

CONSTITUTIONAL REVIEW¹ IN CHINA PROBLEMS AND SOLUTIONS

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In May 2004, the Standing Committee of the National People's Congress (NPC) set up the Laws and Regulations Review Record Office, which is in charge of keeping the records of laws and regulations and reviewing whether these laws and regulations are in conformity with the constitution². This is the first time that the NPC has set up a special agency for the constitutional review of the regional laws and regulations. Of course, this is a progress in the operation of the system, but we should seriously consider, whether this system works and whether it can solve the problem of constitutional review. There is still a long way to go in the construction of the constitutional review system in China.

Constitutional review has been a focus in the academic circle of constitutional research since the promulgation of the constitution in force. It is also a key point for the implementation of the constitution. The academic circle had "three Big Discussions" concerning constitutional review. The first Big Discussion took place at the beginning of the 1980's, when the constitution in force was written. The discussion centered on the draft of the constitution, its design and theoretical basis of the implementation. The second one took place in the late 1980's, when the Chinese society asked for the reform of the Chinese political system. The research on the constitutional review tried to promote a political reform. The third Big Discussion took place in the late 1990's and it centered on the future development of Chinese politics. Since April 2003, centered on Sun Zhigang's case³, which aroused the appeal of the public and academic circle to review whether the administrative regulation of shelter and repatriation was constitutional, the fourth discussion has begun.

These discussions have put forward many valuable thoughts and suggestions and some scholars have even designed various ways of construction of the constitutional review system. But the situation of the constitutional review in China has not achieved any substantial progress. There are many reasons for this, but the most important ones are the difficult points of the design of the constitutional review rooted in the political reality of China. The previous theoretical discussions have not touched these points or they avoided them, what lead to the outcome that explanation and solutions to these problems are still in

the early stage. Therefore, we must start from the political structure and the social conception in China, we have to find the connecting points between the multi-layers of constitutional review, put forward solutions and design a special system. This is the only way we can make the constitutional review system effective.

1. The Setting-up of the Constitutional Review Body

Based on previous research, there are basically three opinions: (1) Setting up a Constitutional Committee within the NPC, which is in charge of constitutional review or helps the NPC and its Standing Committee in its review⁴; (2) Setting up a Constitutional Tribunal within the Supreme Court⁵; (3) Setting up a Constitutional Court⁶. Some researchers put forward a combination of the above mentioned⁷.

As to the feasibility of the implementation of these in China, the most important problem is to evaluate the compatibility of the review body with the NPC system⁸, this is how to solve the problem of the relationship between the review body and the supreme power of the NPC.

Except the first opinion, the other two opinions do not explain how to make the constitutional review body compatible with the NPC system. The opinion of setting up a constitutional court to exercise the power of constitutional review cannot explain how a judicial organ can supervise the organ of highest state power under the current NPC system. It cannot explain how this judicial organ supervises itself either. This opinion does not explain, whether the constitutional court's power of constitutional review means that the constitutional court is superior to the NPC and also an organ of highest state power. This defect leads the government and the majority of the society to agree on the first opinion and neglect the other two. This situation makes the research improperly center on the opinion of setting up a constitutional review body within the NPC. These repeated researches are the main reason for the lack of substantial progress in the theory and practice of constitutional review in China.

In my opinion, the design of a constitutional review body must have two factors. The first is independence. The review body must be independent of the object of review; otherwise there is no guarantee of justice and feasibility of the constitutional review. The second is judicial nature. The review body and its decision must have binding force; otherwise there is no guarantee for the authority and effectiveness of the constitutional review. Therefore, the opinion of setting up a constitutional committee within the NPC or setting up a constitutional tribunal within the Supreme Court is not workable and the way of setting up a Constitutional Court is the only feasible and effective choice of constitutional review.

The setting up of a Constitutional Court is compatible with the basic structure of the NPC and does not affect the highest legal status of the NPC. First, the authority of the Constitutional Court concerning constitutional review does not mean it is the highest body within the structure of the state, so it does not violate the NPC system and the highest legal status of the NPC. Secondly, the foundation of a Constitutional Court to exercise the power of constitutional review is an effective means to enhance the legal status of the NPC. The power of the NPC derives from the Constitution. Only by constitutional review can we fully implement the constitution. In the political practice in China, the violation of the constitution is also a violation of the legal power and authority of the NPC. This means that the Constitutional Court is an effective safeguard of the authority of the NPC. Finally, although the Constitutional Court is independent of the NPC, it is also elected by the NPC and responsible to the NPC. In this sense, the NPC still exercises the highest state power.

2. The Scope of Constitutional Review

Generally speaking, the scope of constitutional review includes the following issues: (1) the review of the laws and regulations; (2) the review of the activities of the governmental bodies and their employees; (3) the review of the activities of the political parties, social organizations, enterprises, non-profit organizations and citizens; (4) the decision of the allocation of power between the governmental bodies⁹. In the author's opinion, the scope of constitutional review should include two layers. Firstly, the objects of the review must be limited, it must be decided which issues and activities should be included in the scope. Theoretically speaking, only the specific legislation procedure stipulated in constitutional law and the activities of the organizations and citizens who exercise state power and have the possibility to abuse such power can be listed in the scope. Secondly, the degree of review must be specific. We should decide whether the object of the constitutional review includes the abstract legislation only, or the specific official activity, or even the constitutional remedies for the victims. This is closely connected with the scope and the operation of the constitutional review.

Based on the analysis above, we must solve three problems. The first one is, whether the activity of the ruling party is included in the scope of review. The second one is, whether the activities of the citizens must be included in the scope of review. And the last one is, whether constitutional litigation is the statutory starting point and settlement of constitutional review.

The activities of the ruling party should be expressly included as the main objects of constitutional review. Under the current political system, although the

ruling party is not entitled to any state power, it actually exercises the power of decision within the operation of national policies and exercises certain state power, such as the decision of important issues, the appointment and removal of officials and so on. So it is necessary to review, whether its activities are constitutional, so as to prevent the abuse of power which may lead to the destruction of the constitutional system and violation of constitutional rights. This is also in conformity with the principle of ruling by law and the constitution of the Chinese Communist Party (CCP). As to the individual activities of the citizens, these activities should not be included in the scope of review. Since citizens do not exercise any constitutional power, their individual activities cannot constitute an abuse of power. The violation of the constitutional rights and interests by the individual activities of the citizens falls into the category of ordinary unlawful practices and crimes and such activities should be punished in accordance with other laws and regulations instead of constitutional law. The foundation of the constitutional litigation system is a demand of reality in China. Such system, which is regarded as the statutory starting point of constitutional review will help in the safeguard of the constitutional rights of citizens.

3. Legal Basis, Validity and Supervision of Constitutional Review

The criterion and legal basis of constitutional review is very important in the design of the review system. As to the criterion and legal basis of constitutional review, there are two opinions in the previous literature: the highest value of constitutional law¹⁰ and the evaluation of the safeguard of human rights¹¹. Both are reasonable, but the legal basis of constitutional review must be normative and feasible, otherwise it will lead to the abuse of power and the arbitrary use of review, which is not in conformity with the purpose of constitutional review. In the author's opinion, the legal basis should be the constitutional norms. If there are no constitutional norms, the review body will determine those from the principle and spirit of the constitution.

As to the validity of constitutional review, there are three opinions. (1) The decision of constitutional review comes into effect when the decision is taken¹². (2) The validity of the decision should be decided by the NPC or its constitutional committee¹³. (3) The decision has no binding force and is only a suggestion formulated for the authorities to correct the unconstitutional legislation and activities¹⁴. In the design of the mechanism of the effectiveness of the decision, it should be determined whether the nature of validity is political or judicial. At the same time, it should also be determined whether the decision is independent of or dependent from the decision of other bodies. Finally, we must determine whether the decision comes into effect at the time when it is taken or it comes

into effect after a certain period. In the author's opinion, the decision comes into effect at the time when it is taken by the review body independently. The decision is not a political suggestion for the violators to correct their activities or a conditional judicial decision. Only this way is the constitutional review authoritative, effective and prompt.

Finally, we must point out that the review body and review activities need supervision as well. Under the current NPC system, the constitutional review body, the Constitutional Court is set up within the NPC. The problem of supervision can be settled by a design that makes the Court responsible and report to the NPC. It solves the problems of supervision of the highest organ of state power and the choice of constitutional review body with no unfavorable effects on the basic structure of the NPC system. So it is a constitutional, reasonable and feasible choice.

¹ The background to this essay: Constitutional review is used under the context of the Chinese constitution. It reviews not only whether the activities of administrative bodies, other governmental organs, political parties and individuals while exercising their power is constitutional, but also whether the laws are constitutional. In accordance with the Constitution of China, which was promulgated in 1982, the Standing Committee of the National People's Congress exercises the power of constitutional review. But this system has not been functioning for a long time now, which is the main reason for the disappointing implementation of the Chinese constitution.

² The report is published in the newspaper *Xinjing Bao* (June 19, 2004).

³ Sun Zhigang, a 27-year-old college graduate, working away from home in Guangzhou, was taken into custody on March 17, 2003 for failing to carry with himself his temporary residence permit. Three days later, Sun was found beaten to death in custody. In May and June 2004, the public and scholars asked review of the administrative regulations. On 20, June, the State Council revised the relative administrative regulation and changed „shelter and repatriation” to „social assistance”.

⁴ Wu Jialin: *The Necessity and Feasibility of Setting up a Constitutional Review Body*, Law Review (Vol. 2, 1991); Wang Shuwen: *The Guarantee of the Implementation of the Constitution*, Chinese Legal Science (Vol. 6, 1992); Hou Shuwen: *The Improvement of the System of Constitutional Review in China*, Law Science, (Vol. 12, 1995); Miao Lianying: *The Thinking on the Setting of the Constitutional Review Body*, Studies in Law and Business, (Vol. 4, 1998); Fei Shancheng: *The Choice of Modes of Constitutional Review System in China*, Politics and Law Forum (Vol. 2, 1999); Ji Weidong: *The Constitutional Review and the Consolidation of Judicial Power*, China Social Science (Vol.2, 2002); Chen Yunsheng: *New Tide in Democracy and Constitutionalism*, People's Publishing House (1988).

⁵ He Rikai: *Constitutional Review and Judicial Power*, Collection of the Papers of the Annual Meeting of the China Association of Constitutional Law (2002, p. 11)

⁶ Wang Keyin: *Theoretical Thinking on the Establishment of the Chinese Constitutional Court*.

⁷ Li Zhong: *On Constitutional Review*; Hu Xiaohua: *Constitutional Litigation*, Law Publishing House (2002, p. 178); Bao Wanchao: *Combined Constitutional Review: Constitutional Committee and the Constitutional Tribunal of Supreme Court*, Law Science, (Vol. 4, 1998).

- ⁸ NPC system is the current political system of China. Under this system, the National People's Congress is the organ of highest state power. All administrative and judicial organs of the state are established by the people's congresses to which they are responsible and by which they are supervised.
- ⁹ Reference to the related sections in the textbook of constitutional law.
- ¹⁰ Han Dayuan and Liu Zhigang: *The Definition and Basic Characteristics of Constitutional Litigation*, Law Review (Vol. 3, 1998).
- ¹¹ Li Yan: *Constitutional Review and Safeguard of Human Rights, the Translation and Review of Foreign Laws* (Vol. 4, 1997).
- ¹² Han Dayuan and Liu Zhigang: *The Definition and Basic Characteristics of Constitutional Litigation*, Law Review (Vol. 3, 1998).
- ¹³ Bao Wanchao: *Combined Constitutional Review: Constitutional Committee and the Constitutional Tribunal of the Supreme Court*, Law Science, (Vol. 4, 1998).
- ¹⁴ Wu Jialin: *The Necessity and Feasibility of Setting up a Constitutional Review Body*, Law Review (Vol. 2, 1991)