

## A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case

Zhiwei Tong<sup>1</sup>

On July 24, 2001, the Supreme People's Court of China (SPC or the Supreme Court) promulgated a new judicial interpretation. This interpretation, commonly referred to as the "Reply to Qi Yuling's Case" took effect on August 13, 2001.<sup>2</sup> On December 18, 2008, however, the Supreme Court annulled twenty-seven judicial interpretations at once, including the Reply to Qi Yuling's Case. The reason given for the annulment of the Reply was that it was "no longer applicable."<sup>3</sup> From its birth to its demise, the Reply survived seven years, four months, and five days in China's legal system.

Although it was never actually applied to a single case after Qi Yuling's Case, there were disputes regarding the Reply in the Chinese legal circle, which attracted almost all of the foreign scholars studying Chinese law.<sup>4</sup> From the very beginning, I have been one of the major participants in this long-lasting discussion and the last resolution fully adopted my point of view.<sup>5</sup> For many years, I insisted that the Reply to Qi Yuling's Case was unnecessary and

---

1. Professor of Constitutional Law of East China University of Law and Politics, Vice Chairman of the Constitution Branch of China Law Society.

2. Zui gao ren min fa yuan guan yu yi qin fan xing ming quan de shou duan qin fan xian fa bao hu de gong min shou jiao yu de ji ben quan li shi fou ying cheng dan min shi ze ren de pi fu, [The Official Reply of the Supreme People's Court on Whether the Civil Liabilities Shall Be Borne For Infringement upon a Citizen's Basic Right of Receiving Education Which Is Under the Protection of the Constitution by Means of Infringing upon His/Her Right of Personal Name], Fa shi 25 hao si fa jie shi, [No. 25 [2001] of the Interpretations of the Supreme People's Court of the People's Republic of China] (promulgated by the Supreme Court of the People's Republic of China, July 24, 2001, effective Aug. 13, 2001) LAWINFOCHINA available at <http://www.lawinfochina.com>.

A "Reply" is a form of judicial interpretation by the Supreme Peoples Court in China.

3. Gu yu fei zhi 2007 nian di yi qian fa bu de you guan si fa jie shi de jue ding [Abolition of the End of 2007 Before the Release of the Relevant Judicial Interpretations (Seventh) of the Decision Which Annuls "the Reply to Qi Yulin's Case"], namely (Si fa jie shi) Judicial Interpretation [2001] No. 25 " (promulgated by the Supreme Court of the People's Republic of China, Dec. 18, 2008, effective Dec. 24, 2008).

4. See Songyou Huang, *Xian fa si fa hua ji qi yi yi* [The Importance of Institutionalizing the Constitution in Judicial Process – On a Supreme People's Court Opinion], REN MIN FA YUAN BAO [PEOPLE'S COURT NEWS], Aug. 13, 2001, translation available at [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/files/1109\\_huang\\_songyou\\_qi\\_yuling\\_case](http://lawprofessors.typepad.com/china_law_prof_blog/files/1109_huang_songyou_qi_yuling_case); Zhengdong Huang, *Xian fa si fa hua shi tuo li zhong guo guo qing de kong tan* [The Constitutional Judicial Application is Empty Talk from China's National Conditions], FAXUE [LAW SCIENCE] No.4 (2009).

5. See Zhiwei Tong, *Xian fa si fa shi yong yan jiu zhong de ji ge wen ti* [Issues on Constitutional Judicial Application], FAXUE [LAW SCIENCE], No. 11, (2001).

suspiciously unconstitutional.<sup>6</sup>

I will address the following questions, which I believe may be difficult for foreign scholars to understand, and which may even be misunderstood by many Chinese legal professionals. First, what is the Reply to Qi Yuling's Case? Second, what is the problem in China's legal practice revealed by the disputes around the Reply? And third, what does the Reply mean and what does its annulment indicate?

#### I. A BRIEF INTRODUCTION TO QI YULING'S CASE AND THE SUPREME COURT'S REPLY

Both Qi Yuling and Chen Xiaoqi were middle school students in Tengzhou City, Shandong Province. In 1990, Qi Yuling passed the entrance exam for the technical secondary schools while Chen Xiaoqi failed. That same year, the Commercial School of Jining City in Shandong Province sent Qi Yuling a letter of admission. However, Chen Xiaoqi's father and the head of Chen Xiaoqi's middle school conspired to intercept the acceptance letter without notifying Qi Yuling. Later, Chen Xiaoqi registered and studied at the Commercial School, using Qi Yuling's name. Chen continued to use Qi's name when she finished her studies and went on to work in a branch of China Bank. It was not until 1999 that Qi Yuling happened to learn the full story. In January of 1999, Qi Yuling filed a lawsuit against Chen Xiaoqi and others for infringement upon her right of name and her right to receive education. Qi's case had two issues: first, whether Chen Xiaoqi violated Qi Yuling's right of name, and second, whether Chen Xiaoqi violated Qi Yuling's right to receive education.

In May of 1999, the Zaozhuang Intermediate Court handed down an opinion, affirming that Chen had violated Qi's right of name, ordering Chen to stop further infringement upon Qi's right of name, and ordering Chen to pay Qi 35,000 yuan in emotional distress damages. However, the court found that Chen Xiaoqi and others had not infringed upon Qi's right to receive education.<sup>7</sup> This led to Qi Yuling's appeal to the Superior Court of Shandong Province on the sole issue of whether Chen Xiaoqi had violated Qi Yuling's right to receive education.

On appeal, the Superior Court of Shandong Province held that there was a very difficult problem of law involved in deciding whether Chen Xiaoqi violated Qi Yuling's right to receive education. The key legal issue, which the Superior Court had no idea how to deal with, was Qi Yuling's argument that the right to receive education was a constitutional right, rather than a civil right written into the General Principles of the Civil Law of the People's Republic of

---

6. *See id.*

7. Qi Yuling v. Chen Xiaoqi, *Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao bao* [SUP. PEOPLE'S CT. GAZ.], Vol. 5, 158, (Shandong High People's Ct., Aug. 23, 2001).

China.<sup>8</sup> Because the Superior Court of Shandong Province was unsure of how to best address this argument, it reported to the Supreme Court for further interpretation according to Article 33 of the Organic Law of the People's Court.<sup>9</sup>

Almost two years later, on July 24, 2001, the Supreme Court promulgated the Reply, stating, “[b]ased on the facts, after consideration, the Court holds that, Chen Xiaoqi and others have infringed upon Qi Yuling's fundamental right to receive education guaranteed by the Constitution through the violation of her right of name, and they have inflicted Qi Yuling concrete damages, so they should bear corresponding civil liabilities.”<sup>10</sup> The Reply took effect on August 13, 2001.

The Superior Court of Shandong Province thus continued its hearing and, in its final decision, held that “Chen Xiaoqi and others should bear civil liabilities for their infringement upon Qi Yuling's right of name and they have in fact violated her constitutional right to receive education.”<sup>11</sup> In the end of its opinion, the Superior Court also declared that Qi Yuling won the appeal after serious discussions within the Judicial Committee, according to Article 46 of the Constitution, Article 9 of the Education Law, and Article 120 of the General Principles of the Civil Law. The Court ordered Chen Xiaoqi and others to pay Qi 100,000 yuan for economic losses and emotional distress damages.

## II. THE MOTIVATION FOR AND BACKGROUND OF THE SUPREME PEOPLE'S COURT'S REPLY

The ultimate goal of the Supreme Court in responding to the Qi Yuling case was definitely not confined to solving a concrete legal problem in a single case, but was rather to expand judicial power by creating a precedent in China that gave the courts a power of constitutional review similar to that of the judiciary

---

8. DAYUAN HAN, *ZHONG GUO XIAN FA SHI LI YAN JIU* [CASE STUDY OF CHINA'S CONSTITUTION] 1 (2005).

9. *Ren min fa yuan zu zhi fa* [Organic Law of the People's Courts of the People's Republic of China], Art. 33 (adopted at the National People's Congress on July 1, 1979, and revised Sept. 2, 1983, Dec. 2, 1986, and Oct. 31, 2006; promulgated by the National People's Congress of P.R.C., Oct. 31, 2006, effective July 1, 1979). Article 33 provides that the Supreme People's Court can interpret the law during the trial, when there is a question as to its application.

10. *Zui gao ren min fa yuan guan yu yi qin fan xing ming quan de shou duan qin fan xian fa bao hu de gong min shou jiao yu de ji ben quan li shi fou ying cheng dan min shi ze ren de pi fu*, [The Official Reply of the Supreme People's Court on Whether the Civil Liabilities Shall Be Borne For Infringement upon a Citizen's Basic Right of Receiving Education Which Is Under the Protection of the Constitution by Means of Infringing upon His/Her Right of Personal Name], *Fa shi* 25 hao si fa jie shi, [No. 25 [2001] of the Interpretations of the Supreme People's Court of the People's Republic of China] (promulgated by the Supreme Court of the People's Republic of China, July 24, 2001, effective Aug. 13, 2001) *LAWINFOCHINA available at* <http://www.lawinfochina.com>; *see also* *REN MIN FA YUAN BAO* [PEOPLE'S COURT NEWS], Aug. 13, 2001.

11. *Qi Yuling v. Chen Xiaoqi*, *Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao* [SUP. PEOPLE'S CT. GAZ.], Vol. 5, 158, (Shandong High People's Ct., Aug. 23, 2001).

in the United States. In China, however, it would have been wiser to carry out this kind of experiment quietly, because it lacked clear constitutional and political bases. However, the judge who prepared the Reply in the Supreme Court did so without any misgivings.

On the same day the Reply was issued, the chief judge of the No.1 Civil Tribunal of the Supreme Court—Huang Songyou, who was in charge of the Reply at that time—published an obviously well prepared article, stating he hoped to copy the example of *Marbury v. Madison*<sup>12</sup> in order to establish a system of constitutional review in China.<sup>13</sup> He said, “We can gradually implement the Constitution in litigation procedures and allow courts to rely on the Constitution in making their ruling. As we don’t have a constitutional court, we can learn from the U.S. model and confer jurisdiction over constitutional litigation to ordinary courts.”<sup>14</sup>

The following three factors are important to note: first, Songyou Huang was the major drafter of the Reply to Qi Yuling’s case; second, his article was published in *People’s Court Daily*, which is the official newsletter of the Supreme Court; and third, the leaders of the Supreme Court silently tolerated his statements. These factors gave people reason to believe that his statement reflected the Supreme Court’s real attitude. However, the theory that the Supreme Court pursued in the Reply had no textual basis in the constitution, nor did it have any basis in legal theory or political philosophy in China. One question we should ask is why responsible judges of the Supreme Court had such a revolutionary intention and the courage to enact and carry out the Reply. It looks, at present, that this result was caused by a multi-faceted situation. Among the many facets, the following were the major influences.

First, the Chinese constitution, especially the articles concerning citizens’ fundamental rights, has not been sufficiently enforced, and society as a whole held an overly ardent expectation as to enforcement of these articles. The limitation on constitutional enforcement primarily means insufficient legislation for the protection of fundamental rights. The insufficiency directly results in situations where public organs could arbitrarily impose restrictions on fundamental rights by means of administrative regulations (enacted by the State Council, ministries, or local government), local congresses, and even documents without a legal title, while the judicial branch has no jurisdiction to try any case regarding fundamental rights infringement. In order to overcome this difficult situation, society on the whole would likely support any attempt that seemed to effectuate that goal. They would not generally, however, consider the constitutionality of the means, nor do they have the professional ability to do so.

Second, the system of constitutional review provided for in the

---

12. *Marbury v. Madison*, 5 U.S. 137 (1803).

13. *See* Songyou Huang, *supra* note 4.

14. *See id.*

Constitution has never been put into practice. According to the text of the Constitution, China does have a system of constitutional review. The preamble describes the system for constitutional review as follows:

This Constitution in legal form, affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the state; 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.<sup>15</sup>

In addition, Article 5 of the Constitution states:

[n]o laws or administrative or local rules and regulations may contravene the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution or the law must be investigated.<sup>16</sup>

Two articles of the Constitution, in monitoring its implementation, have more detailed provisions. Article 62 of the Constitution states that the National People's Congress (NPC) exercises the function and powers "to supervise the enforcement of the Constitution,"<sup>17</sup> and Article 67 further provides that the Standing Committee of the NPC exercises the function and power "to interpret the Constitution and supervise its enforcement", while the Standing Committee has the power "to annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the laws", and "to annul those local regulations or decisions of the organs of state power of provinces, autonomous regions, and municipalities directly under the Central Government that contravene the Constitution, the law or the administrative rules and regulations," in addition to other powers.<sup>18</sup>

The Chinese legal academic circle and legal professionals have long expected that the constitutional review system provided for in the Constitution could be turned from the paper to the ground. Their expectation, however, always went by the board, making them begin to lose patience, and even confidence.

Finally, the responsible judges of the Supreme Court did not have the ability

---

15. XIAN FA [Constitution of the People's Republic of China] pmb. (1982) (P.R.C.).

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

17. XIAN FA art. 62, § 2 (1982) (P.R.C.).

18. XIAN FA art. 67, §§ 1, 7, 8 (1982) (P.R.C.).

to understand the relevant constitutional problems, and overestimated the constitutional position of Chinese courts. The Supreme Court judges who drafted the Reply knew that *Marbury v. Madison* created the United States system of constitutional review, and they took for granted that Chinese courts could do what the United States court had done. However, the judges failed to realize the ultimate differences between the Chinese and United States constitutional systems.

First, the United States Constitution distributes power following the principle of checks and balances by separating the powers distributed to each branch. By constitutional design, the American judicial branch is equal to both the legislative and the executive branches; their courts have the power to check and balance the actions of the latter two. In contrast, the state power in China is distributed in accordance with democratic centralism; the judicial branch is created by and is responsible to the NPC.<sup>19</sup> The constitutional position of the court is thus much lower than that of the NPC and its standing committee, which means the court is unilaterally supervised by the representative organ, rather than supervising or balancing the representative organ.

Second, the United States is a common law country, while China adheres to a statutory law system. In China, we do have cases, but we do not have case law or common law. The whole Chinese judicial system would thus be in chaos if Chinese courts adopted the United States system of constitutional review.

Finally, some Chinese scholars and judges overvalued the United States experience. They regarded the United States constitutional review model as the only feasible method in China, while their knowledge about the Chinese Constitution and China's unique judicial system was quite limited. The opinions of these scholars and judges significantly influenced the judgment of a hot-blooded Supreme Court during the years in which it issued the Reply.

### III. DISCUSSIONS RAISED BY THE SUPREME COURT'S REPLY TO QI YULING'S CASE

The Reply to Qi Yuling's Case caused many discussions both at the time it was issued and in the many following years. Proponents strained their every nerve to elevate its importance to the Chinese constitutional system. They saw the Reply as *Marbury v. Madison* in China and believed that the courts in China had acquired the power to apply the Constitution in all future cases.<sup>20</sup>

---

19. The state organs of China apply the principle of democratic centralism. According to article 3 of the Constitution, "All administrative, 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." XIAN FA art. 3, pmb. (1982) (P.R.C.).

20. See MINGAN JIANG, PING JIANG, WEIFANG HE and DINGJIAN CAI, *Xian fa si fa hua si ren tan* [Roundtable Discussion on Judicialization of the Constitution], NANFANG ZHOUMO [SOUTHERN WEEKEND NEWS], Sept. 13, 2001; see also LEI WANG, XUANZE XIANFA, [TO CHOOSE CONSTITUTIONAL LAW] (2003).

On the other hand, however, the Reply had many opponents.<sup>21</sup> The main critical commentary included the following arguments.

First, both the report of Shandong Superior Court and the corresponding Reply of the Supreme Court were unnecessary, as they failed to provide any new ideas not included in the Education Law of the People's Republic of China.<sup>22</sup> Article 81 of the Education Law states that, "If anyone, in violation of the provisions of this Law, infringes upon the lawful rights and interests of teachers, educates, schools or other institutions of education, thus causing losses or damages, he or she shall bear civil liabilities according to law."<sup>23</sup> This article alone provided sufficient authority for the court to try the case.

Second, both the Supreme Court's Reply and the judgment made by the Superior Court of Shandong Province go beyond the judicial authority allowed in Article 126 of the Constitution and Article 4 of the Organic Law of the People's Court, which require the judiciary to be subject to the law. For this reason, the Reply and judgment are suspiciously unconstitutional.

Lastly, constitutional rights should shelter people from public power. In Qi's case, her right to receive an education was not infringed on by a public power. Qi asserted her right against an equal private party rather than against a public power. As a result, this was not a constitutional case at all. The Supreme Court regarded and propagated this case as a constitutional one only because of the court's ignorance about constitutional law.<sup>24</sup>

The Reply has only been applied, however, to the very case itself when it was decided by the Superior Court of Shandong Province and this application was the result of a misunderstanding. Prior to its annulment, it was never applied again. In fact, it is almost impossible to apply the Reply in cases involving the infringement of fundamental rights by a public power.

The Reply, which was doomed to failure, was an attempt by the Supreme Court to break free from the constitutional restraints that prohibit the Court from applying the Constitution. There were signs that the Standing Committee of the NPC had noticed the content and purpose of the Reply long before its annulment and had reservations about it. Although the Reply appeared to be inapplicable, the Standing Committee of the NPC never officially annulled it.

---

21. See Heping Dong, *Fei zhi qi an "pi fu" "shi xian fa shi yong de li xing hui gui* [Abolition of Qi Case "Reply" is the Rational Return to the Constitution's Text], FAXUE [LAW SCIENCE], No. 3, 2009; see also Ping Yu, *Hu huan fu he zhong guo guo qing de he xian shen cha zhi du* [Constitutional review system in line with China's National Conditions], FAXUE [LAW SCIENCE], No.3, 2009.

22. Jiao yu fa [Education Law of the People's Republic of China] (promulgated by the National People's Congress of P.R.C., Mar. 18, 1995, effective Sept. 1, 1995), LAWINFOCHINA, available at <http://www.lawinfochina.com>.

23. Jiao yu fa [Education Law of the People's Republic of China] (promulgated by the National People's Congress of P.R.C., Mar. 18, 1995, effective Sept. 1, 1995), art. 81, LAWINFOCHINA available at <http://www.lawinfochina.com>; see also Zhiwei Tong, *supra* note 5.

24. Zhiwei Tong, *Xian fa shi yong ying yi xun xian fa ben shen gui ding de lu jing* [Constitution's Application Should Follow the Road Stipulated by Constitution Itself], 6 ZHONGGUO FAXUE [CHINA LEGAL SCIENCE] 31, 36 (2008).

This was a function of deference to the prestige of the Supreme Court. Additionally, the president of the Supreme Court would possibly be publicly embarrassed if he approved the Reply and then later annulled it himself.

The Reply of Qi Yuling's Case and the discussions surrounding it indicate that different state organs in China had different views on how constitutional application should be regulated by the Constitution itself. Top leaders were unsure about the potential impact of the decision, either positive or negative, on the present political framework.

In addition, the Chinese legal circle has yet not adopted a common view on a basic problem. Namely, what is exactly the constitutional application system regulated by the Constitution, and how is state power distributed correspondingly? If we say that the Reply represented one way to solve the problem of constitutional review, then the subsequent case of Sun Zhigang<sup>25</sup> represented another possibility. These possibilities were either breaking through the present constitutional framework to allow the judiciary to apply the Constitution, as in Qi's case, or attempting review under the current constitutional framework by requesting the Standing Committee of NPC to review the constitutionality of relevant administrative regulations as was attempted in Sun's case. I noticed that many legal professionals supported both the method in Qi's case and the attempt in Sun's case without realizing that the two proposals were incompatible. For example, a famous constitutional scholar said, of Qi Yuling's case, "I agree with *the application of constitution through the judiciary procedures*, and that the problem that the Constitution cannot be applied in judicial practice must be changed."<sup>26</sup> On the other hand, the same scholar made incompatible comments about the case of Sun Zhigang stating,

In a written request, three citizens asked the NPC Standing Committee to review the State Department's 1982 Detailed Implementing Regulations for the Measures on Custody and Repatriation of Urban Vagrants and Beggars, a ruling of unconstitutionality ultimately prompted the Government to repeal the

---

25. In March 2003, Sun Zhigang, a young graduate who was not carrying any identification, was taken into a so-called shelter under the Public Security Bureau by police officers. The police based their detention on the Measures on Custody and Repatriation of Vagrants and Beggars in Cities, a law promulgated by the State Council many years before. See Chengshi liulang qitao renyuan shourong qiansong banfa [Measures on Custody and Repatriation of Vagrants and Beggars in Cities] (promulgated by State Council, May 12, 1982, effective Oct. 15, 1982), art. 4, 1982 MINCHENG 80. In the "shelter," Sun Zhigang was beaten to death by other vagrants. After that, throughout the world, public opinion strongly condemned the Measures on Custody and Repatriation of Vagrants and Beggars in Cities as unconstitutional. On June 18, 2003, the State Council abolished the administrative regulations, replacing them with new measures that prohibited forced commitments. See Chengshi shenghuo wuzhuo de liulang qitao renyuan jiuzhu guanli banfa [Measures on the Administration of Aid to Indigent Vagrants and Beggars in Cities] (promulgated by the State Council, June 18, 2003, effective Aug. 1, 2003); see also Keith J. Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China*, 45 COLUM. J. TRANSNAT'L L. 114, 117-31 (2006) (detailing facts of Sun Zhigang case and providing multiple commentator sources).

26. See Mingan Jiang et. al., *supra* note 20.



law, which in China is unprecedented. The success of this case, both in theory and in practice has a huge significance.<sup>27</sup>

These inconsistent statements by the same commentator demonstrate that some leading legal professionals have no concrete idea about the appropriate procedure for establishing a system of constitutional review in China.

#### IV. WHY THE SUPREME COURT ABOLISHED THE REPLY TO QI YULING'S CASE

In December 2008, the Supreme Court quietly but deliberately abolished the Reply to Qi Yuling's case. The Supreme Court's action in abolishing the Reply to Qi Yuling's Case indicates that the political leadership directly responsible for the legal affairs in China recognized that allowing the courts a direct role in enforcement of the Constitution would undermine China's political structure. That is to say, China's senior political leadership has realized that they cannot and should not follow the United States' system of constitutional enforcement.

The Supreme Court's leadership has recently changed, with a new President and Vice-Presidents coming into their respective positions. For the new leadership of the Supreme Court, the Reply to Qi Yuling's Case represented a political burden, and eliminating this burden through its abolition was a more favorable outcome for them. The abolition of the Reply to Qi Yuling's Case demonstrates that the Supreme Court has finally recognized that taking part in constitutional enforcement to expand their jurisdiction was unsuccessful, and that it would also be difficult to achieve that goal in the future.

#### V. FUTURE ENFORCEMENT OF CHINA'S CONSTITUTION

The Chinese Constitution's implementation or enforcement can be accomplished either by appropriate legislation or by constitutional review.

China needs more appropriate legislation first. Together with the open-up policy, in place for the three decades since 1978, China has made great progress in protecting basic human rights and constitutional rights of citizens, but, I have to say, some constitutional rights have still not been protected by appropriate legislation. China is a state of statutory laws and any provision of constitutional rights must be implemented through laws made by legislative bodies; otherwise, the constitutionally recognized rights cannot be practically protected. This is much different from the United States common law system. In the United States, judges can create law by ruling in a case, but the Chinese rely almost completely on congressional legislation. Without doubt, China

---

27. Dingjian Cai, *Zhong guo she hui zhuan xing shi qi de xian zheng fa zhan* [China's Development of the Constitutional Government During Social Transition Period], FA ZHI ZHENG FU WANG [RULE OF LAW GOVERNMENT NETWORK], available at [http://law.china.cn/thesis/txt/2007-05/22/content\\_1588727.htm](http://law.china.cn/thesis/txt/2007-05/22/content_1588727.htm).

needs to strengthen fundamental rights protection through appropriate legislation.

Turning now to the issue of constitutional review in China, there are two problems to be solved, namely effective protection of fundamental rights, and constitutionally based unity of laws of the nation. The current text of the Chinese constitution stipulates the model of constitutional review, also called the NPC review model.<sup>28</sup> This model is much different from the United States system of judicial review. There is no textual basis in the Chinese Constitution for the United States model of judicial review, and that model also lacks political basis. The death of the Reply to Qi Yuling's Case demonstrates that it is not possible to implement the United States system of judicial review in China. Therefore, Chinese scholars must face this reality, and strive to develop their own model of constitutional review.

In the past decade, we have seen some active developments with regard to constitutional review model in China. For example,

on March 15, 2000, the ninth NPC passed the Law on Legislation, which has been in effect since July 1 of that year.<sup>29</sup> The Law on Legislation reaffirms the supremacy of the Constitution among the various levels of laws and reiterates that no law or administrative or local rules or regulations shall contravene the Constitution. In particular, according to this law, social organizations, enterprises and citizens that firmly believe the aforementioned laws, rules, and regulations contravene the Constitution can submit written proposal to the NPC Standing Committee for review thereof.

In May 2004, the Regulations Review Office was established as a subordinate to the Commission of Legislative Affairs of the NPC Standing Committee.<sup>30</sup>

In December 2005, the Standing Committee of the tenth NPC revised the *Procedures for Putting-on-records and Review of administrative rules, local rules, autonomous rules, and single acts, and rules in Special Economic Regions*, and passed *Procedures for Putting-on-records and Review of Judicial Interpretations*, with the purpose of further establishing and improving system for putting-on-records and review of legal documents.<sup>31</sup>

On August 27, 2006, the Standing Committee of the tenth NPC passed the People's Congress Standing Committee Supervision Law.<sup>32</sup> The law went into

---

28. See *supra* notes 15-18 and accompanying text.

29. Li fa fa [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 112 (P.R.C.) *translation available at* <http://www.21lawyer.cn/english/01b/3.html>.

30. See *id.* at ch. V. The NPC Standing Committee set up a regulatory review of the record room as a part of the Legislative Affairs Commission. The office is responsible not only for regulatory filing, but more importantly, for reviewing the subordinate and higher laws, particularly those in conflict with the Constitution.

31. See generally FAZHI RIBAO [LEGAL DAILY], Dec. 19, 2005.

32. Ge ji ren min dai biao da hui chang wu wei yuan hui jian du fa [The People's Congress Standing Committee Supervision Law](promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006,

effect January 1, 2007 and it has served as the legal basis for standing committees of different levels of the People's Congress to exercise their right to supervision. The Supervision Law is an important authority for safeguarding implementation and enforcement of the Constitution. Pursuant to the Constitution and the Law on Legislation, it has set procedures for putting-on-records and review of various legal documents. In addition, it provides for supervision of judicial interpretations rendered by the Supreme Court and the Supreme Procuratorate.

The above-mentioned legislative acts demonstrate that a closely woven institution has been formulated for safeguarding the implementation of the Constitution in China. Despite a widespread view in China that the current safeguarding institution does not work, such a view does not reflect reality. Indeed, the safeguarding system has worked effectively in some fields, but such activities are carried on by the internal coordination form, which is not public.

China's constitutional scholars generally believe that the future of constitutional review in China lies in setting up specialized review bodies in the NPC and its Standing Committee. This work requires two steps: first, to set up a specialized committee in the NPC and its Standing Committee and, second, to set up a constitutional court, which would also be under the NPC and its Standing Committee. The constitutional court should have the power to review administrative and local rules and regulations that contravene the Constitution and the law, and to annul those legal documents. Though such a court could not annul the laws enacted by the NPC and its Standing Committee, it could supply legal advice on the constitutionality of those laws or modify the recommendations.

It is not impossible to establish a constitutional court in China. Around 1981, the Constitution Revision Committee considered the establishment of a constitutional court, but later, because some members of the Committee felt that the constitutional court was unnecessary, the Committee finally abandoned the program. People who did not agree with the creation of a constitutional court had two main reasons: one, that such a court does not comply with the NPC centralized leadership structure, and, two, that enforcement of the constitution cannot rely on a small group of judges who would make up the constitutional court.<sup>33</sup> Based on the arguments in this article, however, I believe a constitutional court is inherently consistent with the statutory law tradition of China.

---

effective Jan. 1., 2007) (2006).

33. POLITICAL STUDIO OF OFFICE OF RESEARCH GROUP UNDER THE STANDING COMMITTEE OF THE NPC, *ZHONG GUO XIAN FA JING SHI* [CHINA'S CONSTITUTION REFINED INTERPRETATION] 196 (1996).