Japanese System of Judicial Review and Its Significance to China*

Wu Xinping**

1. The Establishment

Judicial review, in constitutional law, means reviewing by courts the constitutionality of formative instruments such as laws, ordinances, rules and regulations and of administrative actions. According to Article 81[1] of the Japanese Constitution (1947), judicial review is the power of the Japanese Supreme Court to review the constitutionality of any law, order, regulation, or official act. Obviously, this sort of judicial review is derived from the American doctrine of judicial review. However, Japanese scholars did not all agree to this. During the early period of the enforcement of the Japanese Constitution, the question of how to understand Article 81 of the Constitution and of what kind of system of judicial review should be established in Japan was fiercely discussed and debated among the Japanese scholars of constitutional law. Opinions of constitutional scholars in Japan were divided into at least two schools.

As for judicial review, there are at least two different doctrines in the world: American doctrine of judicial review and European doctrine of judicial review. Since the Japanese legal culture is a mixture of the American experience and European experience with the Japanese way of thinking, opinions of

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**Visiting Professor, Graduate School of International Cooperation Studies, Kobe University; Professor of Law, the Institute of Law and the Graduate School, Chinese Academy of Social Sciences; and Editor-in-Chief, CASS Journal of Foreign Law.

1. Article 81 of the Constitution stipulates, "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."

the Japanese scholars concerning judicial review were divided in the way as the Japanese legal culture was formed: American school of judicial review and European school of judicial review. Because the power of judicial review is exercised by ordinary courts in the United States and by special constitutional courts in European countries, e.g., in Austria and Germany, these two different opinions were also called school of ordinary court review and school of constitutional judgment respectively.

School of Ordinary Court Review. The American doctrine of judicial review is originated from the Supreme Court decisions on Marbury v. Madison[2] and some other constitutional cases. In the Anglo-American legal tradition, courts have the power to interpret laws in adjudicating cases. It was based on this power of legal interpretation and on Article 5 of the American Constitution which makes the Constitution the "supreme law of the land", that Justice Marshall declared that the court has the power to review the constitutionality of laws. According to the American system of judicial review established by constitutional cases, the court reviews the constitutionality of a law only when the court deciding a case in which specific interests of the parties are concerned, and no law will become the object of review if the interests of parties in a case are not concerned with the law, or parties in a case do not have the stand to challenge the constitutionality of the law. And a law declared unconstitutional is invalid and has no legal validity[3]. The school of ordinary court review in Japan insisted that Article 81 of the Japanese Constitution which grants to the Supreme Court the power to review the constitutionality of any

2. 5 U. S. (1 Cranch) 137, 2L. Ed. 60 (1803).
3. As for the validity of a law declared unconstitutional, opinions are different in the United States. Some hold that a law rendered unconstitutional only loses its applicability to that particular case, and the case is decided as if such law was not in existence. The decision of the court or the ground on which the court rendered its judgment may serve as the precedent to the decisions of similar cases, but the law is not abolished (Shephard v. Wheeling, 30 W. Va. 479 4S. E. 635 (1887). Others have the opinion that an unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as though it had never been passed (Norton v. Sheby County, 118 U.S. 425, 454 (1885).

law, order, regulation or official act and Article 98 which declares the Constitution to be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions of the Constitution have legal force or validity, are indicative of the Japanese adoption of the American doctrine of judicial review, and the Japanese Supreme Court reviews the constitutionality of a law only when the law is related to a specific case, because the Japanese Supreme Court is an ordinary court in nature.

As happened in the United States, opinions of the Japanese scholars of this school concerning the validity of a law declared unconstitutional are divided. The opinion represented by Professor Kaneko held that an unconstitutional law is invalid in accordance with Article 98 of the Constitution. Its being invalid is the result of its being unconstitutional. Professor Kaneko also held that the decision of the Supreme Court has a general binding effect as a final judgment over all national organs and all matters, and accordingly the law being held unconstitutional loses its validity absolutely[4]. Another opinion held that according to Article 98 of the Constitution, no unconstitutional law is valid, but the power of judicial review of the Supreme Court must be appropriate for a law court. A law court must decide only practical and specific case concerning parties. Therefore, the Supreme Court only have the power to review the constitutionality of a law that is to be applied to a specific case. This opinion was regarded as a proper request for the Court not to encroach upon the power of the Legislature, which, as provided in the Constitution, is the highest organ of state power and the sole law-making organ of the state[5].

School of Constitutional Judgment. The European doctrine of judicial review is represented by the system of judicial review in Germany. According

4. Kaneko, Judicial System, Kokka Kakkai Zassi Vol.60 No.12.
5. Ukai, The Effect of Decisions Holding Statute Unconstitutional, Kokka Gakkai Zassi Vol. 62 No. 2.

to the Basic Law of the Federal Republic of Germany, a special constitutional court is established to review the constitutionality of laws. Some Japanese scholars held that Japan has adopted the system of constitutional judgment. They argued that, in Japan, the power of judicial review of the constitutionality of laws is solely vested in the Supreme Court and inferior courts do not have such a power. This is similar to the constitutional judgment provided in the German Basic Law and in the Austrian Constitution. The Supreme Court is the court of final resort of ordinary judgment as well as the constitutional court of the nation[6].

Supreme Court Opinion Concerning the Style of Judicial Review. As for the question of what kind of judicial review Japan should have, the Japanese Supreme Court should have the final say. The Court in 1948 in Komatsu v. Japan[7] rejected the opinion of constitutional judgment and interpreted Article 81 as an explicit provision adopting the American type of judicial review. However, the argument was not over.

The question of whether judicial review in Japan should be the continental or American type was again presented in Suzuki v. Japan[8]. In the case, the plaintiff petitioned the Supreme Court to declare the established paramilitary police reserve unconstitutional as a violation of Article 9. The plaintiff directly challenged the doctrine of American type of judicial review with three arguments: (1) The American Supreme Court, lacking express constitutional authority to determine the constitutionality of laws, was limited to reviewing statutes for constitutionality in the process of deciding cases. In contrast, the Japanese Supreme Court, explicitly empowered by Article 81 to determine the constitutionality of any law, must have the authority to pass upon statutes in

6. Toyoji Kakudo, The Doctrine of Judicial Review in Japan, Osaka University Law Review, No. 2 1953.
7. Komatsu v. Japan, 2 Keishu 801, 806 (Sup. Ct., G. B., July 8, 1948).
8. Suzuki. v. Japan, 6 Minshu 783 (Sup. Ct., G. B., Oct. 8, 1952).

the abstract, because "surely blanket authority expressly granted must mean something more than no provision at all." (2) Article 79[9] was included in the Japanese Constitution precisely because the Court was authorized to function as a special constitutional court. (3) Because of the high qualifications required of justices by Article 41 of the Court Organization Law[10], they were qualified to issue abstract pronouncements on constitutional questions. An unanimous Court in Suzuki v. Japan rejected the plaintiff's arguments by holding that the Court had power to consider only constitutional questions raised in concrete legal disputes. The Court noted that though the plaintiff based his petition on Article 81, the language of the article only referred to a "court of last resort". The Court reasoned that if it had the power to make such abstract judgment, statutes would be frequently challenged, possibly resulting in the Court's dominating the other two branches of government, violating the basic principle of democratic government, and that the three powers are independent, equal, and immune from the interference of the other[11].

Today, the question of how to understand the Japanese system of judicial review is still debated between the school of American style of judicial review and the school of constitutional judgment. And the argument within the school of American style of judicial review is also alive.

2. The Operation

(1) Overview of the Operation

According to some Japanese scholars, the operating of the system may be

9. Article 79 requires the appointment of the judges of the Supreme Court be reviewed by the people at the first general election of members of the House of Representatives following their appointments, and be reviewed again at the first general election of members of the House of Represesntatives after a lapse of ten years, and in the same manner thereafter, and a judge of the Supreme Court may be dismissed by the majority of voters.

10. According to Article 41 of the Japanese Court Organization Law, justices of the Supreme Court shall be appointed from among persons of broad vision and extensive knowledge of law, who are not less than 40 years of age. Ten of the fifteen justices must have been either district or High Court judges with at least ten years of experience, or summary court judges, prosecutors, lawyers, or law professors with at least twenty years of experience.

11. Herbert F. Bolz, Judicial Review in Japan, Hastings International and Comparative Law Review, Vol. 4, No. 1.

clarified in two stages: the stage of self-restraint and the stage of active use of judicial review. It is widely accepted that before 1973, the Supreme Court was self-restraint and remarkably reluctant to exercise the power of judicial review. Some scholars even criticized the Court's conduct as "abstention from judicial review", rather than merely self-restraint[12]. Since 1973, the Court has become active to use the power of judicial review[13].

Professor Koba, in summarizing the experience of the Japanese system of judicial review, divides the last fifty years of operating of the system into four stages. During the first stage, dating from 1947 to 1966, constitutional decisions made by the Court were negative in nature, and cases of human rights were decided in favor of public welfare rather than to protect the rights of the plaintiff. During the second stage, dating from 1966 to 1973, the Court played a positive role in human rights protection and concrete norms of judicial review were developed. Since 1973, the Japanese judicial review got to its third stage, during which the Court become conservative. After 1980, the system entered its fourth stage of operating, during which the Court tends to turning away from constitutional issues and is reluctant to have cases decided by the Grand Bench, in which constitutional cases are decided[14].

During the last 50 years, in exercising the power of judicial review, the Japanese Supreme Court have decided a lot of constitutional cases. However, Japanese scholars are not satisfied with this. And almost all the Japanese constitutional scholars are critical to the operating of the system. According to Professor Koba, there are four problems concerning the operating of the Japanese system of judicial review. First, of the cases decided by the Supreme Court, only a few are concerned with constitutional issue and there are only

12. Okudaira, The Japanese Supreme Court: Its Organization and Function, 3 Law Asia 67, 91 (1972).
13. Herbert F. Bolz, Judicial Review in Japan, Hastings International and Comparative Law Review, Vol. 4, No. 1.
14. Koba, Judicature and Judicial Review in 50 years, CASS Journal of Foreign Law, No. 1, 1997.
15. Koba, Judicature and Judicial Review in 50 years, CASS Journal of Foreign Law, No. 1, 1997.

six cases in which laws were held unconstitutional[15]. Second, Supreme Court decisions tend to affirming actions taken by authorities rather than to be critical to them. Third, constitutional decisions have less theoretical significance, and decisions on many cases are logically confused. Fourth, there is a tendency that the Court is reluctant to deal with constitutional issues directly[16].

In analyzing the reasons why the Japanese system of judicial review does not operate as well as it is expected, Professor Ito Masami has the following opinions: (1) The Japanese people have the spiritual tradition of "reconciliation", and are used to respect political institutions rather than to be in conflict with them. (2) In order to maintain the stability of laws, it is difficult to override the conditions that have been lasted for a long period of time. (3) The justices of the Supreme Court are not conscientious of the Court's function as a constitutional court, and pay less attention to constitutional claims. (4) In order to avoid having cases decided by the Grand Bench, decisions are often made to affirm the constitutionality. (5) It is difficult to have the minority opinions maintained[17].

Herbert F. Bolz, an American observer, summarized the factors that have impeded the development in Japan of the powerful American style of judicial review as follows: (1) Judicial reaction to radical efforts to achieve unilateral disarmament in the courts after having failed to achieve this goal through the political process; (2) The appointment of conservatives to the Court and unity of outlook among the official bureaucracy; (3) Social attitudes discouraging resort to the legal process to resolve disputes; (4) Characteristics of the Japanese legal profession, including the small number of lawyers and judges, lack of experience in constitutional litigation, and civil law modes of thought;

16. Koba, Judicature and Judicial Review in 50 years, CASS Journal of Foreign Law, No. 1, 1997.
17. Koba, Judicature and Judicial Review in 50 years, CASS Journal of Foreign Law, No. 1, 1997.

premacy; (6) Impediments inherent in the pattern of judicial organization, such as the Supreme Court's administrative responsibilities, the justices' short tenure on the bench, and the unwieldy number of justices on the court[18].

Professor Koba analyzed the reasons for the non-active operation of the Japanese system of judicial review. He points out, in regard to the non-active operation, both the justices and the system are to blame. The justices of the Supreme Court are familiar with the handling of civil and criminal cases. However, as for constitutional interpretation, they might not be very clear-minded, and sometimes they are inclined to take constitutional issues as political questions. Furthermore, he examined the status of the Supreme Court in the court system and challenged the system of judicial review itself. He holds that although the Court has the power to review the constitutionality of laws, in its practice, it functions as a court of appeal of ordinary cases, and judicial review is only its secondary function. This is different either from the Constitutional Court in Germany which handles constitutional cases concentratedly, or from the American Supreme Court which actually acts as a constitutional court in deciding cases of appeal. Therefore, as to the system of judicial review, he thinks that Professor Ito's idea that it is necessary for Japan to adopt the continental style of judicial review is pertinent to the question[19].

However, there are some opinions that are different from those mentioned above. Herbert F. Bolz points out, though criticized for timidity in the use of judicial review, the Japanese Supreme Court has in fact voided more acts of the national legislature than the United States Supreme Court in an equivalent number of years in its early period. Between 1790 and 1858, the American Court invalidated two acts of Congress; between 1947 and 1978, the Japanese

18. Herbert F. Bolz, Judicial Review in Japan, Hastings International and Comparative Law Review, Vol. 4, No. 1.
19. Koba, Judicature and Judicial Review in 50 years, CASS Journal of Foreign Law, No. 1, 1997.

Court voided five acts of the Diet. Though the early United States Supreme Court also declared unconstitutional several state laws, it showed "remarkable" restraint vis-a-vis the national legislature. As the Japanese Supreme Court has gradually acquired experience in exercising judicial review, it has become more willing to challenge the Diet in significant legal areas[20].

(2) Analysis of the Reasons for Non-active Operating.

All the above mentioned opinions concerning the non-active operation of the Japanese system of judicial review are reasonable to some extent, and some of these opinions have already touched the edge of the essence of the question. However, they have not got into the core of the issue and figured out the substantial reasons.

Whether the Japanese Supreme Court acts as a constitutional court or as an ordinary court of last resort with the power of judicial review is a matter of the form of the system of judicial review. Certainly, the form of the system is very important. But, what is more important is the essence of the system, the purpose of the system, or the spirit of the system.

(a) Purpose and Spirit of Judicial Review

Judicial review, as a constitutional mechanism, is originated in the United States. In the American constitutional law, at least in theory, the essence, or purpose, or spirit of judicial review may be summarized as follows: checks and balance, rule of law and human rights protection.

One of the basic principles in the American Constitution is separation of powers, and the essence of separation of powers is checks and balance. According to the American Constitution of 1787, the President is vested with executive power, Congress with legislative power, and Supreme Court and

20. Herbert F. Bolz, Judicial Review in Japan, Hastings International and Comparative Law Review, Vol. 4, No. 1.

inferior courts with judicial power. These three organs are on the same level and have equal status. It is generally recognized that, among these three departments, the Supreme Court is the weakest one. The Congress makes laws which have binding force on the Court in deciding cases. The President appoints justices of the Court with the consent of the Senate. However, before Marbury v. Madison, the Supreme Court had no power to check other departments, and therefore, there was actually no balance among the legislative, executive and judicial departments. It is the power of judicial review enjoyed by the Supreme Court that help achieve the ideal of balance in the American constitutional system. It is generally accepted that the need for checks and balance gave rise to the establishment of the principle of judicial review.

Rule of law is a generally accepted principle of constitutional law. Many scholars of law have defined the meaning of the rule of law. A. V. Dicey, Joseph Raz, John Rawls, Geoffrey Walker, all have given their definitions to it[21]. According to their definitions, the ideas of the rule of law may be briefly summarized as follows: (1) Law that is constitutional, rational, undiscriminating, prospective, clear and applicable; (2) Government under law; (3) Supremacy of law; (4) Certainty, generality and equality of law; (5) Independence of the judiciary; (6) Social justice.

In Marbury v. Madison, Chief Justice Marshall emphasized the principle of rule of law frequently. He points out, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." The constitution is a superior paramount law, "a legislative act contrary to the constitution is not law". "The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as

21. Geoffrey Walker, The Rule of Law, Melbourne University Press, 1988.

other departments, are bound by that instrument."[22] It is based on this reasoning that the American doctrine of judicial review is developed.

Human rights protection is another important constitutional principle. In modern constitutional theory, a person enjoys human rights simply because he or she is born as a human, and human rights are inviolable by anybody with any means. A person's rights can be restricted only when the exercise of his or her rights is an encroachment of the rights of others. To protect human rights is the ultimate purpose of government. Human rights set the boundaries for the power of government, and the exercise of governmental power is restricted by human rights. Human rights are safeguarded by the constitution. Encroaching upon human rights is a violation of the constitution. All the laws, regulations, orders, rules and decisions enacted, issued or made by government are supposed to protect human rights, and any such instrument or action violating human rights contravenes the constitution, and therefore has no legal effect. The principal purpose of judicial review of constitutionality of laws and administrative actions actually is to protect human rights from being encroached by any law, regulation or order of government. For instance, in the United States, most of the cases brought to court that are of constitutional importance are cases of protection of individual rights.

If the above mentioned checks and balance, rule of law and human rights protection are the essence or purpose or spirit of judicial review, it would be easier to understand what kind of system of judicial review established by the Japanese Constitution, and why the Japanese system of judicial review does not operate actively.

According to the Japanese Constitution, state power is divided into legislative power exercised by the Diet, executive power by the Cabinet, and judicial power by the Supreme Court. To this point, we may say that there is separation of powers in the Japanese constitutional system. As for the rule of law

22. Marbury v. Madison, 5 U. S. (1 Cranch) 137, 2 L. ED. 60 (1803).

and human rights protection, they are often advocated by the Japanese scholars as important principles of the Japanese Constitution. Therefore, we may come to the conclusion that checks and balance, rule of law and human rights protection are also the purpose or spirit of the Japanese system of judicial review and hence the Japanese system of judicial review may be rendered as a system of American style.

But, why this system of American style with checks and balance, rule of law and human rights protection as its principles can not operate as well as it is expected?

To answer this question we need to analyze these principles in Japan.

(b) The Principle of Checks and Balance and the Japanese Practice of Judicial Review

In the Japanese Constitution, indeed, state power is divided into legislative, executive and judicial powers. However, the mechanism of checks and balance is weak, for the status of the Diet is not the same as the other departments, whereas this is one of the important features of separation of powers and the principle of checks and balance. According to the Japanese Constitution, the Diet is the highest organ of state power (Article 41). The Cabinet, in exercise of executive power, shall be collectively responsible to the Diet (Paragraph 3 Article 66). The Prime Minister is designated among the members of the Diet by a resolution of the Diet (Article 67). If the House of Representatives passes a non-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse, unless the House of Representatives is dissolved within ten days (Article 69). This is to say, although separation of powers does exist in Japan, the constitutional status of these three departments are not equal because the legislative power is supreme. If there is one power that is superior over the other, real checks and balance could hardly be achieved. Although the

Prime Minister may dissolve the House of Representatives within ten days after the House of Representatives passes a non-confidence resolution or rejects a confidence resolution (Article 69), this only happens on very rare occasions. Lacking the spirit of checks and balance probably is one of the important reasons why the Japanese Supreme Court is not active to exercise the power of judicial review.

Theoretically speaking, because the laws are enacted by the Diet which is the supreme organ of state power (Article 41), the validity of laws should not be challenged by any other organs of state power. If a law is found unconstitutional, only the Diet itself has the power to invalidate it, because to invalidate a law is within the framework of legislative power. From this analysis, legislative supremacy is non-questionable and should be protected from any encroachment. However, the exercise of the power of judicial review is a sort of judicial supremacy, and this judicial supremacy is embodied in Articles 81 and 98 of the Constitution. However, if the power of judicial review is fully exercised, judicial supremacy would be competing with legislative supremacy, or the legislative supremacy would be encroached. Therefore, it is reasonable for the justices of the Supreme Court to be hesitating in exercising the power of judicial review, for psychologically, they are afraid of encroaching upon the legislative supremacy established in the Constitution. Furthermore, the Constitution does not make it clear as to what kind of power of judicial review the Court is supposed to exercise. Should the Court enjoy abstract power of judicial review and review the constitutionality of laws generally, which means it acts as if it were a constitutional court, or should the Court only exercise the power of judicial review in adjudicating cases in which interests of the parties are concerned with the constitutionality of a law? As to this question, Japanese scholars of constitutional law have been arguing for decades. In this situation, it is safe for the justices of the Supreme Court to exercise the power

of judicial review only as an ordinary court of last resort, rather than to act like a constitutional court, in order to avoid competing with legislative supremacy.

(c) The principles of Rule of Law and Human Rights Protection and the Japanese Practice of Judicial Review

Frankly speaking, the principles of rule of law and human rights protection are embodied in the Japanese Constitution: (1) The Constitution is regarded as the supreme law of the nation and no law, ordinance, imperial rescript, or other act of government contravening the Constitution will have legal effect or validity (Article 98). (2) The supremacy of the Constitution is safeguarded by the system of judicial review (Article 81). (3) The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold the Constitution (Article 99). (4) Human rights guaranteed by the Constitution are regarded as inviolable even by way of legislation (Article 97). (5) No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law (Article 31). (6) All the people are equal under the law (Article 14).

What is written in the code of law is not exactly the same as the reality. This is the truth almost in every country. And this is true of Japan, too. In the society of Japan, there are some traditions that impeding the normal practice of the rule of law and efficient protection of human rights. As observed by many scholars, first, the Japanese people has the tradition of reconciliation. People are used to settling disputes privately by themselves rather than going to court to seek judicial decision. To be confronted with in court is regarded as a kind of shame. Therefore, although the Constitution stipulates that no person shall be denied the right of access to the courts, people are reluctant to bring a suit to court and the quantity of cases decided by courts

are much less than that in the Western countries. Secondly, people in Japan are very submissive and respectful to governmental authorities. They seldom question or challenge the legality of governmental actions or seek remedy for damages by the acts of officials or governmental agencies. Therefore, although Article 17 authorizes a person to sue for redress as provided by law from the State or public entity, in case he has suffered damage through illegal act of any public official, people seldom do so. Thirdly, people in Japan are group-oriented rather than individually oriented. They pay more attention to group dedication, rather than to individual rights. Therefore, people in Japan are less conscious of the protection of their individual rights. Under this circumstances, even if the Court had the intention to be active in exercising the power of judicial review, there would not be so many cases in which constitutional issues are involved.

These features of the Japanese society even have a deep influence on the behavior of the Supreme Court itself. First, the Supreme Court is reluctant to overrule a law that is found unconstitutional. For example, in Nakamura v. Japan, the Court gave the Diet an opportunity to amend the law in question before declaring it unconstitutional, rather than to invalidate the law directly[23]. Secondly, throughout the fifty years of the operating of the Japanese system of judicial review, the main tendency of the Supreme Court in deciding constitutional cases is to affirm the constitutionality of laws, rather than to challenge its constitutionality. Thirdly, in deciding cases of human rights protection, the Supreme Court is inclined to emphasize on public welfare and political question doctrine, rather than to protect the rights of the parties in the case[24]. To this analysis, although the principles of rule of law and human rights protection are upheld in the Japanese Constitution, the spirit of the rule of

23. Herbert F.Bolz, Judicial Review in Japan, Hastings International and Comparative Law Review, Vol. 4, No. 1.
24. Masami Ito The Rule of Law: Constitutional Development, Law in Japan: The Legal Order in a Changing Society, edited by Von Mehren and Arthur Taylor, Harvard University Press, 1963.

law and of human rights protection in Japan are not the same as that in the United States, where constitutional decisions are mainly concerned with cases of human rights protection and rights of the parties involved in cases are often upheld.

According to the above analysis, we have discovered that not only the form of judicial review in Japan is not certain and has been disputed for decades, and what is more, in the Japanese system, the spirit of checks and balance, of the rule of law and of human rights protection, which is the inherent essence of judicial review, is relatively weak. Therefore, the Supreme Court is not to blame for not being active in exercising the power of judicial review.

3. Significance to China

(1) The need of the System of Constitutional Review

In recent years, Chinese scholars of constitutional law have been very concerned about the enforcement of the Chinese Constitution and very active in discussing the question of constitutional guarantee. Reasons for this are obvious.

According to the Chinese Constitution, China has adopted a complex system of legislation. Laws are enacted by the National People's Congress (NPC) and the NPC Standing Committee; administrative rules and regulations are promulgated by the State Council, i.e. the Central Government of China; local rules and regulations are made by local people's congresses of provinces, autonomous regions, municipalities directly under the central government, municipalities which are the seats of provinces and autonomous regions, and municipalities designated as bigger cities by the State Council. Besides, in order to meet the legislative needs demanded by the economic reform, NPC has delegated some legislative powers to the State Council, and to the provinces of Guangdong and Hainan. With such a complex system of legislation, the Constitution of China requires that laws and administrative and local

rules and regulations shall not contravene the Constitution, that 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, and that all acts in violation of the Constitution or the law must be investigated (Article 5).

In order to guarantee the enforcement of Article 5, the Constitution has established a system of supervision: (1) NPC has the functions and powers to supervise the enforcement of the Constitution; and to alter or annul inappropriate decisions of the NPC Standing Committee (Article 62). (2) the NPC Standing Committee has the functions and powers to interpret the Constitution and supervise its enforcement; to interpret laws; to supervise the work of the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate; to annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the law; to annul those local regulations or decisions of the organs of state power of provinces, autonomous regions, and municipalities directly under the Central Governemnt that contravene the Constitution, the law, or the administrative rules and regulations (Article 67).

However, the system of constitutional review provided in the Constitution actually does not effectively operate. Of a very large quantity of laws, administrative and local rules and regulations in China, few of them are ever reviewed of its constitutionality or legality, except the Basic Law of Hong Kong Special Administrative Region, which is reviewed of its constitutionality and declared as constitutional by the NPC Standing Committee, and none of the laws, administrative and local rules and regulations were ever annulled or found unconstitutional or illegal either by NPC or by the NPC Standing Committee. Actually, some local rules and regulations have been regarded by constitutional scholars as unconstitutional or illegal. Facing the problems of

constitutional guarantee, both the constitutional scholars and the Government officialls have now recognized the need for an efficient system of constitutional review.

(2) Formulation of the Chinese System of Constitutional Review

China now is very concerned about the enforcement of the Constitution and the law. In order to help the country guarantee the enforcement of the Constitution and the law, constitutional scholars have done a lot of research on the question of constitutional review. Chinese constitutional scholars all agree that to guarantee the enforcement of the Constitution is imperative in China, and for this purpose, the system of constitutional review should be improved or reestablished. However, as to the question how to improve or reestablish the system of constitutional review, the Chinese constitutional scholars hold different opinions: (1) to establish a committee of constitution as a special committee under NPC and NPC Standing Committee, which shall assist NPC and NPC Standing Committee in exercising the power of constitutional supervision[25]; (2) to establish a committee of constitution within NPC, and such committees at provincial level, which shall be independent institutions of constitutional litigation[26]; (3) to establish a constitutional committee under NPC, which shall be a parallel organ with the NPC Standing Committee and exercise the power of constitutional review independently[27]; (4) to establish a special constitutional court, which shall function like its counterpart in Germany; (5) to authorize the ordinary courts, particularly, the Supreme People's Court, with the function of constitutional review. Comment on these opinions should not be made before rendering some analysis.

25. A majority of the Chinese constitutional scholars hold this opinion.
26. Wu jiying, Li Zhiyun and Wang Ruihe, On the Chinese System of Constitutional Litigation, China Law, No. 5, 1989.
27. Liu Jingxing, A Study of the Chinese System of Constitutional Review, Journal of Inner-Mongolian University, No. 1, 1992.

One of the important reasons why the Japanese system of judicial review failed to operate satisfactorily is that the exercise of the power of judicial review is a challenge to the legislative supremacy explicitly established in the Constitution, which the judicial supremacy is reluctant to compete with. Therefore, in reestablishing China's system of constitutional review, the political system as well as legal system of the country must be taken into serious consideration. The system of constitutional review must be in conformity with the political and legal systems. Any attempt to improve or reestablish the system of constitutional review that does not take the political and legal systems into serious consideration will bound to be a failure.

A. Formulating the System of Constitutional Review in the Framework of China's political system

China's political system is the system of people's congresses. Under this system, the state power is divided into legislative power which is exercised by NPC and the NPC Standing Committee, executive power exercised by the State Council, and judicial power exercised by the Supreme People's Court and the Supreme People's Procuratorate and local courts and procuratorates. However, unlike the separation of powers in the United States, the status of these organs of state power are not parallel. NPC is the supreme organ of state power and the NPC Standing Committee is its permanent organ. Both NPC and NPC Standing Committee exercise legislative power of the state. All other organs such as the State Council, the Supreme People's Court and the Supreme People's Procuratorate are organized by NPC and are accountable to NPC and NPC Standing Committee. It is obvious that, in the Chinese political system, legislative supremacy is upheld and can not be challenged by any other organs of state power. The arrangement in the Constitution that NPC and NPC Standing Committee are empowered to supervise the enforcement of the Constitution

is just in conformity with the Chinese political system. According to this arrangement, NPC has the power to review the constitutionality of laws made by the Standing Committee. The constitutionality of laws made by NPC only can be reviewed by NPC itself. Both NPC and the Standing Committee have the power to review the constitutionality and legality of administrative and local rules and regulations. This arrangement ought to work very well, because NPC and NPC Standing Committee are the supreme organs of state power with supreme authority, except for some kind of failure that it is not suitable for NPC to review the constitutionality of laws made by itself. With this arrangement, legislative supremacy is not encroached and the unity and conformity of the political system are maintained. The question is that these legislative organs should be efficiently assisted in exercising their powers of constitutional review. Therefore, the first opinion suggesting a special committee of constitution be established to assist NPC and the Standing Committee in constitutional review is reasonable.

B. Formulating the System of Constitutional Review in the Framework of China's legal system

China's legal system is unique. It is different from either the Anglo-American legal system, or the continental legal system. Laws of China are all statutory laws. China does have court decisions or cases. However, they are not constituted as part of the law. Courts in China are the judicial organs of state power and exercise judicial power independently in accordance with the law. In addition to the courts, China has established the people's procuratorates as state organs for legal supervision, which exercise procuratorial power independently according to law. The courts investigate and decide cases. The procuratorates have the power to investigate cases and to prosecute criminals as public prosecutors. Article 5 requires that all acts in violation of the

Constitution or the law must be investigated. According to the Constitution and the law, the people's courts and people's procuratorates have the power to investigate acts violating the Constitution and the law. Therefore, Article 5 has actually empowered the people's procuratorates to investigate acts violating the Constitution and the people's courts to decide cases in which acts violating the Constitution are involved.

Moreover, in a resolution of the NPC Standing Committee adopted in 1981, the power of interpretation of laws are classified into the power of legislative interpretation which shall be exercised by the NPC Standing Committee when there is the need to supplement or make clear about the boundaries of a law, the power of judicial interpretation exercised by the Supreme People's Court and the Supreme People's Procuratorate in regard to the application of a law, and the power of executive interpretation by the State Council in regard to the execution of a law.

According to this resolution, the Supreme People's Court may interpret a law that is to be applied to a case. The application of a law may involve several aspects: what to apply, how to apply, why to apply and when to apply. In interpreting a law in regard to its application, the Court must answer these questions. In answering these questions, the Court might find a law that contravenes the Constitution, or an administrative regulation that contravenes the Constitution or the law, or a local rule or regulation that contravenes the Constitution, the law, or the administrative rules and regulations. There will be no question if the Supreme People's Court holds an administrative or local rule or regulation unconstitutional or illegal, because the Court has the power to investigate "all acts in violation of the Constitution or the law" as authorized by Article 5 of the Constitution. But, the Supreme People's Court may not hold a law enacted by NPC or NPC Standing Committee as unconstitutional or illegal, although this is also within the sphere of the

authorization of Article 5, because by doing so, it would be violating the legislative supremacy which is an important principle explicitly provided in the Constitution. The proper way for the Court to do is to report the matter to NPC for decision. Even for the administrative or local rules and regulations held unconstitutional or illegal, the Supreme People's Court should not invalidate them directly, because the Constitution has explicitly authorized the NPC Standing Committee to annul those administrative rules and regulations, decisions or orders that contravene the Constitution or the law, and to annual those local rules and regulations that contravene the Constitution, the law, or the administrative rules and regulations (Article 67), and thus the Court lacks the explicit constitutional authorization of doing so. In order to enable the Supreme People's Court to have the competence of invalidating those administrative or local rules and regulations that contravene the constitution or the law, or of invalidating the local rules and regulations that contravene the administrative rules and regulations, it is necessary for the NPC Standing Committee to delegate this power to the Court. Before the Court is delegated this power or empowered to do so, when the Supreme People's Court finds a law, administrative or local rule or regulation unconstitutional or illegal, it is safe for the Court to report the issue to NPC or NPC Standing Committee for the decision. In exercising the power of judicial review, if the interpretation of a specific provision of the Constitution is requested or involved, the Supreme People's Court should report the matter to the NPC Standing Committee for the interpretation, and the NPC Standing Committee, in interpretating the Constitution according to the authorization of Paragraph 1, Article 67 of the Constitution, may make a decision on the issue concerning the constitutionality or legality of a law, administrative or local rule or regulation that the Supreme People's Court is reviewing, or leave the matter to the Supreme People's Court to decide.

According to the above analysis, under the current Constitution, it is practical and applicable for China to establish a mixed system of constitutional review: legislative review by NPC and NPC Standing Committee assisted by a special committee of constitution, combined with limited judicial review by the Supreme People's Court.

(3) The Spirit of Constitutional Review in China.

As analyzed before, the purpose and spirit of constitutional review is much more important than the form. The system is like a human body. The body is just the form of a human. When the life is in the body, the body is alive. When the life is gone, the body is dead. It is true of a system of constitutional review, too. The system will be alive only when the spirit is within it.

While the spirit of checks and balance, of the rule of law and of human rights protection in China is not as strong as it should be in the Chinese political and legal systems, there is still a long way to go before the Chinese system of constitutional review can operate efficiently.

Checks and Supervisions in Constitutional Review in China. The principle of checks and supervision is explicitly provided in the Constitution and the law, however, the state organs or the officials who are empowered to check and supervise others do not have the sense of checks and supervisions. For instance, NPC and the NPC Standing Committee are empowered to supervise the work of the State Council, the Supreme People's Court, and the Supreme People's Procuratorate. However, except to review the working report presented by heads of these organs at sessions or meetings, NPC and NPC Standing Committee seldom exercise this power. In order to enable NPC and NPC Standing Committee to better exercise the power of legislative review of the constitutionality of laws, administrative and local rules and regulations, a

good sense of checks and supervisions is demanded of the members of NPC and NPC Standing Committee. Besides, because the Chinese legal system is characteristic of statutory law and all legal relations are supposed to be regulated in the form of statutory law, it is necessary for China to speed up the making of the law of supervision, in which the mechanism of checks and supervisions should be devised in accordance with the Constitution.

Rule of Law and Human Rights Protection in Constitutional Review.

The principles of the rule of law and human rights protection are also embodied in the Chinese Constitution: (1) The Constitution is the fundamental law of the state[28]. The uniformity and dignity of the legal system is upheld. 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[29]. (2) All citizens are equal before the law. Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and the law[30]. (3) Freedom of the person and personal dignity are inviolable[31]. (4) The people's courts exercise judicial power independently in accordance with law and are not subject to interference by any administrative organs, public organizations or individuals[32]. (5) The people's courts, the people's procuratorates and the public security organs, in handling criminal cases, shall divide their functions, each taking responsibility for its own work, and shall coordinate their efforts and check each other to ensure the correct and effective enforcement of the law[33].

28. The Preamble of the Constitution of the People's Republic of China.
29. Article 5 of the PRC Constitution.30. Article 33 of the PRC Constitution.
31. Article 37 and 38 of the PRC Constitution.
32. Article 126 of the PRC Constitution.
33. Article 135 of the PRC Constitution.

However, it is not surprising that what is written in the Constitution may not exactly the same as what is in reality. Several years ago, some scholars in China even could not agree to the generally accepted concept of the rule of law. They argued that both the man and the law should rule, rather than the law alone should rule. Some other scholars even favored the rule of man by law rather than the rule of law[34]. Now in China, hopefully, legal scholars all agree to the concept of the rule of law, rather than rule of both man and law or the rule of man by law. As for human rights protection, it has just become the interest of research of the Chinese scholars in recent years. Western scholars are often concerned with the conditions of human rights protection in China. But, the Chinese scholars argue that the Chinese concept of human rights protection is different from the western concept, and the conditions of human rights protection in China have been improved greatly and will continue to improve with the development of the society, economy, and culture.

As for the people, like the people in Japan, to protect their rights and freedoms and to settle their disputes with legal means are not their tradition and custom. Confucianism, as one of the excellent cultural heritage of the Chinese people, has been deeply rooted in the Chinese society. However, such Confucius doctrines as *xiaodao* (the doctrine of respect for parents), *zhongyong* (the doctrine of the mean), and *zhongjun aiguo* (the doctrine of loyalty to the master or emperor and to the nation), have both positive and negative effects. For example, the positive effect of the doctrine of respect for parents and the doctrine of loyalty to the master and to the nation is that people have a good sense of respect for their parents, elder relatives, teachers and government authorities, and are dedicated to safeguarding the dignity and interests of the motherland. The negative effect of these doctrines is that more emphasis is laid on duties and obligations rather than on rights and freedoms

34. Rule of Law : Collected Articles on the Rule of Law in China, the Mass Publishing House, 1983.

of individuals. This negative effect results in the consequence that less attention is paid to the protection of rights and freedoms in the society, and citizens themselves are not used to protect their rights and freedoms through legal procedures. And the negative effect of the doctrine of the mean strengthens this negative effect by softly resolving disputes in private. This is just contrary to the principle of the rule of law, which requires disputes be settled through legal procedures. Nowadays, the Chinese people have become more and more used to protect their rights and interests with legal means. But, in order to meet the needs of the rule of law, the people should be further educated in law and in human rights protection.

The Chinese Government takes the practice of the rule of law and human rights protection as basic state policies. It can be anticipated that the conditions of the rule of law and human rights protection in China will be getting better and better in the future. As the conditions of the rule of law and human rights protection in China are getting better, the system of constitutional review will operate fairly well.