

Outline

Subject:

CONSTITUTIONAL REVIEW “WITH CHINESE CHARACTERISTICS”

Law, Institutions and Recent Developments

Guobin Zhu

Research purpose and significance

Purpose:

To provide an explanation of the theory and application of constitutional review-filing review with Chinese features, covering pertinent law, institutions, and recent developments.

Significant:

1. clarify the distinctions between the other countries and China's constitutional review systems. China don't have judicial review. The constitution has established a system of constitutional review in which the legislature, not the courts, are given the authority to review.
2. Assess China's constitutional review process and identify areas for further development. The Chinese constitutional review system is steadily moving toward the (partial) building of an unconstitutional review system.

Research question

What's Constitutional Review “With Chinese Characteristics” ?

Type of scholarship (maybe a combination of several)

The institutional basis of constitutional review in China as well as the development and evaluation of the F&R review are covered by the doctrinal research methodology, which is completely legal in nature.

What information is relied upon by the author? How is the information gathered and processed?

1. laws and regulations, such as the Constitution, the Legislative Law and the NPC Working Procedures
2. Essays and books.

Concepts: what are the most important/ concepts/ideas one needs to know to understand

F&R system refers to the activities of normative documents which, after being formulated and promulgated, are reported to the Standing Committee of the NPC at the same or higher level for the record in accordance with the statutory period, and which are supervised and reviewed by the Standing Committee of the NPC receiving the record within the statutory period in accordance with the statutory standards and procedures.

Judicial review means that the courts check power by reviewing and deciding, through the judicial process, whether laws, decrees and acts enacted by the legislature and the executive are unconstitutional.

The main argument

China presently uses the constitutional review process as a model for legislative review.

The Constitution already has the foundation for non-judicial entities to evaluate unlawful acts, but they must be used in a way that successfully corrects unconstitutional legislative instruments (and administrative acts). As real enforcement of current constitutional clauses and legislative requirements is somewhat feasible, it should be given priority for the time being.

- 1) The assurance of compliance of constitutionality seems to be the first and original meaning of constitutional review.
- 2) In accordance with the current Constitution, the courts do not possess the power to assure the compliance of constitutionality in adjudicating cases.

Argumentation: reasoning, arguing – how the argument is made?

This chapter will first explore the constitutional provisions and theory regarding constitutional review of legislation and the rationale behind. As part of the power of supervision, the NPC and the NPCSC together exercise the power of constitutional review and ensure the compliance of law with the Constitution. The system of legislative review develops at two levels and for two purposes: (i) the review of law on the basis of constitutionality and (ii) the review of other forms of law on the basis of legality. Based on the above provisions, the NPCSC also exercises the power of review of both constitutionality and legality of other regulations and rules. Following the hierarchy of law and the order of legal effect, once a conflict of law matter arises, the NPC and the local people's congresses shall directly annul these conflicting laws, regulations and rules or demand the enacting authorities to annul or alter them on their own.

Second, it will examine the theoretical and practical development in recent years of the establishment of the "System of Filing and Review", a constitutional review system with Chinese characteristics and a system charged with the second function of constitutional review, and evaluate the efficiency of it. The system of review of constitutionality is primarily based on the principle of supremacy of constitution which has long been confirmed in the 1982 Constitution and it has survived the five amendments thereafter. The Law on Legislation, as amended in 2015,

has fully developed a structured and layered system on the above basis and consolidated relevant provisions, for example.

It ends up with some observation on the future of the system development. Up to now, there are five reports on F&R submitted by the Commission to the NPCSC for deliberation, they are the Reports of 2017, 2018, 2019, 2020 and 2021. The merit of Option IV lies in that the proposal does not contradict the current constitutional framework, respects the NPC as the supreme organ of state power and embodies the spirit of professionalism and procedure. It is believed that it carries with it fewer difficulties and greater feasibility and would encounter less political and professional resistance and would therefore be “the most possible choice so far”. Time has changed. Considering the full implementation of F&R system in China since recent years, Option IV would not be considered for now, although it seemed to be the most practical and feasible one, while other options would certainly not to be taken into account at all.

Conclusion/inference: what conclusion? Sensible?

From the current point of view, judicial review of constitutionality would never be possible unless there was substantial political and constitutional reform, on the one hand.

What are the main assumptions? Are they sound?

The system is a major factor contributing to the different systems of constitutional review. The authors argue that China's theoretical environment and unique system are factors that contribute to the different systems of constitutional review.

What are the implications of this research?

F&R system is still far from our expectation in terms of its effectiveness. In addition, what scholars and lawyers should continue to do is to promote and develop the theory that underlines the significance of a constitutional committee/ council/commission to be established under the NPC.

What's the author's point of view?

The concept “to rule the country according to law and to build a Socialist country of the rule of law”, as prescribed by the Constitution, is the cornerstone supportive of moving constitutionalism forward, and corresponding action should be taken to realize it, including realistically instituting an effective mechanism of constitutional review.

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CONSTITUTIONAL REVIEW “WITH CHINESE CHARACTERISTICS”*

Law, Institutions and Recent Developments

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A general perception among Chinese constitutional law scholars exists that constitutional review as institution and mechanism is an integral part of the constitutional arrangement under the current Constitution (1982).¹ The view is somewhat mistaken but is not completely wrong. The aim of this Chapter is to examine that while substantial constitutional change has not yet taken place, or to say, will not take place in a foreseeable future, it is arguable that a unique Chinese brand of constitutional review system has taken root and is still evolving.

A classical understanding of the concept of judicial review constitutes “a court’s power to review the actions of other branches or levels of government; esp., the courts’ power to invalidate legislative and executive actions as being unconstitutional”². The understanding is largely based on the doctrine and practice of the separation of powers and checks and balances. It 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 written constitution and, within this query, to determine their validity. This system commands a primordial condition: courts have constitutional jurisdiction and exercise it on the basis of constitutionality. Needless to say, constitutional review is an innovation and construct derived from the American constitutional experience modelled after *Marbury v. Madison*³ that now has become a norm or standard justifying and attesting democratic constitutional-making, and a reference for other countries to modernize their constitutional regime.

* This chapter is written partly based on my previous writing “Constitutional Review in China: An Unaccomplished Project or a Mirage?”, first published in (2010) 43 SUFFOLK U. L. REV.625, pp. 625–653. However, for the purpose of this Handbook, the original text has received substantial revision, including deletion, and important updates to include new laws and reference materials.

If the above definition was literally applied to China, any constitutional scholar would have to conclude without any ambiguity that constitutional review does not exist in China. First, the current Constitution (1982) does not contain any such provisions for it. Second, Chinese courts are not granted, expressly or implicitly, the power to review the constitutionality of law and instead their task is merely to apply law, without the power of interpretation of law in adjudicating cases. Judicial review of constitutionality by courts is far from being an institutional fact, nor a mainstream idea in Chinese jurisprudence of constitutional law. That said, it is worth noting that China has tried judicial approach to constitutional review by way of *Qi Yuling* case; unfortunately, *Qi Yuling* had not lived for long in Chinese judicial history.⁴

A more holistic approach to constitutional review once appeared in 2000s in Chinese legal debate that contemplated contemporary public law in a way different from the classic approach. The differences lie in the understanding of the functions of constitutional review which, in my view, should be the assurance of compliance of constitutionality and dispute resolution. The assurance of compliance of constitutionality seems to be the first and original meaning of constitutional review. The second function of it, i.e., 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, if not all, cases played by independent courts, but it may also be played by the national legislature and the bodies under it such as in the case of China as provided for by the Constitution.

In accordance with the current Constitution, the courts do not possess the power to assure the compliance of constitutionality in adjudicating cases. As regards the second element/function of constitutional review, we shall be able to assert that constitutional review of this nature exists in China and that the Constitution has established a system of constitutional review with the power of review vested in the legislature, instead of courts.

This chapter will first explore the constitutional provisions and theory regarding constitutional review of legislation and the rationale behind. Second, it will examine the theoretical and practical development in recent years of the establishment of the “System of Filing and Review” (*Bei'an Shencha Zhi*, F&R), a constitutional review system with Chinese characteristics and a system charged with the second function of constitutional review, and evaluate the efficiency of it. It ends up with some observation on the future of the system development.

Constitutional Review of Legislation as Framed by the Constitution and the Theory

The People's Congress System and Constitutionalism

The Chinese fundamental political system as framed by the Constitution is people's congress system. Based on the Constitution, this system has the following salient features: (i) “All power in the People's Republic of China belongs to the people”⁵; (ii) “The organs through which the people exercise state power are the National People's Congress and the local people's congresses at different levels”⁶; (iii) “All administrative, supervisory, adjudicatory and procuratorial organs of the state shall be created by the people's congresses and shall be responsible to them and subject to their oversight”⁷; (iv), “The

state institutions of the People's Republic of China shall practice the principle of democratic centralism".⁸

Under the people's congress system, the National People's Congress ("the NPC") is "the highest organ of state power", whose permanent body is the Standing Committee of the National People's Congress ("the NPCSC"),⁹ and in the meanwhile, the NPC and the NPCSC "exercise the legislative power of the state".¹⁰ These provisions qualify the constitutional status of the NPC (and the NPCSC as "its permanent organ") and define it as both the sole highest organ of state power and the national legislature. This confirms that all state power is actually centralized in one body and no separation of powers is practiced as institutionalized under most democratic constitutions. This regime that centralizes a high degree of power under the constitutional principle of "democratic centralism" is believed to have been rooted in the previous practice of the government under the Communist Party of China ("the CPC") in the 1930s and 1940s.¹¹ It radically differs from the conventional Western conceptualization of the separation of powers. Though it looks like a parliamentary system considering that the NPC is also the highest legislature of China, the people's congress system is still substantively different from a Westminster system in light of the fact that the creation of the supervisory, judicial and procuratorial organs is completely subject to the decision of the NPC (with the CPC orchestrating behind the screen) and, probably the most importantly, the NPC is not constituted through democratic election.

The NPC, while generally acknowledged as a "rubber-stamp", does have a substantial role to play in decision-making and law-making process. Although Dowdle thinks that "it 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",¹² the main role of the NPC is basically limited to the implementation of the policies and programmes made by the CPC by translating them into laws or regulations. The claim that the NPC has become an "independent" force is indeed questionable, in view of the recent constitutional amendment in 2018 which constitutionalizes the leadership of the country by the CPC by adding this sentence "The leadership of the Communist Party of China is the most essential feature of socialism with Chinese characteristics" to Art. 1¹³ and creates the Commissions of Supervision at all levels, a brand new state institution under the NPC and parallel to people's courts and people's procuratorates,¹⁴ all together further confirming the full leadership of the CPC across all state and political institutions and holistically institutionalizing the Party-State structure. The five constitutional amendments since 1988¹⁵ have gradually confirmed this position. The dynamics of the relationship between the Party and the State can only be understood in this framework of "Party-State" structure. However, it is arguable that the NPC could realize a "soft-landing" for constitutionalism in China by reforming the people's congress system and transforming it into a full range and all-round legislative body.¹⁶

In theory, the NPC enjoys the total power of state and 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.¹⁷ It is believed that "its power to legislate for China is preeminent among the multiple powers that it exercises".¹⁸ As part of the power of supervision, the NPC and the NPCSC together exercise the power of constitutional review and ensure the compliance of law with the Constitution.

“Legislative Supervision” as Constitutional Review: Its Foundation and Rules

The supervisory power is a mandatory power of examination, investigation, overseeing, rectification and review to be exercised by the NPC and the people’s congresses at all levels over the organs created by them, the purpose of which 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.¹⁹ As the highest organ of state power as well as the highest legislature, the NPC exercises the power of supervision over legislative acts, law enforcement, executive actions, the judiciary, state personnel and military and foreign affairs.²⁰

The NPC’s supervisory power over laws and regulations is often called “legislative supervision” (*Lifa Jiandu*), which 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”, the purpose of which is “to ensure that general laws are consistent with the Constitution and basic laws, regulations consistent with laws, all normative instruments consistent with laws, resolutions and decisions made by the people’s congresses, and to maintain the unity of the State legal system”.²¹

The Constitution has provided for the foundation for 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”.²² Some have claimed that any review must be confined to “law”, “administrative regulations” and “local regulations”. This is not true. Based on the 2000 *Law on Legislation (Lifa Fa*, 2015 revised), “legislation” encompasses seven categories: (i) laws, (ii) administrative regulations, (iii) local regulations, (iv) autonomous regulations and specific regulations (of national autonomous regions), (v) regulations (made by special economic zones), (vi) rules (of departments of central government and local governments), and (vii) military regulations and rules.²³

Scholars regard the above seven forms of law as “formal laws”, which 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”.²⁴ Apart from “formal laws”, in Chinese civil society, there exist many “substantive laws”, which, in the broad sense of law, constitute parts of law system in China. They are: (i) resolutions and decisions adopted by the NPCSC and local people’s congresses and their standing committees; (ii) decisions and decrees issued by the Central Military Commission, the State Council and local people’s governments at all levels; and (iii) decisions, orders, directives made by departments of the State Council, departments of local people’s governments at all levels.²⁵ 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 of the CPC and the State Council, i.e., the Central People’s Government. Although the above forms of normative instruments are not officially recognized by *Law on Legislation* as “formal laws and regulations”, they should be taken for parts of functional law, and real law in view of the fact that they are made by the specific institutions, applied to unspecified objects and repetitively, and have general legal effect. As such, these “substantive laws” should be included in the range of review by legislature.²⁶

The practice of decentralization of law-making in China, which means the State Council and the local people’s congresses and their standing committees can make

administrative and local regulations and rules, contradicts the conventional theory of unitary state/unitarism that China practices and it mirrors a kind of de facto legislative federalism. Furthermore, the diversity of categories and forms of laws underlines the complexity of law system. This gives rise to the necessity of creating a system of review of legislation, being it “laws”, “regulations” or “rules”, the purpose of which is to “uphold the uniformity and dignity of the socialist legal system”.²⁷

The system of legislative review develops at two levels and for two purposes: (i) the review of law on the basis of constitutionality and (ii) the review of other forms of law on the basis of legality. The Constitution authorizes the NPCSC to exercise the power of constitutional review, i.e., the review of constitutionality of law by defining that: “The NPCSC exercises the following functions and powers: (i) interpreting the Constitution and overseeing its enforcement; ... (vii) revoking administrative regulations, decisions and orders formulated by the State Council that are in conflict with the Constitution or laws; (viii) revoking local regulations and resolutions formulated by the state organs of power in provinces, autonomous regions and cities directly under central government jurisdiction that are in conflict with the Constitution, laws, or administrative regulations”.²⁸ The NPCSC’s power to examine whether administrative regulations and local regulations actually contravene the Constitution is the power of constitutional review by nature.

Review of Constitutionality and Legality

Based on the above provisions, the NPCSC also exercises the power of review of both constitutionality and legality of other regulations and rules. 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, and between the two procedures of review. In accordance with the hierarchy of law and the structure of authority of law- and regulation-making bodies, the *Law on Legislation* defines the system and process of legislative review as follows:²⁹

The power to modify or revoke laws, administrative regulations, local regulations, autonomous regulations, separate regulations, or rules shall be as follows:

- i. The NPC shall have the power to modify or revoke inappropriate laws enacted by its Standing Committee, and have the power to revoke autonomous regulations and separate regulations approved by its Standing Committee which contravene the Constitution or the provision of paragraph 2, Article 75 of this Law;³⁰ [Emphasis added]
- ii. The NPCSC shall have the power to revoke administrative regulations which contravene the Constitution and laws, have the power to revoke local regulations which contravene the Constitution, laws, and administrative regulations, and have the power to revoke autonomous regulations and separate regulations approved by the standing committee of the people’s congress of a province, autonomous region, or municipality directly under the Central Government which contravene the Constitution or the provision of paragraph 2, Article 75 of this Law; [Emphasis added]

- iii. The State Council shall have the power to modify or revoke inappropriate State Council departmental rules and the rules of local governments;
- iv. The people's congress of a province, autonomous region, or municipality directly under the Central Government shall have the power to modify or revoke inappropriate local regulations made and approved by its standing committee;
- v. The standing committee of a local people's congress shall have the power to revoke inappropriate rules made by the people's government at the same level;
- vi. The people's government of a province or autonomous region shall have the power to modify or revoke inappropriate rules made by the people's governments at the next lower level;
- vii. The empowering authority shall have the power to revoke regulations made by the empowered authority which transcend the scope of empowerment or contravene the purpose of empowerment, and when necessary, may revoke the empowerment.

The above definitions reveal that the review of constitutionality is conducted by the NPC and the NPCSC (see paragraphs (i) and (ii)), while the review of legality is conducted by the State Council (see (iii)), local people's congress and its standing committee (see (iv) and (v)) and local people's government (see (vi)). Interestingly, the arrangement of legislative review in the Constitution and laws displays a pyramidal structure of authority, mirroring the administrative division of the country and corresponding to the institutional establishment.

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. Qin Aolei (秦奥蕾) and Wang Kai conclude that the review of constitutionality by the NPC or NPCSC applies to the following categories of laws and regulations:³¹ (i) law; (ii) administrative regulations made by the State Council under Art. 89 of the Constitution regarding the functions and powers of the State Council;³² (iii) local governmental rules regarding "concrete local administrative matters" under Art. 107 of the Constitution; (iv) local regulations concerning "local affairs" which need to be regulated locally under Arts 99 and 104 of the Constitution; (v) local regulations concerning matters that have not been regulated by national laws or administrative regulations yet; (vi) autonomous regulations and specific regulations; and (vii) other "not yet formalized substantive laws". Qin and Wang actually expanded the scope of review by including category (iii) which should be subject to the review of legality by the State Council and/or the local people's congress concerned.

However, it is appropriate to include the category (vii) which includes resolutions, decisions, and directives jointly adopted by the Central Committee of the CPC and the State Council. This category of normative instruments has substantive authority of law and general legal effect. The review of them certainly constitutes a 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"; on the other hand, "the Chinese people of all nationalities will continue to adhere to the leadership of the CPC, ...",³³ and "Leadership by the Communist Party of China

is the defining feature of socialism with Chinese characteristics”.³⁴ The question now is whether the CPC and its decisions and acts in the capacity of the ruling party are subject to constitutional scrutiny and review. The answer to it, which constitutes an interesting and meaningful academic subject matter, will obviously be no easy.

Hierarchy of Legal Authority as the Basis of Review

The people’s congresses at different levels and the State Council have differentiated roles of law review to play and the review must observe a hierarchical and tiered system of legal authority or effect. The Constitution and the *Law on Legislation* actually have established a set of rules to guide the practice.

The system of legal authority or effect is structured as follows:³⁵ (i) The Constitution has the highest legal authority, and no national law, administrative regulations, local regulations, autonomous regulations and special regulations, or administrative or local rules shall contravene the Constitution; (ii) National laws (made by the NPC and the NPCSC) have higher legal authority than administrative regulations, local regulations and (departmental and local) rules; (iii) Administrative regulations (made by the State Council) have higher legal authority than local regulations and administrative or local rules; (iv) Local regulations (made by the people’s congress and its standing committees at provincial level) have higher legal authority than local rules issued by governments at the same level and lower level; and (v) 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 districted city or an autonomous prefecture within the administrative region of the province or autonomous region. In addition to the above, “the rules of different departments of the State Council shall have equal authority, as well as State Council departmental rules and the rules of local governments”.³⁶

Following the hierarchy of law and the order of legal effect, once a conflict of law matter arises, the NPC and the local people’s congresses shall directly annul these conflicting laws, regulations and rules or demand the enacting authorities to annul or alter them on their own.

However, the above process of review of laws and regulations on the basis of constitutionality and legality is subject to two exceptions, the provisions of which are derived from the Constitution and the *Law on Legislation*. First, autonomous regulations and specific regulations made by the people’s congresses of national autonomous areas can vary national law, administrative regulations and local regulations “in the light of the political, economic, and cultural characteristics of the nationality or nationalities in the areas concerned”,³⁷ “provided that 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 *Law on Regional National Autonomy (Minzu Quyu Zizhi Fa)* and provisions of any other law or administrative regulations which are dedicated to matters concerning national autonomous areas”.³⁸ Thus the inconsistency, if it exists, should not be regarded as contravention of constitutional and national law as long as the prescribed conditions are met.

Second, the revised *Law on Legislation* has made special arrangement as to the making of local regulations by the people’s congress and its standing committee of a “districted city”, also translated as “city divided into districts” (*Shequ de Shi*), as follows: “The people’s congress and its standing committee of a districted city may, according to the city’s specific circumstances and actual needs, enact local regulations on urban and rural development and administration, environmental protection, and preservation of history

and culture, among others, provided that they do not contravene the Constitution, laws, administrative regulations, and the local regulations of the province or autonomous region where the city is located, unless provided otherwise for the enactment of local regulations by a districted city”.³⁹ The inconsistency under this condition is permissible as the power of regulation-making for “districted city” derives directly from the delegation of power by the NPC under the 2018 Constitutional Amendment.⁴⁰

Filing and Review: Non-judicial Review of Constitutionality

A Brief Retrospect of the Origin of F&R System

The review of constitutionality of legislation is conducted via the system of “Filing and Review” (*Bei'an Shenchu*, hereafter abbreviated as F&R). Basically, F&R is first of all a long-time practice to implement the ambiguous intent of the Constitution which permits the creation of a review process within the people's congress system.

The filing system started in 1979 and first applied to local regulations and rules. Until the end of 1983, the filing work was mainly conducted by the Section of Politics and Law of the General Office of the NPCSC, the major objectives of which were to: (i) review the constitutionality and legality of regulations and rules; (ii) manage the register, and conduct statistics and filing; (iii) periodically report to the NPCSC on the situations of law-making by local people's congresses. The General Office did find a “small amount” of local regulations and rules inconsistent with national laws and policies and requested the NPCSC to refer these cases to the standing committees of provincial, regional and municipal people's congress concerned for resolution, as observed by Cai.⁴¹

From 1984 to 1988, the filing of 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 regulations and rules and then put them into different folders). Since 1988, the NPCSC was requested to conduct the work of review of all regulations and rules submitted to it, but the review was basically carried out as a matter of routine.

The situation of no active review lasted for about 5 years until July 1993 when the Secretariat of the General Office of the NPCSC took up the responsibility of filing and review of regulations and rules submitted by local people's congresses, in accordance with *The Outline of Work for the 8th NPCSC (Bajie Quanguo Renda Changweihui Gongzuo Yaodian)*. Based on the “Outline”, the whole process of filing and review consisted of six steps.

The effectiveness of the system depends mainly on the reaction of the local people's congresses, the regulations of which were under challenge. Cai's observation is rather critical when he said that: “As 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”.⁴²

Two subsequent events together have enhanced this non-judicial means of review of constitutionality. One was the establishment of the organ in May 2004 specially in charge of filing and review of laws and regulations within the NPCSC, i.e., the Division of Filing and Review of Regulations (*Fagui Bei'an Shenchu Shi*), the mission of which was to shoulder the task of filing and review of regulations. The second was the adoption of *The Working Procedure Relative to Filing and Review of Administrative Regulations, Local Regulations, Autonomous Regulations and Specific Regulations, and Regulations*

of Special Economic Zones (*Xingzheng Fagui, Difangxing Fagui, Zizhi Tiaoli he Danxing Tiaoli, Jingjitequ Fagui Bei'an Shench Gongzuo Chengxu*, hereafter referred to as “The Working Procedure”) in 2000, and its subsequent revision in 2005, according to which active review of laws and regulations by the NPC and the NPCSC became possible. As we will see it later, this Working Procedure will be replaced by a newly revamped one, demonstrating a substantial progress of the system.

The Theoretical and Constitutional Basis for Review of Constitutionality

Institutionally, the NPC, and only the NPC, as we have seen it above, has the power to supervise and review 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 National Commission of Supervision, the Supreme People’s Court and the Supreme People’s Procuratorate, shall report their work to the NPC. This constitutional arrangement first mirrors the establishment of the people’s congress system which is the fundamental political system of China, and it has made itself far different from typical Western system, be it parliamentary system, presidential system or the separation of powers system. The constitutional design is also responsive to the guiding principles of Chinese constitutional law: people’s sovereignty⁴³ and democratic centralism.⁴⁴

The system of review of constitutionality is primarily based on the principle of supremacy of constitution which has long been confirmed in the 1982 Constitution and it has survived the five amendments thereafter. In the Preamble of the Constitution, it is clearly stated that⁴⁵:

This Constitution, ...; it is the fundamental law of the State and has supreme legal authority. The people of all nationalities, all State organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation. [Emphasis added]

Art 5 of the Constitution further adds that:

The People’s Republic of China governs the country according to law and makes it a socialist country under the rule of law.

The State upholds the uniformity and dignity of the socialist legal system.

No laws or administrative or local regulations shall contravene the Constitution. [Emphasis added]

The above constitutional provisions have been incorporated into the revised *Law on Legislation* in 2015, as follows⁴⁶:

The Constitution shall have the supreme legal effect, and no laws, administrative regulations, local regulations, autonomous regulations, separate regulations, or rules shall contravene the Constitution.

The constitutional intent of establishing a review system to examine the constitutionality and legality of laws and regulations had not been formalized and institutionalized

until the 34th Chairman's Meeting of the NPCSC adopted the above-mentioned The Working Procedure on 16 October 2000. The adoption of it was the first and foremost step towards the institutionalization of constitutional review under the current constitutional framework in China. As a matter of fact, the Working Procedure, a product based on limited accumulated experience, did reflect the need to systematize the work of F&R. To some extent, the symbolic significance of it is farer than the actual one.

Starting from 2000, with the publication of the Working Procedure, F&R, as rightly observed by a scholar, has become "an oversight tool employed by China's top legislature, the Standing Committee of the National People's Congress (NPCSC), to ensure that sub-statutory legislation – ranked below national statutes as to legal force, such as local legislation – conforms to national statutes and policy".⁴⁷ More importantly, F&R has been given the mission to ensure "review of constitutionality" (*Hexianxing Shencha*) by the CPC at its 19th National Congress on 18 October 2017. In his report titled "Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era", Xi Jinping, the Secretary General of the CPC, declared that "We will strengthen oversight to ensure compliance with the Constitution, advance the review of constitutionality, and safeguard the authority of the Constitution".⁴⁸ [Emphasis added] Since this point of time, the term of "review of constitutionality" has been officially adopted and publicly entered into political discourse for the first time; it has gained the legitimacy in academic writings.

In the light of this development of high significance, the Working Procedure (2000), revised first the first time at the 40th Chairman's Meeting of the NPCSC on 19 December 2005, has been repealed and replaced by *The Working Measures for Filing and Review of Regulations and Judicial Interpretations* (*Fagui Sifa Jieshi Bei'an Shencha Gongzuo Banfa*, hereafter "The Working Measures"), adopted at the 44th Chairman's Meeting of the NPCSC on 16 December 2019. The Working Measures have laid down the solid foundation of F&R in general and of constitutional review in particular. The Working Measures are highly regarded by professionals, legal scholars, as well as people working at the NPC. For example, the Division of Filing and Review of Regulations of the Legislative Affairs Commission under the NPCSC regards the adoption of the Working Measures as "a major achievement made by the NPCSC in strengthening the construction of F&R system".⁴⁹ Wang Kai believes that "after revision and improvement for many years, the current F&R system has become the major, or to say, the most efficient supervision system of constitution and laws in China".⁵⁰

F&R as the Major Mechanism of Review

According to Chinese constitutional law, the system of F&R of administrative and local regulations is an integral part of legislative system. In practice, it serves as the basis as well as the major process of constitutional review. Under this system, *bei'an* means "filing", "filing for record" or "for the record" as often translated and used interchangeably in English, and *shencha* means examination, review and audit. The system is rooted and first instituted in the Constitution and *Organic Law of Local People's Congresses and Local People's Governments at Various Levels* (*Difang Geji Renmin Daibiao Dahui he Difang Geji Renmin Zhengfu Zuzhi Fa*; adopted in 1979, and revised in 1982, 1986, 1995, 2004, 2015, 2022), and then fully developed in the *Law on Legislation* (2000, and revised in 2015).

The Constitution first provides for the foundation for the system by promulgating that:⁵¹

The people’s congresses of provinces and cities directly under the Central Government jurisdiction and their standing committees may, provided there is no conflict with the Constitution, laws or administrative regulations, enact local regulations, which shall be reported to the National People’s Congress Standing Committee for the record. [Emphasis added]

And it further institutes a system of filing and approval for regulations adopted by the people’s congresses of national autonomous areas and the people’s congresses of cities divided into districts and their standing committees by defining that:

The people’s congresses of national autonomous areas have the power to enact autonomous regulations and specific regulations in the light of the political, economic, and cultural characteristics of the nationality or nationalities in the areas concerned. The autonomous regulations and specific regulations of autonomous regions shall be submitted to the NPCSC 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 the record. [Emphasis added]⁵²

The people’s congresses of cities divided into districts and their standing committees may, provided there is no conflict with the Constitution, laws or administrative regulations, or with the local regulations of their province or autonomous region, enact local regulations in accordance with the provisions of law, which shall be submitted to the standing committee of the people’s congress of their province or autonomous region for approval before they go into effect. [Emphasis added.]⁵³

The *Organic Law of Local People’s Congresses and Local People’s Governments at Various Levels*, as amended in 2022, refined the above provisions and also identified the State Council as the institution receiving filing by articulating it as follows⁵⁴:

The people’s congresses of provinces, autonomous regions, and municipalities directly under the Central Government may, in the light of the specific conditions and actual needs of their respective administrative areas, formulate and promulgate local regulations, which must not contravene the Constitution, the law, and the administrative regulations; they shall report such local regulations to the NPCSC and the State Council for the record.

The people’s congresses of cities divided into districts and autonomous prefecture may, in the light of the specific conditions and actual needs of their respective areas, formulate local regulations, which must not contravene the Constitution, the law, administrative regulations, and the local regulations of their respective provinces and autonomous regions; they shall report such local regulations to the standing committees of the people’s congresses of the respective provinces and autonomous regions for approval before implementation, and submit them to the Standing Committee of the National People’s

Congress and the State Council for the record via the standing committees of the people's congresses of the respective provinces and autonomous regions. [Emphasis added]

The *Law on Legislation*, as amended in 2015, has fully developed a structured and layered system on the above basis and consolidated relevant provisions, for example, by stating that:⁵⁵

Administrative regulations, local regulations, autonomous regulations, separate regulations and rules shall, within 30 days from the date of promulgation, be reported to the organ concerned for the record in accordance with the following provisions:

- i. Administrative regulations shall be reported to the Standing Committee of the National People's Congress for the record;
- ii. Local regulations formulated 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 the NPC and the State Council for the record, while local regulations formulated by the people's congress of a city divided into districts or an autonomous prefecture and the standing committee thereof shall be submitted to the Standing Committee of the NPC and the State Council for the record via the standing committee of the people's congress of the province or autonomous region in which the said city or autonomous prefecture is located;
- iii. Autonomous regulations and special regulations formulated by the people's congress of an autonomous prefecture or autonomous county shall be submitted to the Standing Committee of the NPC and the State Council for the record via the standing committee of the people's congress of the province, autonomous region or municipality directly under the Central Government in which the autonomous prefecture or autonomous county is located. When autonomous regulations or special regulations are submitted for the record, information on the changes made to relevant laws, administrative regulations and local regulations shall be explained;
- iv. Department rules and local government rules shall be submitted to the State Council for the record, while local government rules shall be concurrently submitted to the standing committee of the people's congress at the same level for the record. Rules formulated by the people's government of a city divided into districts or an autonomous prefecture 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 in which the said city or autonomous prefecture is located for the record, and
- v. Regulations formulated upon authorization shall be submitted to the organ specified in the relevant authorization decision for the record. When regulations of a special economic zone are submitted for the record, information on the changes made to relevant laws, administrative regulations and local regulations shall be explained. [Above emphasis added]

F&R System: New Development

The adoption in 2019 of the above-mentioned *The Working Measures for Filing and Review of Regulations and Judicial Interpretations* does mark a new page of the F&R system development. There is a consensus among scholars and officials in charge of F&R work that the Working Measures represent “a major achievement” of the system.⁵⁶

In **Chapter Two** of the Working Measures, “Filing”, the detailed process and procedures are defined. Taking a few provisions for example:

- (i) A regulation or judicial interpretation shall be submitted to the NPCSC for filing within 30 days from the date when it is issued;⁵⁷ (ii) The paper versions of regulations and judicial interpretations shall be submitted for filing by the respective authorities, such as the State Council, provincial level people’s congresses, etc.;⁵⁸ (iii) The General Office of the NPCSC shall conduct formal review of filed documents within 15 days from the date of receipt of such documents;⁵⁹ and (iv) Before the end of January each year, all submitting authorities shall summarize and submit to the General Office of the NPCSC the lists of regulations and judicial interpretations made, amended, repealed and approved in the previous year.⁶⁰

Chapter Three, “Review”, has defined the responsibilities and scope of review, the procedures of review and the criteria of review. Some new methods, procedures and improvements developed since 2000 have been and included, and normative criteria of review has been systemically formulated, together to ensure the smooth operation of the system of F&R. For example:

- (i) The review is presented in four forms: review ex officio, review upon request, review upon transfer, or special review;⁶¹ (ii) Not only state organs, but also social organizations, enterprises, public institutions and citizens can make recommendation for review to the NPCSC according to the law and the recommendations shall be accepted and registered by the Legislative Affairs Commission;⁶² (iii) Under certain circumstances and upon preliminary research, review process may not be initiated;⁶³ (iv) Regarding the criteria of review, the Working Measures presents more details as follows:⁶⁴ Where it is found during the review of or research on any regulation or judicial interpretation that the regulation or judicial interpretation violates the provisions of any law and falls under any of the following circumstances, relevant opinions shall be provided: (a) It makes provisions for any matter that shall only be governed by laws in violation of Article 8 of the Law on Legislation; (b) It, beyond the prescribed power, illegally sets the rights and obligations of citizens, legal persons, and other organizations, or illegally sets the powers and responsibilities of state organs; (c) It illegally sets administrative licensing, administrative punishment, or administrative compulsion, or adjusts or changes the administrative licensing, administrative punishment, or administrative compulsion set by law; (d) It is obviously inconsistent with legal provisions or contravenes the legislative purpose and principle of a law with a purpose of offsetting, changing or evading legal provisions; (e) It violates the empowerment decision or transcends the scope of empowerment; (f) It varies any matter that

shall not be varied according to the law, or the varying provisions violate the basic principles of the law; (g) It violates legal procedures; and (h) Other circumstances that violate the law; (v) About the handling of regulations and interpretations under review, the reviewing body shall communicate its opinion to the original enacting authority and require it to amend or repeal the regulation or judicial interpretation in a timely manner; if the communication fails, a written review or research opinion shall be provided to the enacting authority in accordance with Article 100 of the Law on Legislation to require it to feedback with a written handling opinion within two months;⁶⁵ (vi) “If an enacting authority fails to amend or repeal any regulation in a timely manner in accordance with the written review or research opinion, the specialized committee [under the NPC] and the Legislative Affairs Commission may legally submit a motion or recommendation for revocation of the regulation to the Chairmen’s Meeting [of the NPCSC] which shall decide whether to submit the motion or recommendation to a session of the Standing Committee [of the NPC] for deliberation. If the enacting authority fails to amend or repeal any judicial interpretation in a timely manner based on the written review or research opinion, the specialized committee [under the NPC] or the Legislative Affairs Commission may legally submit a motion or recommendation requiring the Supreme People’s Court or the Supreme People’s Procuratorate to amend or repeal the judicial interpretation, or a motion or recommendation requiring the Standing Committee of the National People’s Congress to make a legal interpretation, and the Chairmen’s Meeting shall decide whether to submit the motion or recommendation to a session of the Standing Committee [of the NPC] for deliberation.”⁶⁶; and (vii) A specialized committee [under the NPC] and the Legislative Affairs Commission shall generally complete the review or research within three months after the review procedure starts, and submit a written review or research report.⁶⁷

Out of all new provisions and arrangements regarding F&R, there are two particular articles in the Working Measures specifically dealing with the review of constitutionality in clarity that should attract our closer attention. It shows a special focus placed on constitutional review by the NPCSC, and it is presented as follows:

(i) The Constitution and Law Commission of the NPC⁶⁸ and the Legislative Affairs Commission under the NPCSC shall take initiative to review regulations and judicial interpretations should these documents involve constitutional issues; the reviewing organs shall produce a report in writing, and feedback the opinion to the regulations-making bodies;⁶⁹ and (ii) Where it is found during the review of or research on a regulation or judicial interpretation that that regulation or judicial interpretation violates the Constitution, the principles of the Constitution, or the spirit of the Constitution, relevant opinions shall be provided.⁷⁰

According to above paragraph (ii), the review can be based not only on the provisions of the Constitution, but also on “the principles of the Constitution”, or “the spirit of the Constitution”. Although the Working Measures do not prescribe on how to extract the “spirit” of the Constitution, and how to proceed in the above situations, we may presume

that the NPCSC has been given the power and discretion to handle constitutionality-related issues during review, and as required, it is under a duty to produce an opinion with binding effect to be feedbacked to the original document-making bodies. This is where the function and value of F&R system exist.

According to the Working Measures, the major authority of review, here referring to the Legislative Affairs Commission under the NPCSC, shall present its annual report to the NPCSC for deliberation and review. It is defined that:⁷¹

The Legislative Affairs Commission shall submit to the Standing Committee of the National People’s Congress an annual special report on the implementation of filing and review which shall be deliberated at a session of the Standing Committee.

The report on the implementation of filing and review shall, after being amended based on the deliberation opinions of the members of the Standing Committee, be published in the Bulletin of the Standing Committee of the National People’s Congress or on the website of the National People’s Congress.

Interestingly, we discover that this practice of reporting on F&R by the Legislative Affairs Commission did start in 2017, which means it has already been implemented for two years before the official adoption of the Working Measures. Up to now, there are five reports on F&R submitted by the Commission to the NPCSC for deliberation, they are the Reports of 2017, 2018, 2019, 2020 and 2021. Zheng Lei describes this practice as “full coverage” F&R system. Actually, Zheng has just completed a thorough examination and analysis of the first four reports and produced a timely work on the operation of the F&R system.⁷²

A Glimpse at Significant Work of F&R Completed by Reviewing Bodies

In the first Report on F&R submitted to the NPCSC by the Legislative Affairs Commission on 24 December 2017, the Chairman of the Commission presented some interesting and illustrative figures to demonstrate what the Commission had accomplished in 2017. Since 2013, the starting year of the 12th NPC, the Commission has completed review of a total of 4778 normative documents received by it, they included: 60 administrative regulations made by the State Council, 2543 local regulations submitted from provincial level people’s congresses, 1647 local regulations from cities divided into districts, 15 autonomous regulations made by people’s congresses of autonomous regions, 248 separate regulations made by people’s congresses of autonomous regions, 137 local regulations from special economic zones and 128 judicial interpretations. Only in the year of 2017, the NPCSC received 889 normative documents for filing and review.

The table below with statistics which is prepared based on the five Reports can demonstrate the significant work completed by the reviewing bodies, and it is also able to provide for a general picture assisting us in better understanding of the actual work and achievements of F&R.⁷³ Starting from 2020 round of F&R, the NPCSC exercised its review power over the legislation from Hong Kong and Macau. In 2021 round of F&R, a new category of regulations, which is “supervision regulations” adopted by National Supervision Commission, is added.

<i>Types of Normative Documents</i>	2017	2018	2019	2020	2021
Administrative Regulations	18	40	53	25	16
Supervision Regulations					1
Provincial Local Regulations	358	640	516	500	779
Cities' Local Regulations	444	483	78	563	688
Autonomous Regulations and Separate Regulations	25	33	99	85	87
Local Regulations of Special Economic Zones	24	24	58	80	40
Judicial Interpretations	20	18	41	16	251
Ordinances of the Hong Kong Special Administrative Region ⁷⁴				20	42
Ordinances of the Macau Special Administrative Region ⁷⁵				21	17
Total	889	1238	1485	1310	1921

What is Next Step for Constitutional Review?

The mainstream scholars once agreed that there was no systematic practice of constitutional review in China, although the Constitution has provided for a review mechanism by the NPC and the NPCSC. As witnessed by Chen Yunsheng, “So far, the NPC or the NPCSC has never made a decision deeming unconstitutional a law, a regulation, an administrative action or a judicial act”.⁷⁶ Hu Jingguang further pointed out that “there are situations in which normative documents violate the Constitution in actual social life and State activities in China, however the NPC and its Standing Committee have never used the Constitution and the *Law on Legislation* to start constitutional review”.⁷⁷ The disparity between theory and practice still remains apparent and this situation seems to have seen some changes since recent years with effective implementation of F&R.

We may expect some sort of further breakthrough vis-à-vis the current constitutional regime, a radical change, however, will not be possible in the near future. Insofar as constitutional review is concerned, the first task is to truly apply the provisions of the Constitution regarding review of constitutionality of laws and regulations by the NPCSC, so that the authority of the Constitution as the fundamental law of the country can be gradually established. In the meantime, searching for a new constitutional solution with a workable mechanism, for example, judicial review of constitutionality, would require fundamental constitutional reform.

In the early years of twenty-first century, Chinese scholars have completed solid research as to which institution or mechanism would be suitable for Chinese system. Scholars discovered there existed five types of constitutional review in the world which are: (i) constitutional review by ordinary judicial institutions (the courts) (US model); (ii) constitutional review by constitutional court (German and Austria model); (iii) constitutional review by the legislature (British model); (iv) constitutional review by special political organ (French model); and (v) constitutional review by the supreme organ of state power (all ex-Socialist countries except ex-Yugoslavia, including China).⁷⁸

As to the “right” way forward for China, constitutional scholars have put forward four major options/proposals for consideration: (i) Option I – Applying Judicial Review of Constitutionality. This is to follow the American model under which ordinary courts are granted the power to review the constitutionality of legislative and executive actions. In so doing, the SPC, not the NPC, should assume the responsibility of constitutional interpretation,⁷⁹ and the Constitution should be taken for basis of judgment;⁸⁰

(ii) Option II – Establishing Constitutional Court, which refers to the continental European system, Kelsonian model, where a constitutional court is set to take charge of constitutional review;⁸¹ (iii) Option III – Composite System of Review, a relatively new proposal basically applicable to China, which promotes a system of review combining the supreme organ of state power, i.e., the NPC and NPCSC, and judicial institutions; (iv) Option IV – Establishing Constitutional Council (*Xianfa Weiyuanhui*) or Constitutional Supervisory Committee (*Xianfa Jiandu Weiyuanhui*) under the NPC, the mainstream opinion, which has been debated for a long time and is believed to have solid basis for its realization. [In Chinese, “*weiyuanhui*” can be translated into “council”, “committee” or “commission”.]

The merit of Option IV lies in that the proposal does not contradict the current constitutional framework, respects the NPC as the supreme organ of state power and embodies the spirit of professionalism and procedure. It is believed that it carries with it fewer difficulties and greater feasibility and would encounter less political and professional resistance and would therefore be “the most possible choice so far”.⁸² Time has changed. Considering the full implementation of F&R system in China since recent years, Option IV would not be considered for now, although it seemed to be the most practical and feasible one, while other options would certainly not to be taken into account at all.

However, can constitutional review modelled after the American or Kelsonian model be an item on the political agenda of the political decision-makers in today’s China? Taking into consideration all relevant factors, no such opportunity exists anymore, only F&R system remains available, and actually, we have witnessed, it has been endorsed by the CPC⁸³ and institutionalized under the NPC system. As regards the way forward in the coming future, scholars do not have much to say under the strong Party-State polity and ideological control today. Sadly, even the terminology of constitutionalism has become taboo in China. So far, we see no sign supportive of constitutional reform and “the prospects for a meaningful constitutional reform were limited”, as rightly observed by Keith Hand and Thomas E. Kellogg years ago.⁸⁴ When we read Kellogg’s following aspiration again: “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”,⁸⁵ we may feel dizzy. Like a world away today, because times have changed, the ever-expected environment favourable to political reform is no longer there in China.

Conclusion

Since the death of *Qi Yuling* in 2008,⁸⁶ constitutional review, constitutional litigation or judicialization of constitution has already ended in China. It looked like an ancient Greek tragedy and Qi was that forgotten hero. From the current point of view, judicial review of constitutionality would never be possible unless there was substantial political and constitutional reform, on the one hand.

On the other hand, the foundation of constitutional review by non-judicial institutions and avenue in the Constitution is present, but they need to be activated in such a way that unconstitutional legislative instruments (and executive acts) can be effectively corrected. To some extent, literally implementing the subsisting constitutional provisions and the

Law on Legislation is possible and therefore should be prioritized for the moment. It is noticeable that F&R system, with the creation of the Division of Filing and Review of Regulations under the NPCSC and the adoption of the Working Measures in 2019, is steadily progressing towards institution-building of (partial) constitutional review, although it is still far from our expectation in terms of its effectiveness.

In addition, what scholars and lawyers should continue to do is to promote and develop the theory that underlines the significance of a constitutional committee/council/commission to be established under the NPC. Such an organ can certainly make a sharper difference vis-à-vis the current somewhat marginal solution, and the creation of it would not challenge the current constitutional foundation and the authority of the CPC. At the same time and ideally, the courts can be given a somewhat active role to play in rectifying the unconstitutional executive acts, and in so doing, the courts can play a “checking” role and can balance the unlimited, but not always effective, jurisdiction of the NPC.⁸⁷ Whatever system or mechanism to be adopted in the near future, we should fully realise that there is a pressing need to establish a transparent and effective mechanism within the NPC system or to improve the legal and judicial process in order to effectively address citizens’ constitutional claims.

Finally, the concept “to rule the country according to law and to build a Socialist country of the rule of law”, as prescribed by the Constitution,⁸⁸ is the cornerstone supportive of moving constitutionalism forward, and corresponding action should be taken to realize it, including realistically instituting an effective mechanism of constitutional review. Otherwise, constitutionalism in China, though already at the “nascent” stage,⁸⁹ would remain a mirage forever.

Notes

- 1 The Constitution of the People’s Republic of China (“the PRC”) was promulgated in 1982 and has received five important amendments in 1988, 1993, 1999, 2004 and 2018, respectively. There exist four constitutions since the founding of the PRC which were promulgated in 1954, 1975, 1978 and 1982.
- 2 *Black’s Law Dictionary* (8th ed., 2004) 864.
- 3 *Marbury v. Madison*, [1803] 5 U.S. (1 Cranch) 137, is a landmark case in constitutional history and the basis for the exercise of judicial review in the United States, under Article III of the United States Constitution.
- 4 *Qi Yuling* case has attracted much attention from both legal scholars and professionals in China as well as overseas Chinese law scholars. About the origin, and development and end of the case, Cf. Zhu Guobin, ‘Constitutional Review in China: An Unaccomplished Project or a Mirage?’, (2010) 43 *SUFFOLK U. L. REV.* 625, pp. 625–653; Tong Zhiwei, ‘A Comment on the Rise and Fall of the Supreme People’s Court’s Reply to Qi Yuling’s Case’, (2010) 43 *SUFFOLK U. L. REV.* 671, pp. 671–680; Shen Kui, ‘Is It the Beginning of the Era of the Rule of the Constitution – Reinterpreting China’s First Constitutional Case’, (2003) 12:1 *PAC RIM L & POL’Y J.* 199, pp. 199–232.
- 5 The Constitution, art. 2(1).
- 6 The Constitution, art. 2(2).
- 7 The Constitution, art. 3(3).
- 8 The Constitution, art. 3(1).
- 9 The Constitution, art. 57.
- 10 The Constitution, art. 58.
- 11 Cf. Xu Chongde (ed.), *Xian Fa (Constitutional Law)* (Renmin University of China Press, 1999) 108–109.
- 12 Michael W. Dowdle, *The Constitutional Development and Operations of the National People’s Congress*, (1997) 11 *COLUM. J. ASIAN L.* 1.

- 13 The Constitution, art. 1.
- 14 The Constitution. arts. 123–127.
- 15 *Supra* note 1.
- 16 *Cf* Sun Zhe, *A Study of the People’s Congress System (Quanguo Renda Zhidu Yanjiu)* (Law Press, 2004) 29–30.
- 17 *Cf* Zhu Guobin, *Constitutional Law and Political Institutions of China (Zhongguo Xianfa yu Zhengzhi Zhidu)* (2nd ed., Law Press, 2006) 118–123.
Also *cf* Cai Dingjian, *The People’s Congress System of China (Zhongguo Renmin Daibiao Dahui Zhidu)* (4th ed., Law Press, 2003) 259.
- 18 *Cf* Jiang Jinsong, *The National People’s Congress of China* (Foreign Languages Press, 2002) 176.
- 19 The foundation of it derives from Art. 3(3) of the Constitution which reads:

All administrative, supervisory, adjudicatory and procuratorial organs of the state shall be created by the people’s congresses and shall be responsible to them and subject to their oversight.

- 20 *Cf* Can Dingjian, *supra* note 17, at 373–383.
- 21 *Ibid.*, at 373.
- 22 The Constitution, art 5(3).
- 23 Law on Legislation, arts. 2, 103.
- 24 Qin Aolei & Wang Kai, “Constitutional Review in China” (Zhongguo Weixian Shencha), Hu Jinguang (ed.) *A Comparative Study of Constitutional Review (Weixian Shencha Bijiao Yanjiu)* (Renmin University of China Press, 2006) 326.
- 25 *Ibid.*, at 328.
- 26 *Ibid.*
- 27 The Constitution, art. 5(2).
- 28 The Constitution, art. 67.
- 29 Law on Legislation, art. 97.
- 30 Law on Legislation, art. 75(2) reads:

An autonomous regulation or special regulation may vary the provisions of a law or administrative regulation, provided that 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 Law on Regional National Autonomy and provisions of any other law or administrative regulations which are dedicated to matters concerning national autonomous areas.

- 31 Qin Aolei & Wang Kai, *supra* note 24, at 329.
- 32 The Constitution, art. 89 defines that:
The State Council exercises the following functions and powers:

1. to adopt administrative measures, enact administrative rules and regulations, and issue decisions and orders in accordance with the Constitution and the statutes;

...

13. to alter or annul inappropriate orders, directives, and regulations issued by the ministries or commissions;

14. to alter or annul inappropriate decisions and orders issued by local organs of state administration at different levels; ...

- 33 The Constitution, “Preamble”, para. 7.
- 34 The Constitution, art. 1; it is a newly added sentence under the 2018 Constitutional Amendment.
- 35 The Constitution, art. 5(3); Law on Legislation, arts. 87–89.
- 36 Law on Legislation, art. 91.
- 37 The Constitution, art. 116.
- 38 Law on Legislation, art. 75(2).

- 39 Law on Legislation, art. 72(2).
40 The Constitution, art. 100(2), states:

The people's congresses of cities divided into districts and their standing committees may, provided there is no conflict with the Constitution, laws or administrative regulations, or with the local regulations of their province or autonomous region, formulate local regulations in accordance with the provisions of law, which shall go into force after submission to the standing committee of the people's congress of their province or autonomous region and the receipt of approval.

- 41 Cf Cai Dingjian, *supra* note 17, at 309–310.
42 *Ibid.*, at 301.
43 Cf The Constitution, art. 2, which reads:

All power in the People's Republic of China belongs to the people.

The National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power.

The people administer State affairs and manage economic and cultural undertakings and social affairs through various channels and in various ways in accordance with the provisions of law.

- 44 Cf The Constitution, art. 3, which reads:

The State organs of the People's Republic of China apply the principle of democratic centralism.

The National People's Congress and the local people's congresses at various levels are constituted through democratic elections. They are responsible to the people and subject to their supervision.

All administrative, supervisory, judicial and procuratorial organs of the State are created by the people's congresses to which they are responsible and by which they are supervised.

- 45 The Constitution, "Preamble", para. 13.
46 Law on Legislation, art. 87.
47 Wei Changhao, "Reining in Rogue Legislation: An Overview of China's Invigoration of the 'Recording and Review' Process", (2021) *Made in China Journal*, an open access quarterly on Chinese labour, civil society, and rights, posted on 19 September 2021; at <https://madeinchinajournal.com/2021/09/19/reining-in-rogue-legislation/>
48 An English version of the Report delivered by Xi Jinping, the Secretary General of the CPC, at the 19th National Congress of the CPC, has been translated by Xinhua News Agency and published at *China Daily* website: https://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content_34115212.htm.
49 Division of Filing and Review of Regulations of the Legislative Affairs Commission under the NPCSC, *Introduction to "The Working Measures for Filing and Review of Regulations and Judicial Interpretations" (Fagui Sifa Jieshi Bei'an Shencha Banfa Daodu)* (China Democracy and Legal System Press, 2020) "Editors' Note" 1.
50 Wang Kai, "Chinese Practice of Review of Constitutionality" (Hexianxing Shencha de Zhongguo Shijian), (2020) *Leadership Science Tribune (Lingdao Kexue Luntan)* 11, 10.
51 The Constitution, art. 100 (1).
52 The Constitution, art. 116.
53 The Constitution, art. 100 (2).
54 The Organic Law of Local People's Congresses and Local People's Governments at Various Levels, art 10.
55 Law on Legislation, art. 98.
56 *Supra* note 47.
57 The Working Measures, art. 9.

- 58 The Working Measures, art. 10.
- 59 The Working Measures, art. 13.
- 60 The Working Measures, art. 16.
- 61 The Working Measures, art. 18.
- 62 The Working Measures, arts. 21–22.
- 63 The Working Measures, art. 23.
- 64 The Working Measures, art. 38.
- 65 The Working Measures, art. 41.
- 66 The Working Measures, art. 44.
- 67 The Working Measures, art. 36.
- 68 A newly created specialized commission under the NPC by the 2018 Constitutional Amendment; it is based on the former Law Commission.
- 69 The Working Measures, art. 20.
- 70 The Working Measures, art. 36.
- 71 The Working Measures, art. 52.
- 72 Zheng Lei, *Study of the Working Reports on Filing and Review (Bei’an Shencha Gongzuo Baogao Yanjiu)* (China Democracy and Law Press, 2021). Two chapters contained in the book written in English focus on the 2018 and 2019 reports, respectively.
- 73 The Five Reports on the work of filing and record prepared and submitted by the Legislative Affairs Commission to the NPCSC can be retrieved from the official website of the NPC: www.npc.gov.cn. They are at: http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-12/27/content_2035723.htm; <http://www.npc.gov.cn/npc/c12491/201812/afbfcb16af1d455b86dfb0cb4175ba2a.shtml>; <http://www.npc.gov.cn/npc/c30834/201912/24cac1938ec44552b285f0708f78c944.shtml>; <http://www.npc.gov.cn/npc/c30834/202101/239178b5d03944c7b453ddc6bdd7c087.shtml>; and <http://www.npc.gov.cn/npc/c30834/202112/2606f90a45b1406e9e57ff45b42ceblc.shtml>.
- 74 The review of Hong Kong ordinances is based on Art. 17(2)(3) of the Basic Law of the Hong Kong Special Administrative Region, which reads:

Laws enacted by the legislature of the Hong Kong Special Administrative Region must be reported to the Standing Committee of the National People’s Congress for the record. The reporting for record shall not affect the entry into force of such laws.

If the Standing Committee of the National People’s Congress, after consulting the Committee for the Basic Law of the Hong Kong Special Administrative Region under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the Standing Committee may return the law in question but shall not amend it. Any law returned by the Standing Committee of the National People’s Congress shall immediately be invalidated. This invalidation shall not have retroactive effect, unless otherwise provided for in the laws of the Region.

- 75 The review of Macau ordinances is based on Art. 17(2)(3) of the Basic Law of the Macau Special Administrative Region which is similar to the above-cited Basic Law of Hong Kong.
- 76 Chen Yunsheng, *Judicialisation of Constitutional Supervision (Xianfa Jiandu Sifahua)* (Peking University Press, 2004) 452.
- 77 Hu Jingguang & Han Dayuan, *Chinese Constitution (Zhongguo Xianfa)* (Law Press, 2004) 162.
- 78 Cf Qin Aolei & Wang Kai, *supra* note 24, at 368–370.
- 79 Cf Wang Lei, “China’s Institution for Constitutional Interpretation” (Zhongguo de Xianfa Jieshi Jigou), Xu Chongde (ed.), *Constitution and Democratic Politics (Xianfa yu Minzhu Zhengzhi)* (China’s Procuratorate Press, 1994).
- 80 Cf Huang Songyou, “Constitutional Judicialization and its Significance – A Comment on Today’s ‘Response’ by the SPC” (Xifa Sifahua Jiqi Yiyi – Cong Zuigao Renmin fayuan Jintian de Yige Pifu Tanqi), *People’s Courts’ Daily (Renmin Fayuan Bao)*, 13 Aug 2001.
- 81 Cf Huang Xuexian, “Discussion on the Way to Improve Constitutional Supervision Mechanism in China” (Wanshan Woguo Xianfa Jiandu Jizhi de Tantaoyao), (2002) *Research on Constitution (Xianfa Yanjiu)* 342–355.

Also cf. Chen Yunsheng, *Judicialisation of Constitutional Supervision (Xianfa Jiandu Sifahua)* (Peking University Press, 2004), at 501.

82 Qin Aolei & Wang Kai, *supra note 24*, at 370.

83 *Supra note 48*.

84 Thomas E. Kellogg, “The Death of Constitutional Litigation in China?”, (2009) *China Brief* 7, at 6.

85 *Ibid.*, at 6–7.

86 *Ibid.*

For a better understanding of the case of Qi Yuling, also cf.: Zhu Guobin, “Constitutional Review in China: An Unaccomplished Project or a Mirage?”, (2010) 43, No. 3 *Suffolk University Law Review*, pp. 625–653; Shen Kui, “Is it the Beginning of the Era of the Rule of the Constitution? Reinterpreting China’s ‘First Constitutional Case’”, (2003) 12, No. 1 *Pacific Rim Law & Policy Journal*, pp. 199–232; and Tong Zhiwei, “A Comment on the Rise and Fall of the Supreme People’s Court’s Reply to Qi Yuling’s Case,” (2010) 43, No. 2 *Suffolk University Law Review*, pp. 671–680.

87 Cf. Zhu Guobin, “Weak Courts, Weak Rights – Assessing the Realization of Constitutional Rights in the PRC Courts”, (2013) 43, Part 2 *HKLJ* at 713–743.

88 The Constitution, art. 5(1), which is an Amendment to the Constitution, adopted in 1999.

89 Thomas E. Kellogg & Keith Hand, “NPCSC: The Vanguard of China’s Constitution?”, (2008) 2 *China Brief* 4.