

RULE OF LAW: CONSTITUTIONAL INTERPRETATION IN CHINA

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The Constitutionalism in China

Constitution is considered as the fundamental law in most countries. The modern constitutionalism came to China in the very early of 1900s, exactly in 1908, when the first version of Constitution in China had been introduced by the Qing Dynasty.¹ However, with the development of revolution, this Constitution has not entered into force and been buried with the last empire. Since then, China is facing and witnessing the Chinese Nationalist Party's (Kuomintang) governing and many challenges. Nevertheless, the development of Constitution in China had not stopped. After the victory of anti-Japanese war, Kuomintang introduced the new Constitution in China in 1946 and put it into force in 1947. However, with the defeat of the Kuomintang, the legal system of Republic of China was abolished by Chinese communist party, the development of Constitution in China entry into a new chapter.² Current Constitution of the People's Republic of China came into force in 1982.³ In some scholars view, Chinese constitution is an "inaction law" or "dead letter"⁴, since there is not Constitutional Court or constitutional cases in China.⁵ According to Chinese constitution, the "Standing Committee of the National People's Congress has the

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¹ Jianhong, Ma: 《钦定宪法大纲》: 清末宪政观的制度载体 [Outline of Imperial Constitution: the System Carrier of Constitutionalism in the Late Qing Dynasty]. *Social Science in Hunan*, Vol. 6 (2008) 82.

² Hungdah, Chiu: Constitutional Development and Reform in the Republic of China on Taiwan, (1993) *Reprints Series in Contemporary Asian Studies*, 1.

³ There are four amendments of Constitution of the PRC.
http://www.gov.cn/gongbao/content/2004/content_62714.htm.

⁴ Qianfan, Zhang: Constitution without Constitutionalism? The Paths of Constitutional Developments in China. *International Journal of Constitutional Law*, Vol. 8 (2010) 950-976.

⁵ Yan, Lin – Ginsburg, Tom: Constitutional Interpretation in Law Making: China's Invisible Constitutional Enforcement mechanism. *American Journal of Comparative Law*, (2015) 1. See also Cao Yin: Judicial system should enforce the Constitution. *China Daily*, 2014.
http://www.chinadaily.com.cn/china/2014-10/24/content_18794278.htm.



power to interpret the Constitution and supervise its enforcement.”⁶ Standing Committee is the only organ which has the power to exercise and interpret constitution.

However, the rule of law came into this socialist nation even lately. Since *Deng Xiaoping* regain his power in 1978, China started to rebuild its legal system. Numerous laws or codes entered into force within this period.⁷ In 1997, the concept of “Rule of Law” proposed by 15th National Congress of the Communist Party of China. Rule of law, as a political policy or the governing strategy, begun to be popular in China. With the development of rule of law in China, the 4th plenary session of the Central Committee of the Communist Party of China (CPC) put rule of law as the main topic in October 2014. It is the first time that the plenary session of the CPC Central Committee paid its main attention to the rule of law.⁸ A decision of rule of law with Chinese characteristics had been introduced by CPC after this plenary session.⁹ It was a big progress of rule of law in China.

Relevant Decisions

How do we improve the level of enforcement of constitutional interpretation according to the rule of law? At the beginning, this paper examines the development of practice of constitutional interpretation in China.

The story of Constitution of People’s Republic of China started from 1949, the publishing of Common Program of The Chinese People’s Political Consultative Conference (hereinafter referred to as Common Program),¹⁰ had been recognized as the interim Constitution from 1949 to 1954. In 1954, the first real Constitution of People’s Republic of China was introduced by the National People’s Congress of the PRC. Nevertheless, neither of the Constitutional documents have not regulated any provision of constitutional interpretation.¹¹ The following two versions of Constitutions in China

⁶ Paragraph 1, Article 67, Constitution of The People’s Republic of China.

⁷ Chongpu, Luo: Evolution of the Basic Strategy of Governing the Country According to Law since the Reform and Opening Up. *Reform*, Vol. 8 (2014) 5-7.

⁸ Ibid.

⁹ After the 4th plenary session of the 18th CPC Central Committee, “Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law” was issued by CPC. The plenary session in English version is available at <<http://en.people.cn/102775/310499/index.html>.

¹⁰ Common Program, in Chinese 共同纲领, an interim Constitutional document in PRC. From 1949 to 1954, Common Program had served as Constitution in China, until the publishing of Constitution of PRC (1954).

¹¹ There are a few of Chinese scholars who prepared the article of the Common Program and Constitution of PRC (1954). Taking *Xiaobo Zhai’s* article as an example, *Zhai* believe that the development of constitution of PRC is a process, from the movement to the legal system (Fa Zhi). Xiaobo, Zhai: 代议机关至上的人民宪政-我国宪法实施模式的解释性建构 [Popular Constitutionalism with the Supremacy of Representative Organ], *Tsing Hua Law*

did not mention the provision of practice of Constitution as a consequence of Cultural Revolution.

The change came from late 1970s, the collapse of Gang of Four¹² and when Deng Xiaoping regained his power. Socialist China started its reform in legal (or political) and economic fields. However, before starting China's new charter, the author would like to explain the meaning and differences between legal system and rule of law.

In English or other foreign languages, there is no confusion between legal system and rule of law, however since the same pronunciation between legal system (*Fa Zhi*) and rule of law (*Fa Zhi, as well*) in Chinese, there is a long disputation of these words in China.¹³ In Chinese scholars' opinion, these two words stand two different attitude of governing the state. Legal system (*Fa Zhi*) means governing the country with law, law or act will be used in the governing process as a tool, while the legal system should be existed in any type of the form of government. A nation with legal system is not a democracy in itself, e.g. the Nazi Germany was a country with legal system; however, we could not say that it was a democracy. Nonetheless, rule of law, as a modern political concept which stands governing by law, law is the supreme, not any specific person.

As mentioned previously, rule of law became a basic principle of ruling the country by central government since 1997. The Socialist System of Laws with Chinese Characteristics had been taking place since 2010.¹⁴ Its establishment is an important milestone in China's development of socialist democracy as well as the legal system.¹⁵

The "Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law" (hereinafter: Decision) and the Explanation of the Decision which made by *Xi Jinping*, current President of PRC, both of these documents mentioned the enforcement of constitution and perfection of

Review, Vol. 1 (2007) No. 2, 40.

¹² Gang of Four, Si Ren Bang in Chinese, which is considered as the leading and pioneer group of Cultural Revolution by most Chinese.

¹³ In Deng Xiaoping's era, democracy (*Min Zhu*) and legal system (*Fa Zhi*) were usually mentioned in the government's documents; however, as we all know that rule of law (*Fa Zhi*) became a basic principle of ruling the country by CPC. The difference between Legal system (*Fa Zhi*) and Rule of Law (*Fa Zhi*) can be found, for instance, Buyun, Li – Qing, Li: 从“法制”到“法治”二十年改一字——建国以来法学界重大事件研究 [From 'Legal Reform' to 'Rule of Law', The One Word Change in 20 Years: The Research on Important Events of Jurisprudential Circle Since The Establishment of the People's Republic Of China (26)]. *Law Science Magazine*, Vol. 7 (1999) 2.

¹⁴ On 10 March 2011, *Wu Bangguo*, the former chairman of the Standing Committee of the National People's Congress announced that "we had put in place a socialist system of laws with Chinese characteristics", the English version of The Socialist System of Laws with Chinese Characteristics is available at

<<http://www.scio.gov.cn/zfbps/ndhf/2011/Document/1036756/1036756.htm>>.

¹⁵ Ibid.

constitutional supervision system in China.¹⁶ These speeches imply that the importance of constitution, the enforcement of constitution is playing a key role in the period of building a rule of law in China.

With the development of rule of law, Constitution of PRC had shown a progress after Cultural Revolution. Considering Constitutional interpretation for example, it is a very important part of the enforcement of constitution. The Standing Committee of the National People's Congress (hereinafter: Standing Committee) became the only organ which has the power to interpret the Constitution of the People's Republic of China since 1978, the third version of Constitution of the People's Republic of China.¹⁷ Nevertheless, there is no specific legal procedural of constitutional interpretation in China. In practice, the constitutional interpretations were introduced through resolution or decision by Standing Committee or National People's Congress.¹⁸

On *Fan Jinxue's* opinion, there are three models of constitutional interpretation: i) interpretation by common court (i.e. USA), interpretation by a special court (e.g. Constitutional Court or constitutional council) and iii) interpretation by the parliament in some form (e.g. UK).¹⁹ Chinese constitutional interpretation system belongs to the third one, however, Fan hold a view that Chinese constitutional interpretation system is not the same as UK's, although there are some scholars argued that China has the same constitutional interpretation system as UK's.²⁰ In *Zhou Wei's* article, the Chinese constitutional interpretation system is modelled upon that of the Soviet Union, since it was a popular system in the socialist states.²¹

There is no constitutional interpretation procedure law in China. Scholars also argued that whether there is any constitutional interpretation practice in China. In *Han Dayuan's* view, until now, there is no constitutional interpretation practice. In order to

¹⁶ In the second part of the Decision, the title of this part implied the importance of constitution and the necessity of enforcement of constitution, and within this part, perfection of constitutional supervision system is also mentioned.

<http://news.xinhuanet.com/politics/2014-10/28/c_1113015330_2.htm>. Also in the Explanation of the Decision, Xi mentioned the importance of constitution and the perfection of constitutional supervision system in China.

<http://news.xinhuanet.com/politics/2014-10/28/c_1113015372.htm>.

¹⁷ Paragraph 3, Article 25, Constitution of the PRC.

¹⁸ Jinxue, Fan: *宪法解释的理论构建* [*The Theoretical Construction of Constitutional Interpretation*], Shangdong People's Publishing House, 2004. 90. In Fan's book, the dispute of subject of constitutional interpretation is also mentioned.

¹⁹ Jinxue: *op. cit.* 5

²⁰ *Ibid.* 6

²¹ Wei, Zhou: *中国大陆宪法解释案例研究* [Case Study of Constitutional Interpretation of Mainland China]. *Legal Research of Tunghai University*, Vol. 15 (2000) 151.

regulate the constitutional interpretation, the constitutional interpretation procedure law should be drafted.²²

However, there are some scholars in China, who believe that constitutional interpretation practice does exist in China. The reason of the existence of practice of constitutional interpretation in China could divide into two parts: i) on one hand, the practice of constitutional interpretation is not only in the existence of the Constitutional Court or Constitutional Council, but also it is important to implement the constitution into the political sphere. Interpreting the Constitution in China is usually considered as a political issue rather than a legal problem;²³ ii) on the other hand, some scholars admitted that constitutional interpretation should focus on the “judicialization” of constitution. According to *Hu Jinguang* and *Wang Conghu*, there are several constitutional interpretations. In their article, from 1978 to 2000, there were roughly 8 constitutional interpretation practices.²⁴ In *Wang Xun*’s opinion, there is at least one constitutional interpretation practice in China, though it is not clearly seen, there is still some work to be done.²⁵ In *Fan Jinxue*’s book, “Taking Constitutional Interpretation Seriously”, Fan hold a view that there are two kind of constitutional interpretations, one is a legislative constitutional interpretation, the other is a judicial constitutional interpretation.²⁶

According to Fan Jinxue’s opinion, since the Chinese constitutional interpretations are legislative constitutional interpretations, the procedure of constitutional interpretation should be similar to the legislative procedure.²⁷

Since the more or less missing practice of constitutional interpretation and legal procedure, there are no defined and specific patterns for Chinese constitutional interpretation. Nevertheless, in the Decision of Rule of law, it is stated “we must improve the constitutional supervision system of the National People’s Congress and

²² Dayuan, Han: 《宪法程序解释法》的意义、思路与框架 [Significance, Thought and Frame of ‘Constitutional Interpretation Procedure Law’]. *Zhejiang Social Sciences*, Vol. 9 (2009) 15.

²³ Guoqiang, Zhai: 中国宪法实施的双轨制 [Double Track System of the Implement of Constitution in China], *Chinese Journal of Law*, Vol. 3 (2014) 82.

²⁴ Hu, Jinguang – Wang, Conghu: 论我国宪法解释的实践 [On the Practice of Constitutional Interpretation of People’s Republic of China]. *Studies in Law and Business*, Vol. 2 (2000) 3.

²⁵ Xu, Wang: 论我国宪法解释程序机制：规范、实践与完善 [On Constitutional Interpretation Procedure Mechanism in PRC: Regulation, Practice and Perfection]. *Social Sciences of Chinese University*, Vol. 4 (2015) 140.

²⁶ Jinxue: *op. cit.* 21.

²⁷ This is the normal legislative procedure of PRC, Legislation Law of the People’s Republic of China was adopted on 15th March 2000 by the 3rd Plenary Session of the 9th National People’s Congress, and the amendment entered into force on 15th March 2015 by the 3rd Plenary Session of the 12th National People’s Congress. The Chinese version is available at http://news.xinhuanet.com/politics/2015lh/2015-03/18/c_1114682142.htm. See also <http://www.npc.gov.cn/npc/sjb/2013-02/19/content_1755104.htm.

its Standing Committee, and the completion of the Constitutional Interpretation Procedure Mechanism.”²⁸

Historical Reminiscences

In 1988, there is a reply made by the Supreme People’s Court of PRC. In this Reply, it stated that the protection of labour is stipulated by Constitution of the People’s Republic of China.²⁹

In 2001, the Supreme People’s Court hold the following: based on the facts of the case, the defendant *Chen Xiaoyi et al.* who infringement of the plaintiff *Qi Yuling’s* basic right to receive education protected by Constitution through infringement of right of Mr. Qi, Mr. Chen et al. should bear civil liability.³⁰ This legal interpretation raised a great debate among the Chinese legal scholars. *Huang Songyou* (the chief judge of the first civil jurisdiction of the Supreme People’s Court of PRC) pointed out that “it set a precedent of judicialization of constitution.”³¹ *Song Chunyu*, Huang’s colleague, published an article in *People’s Court Daily*, and stated that “the interpretation completes and enriches the citizens’ constitutional right approaches to judicial protection, it has a great significance.”³² In *Robert J. Morris’* paper, he thinks that Qi case

²⁸ Ling, Ma: 我国宪法解释的程序设计 [The Programming of Constitutional Interpretation in PRC]. *Law Review*, Vol. 4 (2015) 1. The original version of this citation is “完善全国人大及其常委会宪法监督制度，健全宪法解释程序机制”，see also in <http://news.xinhuanet.com/politics/2014-10/28/c_1113015330.htm>, accessed 26 Nov. 2015. *Huixing Liang*, the deputy of National People’s Congress and famous jurist in China, submitted a proposal of constitutional interpretation procedure law of PRC in the 5th Plenary Session of the 11th National People’s Congress, <<https://www.iolaw.org.cn/showNews.aspx?id=30094>>.

²⁹ Ibid 133.

³⁰ Ibid 134. See also Huang, Songyou: 宪法司法化及其意义--从最高人民法院今天的一个《批复》谈起 [Judicialization of Constitution and its Meaning: Discussion on Today’s “Reply” of Supreme People’s Court]. 13 Aug. 2001 Page B1, *People’s Court Daily*. A brief introduction of Qi case: Plaintiff, Qi Yuling, female, 28 years old (in 2001), lives in Shangdong Province. Defendant, Chen Xiaoyi, female, the same age in 2001 and lives in Shangdong province. In 1990, Qi passed the entrance examination, Chen did not. However, with the help of Chen’s father, Chen got Qi’s admission letter and had the chance to attend the school and got her further education. 11 years later, Qi was unemployed, Chen got a job in Bank of China. Finally, Qi found that her right of education was infringed by Chen and sued Chen Xiaoyi et al. in 1999, the Final Decision made by Shangdong Higher People’s Court in 2001.

³¹ Huang: *op. cit.*

³² Chunyu, Song: 齐玉苓案宪法适用的法理思考--受教育权的性质与公民基本权利保护的法学研究 [Jurisprudential Thinking on Constitutional Application of Qi Yuling Case: The Nature of Right of Education and Legal Research on the Protection of Citizens’ Basic Rights] 13 Aug. 2001 Page B1, *People’s Court Daily*.

is somewhat China's so-called Marbury case.³³ As we all know, *Marbury v. Madison* case was a milestone in American legal history, since then, the Supreme Court of the United States has the power to exercise judicial review over legislation.

Although, in some scholars' view, Qi case is a significant breakthrough in the enforcement of constitution in China. Huang Songyou's judicialization of constitution aroused a widely debate among the jurists.³⁴ Nevertheless, that decision was annulled on 8th December 2008 by 1457th meeting of the Judicial Committee of the Supreme People's Court.³⁵



Source: China Court, see <http://old.chinacourt.org/html/article/200812/24/337161.shtml>

There were 27 items where judicial interpretations annulled. 19 of these interpretations were annulled because “the situation is changed”. (情况已变化，不再适用); 7 of them were annulled, since the law or code changed (不再适用).³⁶ In *Ma Ling's* paper, Ma gives five reasons for the annulment of the decision: i) denying the judicialization of constitution in China; ii). asking the courts not to apply the Constitution; iii) denying

³³ Morris, Robert: China's Marbury: Qi Yuling v. Chen Xiaoqi – The Once and Future Trial of Both Education & Constitutionalization. *Tsinghua China Law Review*, Vol. 2 (2012) 273- 274.

³⁴ The arguments was existed in *Liang Huixing* and *Qiang Shigong's* paper. Huixing, Liang: 最高人民法院关于侵犯受教育权案的法释 [2001] 25号批复评析 [Review of the Supreme People's Court Reply of Judicial Interpretation No. 25 (2001) of Infringement of Education Right]. See also Shigong, Jiang: 谁来解释宪法? – 从宪法文本看我国的二元违宪审查体制 [Who Shall Interpret the Constitution? – the Examine of Dual Constitutional Review System in China from the Constitutional Text].

³⁵ Ling, Ma: 齐玉苓案“批复”废止“理由”析 [Analysis of ‘the Reason’ of the Abolition of ‘the Reply’ of Qi Yuling Case]. *Law Science Magazine*, Vol. 4 (2009) 18.

³⁶ See <<http://www.chinalaw.gov.cn/article/fgkd/xfq/cfjs/200905/20090500133973.shtml>>.

the necessity of the judicialization of constitution in China; iv), denying the necessity of the judicialization of constitution in China at the present stage; v), denying the approach to “be benign unconstitutionality (良性违宪)” reform.³⁷ In *Chen Xuanyu’s* view, there are two reasons for the annulment: i) the “right of education” should not be applied to the Qi case; and ii) the court should not apply constitutional provision.³⁸

In my point of view, the following should be done in the future. *My suggestion* is to set up specific organs to the constitutional interpretation in the future. The Decision stated that “we must improve the constitutional supervision system of the National People’s Congress and its Standing Committee, and completion of the constitutional interpretation procedure mechanism.”³⁹ In order to improve the constitutional interpretation procedure mechanism, scholars suggested that Constitutional Council (宪法委员会) or Constitutional Interpretation Advisory (宪法解释咨询委员会) should be set up, and the Constitutional Interpretation Procedure Law should be enacted by the National People’s Congress.⁴⁰

However, the constitutional interpretation made by Standing Committee is a legislative constitutional interpretation, but we still need a special organ to carry out judicial constitutional interpretation.

Conclusion

We should admit that constitutional interpretation is not well implemented in China. As a socialist country, constitutional interpretation in China will not follow the western constitutional interpretation system completely, and by preserving the Chinese characteristics,⁴¹ there is a chance to reform the constitutional interpretation. However, there are still some experiences China can learn from the foreign countries. With the government put more and more emphasis on the implementation of constitution and

³⁷ Kui, Shen: 宪法规范层次论：一种解释方法 [Hierarchy of Constitutional Provision: An Interpretive Approach]. *Tsinghua Law Journal*, Vol. 6 (2012) 5. See also Quanxi, Gao – Wei, Zhang – Feilong, Tian: *The Road to the Rule of Law in Modern China*. Springer, 2015. 108.

³⁸ Hongyi, Chen: 齐案“批复”的废止与“宪法司法化”和法院援引宪法问题 [The Abolition of the Reply of Qi Case and the Question of Judicialization of Constitution and Courts Applying Constitution]. *Legal Science Magazine*, Vol. 3 (2009) 11.

³⁹ *Ibid.* 22.

⁴⁰ These suggestions are provided by Wang Xu, Ma Ling and Han Dayuan. See Xu: *op. cit.*, Han: *op. cit.* and Ma: *op. cit.*

⁴¹ Chinese characteristics or socialism with Chinese characteristics is a political concept in China, which introduced by *Deng Xiaoping* in 1982, it emphasized China will insist socialism system, however with special Chinese characteristics and special circumstances. It shows China will employ socialism with a more flexible way, 中国特色社会主义：概念演变与内涵升华 [Socialism with Chinese characteristics: The development and sublimation], available at <<http://theory.people.com.cn/n/2013/0116/c49157-20216946.html>>.

rule of law, the practice of constitutional interpretation should become more and more common in China.