

IMPORTS OR MADE-IN-CHINA: COMPARISON OF TWO CONSTITUTIONAL
CASES IN CHINA AND THE UNITED STATES

by

XIAO LI

(Under the Direction of Milner Ball)

ABSTRACT

When its economic increase attracts the global attention, China is also looking for a break-through in its judicial reform. The Qi v. Chen case (2001) was considered to be the Chinese version of Marbury v. Madison and gave rise to a heated discussion of the judicial review power in China. This article will analyze the doubts on the Qi case and the prospects of judicial review it indicates through comparison with Marbury v. Madison. Although Qi v. Chen opened the door for constitutional litigation, its dramatic facts and strained application of the Constitution threw it into question. Nevertheless, its effect is unquestionable. However, Rome was not built in one day and only the Qi case cannot complete the establishment of a reliable judicial review system of China. This thesis will explain the difficulties China has in applying judicial review to ensure the implementation of the Constitution.

INDEX WORDS: judicial review, constitution, comparison, China, United States

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XIAO LI

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XIAO LI

Major Professor: Milner Ball

Committee: Gabriel Wilner

Electronic Version Approved:

Maureen Grasso

Dean of the Graduate School

The University of Georgia

December 2007

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CHAPTER I

INTRODUCTION

In the implementation of the Constitution, judicial review plays an important role,¹ without which the Constitution is like a wolf without teeth. Although sometimes under serious assault,² it has maintained an admirable power and its broad scope for hundreds of years in the United States of America. Judicial review has been defined as “1. A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court's review of a lower court's or an administrative body's factual or legal findings.”³

This article will discuss only the court's ability to review the constitutionality of the actions the executive and legislative branches of government of other branches or levels

¹ See Mo Jihong, *Judicial Review and Its Basis of Democracy in China*, in *Theory and Practice of Constitutional Review*, 17, 17 (1920).

² See for example, Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 888(2003). “It should come as no surprise that when the Supreme Court has refused to enforce unconstitutional federal legislation, supporters of such legislation have questioned the legitimacy of judicial review. Such arguments typically have arisen during crucial moments in American political and constitutional history, such as the early national period, the Civil War, the New Deal, and the Civil Rights movement. It is fair to say that the recent federalism decisions have not yet wrought a revolution in the federal-state relationship, and there has been nothing approaching the popular outcry and political attacks on the courts that characterized the true controversies over judicial review that occurred during the Civil War or the New Deal.” See also Mark Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press, 1999).

³ Black's Law Dictionary 852 (7th ed. 1999).

of government. The origin of this concept dates back to at least the Greco-Roman civilization.⁴

In France, the Conseil Constitutionnel, a special council with a controversial nature of a legislative or judicial agency,⁵ has the power of constitutional review.⁶ It can interpret the French Constitution in all constitutional cases brought before the court, but its power to impose the interpretation is often limited by other branches of government.⁷

Germany uses a specially designated constitutional court to exercise the judicial review power, as most other states do.⁸

In the United States, the courts have been endowed with a power of judicial review since *Marbury v. Madison* (1803),⁹ but the scope of this power continues to be

⁴ Mauro Cappelletti & William Cohen, *Comparative Constitutional Law: Cases and Materials* 5 (1979).

⁵ Dominique Rousseau, *The Conseil Constitutionnel Confronted With Comparative Law and The Theory Of Constitutional Justice (Or Louis Favoreu's Untenable Paradoxes)*, 5 Int'l J. Const. L. 28, 31 (2007). Whether the nature of Conseil Constitutionnel is judicial or political is still in dispute.

⁶ 1958 Const. 56-63 (Fr.).

⁷ Dominique Rousseau, *The Conseil Constitutionnel Confronted With Comparative Law and The Theory Of Constitutional Justice (Or Louis Favoreu's Untenable Paradoxes)*, 5 Int'l J. Const. L. 28, 40 (2007)

⁸ Mark Tushnet, *Marbury v. Madison: 200 Years of Judicial Review in America*, 71 Tenn. L. Rev. 251, 253 (2004).

⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

questioned to this day.¹⁰ Nevertheless, the influence of the power of judicial review is very wide¹¹ and includes even the eastern part of the world.

After more than 50 years without judicial review,¹² the Chinese Constitution made a breakthrough in implementation with a case on educational rights in 2001. Some people even compared the case *Qi Yuling v. Chen Xiaoqi* (2001)¹³ to *Marbury v. Madison*.¹⁴ Commentators¹⁵ thought the decision would open a door to the future establishment of

¹⁰ See Mary Sarah Bilder, *Why We Have Judicial Review*, 116 Yale L.J. Pocket Part 215, 215 (2007). See also Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 888(2003).

¹¹ Mark Tushnet, *Marbury v. Madison: 200 Years of Judicial Review in America*, 71 Tenn. L. Rev. 251, 274 (2004).

¹² Cai Dingjian, *The Development of Constitutionalism in the Transition of Chinese Society*, 19 Colum. J. Asian L. 1, 13 (2005). “The Chinese Constitution has long been regarded not as a legal vehicle for the protection of citizens' rights, but as merely a political document.”

¹³ *Qi Yuling v. Chen Xiaoqi*, *Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao* [SUP. PEOPLE’S CT. GAZ.], Vol. 5, 158, (Shandong High. People’s Ct., Aug. 23, 2001). It is also available at CHINALAWINFO (<http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=cas&gid=33554781>, last visited Oct. 11th, 2007).

¹⁴ See Chris X. Lin, *A Quiet Revolution: an Overview of China's Judicial Reform*, 4 Asian-Pac. L. & Pol’y J. 255, 272 (2003). See also M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial*, 4 Wash. U. Global Stud. L. Rev. 43, 68 (2005).

¹⁵ See Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's “First Constitutional Case”*, 12 Pac. Rim L. & Pol’y J. 199, 199 (2003). See also M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial*, 4 Wash. U. Global Stud. L. Rev. 43, 68 (2005). See also Peng Yanan, *A Sheep in Wolf's Clothing — The PRC Constitution in Qi Yuling v. Chen Xiaoqi et al*, LAWINFOCHINA, available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=22420 (last visited Oct. 16, 2006).

constitutional court.¹⁶ Six years have now passed, and it is the time to rethink of Qi Yuling case and its effect.

The comparison to the Marbury v. Madison case is somewhat strained but might imply a different understanding about China's constitution and also give a hint about a different way for the judicial reform in the ancient eastern country to proceed.

This thesis will consider: 1) the facts of the Qi Yuling v. Chen Xiaoqi (2001) case in detail; 2) the legal nature of the case; 3) the reasons why it can or cannot be called the "first constitutional case" and what problems there might be in the judgment of this case; 4) the substance of the Chinese and American legal systems by analyzing the Qi v. Chen (2001)¹⁷ case and comparing the Marbury v. Madison (1803); 5) the reasons why the U.S. system may or may not suit China; and 6) the features of China's legal system and its prospects on judicial review in the future.

¹⁶ See Bao Wanchao, *Faguan Yu Xianfa (Judges and the Constitution)*, in FAZHI RIBAO (LEGAL DAILY), Beijing, August 19, 2001, at 3.

¹⁷ In Chinese, given names come after surnames.

CHAPTER II

BACKGROUND

A. Introduction to the “first constitutional case” in China

1. Background of the case

In the last 60 years, the People’s Republic of China has had four Constitutions in 1954, 1975, 1978 and 1982,¹⁸ followed by several amendments including the latest one in 2004. This changing landscape of Constitutional law reflects the people’s experience of prosperity and frustrations in this country for nearly six decades.

None of the four Constitutions had been implemented in a case until Qi Yuling v. Chen Xiaoqi case, which lasted for two years and has been called “the first case of the Constitution of China,”¹⁹ something the parties did not expect.

2. Facts

The plaintiff, Qi Yuling, was a worker at Lunan Ferroalloy General Factory of Shandong. She resided at Chengguanzhen, Zoucheng City, Shandong Province.

The defendants were:

- a. Chen Xiaoqi, an employee of the Shandong Tengzhou Branch, Bank of China;
- b. Chen Kezheng, the father of Chen Xiaoqi’s, a worker in the local government of the place where the case happened;
- c. The Jining Business School of Shandong Province (Jining School);

¹⁸ Ralph H. Folsom&John H. Minan, Law in the People's Republic of China: Commentary, Readings, and Materials 61 (Dordrecht/Boston: M. Nijhoff Publishers 1989).

¹⁹ Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's “First Constitutional Case”*, 12 Pac. Rim L. & Pol’y J. 199, 199 (2003)

d. The Eighth Middle School of Tengzhou City, Shandong Province (the 8th middle school), where the plaintiff Qi and defendant Chen both graduated;

e. The Education Committee of Tengzhou City, Shandong Province (Education Committee).

In 1990, the defendant Chen Xiaoqi failed an exam for further education. The plaintiff Qi Yuling, who was her schoolmate at The Eighth Middle School of Tengzhou City, passed the examination and was admitted to Jining School. With the help of the defendant Chen Kezheng, Chen Xiaoqi obtained Qi Yuling's admission letter, successfully impersonated her, and enrolled in the Jining Business School of Shandong Province. Qi did not know she had been admitted. Years later, Chen Xiaoqi graduated from the Business School and found a job in a bank under the name of Qi Yuling.²⁰

3. Procedural History and Holdings:

a. Plaintiff Qi Yuling filed a suit against Chen Xiaoqi at the Intermediate People's Court of Zaozhuang City, Shandong Province, charging the defendants with infringements of the right of name and the right to receive education, claiming compensation for both economic loss and emotional injury. The defendants argued that the right of education is not a right provided in the General Principles of Civil Law and that plaintiff had no cause of action.

²⁰ Qi Yuling v. Chen Xiaoqi, Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao [SUP. PEOPLE'S CT. GAZ.], Vol. 5, 158, 158-59 (Shandong High. People's Ct., Aug. 23, 2001). It is also available at CHINALAWINFO (<http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=cas&gid=33554781>, last visited Oct. 11th, 2007).

Acting in accord with Articles 99²¹ and 120²² of the General Principles of Civil Law, the Intermediate People's Court of Zaozhuang City held that the defendants' act breached the plaintiff's general rights of personal name provided by Article 99²³ and that the plaintiff deserved economic compensation and an injunction under Article 120.²⁴

The Court held that:

- (1) The defendant Chen Xiaoqi must stop infringing upon the plaintiff Qi Yuling's right to her name;
- (2) The defendants Chen Xiaoqi, Chen Kezheng, Jining, and the Eighth Middle School, Education committee must make an apology to the plaintiff Qi Yuling;

²¹ Min fa tong ze [General Principles of the Civil Law of the People's Republic of China], Art. 99 (promulgated by the National People's Congress of P.R.C., April 12th 1986, effective Jan 1st, 1987) LAWINFOCHINA (last visited Oct. 13, 2007). Article 99 is about the right of name, providing that "Citizens shall enjoy the right of personal name and shall be entitled to determine, use or change their personal names in accordance with relevant provisions. Interference with, usurpation of and false representation of personal names shall be prohibited. Legal persons, individual businesses and individual partnerships shall enjoy the right of name. Enterprises as legal persons, individual businesses and individual partnerships shall have the right to use and lawfully assign their own names." It is also available at the official website of the national legislature of China, <http://www.npc.gov.cn/zgrdw/english/news/newsDetail.jsp?id=2204&articleId=344984> (last visited Oct. 13, 2007).

²² See *id.* art. 120. Article 120 is about compensation and damages in civil cases, providing that "If a citizen's right of personal name, portrait, reputation or honour is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation be rehabilitated, the ill effects be eliminated and an apology be made; he may also demand compensation for losses. The above paragraph shall also apply to infringements upon a legal person's right of name, reputation or honour." It is also available at the official website of the national legislature of China, <http://www.npc.gov.cn/zgrdw/english/news/newsDetail.jsp?id=2204&articleId=344984> (last visited Oct. 13, 2007).

²³ Min fa tong ze [General Principles of the Civil Law of the People's Republic of China], Art. 99, *supra* Note 21.

²⁴ Min fa tong ze [General Principles of the Civil Law of the People's Republic of China], Art. 120, *supra* Note 22.

(3) Chen Xiaoqi was liable for the attorney fees of ¥825,²⁵ together with the other defendants, Chen Kezheng, Jining Business School, the Eighth Middle School of Tengzhou City and the Education Committee of Tengzhou City, who were liable jointly and severally;

(4) The emotional distress damage for Qi Yuling was ¥35,000: Chen Xiaoqi, ¥5,000; Chen Kezheng ¥5,000; Jining School, ¥15,000; the 8th Middle School, ¥6,000; the Education Committee, ¥4,000.

(5) The authentication cost of ¥ 400 shall be paid by the 8th Middle School and the Education Committee, ¥ 200 each.

(6) Plaintiff's other pleadings were rejected.

Qi Yuling v. Chen Xiaoqi (2001).²⁶

b. The Plaintiff Qi Yuling appealed to the High People's Court of Shandong Province, to recover compensation for spiritual damage and emphasized the effect of Jining School and the Eighth Middle School's irresponsibility. The High Court reported to the Supreme People's Court to ask for interpretations.

The Supreme Court of China gave the reply on July 24, 2001, which was adopted at the 1183rd meeting of the Judicial Committee of the Supreme People's Court on June 28, 2001, and was promulgated and came into force on August 13, 2001, regarding whether the Civil Liabilities Shall Be Borne for the Infringement upon a Citizen's Basic Right of

²⁵ “¥” means Yuan or yen, the symbol of Chinese currency RMB. \$ 1≈¥ 7~8.

²⁶ Qi Yuling v. Chen Xiaoqi, *Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao* [SUP. PEOPLE'S CT. GAZ.], Vol. 5, 158, 159-60 (Shandong High. People's Ct., Aug. 23, 2001). It is also available at CHINALAWINFO (<http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=cas&gid=33554781>, last visited Oct. 11th, 2007).

Receiving Education Which was under the Protection of the Constitution by Means of Infringing upon His/Her Right of Personal Name. The Reply stated that the right to education of the Plaintiff protected by the Constitution was infringed and she deserved some compensation in this case.²⁷

With the Supreme People's Court's official reply, No. 25 (2001) Judicial Interpretation, the High People's Court of Shandong Province held that:

- (1). Maintain 1, 2, 3 in the original judgment of first instance;
- (2). Repeal 4, 5, 6 in the original judgment of first instance;
- (3). Appellees Chen Xiaoqi and Chen Kezheng shall compensate Qi Yuling for the direct economic losses in the sum of ¥7000, which she suffered from the infringement of the right to receive education, within ten days after they receive this judgment. Jining Business School, the Eighth Middle School and the Educational Committee shall bear joint liabilities;
- (4). Appellees Chen Xiaoqi and Chen Kezheng shall compensate Qi Yuling for indirect economic losses, in the amount of ¥41,105 within ten days after they receive this judgment. Jining Business School, the Eighth Middle School and the Educational Committee shall bear joint liabilities;

²⁷ Zui gao ren min fa yuan guan yu yi qin fan xing ming quan de shou duan qin fan xian fa bao hu de gong min shou jiao yu de ji ben quan li shi fou ying cheng dan min shi ze ren de pi fu, [The Official Reply of the Supreme People's Court on Whether the Civil Liabilities Shall Be Borne for the Infringement upon a Citizen's Basic Right of Receiving Education Which Is under the Protection of the Constitution by Means of Infringing upon His/Her Right of Personal Name], Fa shi 25 hao si fa jie shi, [No. 25 [2001] of the Interpretations of the Supreme People's Court of People's Republic of China] (promulgated by the Supreme Court of People's Republic of China, July 24, 2001, effective Aug. 13, 2001) LAWINFOCHINA (available at <http://www.lawinfochina.com/law/displayModeTwo.asp?db=1&id=1954>) (last visited May 20, 2007)

(5). Appellees Chen Xiaoqi, Chen Kezheng, Jining Business School, the Eighth Middle School, the Education Committee shall compensate Qi Yuling for her mental damages in the sum of ¥50,000 within ten days after they receive this judgment;

(6). Deny Qi Yuling's other pleadings.

Qi Yuling v. Chen Xiaoqi (2001).²⁸

B. Legal Issues

1. Nature of the case: Civil, Administrative or Constitutional?

Qi v. Chen is diverse in nature because of the involvement of various entities, including schools and the government education committee. Although constitutional in nature, it might also be a civil, administrative, or even criminal case. *Marbury v. Madison* was not that colorful in nature.

a. A Civil Case:

The Qi Case was a civil case. The parties are entities in civil law; the remedy is to pay monetary damages and apologize. The infringed right of the plaintiff is the education right, which is written in the Article 9 of Education Law of the People's Republic of China : "Citizens of the People's Republic of China shall have the right and obligation to receive education. All citizens, regardless of ethnic group, race, sex, occupation, property status or religious belief, shall enjoy equal opportunities for education according to

²⁸ Qi Yuling v. Chen Xiaoqi, *Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao* [SUP. PEOPLE'S CT. GAZ.], Vol. 5, 158, 161 (Shandong High. People's Ct., Aug. 23, 2001). It is also available at CHINALAWINFO (<http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=cas&gid=33554781>, last visited Oct. 11th, 2007).

law.”²⁹ Also, the personal name rights in Article 120 of the General Principles of Civil Law of P.R.C: “If a citizen's right of personal name, portrait, reputation or honor is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation rehabilitated, the ill effects eliminated and an apology made; he may also demand compensation for losses. The above paragraph shall also apply to infringements upon a legal person's right of name, reputation or honor.”³⁰

b. A Criminal Case:

The facts in Qi v. Chen were dramatic. It could not be easy to impersonate somebody especially for such a long time without being found out.

The official files of this case provided the facts as follows:

“... Because the Eighth Middle School hadn't informed Qi Yuling herself of her marks and the fraction line of authorized training, but also because it gave the notice of admission to Chen Xiaoqi who came to take it in the name of Qi Yuling, these created conditions for Chen Xiaoqi to go to school in the name of Qi Yuling under the scheme of Chen Kezheng. Later, because Jining Business School hadn't strictly checked the new students who came for registration, it accepted Chen Xiao under the

²⁹ Jiao yu fa [Education Law of the People's Republic of China] (promulgated by the National People's Congress of P.R.C., March 18th, 1995, effective Sep. 1st, 1995), art. 9, LAWINFOCHINA, available at <http://www.lawinfochina.com/law/display.asp?db=1&id=125&keyword=education%20law> (last visited Oct. 13, 2007). It is also available at the official website of NPC, <http://www.npc.gov.cn/zgrdw/english/news/newsDetail.jsp?id=2204&articleId=345076> (last visited Oct. 13, 2007).

³⁰ Min fa tong ze [General Principles of the Civil Law of the People's Republic of China], art. 120 (promulgated by the National People's Congress of P.R.C., April 12th 1986, effective Jan 1st, 1987) LAWINFOCHINA (last visited Dec 15th, 2003). It is also available at the official website of the national legislature of China, <http://www.npc.gov.cn/zgrdw/english/news/newsDetail.jsp?id=2204&articleId=344984> (last visited Oct. 13, 2007).

circumstance of no certificate for taking examinations and no other effective certificate. As a result, it became a fact that Chen Xiaoqi went to school in the name of others and Qi Yuling lost the chance of receiving authorized training. After Chen Xiaoqi entered Jining Business School, the Educational Committee of Tengzhou helped Chen Kezheng to have forged a form of physical examinations; the Eighth Middle School of Tengzhou helped her to have forged a form of semester comments; Violating the Rules of Archives Management, Jining Business School let Chen Xiaoqi carry her archives by herself, it provided Chen Kezheng with a chance of replacing the materials in the archives, such and such produced the consequence that Chen Xiaoqi not only went to school in the name of others, but also went to work in the name of others, that is to say, the infringement was continued.”

Qi Yuling v. Chen Xiaoqi (2001).³¹

Clearly according to the facts above, the Qi case is related to many crimes: first, the crime of forging and altering official documents and certificates;³² second, probably

³¹ Qi Yuling v. Chen Xiaoqi, *Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao* [SUP. PEOPLE’S CT. GAZ.], Vol. 5, 158, 161 (Shandong High. People’s Ct., Aug. 23, 2001). It is also available at CHINALAWINFO (<http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=cas&gid=33554781>, last visited Oct. 11, 2007).

³² Xing fa [Criminal Law of the People's Republic of China], Art. 280, (promulgated by the Chairman of the Standing Committee of the National People's Congress on July 6, 1979, effective as of January 1, 1980, and Revised National People's Congress on Mar. 14, 1997), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=354&keyword=criminal%20law>, last visited Oct. 13, 2007). Article 280 provides that “Whoever forges, alters, trades, steals, forcibly seizes or destroys officials documents, certificates, or seals of state organs is to be sentenced to not more than three years of fixed-term imprisonment; when the circumstances are serious, the sentence is to be no less than three years but not more than 10 years of fixed-term imprisonment. Whoever forges seals of corporations, enterprises, institutions, or people's organizations is to be sentenced to not more than three years of

bribery³³ – it is hardly persuasive to argue that the other three defendants broke all the rules to help Chen and her father for nothing; third, if no bribery or corruption could be proved, then there must be a dereliction of duty under the ninth chapter of Chinese Criminal Law,³⁴ especially Article 397, neglect of duty.³⁵

c. An Administrative Case:

In the Qi case, the Education Committee of Tengzhou City, Shandong Province, an administrative agency of the local government, were also defendants. This case involved the infringement of a citizen's right by some "administrative organs or personnel," so it

fixed-term imprisonment, criminal detention, control, or deprivation of political rights. Whoever forges or alters citizens' identification cards is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights; when the circumstances are serious, the sentence is to be no less than three years but not more than seven years of fixed-term imprisonment."

³³ See *id.* art. 389. Article 389 provides that "An act of giving state functionaries articles of property in order to seek illegitimate gain shall be considered a crime of offering bribes. In economic activities, whoever gives articles of property to state functionaries in violation of state provisions, when the amount is fairly large, or gives a kickback or service charges of various types to state functionaries in violation of state provisions is to be dealt with as committing the crime of offering bribes. Whoever gives articles of property to state functionaries due to extortion but receives no illegitimate gain shall not be considered as committing the crime of offering bribes."

³⁴ See *id.* art. 397-419.

³⁵ See *id.* art. 397. This article provides that "Any functionary of a State organ who abuses his power or neglects his duty, thus causing heavy losses to public money or property or the interests of the State and the people, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years, except as otherwise specifically provided in this Law. Any functionary of a State organ who engages in malpractice for personal gain and commits the crime mentioned in the preceding paragraph shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years, except as otherwise specifically provided in this Law."

could be considered an administrative case according to Article 2 of the Administrative Procedure Law of China.³⁶

However, the Court, applying Constitution provisions, uses a civil method to redress violations of fundamental rights instead of criminal or administrative law remedies.³⁷

d. A Constitutional Case:

In the Supreme People's Court's mind, the key issue in this case is the infringement upon the plaintiff's educational right, which is not under the protection of China's Law on Education.³⁸ However, Article 81 of the Education Law of China does provide generally that "[t]hose who violate the provisions of this law and infringe upon the legitimate rights and interests of teachers, the persons who are to receive education, schools, and other

³⁶ Xing zheng su song fa [Administrative Procedure Law of the People's Republic of China], art. 2 (promulgated by the National People's Congress of P.R.C., April 4, 1989, effective Oct. 1, 1990) LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?id=1204>, last visited Oct. 13, 2007) Article 2 provides that "A Citizen, A legal person or other organizations have the right to litigate a lawsuit to the people's courts in accordance with this Law once they consider that a concrete administrative action by administrative organs or personnels infringe their lawful rights and interests."

³⁷ Zui gao ren min fa yuan guan yu yi qin fan xing ming quan de shou duan qin fan xian fa bao hu de gong min shou jiao yu de ji ben quan li shi fou ying cheng dan min shi ze ren de pi fu, [The Official Reply of the Supreme People's Court on Whether the Civil Liabilities Shall Be Borne for the Infringement upon a Citizen's Basic Right of Receiving Education Which Is under the Protection of the Constitution by Means of Infringing upon His/Her Right of Personal Name], Fa shi 25 hao si fa jie shi, [No. 25 [2001] of the Interpretations of the Supreme People's Court of People's Republic of China] (promulgated by the Supreme Court of People's Republic of China, July 24, 2001, effective Aug. 13, 2001) LAWINFOCHINA (available at <http://www.lawinfochina.com/law/displayModeTwo.asp?db=1&id=1954>) (last visited May 20, 2007).

³⁸ Qi Yuling v. Chen Xiaoqi, Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao [SUP. PEOPLE'S CT. GAZ.], Vol. 5, 158, 160-61 (Shandong High. People's Ct., Aug. 23, 2001). It is also available at CHINALAWINFO (<http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=cas&gid=33554781>, last visited Oct. 11, 2007).

educational institutions, and cause loss or damages, shall be held civilly liable in accordance with this law.”³⁹

The Qi v. Chen case was said to be the first constitutional case of China because it was the first case to apply a provision of the Constitution as the basis of the judgment. But it would not be appropriate to call it the first constitutional case as judicial review only because of the appearance of a constitutional provision in the judgment, as its nature as a constitutional case was so ambiguous and strained, since it did not touch the relationship between different government agencies at all. The Chinese courts still lack authority over other government branches.

The Marbury v. Madison case appears as the primary case in American Constitutional textbook because it is a landmark in the establishment of the judicial review system.⁴⁰ Nobody could doubt its constitutional nature or relate it to criminal or civil statutes. Because of Justice Marshall’s interpretation, its nature of an administrative case was merged into a more distinguished constitutional litigation. Its influence is still greatly felt today as a check and balance to the legislative and executive branches. In China, there is no such thing as judicial review. The definition is still being debated, and there is no mechanism in reality.

The Marbury case is related to the legislative power, but does not focus on one party’s private rights. However, the Qi case involved in a private interest, and the defendants were mostly private individuals or legal persons; although the Education Committee is

³⁹ See Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongbao [Gazette of Standing Comm. of Nat’l People’s Cong.] Vol. 3, pp. 3-13 (1995).

⁴⁰ Riddhi Dasgupta, Changing Face of the Law: A Global Perspective 390 (iUniverse Inc. 2006).

listed as a defendant, its nature as an administrative or constitutional case was merged in a civil case. If such a case can be called a constitutional case, any case can: even a property or theft case can, because in the new Amendment (2004) of China's Constitution, it provides that "The lawful private property of citizens may not be encroached upon."⁴¹ However, it is meaningless to expand the scope of constitutional cases to such extent.

But if the case cannot be properly considered as a constitutional case, how can it be the "first case" of Constitutional law? Some scholars vividly call it "a sheep in wolf's clothing."⁴² There was a flood of criticism, and the nature of this case as constitutional was gradually displayed.⁴³ It opened the door to a discussion of a series of the constitutional cases.

2. The relevant provisions of Constitution and laws of China

The right to an education is not a traditional constitutional right. It cannot be found in documents like 1787 Constitution of United States⁴⁴ or 1789 Declaration of the Rights of

⁴¹ Xian Fa [Constitution of People's Republic of China], Art.13 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

⁴² Peng Yanan, *A Sheep in Wolf's Clothing — The PRC Constitution in Qi Yuling v. Chen Xiaoqi et al*, LAWINFOCHINA, available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=22420 (last visited Oct. 16, 2006).

⁴³ Cai Dingjian, *The Development of Constitutionalism in the Transition of Chinese Society*, 19 Colum. J. Asian L. 1, 14 (2005).

⁴⁴ U.S. Const. pmbl (1787).

Man and of Citizens of France.⁴⁵ It was unheard of in any constitutions until the 1936 Constitution of USSR.⁴⁶ Deeply affected by the USSR, China's constitutions have always included similar articles, as in the 1954 Constitution of People's Republic of China.⁴⁷

In the 138 provisions long Constitution of China, there are at least 2 articles that are related to the Qi case:

Article 5. The state upholds the uniformity and dignity of the socialist legal system. No laws or administrative or local rules and regulations may contravene the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution or the law must be investigated. No organization or individual is privileged to be beyond the Constitution or the law.

Article 46. Citizens of the People's Republic of China have the duty as well as the right to receive education. The state promotes the all-round development of children and young people, morally, intellectually and physically.

Constitution of People's Republic of China.⁴⁸

⁴⁵ Thomas Paine, *The Rights of Man* 65-7 (Courier Dover Publications 1999).

⁴⁴ See Joel Spring, *The Universal Right to Education: Justification, Definition, and Guidelines* 11 (Lawrence Erlbaum Associates Publishers 2000).

⁴⁷ Xian Fa [Constitution of People's Republic of China], art.94 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

3. The Supreme People's Court's role in this play

In the Qi v. Chen case, the Supreme People's Court of P.R.C. played a completely different role than that of the Supreme Court of the U.S. in *Marbury v. Madison*.

In the *Marbury* case, the Supreme Court as the trial court held that in essence the Defendant, Mr. Madison, should have delivered the commission to Marbury,⁴⁹ but the section of the Judiciary Act of 1789 that gave the Supreme Court the power to issue writs of mandamus exceeded the authority allotted the Court under Article III of the Constitution, and was therefore null and void.⁵⁰ Justice Marshall did not only directly judge the case but also interpreted the Constitution, even though it did not grant any remedy to the plaintiffs as they pled.⁵¹

In the Qi case, the Supreme People's Court of P.R.C., only gave a reply in response to the provincial court's request, and the Shandong Province court that made the judgment to the case. The interpretation of the Constitution in the Reply is very limited and literal. The Supreme People's Court affects the lower courts' judgment usually in the role of a consultant. However, whether this method is a proper one is still an open question

⁴⁸ Xian Fa [Constitution of People's Republic of China], Art.5 & 46 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited Oct. 13, 2007). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

⁴⁹ *Marbury v. Madison*, 5 U.S. 137, 167 (1803)

⁵⁰ *Id.* at 177-78.

⁵¹ James A. Henretta, David Brody, and Lynn Dumenil, *America's History: Volume 1: To 1877* 218-19 (Boston: Bedford/St. Martin's, 6th ed., 2007).

discussed by the scholars.⁵² The reality in China is that, in accordance with the Article 33 of Organic Law of the People's Courts of the People's Republic of China, which provides that “[t]he Supreme People's Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceeding,”⁵³ it seems that the Standing Committee of the National People's Congress has a superior power to do so.⁵⁴ The supreme people's court is not supreme but subject to the supervision of the legislative branch.⁵⁵

⁵² Fu Yulin, *On the Functions of the Supreme Court*, Peking Univ. Law J. May, 2003. It is also available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=24998 (last visited Oct. 13, 2007)

⁵³ Ren min fa yuan zu zhi fa [Organic Law of the People's Courts of the People's Republic of China], Art. 33 (Adopted at the National People's Congress on July 1, 1979, and revised on September 2, 1983, December 2, 1986, and October 31, 2006; promulgated by the National People's Congress of P.R.C., Oct., 31, 2006, effective July 1, 1979). LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=5623&keyword=Organic%20Law> last visited Oct. 13, 2007). Article 33 provides that “The Supreme People's Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceeding.”

⁵⁴ Li fa fa [The Law on Legislation of the People's Republic of China], § 4, Art. 42-47 (promulgated by National People's Congress Mar. 15, 2000, effective July 1, 2000), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=386&keyword=Law%20on%20Legislation>, last visited Oct. 13, 2007). Article 43 states that “... the Supreme People's Court... may make a request for legislative interpretation to the Standing Committee of the National People's Congress.”

⁵⁵ Xian Fa [Constitution of People's Republic of China], Art. 67 (6) & 135 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec. 4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited Oct. 13, 2007). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007). Article 67 provides that “The Standing Committee of the National People's Congress exercises the following functions and powers: ... (6) to supervise the work of

C. Doubts about this case

1. Invasion of Constitution into private area;

What is a constitution? Different countries may give different answers. “For Americans, ‘the Constitution’ is essentially a contract between sovereign states,”⁵⁶ or a kind of contract between the government and the people, which tells “what kind of government and laws a nation will have. It listed the powers and duties of the government, and the rights of the people.”⁵⁷ So usually private persons cannot be the violator of a Constitution,⁵⁸ except the violation of the 13th Amendment.⁵⁹ Under this presumption, to apply a constitutional provision in a common civil case between two private parties is illogical.

However, the P.R.China’s constitution is very different from constitutions of the western countries. It not only limits the government, but also imposes obligations upon the citizens, (discussed below) which makes it possible for an individual to become the

the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate.” Article 135 provides that “The people's courts, the people's procuratorates and the public security organs shall, in handling criminal cases, divide their functions, each taking responsibility for its own work, and they shall coordinate their efforts and check each other to ensure the correct and effective enforcement of the law.”

⁵⁶ Introduction to Constitutional Politics: Essays on Constitution Making, Maintenance, and Change 2 (Robert P. George & Sotirios A. Barber ed., Princeton University Press 2001).

⁵⁷ Joanne Randolph, What Is the U.S. Constitution? 5 (Rosen Publishing Group, Inc. 2003).

⁵⁸ Harold Furchtgott-Roth, *Violating the Constitution with Impunity*, Speeches (Washington: American Enterprise Institute, 2001). “The constitution is a set of instructions about the organizations, authorities, and limitations on government activities. Who can violate the constitution? Only a governmental entity can, or indirectly, an individual exercising responsibility for that governmental entity.”

⁵⁹ U.S.Const. amend XIII, §1.

one who violates the Constitution. However, the legitimacy of such provisions of China's Constitution can be problematic.

First, the invasion of the Constitution of China into private area can lead to the abuse of rights. Because of the conciseness and abstractness of the constitutional text, the basic rights of individuals regulated in a Constitution can be ambiguous. If the articles of the Chinese Constitution are cited too frequently in civil cases between private parties, it can be possible that the parties apply constitutional articles instead of specific rules to pursue and maximize their rights in each case. Then the private rights can be to some extent boundless and abused.

Second, this kind of use of constitutional law could cause the crisis between different legal departments. As constitution is the mother law,⁶⁰ any concrete rule in each legal department is a particular detailed expression of the spirits of constitution. Any law against the aim and tenet of the Constitution should not be valid. When there is any conflicting result to apply laws of two legal areas in one case, if the constitution can directly adjust any relations between two actors, then the specific rules could be overlooked and lose their functions which they are expected to have. Then, the function of the Constitution is over enlarged, overlapping the subordinate legal sections.

Third, the overuse of the Constitution can harm its sanctity. A Constitution is the basic law of a country and the source of the authority of all the other legal provisions. It adjusts the whole social relations between the rights of citizens and the power of the State. If applied in every civil case directly without necessity, the Constitution can be deprived of its dignity as the highest law and lowered to the same level as the other legal statutes.

⁶⁰ Albert h.y. Chen, *An Introduction to the Legal System of the People's Republic of China*, 45 note 29 (citing CPC Central Party School, Law Unit (1984)) (1992).

Thus, to privatize the Constitution is a very creative thought, but has no sufficient theoretical and practical basis and is very questionable in its prospect, although it can make the Constitution more functional.

2. Other opportunities for the beginning of judicial review.

The Qi Yuling v. Chen Xiaoqi case became the “first constitutional case” of China, but actually, there are some other cases more qualified to be entitled to that, as follows

a. The High School Graduates v. Ministry of Education case (2001)

On August 23, 2001, three high school graduates, Jiang Yan, Luan Qian & Zhang Tian Zhu, filed an administrative lawsuit against the Ministry of Education on the grounds that the universities' 2001 recruitment plans infringed upon their right to equal education. The claim was based on the assertion that a Qingdao student needed significantly higher results on the standardized entrance examination than a Beijing student for university admission.⁶¹

In summer of 2001, the three plaintiffs graduated from a high school in Shandong Province and took part in the National College Entrance Examination. When the results came out, they found their scores were not high enough to go to any ideal college; but students from Beijing and some other developed locations could go to good universities with the same scores, which favored students from Beijing or other relatively more developed provinces.⁶² The three girls filed a suit against the National Education

⁶¹ See generally Yu Meisun, *On the Exigency of Renovating the College Recruiting System, Judging From the Two Cases Where the Ministry of Education is the Defendant*, The Epoch Times, Apr. 23, 2004, available at <http://www.epochtimes.com/gb/4/4/23/n519496.htm> (last visited Oct. 8th, 2007).

⁶² Yu Meisun, *On the Exigency of Renovating the College Recruiting System, Judging From the Two Cases Where the Ministry of Education is the Defendant*, The Epoch Times,

Ministry in the Supreme People's court. The case was denied to be put on trial by the Supreme People's Court because of the lack of jurisdiction.⁶³

Supposing the Supreme People's Court took the case and ruled in favor of the students declaring the National Ministry of Education violated the constitution and committed discrimination by making such rules in the national college entry test, and then it would be more like a judicial review case judging the acts of a government agency, which is not provided in the general equality provision in the Chinese Constitution.⁶⁴

b. The Sun Zhigang case (2003)

Sun Zhigang, a 27 years old graphic designer from Hubei Province, was arrested on the streets of Guangzhou City in March 2003 for not carrying a required registration permit. Police brought him to a "custody and repatriation" center, one of hundreds of detention facilities run by local governments to control migrant populations. Three days later, Sun died from the torture by the workers there. As the killers in the Sun case were sentenced, some scholars in law filed a letter to the Standing Committee of National People's Congress according to the Article 90 of the Law on Legislation of the People's Republic

Apr. 23, 2004, available at <http://www.epochtimes.com/gb/4/4/23/n519496.htm> (last visited Oct. 8th, 2007).

⁶³ Xian Fa Xue An Li Jiao Cheng [Casebook of Constitutional Law]37, Zhi shi chan quan chu ban she [Intellectual Property Publishing House] (Jiao Hongchang & Yao Jianguo eds., 2004).

⁶⁴ Xian Fa [Constitution of People's Republic of China], art.33 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007). Article 33 provides that "All citizens of the People's Republic of China are equal before the law."

of China,⁶⁵ asking for a constitutional review of the “Housing and Repatriating Regulation (an administrative regulation),” which was considered a violation of the Constitution⁶⁶ and the Law on Legislation⁶⁷ by illegal deprivation of a citizen’s freedom. Finally, the State Council (the central government) decided to repeal the Housing and Repatriating Regulation, which it had issued in 1982. The criminal case did not become a constitutional case.

⁶⁵ Li fa fa [The Law on Legislation of the People's Republic of China], Art. 90 (promulgated by National People’s Congress Mar. 15, 2000, effective July 1, 2000), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=386&keyword=Law%20on%20Legislation>, last visited Oct. 13, 2007). Article 90 provides that “Where the State Council, the Central Military Committee, the Supreme People's Court, the Supreme People's Procuratorate, all special committees of the Standing Committee and the standing committee of the People's Congress of all provinces, autonomous regions and municipalities directly under the central government deems that an administrative regulation, local regulation, autonomous regulation or special rule contravenes the Constitution or any law, it may make a written request to the Standing Committee of the National People's Congress for review, and the working office of the Standing Committee shall distribute such request to the relevant special committees for review and comments. Where any state organ and social group, enterprise or non-enterprise institution or citizen other than the bodies mentioned above deems that an administrative regulation, local regulation, autonomous regulation or special rule contravenes the Constitution or any law, it may make a written proposal to the Standing Committee of National People's Congress for review, and the working office of the Standing Committee shall study such proposal, and where necessary, shall distribute such proposal to the relevant special committees for review and comments.”

⁶⁶ Xian Fa [Constitution of People’s Republic of China], art.94 (promulgated by the National People’s Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007). Article 37 provides that “Freedom of the person of citizens of the People's Republic of China is inviolable.”

⁶⁷ Li fa fa [The Law on Legislation of the People's Republic of China], *supra* Note 67, art. 8 (5). Article 8 (5) provides that “Laws may be enacted only in respect to matters regarding ... deprivation of the political rights of citizens, or compulsory measures and penalties that restrict personal freedom.”

Compared to any cases mentioned above, this case involving a person's death was of great influence over the whole country. It did not become a case, but the outcome is similar: a regulation promulgated by the executive branch of government was abolished because of its unconstitutionality. This case really affected the power of two of the government branches, although neither is the judicial one. According to news reports, the three scholars received tons of letters complaining about the similar situation and asking them for help.⁶⁸ This is a reflection on the reality that the judicial review is not yet a system but an occasionally happening incident relying on some influential people's help.

c. Jiang Tao v. Chengdu Branch of the People's Bank of China (2006)⁶⁹

The first discrimination lawsuit was brought by Jiang Tao, a law student of the University of Sichuan Province, against the Chengdu Branch of the People's Bank of China over the recruiting requirement of height, claiming that it was discriminatory and therefore violated his right to equal protection under the Chinese Constitution. Before the court could reach a judgment, the bank branch dropped the height requirement. Thus, the Wuhou District People's Court stated that because the issuance of the recruitment announcement was not an administrative act by the bank, and because the nullified

⁶⁸ Chen Xiaoying & Zhen Dong, *San bo shi shang shu tui kai fa gui shen cha zhi men* [A Letter from Three Ph. Ds Opened the Door to the Review of Laws and Regulations], *Fa Zhi Ri Bao* [Legal Daily], Dec. 31, 2003. It is also available at <http://www.people.com.cn/GB/14576/14528/2274551.html> (last visited Nov. 10, 2007).

⁶⁹ Jiang Tao v. Chengdu Branch, People's Bank of China, Opinion by the People's Court in Wuhou District, Chengdu, Sichuan Province, Chinese Educ. & Soc'y, July/Aug. 2006, at 80.

requirement had no direct effect on the plaintiff, the case was so dismissed according to the Administrative Litigation Law of China.⁷⁰

This case was also a discrimination case in employment although the defendant's compromise made the case dismissed before giving a judgment.

d. The Hepatitis B carriers case⁷¹

Discrimination is based not just on the height of individuals but also on the health condition of civil servant recruits. The plaintiff, Zhang Xianzhu, won the first place in the written and interview part of national civil servants recruiting process in the Wuhu City, Anhui Province. However, he was turned down simply because he was a carrier of Hepatitis B. Mr. Zhang failed to pursue any remedy from the administrative agency, so he filed a lawsuit against the personnel department of the Wuhu City seeking for a recovery of the lost opportunity to take part in the recruiting procedure. Finally, Mr. Zhang won the case only technically: although the court ruled that the personnel department of the Wuhu City had no legal basis to disqualify Zhang in the recruiting procedure simply according

⁷⁰ See the *Administrative Litigation (Procedure) Law of the People's Republic of China*, Art. 5 (promulgated by the National People's Congress of P.R.C., April 4th, 1989, effective October 1, 1990) LAWINFOCHINA (last visited Oct. 15th, 2007). It is available at <http://www.lawinfochina.com/law/display.asp?id=1204>. "Article 5. In handling administrative cases, the people's courts shall examine the legality of specific administrative acts." See also *Supreme People's Court Interpretation on Several Problems in Implementing the People's Republic of China Administrative Litigation Law* (Adopted at the 1088th meeting of the Judicial Committee of the Supreme People's Court on November 24th, 1999), Fashi (Interpretation of Law)[2000] No.8, It is available at <http://www.cecc.gov/pages/newLaws/implementALLinterpret.php>

⁷¹ Sun Wenying, *Zhang Xianzhu An: Zhongjie Yigan Qishi [The Zhang Xianzhu Case: Termination of Discrimination Against HBV Carriers]*, Renmin fayuanbao [People's Court Daily], Nov. 3, 2006, available at <http://rmfbyb.chinacourt.org/public/detail.php?id=102369> (last visited Oct. 10th, 2007). See also Xun Zeng, *Enforcing Equal Employment Opportunities in China*, 9 U. Pa. J. Lab. & Emp. L. 991, 1003-4 (2007).

to the result of a wrongly concluded physical examination, the wrong-doer seemed not only the municipal personnel department but the hospital to whom the physical examination was entrusted to. Thus, act of the personnel department should be revoked. The court refused to rule on the issue – whether the regulations rejecting hiring HBV carriers as civil servants violated the plaintiff's constitutional rights of equality and political participation and refused to grant the plaintiff any remedy because the position that Mr. Zhang applied was already occupied.⁷²

At almost the same time, on November 20, 2003, a petition signed by 1161 Chinese citizens demanded constitutional review of a regulation barring Hepatitis B carriers from recruitment as civil servants and called for equal rights for Hepatitis B carriers. The petition pointed out that the regulation excluded 120 million⁷³ Hepatitis B carriers from positions as civil servants, infringing upon their constitutional rights of labor and equal protection.⁷⁴

⁷² Sun Wenying, *Zhang Xianzhu An: Zhongjie Yigan Qishi [The Zhang Xianzhu Case: Termination of Discrimination Against HBV Carriers]*, Renmin fayuanbao [People's Court Daily], Nov. 3, 2006, available at <http://rmfyb.chinacourt.org/public/detail.php?id=102369> (last visited Oct. 10th, 2007). See also Xun Zeng, *Enforcing Equal Employment Opportunities in China*, 9 U. Pa. J. Lab. & Emp. L. 991, 1003-4 (2007).

⁷³ *Yigan Bingdu Bu Tongguo Shejiao Huodong Chuanbo [The Hepatitis B Virus Does not Transmit Though Social Activities]*, Xinhua Wang [Xinhua News Agency], Jan. 4, 2004, http://www.gd.xinhuanet.com/newscenter/2004-04/01/content_1895304.htm (last visited Oct. 10, 2007).

⁷⁴ *1611 Ren Suqing Weixian Shenchu, Huyu Xiugai Kao Gongwuyuan Yigan Jinling [1,611 Chinese Citizens Petition for Constitutionality Review, Asking for a Lift of Ban on HBV Carriers to Become Civil Servants]*, Xinhua Net [Xinhua News Agency], Nov. 26, 2004, http://news.xinhuanet.com/legal/2003-11/26/content_1198971.htm. (last visited Oct. 10, 2007).

The Hepatitis B case was similar to the Jiang Tao case mentioned above. In this case, the government agency did not yield to the pressure from the society but stuck with its original regulations in employment. The court gave the judgment in favor of the plaintiff without any remedy.

If *Marbury v. Madison* is a landmark in the establishment of judicial review in the United States, then *Qi v. Chen* is the starting line for China. Although some violation of the Constitution still cannot be tried in court, as shown by the situation in the High School Graduates case, at least *Qi* opened the door. More and more cases will appear to test the practicability of China's judicial review of constitutionality.

CHAPTER III

COMPARISON BETWEEN QI V. CHEN AND MARBURY V. MADISON

A. Different legal backgrounds of the two cases:

1. Judicial review before Marbury

Nothing comes from nothing. Marbury was not the first case about judicial review in the judicial history of United States. Before this most famous one, which occupies the beginning of many constitutional law text books, this judicial review power was already exercised in some states before the Supreme Court's ruling.⁷⁵ There were several earlier cases smoothing its way:

- Rutgers v. Waddington (1784)

Rutgers v. Waddington:⁷⁶ in 1783, the New York State Legislature passed a Trespass Act, which allowed land owners whose property had been occupied by the British during the Revolution to sue for damages. Rutgers sued in the Mayor's Court on the seizure of her brewery, and the judge declared the Trespass Act void because it conflicted with a provision of the Treaty of Paris and the Constitution of New York whose adoption of "the common law" was broadly interpreted to include "the law of nations."⁷⁷ Alexander

⁷⁵ See George Lee Haskins & Herbert A. Johnson, *History of the Supreme Court of the United States: Foundations of Power: John Marshall, 1801-15*, 190 (1981) (stating that "the idea of judicial review was hardly a new one when Marbury was decided")

⁷⁶ N.Y. Mayor's Ct. 1784, In American Historical Association, *Select Cases of the Mayor's Court of New York City 1674-1784*, 302 (Washington, D.C.: American Historical Association, Richard B. Morris ed., 1935).

⁷⁷ 1 *The Law Practice of Alexander Hamilton* 282- 419(Julius Goebel, Jr. ed. 1964).

Hamilton was one of the lawyers for the defendants.⁷⁸ It was the first time a court in the United States declared a law unconstitutional, which if not explicitly declared the judicial review power of the court over the legislature at least for the first time exercise it,⁷⁹ and so became an important precedent for the later U.S. Supreme Court decision in *Marbury v. Madison*.⁸⁰

- *Trevett v. Weeden* (1786)

Trevett v. Weeden,⁸¹ occurred under the Articles of Confederation, when each state had a different currency. Acts passed by the Rhode Island Legislature imposed heavy penalty fines on those who refused to accept the state's currency, because of its depreciated value. Weeden, who was a businessman and refused to accept the depreciated state currency, was acquitted on the grounds that the acts were "unconstitutional".⁸² The court so dismissed the complaint. Some furious legislators of that state even censured the court

⁷⁸ Henry Wilson Scott, *The Courts of the State of New York: Their History, Development and Jurisdiction* 218 (New Jersey: The Lawbook Exchange, Ltd. 2001).

⁷⁹ Julius Goebel, Jr., *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* 132-37 (1971) (noting *Rutgers* was "the earliest reported case where the restraints upon a state legislature implicit in the national constitution, such as it then was, were brought to issue").

⁸⁰ Robert H. Henry, *Catching The Jurisprudential Wave: Bernard Schwartz's Main Currents In American Legal Thought*, 33 *Tulsa L.J.* 385, 394 (1997). (Noting that "... the important New York case *Rutgers v. Waddington*, which is often referred to as a forerunner of *Marbury*.")

⁸¹ See James M. Varnum, *The case, Trevett against Weeden: on information and complaint, for refusing paper bills in payment for butcher's meat, in market, at par with specie 1* (Providence: John Carter, 1787).

⁸² See James M. Varnum, *The case, Trevett against Weeden: on information and complaint, for refusing paper bills in payment for butcher's meat, in market, at par with specie 38* (Providence: John Carter, 1787)..

and debated a proposal to remove the judges.⁸³ With the “remarkable”⁸⁴ arguments that “that this court has power to judge and determine what acts of the general assembly are agreeable to the constitution” made by James M. Varnum, *Trevett vs. Weeden* case in 1786 is one of the landmarks in the establishment of judicial authority in the United States⁸⁵ and helped Marshall in the judicial establishment of the constitution of the United States.⁸⁶

- *Kamper v. Hawkins* (1793)

In the historic Virginia case, *Kamper v. Hawkins* (1793),⁸⁷ some of the top minds examined in detail and with great clarity, the principles of the founding fathers regarding the proper role of each of the branches of government. The state judges in this case tried to establish a state organic law based on the sovereignty of the people. Judge Spencer Roane, who later became the chief justice of the Virginia Supreme Court, wrote in 1793, “I consider the people of this country as the only sovereign power. I consider the legislature as not sovereign but subordinate; they are subordinate to the great constitutional charter, which the people have established as a fundamental law, and which

⁸³ James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 38 (New York: Oxford University Press, 1992).

⁸⁴ Brinton Coxe, *An Essay on Judicial Power and Unconstitutional Legislation*, Being a Commentary on Parts of the Constitution of the United States 236 (Philadelphia: Kay and Brother, 1893).

⁸⁵ Charles Grove Haines, *The Conflict Over Judicial Powers in the United States to 1870*, 28 (New Jersey: The Lawbook Exchange, Ltd., 2001).

⁸⁶ William B Weeden, *Early Rhode Island: A Social History of the People* 333 (New York: The Grafton Press, 1910). It is also available at <http://www.dinsdoc.com/weeden-1-10.htm> (last visited Sept. 2, 2007)

⁸⁷ *Kamper v. Hawkins*, 1 Va.Cas. 20, 1 (1793).

alone has given existence and authority to the legislature...”⁸⁸ This case is not only the leading precedent in Virginia for what became known as “judicial review,”⁸⁹ but is also referred to as the most well-known and influential case on judicial review in the years leading up to *Marbury v. Madison*.⁹⁰

- *Respublica v. Duquet* (1799)

Respublica v. Duquet:⁹¹ in 1795, the legislature of the state of Pennsylvania empowered the city of Philadelphia to prohibit construction of wooden buildings in certain parts of the city.⁹² In the next year, the Philadelphia city passed a similar ordinance pursuant to the state statute.⁹³ Soon after the passage of the ordinance, Duquet built a wooden structure in the forbidden area and was sued in the mayor's court.⁹⁴ When the case was removed to the Supreme Court of Pennsylvania, Duquet challenged the statute as unconstitutional.⁹⁵ In a brief opinion written by Chief Justice Shippen, the Pennsylvania Supreme Court found no impropriety with the city prosecuting offenders in

⁸⁸ *Id.* at 6.

⁸⁹ Charles F. Hobson, *Institute of Bill of Rights Law Symposium: St. George Tucker and His Influence on American Law*, 47 Wm. & Mary L. Rev. 1245, 1274 (2006)

⁹⁰ 1 Charles Grove Haines, *The American Doctrine of Judicial Supremacy* 150-52, 157 (2d ed. 1932). Kamper's influence was due in no small measure to its quick publication in book form, which made it more accessible than other opinions in an age before published reports were common.

⁹¹ *Respublica v. Duquet*, 2 Yeates 493, 1799 WL 240 (Pa.) (1799)

⁹² *Respublica v. Duquet*, 1799 WL 240 (Pa.), 1 (1799)

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

the mayor's court.⁹⁶ Regarding judicial review, the court noted that "a breach of the constitution by the legislature, and the clashing of the law with the constitution, must be evident indeed, before we should think ourselves at liberty to declare a law void."⁹⁷ Although the statute in question was constitutional, the court made clear that in the appropriate case it would not "shrink from the task of saying such law is void."⁹⁸ The Pennsylvania Supreme Court also embraced judicial review, although it did not strike down any act of the legislature.⁹⁹ Pennsylvania seemed also in line with its sister states on the subject of judicial review.

- Whittington v. Polk (1802)¹⁰⁰

This case may have inspired Marbury, because it happened just one year before the Marbury case. The plaintiff, William Whittington, ran into a similar situation as Marbury. The Republicans controlled the legislature of Maryland; and tried to squeeze the Federalists, like Whittington, out of the state judicial system. A bill known as a "ripper bill" repealing the original 1796 Judiciary Act of Maryland, was made, stripping judges from office simply to create vacancies for new appointments.¹⁰¹ Whittington filed a lawsuit in the general court of Maryland, which was both the trial and the appellate court

⁹⁶ *Id.* at 7.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Isaac Grant Thompson & Irving Browne, *The American Reports: Containing All Decisions of General Interest Decided in the Courts of Last Resort of the Several States, with Notes and References* 383 (San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers 1884).

¹⁰⁰ *Whittington v. Polk*, 1 H. & J. 236 (Md. 1802).

¹⁰¹ Paul S. Clarkson & R. Samuel Jett, *Luther Martin of Maryland* 198 (1970).

at that time,¹⁰² to reclaim his position. The key issue was about a statute reorganizing the Maryland judiciary that had been applied to remove Whittington, as the chief justice of the courts of the county and replaced him with Polk, the Defendant. Whittington challenged this statute as unconstitutional¹⁰³ on the grounds that the Maryland Constitution provided that “the Chancellor [and] all Judges shall hold their commissions during good behavior”¹⁰⁴ and that the judges could be “removable only for misbehaviour, or conviction in a Court of Law.”¹⁰⁵ The General Court began its opinion by stating that the people were the source of all power and that the people had only delegated certain powers to government,¹⁰⁶ and stated that the legislature could not be the judge of its own powers because that would “establish a despotism.”¹⁰⁷ The court observed that the people could not personally exercise such a power because they could only be heard during elections.¹⁰⁸ But under the Constitution, the judiciary was the “barrier” established to “resist the oppression” of constitutional infringements.¹⁰⁹ It thus fell to the courts “to

¹⁰² See Carroll T. Bond, *The Court of Appeals of Maryland, A History* 88-91 (Baltimore: Barton Gillet Company 1928).

¹⁰³ Jed Handelsman Shugerman, *Marbury and Judicial Deference: the Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. Pa. J. Const. L. 58, 58-9 (2002).

¹⁰⁴ Md. Const. of 1776, *The Constitution or Form of Government*, art. XL.

¹⁰⁵ *Id.*

¹⁰⁶ *Whittington v. Polk*, 1 H. & J. 236, 242 (Md. 1802).

¹⁰⁷ *Id.* at 243.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 245.

determine whether an act of the legislature . . . is made pursuant to" the constitution.¹¹⁰ The court admitted that the judiciary might at times fail to properly interpret the Constitution, but found this was not enough to argue against the exercise of judicial review.¹¹¹ The General Court held that, according to the Constitution, justices of the county courts, such as Whittington, held office for a term of years or until the justices were discharged, and not during good behavior as did other judges in the state.¹¹² Thus, the act at issue was held not to violate the Constitution.¹¹³

This series of cases in different states created both the practical and theoretical basis for the later coming Marbury case. Marbury is the conclusion of the efforts made by the judges in the state courts. After that, the judicial review power of the judges was officially established.

2. Judicial Review before Qi v. Chen

Before the Qi v. Chen case there had been not a single case of constitutional review in China, although the text of the Chinese Constitution was changed four times before this case.¹¹⁴

B. Different levels of courts: Supreme court v. local court

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 248(Md. 1802).

¹¹³ *Id.* at 249-50(Md. 1802).

¹¹⁴ Ralph H. Folsom&John H. Minan, Law in the People's Republic of China: Commentary, Readings, and Materials 61 (Dordrecht/Boston : M. Nijhoff Publishers 1989).

In *Marbury v. Madison*, the plaintiff did not sue the defendant in a lower level court but went directly to the Supreme Court of the United States¹¹⁵ according to Article III Section 2 of the U.S. Constitution, which granted the Supreme Court the original jurisdiction in “all cases affecting ... other public Ministers and Consuls ...”¹¹⁶

In *Qi v. Chen*, the plaintiff brought the suit to local intermediate court first and then appealed at the provincial higher court. In *Qi v. Chen*, the function of the supreme people’s court of China is not to try the case directly, but to give the provincial court instruction on how to interpret the Constitution of China.¹¹⁷ As said in a frequently quoted paper on this case, “Ms. Qi may have never imagined that her ‘struggle for rights’ would eventually give rise to ‘the first case of judicial application of the Constitution.’”¹¹⁸ Indeed, before the High People's Court of Shandong Province reported to the Supreme People's Court to ask for interpretations, there was no indication this case would become the “first constitutional case of China.”

The impacts of cases tried by courts at different levels are different. According to the recently amended Civil Procedure Law of China, the impact of a case is an aspect to decide the jurisdiction.

¹¹⁵ *Marbury v. Madison*, 5 U.S. 137; 2 L. Ed. 60 (1803).

¹¹⁶ U.S. Const., art. III § 2.

¹¹⁷ *Qi Yuling v. Chen Xiaoqi*, 5 SUP. PEOPLE’S CT. GAZ. ? (Shandong High. People’s Ct., Aug. 23, 2001). See also at CHINALAWINFO (<http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=cas&gid=33554781>).

¹¹⁸ Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's “First Constitutional Case”*, 12 Pac. Rim L. & Pol’y J. 199, 199 (2003).

Article 18 A basic people's court shall have jurisdiction as the court of first instance over civil cases, unless otherwise stipulated in this Law.

Article 19 An intermediate people's court shall have jurisdiction as courts of first instance over the following civil cases: (1)Major cases involving foreign elements; (2)Cases that have major impacts in the area of its jurisdiction; and (3)Cases under the jurisdiction of the intermediate people's courts as determined by the Supreme People's Court.

Article 20 A higher people's courts shall have jurisdiction as the court of first instance over civil cases that have major impacts on the areas of its jurisdiction.

Article 21The Supreme People's Court shall have jurisdiction as the court of first instance over the following civil cases: (1)Cases that have major impacts on the whole country; and (2)Cases that the Supreme People's Court deems should be adjudicated by itself.

Civil Procedure Law of the People's Republic of China, art. 18-21 (2007).¹¹⁹

Qi v. Chen was the official first constitutional case in China and had such "major impacts on the whole country"¹²⁰ that the Supreme People's Court could have the jurisdiction if it would like to, but it did not. That to certain extent lowered the possible influence of this case. If Qi was tried by the Supreme People's Court, it would have attracted greater public attention.

¹¹⁹ Min shi su song fa [Civil Procedure Law of the People's Republic of China], art. 18-21 (promulgated by the National People's Congress of P.R.C., Oct. 28, 2007, effective on April 9, 1991) LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=6459&keyword=procedure%20law>, last visited Oct. 15th, 2007).

¹²⁰ *Id.*, art. 21.

C. Different types of defendants: a government official v. individuals, government branch and other entities

In *Marbury v. Madison*, the defendant was a government official, the Secretary of State of the United States.¹²¹ The plaintiff was hoping to become a judge.¹²² The case became a battlefield of the two leading political parties at that time.¹²³ This case was in process for over two years.¹²⁴

In *Qi v. Chen*, the defendants included individuals, government agencies and other social entities, as education institutions.¹²⁵ The plaintiff was a common individual citizen with no public position. It seemed to be a common civil case: no party did anything to make this case political. Nobody could foresee how widely and deeply concerned this case finally was or what effect it would bring to the Chinese legal academies and judicature.

D. Different outcomes of the two cases: dismissal v. the winning of plaintiff

Although the Supreme Court of the United States successfully granted itself the power of judicial review with a meaningful interpretation of the Constitution of United States, the plaintiff got nothing through the case, although the Supreme Court agreed that his

¹²¹ Ryan P. Randolph, *Marbury V. Madison: The New Supreme Court Gets More Power* 21 (New York: Rosen Publishing Group 2003).

¹²² *Id.* at 16.

¹²³ *Id.* at 8..

¹²⁴ *Marbury v. Madison*, 5 U.S. 137, 137 (1803).

¹²⁵ *Qi Yuling v. Chen Xiaoqi*, *Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao* [SUP. PEOPLE'S CT. GAZ.], Vol. 5, 158, 158 (Shandong High. People's Ct., Aug. 23, 2001). It is also available at CHINALAWINFO (<http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=cas&gid=33554781>, last visited Oct. 11th, 2007).

rights was violated and the laws of his country afforded him a remedy,¹²⁶ because Section 13 of the Act of 1789¹²⁷ the legal basis he relied on to get a writ of mandamus from the court was unconstitutional in expanding the original jurisdiction of the Supreme Court of the United States.¹²⁸ It was unfortunate for the judge candidates, but a success of the judicial power.

No matter what ways adopted or what statutes applied, in the Qi v. Chen case, the plaintiff was granted the remedy she asked for basically.¹²⁹ However, the criticism of this case is even louder than the applause, as stated above.

E. Different Effects

The effects of the Marbury could fill volumes. 200 years after the beginning of the Independence War, lawyers, judges, and law professors still rank Marbury v. Madison as the most important Supreme Court ruling of all time in a poll conducted by the American

¹²⁶ Marbury v. Madison, 5 U.S. 137, 168 (Supr. Ct, 1803).

¹²⁷ Mark V. Tushnet, *Arguing Marbury v. Madison* 14 (Stanford University Press, 2005). Section 13 provided that "The supreme court shall also have appellate jurisdiction from the circuit courts, and the courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

¹²⁸ See U.S.Const. art. III, § 2. Section 2 of Article III provided that the Supreme Court has original jurisdiction "in all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party."

¹²⁹ Qi Yuling v. Chen Xiaoqi, *Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao* [SUP. PEOPLE'S CT. GAZ.], Vol. 5, 158, 161 (Shandong High. People's Ct., Aug. 23, 2001). It is also available at CHINALAWINFO (<http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=cas&gid=33554781>, last visited Oct. 11th, 2007).

Bar Association.¹³⁰ Both the Marbury and Qi cases led to heated discussions and controversies following the judgment. Nevertheless, a number of cases followed Marbury. In China, the Supreme People's Court remains quiet on the constitutionality of judicial review in China, but there is continuing, heated discussion of the subject among commentators.¹³¹ The delay is understandable, since it was not until more than 50 years later in the Dred Scott v. Sandford case (1856)¹³² that the U.S. Supreme Court held another congressional act unconstitutional.¹³³

¹³⁰ Jethro K. Lieberman, *Milestones! 200 Years of American Law: Milestones in Our Legal History* vii (1976).

¹³¹ Cui Ruohong, *Qi Yuling an jian si fa pi fu huan xiang qu* [Fantasia of the Official Reply of the Supreme People's Court on the Qi Yuling Case], *Zhong guo xian fa* [Constitution of China], CHINAINFOLAW, http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=23457 (last visited Oct. 13, 2007).

¹³² *Dred Scott v. Sandford*, 60 U.S. 393, 633 (Supr. Ct., 1856).

¹³³ , *A History of American Law* 259 (Simon & Schuster, Inc, 3rd ed., 2005). (Noting that "It is impossible to say for sure. Judicial review was a slow growth. After Marbury v. Madison, there was no clear-cut example of a case in which the Supreme Court dared to strike down an act of Congress until the Dred Scott case in 1857.")

CHAPTER IV

ANALYSIS: WHY CHINA'S "FIRST CASE" IS SO DIFFERENT FROM THE U.S.

ONE

A. The Constitutional text itself: rights giving law, not power limiting law

Constitutional law is new to China. At the end of the last Chinese dynasty, Qing, Chinese politicians began to seek resolution of the problems caused by incursions from the west. From Shen Jiaben's Consitutional Law Outline Made by Imperial Order¹³⁴ to the present Constitution of People's Republic of China amended in 2004, many different versions of a constitution appeared and disappeared one by one. The history of constitutions of mainland China is not a continuous story but principally consists of three phases: quasi-constitutional monarchy (before 1912), westernization¹³⁵ (1912-1949) and communism era under the leadership of Chinese Communist Part (after 1949).

As a 138-article-long text with a lengthy preamble, the present Constitution of China is an interesting combination of communism in the old Soviet Russian style¹³⁶ and typical oriental tradition of regime with some Chinese characteristics,¹³⁷ plus some fragments of modern western legal thoughts.¹³⁸

¹³⁴ 1 Qing mo chou bei li xian dang an shi liao [Historic Documents of the Pre-Constitution at the End of Qing Dynasty] 58 (Zhong hua shu ju [Zhonghua Bookstore] 1979).

¹³⁵ See Chen Jianfu, Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Development 17 (Martinus Nijhoff Publishers, 1999).

¹³⁶ See He Qinhua & Li Xiuqing, Foreign Law and Chinese Law: Reflection on the Transplanting of Foreign Law to China 173 (China University of Political Science and Law Press 2003)

¹³⁷ Xia Xinhua, Gong ju xing de xian fa he xian fa de gong ju xing [A Constitution as an Instrument and the Instrumental nature of a Constitution], CHINAINFORLAW,

1. The provisions of rights:

There are many rights written in the Constitution of China, which makes this document such a long one with 138 articles, compared with the 7-article and 27 Amendments of the United States Constitution. The Chinese Constitution tries to list all the rights of a citizen one by one. However, the exercise by citizens of their rights and freedoms may not impinge upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.¹³⁹

Of course, a fundamental right to education is among them, as Article 46 of China's Constitution provides: "Citizens of the People's Republic of China have the duty as well as the right to receive education. The state promotes the all-round moral, intellectual and physical development of children and young people."

But what if there are some rights that are not included, like the right to private property, which was not protected in any articles of the Constitution of China until 2004?¹⁴⁰ It was not possible to include everything in the limited provisions.¹⁴¹ Does that mean that before 2004 China did not protect any private property? Of course not. However, there is no

http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=37020 (last visited Oct 13, 2007).

¹³⁸ *Id.*

¹³⁹ Xian Fa [Constitution of People's Republic of China], Art. 51 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec. 4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

¹⁴⁰ *See id.* art.13 (1)

¹⁴¹ Ronald Dworkin, *Law's Empire* 410-11 (1986).

general provision about protection of the individuals' rights. The word "right" was first mentioned in Article 4 about the particular equal rights of minority nationalities.¹⁴² So no matter how many rights articles we have, it is still possible to have left something outside. Therefore, still there is no clear scope of the rights of citizens. Such a phenomenon reflects a different ideology in the two legal philosophy systems: the western idea is that people "are born and remain free,"¹⁴³ and the Chinese presumption is that "Under the wide heaven, all is the king's land. Within the sea-boundaries of the land, all are the king's servants."¹⁴⁴ That is the reason why there are so many disputes about the human rights between China and some western countries, and why in the *Qi Yuling v. Chen Xiaoqi* case, the first case to implement the Constitution, was so eye-catching. As a human being is not really born to be free, Qi got the remedy for her infringed education rights granted by the Constitution, which implies that without the existence of the Constitution the right of education does not exist for Qi. This reflects the popularity of the theory of positive law instead of natural law.

Although the U.S. Constitution does not directly endow the courts with the power of judicial review, in the *Marbury v. Madison* case Chief Justice Marshall interpreted the

¹⁴² Xian Fa [Constitution of People's Republic of China], Art.4 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

¹⁴³ 1958 Const. 1 (Fr.)

¹⁴⁴ *Bei Shan Zhi Shi* [Decade of Bei Shan], *Shijing* [The Book of Odes] (the oldest collection of Chinese Poetry), Sec. II *Xiaoya* [Minor Odes of the State], Chap. 6.

framer's original intention in this way.¹⁴⁵ In the Qi v. Chen case, although the plaintiff did not mention her constitutional rights and only quoted the civil law statutes of China as in accord with her pleading, the Supreme People's Court of China introduced the Chinese Constitution as the basis of the plaintiff's right of education. What if the right of education was not listed in Chinese Constitution like private property before 2004? Can the Supreme People's Court still interpret the Constitution as the source of Qi's education right? Can Qi's legitimate rights still be protected by the existing statutes? Have China's Constitutions included all the rights of a citizen for the government to protect? As long as a society continues to develop, is it possible for a constitutional text to always contain everything at present or even every possibility in the future? Can the written statutes be amended as promptly as they need to be? If not, can the court expansively interpret the law according to the Constitution or justice? These problems are still waiting for resolution.

2. The prohibitive provisions:

The Constitution of the United States is full of articles that limit the power of the government, especially in the Amendments that protect the people's rights from public powers. For example, Amendment 1 prohibits the Congress from limiting the freedom of speech of the people,¹⁴⁶ and Amendment 5 prohibits individuals from being punished without proper legal procedures¹⁴⁷ and Amendment 8 prohibits punishments which are

¹⁴⁵ Marbury v. Madison, 5 U.S. 137, 179 (1803).

¹⁴⁶ U.S.Const. amend. I.

¹⁴⁷ U.S.Const. amend. V.

too harsh.¹⁴⁸ China has a very different style of the prohibitive provision in its Constitution. For example, in its Article 1, it provides: “The socialist system is the basic system of the People's Republic of China. Sabotage of the socialist system by any organization or individual is prohibited.” This article is aimed not at limiting the power of government or any branch of it but at limiting other organizations and individuals of the country. There are many provisions like that. For example, Article 10, provides that no “organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways”;¹⁴⁹ Article 12 prohibits any “appropriation or damage of state or collective property by any organization or individual by whatever means”;¹⁵⁰ Article 15 prohibits “disturbance of the orderly functioning of the social economy or disruption of the state economic plan by any organization or individual”;¹⁵¹ Article 36 prohibits anyone from making “use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state”;¹⁵² Article 49

¹⁴⁸ U.S.Const. amend. VIII.

¹⁴⁹ Xian Fa [Constitution of People's Republic of China], Art.10 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

¹⁵⁰ *See id.* art. 12.

¹⁵¹ *See id.* art. 15.

¹⁵² *See id.* art. 36.

prohibits “violation of the freedom of marriage” and “maltreatment of old people, women and children.”¹⁵³

China’s Constitution is like a responsible parent speaking to his energetic but disobedient children. The U.S Constitution is like the board of directors of a company talking to a very smart but questionable manager. The problem is who is the speaker or the creator of the constitution of China? A constitution should be the will of the people, a widely acknowledged truth including in the Chinese Constitution.¹⁵⁴ However, if the people are the speaker, the provisions can be very illogical—who is the listener or the objectors of the prohibitive provision? The government or the Communist Party? But the government or the party cannot be the objects of the prohibitive provisions. Are the people speaking some nonsense in the basic law of the country? Or there is someone else being the listeners? Who are they?

To answer this question, it is necessary to define the political term “the people” first. The phrase in the preamble “all socialist working people, all patriots who support socialism and all patriots who stand for reunification of the motherland” is the model answer in the Chinese high school Politics text books and the Report of Government Work.¹⁵⁵ Clearly, not all Chinese are the Chinese People. Therefore, some of the prohibitive clauses in China’s Constitution are the words from the Chinese People to the other Chinese citizens, which might be small number of Chinese. In other words, it is

¹⁵³ See *id.* art. 49.

¹⁵⁴ *Id.* pmbl. & art.2.

¹⁵⁵ Zheng fu gong zuo bao gao [Gov. Work Rep. of China], Ren min ri bao [The People’s Daily], June 27, 1957, at 4. (P.R.C.) It is also available at http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/ziliao/2004-10/12/content_2081284.htm.

some citizens' rights against other citizens. They may or may not be the "class enemy." In the Qi Case, the defendants are certainly not the enemies of the people. To the contrary they are part of the people according to the definition given above. But, Qi has the education right given by Article 46 mentioned above, and Article 5 provides: "All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated."¹⁵⁶ So, technically, the defendants can be sued strictly according to the constitution.

Of course, there are prohibitive clauses for the agents of government, but the usually used "shall not" seems comparatively less powerful.

The focus of the Chinese constitution is not in separating and limiting the power of the government, but in what a citizen should do or not. The Constitution is not everything, and there is something that a constitution should not provide.¹⁵⁷ Like a Chinese idiom says "talk much, error much" or "talk much, lies much." The Constitution works the same way. To promise too many rights in an ambiguous language which cannot really be

¹⁵⁶ Xian Fa [Constitution of People's Republic of China], art.5 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

¹⁵⁷ See Qianfan Zhang, Xian fa bu ying gai gui ding shi me? Wei xian fa shi shi qing chu ji dian zhang ai [What Should Not Be in the Constitution: To Clear Several Textual Impediments to the Constitutional Implementation], Hua dong zheng fa xue yuan xue bao [Journal of the East China University of Politics & Law], Vol. 2005(3), 25-33, (2005). It is available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=29893 (last visited Oct. 7th, 2007).

realized or examined just in order to make the text sound sweet certainly does not contribute to the dignity of the “mother law.”¹⁵⁸ “Most importantly, constitutionalism implies respect for individual rights and contemplates some means of assuring that respect . . .”¹⁵⁹ Whatever its contents, a constitution will not be able to provide for every possible right or freedom. Many things must be settled by practice because “over-anticipation is a fault of pedantry and of distrust.”¹⁶⁰ Because of the disadvantages of the Constitution of China, there are even phenomena like “benign unconstitutionality”¹⁶¹ to be discussed.¹⁶² Also, the language of the Constitution of China is the target of criticism.¹⁶³

¹⁵⁸ China's Constitution Touches Citizens' Daily Life, People Daily (English version), Wednesday, December 05, 2001. It is also available at http://english.people.com.cn/200112/05/eng20011205_85954.shtml (last visited Oct 13, 2007). Huang Songyou, a chief judge from the Supreme People's Court of China, said, "Among all kinds of laws applied in China, the Constitution used to be a source of embarrassment." "On the one hand, the Constitution is honored as the state's basic law, acting as the 'mother' of various laws and regulations; on the other hand, the majority of its content has been placed, neglected, 'on the shelf' in China's judicial activities, having no practical legal effect."

¹⁵⁹ Louis Henkin, *Revolutions and Constitutions*, 49 La. L. Rev. 1023, 1035 (note 28) (1989).

¹⁶⁰ Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J. 229, 258 (1990).

¹⁶¹ See Zhang Qianfan, *Constitutional Variability and Local Experiment*, China Journal of Law, Vol. 29 Issue 1, pp63-73, p73, 2007. “‘Benign unconstitutionality’ is a phenomenon attributed to the fact that the constitution and central laws have excessively restricted local autonomy.”

¹⁶² *Id.*, at 72. “Thus, our local economic and political reforms are ‘illegal’ or ‘unconstitutional’, not because these reforms are illegitimate, but because our constitution and laws are regulating something they should not interfere with.”

¹⁶³ See Deborah Cao, *Chinese Law: A Language Perspective* = Shuo Fa 122 (Ashgate Publishing, Ltd. 2004).

B. The vertical flowing direction of power: top to bottom, not bottom to top

The power of government in China is said to be authorized by the people as Article 2 of China's Constitution says: "All power in the People's Republic of China belongs to the people."¹⁶⁴ Almost the same expression appeared in the United States Constitution in the preamble. However, as mentioned above, the similar language can have opposite meanings. In the U.S., people are born free and choose their own leaders through free elections.¹⁶⁵ In China, it seems just the opposite. In its legal culture, freedom is the result of a long hard struggle of the Chinese people and their great leader:

...the Chinese people of all nationalities led by the Communist Party of China with Chairman Mao Zedong as its leader ultimately, in 1949, overthrew the rule of imperialism, feudalism and bureaucrat-capitalism, won a great victory in the New-Democratic Revolution and founded the People's Republic of China. Since then the Chinese people have taken control of state power and become masters of the country.

Constitution of the People's Republic of China, Preamble.¹⁶⁶

¹⁶⁴ Xian Fa [Constitution of People's Republic of China], Art.2 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

¹⁶⁵ Jean-Jacques Rousseau, *The Social Contract* at ch. 1 (Maurice Cranston trans., Penguin Books 1968) (1762).

¹⁶⁶ Xian Fa [Constitution of People's Republic of China], pmbl. (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>,

However, the structure of the Chinese government does not allow “the Chinese people” to easily grab their power in “their own hands.” The government is the one who is authorized to exercise the power. China is declared to be “a unitary state”¹⁶⁷ and possesses features like¹⁶⁸

- 1) Formal power and authority is located at the national centre, and sub-national government and other local units do not exercise any political powers independently of the central authority.
- 2) The local or regional units of government exercise powers and authority that are delegated to them by the centre and may also be withdrawn by it.
- 3) The central government may at any time re-draw or abolish the boundaries of local or regional units.
- 4) The actions and policies of the central government control and override the policies and actions of sub-national levels of government.

There is one President¹⁶⁹ and a State Council which make up the executive branch with broad but limited power under the strong control of the National People’s Congress (NPC)

last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

¹⁶⁷ *Id.* pmbl.

¹⁶⁸ See Ivo D. Duchacek, *Comparative Federalism: The Territorial Dimension of Politics* 234-75 (New York: Holt, Rinehart & Winston 1970).

¹⁶⁹ Xian Fa [Constitution of People’s Republic of China], Chap. 3, § 2 (promulgated by the National People’s Congress of P.R.C., Mar. 14, 2004, effective Dec. 4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

– the legislature of the state.¹⁷⁰ The NPC is “the highest organ of state power,”¹⁷¹ where all the other organs originated. Its authority includes amending the Constitution,¹⁷² interpreting the Constitution,¹⁷³ supervising the enforcement of the Constitution,¹⁷⁴ electing¹⁷⁵ and removing the President of the Supreme People's Court.¹⁷⁶ So The NPC is actually the center of the Chinese government, where all the powers are assigned. The Supreme People's Court is only one of the agencies under its control. In such a situation, to ask the legislature to give up a law they made can be as hard as asking a tiger for a coat made of its fur.¹⁷⁷

¹⁷⁰ See *id.* art. 80.

¹⁷¹ See *id.* art. 57.

¹⁷² See *id.* art. 62.

¹⁷³ The Standing Committee of NPC has the power to interpret the Constitution according to Art. 67 (1), so the NPC of course has this power. See *id.* art. 67 (1).

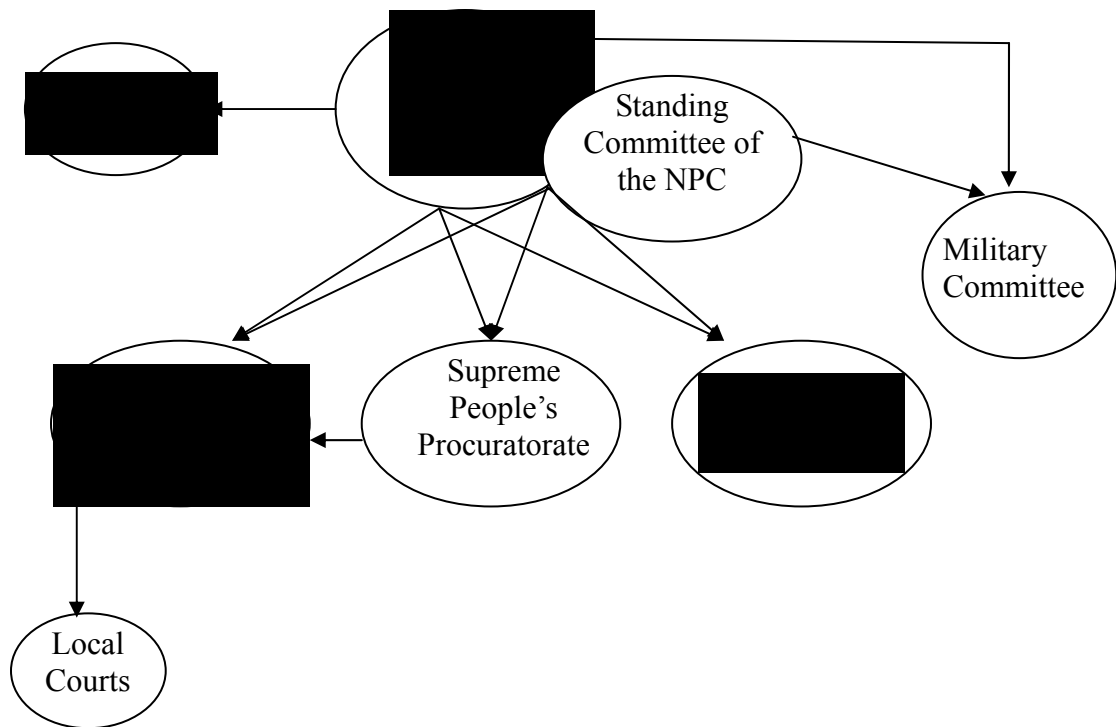
¹⁷⁴ Xian Fa [Constitution of People's Republic of China], Art. 62 (2) (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec. 4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

¹⁷⁵ See *id.* art. 62 (7).

¹⁷⁶ See *id.* art. 63 (4).

¹⁷⁷ See Eva Pils, *Asking the Tiger for His Skin: Rights Activism in China*, 30 Fordham Int'l L.J. 1209, 1286 (2007).

Chart 1. The Government Structure of the People's Republic of China¹⁷⁸



In the judicial system, the local courts are subject to the higher courts. Actually, the executive branch's structure is transplanted in the judicial system. The relationship between judges of different levels is the same as the relationship between officials in an executive government agency: the higher over-rank the lower and there is hardly any independence between them.¹⁷⁹ It is not surprising to observers of Chinese history and

¹⁷⁸ Stephanie Donald & Robert Benewick, *The State of China Atlas* 56-57 (University of California Press 2005).

¹⁷⁹ Ren min fa yuan zu zhi fa [Organic Law of the People's Courts of the People's Republic of China], Art. 17 (Adopted at the National People's Congress on July 1, 1979, and revised on September 2, 1983, December 2, 1986, and October 31, 2006; promulgated by the National People's Congress of P.R.C., Oct., 31, 2006, effective July 1, 1979). LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=5623&keyword=Organic%20L>)

politics, who note that China's judges have for centuries looked to their superiors for guidance in deciding cases.¹⁸⁰ The judgment of a trial court might already be affected by its superior court. So there is no need for the supreme people's court to have no original jurisdiction case to try, however, with the "replies" or interpretations, it can affect any lower court's judgment of any case. Therefore, no wonder that in its nearly sixty years history, China's Supreme People's Court did not really try any case, but played the role of an instructor in many cases. The relation between higher and lower courts may make appeals lose their function.¹⁸¹ In the Qi case, the High Court of Shandong Province asked the Supreme Court's opinion. The High Court humbled itself to depend on the Supreme Court's will and denied its own authority and ability to try such a case independently. To ask for and obey the instructions of a higher office is a typical way in which the executive agencies work.

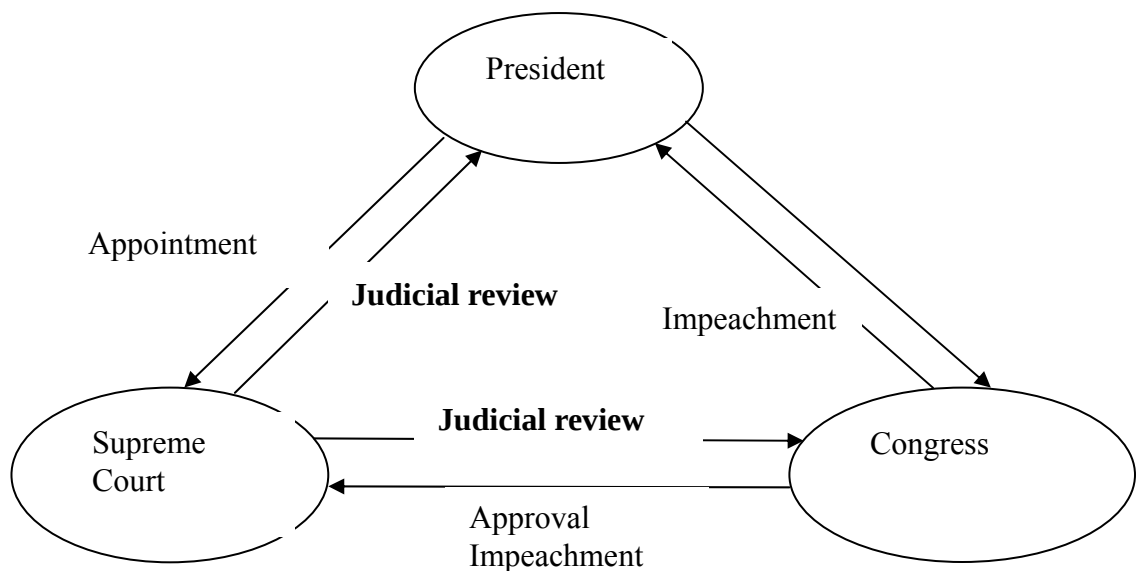
Compared with China, the structure of the government of United States is very different: the U. S. Government is separated into three branches and the government power is assigned between them. Although the lines between the authorities of each branch can be somewhat blurry, theoretically each has a way to counter-balance the others. For the Supreme Court, this balance is affected through the power of judicial review. See the chart below:

aw last visited Oct. 13, 2007). Article 17 provides that "The judicial work of people's courts at lower levels is subject to supervision by people's courts at higher levels." See also He Weifang, *Zhong guo si fa guan li zhi du de liang ge wen ti* [Two Issues on the Supervision Mechanism in the Judicial System of China], Social Sciences in China, 1997 (6), 117-30 (1997).

¹⁸⁰ Wang Zhiqiang, Case Precedent in Qing China: Rethinking Traditional Case Law, 19 Colum. J. Asian L. 323 (2005).

¹⁸¹ See He Weifang, *Si fa de li nian yu zhi du* [The Idea and System of Judicature] 132 (China University of Political Science and Law Press 1998).

Chart 2. The Government Structure of the United States of America



The power flows like a circle between each of the 3 powers: the Supreme Court's depends on the President for judicial appointment and the approval of the congress. However, it can influence the two with its special power of judicial review, as the least dangerous branch,¹⁸² but very "extraordinarily powerful" compared with its equivalents in other countries in the world.¹⁸³

Also, in the government structure, U.S. courts are relatively independent of each other. The two courts systems – federal and state – assure the independence principle, although

¹⁸² The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁸³ Alexander M. Bickel, *The Least Dangerous Branch* 1 (1962). (Noting that "the least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known.")

intricately interwoven. State courts may apply not just the laws and the constitution of their state, but also the laws and Constitution of the United States.¹⁸⁴ The independence makes the lower courts exercise a “decentralized judicial review”¹⁸⁵ more effectively.

C. The courts’ position in the government’s structure: no judicial independence in both history and reality

China's constitutional structure is unitary and centralized, and the constitutional structure provides for five political-legal state organs,¹⁸⁶ including (1) the State Council; (2) the President of the PRC; (3) the Judiciary; (4) the Procuratorate; and (5) the Central Military Commission.¹⁸⁷ Plus, “China is a socialist country where the CPC is the permanent ruling party.”¹⁸⁸ In the structure of China’s government, the courts are not in the charge of the executive branch technically. However, with the very limited power and authority, the courts cannot help being affected by the administrators of the government. It is a tradition in the ancient Chinese government structure that the local executive

¹⁸⁴ Tahirih V. Lee, *Exporting Judicial Review from the United States to China*, 19 Colum. J. Asian L. 152, 155 (2005).

¹⁸⁵ See Mauro Cappelletti, *Judicial Review in the Contemporary World* 46-60 (1971).

¹⁸⁶ Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 54 (1997).

¹⁸⁷ Xian Fa [Constitution of People’s Republic of China], Art. 94, 95 (promulgated by the National People’s Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

¹⁸⁸ Zhu Guobin, *Constitutional Law*, in *Introduction to Chinese Law* 36 (Wang Chenguang & Zhang Xianchu eds., 1997).

magistrates are also the judges of local trial courts.¹⁸⁹ As is not true in the Anglo-Saxon tradition, the judges have served as the jury and prosecutors.¹⁹⁰ This value judgment logic is similar to what was called Kadi-Justice by Max Weber¹⁹¹ in reference to Arabic traditions. Such a tradition which lasted for thousands of years has gradually changed in the last 100 years though it still has strong influence in modern China. The U.S. legal tradition of separating the executive and judicial powers dates back the Independence War and is also a common tradition of all the common law countries dates back to hundreds of years ago,¹⁹² following the European tradition since the twelfth century.¹⁹³

The National People's Congress of China and its Standing Committee have the ultimate authority to interpret law¹⁹⁴ and to enforce the Constitution.¹⁹⁵ As China is a

¹⁸⁹ Xiang Gongpi, *Zhong Guo De Fa Zhi Xian Dai Hua* [The Modernization of Chinese Legal System] 291 (China's University of Politics and Law Press 2004).

¹⁹⁰ Eileen Tamura, *China: Understanding Its Past* 118 (Hawaii: University of Hawaii Press 1998).

¹⁹¹ See Max Weber, *Economy and Society* 976 (G. Roth & R. Wittich ed. 1968). See also Max Weber: *Critical Assessments* 1 Vol. III, p. 151, Note 22 (London & New York: Routledge, Peter Hamilton ed. 1991).

¹⁹² U.S. Const. art. I, II & III. Three branches are created in the Constitution. The Legislative, composed of the House and Senate, is set up in Article 1. The Executive, composed of the President, Vice-President, and the Departments, is set up in Article 2. The Judicial, composed of the federal courts and the Supreme Court, is set up in Article 3.

¹⁹³ 4 *Encyclopedia Britannica* 525-6 (Encyclopedia of China Publishing House, Int'l Chinese ed., 1999).

¹⁹⁴ The Standing Committee of NPC has the power to interpret the Constitution according to Art. 67 (1), so the NPC of course has this power. See *id.* art. 67 (1).

¹⁹⁵ Xian Fa [Constitution of People's Republic of China], Art. 62 (1) & (2) (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec. 4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>,

civil law more than a common law country,¹⁹⁶ courts have no formal power to make laws in the sense that judicial decisions are not binding precedents. Similarly, courts are not empowered to interpret administrative regulations. The ultimate authority over the interpretation and application of such rules rest with the issuing agency. Even with this limited authority, Chinese courts are subject to the supervision by the people's congresses and even the procuratorate's checking power.¹⁹⁷ The Procuratorate is a "Soviet-style institution."¹⁹⁸ Court officials typically are outranked by public security and other law enforcement officials in the Party hierarchy, limiting their influence over Communist

last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007). Article 62 provides that "The National People's Congress exercises the following functions and powers: (1) to amend the Constitution; (2) to supervise the enforcement of the Constitution; ..."

¹⁹⁶ In China judges are not supposed to create any new rules but to apply the existing ones – there are no case laws and no precedent has a binding force to later cases, although the cases published in the periodicals of the Supreme People's Court have some influence on the following cases. See Nanping Liu, *"Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court*, 5 J. CHINESE L. 107, 108 (1991).

¹⁹⁷ Xian Fa [Constitution of People's Republic of China], Art. 67 (6) & 135 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec. 4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007). Article 67 provides that "The Standing Committee of the National People's Congress exercises the following functions and powers: ... (6) to supervise the work of the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate." Article 135 provides that "The people's courts, the people's procuratorates and the public security organs shall, in handling criminal cases, divide their functions, each taking responsibility for its own work, and they shall coordinate their efforts and check each other to ensure the correct and effective enforcement of the law."

¹⁹⁸ Tahiri V. Lee, *Exporting Judicial Review from the United States to China*, 19 Colum. J. Asian L. 152, at 161 (2005).

Party policy related to legal work.¹⁹⁹ “The centralized ruling tradition contributed to Chinese people’s lack of familiarity with judicial independence.”²⁰⁰

Originating from and subject to the legislature, affected by the executive agencies, the courts of China can hardly be blamed for their lack of independence. The reason for the weakness of judicial branch is a result of the whole design of the political structure or the Constitution itself.

D. The judges of China

Constitutional review requires highly qualified judges. In both the United States and China, there are somewhat complicated mechanisms for selecting judges.

In the United States, there are basically three ways to select judges with some minor variations.²⁰¹ The first method is by appointment. This way applies to principal judges in the federal system, like the Justices of Supreme Court, the Circuit Court Judges and the

¹⁹⁹ Xian Fa [Constitution of People’s Republic of China], pmbl. (promulgated by the National People’s Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007). *See also* Deng Xiaoping, *Upholding Four Cardinal Principles (Mar. 30, 1979)*, in *Selected Works of Deng Xiaoping (1975-1982)* 166, at 172 (Bureau for the Compilation and Translation of Works of Marx, Engels, Lenin and Stalin Under the Central Committee of the Communist Party of China, trans., 1984). In March of 1979, Deng Xiaoping announced that in order to carry out China's four modernizations, "we must uphold the four cardinal principles ideologically and politically." *Id.* One of the four principle is “We must uphold the leadership of the Communist Party.”

²⁰⁰ He Weifang, *Three Key Issues in the Reform of the Judicial System in China*, Social Science of China (English Version)(Feb. 2002) LAWINFOCHINA (http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=24540, last visited Oct. 13, 2007).

²⁰¹ Justice William J. Brennan et al., *Fundamentals of American Law* 57 (Alan B. Morrison ed., Oxford University Press 1996).

District Court Judges.²⁰² They must be appointed by the President and approved by the Senate,²⁰³ and they have lifetime tenure authorized by the Article 3 of the Constitution.²⁰⁴ The second method is election, which is widely used by states.²⁰⁵ The last one is to combine the two methods above together, in which voters have a chance to say “no” to a not well-performing judge in his or her “retention election.”²⁰⁶ For most jurisdictions, American judges are members of their state’s bar.²⁰⁷

China has the largest population of the world. In spite of the peaceful nature of most Chinese, the number of suits is very large. In the year 2006, there were more than 8.1 million suits tried and closed.²⁰⁸ However, the number of judge of China has reached 210,000 in 2002.²⁰⁹ So the burden of every judge is only 29 cases per year in 2002.²¹⁰ It

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 58.

²⁰⁵ *Id.* at 58.

²⁰⁶ *Id.* at 58.

²⁰⁷ *Id.* at 173.

²⁰⁸ Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong zuo bao gao 2007(The Work Report of the Supreme People’s Court 2007), LAWINFOCHINA (<http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=blgf&Gid=704645013>, last visited Oct. 13, 2007).

²⁰⁹ Wang Chenguang, *Wo guo fa guan de chong zu yu fen liu yan jiu* [Research on the Re-organization and Re-division of Judges], *Fa lv ke xue* (Xi bei zheng fa da xue xue bao) [Science of Law - Journal of Northwest University of Political Science and Law], Issue 2004 (3), pp44-50, p44 (2004).

²¹⁰ Lei Yonggui, *Guan yu wo gua fa guan yuan e zhi du gou jian de shi zheng kao cha* [The Authentic Research into the Construction of Judicial System for Specified Number of Personnel], *Yang zhou zhi ye da xue xue bao* [Journal of Yangzhou Polytechnic College], Vol. 9 (3), Issue 2005 (9), pp. 30-33, 30 (2005)

is not a big number compared with an American judge, who tries on average ten times as many as his Chinese colleague does.²¹¹ In the Marbury case, in spite of some political interruption and delay, after the argument on Feb. 11, 1803, the judgment was given only 13 days later on Feb 24 by the Supreme Court of U.S. In such a case, the justices in the Supreme Court showed incredible decisiveness. In the Qi case, Qi filed the suit in April 1999 and got the final judgment in August 2001— without the obstacles or interruptions by legislature, the case lasted for more than two years. What is the reason for such low efficiency?

In U.S. as Justice Holmes said, "[t]he life of the law has not been logic; it has been experience,"²¹² Article III judges are appointed for life, and they can only be removed through the impeachment process. Those who are nominated are typically very accomplished private or government attorneys, judges in state courts, magistrate judges or bankruptcy judges, or law professors. The judiciary plays no role in the nomination or confirmation process.²¹³ Federal judges abide by the Code of Conduct for United States Judges,²¹⁴ a set of ethical principles and guidelines adopted by the Judicial Conference of

²¹¹ Wang Liming, *Si fa gai ge yan jiu* [Research on the Judicial Reform] 467, *Fa lv chu ban she* [Law Press, 2001].

²¹² Justice Oliver Wendell Holmes Jr., *Common Law* 1 (1881).

²¹³ U.S. Const. art. III.

²¹⁴ The Code of Conduct for United States Judges governs the conduct of United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges, initially adopted by the Judicial Conference on April 5, 1973 known as the "Code of Judicial Conduct for United States Judges." At its March 1987 session, the Judicial Conference deleted the word "Judicial" from the name of the Code. Substantial revisions to the Code were adopted by the Judicial Conference at its September 1992 session. Section C. of the Compliance section, following the code, was revised at the March 1996 Judicial Conference. Canons

the United States. The Code of Conduct provides guidance for judges on issues of judicial integrity and independence, judicial diligence and impartiality, permissible extra-judicial activities,²¹⁵ and the avoidance of impropriety or even its appearance. They have a distinguished history of service to the legal profession through their writing, speaking, and teaching. This important role is recognized in the Code of Conduct, which encourages judges to engage in activities to improve the law, the legal system, and the administration of justice. Rich experience not only gives them deep understanding in law but also high credit and respect from the public. The state court judges are also bound by no less strict rules. So far, this standard and the election system of judges work well.²¹⁶

However, in China, according to the Article 9 of the Judges Law, a judge only has to meet flexible and relatively easy-achieved requirements as follows:

- (1) to be of the nationality of the People's Republic of China;
- (2) to have reached the age of 23;
- (3) to endorse the Constitution of the People's Republic of China;
- (4) to have fine political and professional quality and to be good in conduct;
- (5) to be in good health; and
- (6) to have engaged in the legal work for at least two years in the case of graduates of law major of colleges or universities or of non-law majors of

3C(3)(a) and 5C(4) were revised at the September 1996 Judicial Conference. Canon 3C(1)(c) was revised at the September 1999 Judicial Conference. The Compliance Section was clarified at the September 2000 Judicial Conference. It is available at http://www.uscourts.gov/guide/vol2/ch1.html#N_1_ (last visited Oct. 13, 2007).

²¹⁵ 28 U.S.C.A. § 455.

²¹⁶ Justice Richard B. Sanders, *Judge-election system works well*, The Seattle Times, Aug. 2005, It is also available at http://seattletimes.nwsourc.com/html/opinion/2002428265_sanders09.html (last visited Oct. 13, 2007).

colleges or universities but possessing the professional knowledge of law, and among whom those to assume the posts of judges of superior People's Courts and of the Supreme People's Court shall have engaged in the legal work for at least three years; or to have engaged in the legal work for at least one year in the case of those who have Master's Degree of Law or Doctor's Degree of Law, or those who have Master's Degree or Doctor's Degree of non-law majors but possess the professional knowledge of law, and among whom those to assume the posts of judges of superior People's Courts and of the Supreme People's Court shall have engaged in the legal work for at least two years.

The judicial personnel who do not possess the qualifications as provided by item (6) of the preceding paragraph prior to the implementation of this law shall receive training; the specific measures shall be made by the Supreme People's Court.

For the places where it is really difficult to apply the academic qualification as provided by the sixth item of the first paragraph, after being examined and determined by the Supreme People's Court, the academic qualification for judges may be eased for a specific period as two-year graduates of law major of colleges and universities.

Fa guan fa [Judges Law of the People's Republic of China], art. 9.²¹⁷

The requirements are simple and loose, which in fact means anybody can be a judge if permitted by the government. It may be possible that an unmarried graduate from a law

²¹⁷ Fa guan fa [Judges Law of the People's Republic of China], art. 9 (promulgated by National People's Congress June 30, 2001, effective July 1, 1995), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=1861&keyword=law%20of%20judges>, last visited Oct. 13, 2007).

school in his or her early 20's can try a divorce case of a 60 years old couple. And he or she does not even have to be a law school student or a bar member, not to mention legal experience in accordance with Article 9 (6) above. Therefore, the Chinese courts consist of various personnel: mainly legal professionals, retired military officers, and others transferred from other agencies of government.²¹⁸ Lack of professionalization is perhaps one of the reasons that a lower court may ask for higher court's opinion for a case on trial and the reason for low efficiency.

The Presidents of the People's Supreme Court of China in the past made a lot effort to change such a situation, as the former Presidents Zheng Tianxiang and Jiang Hua called on to related agencies not to put in office demobilized and transferred army men in from the 1980s.²¹⁹ Legal scholars also complained about this situation a lot. However, even a complaint in a temperate tongue could lead to a violent disagreement. After a paper in the South of China published an essay of a famous law professor mildly doubting the qualification of transferred army men judges, writers from the army attacked his view wildly with much longer articles in several influential papers published by the military, especially at a political angle.²²⁰ This is not surprising to anybody who is familiar with the modern history of China. The military is fully controlled by the

²¹⁸ Si fa gai ge bao gao: hong guo si fa gai ge bao gao[Report on the Judicial Reform of China: The Reform of the Chinese Procuratorate and Court System] 71 (Sun Qian & Zheng Chengliang ed., Fa lv Press [Law Press], 2004).

²¹⁹ He Weifang, [Yun song zheng yi de fang shi] The Way to Deliver Justice 8 (Shanghai: Sanlian Bookstore, 2002).

²²⁰ *Id.* at 261-99.

Communist Party of China²²¹ and the most political part of Chinese government structure.²²²

Such a composition of judicial agencies cannot contribute much to the reputation authority of the court system in the heart of the public. In addition, the dependent position of the court as discussed above, put the judges in an unfortunate situation: on one side, they are respected, not for their outstanding ability and flawless morality but the power in their hands; on the other side, they are ignored, not only for their position in the government and strictly limited power, but also for the impression of judges in common people's minds. It is said that in a conference of government, the court's representatives called on an increase of the salary of judges; representatives from the financial department countered with a question: "What for? At what point are you better than the others?" The jurists could not answer.²²³

Another inescapable question is the phenomenon of corruption in the Chinese judicial system.²²⁴ As scholars pointed out "the problem of judicial corruption is more severe now than it has been in the past. In 2004 alone, two members of a Higher Level People's Court and two officials in a Higher Level People's Procuratorate, both provincial-level

²²¹ Marc Rosenberg, *The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System under the Constitution and Major Statutes of the People's Republic Of China*, 9 U. Miami Int'l & Comp. L. Rev. 225, 234 (2001). "The members of the State Central Military Commission are also members of the Communist Party's Central Military Commission."

²²² Stephanie Donald & Robert Benewick, *The State of China Atlas* 58 (University of California Press 2005).

²²³ He Weifang, [Yun song zheng yi de fang shi] *The Way to Deliver Justice* 8 (Shanghai: Sanlian Bookstore 2002).

²²⁴ See Transparency International, *Global Corruption Report 2007*, New York: Cambridge University Press, 151 (2007).

institutions, were investigated for corruption and bribery. In the same year, 35,031 government officials were tried for corruption and bribery, and more than 1275 of those bribery and appropriation cases involved more than ¥ 1 million.”²²⁵

Can all in such a group of people be trusted with the responsibility and authority to interpret the Constitution and judge cases in accordance with such a complex code? It is hard to give a positive answer for both the policy-maker and the public.

E. Different Trends of American Law and Chinese Law

Interestingly, as China is trying to refer to the experience of American jurisprudence, the American legal system also experienced doubt and criticism.²²⁶ The appearance of critical legal studies movement was a reflection,²²⁷ including the critics on judicial review power doubting whether it is effective or even harmful,²²⁸ and also whether the court’s power could properly promote social reforms.²²⁹ The political structure of China is obviously more convenient for reforms, as shown by the several changes²³⁰ during the modern history of China. However, the problem of policy-over-law style is more and

²²⁵ Cai Dingjian, *The Development of Constitutionalism in the Transition of Chinese Society*, 19 Colum. J. Asian L. 1, 3 (2005).

²²⁶ Judge Charles W. Pickering, *A Price Too High: The Judiciary in Jeopardy* 263 (Stroud & Hall 2007).

²²⁷ See generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983).

²²⁸ Mark Tushnet, *Taking the Constitution away from the Courts* 1 (Princeton University Press 1999).

²²⁹ See David Schultz, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's the Hollow Hope: Can Courts Bring about Social Change?* 12 J.L. & Pol. 63, 63 (1995).

²³⁰ David Curtis Wright, *The History of China* xx (Greenwood Press 2001). There is a timeline of historical events happened after the Communist Party began its reign.

more serious. A too flexible system cannot lead to any confidence in its stability. A legal systematization of politics is called for by scholars.²³¹

Under the effect of liberalism, private rights constitute the basis of the political theories.²³² Now a tide of emphasizing the public interests grows up. Many people have started to think that sometimes private rights should be subject to the interests of the public particularly in several areas, like intellectual and real property.²³³ However, in China, the returning of the private rights is still on its summit. Extremely strong public power is more and more doubted and private rights have been written into the newly amended Constitution of People's Republic of China.²³⁴

²³¹ See Stephanie Balme, *The Judicialisation of Politics and the Politicisation of the Judiciary in China (1978-2005)*, 5 Global Jurist Frontier 1, at 1 (2005).

²³² Encyclopedia of Social Work 116 (National Association of Social Workers, 1987). See also Albrecht Wellmer, *Endgames: The Irreconcilable Nature of Modernity: Essays and Lectures* 47 (The MIT Press 2000).

²³³ See for example Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 Geo. L.J. 1015, 1015-63 (2006). See Jeffrey J. Wechsler, *This Land Is Our Land: Ranchers Seek Private Rights in the Public Rangelands*, 21 J. Land Resources & Envtl. L. 461, 461-87 (2001).

²³⁴ Xian Fa [Constitution of People's Republic of China], art.13 (promulgated by the National People's Congress of P.R.C., Mar. 14, 2004, effective Dec.4, 1982), LAWINFOCHINA (<http://www.lawinfochina.com/law/display.asp?db=1&id=3437&keyword=constitution>, last visited May 11th, 2004). It is also available at the official website of Chinese government: http://english.gov.cn/2005-08/05/content_20813.htm (last visited Oct. 13, 2007).

When the jurists are said to be too powerful, too activist,²³⁵ or even “tyrannical”²³⁶ in the United States, their equivalents in China are gradually growing up to attract more and more attention.

Any change a country is making should depend on the specific condition it is confronting. Although in different directions, both countries are moving on to adapt to their new time and new situation.

²³⁵ Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism”*, 92 Cal. L. Rev. 1441 (2004).

²³⁶ See Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 Regent U. L. Rev. 111 (1998). “As they are today...Americans have often been concerned about judicial activism, judicial tyranny, evolutionary jurisprudence, rendering unconstitutional opinions, and the like.” at p127-128. See also Mark Sutherland, etc., *Judicial Tyranny - the New Kings of America?* (Amerisearch, Inc. 2005).

CHAPTER V

CONCLUSION: A LONG WAY TO GO WITH A HEAVY BURDEN

It has been 200 years since the *Marbury v. Madison* case established the judicial review mechanism in the United States in 1803. The later cases proved how important the case is in protecting the authority of Constitution, balancing the legislative, executive and judicial powers of government, and defending human rights. Without judicial review the country will be in the danger that the constitution is only a couple pieces of paper.²³⁷ The People's Republic of China has been in such a danger of this for decades. Now is the time to eliminate such danger. However, there is always a long distance between ideal and reality, sometimes necessity and possibility. The impractical text of the Constitution, the strong effect from other branches and the problems in the judicial system itself make necessary and urgent judicial reform are unlikely to be finished as soon as needed. Nevertheless, the judicialization of the Constitution is gradually happening in this ancient eastern country.

The *Qi Yuling v. Chen Xiaoqi* case was a likely one to become the so called “first constitutional case” of China. Its faults were criticized by many scholars, and they are too true to deny. However, the meaning of the *Qi Yuling v. Chen Xiaoqi* case is not how wonderfully it applied a provision of the Constitution of China or how “correctly” it understands the meaning of “judicial review.” But it is an admission of the idea that “China thinks the constitution need to be reviewed and its present review system needs to be improved.” It is also a signal of beginning of this process.

²³⁷ See Cass R. Sunstein, *On Property and Constitutionalism*, in *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* 383, 394 (Michel Rosenfeld ed., Duke University Press 1994). “Without judicial review, constitutions tend to be worth little more than the paper on which they are written.”

China's favorable balance of trade always elicits complaints by some States, but China also likes importing, from Marxism to Boeing Aircrafts.²³⁸ The judicial review system of constitutionality is on the list of imports and the United States is an attractive place of origin. But how much of the system can be imported is questioned. Although there are deep differences between the two legal systems, it cannot be a reason for rejecting such a way of protecting the people. The Qi case displays the possibility that it may work for China.

However, for the common Chinese courts to effectively use the power of judicial review as the U.S. does, some preconditions must be satisfied: first, the text of China's Constitution must be amended to make it more practicable with more limitation to the government; second, the court's position in the government must be elevated and independent from the other branches, especially the legislative agencies' policy; third, every court must be independent in the process of trial and not affected by the higher courts' opinions; fourth, more qualified judges are needed; fifth, the requirements for judges need to be more delicately amended. Without the conditions above, the judicial review of constitutionality in China is only a form or a performance.

²³⁸ Xin Li, *China Eyes Billions in U.S. Deals Will Buy 80 Boeing Aircraft, Lift Restrictions on Beef Imports*, Wash. Times, April 12, 2006, at C10. See also *Air Travel Set to Grow in China, Boeing Says Company Raises Its Forecast for Aircraft Business Asia*, Int'l Herald Trib., Sept. 19, 2007, at 20.

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