

# The Changes of Constitutional Review in China

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## ABSTRACT

According to the report of the 19th National Congress of the Communist Party of China, it is required to "strengthen the implementation and supervision of the Constitution, and promote the constitutional review", and the concept of "constitutional review" is introduced for the first time. Worldwide, this system is an important arrangement in the constitutional guarantee system. China started late in this regard. It is generally believed that the construction of China's constitutional review system with modern significance began with the 1982 Constitution, but in fact, the germ of this system appeared in the "Organic Law of the Central People's Government" adopted by the Plenary Session of the Chinese People's Political Consultative Conference in 1949. With more than 70 years of ups and downs in the People's Republic of China, China's constitutional review has been improving day by day, but the current situation is not satisfactory. While promoting active review, it is suggested to establish a compound constitutional review system of "standing committee of the National People's Congress + court", and adopt a bottom-up path from administrative litigation to constitutional review to promote the development of constitutional review system in China.

**Keywords:** *Constitutional supervision, Constitutional review, Compound constitutional review system.*

## 1. INTRODUCTION

In the report of the 19th National Congress, "strengthening the implementation and supervision of the Constitution and promoting constitutional review" was necessary, and the concept of "constitutional review" was introduced for the first time. It is generally believed that the construction of a modern constitutional review system in China began with the 1982 Constitution. In fact, the germ of such a system appeared in the "Organic Law of the Central People's Government", which was adopted by the Plenary Session of the Chinese People's Political Consultative Conference in 1949.<sup>1</sup> With the ups and downs of the People's Republic of China for more than 70 years, the constitutional review system with Chinese characteristics has become more and more perfect. However, since entering the new era, the Chinese Communist Party has attached importance to the authority of the constitution and the constitution consciousness of the whole society has been enhanced, so the future of the system is worth looking forward to.

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1. Article 7 of the Organic Law of the Central People's Government (1949).

## 2. "THE ORGANIC LAW OF THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA": THE GERM OF A CHINESE-STYLE CONSTITUTIONAL REVIEW SYSTEM

### 2.1 *Taking "Common Programme" as the Provisional Constitution of New China*

Constitutions are all political in essence, but their specific orientations differ in different historical periods.[1]

In September 1949, parts of China had not yet been liberated and the land revolution had not yet been completed, so there were not sufficient objective conditions to convene a people's congress with universal suffrage. Against this background the plenary session of the Chinese People's Political Consultative Conference acted as the People's Congress and adopted the "Common Programme" as the policy of the Central People's Government.

The emergence of any constitution can be regarded as the result of the exercise of the constitutional power. As for the exercise subject of the constitutional power, Sieyes of France put forward: "the constitutional power refers to the power to create the constitution, which can only be enjoyed by the sovereign." [2] Since the new CPPCC was not elected by universal suffrage, it could not exercise the constitutional power on behalf of all the people as sovereigns. Therefore, the "Common Program" was difficult to be defined as China's first constitution because it lacked sufficient democratic legitimacy. [3] However, it was fully justified to identify it as the provisional constitution of new China. Liu Shaoqi once pointed out in the "Report on the Draft Constitution of the People's Republic of China": "the 'Common Program' plays the role of the provisional constitution." [4] The positioning of the "Common Program" here reflected the real intention of the framers. First of all, as the main body of the formulation of the "Common Program", the new CPPCC was widely representative. The Communist Party of China made clear requirements on the "representativeness" of the CPPCC. "In order to expand the representativeness of the CPPCC, it is necessary to first expand the composition, units and quota of participants in the CPPCC, so that it can represent the aspirations and requirements of all democratic classes and people of all nationalities." <sup>2</sup> Mao Zedong also pointed out in the opening speech of the first plenary session of the new CPPCC: "the current Chinese people's Political Consultative Conference has the nature of representing the people of the whole country, and it has won the trust and support of the people of the whole country at the same time." Based on the broad representativeness of the new CPPCC, the formulation of the "Common Program" had a certain basis of democratic legitimacy, so it had legitimacy and was not just a political decision of the new regime. Secondly, the "Common Program" organized the state power system and endowed the new power with legitimacy. Mao Zedong pointed out in the opening speech of the first plenary session of the new CPPCC: "the Chinese people's Political Consultative Conference declares that it will implement the functions and powers of the National People's Congress. In its own agenda, the Chinese people's Political Consultative Conference

will formulate the organizational law of the Chinese people's Political Consultative Conference, the organizational law of the Central People's Government of the people's Republic of China and the common program of the Chinese people's Political Consultative Conference..." The above contents were finally reflected in paragraph 2 of Article 13 of the "Common Program". The above provisions provided a normative basis for the new CPPCC to implement the functions and powers of the National People's Congress. By formulating the "organic law of the Central People's Government" and electing the Central People's Government Committee to organize the system of state power and "give it the power to exercise state power", the status of the "provisional constitution" was proved.

## ***2.2 The Committee for Central People's Government Exercises the Substantive "Constitutional Review Power"***

Article 7 of the "Organic Law of the Central People's Government" in 1949 stipulated: "the Committee of the Central People's Government shall exercise the following functions and powers in accordance with the common program formulated by the plenary session of the Chinese people's Political Consultative Conference:... It is suggested to abolish or amend the resolutions and orders of the Council that are in conflict with the laws and decrees of the state." Regarding "the Common Program" here, the Central People's Government Committee shall take the provisions of the "Common Program" as the standard to judge whether the laws and decrees of the Administrative Council are in conflict with them by "repealing or revising".

It can be seen that in the state power system established by the first plenary session of the Chinese people's Political Consultative Conference, one of the functions and powers of the Central People's Government Committee is to exercise the substantive power of constitutional review. The reason why the word "substantial" is used here is that at the beginning of the founding of the People's Republic of China, neither state leaders nor the public had constitutional consciousness in the modern sense, let alone the concept of constitutional review. The reason why this provision was made was based on the political system of the combination of legislative and executive powers at that time. The purpose was to maintain the unity of the legal system and strengthen centralization of power, which

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2. The United Front Work Department of the Central Committee of the Communist Party of China, the Literature Research Office of the Central Committee of the Communist Party of China. "Selected Works of Zhou Enlai Unifying Front", People's Publishing House, 1984, p. 130.

objectively shaped the embryonic form of China's subsequent constitutional review system.

### **3. MAY FOURTH CONSTITUTION: THE INITIAL CONSTRUCTION OF A CHINESE-STYLE CONSTITUTIONAL REVIEW SYSTEM**

May 4th Constitution did not make a clear declaration of the supremacy of constitutional status, nor did it stipulate what institution should interpret the constitution. In 1954, Chairman Mao Zedong discussed China's first draft constitution at the Committee of the Central People's Government and put forward: "the Constitution is a general constitution."<sup>3</sup> The Constitution was regarded as the "general articles of association", which showed that there was no clear concept of what the constitution was at that time.

May 4th Constitution entrusted the responsibility of supervising the implementation of the Constitution to the National People's Congress, which was consistent with the superiority of the status of China's National People's Congress. However, due to the short meeting period of the National People's Congress, it was difficult for this power to play a practical role in practice. Article 31 of the Constitution stipulated that the Standing Committee of the National People's Congress might "revoke resolutions and orders of the State Council that contravened the constitution, laws and decrees" and "alter or revoke inappropriate resolutions of state power organs of provinces, autonomous regions and municipalities directly under the central government". At the same time, Articles 49, 60 and 65 stipulated the functions and powers of the State Council, local people's congresses at all levels and people's committees at or above the county level to "change or revoke". Although there were sentences that "the Standing Committee of the National People's Congress might revoke the resolutions and orders of the State Council that contravened the constitution, laws and decrees" in the provisions of Article 31, according to the constitutional concept of the framers at that time, the original intention of making such provisions in the constitution was not to carry out constitutional review, but to establish a set of top-down centralized system of democratic

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3. Wang Peiying. "Comprehensive Compilation of Chinese Constitutional Documents", China Democracy and Legal System Publishing House, 2004, p. 266.

centralism.<sup>4</sup> Of course, its system design was very similar to the constitutional supervision system established in the 1982 Constitution, or the constitutional supervision system established in the 1982 Constitution inherited the path and way of the May 4th Constitution in form. Therefore, the relevant provisions of the May 4th Constitution objectively made a preliminary construction of China's constitutional review system.

### **4. 1982 CONSTITUTION: THE FORMATION OF A MODERN FRAMEWORK FOR A CHINESE- STYLE CONSTITUTIONAL REVIEW SYSTEM**

The 1982 Constitution was based on the May 4th Constitution and was the inheritance and development of the May 4th Constitution. After ten years of the Great Cultural Revolution, party and state leaders fully realized the value of "ruling by law and not by man", the highest basis for realizing the rule of law was the constitution, and deepened their understanding of the authority of the constitution. In addition to the people's desire for the rule of law, the 1982 Constitution, which was born after full democratic discussion by the people of the whole country, condensed the greatest consensus of the people of the whole country.

Since the Third Plenary Session of the 11th CPC Central Committee, with the reform and opening up of China, the constitutional concept in the modern sense has just really appeared, and the concept of "constitutional review" has been enlightened and inspired. [5]

#### ***4.1 The Path Chosen by the 1982 Constitution for Constitutionality Review System in China***

Currently, there are three stable models of constitutional supervision in the world. First is the model of judicial supervision. This model first arose in the United States and originated in the 1803 case of *Marbury v Madison*. The courts at all levels act as the main body of constitutional supervision, following the principle of "no prosecution", and the constitutionality review is

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4. "...People's Congress is such a state power organ that can make decisions on major issues and supervise their implementation." The Central Literature Research Office of the Communist Party of China. "Selected Important Literature since the founding of the People's Republic of China", Volume 5, Central Literature Publishing House, 1993, p. 490.

dependent on the specific case. The second is the model of supervision by specialized organs. The specialized organs are generally given a supreme status and high prestige, and can effectively supervise the acts of state organs including the legislature, typically such as the German Constitutional Court and the French Constitutional Council. Third is the supervision mode of representative organs. This model originated in the UK, where the courts do not have the power to review the laws passed by Parliament because of the tradition of "parliamentary supremacy", and the problems in the laws can only be amended by Parliament itself. In addition, as socialist countries generally adopt the principle of democratic centralism, the representative organs, which are elected by the people directly or indirectly, are in a superior position to other state organs, and this position determines that the power of constitutional supervision is exercised by the representative organs, so this model is also commonly used in socialist countries. As one of the important members of the socialist country camp, the system of people's congresses implemented by China determines that "it is difficult to conceive of setting up an organization with higher power and prestige than the Standing Committee of the National People's Congress to manage this matter". [6] Therefore, based on the basic national conditions of People's Congress System in China, the 1982 Constitution stipulated that the National People's Congress and its Standing Committee were responsible for the implementation of constitutional supervision, that is, whether a certain norm or act was constitutional, only the National People's Congress and its Standing Committee had the final right to decide.

## **4.2 The Framework of the Constitutional Review System Established by the 1982 Constitution**

### **4.2.1 Declaring the Supreme Status of the Constitution as the Fundamental Law**

It is the foundation of the constitutionality review system that the Constitution has the highest status as the fundamental law. Only in this way can the Constitution be used as an evaluation criterion for ordinary law to judge its constitutionality. [7] The reason why Britain has not established the constitutional review system is that there is no difference between its constitutional law and other laws, so they can not be used as the evaluation

standard. European countries established the constitutional supervision system with the Austrian Constitution in 1920 as the symbol. It is precisely because the constitutional power as the representative of the public opinion is separated from the legislative power that reflects the will of the representative organ of the public opinion. The public opinion is obviously higher than the will of the representative organ of the public opinion, and the two have a difference in effectiveness. [8]

The last paragraph of the preamble of the Constitution stipulated: "this Constitution... has the highest legal effect." Article 5 stipulated: "all laws, administrative regulations and local regulations shall not contravene the constitution. All state organs, armed forces, political parties, social organizations, enterprises and institutions must abide by the Constitution and the law." It clarified the supreme law status of the Constitution, which laid a foundation for the establishment of China's constitutional review system.

### **4.2.2 Entrusting the National People's Congress and Its Standing Committee With Constitutional Supervision**

During the formulation of the 1982 Constitution, the constitutional amendment committee considered the establishment of the constitutional committee as a special body for constitutional review. [9] Because "it could not solve the relationship between it and the standing Committee of the National People's Congress", the proposal was not adopted. [10] If a constitutional committee independent of the Standing Committee of the National People's Congress is set up to exercise external supervision over the Standing Committee of the National People's Congress and openly challenges the decisions made by the Standing Committee, it will undoubtedly undermine the political prestige and constitutional status of the Standing Committee, thus causing a realistic impact on the gradually recovering constitutional order at that time. And this is obviously contrary to the idea of strengthening People's Congress System by expanding and improving the status and capacity of the Standing Committee of the National People's Congress in the 1982 Constitution.<sup>5</sup> Therefore, at that time, the responsibility of supervising the implementation of the Constitution was directly

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5. Peng Zhen. "Report on the Draft Amendment to the Constitution of the People's Republic of China — at the Fifth Session of the Fifth National People's Congress on November 26, 1982," People's Daily, December 6, 1982, 1st edition.

entrusted to the National People's Congress and its Standing Committee. However, in terms of system design, there are two major defects: the lack of permanent organization and corresponding review procedures.

The 1982 Constitution entrusted the responsibility of supervising the implementation of the Constitution to the National People's Congress and its Standing Committee at the same time. Since then, this complex, arduous and time-consuming work is no longer subject to the short meeting period of the National People's Congress, and it is possible to give full play to practical results in practice. Articles 62 and 67 of 1982 Constitution entrusted the right of supervising the implementation of the Constitution to the NPC and its Standing Committee in the form of "change or revocation". In addition, Articles 89, 98 and 104 stipulated the functions and powers of the State Council, local People's Congresses at and above the county level and governments to "change or revoke" respectively. Some scholars believe that the subjects of constitutional supervision in China include not only the National People's Congress and its Standing Committee, the State Council, People's Congresses at and above the county level and its Standing Committee, all of which can exercise the power of constitutional supervision, and even "social supervision" is included in the constitutional supervision. Such a broad understanding has rendered it meaningless. In fact, constitutional supervision cannot be separated from constitutional interpretation. The National People's Congress is the organ of formulating 1982 Constitution, and it naturally enjoys the power of constitutional interpretation, while the power of constitutional interpretation of the Standing Committee of the National People's Congress is explicitly authorized by the Constitution. Therefore, the National People's Congress and its Standing Committee are the constitutional supervision organs of course. The exercise of public law follows the principle of "being invalid in the condition of ultra vires", while other state organs do not have this authority due to the lack of explicit authorization of the Constitution.

#### 4.2.3 *The Constitutional Review Method Is Prior Review*

In China's constitutional review system, except for autonomous regulations and separate regulations, they adopt prior review. Since the formulation of regulations, rules, judicial interpretations and normative documents by

administrative organs, local people's congresses at all levels and their standing committees, people's courts, people's procuratorates and other state organs are inherent functions and powers entrusted to them by the Constitution and laws, prior review is conducive to ensuring that they exercise their functions and powers according to law without undue interference, reflecting the democratic principle of supervision. The legislation of national autonomy involves the specific interpretation of the provisions on the right of national autonomy, which originally belongs to the Standing Committee of the National People's Congress, and there is a constitutional basis for its prior review. Such an institutional arrangement is reasonable because "the prior review is divorced from the specific situation and can only make 'literal judgment', which can not solve the unconstitutional problems in the application of laws and regulations, let alone foresee the unconstitutional problems emerging due to social development or the emergence of specific cases". [11]

### 5. NEW ERA: FURTHER DEVELOPMENT OF CONSTITUTIONAL REVIEW SYSTEM IN CHINA

As mentioned above, due to historical reasons, the 1982 Constitution directly entrusted the National People's Congress and its Standing Committee with the responsibility of supervising the implementation of the Constitution. In the end, a Constitutional Committee was not established. With the promotion of academic circles and the joint proposal of NPC deputies, the issue of setting up a special constitutional supervision institution finally entered the vision of senior officials. In the process of amending the Constitution in 1993, the "supplementary proposal of the Central Committee of the Communist Party of China on amending some parts of the Constitution" stated as follows: "according to the provisions of Article 70 of the Constitution, the National People's Congress may establish a constitutional supervision committee in the nature of a special committee, and the Constitution may no longer provide for it."<sup>6</sup> Based on Article 70 of the 1982 Constitution that "the National People's Congress shall establish a Nationalities Committee, a Law Committee... and other special committees", it further conveyed the

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6. Wang Peiying. "Comprehensive Compilation of Chinese Constitutional Documents", China Democracy and Legal System Publishing House, 2007, p. 102.

CPC Central Committee's positive attitude towards the establishment of a special constitutional supervision organization — the National People's Congress can set up a constitutional supervision committee with the nature of a special committee at any time without passing constitutional amendment. However, China's political practice shows that it is difficult to make major adjustments to the central state organs without the clear and specific policy arrangements of the CPC Central Committee. Until February 2018, the Third Plenary Session of the 19th CPC Central Committee adopted "the plan for deepening the reform of Party and state institutions", proposing to rename the NPC Law Committee to the NPC Constitution and Law Committee to "strengthen the implementation and supervision of the Constitution and promote the review of constitutionality". [12] With this important political foundation, [13] the contents was reflected in the second item of Article 44 of the "amendment to the Constitution of the People's Republic of China" deliberated and adopted at the first session of the 13th National People's Congress in March of the same year. Since then, the specialized agencies specifically responsible for constitutional review have finally had specific institutional arrangements.

At the same time, China's constitutional review has begun to show a good running trend. On December 24, 2017, the working committee of the Standing Committee of the National People's Congress submitted the report on the annual filing review to the Standing Committee of the National People's Congress for deliberation for the first time; 2019 Filing Review Report further pointed out that the provisions in some local regulations concerning the traffic control authorities' access to and copying of the parties' communication records when conducting traffic accident investigations are inconsistent with the constitutional principles and spirit of protecting citizens' freedom and privacy of communication; 2020 Filing Review Report listed "constitutional issues" for the first time, and clearly pointed out that certain local legislation requiring ethnic schools to teach in ethnic languages was "inconsistent" with the state's constitutional provision to promote Mandarin.

## 6. CONCLUSION

It can be said that China's constitutional review system is not an active rational construction at the beginning, but the natural result of the accumulation of experience and gradual exploration,

with the meaning of "inserting willows inadvertently". Later, with the improvement of people's constitutional consciousness and the attention of the Communist Party of China to the rule of law, the constitutional review system is gradually matured. Since entering the new era, the new generation of leaders, with Comrade Xi Jinping as its core, has attached great importance to the Constitution, and has fully demonstrated the ruling party's determination to establish and uphold the authority of the Constitution and adhere to the rule of law through the establishment of a Constitution Day, the constitutional oath system, the inclusion of "the leadership of the Communist Party of China being the most essential characteristic of socialism with Chinese characteristics" in the Constitution, and the strengthening of recording review.

Of course, there is still room for further improvement of China's constitutional review system. Specifically, it is necessary to enhance the vitality of passive review. At present, the number of legislation in China is very large, and the initiative of review is not enough. It is suggested to establish a compound constitutional review system of "NPC Standing Committee + Court". In other words, in the process of hearing a case, if the people's court finds that a law, regulation or the behavior of the administrative organ involved in the case may conflict with the Constitution, it can temporarily suspend the trial, submit the laws, regulations or behaviors suspected of violating the Constitution to the Standing Committee of the National People's Congress for constitutional review, and finally apply the review results to specific cases. The "Administrative Procedure Law" provides ideas for this. Professor Yang Haikun believes that "the bottom-up approach from administrative litigation to constitutional review can be adopted". [14] At the same time, it is necessary to bring the law into the scope of constitutional review. In current system of constitutionality review of China, the review of normative documents below the law is its main element. The review of the law itself is mainly carried out in the legislative process and is not included in current system of constitutional review of China, which is mainly in the form of recording review. The underlying logic is that the NPC represents the will of the people and is at the same time the constitution-making organ, and the laws it enacts will categorically not contradict the Constitution. "Obeying the Constitution is the basic logical conclusion of the supremacy of the Constitution". The review of the constitutionality of

the law is not only the most effective means to avoid its unconstitutionality, but also a common practice in the world. The National People's Congress is a representative organ of public opinion, not public opinion itself, and the laws it enacts may still be unconstitutional, not to mention the risk of "tyranny of the majority" even for public opinion itself. Therefore, it is necessary to bring the law into the scope of constitutional review.

## AUTHORS' CONTRIBUTIONS

This paper is independently completed by Juan Qiao.

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