

Study On the Localization of The Constitutional Review in China—With Reference to The United States

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Abstract. This paper discusses the concept and importance of constitutional review. The article analyses judicial review in the United States and its jurisprudential basis, taking mainly American judicial review as a reference. In analysing the justification process of judicial review, the article cuts through the separation of powers and the least dangerous branch theory. In the face of elitist blame, the article specifically analyses how the non-democratic process of judicial review achieves democratic ends. On this basis, the author analyses constitutional review in China and the reasons why China's attempt to use judicial review ended in failure. Through comparison, the author summarises the political system factors, political philosophical thought factors and judicial factors that led to the failure. After that author suggests that judicial review is not directly applicable in China. Finally, the paper attempts to present the constitutional court model as a possible transitional model for China's future attempts to develop a judicial review model.

Keywords: Constitutional review; Judicial review; jurisprudential basis; constitutional court.

1. Introduction

Constitution is supreme for a modern State governed by the rule of law. Although, unlike other department laws, the Constitution does not regulate legal relationship in society, it protects the people's right in all areas of a country. The implementation of the Constitution needs to be monitored, especially in terms of legislation. That's why constitutional review is so important.

Different countries take different methods of constitutional review, for example, the United States adopts judicial review, Germany adopts supervision by the Constitutional Court, and the United Kingdom adopts court interpretation of the law to avoid conflict with Parliament.

China currently adopts the approach of self-censorship by the legislature. Many scholars recognise that China's constitutional review system is being built through experience accumulation rather than a logical construction process [1]. This procedure just like a Chinese old saying, "Feeling one's way across the river."

There is no doubt that China's approach to self-censorship is problematic, as the saying goes "it cannot be its own judge". At the same time, A court in Luoyang, tried and failed to introduce the U.S. model of judicial review in the case, which became known as the "Luoyang Seed" case. This brings about a reflection on the jurisprudence of judicial review and a comparative analysis based on the Chinese reality.

In the process of analysing this, it is found that factors such as a country's institutional structure, judicial situation and political philosophical views are the main factors influencing the mode of constitutional review.

This article summarises the reasons for the failure of China's application of US judicial review based on the argumentation of the jurisprudential basis and comparison of the different conditions between China and the US. On this basis, it concludes that the path that China must take towards judicial review in the future is the constitutional court review model.

2. Overview of the Constitutional Review

2.1. The concept of the Constitutional Review

Constitutional review is the judgement of the constitutionality of an order, law or regulation by some type of authority vested with the power of review.

In countries with "parliamentary supremacy", it used to be the legislature that reviewed the constitutionality of their laws. But this model has been questioned that it is difficult to achieve the ultimate goal of judicial review because self-policing is unreliable. There is a legal principle called "nemo iudex in causa sua", that means you cannot be your own judge.

After World War II, many countries have reformed in response to this problem, resulting in two main models of judicial review. One is reviewed by ordinary courts, representing the United States, while the other is reviewed by specialized courts, representing Germany. Judicial review powers for the former are divided among each judicial branch, while the latter are centralised in a specialised branch.

2.2. The Necessity of Judicial Review

The judicial review model is one of the most widely used review models in the world. The judicial review model is the one applied in the United States, which is the subject of this paper. There are several aspects to answer why modern states need judicial review.

In terms of constitutional implementation, legal status of the Constitution is supreme, and it is necessary to avoid the violation of the Constitution by other laws and administrative acts, thus negatively affecting the supreme authority and seriousness of the Constitution. So, states need judicial review to monitor legislature.

At the level of fundamental rights and freedoms of citizens protection, Since the Constitution provides for a large number of fundamental rights and freedoms of citizens, there is a need for a mechanism of judicial review when the legislature and the executive branch fail to do so. The outcome of having a system of judicial review is that individual rights are more likely to be protected, especially considering that judges are far more insulated from political pressures than the political branches. This benefit has sometimes been characterized as an independent judiciary protecting against the tyranny of the majority [2]. Or putting it another way, Justice is politically rational, independence makes it suitable for the defence of the fundamental values of society.

In terms of separation of powers, Judicial power involves neither financial nor military power, and even judgements rely on executive power as a safeguard. And that is why Montesquieu says, "Of the three powers abovementioned, the judiciary is, in some measure, next to nothing". [3] So giving the judiciary the power of judicial review can enhance its power to check and balance the other powers, which is favourable to maintaining the mutual checks and balances of the three powers.

Judicial review can fulfil the strengths of a democratic system. "The people," said Hamilton, "are turbulent and changing; they seldom judge or determine right. . . . Nothing but a permanent body can check the imprudence of democracy." [4] This proves an idea that the legislature is unstable, and the legislature is often swayed by the public whose argument has the potential to be abused. In order to prevent "tyranny of the majority," It is far more rational to empower the judiciary with the power of judicial review, that one of the main purposes of the courts' establishment as a body intermédiaire between the people and the legislature was to ensure that the latter stayed within the bounds of its power [5]. In a democracy, the people trust jurists because they know that they are serving of the public [6]. The design of the courts to intervene between the people and the legislature makes perfect use of the intellect of the legal practitioner to limit decision-making, whether good or bad, while at the same time, because of the characteristics of the judiciary, it does not have a negative impact on the democratic system. Not only that, but D. Brooks Smith also says "when coupled with the legislative process, it does a better job of increasing individuals' ability to participate in a democracy than a system that does not have judicial review." [2] Although representative democracy reflects the views of every citizen in its institutional design, in real practice it is unrealistic to assume that every

citizen has the time and resources to participate in decision-making. Judicial review can provide an opportunity for citizens to re-engage in decision-making after legislation is enacted to ensure the procedural implementability of the democratic process.

3. The Jurisprudential Origin of the U.S. Judicial Review

3.1. The Introduction of the U.S. Judicial Review

The power of the federal courts to review unconstitutionality originated in the United States but was not expressly granted in the 1787 U.S. Constitution. It was first asserted by Chief Justice Marshall in the famous case of *Marbury v. Madison* [7], decided in 1803. In *Marbury v. Madison*, Chief Justice Marshall took a court of law and "made it into an organ of government"[8]. The judicial review mechanism gives the judiciary the power to oversee the consistency of the other two branches of government with the Constitution.

The United States was deeply influenced by Britain before the Revolutionary War, but in the mid-18th century, in order to alleviate the contradictions and difficulties brought about by the "Seven Years' War," the British government issued a series of policies and regulations to strengthen its rule, such as the Stamp Act, the Tea Act, and the Quartering Act, which led to the North American people's fear of the local legislatures[9]. After that, The data indicate that before the case of *Marbury vs. Madison*, state courts had exercised judicial review in at least 20 cases.[10] Alexander Hamilton articulated the necessity of judicial review in *Federalist No. 78*, "Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." [5] These factors have created judicial review in the United States and the idea of a written constitution and "the concept of judicial review is a unique American contribution to the art and practice of government"[11], profoundly influencing the global landscape.

3.2. Jurisprudential Foundations of Judicial Review in the U.S.

Apart from the influence of historical factors, the jurisprudential basis of judicial review in the United States is rooted in the application of the Separation of Powers theory in the process of governmental construction.

John Locke mentioned the concept of separation of powers in his "Two Treatises of Government." However, it is not entirely consistent with the form of doctrine adopted in the United States. The United States adopted the theory of separation of powers discussed by Montesquieu in "The Spirit of the Laws." In this book Montesquieu states that Legislative, executive and judicial powers are the three powers possessed by the State. And he mentioned "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." [3]

The fear of the dire consequences of centralisation of power created the doctrine of separation of powers and provided the basis for judicial review. Of the legislative, executive and judicial powers, the judiciary is the weakest. "that it can never attack with success either of the other two." [5] The Federalists argued that the key to the separation of powers is mutual checks and balances rather than complete separation of powers. That's why Hamilton came up with the least dangerous branch theory.

Giving the judiciary the power to review legislation will strengthen its power to check and balance the other powers and will be beneficial to maintaining the checks and balances among the three powers.

Some scholars have questioned whether the power of constitutional review can be given to the judiciary. They argue that it would transform the judiciary from the least dangerous branch to the most dangerous, and that it would give judges the power to legislate. They quoted Robespierre's words from "The Revolutionary Laws and Trials": "The power to interpret the law belongs to those who create it. The Romans understood that if it was not the power of the legislator to interpret the law, then some other power would ultimately change the law and place its own will above that of the legislator." [12] This question can be answered by quoting from the Federalist Papers, "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents." [5] In other perspective, this usually vests the court with a function which Hans Kelsen called that of a 'negative legislator', namely, not a maker, but 'unmaker' of laws which the court holds to be unconstitutional [13]. That means judiciary can never have legislative authority because he is only a passive check and balance rather than an active maker.

But it is still hard to answer If it is said that the legislative itself cannot decide whether its legislation complies with superior law, why choose the judiciary, a non-democratic institution, to oversee it instead of another representative institution? The reason for vesting the power of judicial review in the judiciary rather than in an elected body is not only to maintain the separation of powers, but also because the judiciary has advantages that are not available to an elected institution.

First, in a state of separation of powers, the judiciary exists independently of politics and has political rationality.

Secondly, the judiciary is unelected and is not swayed by the opinions of the electorate, thus maintaining a stable system of value judgements. Because of this there would not be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws [5]. Courts have distinctive principles of dealing with matters that are different from those of the legislature and the executive branch. Trained judges act in a rational way and maintain consistent institutional habits. This confers on the Court an innate excellence and an ability to evoke positive thinking, enabling it to think deeply.

This theory of justifying judicial review on the basis of judges' learning is essentially an elitist theory. This leads to a critique of this theory: if the will of the people can be perfectly revealed through the legal interpretations of judges; if elites already exist prior to democracy then what is the point of having democracy, of having elections? This criticism argues that judicial review takes a distinctly paternalistic view of the electorate [2]. This series of challenges has given rise to the theory that judicial review is endogenous to the democratic process. If the term is taken in its strict sense, true democracy has never existed and never will [14]. This is not questioning the democratic system; it is just meant to illustrate that the separation of powers requires democratic concessions. This concession was necessary, as Tocqueville stated in "On Democracy in America", that the more developed the representative republic, the more extensive the elected legislators and officials, and the more unlikely the hierarchical control of the executive, the greater the need for an unelected judiciary to clarify the competence of these elected institutions in accordance with the law in place of the oversight of superiors and the incentive for advancement in order to prevent them from doing harm to the people [15]. Scholars invoke functional democracy to justify judicial review, arguing that the constitution is the supreme representative of democracy, and that judicial review is a process of monitoring democracy by using learning to avoid being negatively affected by the democratic system. The simple fact is that judicial review does not constrain democracy, rather it is a corrective to the

deficiencies of democracy. Elites serve democracy and are positioned as its servants and not as its manipulators.

4. Localised Choices for Judicial Review in China

4.1. Constitutional Review in China

In China, judicial review, as represented by the United States, or constitutional review by the Constitutional Court, as represented by Germany, has not been used. In fact, Constitutional review in China is conducted by the legislature, that is, the Chinese National People's Congress (NPC) and its Standing Committee, as well as the people's congresses and standing committees of the people's congresses at all levels, to review the constitutionality of its laws. China currently applies a filing review model, in which the Standing Committee of the National People's Congress (NPC) may conduct filing reviews of administrative regulations, local regulations, individual regulations, autonomous regulations, and judicial interpretations; the State Council may conduct filing reviews of local regulations, departmental regulations, and local governmental regulations; and the Standing Committees of the local people's congresses may conduct filing reviews of local governmental regulations, as well as resolutions and decisions of the local people's congresses and their Standing Committees, and decisions and orders of the local governments. The Standing Committee of the local People's Congress may conduct record reviews of local government regulations, as well as resolutions and decisions of the local people's congresses and their standing committees and decisions and orders of local governments [16]. However, only the National People's Congress has the power to review for unconstitutionality, while other organs can only review for legality. The filing review is a good design to ease the pressure for constitutional review. However, as China's legislation has developed, it has become increasingly difficult for the record review to fulfil its original role.

This model is used by a lot of country and changed due to flaws in the system. It is clear that this model is outdated, but still being used. As Hegel said, "What is rational is actual and what is actual is rational." [17] This state of affairs is understandable, however, because China's truly modern concept of "constitutional law" originated with the Reform and Opening up of China, and accordingly, the concept of "constitutional review" developed relatively late.

However, currently, this model urgently needs to change. Firstly, the filtering review is difficult to adapt to present-day Chinese society. "As Chinese legislation tends to be more and more specialised and China's local differences are large" [1], The filtering review is costly and ineffective. Secondly, the inherent flaws in the mechanism, such as the self-examination of the legislative body, make it difficult for constitutional review to fulfill its intended role.

4.2. The U.S. Judicial Review Model's Failure to Fulfil in China

There is no denying that the judicial review system in the United States is successful, but this does not mean that this model can be directly applied in China.

The Luoyang Intermediate People's Court tried to apply judicial review in China in a 2003 case, but the attempt failed. The Luoyang Intermediate Court held that the law enacted by the Standing Committee of the Henan Provincial People's Congress contradicted the Constitution and was therefore invalid. However, this judgement was overruled by the Provincial People's Congress, which considered that it violated the system of people's congresses in China, infringed on the powers of the organs of authority, and constituted a serious violation of the law. This case is known as the "Luoyang Seed Case" [18]. In a way, the Luoyang Seed Case is a low-level case of *Marbury v. Madison* in China. [1] But the two cases had very different results. The failure of this judicial review proves the difficulty of trying to establish a judicial review system in China, and there are complex reasons for this. These reasons can be generally categorised into political and legal.

The reasons at the political level are summarised in three points: the political structure, administrative model and the political philosophy.

In terms of political structure, China does not use the separation of powers, but a system of people's congresses combined with a political party system. China emphasizes the leadership of the Communist Party. That means all structures are led by the party, particularly to the legislative body, the National People's Congress (NPC), which serves as the country's top legislative authority. On the one hand, the jurisprudential basis of the separation of powers for judicial review does not apply in China, and on the other hand, judicial power is weak under this system, which makes it difficult for it to challenge the legislature.

In terms of administrative model, China's administrative centralisation is extremely well developed. The legislature, the executive and the judiciary each operate in strict observance of the principle of centralised administrative power, and there is a hierarchical relationship between them. Therefore, it is difficult to implement the model of judicial review, which decentralises power to the various judicial departments.

Another point to note is the different construction of representative republicanism. In the course of the argument for the legitimacy of judicial review in the United States, judicial review was designed to address the problem of unclear hierarchical relationships in the United States, which does not exist in China.

In terms of political philosophy, this model is not welcomed by Chinese politics. China's political philosophy differs from that of the United States, which Francis Fukuyama considers as "Vetocracy", in that Chinese politics is about cooperation and Valuing harmony above all. The State Council's willingness to self-correct may indicate the existence of an invisible mediation mechanism under the Chinese system, through which the conflict of public power in the "unconstitutional review" can be resolved[1]. This non-confrontational view makes the legislation unwilling to accept direct judicial criticism of it, preferring instead the more subdued approach of self-policing.

The legal aspect should not be underestimated. First, judicial review presupposes that the judiciary is above administrative influence, but this is impractical in China. This is because the judiciary in China is less independent. Second, China's limited judicial transparency makes it difficult to gain the trust to the judiciary as the American public does. The third is the quality of the judge. The popularity of the law in China is not perfect, and the quality of basic-level judges varies. Judicial review is in crisis when the factor of the quality of the judge does not exist a priori. The above inherent deficiencies at the judicial level make it difficult for China to build a system of judicial review and forcing it to do so would have an impact on the entire social structure and it is feared that the judiciary will go from being the least dangerous branch to the most dangerous. Lastly, with regard to legal concepts, Chinese citizens, for historical and other reasons, have less knowledge of the law and have not constructed a set of contemporary concepts of the rule of law. There is insufficient understanding of the Constitution at the bottom, and relying on top-down development is difficult without a bottom-up drive to promote improved constitutional oversight.

In summary, the above reasons make it difficult for China to directly apply the judicial review system of the United States.

4.3. Suggestions for the construction of an constitutional review in China

Although China cannot directly apply the American judicial review, it is not difficult to recognise that there are many drawbacks to having the legislature act as its own monitor at present, and that we should come up with a new conception of constitutional review.

This article hopes to present a vision for future development, but a few questions need to be answered before that can happen.

The first question is whether the law enacted by the National People's Congress can be supervised by other institutions. This question is based on the doctrine of popular sovereignty, and the NPC is supreme because it represents the people. But this question is illustrated in the Federalist Papers quoted earlier. From this, the theory of constitutional supremacy can be derived, that the legislation of a representative body is invalid if it is contrary to the fundamental law under which it was appointed to exercise its representative powers. The constitution represents the people more than the

representatives of the people because it is the supreme expression of the will of the people. It is therefore legitimate in China to supervise the National People's Congress, which is the lower level of representation, on the basis of the Constitution, which is the supreme representative of the people.

The second question is whether we want to introduce "political question doctrine". The Constitution is, after all, not only a supreme legal instrument, but also a preeminent political document. It is used not only to determine questions of justice, but also of power.[19] The significance of the introduction of this principle is that it allows the monitoring body to avoid involvement in politics and guarantees the political independence of the law. It also avoids the influence of political factors on the constitutional monitoring process. Thus, it is necessary for this principle to be applied in the process of constitutional review.

Returning our attention to our subject. It is possible to recognise that judicial review will not be achieved until China moves towards the separation of administrative powers, equal elections, an independent judiciary and the full establishment of democracy. With this situation unlikely to come soon, the establishment of a constitutional review system in our country should consider the possibility of other avenues.

Based on the analysis of China's situation, the establishment of the Constitutional Court for constitutional review is a good choice.

Some scholars believe that the constitutional court model of the civil law system is a "centralised" system, while the judicial review model of the common courts is a "decentralised" system. The difference between the two lies in the existence of the principle of *stare decisis*. This is too much to take for granted. Firstly, although civil law countries do not follow the principle of precedent as strictly as common law systems, this does not mean that civil law courts do not take into account past legal interpretations and decisions at all. In practice, civil law courts also refer to past cases to some extent, although this reference is not as mandatory as in the common law system.

But this view provides two good classifications. Based on this categorisation, it allows us to discover in more detail that the differences between the two systems lie in the legal system, legal culture, political structure and history of each country.

Applying these factors to China, we therefore find that China is at this stage more suited to a German-style model of constitutional review by the Constitutional Court.

China has its roots in Germany in terms of its legal system and legal culture, while cooperative federalism of Germany also fits in with China's political philosophy.

The form of a constitutional court could both get China out of its self-policing dilemma and provide a more moderate step forward without causing great resistance.

5. Conclusion

This article introduces judicial review and answers the dilemmas and possibilities for its development in China through a comparative study. Unlike other articles, this article attempts to understand the legitimacy of judicial review from a jurisprudential basis and disentangle the inevitability of the failure of China's direct construction of American-style judicial review. It also analyses the shortcomings of China's current constitutional review, and proposes some suggestions for China's constitutional review. The paper concludes by proposing the establishment of a Constitutional Court review and this is a combination of the realities of the Chinese legal system and judicial situation, as well as the practicalities of considering whether the new system would be acceptable in a non-adversarial environment.

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