

Constitutional Review in China: An Unaccomplished Project or a Mirage?

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I. INTRODUCTION

A general perception exists that constitutional review is not a part of modern Chinese jurisprudence. That view is mistaken. The aim of this essay is to show that, while substantial constitutional change has not yet been established, it is arguable that a unique Chinese brand of constitutionalism has taken root and is evolving. A classic understanding of the concept of judicial review is “a court’s power to review the actions of other branches or levels of government,” including a court’s “power to invalidate legislative and executive actions as being unconstitutional.”¹ Judicial review has become an established part of contemporary constitutionalism in Western jurisprudence.

Constitutional review, another expression of judicial review closely associated with the discussion of constitutional law, is the power of courts to examine whether legislation enacted by the parliament or acts of the executive authorities are consistent with the written constitution and, within this query, to determine their validity. This system commands a primordial condition: courts receive jurisdiction through the constitution and use that jurisdiction to determine constitutionality. Needless to say, constitutional review is an innovation derived from the American constitutional case *Marbury v. Madison*,² which has become the standard for democratic constitution-making, and a reference for other countries looking to modernize their constitutional regime.

If the above definition were applied literally to China, any constitutional scholar must conclude without any ambiguity that constitutional review does not exist in China. First, the current Constitution, adopted in 1982, does not

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1. BLACK’S LAW DICTIONARY 864 (8th ed. 2004) (defining judicial review).

2. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This landmark case determined that Article III of the United States Constitution authorizes judicial review.

contain any provisions for constitutional review. Second, Chinese courts are not given, expressly or implicitly, the ability to exercise such a review power. Instead, courts in China merely apply the law, without the power of interpreting the law in adjudicating cases. Chinese courts performing judicial review of constitutionality is far from being a part of Chinese jurisprudence.

A more holistic approach to constitutional review is emerging in Chinese legal academic debate that contemplates contemporary public law in a manner different from the classic approach. The difference lies in the understanding of the functions of constitutional review, which, in my view, should be: (i) the assurance that legislation complies with the Constitution, and (ii) the resolution of disputes among different branches of government. The assurance of constitutional compliance of legislation seems to be the first and original meaning of constitutional review. The second function of constitutional review—the resolution of disputes among different branches of government—is being widely acknowledged as an equally important mechanism in both mature and emerging democracies. The role of arbitrator is in most cases played by courts, but it can also be played by the national legislature, as is provided in the Chinese Constitution.

Considering the Chinese Constitution and the second element of constitutional review, we can conclude that constitutional review exists in China, as the Constitution establishes a system of constitutional review with the power of review vesting in the legislature instead of courts.

This essay will first trace how this system of constitutional review has been set up and evaluate its efficiency. Second, the essay will explore the development of constitutional review by courts in China by examining the *Qi Yuling* case and relevant judicial interpretations. Finally, the essay will discuss the theoretical development of the establishment of constitutional review in China, as well as comment on the major ideas and suggestions related to it.

II. CONSTITUTIONAL REVIEW OF LEGISLATION AS FRAMED BY THE CONSTITUTION

A. *The People's Congress System and Constitutionalism*

The fundamental Chinese political system is framed by the Constitution as a people's congress system. According to the Constitution, this system has the following salient features: “[a]ll power in the People’s Republic of China belongs to the people;”³ “[t]he organs through which the people exercise state power are the National People’s Congress and the local people’s congresses at different levels;”⁴ “[a]ll administrative, judicial and procuratorial organs of the state are created by the people’s congresses to which they are responsible and

3. XIAN FA art. 2, § 1 (1982) (P.R.C.).

4. *Id.* art. 2, § 2.

under whose supervision they operate;”⁵ and “[t]he state organs of the People’s Republic of China apply the principle of democratic centralism.”⁶

Under the people’s congress system, the National People’s Congress (NPC) is the highest organ of state power, and its permanent body is the Standing Committee of the National People’s Congress (NPCSC). Together, the NPC and the NPCSC carry out the legislative power of the state. These provisions qualify the constitutional status of the NPC (and thus, the NPCSC) and define it as the sole, highest organ of power. This confirms that all state power is actually centralized in one body with no separation of powers. This regime of highly centralized power is believed to have been rooted in the previous governmental practices under the Communist Party of China (CPC) in the 1930’s and 1940’s.⁷ This centralized system is radically different from the conventional Western conceptualization of separation of powers. Though it looks like a parliamentary system, considering that the NPC is the highest legislature in China, the people’s congress system is still substantively different, as the creation of the judicial and procuratorial organs is completely subject to the decision of the NPC and, probably most importantly, the NPC is not organized through universal suffrage.

The NPC, while generally acknowledged as a “rubber-stamp,” does play a substantial role in the modern decision-making and law-making processes. Although one scholar asserts that “[i]t is no longer a secret that the National People’s Congress . . . has recently shed its ‘rubber-stamp’ character and emerged as an independent and influential force in China’s political arena,” the main role of the NPC is essentially limited to the implementation of CPC policies by translating them into laws or regulations.⁸ The claim that the NPC has become an “independent” force is exaggerated. The four constitutional amendments since 1988 have confirmed this position. The dynamics of the relationship between the Party and the State can only be understood in this “Party-State” framework. It is arguable, however, that the NPC could realize a “soft-landing” for constitutionalism in China by reforming the people’s congress system and transforming itself into a full-range and all-around legislative body.⁹ In theory, the NPC enjoys total state power, as it is a totalitarian type body. As the highest organ of state power, the NPC exercises a full range of powers, which can be categorized into legislative power, decision-making power, power of appointment and removal, and power of supervision.¹⁰

5. *Id.* art. 3, § 3.

6. *Id.* art. 3, § 1.

7. See XU CHONGDE, XIANFA [CONSTITUTIONAL LAW] 108-09 (Renmin University of China Press 1999).

8. Michael W. Dowdle, *The Constitutional Development and Operations of the National People’s Congress*, 11 COLUM. J. ASIAN L. 1, 1 (1997) (articulating role of NPC in China’s political domain).

9. See SUN ZHE, QUANGUO RENDA ZHIDU YANJIU [A Study of the National People’s Congress of China] 29-30 (Law Press China 2004).

10. See ZHU GUOBIN, ZHONGGUO XIANFA YU ZHENGZHI ZHIDU [Constitutional Law and Political

It is believed that the NPC's "power to legislate for China is preeminent among the multiple powers that it exercises."¹¹ As part of its power of supervision, the NPC exercises constitutional review and ensures the compliance of the law with the Constitution.

B. "Legislative Supervision" as Constitutional Review: Its Foundation and Rules

The NPC and the people's congresses both exercise supervisory power. Supervisory power is a mandatory power of examination, investigation, oversight, rectification, and review. The NPC and the people's congresses exercise this power at all levels, and therefore over the organs created by them and their activities. The purpose of supervisory power is to fully guarantee the implementation of national laws, prevent the executive and judicial branches of government from abusing power, and protect people's fundamental rights and interests.¹² As the highest organ of power as well as the highest legislature, the NPC exercises its power of supervision over legislative acts, implementation of law, executive actions, the judiciary, the state personnel, the military, and foreign affairs.¹³

The NPC's supervisory power over laws and regulations is often called "legislative supervision." This refers to the supervisory activities of "the people's congresses and their standing committees to examine whether laws, regulations and other normative instruments violate the Constitution, laws, and resolutions and decisions of the people's congresses."¹⁴ The purpose of legislative supervision is to ensure the following: "that general laws are consistent with the Constitution and basic laws," that regulations are consistent with the laws, that all normative instruments are consistent with the laws, that the people's congresses make all resolutions and decisions, and that the unity of the State legal system is maintained.¹⁵

The Constitution provides for the foundation of legislative supervision, in other words, constitutional review of legislation, when it states that "no law or administrative or local rules and regulations shall contravene the Constitution."¹⁶ Some scholars claim that any review must be confined to law, administrative rules and regulations, and local rules and regulations. This is not

Institutions of China] 118-23 (Law Press China, 2d ed. 2006); *see also* CAI DINGJIAN, ZHONGGUO RENMIN DAIBIAO DAHUI ZHIDU [The People's Congress System of China] 259 (Law Press China, 4th ed. 2003).

11. *See* Jiang Jinsong, THE NATIONAL PEOPLE'S CONGRESS OF CHINA 176 (Foreign Language Press 2002) (translation by author).

12. *See* XIAN FA art. 3, § 3 (1982) (P.R.C.). Article Three states "[a]ll administrative, judicial and procuratorial organs of the state are created by the people's congresses to which they are responsible and under whose supervision they operate." *Id.*

13. *See* CAI DINGJIAN, *supra* note 10, at 373-83.

14. *See id.* at 259.

15. *Id.* at 373.

16. XIAN FA art. 5, § 3 (1982) (P.R.C.).

true. Based on the 2000 *Li fa fa* [Law on Legislation], legislation encompasses seven categories: law, administrative rules and regulations, local rules and regulations, rules of departments and local governments, autonomous regulations and specific regulations, military rules and regulations, and rules and regulations by delegated authorities and by special economic zones.¹⁷

Scholars regard these seven forms of law as formal laws that refer to “the normative legal instruments taking statutory forms, which are made by the specific institutions of the State in exercising legislative power, and in accordance with legal procedures.”¹⁸ In Chinese civil society, in addition to formal laws, many substantive laws exist. In the broad sense of law, they also constitute part of the legal system in China. Substantive laws are: resolutions and decisions adopted by the NPCSC and local people’s congresses and their standing committees, decisions and decrees issued by the Central Military Commission, the State Council, and local people’s governments at all levels, and decisions, orders, and directives made by departments of the State Council and departments of local people’s governments at all levels.¹⁹ The substantive laws also include resolutions, decisions, and directives adopted by the Central Committee of the CPC, and functional departments of the CPC, some of which are jointly adopted by the Central Committee and the State Council. Although these forms of normative instruments are not recognized by the Law on Legislation as formal laws and regulations, they should be taken as part of functional law and real law, because they are made by the specific institutions, repetitively applied to unspecified objects, and have general legal effect. As such, substantive laws should be included when exercising legislative supervision.²⁰

In China, there is a practice of decentralization of law making. Both the State Council and the local people’s congresses have the power to make administrative and local rules and regulations. This practice contradicts the theory of the unitary state of China. In my view, it mirrors a de facto legislative federalism. Furthermore, the diversity of categories and forms of laws underline the complexity of the legal system. This gives rise to the necessity of creating a system of legislative review, the purpose of which is to uphold “the uniformity and dignity of the socialist legal system.”²¹

The system of legislative review develops at two levels and for two purposes: to review law on the basis of constitutionality, and to review other

17. See generally *Li fa fa* [Law on Legislation] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 112 (P.R.C.).

18. See Qin Aolei & Wang Kai, *Zhongguo weixian shencha* [Constitutional Review in China], in WEIXIAN SHENCHA BUIAO YANJIU [A COMPARATIVE STUDY OF CONSTITUTIONAL REVIEW] 326 (Hu Jingguang ed., Renmin University of China Press 2006) (translation by author).

19. See *id.* at 328.

20. See *id.*

21. XIAN FA art. 5, § 2 (1982) (P.R.C.).

forms of law on the basis of legality. The Constitution authorizes the NPCSC to exercise the power of constitutional review by granting the NPCSC the power:

to interpret the Constitution and supervise its enforcement . . . to annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the statutes . . . [and] to annul those local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the Central Government that contravene the Constitution, the statutes or the administrative rules and regulations.²²

The NPCSC's power to examine whether administrative rules and regulations contravene the Constitution is actually the power of constitutional review.

C. Review of Constitutionality and Legality

Based on the above provisions, the NPCSC exercises the power of review of legality over other rules and regulations as well. As a matter of both law and fact, the Constitution and the Law on Legislation do not make a clear distinction between the review of constitutionality and the review of legality. The Law on Legislation defines the system and process of legislative review as follows:

The authorities for amending or canceling a national law, administrative regulation, local decree, autonomous decree or special decree, and administrative or local rule are as follows: The National People's Congress has the authority to amend or cancel any inappropriate national law enacted by its Standing Committee, and to cancel any autonomous decree or special decree approved by its Standing Committee in violation of the Constitution or the provision of Paragraph 2 of Article 66 hereof; The Standing Committee of National People's Congress has the authority to cancel any administrative regulation which contravenes the Constitution or any national law, and to cancel any local decree which contravenes the Constitution or any national law or administrative regulation, and to cancel any autonomous decree or special decree approved by the Standing Committee of the People's Congress of any province, autonomous region, or municipality directly under the central government in violation of the Constitution or the provision of Paragraph 2 of Article 66 hereof; The National People's Congress has the authority to amend or cancel any inappropriate administrative rule or local rule; The People's Congress of a province, autonomous region, or municipality directly under the central government and the Standing Committee thereof has the authority to

22. *Id.* art. 67.

amend or cancel any inappropriate local decree enacted by its Standing Committee or any inappropriate local rule approved by its Standing Committee; The Standing Committee of a local People's Congress has the authority to cancel any inappropriate rule enacted by the local government; The People's Government of a province, autonomous region, or municipality directly under the central government has the authority to amend or cancel any inappropriate local rule enacted by a lower level People's Government; The enabling body has the authority to cancel the administrative regulation or local decree which has been enacted by the enabled organ acting beyond its scope of authority or in violation of the objective of the enabling decision, and where necessary, the enabling body may revoke the authorization.²³

The above definitions reveal that the review of constitutionality is conducted by the NPC and the NPCSC, while the review of legality is conducted by the State Council, the local people's congress and its standing committee, and the local people's government.

Being the highest organ of state power and the highest legislature of the country, the NPC and NPCSC's power of constitutional review corresponds to the theory of the people's congress. Under the polity of the people's congress, only the NPC and NPCSC can exercise this constitutional power. Chinese scholars Qin Aolei and Wang Kai conclude that the review of constitutionality by the NPC or NPCSC applies to the following categories of law and regulation: law, administrative rules and regulations made by the State Council under Article 89 of the Constitution regarding the functions and powers of the State Council, local governmental rules regarding concrete local administrative matters under Article 107 of the Constitution, local regulations concerning local affairs which need to be regulated locally under Articles 99 and 104 of the Constitution, local regulations concerning matters that have not yet been regulated by national laws or administrative regulations yet, autonomous regulations and specific regulations, and other not yet formalized substantive laws.²⁴ Qin and Wang actually expanded the scope of review by including local government rules regarding concrete local and administrative matters under Article 107 of the Constitution, which, in my view, should be subject to the review of legality by the State Council and/or the local people's congress involved.

However, I support the inclusion of resolutions, decisions, and directives jointly adopted by the Central Committee of the CPC and the State Council. This category of normative instruments has the substantive authority of law and general legal effect. The review of these instruments certainly constitutes a

23. Li fa fa [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT'L PEOPLE'S CONG. PEOPLE'S CONG. GAZ. 112, arts. 78-80 (P.R.C.).

24. Qin Aolei & Wang Kai, *supra* note 18, at 329; *see* XIAN FA arts. 89, 99, 104, 107 (1994) (P.R.C.).

challenge to the current constitutional regime and poses serious problems of feasibility and applicability. The dilemma we are facing is how to understand the constitutional provisions in regard to the role and status of the ruling party. On the one hand, “all political parties and public organizations . . . in the country must take the Constitution as the basic norm of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation;” but on the other hand, “the Chinese people of all nationalities will continue to adhere to the people’s democratic dictatorship and the socialist road.”²⁵ The question is now whether the CPC and its decisions and acts, in the name of the ruling party, are subject to constitutional scrutiny and review. Finding the answer to it will obviously not be easy.

D. Hierarchy of Legal Authority as the Basis of Review

The people’s congresses, at different levels, and the State Council, have distinct roles in reviewing laws, and the review must observe a hierarchical system of legal effect or authority. The Constitution and the Law on Legislation actually have established a set of rules to guide the practice.

The system of legal authority is structured as follows: the Constitution has the highest legal authority, and no national law, administrative regulation, local regulation, autonomous regulation and special regulation, or administrative or local rule may contravene the Constitution; national law (made by the NPC and the NPCSC) has higher legal authority than administrative regulations, local decrees and administrative or local rules; administrative regulations (made by the State Council) have higher legal authority than local regulations and administrative or local rules; local regulations (made by the people’s congress and its standing committees at the provincial level) have higher legal authority than local rules issued by governments at the same or lower levels; and local rules (enacted by the people’s government of a province or autonomous region) have higher legal authority than local rules enacted by the people’s government of a “major city” located in its jurisdiction.²⁶

Following the hierarchy of law and the order of legal authority, once a conflict of law arises, the NPC and the local people’s congresses shall directly annul the conflicting laws, rules, and regulations, or demand that the enacting authorities annul or alter them. The process of reviewing laws and regulations on the basis of constitutionality and legality, however, is subject to two exceptions derived from the Constitution and the Law on Legislation. First, the people’s congresses of national autonomous areas may promulgate autonomous

25. XIAN FA pmbl. (1994) (P.R.C.).

26. See XIAN FA art. 5 (1994) (P.R.C.); Li fa fa [Law on Legislation] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT’L PEOPLE’S CONG. PEOPLE’S CONG. GAZ. 112, arts. 78-80 (P.R.C.). “Major city,” refers to “a city where the People’s Government of the province or autonomous region is seated, the city where a special economic zone is located, and any other major city approved by the State Council.” Li fa fa [Law on Legislation] art. 64, § 4.

and specific regulations that vary national law, administrative regulations, and local regulations “in . . . light of the political, economic, and cultural characteristics of the . . . nationalities in the areas concerned.”²⁷ Additionally, “any such variance shall not violate the basic principles thereof, and no variance is allowed in respect of any provision of the Constitution or the *Minzu quyue zizhi fa* [Law on Regional National Autonomy] and provisions of any other law or administrative regulations which are dedicated to matters concerning national autonomous areas.”²⁸ Thus, the inconsistency, if it exists, should not be regarded as contravening constitutional law. Second, the four special economic zones (Shenzhen, Zhuhai, Shantou and Xiamen) enjoy a special power of legislation. Their people’s congresses and the standing committees, “in light of the specific situations and actual needs of the jurisdiction,” may enact local regulations provided that they shall not “contravene any provision of the Constitution, national law, administrative regulations and the local regulations in force in the province or autonomous region in which the city is located.”²⁹ The inconsistency under this condition is permissible because the power of regulation making derives directly from the delegation of power from the NPC, and the legal status of the special economic zones is specially defined by law.

III. FILING AND CHECK: NON-JUDICIAL REVIEW OF CONSTITUTIONALITY

The review of constitutionality of legislation is conducted through the process of filing and check (*bei’an shencha*). Basically, filing and check is a longstanding practice which permits the creation of a review process within the NPC system to implement the ambiguous intent of the Constitution. Theoretically, the NPC, and only the NPC, as explained above, has the power to supervise the legislation adopted by the state organs created by it and under it. As a component of accountability, the state organs, including the State Council, the Supreme People’s Court, and Supreme People’s Procuratorate shall report their work to the NPC.

A formal review system to examine the constitutionality and legality of laws and regulations did not exist until October 16, 2000, when the meeting of the NPCSC adopted *Xingzheng fagui, difangxing fagui, zizhi tiaoli he danxing tiaoli, jingjitequ fagui bei’an shencha gongzuo chengxu* [*Working Procedure Relative to Filing and Check of Administrative Rules and Regulations, Local Regulations, Autonomous Regulations and Specific Regulations, and Regulations of Special Economic Zones*] (Working Procedure).

The adoption of the Working Procedure was the first step towards the

27. XIAN FA art. 116 (1994) (P.R.C.).

28. Li fa fa [Law on Legislation] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 112, art. 66, § 2 (P.R.C.).

29. *Id.* art. 63, § 2.

institution of constitutional review in the current constitutional framework in China. As a matter of fact, the Working Procedure, a product based on accumulated experience, reflected the need to systematize the work of filing and check. To some extent, the symbolic significance of the Working Procedure reaches farther than the actual significance. Indeed, the implementation of the Working Procedure called for the establishment of an institution specifically in charge of filing and check.

A. *Filing and Check as the Major Process of Review*

The system of filing and check of administrative and local regulations is an integral part of the legislative system. In particular, the system is the basis as well as the major process of constitutional review. Under this system, *bei'an* means “for the record” or “for filing,” often used interchangeably in English, and *shencha* means “examination,” “investigation” or “audit.” The system’s roots exist in the Constitution and *Difang geji renmin daibiao dahui he difang geji renmin zhengfu zuzhi fa* [*Organic Law of Local People’s Congresses and Local People’s Governments of the People’s Republic of China*], and fully develop in the Law on Legislation.³⁰

The Constitution provides the foundation of the system by promulgating that: “[t]he people’s congresses of provinces and municipalities directly under the Central Government, and their standing committees, may adopt local regulations, which must not contravene the Constitution, the laws, and the administrative rules and regulations, and they shall report such local regulations to the standing committee of the National People’s Congress *for the record*. The Constitution further institutes a system of approval and filing for regulations adopted by competent authorities of national autonomous areas by stating that:

People’s congresses of national autonomous areas have the power to enact autonomy regulations and specific regulations in the light of the political, economic and cultural characteristics of the nationality or nationalities in the areas concerned. The autonomy regulations and specific regulations of autonomous regions shall be submitted to the standing committee of the National People’s Congress *for approval* before they go into effect. Those of autonomous prefectures and counties shall be submitted to the standing committees of the people’s congresses of provinces or autonomous regions for approval before they go into effect, and they shall be reported to the NPCSC *for filing*.

30. *Difang geji renmin daibiao dahui he difang geji renmin zhengfu zuzhi fa* [Organic Law] (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1979, effective Jan. 1, 1980) 1980 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. art. 7 (P.R.C.).

The Organic Law of the Local People's Congresses and Local People's Governments of the People's Republic of China at Various Levels, as amended in 2004, refined the above provisions and identified the State Council as the institution receiving filing. The people's congresses of provinces, autonomous regions, and municipalities directly under the Central Government may enact regulations consistent with the Constitution and laws and regulations of the national government. The people's congresses of cities in which provincial and autonomous governments sit, along with the people's congresses of relatively large cities, are permitted to formulate local regulations provided that the State Council approves and specific conditions are satisfied.³¹ Moreover, the local regulations must not contravene the Constitution, administrative regulations and other laws, and the local regulations of their provinces and autonomous regions.³² Such local regulations must be reported to the standing committees of the people's congresses of their respective provinces and autonomous regions prior to implementation. The local regulations must also be submitted to the standing committee of the National People's Congress *for the record*.³³

The 2000 Law on Legislation developed and improved the system on the above basis and consolidated relevant provisions; for example, by stating that:

Within 30 days of its promulgation, an administrative regulation, local decree, autonomous decree or special decree, or any administration or local rule shall be submitted to the relevant body *for filing* in accordance with the following provisions:

- (i) An administrative regulation shall be submitted to the Standing Committee of National People's Congress *for filing*;
- (ii) A local decree enacted by the People's Congress of a province, autonomous region, or municipality directly under the central government and the standing committee thereof shall be submitted to the Standing Committee of National People's Congress and the State Council *for filing*; a local decree enacted by the People's Congress of a major city and the standing committee thereof shall be submitted to the Standing Committee of National People's Congress and the State Council *for filing* through the Standing Committee of the People's Congress of the province or autonomous region in which the city is located;
- (iii) An autonomous or special decree enacted by an autonomous prefecture or autonomous county shall be submitted to Standing Committee of National People's Congress and the State Council *for filing* through the Standing Committee of the People's Congress of the province or autonomous region in which the prefecture or county is located;
- (iv) An administrative or local rule shall be submitted to the State Council *for*

31. *Id.*

32. *Id.*

33. *Id.*

filing; a local rule shall be concurrently submitted to the Standing Committee of the local People's Congress *for filing*; local rules enacted by a major city shall also be concurrently submitted to the Standing Committee of the People's Congress and the People's Government of the province or autonomous region *for filing*;

(v) An administrative regulation or local decree enacted pursuant to an enabling decision shall be submitted to the body specified therein *for filing*.³⁴

B. Discussion on the Nature and Effect of Filing and Check

Is filing just a link in the whole legislative procedure? Does filing imply a check and review of the substance of laws or regulations by the receiving body? How does filing and check function in reality? The effectiveness of the system of review depends on the answers to such questions.

The filing started in 1979 and originally applied to local regulations and rules. Cai Dingjian, an authority of the people's congress system, who once worked at the Secretariat of the NPCSC, observed that until the end of 1983, the filing work was conducted by the Section of Politics and Law of the General Office of the NPCSC (Section), whose major objectives were to review the constitutionality and legality of rules and regulations. The Section worked in collaboration with the Legal Bureau of the State Council and other relevant bureaus to examine whether the legal documents received conformed to the Constitution and law, and if it found them unconstitutional or illegal, returned them to the standing committee of the people's congress for further action. Other objectives of the Section were to manage the register and conduct statistics and filing. In addition, it periodically reported to the NPCSC when the local people's congresses engaged in lawmaking. The General Office did find a "small amount" of local rules and regulations inconsistent with national laws and policies and requested the standing committee to refer these cases to the standing committees of the provincial, regional and municipal people's congress concerned for resolution.³⁵ "Once the NPCSC examined the report of review, it seemingly had taken no further action; the review stopped then."³⁶

From 1984 to 1988, filing laws and regulations became the responsibility of the liaison bureau of the NPCSC, and the actual work was reduced to the implementation of the technical work, including registration, statistics, and filing, which meant sorting out local rules and regulations and then putting them into different folders. Since 1988, the NPCSC was requested to review

34. Li fa fa [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT'L PEOPLE'S CONG. PEOPLE'S CONG. GAZ. 112, art. 89 (P.R.C.).

35. See CAI DINGJIAN, *supra* note 10, at 309-10.

36. *Id.* (translation by author).

all rules and regulations submitted to it, but the review was carried out as a matter of routine.³⁷

The period of no review lasted for about five years until July 1993 when the Secretariat of the General Office of the NPCSC took on the responsibility of filing and checking rules and regulations submitted by local people's congresses, in accordance with *Dibajie quanguo renmin daibiao dahui changwu weiyuanhui gongzuo yaodian* [Major Items of Work for the 8th NPCSC] (Major Items).³⁸

Based on the Major Items and the observations of Cai Dingjian, the whole process of filing and check was instituted as follows. First, the Secretariat of the General Office of the NPCSC received the local regulations that the standing committees of provincial, regional, and municipal people's congresses periodically submitted; then, in view of the matters at issue, the Secretariat distributed the local regulations to the relevant special commissions of the NPC for review. Second, upon receiving the regulations, the special commission concerned requested the working body under it to examine and determine whether these regulations contravened the Constitution and law, and then submit a report of review. Third, based on the views of the working body, the special commission decided and made recommendations to the General Office of the NPCSC. Fourth, upon receipt, the General Office should report to the Secretary General of the NPCSC if the special commission's report found a local regulation inconsistent with the Constitution and law. With the prior approval of the Secretary General of the NPCSC, the General Office informed the standing committee of the people's congress that made the regulation, and requested them to examine the constitutionality and legality of the regulation to ensure its consistency with higher laws. Fifth, in this situation, some standing committees altered the regulation in question, while others held opposite opinions and still insisted that their regulations were constitutional and legal. In case of a discrepancy in the opinions of the special commission and the local standing committee, the General Office might request the special commission concerned and the Law Commission of the NPC to conduct a joint study and put forward their joint opinions. The joint study would submit the new report to the Secretary General for him or her to redirect it for action to the appropriate local standing committee. Next, the Secretary General would report to the Chairman's Meeting to decide whether unconstitutionality arose out of local regulations and whether the respective local people's congress persisted in supporting it. Lastly, the NPCSC would decide the case at the Chairman's Meeting.

Cai Dingjian thought that, in a normal case, the review should be declared over if the first four steps above had been completed. Dingjian stated, "[i]n

37. See *id.* (noting request for review).

38. *Bajie quango renda changweini gongzuo yaodian* [Major Items of Work for the 8th NPCSC] available at <http://chinalawlib.com/317199051.html> (translation by author).

case the local standing committee held its own opinions and persisted notwithstanding, the work of check is thereupon over and no further measures will be taken.”³⁹

The effectiveness of the system depends mainly on the reaction of the local people’s congresses whose regulations are challenged. Cai’s observation is rather critical: “[a]s a matter of fact, only a few local standing committees rectified the regulations by virtue of the opinions adopted by the special commissions, many others chose to insist on their original opinions based on various reasons.”⁴⁰ Cai’s observation confirms the long held assumptions of Chinese constitutional law scholars that the NPCSC never conducted an open process of review and never held an institution under its authority accountable by declaring the regulations they reviewed unconstitutional, or in contradiction with the Constitution and/or national law. If what Cai said is actually true, we do have ample reason to challenge the actual effectiveness of the system.

Two subsequent events, however, prevent us from reaching such a conclusion. One is the establishment of an organ specifically in charge of checking and filing laws and regulations within the NPCSC in May 2004. The second is the revision of the *2000 Working Procedure Relative to Filing and Check of Administrative Rules and Regulations, Local Regulations, Autonomous Regulations and Specific Regulations, and Regulations of Special Economic Zones* in December 2005. The revision permits the NPC and NPCSC to actively review laws and regulations.

C. “One Organ” and “One Procedure” Together Mark A New Stage

“One Organ” refers to the agency specially created by the NPCSC in May 2004—the Division of Check and Filing of Laws and Regulations (*fagui shencha bei’an shi*). This division is under the NPCSC’s working body, the

39. CAI DINGJIAN, *supra* note 10, at 310-11 (translation by author). Cai actually gave a table showing the work of review done by the NPCSC from 1993 to 1999, as follows:

Year	The number of regulations received	The number of review completed	Cases of contravention	The number of regulations not reviewed yet
1993	299	262	14	37
1994	819	582	18	229
1995	883	388	15	495
1996	801	728	18	475
1997	1831	817	18	1014
1998	759	385	13	374
1999	719	328	No	691

Under the Table, Cai noted that some figures may not be accurate, some may overlap with others, and the committee may or may not have reviewed some regulations in the same year the committee received them. *See id.* at 301 (explaining table’s limitations).

40. *Id.* (translation by author).

Committee of Legal Work as a sub-unit. The purpose of setting up this new organ is reportedly to examine the requests of review submitted from the State Council, the Supreme People's Court, the Supreme People's Procuratorate, local people's congresses, and the Central Military Commission, as well as the suggestions of review from citizens, legal persons, and other social organizations. The Secretariat made the following statement to a newspaper: "this work has been conducted by the Secretariat of the NPCSC, and it is now handed over to this new office. It shows that the work of review of constitutionality and legality of laws and regulations will be consolidated and further strengthened."⁴¹ Xu Chongde, a leading scholar of constitutional law, regards the establishment of the special organ as significant progress in constructing the Chinese rule of law. Han Dayuan, a constitutional law authority, also concludes that "this is a landmark event in the building of rule of law, and it will help safeguard the unity and dignity of the legal system in China."⁴²

We are told that the NPCSC annually receives numerous suggestions to review the constitutionality and legality of laws and regulations from citizens, legal professionals, and other social organizations. Yet receiving suggestions does not necessarily activate the mechanism of review, as the Division of Check and Filing must screen them and conduct the prior study before activating the process. Activating the review process is quite "serious and prudential."⁴³ Legal experts have commented that the establishment of this special organ "would normalize the review of constitutionality and legality, and make the system operational." Institutionalization "would also mean that constitutional review in its real sense [in China] is becoming a reality."⁴⁴

Of course, citizens and particularly legal scholars have reason to believe that this is a good start, a step toward waking up the dormant clauses of the Constitution. It may be premature to believe that this symbolizes "the beginning of the time of constitutionalism in China," an optimism expressed by one scholar, but it will certainly help promote and push forward the rule of law and constitutionalism in China.

"One Procedure" refers to the *Working Procedure Relative to Filing and Check of Administrative Rules and Regulations, Local Regulations, Autonomous Regulations and Specific Regulations, and Regulations of Special Economic Zones* (2005 Working Procedure), as revised in December 2005. On

41. Cui Li, *Quanguo renda changweihui fagongwei sheli fagui shencha bei'an shi* [The Committee of Legal Work of the NPCSC Sets Up a Division of Check and Filing of Laws and Regulations: The Review of Constitutionality and Legality Will be Activated], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], June 20, 2004 (translation by author).

42. Wang Yijun, *Xianfaxue quanwei zhuanjia: chengli weixian shencha jigou shi zhongda jinbu* [Leading Experts of Constitutional Law: The Establishment of the Organ of Constitutional Review is a Significant Progress], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], June 22, 2004 (translation by author).

43. Cui Li, *supra* note 41 (translation by author).

44. Cui Li, *supra* note 41 (translation by author).

the surface, the 2005 Working Procedure intends to implement the relevant constitutional clauses and particularly Chapter V, Application and Filing of the Law on Legislation. Comparing the contents of the 2005 Working Procedure with the observations made by Cai Dingjian, the process instituted in the Working Procedure is a formalization of the practice since 1988.

The 2005 Working Procedure has been highly regarded by scholars. For example, journalist Nanfang Doushi Bao said it has “moved forward a giant step.”⁴⁵ The 2005 Working Procedure has also been described as “a substantial step towards the system of constitutional review,” because it “has laid down an institutional foundation for the review of constitutionality and legality,” and is “a milestone in the history of constitutionalism in China.”⁴⁶

While these comments may appear to be slightly exaggerated or too optimistic, the 2005 Working Procedure does represent an improvement of the system. First, it provides the procedure for the Division of Check and Filing to operate. Second, it has clarified the roles to be played by different parties, the division of work among them. Finally, it has activated unused provisions of the Constitution and brought the Law on Legislation alive.

There are two important examples from the 2005 Working Procedure that illustrate its constitutional prominence. The normal process of check and filing is rather passive, which means the Division of Check and Filing receives regulations submitted from the State Council and local people’s congresses. But, on the other hand, the Division of Check and Filing may activate the process of review upon request by the State Council, the Supreme People’s Court, the Supreme People’s Procuratorate, local people’s congresses, or the Central Military Commission. The focus of the review is, of course, on the constitutionality and legality of the regulations under review. Now, a more active approach of review has been introduced into the process by the 2005 Working Procedure. In case a conflict arises between the regulations for filing and the Constitution or law, the applicable special commission under the NPC can actively check the regulations under review and, in conjunction with the Committee of Legal Work under the NPCSC, set forth an opinion in writing. In the meantime, if the Committee of Legal Work finds the regulations for filing contravening the Constitution or law, it can submit an opinion in writing to the Secretary General of the NPCSC for approval before sending the regulations to the special commissions for review.

A second aspect deserves our attention. The second aspect is this: if after the completion of the normal procedure, the enacting party is not willing to

45. Nanfang Doushi Bao, *Weixian shencha maichu yi dabu taguo jinyan shang xu jiejian* [Constitutional Review has Moved A Giant Step and Experiences of Other Countries Should be Taken for Reference], SOUTHERN METROPOLITAN DAILY, Dec. 21, 2005, <http://star.news.sohu.com/20051221/n241052118.shtml> (translation by author).

46. Gao Yifei, *Weixian shencha jizhi: xianzhengshi shang de yige lichengbei* [The Mechanism of Constitutional Review: A Milestone in the History of Constitutionalism], (Dec. 12, 2005) (on file with author).

rectify the regulation, the NPCSC can examine the case and decide to cancel the regulation due to its inconsistency with the Constitution or law.

As correctly observed by Jiang Ming'an, a leading scholar of administrative law from Peking University, the establishment of the Division of Check and Filing represents the first step towards the establishment of constitutional review in China, and "the improvement of the Working Procedure has moved the second key step forward."⁴⁷ Jiang argues that the third step—the activation of real review—should emerge as quickly as possible. He advocates that at the yearly plenary session of the NPC, the Chairman should report to the NPC and to the people the result of the past year's review, including the number of requests and suggestions received, the number of cases actually reviewed and their treatment, and the cases of contravention and subsequent rectification or cancellation.⁴⁸ On the whole, Jiang's opinion is fair and objective, and in line with the significance of "One Organ" and "One Procedure."

In addition to the Working Procedure, the same Chairman's Meeting of the NPCSC in December 2005 also adopted *Sifa jieshi bei'an shencha gongzuo chengxu* [Working Procedure Relative to Filing and Check of Judicial Interpretations] (Working Procedure for Filing and Check), under which the State Council, other state organs, social organizations and enterprises, and citizens can request review or suggest in writing that the NPCSC take further action. The publication of the Working Procedure for Filing and Check mirrors the special status of the NPC (and NPCSC) and its authority over the judiciary, and helps illustrate how the system of people's congress works in real time in China.

IV. A CASE LEADING TO THE IMPLEMENTATION OF REVIEW OF LEGISLATION

The *Sun Zhigang* case is a tragedy that occurred in March 2003. The case directly challenged the constitutionality of an important subsisting national system, *Shourong qianfan*, [Custody and Repatriation] (C&R), which, as a result of weakness in the system, led to the death of a Chinese citizen.

Chinese C&R, an administrative procedure, was created after the founding of the PRC; its legal basis was *Chengshi liulang qitao renyuan shourong qianfan banfa* [Measures of Custody and Repatriation of Urban Vagrants and Beggars in Cities], which was adopted by the State Council in 1982. In the early 1990s, the State Council issued *Guanyu shourong qianfan gongzuo gaige wenti de yijian* [Opinions on the Questions Relating to the Reform of Work of Custody and Repatriation] (Opinion), and expanded the scope of custody to include people with no legal documents, no fixed residence, and no steady income; essentially, people without identity cards, temporary residence permits,

47. See *The NPC Has Clarified the Procedure of Constitutional Review*, XINJING BAO [THE BEIJING NEWS], Dec. 20, 2005.

48. See *id.*

or work permits. The Opinion stated that those who stayed for more than three days in a city must apply for temporary residential permits for non-local residents; otherwise, they would be deemed illegal residents and would be detained and repatriated to their place of origin. This system violated the national laws, such as the Law on Legislation, and breached the minimum international standards of human rights, including the presumption of innocence, the person's individual rights, the right to movement, and the right to choose employment, among other human rights.

The C&R system was similar to existing systems of legal arrest, detention, and deportation of vagrants, illegal aliens, or aliens who commit crimes. In Chinese as well as foreign cases, the detentions were usually extrajudicial because even though the police acted under regulations or laws, it was difficult or impossible for the accused to use the law to correct mistakes or appeal his or her detention.

On March 17, 2003, Sun Zhigang, a twenty-seven-year-old university graduate, then working in a garment company, was arrested by policemen because he was unable to produce his identity document. The next day he was sent to a municipal detention center in the city of Guangzhou, the capital of Guangdong Province. Two days later, on March 20, he was found dead at the center. According to the legal doctor's appraisal report, Sun was beaten to death. Sun's family reported the information to investigative reporters at *Nanfang dushi bao* [*Southern Metropolitan Daily*] in Guangzhou on April 25, 2003, amidst the SARS epidemic. The case occupied the national stage and became a national focus on the Internet along with SARS.⁴⁹ While most people wanted the government to take action to remedy this injustice, much attention was also cast on the need to improve the legal process underlying C&R.

At this critical juncture, citizens became actively involved. On May 14, 2003, Yu Jiang, Teng Biao, and Xu Zhiyong, all holding Ph.Ds of law and working as junior staff members in law schools in Wuhan and Beijing, submitted a joint petition to the NPCSC. In their "Letter Demanding a Review of the Measures of Custody and Repatriation of Urban Vagrants and Beggars in Cities," they argued that the measures taken to restrict the liberty of the person violated the relevant provisions of the Constitution and the law, and thus should be amended or abolished. Their letter is referred to as the famous *San boshi shangshu* [Petition by the Three Doctors].⁵⁰ On May 23, another five professors of law submitted a request to the NPCSC, demanding that the power organ activate a special investigation process to assess the implementation of the C&R system. This demand is called *Wu jiaoshou shangshu* [The Open

49. The *Sun Zhigang* case was widely covered in China. See, e.g., <http://news.tom.com/hot/shourong/>; <http://news.sina.com.cn/z/sunshzs/index.shtml>.

50. See Chu Li, *San gongmin shangshu renda jianyi dui shourong banfa jinxing weixian shencha* [Three Citizens Submitted a Letter to the NPC Demanding to Check the Constitutionality of the Measures of Custody], *ZHONGGUO QINNIAN BAO* [CHINA YOUTH DAILY], May 16, 2003 (reporting on three doctors' petition).

Letter by Five Professors].⁵¹

So far, no documentation exists to show whether the NPCSC and the State Council considered the petition or the letter. Regrettably, no reports on the activation of special processes of investigation and review by the NPCSC, which was the original intent of these doctors and professors of law, have been published. The petitioners wished to push the NPCSC to activate the mechanism of constitutional review available in the Law on Legislation and to set a precedent for later follow-up.⁵² However, an entirely “black box” operation exists among the state institutions involved, including the State Council and the NPCSC. To the surprise of many, on June 20, 2003, three months after the death of Sun Zhigang, the State Council announced the abolishment of the Measures of Custody and Repatriation of Urban Vagrants and Beggars in Cities, and the implementation of a new regulation, *Chengshi shenghuo wuzhe de liulang qitao renyuan jiuzhu guanli bangfa* [Measures of Aid and Management of Urban Vagrants Beggars without Life Support], which was issued in its place.

The NPCSC adopted a low-profile approach, settling the issue internally by abolishing the measures in question on its own rather than declaring them unconstitutional or illegal. Such an approach minimized the shock brought by the eventual cancellation of the regulation by the NPCSC.⁵³

In the end, an innocent young life was lost because of an outdated, unconstitutional system. The significance of the petition by three doctors of law is far-reaching. The submission was the first high-profile move, where citizens used legal procedures—instituted in the Law on Legislation—to initiate constitutional review processes and challenge a national regulation. The event is believed to be an unprecedented one.⁵⁴ As Chen Xiaoying asserted, “the letter by the three doctors has opened the door of review of laws and regulations.”⁵⁵

The door has actually been opened. Following the letter by the three doctors, Professor Hu Xindou submitted a letter to the NPCSC in April 2003 requesting it to review the system of re-education through labor and its legal basis. Further, in July 2003, over one hundred residents of Hangzhou, the capital of Zhejiang Province, petitioned the NPCSC challenging the ministerial

51. See Wuwei faxuejia tiqing renda qidong tebie chengshi diaocha Sun Zhigang an [Five Jurists Requested the NPC to Activate a Special Procedure to Review Sun Zhigang Case], ZHONGGUO QINNIAN BAO [CHINA YOUTH DAILY], May 28, 2003.

52. See Jiang Fei, *Redian pinglun* [Hot Comments], ZHONGGUO QINNIAN BAO [CHINA YOUTH DAILY], Dec. 8, 2004.

53. An analysis of the current system of review by Niu Longyun is also helpful. See Niu Longyun, *Cong Sun Zhigang an toushi zhongguo weixian shencha zhi* [A Perspective of Constitutional Review System in China Through the “Sun Zhigang Incident”], LIAOWANG ZHOUKAN [OUTLOOK WEEKLY], June 5, 2003.

54. See Cui Li, *supra* note 41 (describing petition by three doctors of law as unprecedented).

55. Chen Xiaoying, *San boshi shangshu tuikai fagui shencha zhi men* [The Letter by the Three Doctors Has Opened the Door of Review of Laws and Regulations], FAZHI RIBAO [LEGAL DAILY], Dec. 31, 2003 (translation by author).

and municipal regulations on removal and relocation of urban houses. In November 2003, 1,161 carriers of Hepatitis B jointly requested the NPCSC to review the regulations regarding the recruitment of civil servants, which discriminated by excluding the carriers from being considered. The list of petitions was so long that scholar Wang Yi declared that 2003 was “[a] year of a new civil rights movement.”⁵⁶

The story of the emergence of constitutional review has not ended. On December 7, 2009, five scholars from Peking University Law School sent a letter to the NPCSC, demanding it to review the constitutionality of *Chengshi fangwu chaiqian tiaoli* [Regulation Relating to the Removal and Relocation of Urban Residences] (2001 regulation), an administrative regulation adopted by the State Council in 2001. Currently, the State Council is examining the 2001 Regulation. It is believed that the 2001 Regulation will be abolished and replaced by *Zhengshou yu chaiqian buchang tiaoli* [Regulation Relating to Compensation for Acquisition and Removal (of Urban Residences)].⁵⁷

V. QI YULING AND JUDICIALIZATION OF THE CONSTITUTION—A NINE DAYS WONDER

Hu Xiaohua asserts that “no constitutional lawsuit means no constitutionalism,” because “constitutional justice is the guardian of constitutionalism.”⁵⁸ This reflects the genuine belief of the majority of Chinese constitutional lawyers and many legal professionals, and represents the great ideal pursued by them. The realization of the ideal depends largely on a system of judicial constitutional review. However, such a judicial system contradicts the current constitutional order, as examined in Part II of this essay, in which only the NPC and its standing committee have constitutional jurisdiction over legislative acts and governmental actions, and the judiciary is not given the power to exercise any constitutional jurisdiction. To sum up, on the one hand, judicial review in the Western sense of the term has no room for existence under the people’s congress system. On the other hand, there is no constitutional justification or basis for that system.

A. *Qi Yuling Case: A Chinese Version of Marbury v. Madison?*

The inability to file a constitutional lawsuit in China has disappointed many people who believe it represents a “bottleneck” problem in the growth and development of constitutionalism. People have long wished for a breakthrough

56. See Chen Hongyi, *2004 nian xiuxian yu zhongguo xianzheng qianjing* [2004 Constitutional Amendment and the Perspective of Constitutionalism in China], 88 ERSHIYI SHIJI [TWENTY-FIRST CENTURY] 67 (2005) (on file with author).

57. *Regulation Relating to Compensation for Acquisition and Removal of (Urban Residences) Will be Abolished* (Xinmin Evening News broadcast Dec. 17, 2009) (transcript on file with author).

58. HU XIAOHUA, *XIANFA SUSONG YUAN LUN* [ON CONSTITUTIONAL JUSTICE] 1 (Law Press 2002) (translation by author).

in the area. This breakthrough came with the promulgation of a judicial interpretation of the application of the Constitution in *Qi Yuling* by the Supreme People's Court (SPC) in 2001.

Qi Yuling v. Chen Xiaoqi & Ors,⁵⁹ known as the first case of constitutional application or judicialization in China, is not a complicated case.⁶⁰ In 1990, Qi, then a seventeen-year-old high school student in a village in Shandong Province, had her college entrance exam scores stolen by a classmate, Chen Xiaoqi. Chen then used the scores to apply to college in Qi's name. Qi was led to believe that she had failed the exam, and therefore lost her chance at a college education. Chen, maintaining her false identity, went off to college and found a job working in a local bank. Years later, Qi finally discovered the incident, and sued. In court, Qi claimed that her identity had been stolen and used. She also claimed that Chen's actions blocked her constitutional right to an education, and that she should be compensated for the infringement of her constitutional rights as well. Unsure of how to proceed with the novel right to an education claim, the Shandong Provincial Higher People's Court (provincial court) sought guidance from the SPC on how to apply relevant laws. The SPC gave a somewhat surprising answer in "The Response of the SPC on Whether the Act Which Has Violated Citizen's Rights to Education Protected by the Constitution by Means of Violating the Right to Identity Shall Assume Civil Liabilities." (Response). The SPC held that, because Qi Yuling's constitutional right to an education had been violated, she could indeed claim damages.⁶¹ Thus instructed, the provincial court found in favor of Qi Yuling on both her identity theft claim and her right to education claim, awarding Qi damages on both counts.⁶²

On the same day the SPC issued the Response, the former SPC Justice Huang Songyou published an article in SPC's official house organ, *Renmin fayuan bao* [*People's Court Daily*] to comment on the Response. In this influential article, entitled *Constitutional Judicialization and its Significance—A Comment on Today's 'Response' by the SPC*, Huang openly states that the

59. *Qi Yuling v. Chen Xiaoqi*, SUP. PEOPLE'S CT. GAZ. (Supreme People's Ct., June 28, 2001), available at <http://www.lawinfochina.com/Case/List.asp> (search for "Qi Yuling").

60. See Ren Jin, *Zhongguo xianfa shiyong diyi an pingxi* [A Comment and An Analysis of the First Case of Constitutional Application in China], GUOJIA XINGZHENG XUEYUAN XUEBAO: ANLI KU [JOURNAL OF STATE SCHOOL OF ADMINISTRATION: DATABASE OF CASES] 55 (2002); Yang Ping, *Dui "Xianfa sifahua diyi an" de sikao* (Reflections on "The First Case of Constitutional Judicialization"), 2 XIBEI SHIDA XUEBAO (SHEHUI JEXUE) [JOURNAL OF NORTHWEST NORMAL UNIVERSITY (SOCIAL SCIENCES)] 125 (2002).

61. See generally *Qi Yuling v. Chen Xiaoqi*, SUP. PEOPLE'S CT. GAZ. (Supreme People's Ct., June 28, 2001), available at <http://www.lawinfochina.com/Case/List.asp> (search for "Qi Yuling"); Guanyu yi qinfan xingmingquan de shouduan qinfan xianfa baohu de gongmin shou jiaoyu de jiben quanli shifou ying chengdan minshi zeren de pifu [Response of the Supreme People's Court on Whether the Act Which Has Violated Citizen's Fundamental Right to Education Protected by the Constitution by Means of Violating the Right to Identity Shall Assume Civil Liabilities] *Zuigao renmin fayuan gonggao* (Official Bulletin of Supreme People's Court), FASHI (2001), No. 25 [hereinafter Response].

62. See Thomas E. Kellogg, *The Death of Constitutional Litigation in China?*, 7 CHINA BRIEF 4-7 (2009) (describing court's holding in favor of Qi Yuling).

interpretation of *Qi Yuling* was meant to trigger explicit use of the Chinese Constitution by the courts. “The Response will certainly exert a significant and far-reaching influence in judicial proceedings in the future.”⁶³

In the Response, the SPC declared that

[h]aving studied the case and based on the facts presented in front of us, we assert that, by means of violating the right to identity, Chen Xiaoqi and others have infringed upon the fundamental right to education that Qi Yuling should enjoy in accordance with the constitutional provisions, and caused concrete damages to the appellant; they should assume civil liabilities accordingly.⁶⁴

On August 23, 2001, in line with the above conclusion, the Shandong Higher People’s Court rendered the judgment, which confirmed that Chen violated Article 46 of the Constitution.⁶⁵ Huang, then President of the Civil Chamber of the SPC, was believed to be the mastermind behind the Response. He made the case for the beginning of the era of “constitutional judicialization.” The concept of constitutional judicialization was first promoted by Wang Lei from Peking University Law School and Hu Jingguang from Renmin University of China Law School.⁶⁶ The concept refers to introducing the constitution into judicial proceedings and using it for the legal basis for adjudicating cases.⁶⁷ Obviously, Huang was directly under the influence of *Marbury v. Madison* and even quoted Justice John Marshall in the article justifying his point on “constitutional judicialization.” For this reason, Tong Zhiwei, a leading constitutional scholar, called this Response “a Chinese version of *Marbury v. Madison*.”⁶⁸

Huang developed his arguments on constitutional judicialization in China by stating that “[c]onstitutional judicialization is the prerequisite to the realization

63. Huang Songyou, *Xifa sifahua jiqi yiyi – cong zuigao renmin fayuan jintian de yige pifu tanqi* [Constitutional Judicialization and its Significance—A Comment on Today’s “Response” by the SPC], RENMIN FAYUAN BAO [PEOPLE’S COURT DAILY], Aug 13, 2001 (translation by author).

64. See Response, *supra* note 61.

65. See XIAN FA art. 46 (1994) (P.R.C.). Article 46 states that “[c]itizens of the People’s Republic of China have the duty as well as the right to receive education,” and “[t]he state promotes the all-round moral, intellectual and physical development of children and young people.” *Id.*

66. See Wei Dingren & Wang Lei, *Woguo xianfa sifahua de tantao* [An Exploration of Constitutional Judicialization in China], in MINZHU XIANZHENG SHINIAN [TEN YEARS OF DEMOCRACY AND CONSTITUTIONALISM] 199-206 (Wang Shuwen ed., Red Flag Press 1993); Wang Lei, XIANFA DE SIFAHUA [JUDICIALIZATION OF CONSTITUTION] (Press of China University of Politics and Law 2000); see also Wang Lei, XUANZE XIANFA [TO CHOOSE THE CONSTITUTION] 1-4 (Peking University Press 2003). See generally Hu Jingguang, *Xianfa sifahua de biranxing he kexingxing tantao* [An Exploration of the Necessity and Feasibility of Constitutional Judicialization], 1 FAXUE JIA [JURIST] (1993). Subsequently, Huang adopted other expressions such as “constitutional application” or “judicial application of constitution.”

67. Huang Songyou, *supra* note 63.

68. See generally Tong Zhiwei, *Xianfa shiyong ying yixun xianfa bensheng guiding de lujing* [The Constitutional Application Should Follow the Route Provided for by the Constitution], 6 ZHONGGUO FAXUE [CHINA LEGAL SCIENCE] (2008).

of ruling the country in accordance with the law and to the building of a socialist country of rule of law.” He also opined that “[t]he minimal requirement for ruling the country according to [the] law is to rule the country according to [the] constitution.” Further, “[c]onstitutional judicialization is the requirement for enhancing the legal effect of the Constitution.” “As the ‘mother law’ of other legal norms, parts of the constitutional provisions have been indirectly implemented through other legal norms, and many others have not been embodied in the ordinary legal instruments. If the Constitution is not introduced into judicial proceedings, these contents will never be implemented in judicial practice.” “If the Constitution is excluded from judicial process, the legal effect of it will certainly be weakened.” Hung further stated that “[c]onstitutional judicialization is the internal need out of the judiciary in adjudicating cases.” Hung noted that “[c]onstitutional provisions which regulate social relations are highly principal and general, and can adapt to the demand by the continuously changing situations.” “Introducing the Constitution into the judicial procedure and taking it for direct legal basis,” according to Huang, “will remedy the flaws and loopholes of the ordinary legal norms.”⁶⁹

B. The End of Qi Yuling, or “The Death of Constitutional Litigation?”

Based on the above considerations, Huang concluded that courts may gradually use the Constitution in their legal proceedings, and directly quote the Constitution to support their decisions. To the surprise of many, Huang continued that

China may refer to the American model according to which normal courts apply the constitution; all disputes concerning constitutional matters shall be tried by ordinary courts in accordance with ordinary legal procedure in China, and the courts can directly take the Constitution for the basis of judgment when adjudicating the cases of this nature.⁷⁰

This assertion helps us understand Huang’s attitude towards the ongoing judicial reform, and the reason why scholars regard this Response as a Chinese version of *Marbury v. Madison*, in both positive and negative senses.

As a matter of fact, Huang promoted the concept of constitutional judicialization in the Response, and in his article, and believes the Response had the following pioneering merits: it protects the fundamental rights citizens shall enjoy in accordance with the Constitution; it establishes a precedent in constitutional judicialization; and it proposes protecting the fundamental rights

69. Huang Songyou, *supra* note 63 (translation by author).

70. *Id.* (translation by author).

as prescribed by the Constitution by means of a civil law remedy.⁷¹

After the publication of this historic judicial opinion, most academics accepted the SPC's Response in *Qi Yuling*. Wang Lei believed that courts lack the power to refuse applying the constitution when adjudicating cases.⁷² They agreed *Qi Yuling* was "indeed the first case of constitutional application, but not constitutional litigation in its real sense."⁷³

In the meantime, a number of scholars quickly observed that the SPC's intervention in *Qi Yuling* was flawed in a number of ways. What the Court was trying to accomplish was absolutely radical. According to the conventional understanding of the Chinese constitutional system, the Constitution is not subject to judicial interpretation or application. Those supporting the conventional view believe there is little feasibility of judicial application to the Constitution.⁷⁴ As discussed in Part II of this article, there is also no separation of powers, and courts are unable to step in to defend individual rights against state encroachment. In addition, courts are not given any power to interpret the Constitution. Moreover, they do not have the power to request that the NPCSC examine the consistency of the Constitution and the laws. Huang Jingguang and Chen Xiong noted that, before earning their credibility, courts should not be granted the power to interpret the Constitution.⁷⁵

Thomas E. Kellogg correctly observed that Huang Songyou and his colleagues, including Xiao Yang, then the Chief Justice of the SPC, were trying subtly to alter that understanding, and bring the courts into the constitutional game."⁷⁶ Looking back, we see that this move itself was very fragile because it lacked the support of a mature theory. Second, the initiative contradicted the people's congress system; and third, the political environment was not friendly enough to tolerate such an audacious experiment. In addition, Huang, seemingly an admirer of the American system, made the move by orchestrating the Response, though very audaciously and perhaps prematurely. Among all reasons leading to the death of the Response, and to the removal of Huang in 2008, Huang's promotion of the Americanization of the Chinese court system should not be ignored.

In December 2008, the SPC dealt a fatal blow to the Response to the *Qi Yuling* case by withdrawing it from application. According to the "Decision on

71. *Id.*

72. Wang Lei, *Xianfa shishi de xin tansuo* [New Experience in Constitutional Application], 2 ZHONGGUO SHEHUI KEXUE [CHINA SOCIAL SCIENCES] 29 (2003).

73. Ren Jin, *supra* note 60, at 60.

74. Tong Zhiwei is one of the critics of, or at least very skeptical about this response and the concept of constitutional judicialization. See Tong Zhiwei, *supra* note 68; see also Tong Zhiwei, *Xianfa sifa shiyon yanjiu zhong de jige wenti* [Several Questions regarding the Study of Judicial Application of the Constitution], 1 FAXUE [LEGAL SCIENCE] 3 (2001) (questioning judicial application of the Constitution).

75. Hu Jingguang & Chen Xiong, *Guangyu zuigao fayuan 6.28 pifu xingzhi de jiexi* [Explanation and Analysis of the Nature of the Response of June 28th], 7 SHANDONG SHEHUI KEXUE [SHANDONG SOCIAL SCIENCES] 15 (2005) (opining courts should not have power to interpret Constitution).

76. Thomas E. Kellogg, *supra* note 62, at 5 (translation by author).

the Abolishment of the Judicial Interpretations Adopted Before the End of 2007,” (2007 Decision) the SPC declared the Response ineffective because it was “no longer applied.”⁷⁷ Subsequent to the 2007 Decision, another round of discussions on *Qi Yuling* took place on a much smaller scale.

The *Qi Yuling* case is dead and the problem of constitutional review remains unsolved. Does this signify “the death of constitutional litigation in China”, as Thomas E. Kellogg suggests?⁷⁸ Can China find an alternative constitutional review system? Which one? And how?

VI. WHAT IS THE NEXT STEP TOWARD CONSTITUTIONALISM?

Mainstream scholars agree that there is no systematic practice of constitutional review in China. Although the Constitution has provided for a review mechanism by the NPC, the NPC or NPCSC has not yet deemed a law, regulation, administrative action, or judicial act unconstitutional.⁷⁹ Additionally, the NPC and NPCSC have not used the Constitution or Law on Legislation to review normative documents that violate the Constitution in Chinese social life and state activities.⁸⁰ The disparity between theory and practice still remains and this situation seems to deadlock the evolution of constitutionalism in China.

Although some sort of breakthrough vis-à-vis the current constitutional regime can be expected, a radical change will not be possible in the near future. As far as constitutional review is concerned, the first task is to truly apply the current provisions of the Constitution regarding check and filing, so that the authority of the Constitution as the fundamental law of the country can be gradually established. In the meantime, searching for a proper solution and a workable mechanism compatible with the current Constitution should be the real priority. In this regard, Chinese scholars have laid down a solid foundation as to which institution or mechanism should be suitable for the Chinese system.

For about two decades, Chinese scholars, particularly those in constitutional law, have been very active in debating the way to implement the current constitutional provisions and in proposing new approaches. Scholars found there are five types of constitutional review in the world: constitutional review by ordinary judicial institutions (the courts) (the U.S. model), constitutional review by a constitutional court (the German and Austrian model), constitutional review by the legislature (the British model), constitutional

77. Guanyu feizhi 2007 nian di yiqian fabu de youguan sifa jieshi (di qi pi) de jue ding [Decision on the Abolishment of the Judicial Interpretations adopted before the End of 2007] *Zuigao renmin fayuan gonggao* (Official Bulletin of Supreme People’s Court), FASHI (2008), No. 15 (translation by author).

78. Thomas E. Kellogg, *supra* note 62 (translation by author).

79. CHEN YUNSHENG, XIANFA JIANDU SIFAHUA [JUDICIALIZATION OF CONSTITUTIONAL SUPERVISION] 452 (Peking Univ. Press 2004) (exposing China’s lack of constitutional review process).

80. See HU JINGGUANG & HAN DAYUAN, ZHONGGUO XIANFA [CHINESE CONSTITUTION] 162 (Law Press 2004).

review by a special political organ (the French model), and constitutional review by the supreme organ of state power (all ex-Socialist countries except ex-Yugoslavia, including China).⁸¹

A. Options for Constitutional Review as Proposed by Scholars

As to the “right” way going forward for China, Chinese constitutional scholars have put forward four major options for consideration.

First, to follow the American model and allow ordinary courts to review the constitutionality of legislative and executive actions. In doing so, the Supreme Court, not the NPC, would assume responsibility for constitutional interpretation, and the Constitution should be the basis of the judgment.⁸²

Second, to follow the European continental system by establishing a constitutional court to take charge of constitutional review.⁸³

Third, to follow a relatively new proposal, which promotes a system of review combining the supreme organ of state power and judicial institutions.

Under the third option, there are four sub-options. First, while establishing a Committee of Constitutional Supervision under the NPCSC, which would be in charge of constitutional interpretation and supervision of constitutional application, the system would also allow review of constitutionality, in order to institutionalize a “dual track system” of review.⁸⁴ Second, while granting constitutional supervisory jurisdiction to the Law Commission, a parliamentary commission under the NPC (which already exists), would conduct a prior review before the adoption of legal normative documents and a posterior review after the adoption. In addition, a separate Constitutional Chamber within the SPC would review constitutional violations in adjudicating cases.⁸⁵ The third subsection is similar to the second, but instead of the Law Commission, a Constitutional Committee under the NPC would conduct prior review of constitutionality. This Committee would serve as an appellate body to receive appeals from the Constitutional Chamber of the SPC and make a

81. See Qin Aolei & Wang Kai, *supra* note 18, at 368-70.

82. See Wang Lei, *Zhongguo de xianfa jieshi jigou* [China's Institution for Constitutional Interpretation], in *XIANFA YU MINZHU ZHENGZHI* [CONSTITUTION AND DEMOCRATIC POLITICS] (Xu Chongde ed., China's Procuratorate Press 1994) (articulating first option); Huang Songyou, *supra* note 63 (arguing Supreme Court should use Constitution for basis of constitutional review).

83. See Huang Xuexian, *Wanshan woguo xianfa jianqu jizhi de tantao* [Discussion on the Ways to Improve Constitutional Supervision Mechanism in China], 1 *XIANFA YANJIU* [RESEARCH ON CONSTITUTION] 342-55 (2002) (supporting option of constitutional court conducting constitutional review); see also CHEN YUNSHENG, *supra* note 79, at 501.

84. See generally Wang Caisong, *Qianyi weixian he dui weixian de jianqu shencha* [A Preliminary Discussion of Violation of Constitution and its Supervision and Review], 3 *DONGBEI SHIFAN DAXUE XUEBAO* (ZHESHEBAN) [JOURNAL OF NORTHEAST NORMAL UNIVERSITY (PHILOSOPHY AND SOCIAL SCIENCES)] (1986) (supporting a dual track system of constitutional review).

85. See generally Wang Jingyuan, *Sifa shencha moshi lun* [On the Model of Judicial Review], 4 *SHIHUI KEXUE* [SOCIAL SCIENCES] (1994) (delineating constitutional system in which special Constitutional Chamber of SPC would review constitutional violations).

final judgment.⁸⁶ Under the final sub-option, the NPC and its standing committee would be given the power to review alleged constitutional violations committed by the organs of the Central Government, as well as the people's congresses and their standing committees of provincial levels. The people's congresses and their standing committees at various local levels would also review all unconstitutional acts committed by other local organs, as well as the people's congresses and committees immediately subordinate to them. In addition, they would have jurisdiction to receive complaints on rulings made by the people's congress and its standing committee that are on the next immediate level. In the meantime, the courts would be granted partial constitutional jurisdiction to examine acts of executive organs and their personnel.⁸⁷

Fourth, the establishment of a Constitutional Council (*xifa weiyuanhui*)⁸⁸ or Constitutional Supervisory Committee (*xianfa jiandu weiyuanhui*) under the NPC is a mainstream opinion that has been debated for a long time and has potential for realization. The merit of this proposal is that it does not contradict the current constitutional framework, and further, it respects the NPC as the supreme organ of power and embodies the spirit of professionalism and procedure. Many believe that this proposal carries fewer difficulties, is more feasible, and will encounter less political and professional resistance. Therefore, this proposal is the most plausible choice thus far.⁸⁹

Under the fourth option, however, the status of this Council or Committee under the Constitution remains unsolved. Scholars have proposed three solutions. The first is to set up a Constitutional Council under the NPC parallel to the NPCSC. The Council would be subordinate to the NPC and subject to its supervision.⁹⁰ The second proposal is to set up a Constitutional Commission under the NPC whose function would be the same as one of the other special parliamentary commissions it controls. According to this majority opinion, the Constitutional Commission would be elected by the NPC and would be a functional organ of the NPC and its standing committee. Upon authorization by the NPC or the NPCSC when the NPC is not in session, the Commission

86. See generally Bao Wanchao, *Sheli xianfa weiyuanhui he zuigao fayuan weixian shencha ting bingxing de fuhezhi: wanshan woguo weixian shencha zhidu de lingyizhong silu* [Establishing a Composite System Combining a Constitutional Committee and Constitutional Chamber of the SPC: Another Way to Improve Constitutional Review System in China], 4 FAXUE [LEGAL SCIENCE] (1998) (arguing for a constitutional committee to review constitutionality).

87. See generally Wang Shiru & Wei Peifen, *Guanyu sheli shuangchong weixian shencha zhidu de sikao* [Reflection on the Establishment of a Dual Constitutional Review System], 4 JINGYANG XUEKAN [JOURNAL OF JINGYANG] (1999) (articulating dual constitutional review system for China).

88. In Chinese, *weiyuanhui* can be translated into "council", "committee", or "commission".

89. Qin Aolei & Wang Kai, *supra* note 18, at 370 (noting benefits of establishing a constitutional council or constitutional supervisory committee in China).

90. See generally Fei Shancheng, *Shilun woguo weixian shencha zhidu de moshi xuanze* [On the Choice of Models of Constitutional Review in China], 2 ZHENGFA LUNTAN [FORUM ON POLITICS AND LAW] (1999) (reviewing potential constitutional review models for China).

would exercise constitutional jurisdiction.⁹¹ The third proposal is to set up a Constitutional Committee as a working committee under the NPCSC. This Committee would be subordinate to the NPCSC, equal to other standing committees, and have no independent adjudicative authority. In sum, the Committee would just be a working body unable to make binding decisions, and required to report its deliberations to the NPCSC.⁹²

B. A Quick Assessment of the Next Move

Considering the strengths and weaknesses of the above proposals, and in view of the current constitutional provisions, I am of the view that the fourth option is the most practical and feasible. The third option demands reforming the constitutional framework by granting constitutional jurisdiction to the courts. Such a task represents some kind of insurmountable difficulty at this stage. In theory, taking the majority view (the second solution) under the fourth option would eliminate the need for substantial constitutional reform, save a few technical adjustments without constitutional amendment, in order to make the system immediately operational.

Can constitutional review be an item on the political agenda of the decision-makers in China? Nobody, whether scholars or politicians, can predict this answer. Essentially, the answer depends on the following: the need of internal politics, the courage and momentum of political leaders, and, of course, the maturity of the theory. I also believe that scholars have little to say under the strong Party-State polity. So far, I have yet to see any signs supporting this direction of constitutional reform. Scholars Keith Hand and Thomas E. Kellogg agree, as they believe “the prospects for a meaningful constitutional reform are limited.”⁹³ For this reason, Kellogg continued:

Given the somewhat prohibitive environment for top-down reforms, it may be more fruitful for Chinese lawyers, academics, and activists to continue to pursue bottom-up strategies. In particular, lawyers and academics should continue to make rigorous, creative, and useful constitutional arguments to Chinese judges. Lawyers may also want to consider experimenting with greater use of international and comparative law.⁹⁴

91. See Cheng Xiangqin, *Guanyu xianfa jianyu de jige you zhenyi de wenti* [Several Disputable Questions About Constitutional Supervision], 4 FAXUE YANJIU [CHINESE JOURNAL OF LAW] 56 (1999) (discussing proposal of setting up constitutional commission under the NPC to exercise constitutional jurisdiction); see also HU JINGGUANG, *ZHONGGUO XIANFA WENTI YANJIU* [RESEARCH ON THE QUESTIONS OF CHINESE CONSTITUTION] 214-16 (Xinhua Press 2004) (articulating potential constitutional review systems for China).

92. See generally Yu Jingrao, *Shilun quanguo renda changweihui gongzuo weiyuanhui jianshe* [On the Establishment of Working Committees Under the NPCSC], 5 FAXUE PINGLUN [LAW REVIEW] (1993) (addressing potential for establishing working committees under purview of NPCSC).

93. Kellogg, *supra* note 62, at 6 (translation by author).

94. *Id.* at 6-7 (translation by author).

VII. CONCLUSION

When asked whether the SPC's 2008 decision in the *Qi Yuling* case represents "the death of constitutional litigation in China," Kellogg responded that "[c]onstitutional litigation in China has not yet died, but it will need additional care and feeding from its supporters to endure this latest turn of events."⁹⁵

Indeed, the foundation of constitutional review in the Constitution exists, but it must be activated in such a way that unconstitutional legislative instruments and executive acts can be corrected. To some extent, literally implementing the Constitution and Law on Legislation should be the first priority. The creation of the Division of Check and Filing under the NPCSC, and the amendment to the Working Procedure in 2005 are just parts of this first stage of the activation process.

In addition, scholars and lawyers should continue to develop a theory that must underline a constitutional committee, council, or commission under the NPC. Such an organ can certainly make a difference vis-à-vis the current somewhat deadlocked situation, without shaking the current constitutional foundation and the authority of the CPC. At the same time, the courts must be given a role to play in rectifying the unconstitutional acts, and in so doing, the courts should play a "checking" role in a neutral position, and balance the unlimited jurisdiction and uncontrolled authority of the NPC. More importantly, there is a pressing need to establish a transparent and effective mechanism within the NPC system and a legal process for addressing citizens' constitutional claims. Finally, the constitutional concept that China "exercises the rule of law, building a socialist country governed according to the law," is the correct principle to move constitutionalism forward.⁹⁶ As a result, corresponding action should be taken to realize it, including realistically instituting an effective mechanism of constitutional review. Otherwise, constitutionalism, though already at the nascent stage, will remain an empty word.⁹⁷

95. *Id.* at 7 (translation by author).

96. XIAN FA art. 5, § 1 (1982) (P.R.C.).

97. Thomas E. Kellogg & Keith Hand, *NPCSC: The Vanguard of China's Constitution?*, 2 CHINA BRIEF 4 (2008).