A Probable Future of Constitutional Review in China

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Abstract. State power has a natural tendency to violate private rights. Inadequate protection of fundamental rights reflects the lack of institutional safeguards. Based on the current inadequacy of fundamental rights protection in China, an institutional reform to the constitutional review system is necessary. The paper first analyzes the supremacy of the Constitution and the legitimacy of constitutional review. Further, it examines the three main review models of the significant constitutional countries in the world, compared with the currently implemented constitution review system in China. Considering the specific conditions of Chinese society, recognizing the structural shortages of the current system, and pointing out the infeasibility of the judicial review model in China, this paper argues that a constitutional review model where an independent review subject conducts the review can solve the problem of lack of independence while simultaneously adapting to the political tradition of China's People's Congress system. This future system is envisioned in the hope that it will better uphold the authority of the Constitution, regulate the administrative power, and thus protect the constitutional rights of citizens.

Keywords: Constitutional review, Constitution authority, Constitutional rights, Independent review department.

1. Introduction

The Roman law proverb says: Remedy Precedes Rights. As far as the Constitution is concerned, its effectiveness lies in its application and its life in its implementation. In China, the judicialization of the Constitution has its precursors. As early as the Qi Yuling v. Chen Xiaoqi case [1], 2001, Chinese judges based their decisions on the constitutional right to education. However, the resource they based on was then, in 2008, annulled by the Chinese Supreme People's Court [2]. Later, in the Sun Zhigang case, which gave rise to great controversy, the system of internment and repatriation was ruled unconstitutional and thus abolished [3], although public opinion plays a more critical role in the process than the institutional review system.

What should be discussed first is whether the Constitution should be upheld or whether it should have supreme authority. Whether it is superior to the state power, the government, or even the state that is organized from it. If the answer is yes, the "constitutionality" review is naturally justified.

However, the problem today, many constitutional rights are not adequately guaranteed. Although the situation has been improving over the past decades, the Chinese government, including legislative and administrative powers, sometimes still violates fundamental rights, often beyond the limits of its constitutional authority.

Therefore, institutional reform is still needed to ensure the taming of administrative power, utilizing a more effective and independent constitutional review model to continue and accelerate the upturn. Comparing the methods of safeguarding the constitutional authority of the world's major constitutional countries with China's model of "constitutional review," although the shortcomings of China's current model are apparent, it is possible to learn from continental European countries and change the status quo. The paper proceeds along these lines, envisioning an "independent review body" model similar to the one in Germany.

2. The Justice to Implement Constitutional Review

2.1. The Superiority of the Constitutional Law: Normative Constitution and Modern States

The Treaty of Westphalian established a state system in Europe that is now seen as the origin of international society, where each member became a political entity with sovereignty, no longer striving for religion but for the nation.

The modern state should possess the following features. First, the governance in the state is well-organized under systemized institutions, whether the authority is centralized or not, pluralism or not. Second, multiple fundamental rights related to freedom shall be completely well prevented to a proper degree. Third, the two principles above are secured via a normative constitution, whether written or convention.

The first point is necessary for a state that is in line with the original purpose for which it was established, which is to eliminate the state of nature, which is characterized by the "war of every man against every man" in Leviathan (Hobbes, Leviathan). The second point is also significant, especially when people's rights are violated by unlimited authorities worldwide. Reaching a limited government, or taming Leviathan, is now widely accepted among those states with governance under the rule of law [4].

The more crucial the former two are, the more critical the latter one is. Only with a normative constitution shall the former two principles be secured without relatively more extensive possibilities of being ruined.

This is where the importance of the constitution for the modern state comes in, using the constitution to ensure the systematization of the governance of the state and to guarantee the rights of the people. At the same time, it also means that the realization of the first two principles can only be guaranteed if the constitution is fully implemented, and therefore, the constitution should be superior, above the government, the rights of the state, and the state itself, and this superiority should be reflected in the whole process of social life. This is why there is a need for constitutional review.

2.2. Government's Power under the Constitutional Law

The supremacy of the Constitution emphasizes its supremacy over governmental powers based on the authority of the State, including not only the administrative but also the legislative power. In different contexts, "unconstitutionality" may only be thought of in terms of the nature of the object, either a specific administrative act or an abstract administrative act within the reservation to the law and, therefore, is partly a kind of legislative power, as well as legislative acts. Of course, if it is a usurpation of the reservation of law in the constitutional sense, there is no doubt that it is unconstitutional.

2.2.1 Constituent Power and Legislative Power

The constituent power and the legislative power must be distinguished, both doctrinally and practically, because the latter is "constitutional power"-the power in the Constitution-while the former is the power to make the genesis of the state, based on revolution, inheritance, discovery, or, in the case of the natural law theory, the innate power to begin organizing a community based on freedom from a "warlike state of nature." As a constitutional power, it is evident that legislative power is derived from the constitution, which is derived from constituent power. At the same time, although the legislature and the Constituent Congress overlap in terms of name, personnel, etc., they are not two coinciding entities. The latter is just a department established as a result of the Constitution.

Therefore, even if it appears on the surface that the legislature and the Constituent Congress are linked, all legislation and the legislative process should conform with the Constitution since the legislative power is subordinate to the constitution-making power. Then, of course, laws enacted by the legislature are one of the objects of unconstitutional review. And the review of legislative acts and their results, i.e., a series of bills and laws, even including the process of forming them, is justified and also necessary.

2.2.2 Constitution and Administrative Power

Constitutional review is necessary for administrative actions because the administration is the most powerful, direct, and potentially potent force to change the framework of government set by the Constitution and infringe upon citizens' fundamental rights.

Administrative governments often pursue a perhaps beneficial purpose that is included in their decisions. However, because efficiency is a relatively important factor for them, often the by-products, or unintended effects, of these decisions, which are usually infringements on the fundamental rights of some groups, are not considered. Worse still, the executive power sometimes assumes that such violations are necessary, even if only because of internal discretionary trade-offs. It infringes fundamental rights under the Constitution and cannot be justified based on the principle of proportionality or any other jurisprudential theory or principle.

Constitutional review is, therefore, a reminder and a corrective to the government to ensure that the Constitution is implemented because of its supremacy and supervision or remediation to regulate the government under the Constitution.

3. Probable Institutions of the Constitutional Review

3.1. Judicial Review

Judicial review refers to an institution where the general court acts as the subject of constitutional review. This model is characterized by the superiority of judicial power over the bill or administrative act under review. Moreover, this review usually has associated effects because of the common effective principle. Proceedings for the review of a bill or law may be initiated due to ordinary civil, criminal, or administrative proceedings, and the outcome of the proceedings thus initiated is effective for all the effects produced by the bill or law.

The United States became a proper case after William v. Marbury [5], where Chancellor Marshall secured the Court's right to judicial review with a sophisticated judgment. Since then, the federal courts of the U.S. have played an essential role in implementing the Constitution of the U.S. The general federal courts can judicially invalidate federal or state legislation or executive orders as unconstitutional based on a referral. This means that the constitutional review of legislation and administration is frequent and familiar, which puts considerable pressure on the constitutionality of the corresponding subjects of power. Considering the solid political attributes of the U.S. courts, especially the Supreme Court, judicial review cannot be viewed simply from an institutional perspective. However, the system forces legislators and the administration to pay more attention to whether their decisions contradict the Constitution's determination of fundamental rights and principles.

3.2. A Specialized Department for Constitutional Review

The model of specialized departments is to establish a department commonly called constitutional special courts or constitutional committees to specially review whether the administrative and legislative behaviors are constitutional or not. They are always independent of any government, from the tenure of members to the organization's setup, to ensure their neutrality, justice, and righteousness. These specialized constitutional courts are legally distinct from the ordinary courts and are even constitutionally protected.

In Germany, for example, the constitutional court has two distinct departments focusing separately on concrete power disputes and abstract laws and orders, based on Kelson’s theory. Additionally, Article 115g of the Constitution of Germany provides that the constitutional status and functions of the Constitutional Court may not be diminished, even in a state of war emergency [6].

The Commission review in France can be considered a typical case other than the German. According to their constitution, amended in 1958, a specialized committee, including a retired president as a member, has been established to secure the implementation of the French constitution.

However, they can only review legislative behaviors by setting necessary procedures and adopting all laws and parliamentary decisions sent to the Committee for review.

3.3. Mixed Model in the U.K.

In Britain, parliamentary supremacy was the most crucial political tradition after the revolution. Therefore, the constitutionality of parliamentary legislation can only be scrutinized by Parliament. This changed, however, when the Human Rights Act of 1998 incorporated the 1950 European Convention on Human Rights (ECHR), which is constitutional because it protects fundamental rights in the domestic legal system. The courts have been given a relatively limited review power and can make decisions to amend or repeal legislation of Parliament where it conflicts with the Convention.

This meant a change to the British constitutional landscape of parliamentary supremacy for centuries, which is not adverse, however. The potential crisis of unconstitutionality in Parliament is mitigated by the courts' entry as a subject of constitutional scrutiny. Human rights are further safeguarded, particularly the fundamental rights protected by various British constitutional documents and traditions. Unconstitutionality by the government has lost considerable potential because of better checks and balances on power rather than just self-censorship by Parliament. And, for fundamental rights that have been infringed, the change has made it possible to obtain remedies within a stable framework rather than always having to resort to extraordinary means.

The principle of parliamentary supremacy already guarantees the constitutionality of the executive branch. In other words, since "parliamentary supremacy" is a constitutional tradition sufficient to serve as the legal source of the British Constitution, it is in line with the British Constitution that the Parliament is responsible for the unconstitutionality of the Cabinet. Therefore, in the present mode of review in the United Kingdom, the power of the executive government is also under the constitution through the bridge of the Parliament [7].

4. The Current Constitutional Review in China

4.1. The Legal and Constitutional Basis of Constitutional Review in China

Article 5, paragraph 3 of the Constitution of the People's Republic of China: All laws, administrative regulations, and local regulations shall not contradict the Constitution, indicating that the Constitution has the highest rank in China, which provides a legal basis for the review of constitutionality [8]. In addition to this, Article 62 (2) and (12) of the Constitution, and Article 67 (1), (7) and (8) of the Constitution also provide a basis of legal legitimacy for the conduct of constitutional review8. The Organic Law of the National People's Congress (NPC), as amended in 2021, explicitly lists "promoting constitutional review" as a duty of the NPC [9]. Actively promoting and carrying out constitutional review in China aligns with the spirit of the modern rule of law regarding jurisprudence and national laws.

4.2. The Institution of Constitutional Review in China

Articles 37 (8) and 39 of the Organic Law of the National People's Congress (NPC) further clarify that the main body of constitutional review is the NPC, its Standing Committee, and the relevant departments under them9. Procedurally, constitutional review is further divided into five steps: "initiation," "submission of review opinions," "feedback from the enacting authority," "disposition of results," and "public disclosure."

4.3. The Shortage of Constitutional Review in China: Lack of Independence

Inclusion and negotiation within the government power are essential features of the Chinese system. Constitutional review indeed continues this tradition, which means the independence of a particular department or committee for the constitutional review is lacking and unencouraged. In the

Chinese political context, the separation of powers is particularly sensitive, and checks and balances contradict China's critical organizing principle of "democratic centralization."

However, independence is a prerequisite for "review" activities in most contexts, even if this independence is not judicial and the review is not for constitutionality. This is because independence is a prerequisite for ensuring that the subject of the review adheres to the principle of conducting the review. Independence is significant when the purpose of the review is constitutional and lies in the design and establishment of a new authority independent of the government under review.

More critically, the independence of the reviewing body means that unconstitutional facts can be more directly translated into unconstitutional liability. In China's reality, however, moderation and weakness are the main features of constitutional review activities. The creation of unconstitutional liability based on unconstitutional facts is a process that does not usually occur, and the review process is usually concluded at the third step, "feedback from the enacting authority." Thus, while the unconstitutional facts are altered, the unconstitutional responsibility is not actually assumed. It is as if a wrong that should be held accountable is exempted from accountability because it is salvaged.

In current China, political pluralism is almost non-existent. The main body of constitutional review is the specialized committee under the National People's Congress (NPC), but the vital object of review is the legislation of the NPC. It is as if the employee is asked to review the manager's behavior for compliance with the board's resolution. However, politically, the people's democratic dictatorship has ensured that this framework of the review of higher authorities by lower authorities operates per the original intention of the review; it undermines the practical effectiveness of implementing the Constitution because of the usual reasoning of human nature.

Moreover, the people's government generated by the National People's Congress is only institutionally related to this committee, so it is tough to review administrative behavior effectively.

5. The Future of Constitution Review in China

5.1. The Infeasibility of the Judicial Review Model in China

Many argue that judicial review is a better future, but such arguments ignore the context of legal practice in Chinese society [10, 11]. The relative weakness of the judiciary in China has been a political tradition for many years. The constraints on the legislature and the executive government called for by judicial review by the courts are challenging to implement. The American success we have seen is based on the underlying design of the separation of powers and the historical tradition of contractual statehood above all else. Suppose a constitutional review system similar to judicial review is designed in today's China. In that case, it may shake the nature of China's people's democratic dictatorship, as it is difficult for the courts to become democratically centralized. The judicial review model is, therefore, not feasible.

5.2. Independent department specialized in Constitutional Review

This paper envisions a future review model for China that is similar to that of continental Europe. That is to be looking forward to an independent organ that will come into being at the same time as, or based on, the NPC. This organ will have a staggered term of office and organizational independence from the NPC, the Central Committee of the Communist Party of China, and the People's Government. Once established, it acquires the power to review the constitutionality of the National People's Congress and the People's Government to safeguard the authority of the Constitution. This Commission, which has a special status and is specially protected by law, exercises the power of constitutional review.

There is no doubt that this conception is in the spirit of the Constitution. However, the challenge is whether it is compatible with the people's democratic dictatorship. Many questioned whether such an independent body challenged the supremacy of the NPC.

However, as long as the creation of this institution is based on the principle of democratic centralization and this institution is set up under the will of the people, it is consistent with the nature

of China as a people's democratic dictatorship. The supremacy of the people's congresses is, in fact, derived from the people's democratic dictatorship nature of the State. Therefore, this challenge is not an unfavorable reason for establishing an independent constitutional review organ. On the contrary, this new institutional design for constitutional review is a new initiative that can competently promote the implementation of the People's Constitution.

In addition to facilitating the better implementation of constitutional review, this system also caters to the political context of China's specific national conditions.

6. Conclusion

Based on the above analysis, we have come to the following conclusions: first, the Constitution is supreme, and thus, "constitutional review" is justified. Secondly, China's current constitutional review system is incomplete and needs to be improved. Finally, although the judicial review model is unsuitable for China, an independent review body is highly desirable. A better future where unconstitutionality is diminished and constitutional rights are guaranteed is not just looked forward to. The envisioned system may move us into the future.

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