

# On the Necessity and Feasibility of the Constitutional Judicialization

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## Abstract

The proposal of "constitutional judicialization" is the product of the continuous development of constitutional theory and the needs of practice. Constitutional judicialization in a broad sense includes unconstitutional review and constitutional judicial judgment. The essence of constitutional judicialization in China is the judicial relief of constitutional rights, which aims to protect the basic rights of citizens. The judicialization of China's constitution must be carried out under the existing political and judicial system, so as to safeguard the people's democratic dictatorship and the people's Congress system. Specifically, we can effectively realize the judicialization of the Constitution in the form of indirect application of the constitution through constitutional interpretation, which can not only safeguard the authority of the National People's Congress and its Standing Committee, but also effectively protect the basic rights of citizens.

**Keywords:** constitutional judicialization, the constitution, constitutional review, constitutional interpretation

## 1. The Origin and Dispute Focus of Constitutional Judicialization

In China, the concept of "constitutional judicialization" first appeared in the 1990s. Professor Wang Lei systematically expounded the concept of constitutional judicialization for the first time in *Discussion on constitutional judicialization in China* published in 1992. In *On the inevitability and feasibility of constitutional judicialization* published in 1993, Professor Hu Jinguang briefly discussed the inevitability and necessity of constitutional judicialization, the two major problems of constitutional judicialization as well as the steps of constitutional judicialization in China. According to Professor Wang Lei, constitutional judicialization refers to the special activities of national judicial organs to apply the constitution to deal with specific cases according to legal functions and powers and legal procedures. However, Professor Tong Zhiwei adopted Professor Hu Jinguang's view of "judicial applicability of constitution", saying that constitutional judicialization is constitutional judicial application; Professor Tong Zhiwei believes that the word "legalization" in "constitutional judicialization" seems to imply that the court wants to monopolize the application right of the constitutional code and exclude the application of subjects such as the legislature. The formulation of constitutional judicial application is well connected with the concept of "Application of law" in jurisprudence, so the meaning is easy to grasp. This paper adopts the general concept of "constitutional judicialization"

The research on "constitutional judicialization" in China is diverse, and the interpretation of its meaning is also different. The focus of debate is whether constitutional judicialization refers to "Judicial Judgment" or "Constitutional Review".

Judge Huang Songyou defines the constitutional judicialization as the issue of judicial judgment. When expounding the Qi Yuling case, he believes that the so-called constitutional judicialization means that the Constitution can enter the judicial procedure like other laws and regulations, directly serve as the legal basis for judging cases, and be cited in the judgment documents. Professor Wang Lei believes that the constitutional judicialization takes the constitution as the application of laws such as criminal law and civil law, which is also repeatedly applied by specific organs for individual cases. Judge song Chunyu also holds this view and calls constitutional review with the concepts of judicial review or constitutional litigation.

However, Professor Qiao Xinsheng defined constitutional judicialization as unconstitutional review. He believes that constitutional judicialization does not use the constitution as an ordinary law to judge a case, but an unconstitutional review to review whether the law is unconstitutional according to the constitution. Professor Qiang Shigong integrates the above two different views.

Drawing on the above views, this paper holds that the broad sense of constitutional judicialization includes two meanings: constitutional review and judicial judgment; In a narrow sense, the judicialization of constitution only refers to judicial judgment. The definition here actually paves the way for the later discussion on the core issues of constitutional judicialization and its necessity and feasibility. The detailed definition of constitutional judicialization will be discussed below.

## **2. The Development Process and Necessity of Constitutional Judicialization**

The proposal and necessity of constitutional judicialization is the product of the continuous development of constitutional theory and the needs of practice. Constitutional judicialization includes constitutional review and judicial judgment. At the initial stage, the constitutional review system focuses on solving the problem of right checks and balances between public powers. Gradually, it developed from the initial review of whether national legislative activities are unconstitutional to the constitutional supervision of government actions. With the rapid development of society, the basic rights of citizens have been paid more and more attention. The judicialization of the constitution has begun to transfer to the protection of public power in the constitution to protect the basic rights of citizens given by the constitution from being infringed by public power; Later, it was gradually expanded to implement judicial relief for private rights above the constitution to protect citizens' constitutional rights from infringement by third parties or other organizations.

The unconstitutional review system originated in the United States and was officially established in the *Marbury v. Madison* in 1803. In 1816, the Federal Supreme Court established the control of the federal court over the state courts through *Martin v. Hunter's Lessee*. In 1824, *Gibbons v. Ogden* established the power of the Federal Supreme Court to review state legislation.

Until the American Civil War in 1860, the object of constitutional review by the United States Supreme Court was the legislation and judgment activities of states. After the Civil War and before the Civil Rights Movement in the 1950s, the United States continuously strengthened the protection of citizens' rights through a series of constitutional amendments, but did not really use the constitutional review system to protect citizens' constitutional rights. The Procedural Revolution in the 1970s prompted the Supreme Court to widely apply judicial review to protect citizens' rights. At this time, judicial review really played a full role in protecting citizens' constitutional rights.

The constitutional review of Germany is in the charge of the Federal Constitutional Court of Germany. Different from the ordinary court review mode of the United States, the Federal Constitutional Court of Germany is composed of the first chamber and the second chamber, and the first chamber is responsible for judicial review. The review content includes whether the laws and regulations are unconstitutional and the constitutional appeal; The second court is responsible for constitutional review, that is, the traditional unconstitutional review. The object of the review is whether the separation of powers and checks and balances between public powers is constitutional, which aims to maintain the constitutional system and the decentralized regime. The constitutional review of the German Federal Constitutional Court was mainly used to maintain the decentralization system between public powers in the 1950s and 1960s, but the German labor court has tried to directly apply the constitution to regulate labor relations. At that time, the constitution began to apply to the field of private law. In 1958, the German Federal Constitutional Court officially applied the constitution indirectly to the practice of private law.

The development of constitutional history shows that in order to meet the needs of social development and rights protection, the implementation of the constitution is a constantly strengthened and improved process from virtual to real, from simple constitutional review, supervision and balance of the power of state organs, to extensive judicial protection of citizens' basic rights, and then to relief of citizens' private rights in the constitution.

The relief of citizens' constitutional rights is the core of the necessity of constitutional judicialization. Although China's constitution stipulates a wide range of citizens' basic rights, the abstract constitutional rights have neither specific legal provisions as the basis for direct invocation, nor a special constitutional court to be responsible for citizens' constitutional appeals. Therefore, the protection of citizens' abstract constitutional rights can only be pinned on the post legislative activities of the legislature.

However, the legislation after the event is lagging behind and the whole legislative process takes a long time. The process includes incorporation into the annual legislative plan, drafting, proposal, deliberation, voting and publication. Moreover, the National People's Congress has only one plenary session a year. Such a system cannot effectively and timely protect the basic rights of citizens, and does not match the constitutional provisions and policy direction of Respecting and Protecting Human Rights. Therefore, in terms of the protection of citizens' basic rights, judicial judgment in the judicialization of the constitution is necessary. The important reason why

the Qi Yuling case could have caused great repercussions is that it triggered the people's protection of citizens' basic rights.

I think there are many ways to protect citizens' rights, and the judicialization of the constitution is not the only way. Moreover, it will destroy the regime of the people's democratic dictatorship and the People's Congress system. China's constitution stipulates that the National People's Congress has the right to amend the constitution, supervise the implementation of the constitution, and formulate and amend basic laws. The Standing Committee of the National People's Congress has the power to interpret the Constitution and supervise its implementation. The judicialization of the Constitution will endow the court with the power of constitutional interpretation and constitutional review, which is tantamount to directly abolishing the regime of people's democratic dictatorship and changing into the "Separation of Powers" of capitalism.

### **3. The Chinese Road of Constitutional Judicialization**

To sum up, we can finally define the substantive meaning of constitutional judicialization, which essentially refers to the judicial relief of citizens' basic rights stipulated in the constitution. The definition involves the basic understanding of the constitution usually defined as public law which is opposite to private law. It is a constitution that stipulates the basic system of the state, limits public power and protects citizens' basic rights.

As a fundamental law, the constitution has the highest effect and is the basis for formulating other laws. As the epitome of the whole legal system of a country, the constitution should have the nature of both public law and private law. The constitution should not only adjust the relationship between right and power, but also adjust the relationship between power and power and the relationship between right and right. Jorio, a French Constitutional scholar, once divided the constitution into political constitution that regulates the power relationship of state organs and a social constitution that constitutes a civil contract. The broad sense of constitutional judicialization includes both constitutional review with public power as the object and legal application with private rights as the object. The concept of constitutional judicialization in China is to strive to solve the problem of legal application of the constitution. In the past, due to the lack of research, the constitutional judicialization was equated with the judicialization of unconstitutional review, which entered the paradox of the contradiction between the judicialization of constitutional review and the people's democratic dictatorship, so that it came to the wrong conclusion that the constitutional judicialization is not applicable to China, and it can not fully protect the basic rights of citizens.

After analyzing the essence of "constitution" and "constitutional judicialization", constitutional judicialization can be distinguished according to the dispute resolution mechanism of the Constitution: 1. The conflicts between rights organs (or public power) and constitutional disputes in which public power infringes on citizens' basic rights are still resolved through unconstitutional review (or constitutional review system), The National People's Congress and its Standing Committee will continue to exercise the power of constitutional supervision, constitutional interpretation and constitutional review. 2. Where there are specific provisions in law, the rights disputes between citizens or other organizations shall be dealt with in accordance with such provisions. Where there are no specific provisions in law and the parties concerned cannot safeguard their own rights after exhausting remedial measures, they may request judicial relief of their constitutional rights. Only in the second circumstance it is the substantial judicialization of the Constitution.

Judicial remedy for constitutional rights (constitutional judicialization) requires citing the Constitution as a basis for adjudication, which inevitably involves the courts' interpretation of the Constitution. However, the Constitution stipulates that only the Standing Committee of the National People's Congress has the power to interpret the Constitution. The conflict can be solved through constitutional Hermeneutics: the court indirectly applies the constitution through constitutional interpretation, which does not need to be quoted as the basis of judgment, but should quote the constitutional provisions in the part of judgment reasoning. If courts, during the course of constitutional interpretation, find laws to be obviously unconstitutional, they should suspend the lawsuit and report to the Supreme People's Court level by level. The Supreme People's Court should then submit the case to the Standing Committee of the National People's Congress for handling. People's courts at all levels should give constitutional interpretation for the application of laws in civil, criminal, and administrative litigation cases. Every judge is entitled to interpret the laws and the Constitution. This does not deny the supreme judicial interpretation power of the Supreme People's Court and the final interpretation power of the Standing Committee of the National People's Congress.

### **4. Conclusion and Enlightenment**

Constitutional judicialization in a broad sense includes constitutional review and judicial judgment. The essence of constitutional judicialization in China is the judicial relief of constitutional rights. Because of the different

political systems in China, we can't mechanically copy the practices of foreign legal systems represented by the United States or Germany. In the process of building and improving the legal system to protect citizens' constitutional rights, we cannot ignore China's state system and arbitrarily amend the constitution, which will only undermine the stability and unity of the legal system. The judicialization of China's constitution can be carried out by promoting the judicial relief of constitutional rights through constitutional interpretation, but these must be based on respecting the supreme authority of the constitution. By using constitutional interpretation technology to solve the conflict between the court and the Standing Committee of the National People's Congress in constitutional interpretation, we can not only maintain the unity of the rule of law, but also fully protect citizens' constitutional rights.

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