Liu Xiaobo's charge falls under Endangering State Security crimes, his lawyers also cited Principle 6 of Johannesburg Principles on National Security, Freedom of Expression and Access to Information (updated and renamed as Tshwane principles in June 2013) stating that “expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”

²⁶ *Schenck v. United States*, 249 U.S. 47 (1919).

²⁷ See, Teng Biao, *Open Proposal on Judicial Review of the Law on Assemblies, Processions and Demonstrations (dui jihui youxing shiweifa tiqi weixian shencha de gongkai jianyi)* http://blog.boxun.com/hero/201401/tengb/1_1.shtml, accessed 10 January 2015.

²⁸ Canyu, “Professor Jiang Ping comments on Liu Xiaobo Case: A Sheer Punishment because of Speech”, 23 February 2010, <http://canyu.org/n13503c6.aspx>, accessed 12 February 2015.

²⁹ China Perspective, “Cui Weiping telephoned for opinion on Liu Xiaobo case (2)”, <http://www.chinainperspective.com/ArtShow.aspx?AID=4264>, accessed 12 February 2015.

³⁰ China Digital Times, “Minitrue: Silencing Xu Zhiyong”, <http://chinadigitaltimes.net/2014/01/minitrue-silencing-xu-zhiyong>, accessed 12 February 2015.

³¹ Xinhua news, “Beijing court upholds Liu Xiaobo's initial sentence”, 11 February 2010, http://news.xinhuanet.com/english2010/china/2010-02/11/c_13172103.htm, accessed 10 January 2015.

³² Chen Weidong played a key role in drafting the 1997 Criminal Procedure Law. While this article does not address the procedural issues in each case, numerous procedural violations took place in both cases.

³³ Zhao Bingzhi is president of the Criminal Law Scientific Research Institute at Beijing Normal University and of the China Law Society's Criminal Law Research Committee.

³⁴ Xinhua news, 11 February 2010.

³⁵ Xinhua News, Suowei “yinyanhuozui” shi dui Liu Xiaobo an panjue de wudu—xingfaxue zhuanjia tan Liu Xiaobo an yu yanlunziyou, http://news.xinhuanet.com/world/2010-10/25/c_12698346.htm, accessed 10 January 2015. English translation available at: <http://www.cecc.gov/so-called-punishment-because-of-speech-is-a-misreading-of-the-judgment-in-the-liu-xiaobo-case>, accessed 10 January 2015.

³⁶ See Guancha, 18 February 2014, Tang Xuhui: Ye tan Xu Zhiyong an yu xianfa, http://www.guancha.cn/TangXuHui/2014_02_18_206949.shtml, accessed 10 January 2015.

³⁷ Jiang Shigong is a professor of Jurisprudence at Peking University and a translator of Carl Schmitt. His discussions about judicial review and judicial judgment are based on the Qi Yuling case about the right to education. See Jiang 2003. For a discussion of the ideological dimension of his work, see Holbig, 2014.

³⁸ See, Guancha, 18 February, 2014.

³⁹ Chinese Constitution, Article 35; ICCPR, Article 19.

⁴⁰ General Comment No. 34 of the UN Human Rights Committee, Article 11.

⁴¹ *Ib*, Article 21.

⁴² They include three official agencies (police, procuratorate and court). According to the Constitution, they are supposed to mutually “restrain” and “supervise” one another, but in practice they more often “coordinate” with one another to enforce orders from party leaders. Mike McConville also noted in his book “Criminal Justice in China: An Empirical Inquiry” (2011) the endurance of a Mao-era view of the criminal process in which the courts, police and prosecutors work together like “three workshops in the same factory.” The most powerful of the three is the police, who “holds the hilt” (*dao bazi*), to use a Mao's era metaphor.

⁴³ E.g. Yuen, 2013; Zhu, 2013.

⁴⁴ See full text in Chinese: http://china.findlaw.cn/fagui/p_1/135999.html, accessed 12 January 2015.

⁴⁵ *Zuigao renmin fayuan guanyu renmin fayuan zhizuo falu wenshu ruhe yinyong falu guifanxing wenjian de pifu* (1986). The text in Chinese is available at http://www.law-lib.com/Law/law_view.asp?id=3936, accessed 12 January 2015.

⁴⁶ *Zuigao renmin fayuan guanyu yi qinfan xingmingquan de shouduan qinfan xianfa baohu de gongmin shoujiaoyu de jiben quanli shifou ying chengdan minshi zeren de pifu*, *Fashi 25 hao Sifa Jieshi*, [No. 25 [2001] of the Interpretations of the Supreme People's Court of the People's Republic of China], 24 July, 2001, effective 13 August, 2001, available at http://www.law-lib.com/law/law_view.asp?id=15994

⁴⁷ On 20 March 2003, Sun Zhigang, a young university graduate was detained for not carrying his temporary living permit, and later he was beaten to death in the detention centre. After this case was reported by *Nanfang zhoumo*, a leading newspaper in China, it aroused nationwide discussion about the abolishing of the system of custody and repatriation.

⁴⁸ Xu Zhiyong blog, 9 November 2012, Sun Zhigang zhi si-gongmin jianyi, http://xuzhiyong2012.blogspot.ca/2012/11/blog-post_6799.html, accessed 10 January 2015.

⁴⁹ See, Beijingshi gaoji renmin fayuan guanyu yinfa <Beijingshi gaoji renmin fayuan guanyu guifan panjueshu yuanyin falü deng youguan wenti de zhidao yijian> de tongzhi, Jinggaofa[2005]No.341, 14 December 2005, http://code.fabao365.com/law_104716.html, accessed 12 January 2015.

⁵⁰ Notice of the Supreme People's Court, 18 December 2008. This notice stated that the previous "Reply" regarding Qi Yuling, a kind of judicial interpretation, issued by the Supreme People's Court, was considered "no longer applicable" and thus "abolished"; see also, Zhu, 2013, p. 4.

⁵¹ Charter 08, English translation available at http://www.foreignpolicy.com/articles/2010/10/08/charter_08, accessed 12 January 2015.

⁵² Dui Hua Foundation, "Official Data Show State Security Arrests, Prosecutions in China Remained at Historical Levels in 2010," 12 March 2011, available at: http://duihua.org/wp/?page_id=1812, accessed 20 April 2015.

⁵³ See English translation available at: <http://www.thechinastory.org/2012/09/the-ten-grave-problems-facing-china>, accessed 12 January 2015.

⁵⁴ See English translation available at: <https://chinacopyrightandmedia.wordpress.com/2013/09/26/how-to-implement-the-1982-constitution-an-expert-group-talk>, accessed 12 January 2015.

⁵⁵ For an in-depth review and analysis of the Constitutional debate in 2013, see Creemers, 2014.

⁵⁶ See English translation available at: <http://www.chinafile.com/document-9-chinafile-translation>, accessed 12 January 2015.

⁵⁷ Ibid.

⁵⁸ See <http://bigstory.ap.org/article/china-hits-activists-common-crime-charges>, accessed 12 January 2015.

⁵⁹ See http://chrdnet.com/wp-content/uploads/2014/03/CHRD_XJP_online.pdf, accessed 12 January 2015.

⁶⁰ Further discussion about the crime of subverting state power, see, Teng, 2012b, pp. 271-288.

⁶¹ E.g., in September 2014, Ilham Tohti, a Uyghur scholar and university professor, was sentenced to life imprisonment with confiscation of all his assets for "Separatism." The main evidence of his sentence is his articles and speeches, which relates to freedom of expression, though Ilham Tohti's lawyer did not defend the case by using the Constitutional rights. In 2014, more people, including influential scholars Xu Youyu, Guo Yushan, Hao Jian, lawyer Pu Zhiqiang, and many others, were detained under the crime of "disrupting public order." Even if there are other legal reasons for their detention, it is rational to presume that their cases relate to freedom of expression too, since most of these people have publicly expressed their critical opinion about the political system or political issues in China, e.g., organizing discussions of the 1989 Tian'anmen Incident, supporting the 2014 Hong Kong students' "Occupy Central" fighting for a real universal suffrage of the election of the Hong Kong Chief Executive in 2017, etc.

⁶² See Weibo post available at: http://www.weibo.com/1110550747/zCj35hMPQ#_rnd1424645590950, accessed 12 January 2015.

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