

# Research on China's Unconstitutional Review Mechanism and the Improvement Path

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**Abstract:** The report of the Fourth Plenary Session of the 18<sup>th</sup> Central Committee of the CPC pointed out that law is an important tool in governing the country, and good law is a prerequisite for good governance. To uphold the rule of law, we must first uphold the rule of the Constitution, and the law must first govern in accordance with the Constitution. As the fundamental law of China, the Constitution not only provides the basis for the enactment of other laws, but also is the highest criterion for all acts. No other law shall conflict with the provisions of the Constitution. The level of governing the country according to the constitution is inseparable from the unconstitutional review mechanism. As a reliable measure to supervise the implementation of the constitution, the benign development of the unconstitutional review mechanism can not only effectively guarantee the implementation of the constitution, but also maintain the stability of the constitutional order, so as to ensure the smooth realization of the rule of law.

**Keywords:** Unconstitutional Review Mechanism; Deficiency; Review Mode; Improvement.

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## I. INTRODUCTION

### A. Connotation of Unconstitutional Review

The article 5 of the current *Constitution of China* stipulates that accountability must be enforced for all acts that violate the Constitution or Laws. For the specific connotation of “unconstitutional review”, the academic circle has not yet formed a completely unified concept. Different scholars explain from their own angles. Professor Wang Zhenmin (2004) believes that unconstitutional review is a key system and mechanism for a constitutional state to guarantee a limited government, and the government limits and regulates the power of the government through it.[1] Professor Lin Laifan (2009) thinks the review of unconstitutional law is a system or activity that is authorized or recognized by the constitution. According to the established legal procedures, according to the relevant constitutional norms, the review of whether the public power has been formed or will be formed, especially a specific act mentioned in the process of public power because of disputes, is in violation of the upper law, especially the constitution, and make the corresponding judgment.[2] And professor Dong Heping (2000) says that unconstitutional review refers to the system in which the state organs with the constitutional power examine and adjudicate whether all laws, regulations, orders and punishments are in accordance with the constitution, and impose sanctions on unconstitutional acts.[3]

Through comparison, it can be seen that different scholars have different interpretations of the word “unconstitutional review”, but basically cover the following aspects: firstly, the subject with the right to conduct unconstitutional review; secondly, review object; thirdly, review method; Fourthly, review results and follow-up treatment. Accordingly, the unconstitutional review is a mechanism by which a specific organ of a country conducts a constitutional review of the laws, regulations, rules and other acts of all organizations issued by the state organs with legislative power at different levels of the country, and then makes a decision on whether to violate the constitution of the country, and makes a decision on the determination of unconstitutional acts.

### ***B. Characteristics of Unconstitutional Review***

By combining the different definitions of constitutional review in Chinese academic circles and the specific practice of constitutional review at home and abroad, some basic characteristics of constitutional review can be sorted out and summarized.

First of all, only a specific state agency can exercise the power of unconstitutional review. Usually by the legislative, administrative, judicial organs or other specific state organs as the subject of unconstitutional review. In exceptional circumstances, although some state organs enjoy the right of unconstitutional review without the explicit provisions of the constitution, they also obtain the power after long-term constitutional practice. For example, the Supreme Court of the United States of unconstitutional review is realized through practical precedents.

In the second place, the object of unconstitutional review is mainly legal and specific acts. The specific behavior here refers to the act of public power, but in addition to the legislative behavior we are familiar with, the state organs, political parties, social organizations and other behaviors are included. It should be noted that unconstitutional acts of individual citizens are generally not considered to be the scope of unconstitutional review. Some scholars believe that the scope of review should meet two requirements at the same time, one is the behavior or event involving the major interests of the country, the other is to be within the scope of the unconstitutional review organs.

In the next place, on the standard of review, the constitution is the sole standard. In essence, the review of unconstitutional law is to resolve whether the laws and acts enacted by state organs at all levels are in line with the constitution. Those that are in line with the constitution should be upheld, while those that are not in line should be corrected or even revoked.

Finally, the results of an unconstitutional review have dual exclusive and final effects. Based on the fundamental legal status of the constitution in a country, the unconstitutional review, as the review with the highest legal status, naturally has the supreme authority. In essence, unconstitutional review is which institution or individual decides the most important matter of the country before appealing to the people, or does not need to resort to the people to make the final decision, and which institution or individual decides when the state organs have different opinions or even disputes on some fundamental issues. In terms of subsequent treatment, if the law is deemed unconstitutional as an example, it will lead to the complete invalidation of the law in some countries, and some countries will only make the light results that make the law unable to be applied in specific cases.[4]

### ***C. Overview of Relevant Academic Research in China***

Chinese scholars as early as in the last century has begun to pay attention to and participate in the unconstitutional review mechanism of research, represent scholar is Bao Wanchao. In 1998, professor Bao innovatively proposed a compound unconstitutional review system, which is different from the unitary review system. The Constitution Council and the Constitutional Review Chamber of the Supreme Court combine to conduct composite review.[5]

After searching on “CNKI” database with the keyword “unconstitutional review”, we can count the literature included on the website for more than 20 years since around 1995. It can be seen from TABLE I that since the 21st century, the Chinese legal circle has obviously strengthened the research on the unconstitutional review mechanism, and more research results have appeared. Han Dayuan (2013) proposed the establishment of a constitutional supervision body in the National People's Congress, which is specifically responsible for reviewing the unconstitutional normative documents or acts, and put forward the review opinions to the National People's Congress or its Standing Committee.[6] In another article, Professor Han (2012) also stressed the need to adhere to the dominant position of the NPC and further improve the relevant procedures.[7] Similar to professor Han's view, Lin Laifan (2018) also thought to strengthen the National People's Congress, and put forward a special mechanism called “Constitutionality review priority transfer”. Through this mechanism, people's courts are connected with the NPC Standing Committee, and after preliminary examination by the People's Courts, they are transferred to the NPC Standing Committee.[8] But Professor Lin did not argue whether the plan was feasible, nor did he make a further analysis.

**TABLE I: THE NUMBER OF DOCUMENTS INCLUDED IN “CHINA NATIONAL KNOWLEDGE NETWORK” (CNKI)**

Published Time	In Year 1995 and Before	In Year 1996 to 2000	In Year 2001 to 2005	In Year 2006 to 2010	In Year 2011 to 2015
The Number of Literature	30	29	252	544	311

Professor Ji Weidong (2015) also wrote about his views. He cited four options that could be used as reference for our constitutional review system, among which he believed that the most appropriate plan is to set up a constitutional court, because the process of constitutional review involves the judgment of the nature of specific unconstitutional acts. But he also pointed out that if this plan is implemented, it will affect the current system of People's Congress, so it should be carefully considered.[9] In addition, Professor Qin Qianhong & Tu Siyi (2010) believes that improving China's constitutional review mechanism should adhere to the premise of the Party's leadership, and the constitutional review body should be responsible to the Standing Committee of the National People's Congress.[10]

According to the views of some scholars, we can understand that scholars generally believe that China should set up an agency responsible for the review of constitutional violations, but there is still much room for discussion on many specific details of the agency. In the choice of specific modes, there are also many scholars focusing on the experience of unconstitutional review outside the domain. The study of foreign experience is mostly conducted in France, Germany, and also in South Africa and other countries and regions.

## II. CHINA'S UNCONSTITUTIONAL REVIEW MECHANISM

Since the past period of time, the theoretical circle of our country on whether the existence of the constitutional review mechanism has been identified and denied two voices. The negative voices mainly believe that China has not established a special agency for unconstitutional review, and neither written constitution nor judicial practice have the right to examine whether other laws and regulations violate the Constitution. In contrast, the identification voices believe that the expressions related to the unconstitutional review mechanism have been mentioned in China's current laws, such as paragraph 3 of Article 5 of the *Constitution of China* and Item 2 of Article 96 of the *Legislation Law of China*. There is another opinion that not all systems are interrelated and perfect in logic, value and constitution, and it puts forward that China's Unconstitutional Review System is difficult to play all its full functions in concrete practice due to its imperfect design. In my opinion, there is an unconstitutional review mechanism in China, but the operation effect is not very ideal, so we should seek a path to supplement and improve. In order to provide a certain basis for finding some specific paths, we can observe the historical evolution of China's Unconstitutional Review Mechanism and analyze the current situation.

### A. Historical Development and Evolution

#### a) In the Late Qing Dynasty

After the Opium War, with the intensification of the western powers' aggression against China, various contradictions faced by the Qing Dynasty gradually became acute and internal and diplomatic difficulties. At this time, some leaders wanted to save the crisis in the name of implementing the "New Deal". The representative legislation of this period included *The Outline of the Authorized Constitution* and *The Nineteen Articles of Major Creeds of the Constitution*. The former is the first constitutional document in Chinese history, and the first part stipulates that "*The sacred dignity of the king is inviolable*". The latter is similar to the former, also stipulates that "*The emperor is inviolable*". Neither of the constitutional documents mentioned the unconstitutional review.

#### b) The Revolution of 1911 Came to the First Period of Cooperation Between the Kuomintang and the Communist Party

The Revolution of 1911 ended the feudal autocratic rule of more than two thousand years in Chinese history. The main constitutional activities of this period included *The Provisional Treaty Law of the Republic of China*, *The Draft Constitution of the Republic of China* and *The 1923 Constitution of the Republic of China*. As the first constitutional document of the nature of a bourgeois republic in modern times, *The Provisional Treaty Law of the Republic of China* implements the separation of three powers, adopts the responsible cabinet system, and realizes the unconstitutional review through the trial of Dali Court. *The Draft Constitution of the Republic of China* also has relevant provisions on the review of constitutional violations. During the period of the Beiyang government, *The 1923 Constitution of the Republic of China* existed in name only because Yuan Shikai restored the monarchy.

#### c) The Period From the Construction of Revolutionary Bases to the Founding of New China

Under the one-party dictatorship of the Kuomintang, constitutional activities were carried out to formulate *The Constitution Law of the Republic of China during the Period of Political Training*, *The Draft Constitution of the Republic of China*, and *The Constitution of the Republic of China in 1946*. None of the three constitutional documents contain unconstitutional review, which seem to divide the power, but in fact they are similar to the individual dictatorship of the Beiyang government.

In the legal system of the revolutionary base areas in the same period, there were constitutional documents represented by *The Outline of the Constitution of the Soviet Republic of China*, *The Policy Program of the Shaanxi-Gansu-Ningxia Border Region* and *The Principles of the Constitution of the Shaanxi-Gansu-Ningxia Border Region*. At this time, the political principle of democratic centralism was implemented, and the People's Congress supervised the implementation of the Constitution.

#### **d) The Period After the Founding of New China**

Since the founding of the People's Republic of China in 1949, four Constitutions have been enacted and five amendments have been made to the Constitution. With the exception of *The 1975 Constitution*, the other three have provisions for unconstitutional review. In *The 1982 Constitution*, it is clearly stipulated that the NPC and its Standing Committee have the power to supervise the implementation of the Constitution, as well as the autonomous regulations and separate regulations formulated by ethnic autonomous areas, which must be reported to the NPC Standing Committee for approval. Article 87 to 102 of the current *Legislation Law of China* also reflect the construction of China's unconstitutional review mechanism.

#### **B. Case Observation: Zhang v. Personnel Bureau of Wuhu City to Cancel the Civil Servant Admission Qualification Case**

In 2003, the first case of hepatitis B discrimination in Wuhu City, Anhui Province, caused widespread concern in the Chinese society. The plaintiff Zhang passed the written examination and interview examination after entering the physical examination procedure. However, according to *The Implementation Rules of Physical Examination for Recruitment of National Civil Servants in Anhui Province (Trial)* at that time, part of the indicators of hepatitis B two-half did not meet the provisions of the above rules. After reexamination, he was still unqualified and was disqualified from admission, so he sued the Personnel Bureau of Wuhu City to the People's Court.[11] Although it has been quite some time since this case, we may get a glimpse of China's Constitutional Review Mechanism by using this case as a breakthrough point.

This case needs to clarify a series of key issues. *The Constitution* gives citizens the right to equality, privacy and labor. Hepatitis B carriers do not have the possibility of infecting others from a medical point of view, so the position Zhang applied for will not affect the effectiveness of his work and the physical and mental health of others because of his hepatitis B virus. *The Implementation Rules of Physical Examination for Recruitment of National Civil Servants in Anhui Province (Trial)* formulated by the Personnel Department and the Department of Health of Anhui Province in accordance with the authorization is a rule in the legal nature. The restrictions set for hepatitis B patients in the text cause undue obstacles to the normal employment of citizens while the lack of necessity. The provisions of the rules are therefore unconstitutional. However, in China's judicial practice, the People's Court will not directly cite the provisions of the Constitution as the basis for the judgment, so it is difficult to see whether the People's Court makes a judgment on the provisions or acts of a normative legal document against the Constitution. This can turn to the discussion of whether the Constitution should be judicial.

Through this case, combined with the provisions of the current *Constitution*, we can observe that some places of China's Unconstitutional Review Mechanism need to be improved. On the one hand, the subject of the right to exercise the power of unconstitutional review is not clear enough. Articles 62 and 67 of the *Constitution* provide that the NPC and the Standing Committee have the right to supervise the implementation and the NPC to change or cancel the inappropriate decisions of the NPC Standing Committee and the right to revoke the administrative regulations, decisions and orders enacted by the State Council and the local regulations and resolutions enacted by the provinces, region, city and state authorities. At the same time, item 13 and 14 of Article 89, Article 99 and 108 of the *Constitution* also stipulate that the State Council, local People's Congresses at all levels and local governments at all levels have certain power to review constitutional violations. It can be seen that there are many subjects exercising the power of constitutional review in China. According to the effectiveness level of the relevant normative legal documents reviewed, they are distributed vertically, which is slightly scattered and unclear in design. On the other hand, the review process needs to be detailed provisions. The procedure of unconstitutional review mainly focuses on the provisions of Article 99 and 100 of the *Legislation Law*. The five subjects, including the State Council, have the right to put forward written review requirements, while other subjects can put forward written review suggestions. In addition to this regulation, we have not yet found any other procedural provisions. The problem is that these two provisions only roughly explain the subject of the proposal and the review process, and do not refine the standards for the review. In addition, the understanding of the paragraphs 1 and 2 of Article 99 of the *Legislation Law* shows that the relevant institutions should accept the review requirements, while the review suggestions of the subjects including citizens are considered necessary after study. This may, to some extent, be not conducive to the protection of the legitimate rights and interests of citizens.

### III. THE OPERATION EFFECT OF UNCONSTITUTIONAL REVIEW MECHANISM FROM OUTSIDE THE FIELD OF VIEW

Looking at the world, different countries have some differences in the choice of unconstitutional review mode due to their different history and constitutional process. At present, more than 130 countries have established unconstitutional review system, which mainly includes three modes: legislative, judicial and specialized organs.

#### A. Review Mechanism of the Legislature

The representative country that adopts the legislative review mechanism is the United Kingdom. Britain is a country with an unwritten constitution, which adheres to the supremacy of parliament, which has the supreme legislative power. Therefore, from the formulation, amendment and interpretation of the constitution, Parliament exercises the corresponding power. In addition to the content of dealing with the disputes over the authority of state organs, the British Constitutional Review Mechanism also includes the judicial protection of citizens' basic rights by courts. Especially after the introduction and implementation of the *Human Rights Act* in 1988, the constitutional legislation and judicial protection of citizens' basic rights were strengthened, which has far-reaching significance for the development of the British unconstitutional review mechanism.

The British mode of unconstitutional review has similar to China's constitutional system. As mentioned above, China supervises the implementation of the Constitution through the National People's Congress and its Standing Committee, and gives full play to the auxiliary effectiveness of the special committees of the NPC to ensure the authority of the results of the review of unconstitutional law. The British mode is closely related to its democratic culture, subsequently separating the legislative power of parliament from the power of unconstitutional review. Therefore, it gives us a revelation that although China is both the review mode of the legislature, China should also explore and construct a set of more perfect unconstitutional review mechanism based on the actual situation.

#### B. Review Mechanism of Judicial Organs

The representative country that adopts the judicial review mechanism is the United States. In 1803, the United States Chief Justice Marshall in the "Marbury v. Madison" case established the judicial review model of unconstitutional review system, and since then has become an indispensable part of the American constitutional government. The characteristic of this mode is that federal courts at all levels have the power to review unconstitutional cases, while ordinary courts have the right to review the laws and regulations related to the constitutional cases and interpret the constitutional law. To some extent, the design concept of this mechanism can reflect the timeliness and efficiency of civil rights relief.

#### C. Review Mechanism of the Special Organs

The representatives of the special agency review mechanism are France, which establishes the Constitutional Council, and Germany, where the Constitutional Court is established. The Constitutional Council of France mainly exercises three functions: supervising electoral activities, examining the constitutionality of the law and punishing unconstitutional acts. In terms of specific review activities, different from the judicial review mode of the United States, the review activities of the Constitution Council are usually conducted in secret, and only the results of the review are released to the public, not the reasons for the ruling. The Constitutional Court in Germany is also an agency responsible for constitutional supervision. Its review objects include abstract legal documents and specific unconstitutional acts, using a combination of prior and post review. In terms of legal effect, the Constitutional Court applies to all cases except the constitutionality of the constitutional law directly against the unconstitutional law. Compared with the aforementioned advantages in the establishment of legislative and judicial organs, that is, it is independent and responsible without improper interference by legislative and administrative organs.

### IV. THE IMPROVEMENT PATH OF CHINA'S UNCONSTITUTIONAL REVIEW MECHANISM

Based on the shortcomings in the actual operation of China's Unconstitutional Review Mechanism, perfecting the mechanism is the realistic need of the construction of socialist rule of law in China.

#### A. Exploration of Different Modes of Unconstitutional Review

The selection of the unconstitutional review mode in China has been widely discussed, and several opinions are selected for comparative analysis.



The first viewpoint is to advocate the judicialization of the constitution. This model grants the power to interpret the constitution to the courts at all levels of the country, but involves an important issue. Article 67 of the *Constitution of China* clearly stipulates that only the Standing Committee of the National People's Congress has the right to interpret the Constitution. In addition, due to the vast territory of China, the development level of different regional courts is different, and the professional quality of judges is also different. The judicature of the Constitution will lead to different judgments of the same case or similar cases, which is not conducive to the realization of the goal of comprehensively promoting the rule of law in China.

The second viewpoint is to construct a compound unconstitutional review mechanism. This mode envisages that a committee under the NPC is responsible for examining constitutionality, and that the NPC and the Supreme People's Court will exercise the power of unconstitutional review. However, there are some difficulties in the connection of the above two subjects, which is not easy to realize.

The third viewpoint is to advocate the establishment of constitutional court. This mode assumes that China can draw lessons from Germany's experience and exercise the power of unconstitutional review uniformly through the constitutional court. However, there is no soil suitable for the existence of the constitutional court in China. Once established, it will break through the current constitutional system and conflict with the People's Congress System.

In short, the current system designed by the NPC and its Standing Committee to exercise the power of constitutional supervision is reasonable, and should be first considered to repair and improve on the existing basis.

#### ***B. The Improvement of the Unconstitutional Review Procedures of China***

As previously mentioned, Chinese law has few and abstract provisions on starting procedure, hearing procedure and hearing result of unconstitutional review. Some scholars believe that highly abstract and generalized normative documents can only be exposed whether they are unconstitutional or not through the test of rich judicial practice and social practice. Hence the need to develop a more detailed review procedure, from the submission of the review to the publication of the results, should be clearly defined. With standardized procedures and regulations throughout the whole process, the Unconstitutional Review Mechanism can operate more smoothly and orderly.

#### ***C. Other Aspects to Be Improved***

The first issue is the decentralization of the exercise of power. The *Legislation Law* and the *Organic Law of the National People's Congress* both stipulate that the special committees of the NPC have the duty to examine the constitutionality of relevant legislation. However, there are 10 special committees under the NPC, which are relatively scattered in the exercise of the right to review the Constitution.

The second issue is about the scope of constitutional review. The current provisions of China mainly review the constitutionality of administrative regulations, local regulations, autonomous regulations and special regulations. In the future, detailed provisions should be made for the review of the constitutionality of laws, rules and other legal forms.

### **V. CONCLUSION**

The review of unconstitutionality originated from the West, which has been more than 200 years since its first appearance in the world, and has been continuously developing in the long-term practice of the countries around the world. Nowadays, comprehensively advancing the rule of law and building a socialist country under the rule of law is an important strategic plan of China. Because of this, it has become an important and urgent issue to explore how to improve the Review Mechanism of Unconstitutional Law in combination with the actual national conditions. We believe that the improvement of any mechanism can not achieve the ideal results overnight, and may need a long-term repeated running-in process.

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