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IS IT THE BEGINNING OF THE ERA OF THE RULE OF THE CONSTITUTION? REINTERPRETING CHINA'S "FIRST CONSTITUTIONAL CASE"

Written by Shen Kui[†]*

Translated by Yuping Liu

Translator's Note: The subject of this article is the so-called "first constitutional case" in China. The *Qi Yuling* case is, in a sense, the very first time since the foundation of the People's Republic of China that constitutional provisions have been directly invoked by the Supreme People's Court in a civil lawsuit to protect a citizen's right to receive education, one of the fundamental rights protected by the Constitution. The *Qi Yuling* case, therefore, has given rise to much discussion on issues of judicial interpretation of the Constitution and the Constitution's application in the private domain, as well as the institution of judicial review in China. Professor Shen's article discusses the ramifications of *Qi Yuling*, specifically centering on the theory of constitutional justiciability from a comparative perspective, and the prospects of constitutional justiciability in China.

I. INTRODUCTION

Ms. Qi Yuling, a girl from Zaozhuang Municipality of Shandong Province, may have never imagined that her "struggle for rights" would eventually give rise to "the first case of judicial application of the Constitution." Her case is the subject of extensive discussion and debate within Chinese academia, the legal community, and the media, and has even been referred to as China's *Marbury v. Madison*.¹

The judicial application of the Constitution in the *Qi Yuling*² case is an encouraging development and provides an actual example for the Chinese people who have generally understood the Constitution as existing only in

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* This Translation follows the Chinese practice of placing the family name before the given name. Thus, when sources are later cited in short form, the name used is the author's family name.

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

² See *Qi Yuling v. Chen Xiaoqi Case of Infringement of Citizen's Fundamental Rights of Receiving Education Under the Protection of the Constitution by Means of Infringing Right of Name*, 5 ZUIGAO RENMIN RAYUAN GONGBAO [GAZETTE OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA] 158 (2001) [hereinafter *Qi Yuling v. Chen Xiaoqi Case*].

the abstract. However, this case is only the first step toward true constitutional government. Whether it is the proper step must be determined through serious research and discussion. Western constitutional jurisprudence has developed not only through judicial interpretations of actual cases, but also through scholarly research dealing with issues of constitutional government. The *Qi Yuling* case provides an excellent opportunity for theoretical legal research,³ possibly marking the beginning of a new era in the development of constitutional legal scholarship in China.⁴

³ The Interpretation of Section 4 of Article 22 and Item 3 of Section 2 of Article 24 of the Basic Law of Hong Kong Special Administrative Region by the Standing Committee of the National People's Congress, adopted on June 26, 1999, was also influenced by the *Ng Ka Ling* case decided by the court of last appeal in Hong Kong SAR. This case had attracted wide attention and research by both mainland and Hong Kong constitutional law scholars. However, most people regarded it as insignificant because: (1) the Interpretation was made by the Standing Committee of the NPC rather than Supreme People's Court; and (2) the content of the Interpretation targets the Basic Law of Hong Kong, though its actual effect is in both mainland China and Hong Kong.

⁴ Both Professor Xu Chongde and Professor Mo Jihong think the *Qi Yuling* case has more significance to constitutional law research. According to Professor Xu:

There is no doubt that the application of the Constitution in the *Qi Yuling* case has very significant implications for the protection of citizens' fundamental constitutional rights. However, this is a civil dispute, and strictly speaking, it cannot be classified as a Constitutional case. A series of issues needs to be resolved before a constitutional litigation system with Chinese characteristics can be established. For instance, must a Constitutional Litigation Law similar to Administrative Litigation Law first be enacted? Further, what model of constitutional review should China establish? If ordinary courts may accept and decide constitutional cases, who will coordinate and reconcile those decisions with the National People's Congress and its Standing Committee function of supervising the application of the Constitution? . . . These are significant questions, answers to which are nearly impossible to predict. In a word, although the need is urgent, the way seems quite long. At the very least, if the *Qi Yuling* case can arouse attention and concern for constitutional application, and especially for the need to establish a constitutional supervisory system, it will be a paramount achievement.

Xu Chongde, *The Establishment and Perfection of a System of Constitutional Supervision*, FAZHISHIDAI ZHOUKAN [LEGAL ERA WEEKLY OF THE PEOPLE'S COURT DAILY], Sept. 17, 2001. Similarly, Professor Mo notes:

The theoretical study of the constitutional law in China has progressed in a vacuum due to the lack of actual constitutional cases with legally binding decisions, resulting in theoretical research weak in applicability and purpose. The issuance of the Reply of Supreme People's Court Concerning Whether Civil Liability Arises When the Constitutionally-Protected Fundamental Right of Citizens to Receive Education Is Violated by Means of Violating Rights in a Person's Name ("the Reply") has received wide attention from constitutional law scholars and will likely generate a large quantity of high-quality scholastic treatises. The science of constitutional law will thus progress from mere theoretical design to actual judicial application

Mo Jihong, *Constitutional Law Research Steps into the Phase of Judicial Application*, FAZHISHIDAI ZHOUKAN [LEGAL ERA WEEKLY OF THE PEOPLE'S COURT DAILY], Sept. 17, 2001.

This article will proceed in the following order. Part II briefs the *Qi Yuling* case, the decisions of local courts, and the Reply of the Supreme People's Court. Part III identifies the judicial policy and constitutional justiciability theory underlying the Supreme People's Court's decision in *Qi Yuling*, emphasizing the constitutional justiciability theory, which may function as a precedent in China. Parts IV and V address two questions reflected in the constitutional justiciability theory in *Qi Yuling* case. First, is it necessary for the court to determine constitutional grounds for the plaintiff's claim that her right to receive education was violated by individuals rather than by the government? Second, will the direct application of the Constitution to a private or civil relationship lead to the privatization of the Constitution, and is this tendency positive or negative? Finally, Part VI predicts the prospects of constitutional justiciability in China. The problematic question of whether the constitution may be directly applied to private relationships arises out of the complex relationship between private autonomy and state intervention. Western jurisprudence basically views the protection of individual freedom and the restriction of government power as the essence of modern constitutions. Similarly, the evolution of constitutional justiciability in China should lie in the judicial resolution and scholarly evaluation of actual issues arising from the relationship between government and individuals.

II. THE FACTS OF THE *QI YULING* CASE

In 1990, the plaintiff, Qi Yuling, and one of the defendants, Chen Xiaoqi, were both junior high school graduates from the Tengzhou Municipality No. 8 High School of Shandong Province. Both of them took the pre-selection middle-level training school examination. Chen Xiaoqi failed the exam and thus was not qualified to take the subsequent uniform student recruiting examination. Qi Yuling, however, not only passed the pre-selection examination, but also exceeded the enrollment score for entrusted students⁵ at the uniform examination. Jining Municipality School of Commerce of Shandong Province admitted Qi Yuling and sent her acceptance letter to the Tengzhou Municipality No. 8 Middle School. Chen Xiaoqi fraudulently appropriated Qi Yuling's acceptance letter from the

⁵ [Translator's note] "Entrusted students" are a specific category of students in China. They are usually enrolled with a designated potential employer in their file and after graduation they are supposed to work with this specific employer and cannot choose to work with others. They may change jobs after several years, depending on what conditions are attached by the employer. Generally this type of student can be enrolled with a lower score than other students and in some occasions their potential employers pay partial or full tuition for them.

school, and with the help of her father Chen Kezheng, enrolled in and ultimately graduated from Jining Municipality School of Commerce under Qi Yuling's name. Afterwards, Chen Xiaoqi, still using Qi Yuling's name, took a job with the Tengzhou Branch of the Bank of China.

Upon discovering Chen Xiaoqi's appropriation of her name, Qi Yuling filed a civil suit to Zaozhuang Municipality Intermediate People's Court of Shandong Province. The defendants included Chen Xiaoqi, her father Chen Kezheng, Jining Municipality School of Commerce, Tengzhou Municipality No. 8 High School, and Tengzhou Municipal Education Commission of Shandong Province. The plaintiff claimed that the defendants jointly committed fraud resulting in Chen Xiaoqi being able to study in Jining Municipality School of Commerce using the plaintiff's name, thus violating the plaintiff's right to her name, her right to receive education, and other relevant rights and interests. The plaintiff sought an injunction terminating the defendants' violation, an apology, and compensation for economic loss of ¥160,000 and emotional distress of ¥400,000.

The Zaozhuang Municipality Intermediate People's Court held that the defendant Chen Xiaoqi, with the help of her father Chen Kezheng, appropriated and assumed Qi Yuling's name in violation of Article 99 of the General Principle of the Civil Law, which provides that:

[c]itizens 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.⁶

Second, the court recognized that the right to receive education claimed by the plaintiff Qi Yuling belongs to the category of citizens' general "right of personality," which is the right of freedom for citizens to enrich and develop their human dignity.⁷ However, the court found that the evidence indicated that Qi Yuling actually waived her right to enroll as a "student entrusted to receive education," and that there was insufficient proof to support her claim that her right to receive education was violated.⁸ Consequently, the compensation sought by Qi Yuling was denied. Third, the court held that in

⁶ General Principle of the Civil Law, art. 99 (1986) (P.R.C.) (adopted at the fourth session of the Sixth National People's Congress, promulgated by Order No. 37 of the President of the People's Republic of China on Apr. 12, 1986, effective as of Jan. 1, 1987) (National Information Center of P.R.C. CD-ROM, 2000).

⁷ *Qi Yuling v. Chen Xiaoqi Case*, *supra* note 2, at 159.

⁸ *Id.*

addition to the primary liability of the defendants Chen Xiaoqi and Chen Kezheng for violating Qi Yuling's right to her name, the defendant Jining Municipality School of Commerce must also assume significant liability for knowingly admitting Chen Xiaoqi and allowing her to continue her studies under Qi Yuling's name.⁹ Finally, Tengzhou Municipality No. 8 High School and Tengzhou Municipal Education Commission were also found liable for aiding and abetting Chen Xiaoqi and Chen Kezheng's fraudulent use of Qi Yuling's name.

On the basis of these findings, according to Article 120 of the General Principles of the Civil Law, "[i]f a citizen's right to a personal name, portrait, reputation, or honor is infringed upon, he or she shall have the right to demand that the infringement be stopped, his or her reputation be rehabilitated, the ill effects be eliminated, and an apology be made; he or she may also demand compensation for losses."¹⁰ Under this provision, the Zaozhuang Municipality Intermediate People's 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 Municipality School of Commerce, Tengzhou Municipality No. 8 High School, and Tengzhou Municipal Education Commission must make an apology to the plaintiff Qi Yuling;
- (3) Chen Xiaoqi is liable for ¥ 825 in attorney's fees, and the defendants Chen Kezheng, Jining Municipality School of Commerce, Tengzhou Municipality No. 8 High School, and Tengzhou Municipal Education Commission are liable jointly and severally;
- (4) The damages for Qi Yuling's emotional distress are ¥ 35,000. Chen Xiaoqi and Chen Kezheng respectively are liable for ¥ 5,000, Jining Municipality School of Commerce is liable for ¥ 15,000, Tengzhou Municipality No. 8 High School is liable for ¥ 6,000, and Tengzhou Municipal Education Commission is liable for ¥ 4,000; and

⁹ *Id.*

¹⁰ General Principle of the Civil Law, *supra* note 6.

(5) Plaintiff Qi Yuling's other pleadings are rejected.¹¹

Qi Yuling appealed this decision to the Shandong Province Higher People's Court. In addition to objecting to the calculation of emotional distress damages, she provided proof to demonstrate that she did not waive her right to receive education, and that the respondents jointly violated her right to receive education, resulting in the loss of a series of related interests. Qi Yuling requested (1) compensation from Chen Xiaoqi for her emotional distress resulting from the violation of the right in her name; and (2) compensation from all respondents jointly for her economic loss of ¥160,000 and emotional distress in the amount of ¥350,000 resulting from their joint violation of her right to receive education.¹²

Due to the difficulty of applying the law to these facts, the Shandong Province Higher People's Court submitted Qi Yuling's case to the Supreme People's Court for interpretation.¹³ The Supreme People's Court issued its "Reply Concerning Whether Civil Liability Arises When the Constitutionally-Protected Fundamental Right of Citizens to Receive Education Is Violated by Means of Violating Rights to a Person's Name" ("Reply").¹⁴ The full text of the Reply is as follows:

To Shandong Province Higher People's Court:

We have received your court's *Request for Instructions Concerning the Dispute Involving Rights in a Person's Name between Qu Yuling and Chen Xiaoqi, Chen Kezheng, Jining Municipality School of Commerce of Shandong Province, Tengzhou Municipality No. 8 High School of Shandong Province and Tengzhou Municipal Education Commission of Shandong Province*. After study, we hold, on the basis of the facts in this case, that Chen Xiaoqi and others have violated the fundamental right to receive education enjoyed by Qi Yuling in accordance with the provisions of the Constitution by means of violating rights to a person's name. Because this violation has resulted in actual damages, commensurate civil liability arises.

¹¹ *Qi Yuling v. Chen Xiaoqi Case*, *supra* note 2, at 159-160.

¹² *Id.* at 160.

¹³ According to Article 33 of the *Law of the People's Republic of China of People's Court Organization*, the "Supreme People's Court interprets issues concerning how to apply laws and decrees in trials."

¹⁴ *Qi Yuling v. Chen Xiaoqi Case*, *supra* note 2.

Reply is hereby given.

After receiving the Reply, the Shandong Provincial Higher People's Court held:

Because the respondent Tengzhou Municipality No. 8 High School did not notify Qi Yuling herself about her uniform exam score and the enrollment score for entrusted students, and gave the admission letter to respondent Chen Xiaoqi who fraudulently claimed it, Chen Xiaoqi, with her father's help, was able to go to school using Qi Yuling's name. Also, because Jining Municipality School of Commerce did not strictly examine the enrolled freshmen and accepted Chen Xiaoqi when she could not provide either the exam ticket or valid identification, Chen Xiaoqi was able to assume Qi Yuling's name, resulting in Qi Yuling's losing her opportunity to receive entrusted education. After Chen Xiaoqi was mistakenly enrolled, the respondent Tengzhou Municipal Education Commission helped Chen Kezheng forge physical examination forms. Tengzhou Municipality No. 8 High School helped Chen Kezheng forge student evaluation forms. Jining Municipality School of Commerce violated student file management rules and allowed Chen Xiaoqi to bring her own file so as to provide the chance for Chen Kezheng to exchange the file documents, which allowed Chen Xiaoqi not only to attend school, but also to secure a job, thus prolonging Chen Xiaoqi's tortious conduct. The tort committed was a result of the conduct of Chen Xiaoqi, Chen Kezheng, Tengzhou Municipality No. 8 High School, and Tengzhou Municipal Education Commission, and of the negligence of Jining Municipality School of Commerce. The tortious conduct includes both the violation of Qi Yuling's right to her name and the violation of Qi Yuling's constitutionally-protected right of citizens to receive education. The respondents are liable for the consequences of this tortious conduct and must assume civil liability.

As a result of the respondents' tortious conduct, Qi Yuling had to undergo another year of exam preparation for higher education. She also had to pay a municipality population-

increasing fee for the transfer of agricultural resident status to non-agricultural resident status, as well as attorney's fees for the lawsuits. These payments are all direct economic losses arising from the violation of her right to receive an education, which shall be compensated by the respondents Chen Xiaoqi and Chen Kezheng, and for which other respondents shall be jointly and severally liable.

To punish the respondents and deter further tortious conduct, the benefits and interests the respondent Chen Xiaoqi has obtained (that is, the salary received in the name of the appellant Qi Yuling less the necessary living expenses of Chen Xiaoqi) are held to belong to Qi Yuling. Chen Xiaoqi and Chen Kezheng shall compensate them and the other respondents shall be liable jointly and severally

In sum, the original decision of the lower court is partly correct in holding that the respondents Chen Xiaoqi *et al.* violated the appellant Qi Yuling's right to her name and finding Chen Xiaoqi liable for corresponding civil liability. However, the original decision lacks sufficient factual grounds for the finding that Qi Yuling waived her right to receive entrusted education. Qi Yuling's request that the respondents assume liability for violating her right to receive education is reasonably justified and shall be upheld.¹⁵

Thus, in accordance with Article 46¹⁶ of the Constitution and the Reply of Supreme People's Court, the Shandong Province Higher People's Court determined that Zaozhuang Municipality Intermediate People's Court's judgment should be partly affirmed and partly reversed and held:

- (1) The respondents Chen Xiaoqi and Chen Kezheng shall compensate Qi Yuling's direct economic loss as a result of the violation of her right to receive education in the amount of ¥7,000, and for which the respondents Jining Municipality School of Commerce, Tengzhou

¹⁵ *Id.* at 161.

¹⁶ The article provides that "[c]itizens of the People's Republic of China have the duty as well as the right to receive education." ZHONGHUA RENMIN GONGHUEGO XIANFA [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA] art. 46 (1982) (P.R.C.).

- Municipality No. 8 High School and Tengzhou Municipal Education Commission are jointly and severally liable;
- (2) The respondents Chen Xiaoqi and Chen Kezheng shall compensate Qi Yuling's indirect economic loss (calculated by the salary Chen Xiaoqi received in the name of Qi Yuling less Chen Xiaoqi's minimum living expenses) as a result of the violation of Qi Yuling's right to receive education in the amount of ¥ 41,045, and for which the respondents Jining Municipality School of Commerce, Tengzhou Municipality No. 8 High School, and Tengzhou Municipal Education Commission shall be jointly and severally liable; and
 - (3) The respondents Chen Xiaoqi, Chen Kezheng, Jining Municipality School of Commerce, Tengzhou Municipality No. 8 High School, and Tengzhou Municipal Education Commission shall compensate Qi Yuling for her emotional distress in the amount of ¥ 50,000.

In reviewing this case, the key issue for Qi Yuling was whether the court properly upheld her claim that her right to receive education had been violated, and whether she could claim damages. According to the damages calculation adopted by the trial court and the appellate court, if the Supreme People's Court did not uphold the right (as did Zaozhuang Municipality Intermediate People's Court), Qi Yuling could only receive the damages for emotional distress resulting from the violation of the right in her name. If the court upheld the right to education (as did Shandong Province Higher People's Court), Qi Yuling would be able to receive all the damages of material loss and emotional distress caused by the violation of her right to receive education. However, since the General Principles of the Civil Law does not explicitly provide the right to receive education and the case is a civil litigation suit, the Shandong Province Higher People's Court had difficulty applying the law to this civil suit. The provincial court, then, submitted the issue to the Supreme People's Court for interpretation. The Supreme People's Court subsequently issued its Reply holding that Chen Xiaoqi, *et al.* had violated Qi Yuling's constitutionally protected right to receive education.¹⁷ The Reply was directed to the case on appeal and

¹⁷ *Qi Yuling v. Chen Xiaoqi Case*, *supra* note 2, at 158-61.

touched upon the concrete disputes in judicial proceedings.¹⁸ Therefore, it is judicial in character as distinguished from other Supreme People's Court interpretations that are legislative in character. Moreover, the Reply directly applied the Constitution as its sole legal basis in deciding whether the tortfeasors should assume civil liability.¹⁹ These two features make this "the first case of judicial application of the Constitution," as it is referred to by the legal community, academics, and the media.²⁰

Whether or not scholars familiar with Western constitutional law view this case as a true constitutional case, the above mentioned position has

¹⁸ *Id.*

¹⁹ Compare this with another interpretation by the Supreme People's Court, *Zuigao Renmin Fayuan Gaunyu Gugong Hetong Yingdang Yanghe Zhixing Laodong Baohu Fagui Wenti De Pifu* [the Reply of Supreme People's Court Concerning Issues that Employment Contracts Shall Strictly Implement Labor Protection Laws and Regulations] in 1988:

After study, we hold that to supply labor protection to employees has been expressly provided in the Constitution. This is the right employees are entitled to and is protected by the State against violation by individuals or organizations. Employers Zhang Xuezheng and Xu Guangqiu shall provide labor protection to their employees in accordance with the relevant laws. However, they included a disclaimer in the recruiting registration form that they bear "no responsibility for injuries incurred during employment." This is a violation of the Constitution and relevant labor protection laws and regulations. It is also against socialist morality. The acts shall be held void.

The Tianjin Municipality Tanggu District People's Court later relied on that decision in deciding *Zhang Lianqi v. Zhang Xuezheng* concerning injury damages. See 1 ZUIGAO RENMIN FAYUAN GONGBAO [GAZETTE OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA] (1989).

²⁰ When a journalist asked Chief Judge Huang Songyou, Supreme People's Court Judicial Committee Member and Chief Judge of the First Civil Division of Supreme People's Court, whether *Qi Yuling's* case was the first case of China's Constitutional justiciability in terms of its direct application of the Constitution in deciding concrete cases, he responded:

Previously the Supreme People's Court issued very few replies concerning cases of indirect application of the Constitution. However the issues in *Qi Yuling* concerned violations of citizens' constitutional rights, as well as and rights provided in laws such as the General Principles of the Civil Law. In the Reply to the principal case, *Qi's* right to receive education is a right difficult for civil law theory to cover and is obviously one of the fundamental rights provided by the Constitution. Had we not directly applied the Constitutional provisions, it would have been hard to provide judicial remedies. Apparently, the Reply established a precedent for the justiciability of the Constitution in China.

See *The Event of Usurpation of Another's Name for School Leads to the First Case of Constitutional Justiciability*, NANFANG WEEKEND, Aug. 16, 2001. See also Huang Songyou, *Constitutional Justiciability and its Significance*, FAZHISIDAI ZHOUKAN [LEGAL ERA WEEKLY OF PEOPLE'S COURT DAILY], Aug. 13, 2001. However, some scholars think that even understanding "the justiciability of the Constitution" as applying to civil cases, the Reply cannot be viewed as the first such decision. This is because the Reply by Supreme People's Court in 1988, *supra* note 19, already had such a character; and prior to the Reply, some local courts had already decided civil cases by directly citing Constitutional provisions. See Yin Xiaohu, *Doubts and Reflections of the Justiciability of the Constitution*, 6 HUADONG ZHENGFA XUEYUAN XUEBAO [E. CHINA INST. OF POL. & L.J.] (2001).

become very popular. It is appropriate, therefore, to analyze the body of jurisprudence governing judicial application of the Constitution as developed by the Supreme People's Court out of this "first constitutional case." It is true that the substance of the Reply is very simple. Chinese judges generally do not engage in detailed reasoning in their decisions, as their Western counterparts often do. Nevertheless, the judges who authored the Reply, recognizing its potential impact on China's rule of law, did publicize their opinions in the media.²¹ Therefore, this Article will explore and comment on China's Constitutional justiciability theory evidenced in the Reply, the case reports published on volume five of the Gazette of Supreme People's Court of 2001, and articles written by Judge Huang Songyou and Judge Song Chunyu.

III. JUDICIAL POLICY AND LEGAL THEORY

Upon closer examination, the Supreme People's Court Reply seemed to have discussed two associated but relatively independent issues. The first issue is whether the Constitution ought to and can enter judicial proceedings as the legal basis for deciding a case. The second issue is why the Constitution was directly applied in the *Qi Yuling* case.

The first issue logically consists of two levels: desirability and feasibility. Desirability seems to be an issue that does not need much justification, especially for scholars acquainted with the literature of Western constitutional law.²² Nevertheless, interpretations of the Reply by the judges of Supreme People's Court should distinguish between these theoretical discussions in terms of their authoritative significance.²³ Judge Huang

²¹ See Huang, *supra* note 20. See also Song Chunyu, *Jurisprudence Reflections on the Constitutional Application in Qi Yuling Case*, FAZHISIDAI ZHOUKAN [LEGAL ERA WEEKLY OF PEOPLE'S COURT DAILY], Aug. 13, 2001.

²² Some scholars advocate direct constitutional application to be applied in judicial proceedings, among them Associate Professor Wang Lei, who named his treatise "The Justiciability of the Constitution." See WANG LEI, XIANFA SIFA HUA [THE JUSTICIABILITY OF THE CONSTITUTION] (2000). According to Wang, the essence of constitutional justiciability is that citizens whose constitutional rights are violated may petition the court directly, and the judge can decide a case with the Constitution as the legal basis. *Id.* Prior to publication of Wang's book, although legal scholars had not widely adopted the term "constitutional justiciability," a constitutional review system had been very thoroughly discussed with three points of view predominating: (1) Ordinary courts conducting constitutional review in trying concrete cases; (2) an independent constitutional court exercising constitutional reviewing power; or (3) establish a constitutional commission under the National People's Congress exercising power. Each of the models would require an amendment to the Constitution.

²³ See Huang, *supra* note 20. To make it clear, the author hereby summarizes his position. First, Constitutional justiciability is necessary to govern the nation in accordance with law and to construct a socialist rule-of-law country. The Constitution first exists as a law, and as with other ordinary laws, has general binding force. Thus, in governing the nation in accordance with law it is necessary to govern the

Songyou did not explicitly mention the feasibility issue. But he argues that the judiciary had an inflexible understanding of the judicial application of the Constitution in the past. He pointed out, however, that the Supreme People's Court, in the *Letter of Reply Concerning the Inappropriateness of Citing the Constitution as a Basis for Convictions and Sentencing in Criminal Judgments*, addressed to Xinjiang Uighur Autonomous Region (the then Xinjiang Province) Higher People's Court in 1955 and in the *Reply Concerning How People's Courts Are to Cite Legally Normative Documents When Producing Legal Documents*,²⁴ addressed to Jiangsu Province Higher People's Court, neither "thoroughly negates" nor "completely excludes" the possibility of applying the Constitution.²⁵ Thus, in reinterpreting the 1955 Letter of Reply and the 1986 Reply, Judge Huang Songyou implies that constitutional justiciability is feasible.²⁶

The Supreme People's Court, in justifying constitutional justiciability, to some extent follows the Western practice of interpreting away the binding effect of outdated precedents by reinterpreting the 1955 Letter of Reply and the 1986 Reply as "not excluding the direct application of the Constitution by courts."²⁷ Legal reasoning reflects judicial policy, and the essence of that policy is very clear: to establish constitutional justiciability. On the one hand, this judicial policy reinforces the authority and dignity of the

nation in accordance with the Constitution. If the Constitution cannot be judicially interpreted directly, citizens' fundamental rights will be unenforceable and the Constitution will lose its authority and dignity. Second, this requirement reinforces the legal effects of the Constitution. As the source of all laws and regulations, the Constitution is indirectly applied through other laws and regulations; however, many of its provisions are not reflected in ordinary laws and regulations. The legal validity of the Constitution would be weakened if not given effect through judicial proceedings. Finally, the Constitution provides the basic principles upon which all cases are decided. Ordinary laws and regulations usually only contain concrete provisions. The scope of the legal relationships they cover is usually narrow and does not provide explicit legal basis for new legal relationships emerging during periods of transition. In contrast, the legal relationships covered by the Constitution are highly principled and general and can accommodate continuously changing social relations. The Constitution provides the legal basis for adjusting social relations and can therefore remedy the defects and gaps of ordinary laws and regulations.

²⁴ *Letter of Reply Concerning the Inappropriateness of Citing the Constitution as a Basis for Convictions and Sentencing in Criminal Judgements*, in ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN SIFA JIESHI QUANJI (10/1949-6/1993) [CORPORA OF JUDICIAL INTERPRETATIONS ISSUED BY SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA (10/1949-6/1993)] 786-87 (1994). For the *Reply Concerning How People's Courts Are to Cite Legally Normative Documents When Producing Legal Documents*, see *id.* at 28.

²⁵ *Letter of Reply Concerning the Inappropriateness of Citing the Constitution as a Basis for Convictions and Sentencing in Criminal Judgements*, in ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN SIFA JIESHI QUANJI (10/1949-6/1993) [CORPORA OF JUDICIAL INTERPRETATIONS ISSUED BY SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA (10/1949-6/1993)] 786-87 (1994). For the *Reply Concerning How People's Courts Are to Cite Legally Normative Documents When Producing Legal Documents*, see *id.* at 28.

²⁶ See Huang, *supra* note 20.

²⁷ *Id.*

Constitution (by way of judicial practice to give it actual legal validity) and the humanism inherent in constitutional government (to safeguard citizens' fundamental rights). On the other hand, it positions Constitutional law to function as a "gap filler."²⁸

This judicial policy was not declared explicitly in the Reply by the Supreme People's Court concerning the *Qi Yuling* case; instead it was declared in the post-evaluation by the Supreme People's Court judges who were involved in making the Reply.²⁹ It not only removed the ideological obstacle to the application of the constitution to the *Qi Yuling* case, but also was a precondition to further explain why the Constitution was directly applied in the *Qi Yuling* case. In the explanation, the Supreme People's Court attempted to give an answer to a more general question; that is, under what circumstances the Constitution can be directly applied in disputed cases. The answer provided by the Supreme People's Court judges, in my view, constitutes a theory of constitutional justiciability, which could be explained by the following syllogism:

- 1) Major premise: When defects and gaps emerge in ordinary laws and regulations so that there are no applicable laws, and when citizens' constitutionally protected fundamental rights are indeed violated, the Constitution can be directly applied;
- 2) Minor premise: In the *Qi Yuling* case, the plaintiff's right to receive education was violated and ordinary laws, in particular the Civil Law, did not explicitly provide for the right to education and could not provide a legal basis for deciding the case;
- 3) Conclusion: Therefore, the constitutional provisions concerning the right to receive education can be directly

²⁸ Judge Huang Songyou used two cases to illustrate the lagging nature of legislation and the function of the introduction of the Constitution into judicial proceedings. The staff of the Beijing Nationalities Hotel brought a suit for the violation of their election rights because the Nationalities Hotel did not issue them voter cards and did not give them notice to participate in the election. The suit was rejected by the Beijing Municipal First Intermediate People's Court on the basis that the plaintiffs had no legal basis for their claim. The second case involved a situation when the Beijing Municipality Zhongguancun High School prohibited a so-called "bad-grade student," Yang, to attend the National Examination for Entry to the Universities so as not to affect their proportion of students entering universities. See Huang, *supra* note 20. However, using the Constitution as a "gap filler" may diminish its supremacy and its functional ability to safeguard fundamental rights.

²⁹ See Huang, *supra* note 20. See also Song, *supra* note 21.

applied to the instant case, and the tortfeasors held civilly liable.

The major premise stems directly from the judicial policy developed by the Supreme People's Court judges. In the instant case, the minor premise is critical, as it addresses the facts of the case to determine if there was a violation of Qi Yuling's right to receive education, and why the Civil Law does not include the right to receive education.

In *Qi Yuling*, the respondents argued that the right to receive education is not a civil right, but a constitutional right, which cannot be applied directly in private suits.³⁰ The respondents argued that Qi Yuling's opportunity to receive education is more properly viewed as a consequence of the violation of Qi Yuling's right to her name, which would also enable Qi Yuling to obtain a sufficient remedy.³¹ The Supreme People's Court, however, rejected this argument. The Court held that, although Qi Yuling suffered violations of her right to her name, her right to receive education, and her right for employment, the primary right violated was the right to receive education.³² The infringement upon the right to her name was only a means to violate her right to receive education, and the violation of her right to employment was the direct consequence of the violation of the right to receive education.³³ Therefore, in its Reply, the Supreme People's Court noted that "Chen Xiaoqi and others have violated the fundamental right to receive education enjoyed by Qi Yuling in accordance with the provisions of the Constitution by means of violating rights to a person's name."³⁴ Had the court adopted the respondents' argument, the amount of damages would not have been greatly affected, because the loss of opportunity to receive education would also be compensated as the consequence of the infringement upon the right to a person's name. The court found, however, that characterizing the tort as one that primarily violated Qi Yuling's right to

³⁰ *Qi Yuling v. Chen Xiaoqi Case*, *supra* note 2.

³¹ *See Song*, *supra* note 21.

³² *Qi Yuling v. Chen Xiaoqi Case*, *supra* note 2.

³³ *See Huang*, *supra* note 20. Judge Song Chunyu did not address the right to employment in his article, but also stated that:

the tortfeasors' infringement upon the right to a person's name is only the means to conduct tortious act. The usurpation of another's right to receive education is the purpose of committing the tortious act, and the loss of opportunity to receive education is also the primary harm caused by the tort.

See Song, *supra* note 21.

³⁴ *Qi Yuling v. Chen Xiaoqi Case*, *supra* note 2.

receive education was more accurate and persuasive based on the facts, and served as a better response to the appellant's pleadings.³⁵

In determining that the Civil Law does not include the right to receive education, the Supreme People's Court rejected the argument that "the right to receive education is also a civil right."³⁶ This determination, however, is less persuasive and somewhat ambiguous. The rejected argument asserted that:

- 1) The right to receive education entitles citizens to obtain and advance their cultural and scientific knowledge in various schools and educational institutions, or by other means. The right to receive education inheres both from public law and from private law. The right to receive education in its private law dimension is the right based on the development and perfection of the traditional notion of the right to human dignity in civil law. The constitutional provision of the citizens' right to receive education does not preempt its existence as a civil right.
- 2) The General Principles of the Civil Law adopts non-exhaustive legal prescriptions in providing civil rights. That is, it is not only rights enumerated in the statute that are protected. For instance, the right of privacy shall be and has been protected by courts when there are damages as a consequence of tort, even if the General Principles of the Civil Law does not specify the right. Likewise, the law does not expressly grant the right to receive education. Consequently, it is a legislative gap requiring judicial interpretation.
- 3) The sophisticated division of labor in modern society makes the right to receive education a necessary condition for an individual's existence and development. The right to receive education in the civil law is equivalent to the development and expansion of the right to human dignity in modern society. The right to receive education in its

³⁵ *Id.*

³⁶ Song, *supra* note 21.

private law dimension is essentially the right to equality and freedom. Thus, it is a civil right.³⁷

The Supreme People's Court judges rejected this argument, stating that "the right to education of the appellant in the instant case is a right that the civil law doctrines are not able to accommodate, but is a constitutionally protected fundamental right of citizens," or that "it is improper to interpret the right to receive education provided in the Constitution as a civil right."³⁸ These statements skate over the issue without detailed explanation.

IV. IS THE CONSTITUTION THE ONLY BASIS FOR CLAIMING THE RIGHT TO RECEIVE EDUCATION?

Is it true that Qi Yuling's claim for the right to receive education is based only in the Constitution? In other words, if the validity of the constitutional justiciability theory is assumed, are there other means of claiming this right?

The claim for the right to receive education would naturally lead one to examine the Education Law.³⁹ Section 1 of Article 9 of the law provides that "[c]itizens of the People's Republic of China have the duty as well as the right to receive education."⁴⁰ Article 81 provides 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 educational institutions, and cause loss or damages, shall be held civilly liable in accordance with this law."⁴¹ In interpreting the two provisions, "the right to receive education" clearly falls within the rubric of "legitimate rights and interests." In addition, while the Education Law does not clearly define who are "the persons to receive education," and therefore, whether Qi Yuling is such "a person" seems uncertain, it is clear that the persons to receive education are not only those already enrolled at school. Qi Yuling was not able to officially enroll in the school due to the tortious act, but she had been admitted and had been issued her admission letter. Therefore, to deem her "a person to receive education" as provided in

³⁷ *Id.*

³⁸ *Qi Yuling v. Chen Xiaoqi Case, supra note 2.*

³⁹ See 3 ZHONGHUA RENMIN GONGHEGUO QUANGUO RENMIN DAIBIAO DAHUI CHANGWU WEIYUANHUI GONGBAO [GAZETTE OF STANDING COMMITTEE OF NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA] 3-13 (1995). The Education Law was adopted at the Third Session of the Eighth National People's Congress, promulgated by Order No. 45 of the President of the People's Republic of China on March 18, 1995, and effective as of September 1, 1995.

⁴⁰ *Id.*

⁴¹ *Id.*

Article 81 is not inappropriate. Hence, the Education Law provides sufficient legal basis to hold Chen Xiaoqi and the others civilly liable.

The Supreme People's Court's "approach to use the 'civil law method' to protect the fundamental rights of citizens in the Constitution"⁴² is not new. Rather, it was done by the legislature in enacting the Education Law, which permits the courts to protect the right to receive education through civil litigation. The only distinction between the legislature's and the Supreme People's Court's approaches lies in defining the nature of the right to receive education. The legislature avoids characterizing it as a fundamental constitutional right or a civil right, while the Supreme People's Court pronounced that the right to receive education was a fundamental constitutional right and not a civil right. Whether it was deliberate or not, the legislature's failure to characterize the nature of the right to education suggests that it did not intend that the right be considered a civil right. Although Article 81 does not enumerate all the acts that violate the legitimate rights and interests of persons to receive education, this does not preclude applying the Education Law in civil litigation.

Judge Song Chunyu notes that "the constitutional law referred to in the Reply is not the Constitution in its narrow sense, rather, it consists of various constitutional-type laws as well as the Constitution itself."⁴³ The fundamental concern and objective of the Education Law, a constitutional-type law, is to protect the right to receive education and the right to freely choose the means of receiving an education.⁴⁴ Any person who restricts or deprives others of the right to equally and freely receive education violates that right.⁴⁵ This interpretation of the Constitution in the Reply is puzzling when compared with the Supreme People's Court's own comments that the *Qi Yuling* case is "the first constitutional case."⁴⁶ According to this logic, every judicial decision applying the Education Law provisions protecting the right to receive education must be categorized as a constitutional case. For this reason, the term "constitutional-type laws" is very confusing.

In fact, the Education Law is not applicable in this case because the tortious act occurred in 1990 and the Education Law became effective on September 1, 1995. Although the trial was conducted after the implementation of the Education Law, following the principle that laws do not have retroactive effect, the court should not have and, indeed, did not

⁴² See Huang, *supra* note 20.

⁴³ See Song, *supra* note 21.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Qi Yuling v. Chen Xiaoqi Case*, *supra* note 2.

decide the case under the Education Law.⁴⁷ Thus, the minor premise in the syllogism posed earlier in this Article is apparently satisfied in this case. However, the argument rejected by the Supreme Court that the right to receive education in the private law context is an expansion and refinement of the right to human dignity deserves reexamination.

The right to human dignity in the civil law is a historical concept that is broad in scope and continuously developing. The General Principles of the Civil Law is intended to protect human dignity and interests through the enumeration of specific rights. In addition to the right to life and health, only the rights of personal name, of portrait, of reputation, and of honor are recognized. The right to freedom is not included. This legislative approach is inconsistent with Western laws or precedents that widely recognize the general right to human dignity.⁴⁸ In practice, however, courts occasionally (and the Supreme People's Court, indeed, usually) embrace judicial flexibility and non-doctrinairism in responding to various claims in civil litigation in order to adapt to rapidly changing economic and social conditions. The evolving concept of a right to privacy in Chinese law is an illustration. The Supreme People's Court has also recognized "the right of human dignity and the right of personal freedom" in its general sense.⁴⁹ The "right of peace," although not mentioned in the Interpretations, has also recently been recognized by the judiciary.⁵⁰

Could this non-doctrinaire approach used in civil trials be adopted in the *Qi Yuling* case and the right to receive education be developed as a concretization of the general right to human dignity in the private law context? First, the essence of the right to human dignity lies in the claim for

⁴⁷ During the discussion of this case in my lecture at Peking University, my student, Gao Xiang reminded me of the inapplicability of the Education Law in this case. I would like to extend gratitude to him here.

⁴⁸ Wang Zejian, *Zhonggong Minfa Tungze Zhi Qinquan Zeren: Bijiaofa De Fenxi* [Tort Liability Under the General Principles of the Civil Law: A Comparative Analysis], in 6 MINFA XUESHUO YU AN LI YANJIU [A STUDY OF CIVIL LAW THEORIES AND CASES] 285 (1989).

⁴⁹ See *The Interpretations Concerning Some Issues on Determining the Liability to Remedy Mental Sufferings Caused by Civil Torts, Article 1, Section 3, 2* ZUIGAO RENMIN FAYUAN GONGBAO [GAZETTE OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA] 51, 51-52 (2001).

⁵⁰ See Wang Shi Zhong, *Ma Jiang Shop Dispute*, DONGFANG XIN BAO [ORIENTAL NEWS DAILY], July 27, 2001 (reporting that Changsha Municipality Yuelu District People's Court decided in a case that the defendant must stop knocking on the floor so as to stop the violation of the right to peaceful life). Beijing Municipality Haidian District People's Court decided in a case that Ms. Song is entitled to damages for the violation of her "right to peace," which was caused by a mistakenly advertised telephone number in a newspaper. See Ma Jun, *Right to Peaceful Life Protected By Law*, BEIJING WANBAO [BEIJING EVENING], Apr. 9, 2001. One scholar thinks the right to peace is not an independent concrete human dignity right but should be regarded as general human dignity right. See Yang Lixin, *Yiban Rengequan Jigi Bachu* [General Human Dignity Right and its Civil Law Protection], <http://www.civillaw.com.cn/case/case1-4.asp> (last visited Jan. 20, 2003).

"individual existence, development, and freedom, and respect and recognition from others."⁵¹ In the abstract, this is difficult to distinguish from the long-standing Western notion of human rights. The right to human dignity, however, cannot logically be regarded as the premise for the violation of a concrete interest in an actual case because all such interests may relate to existence, development, and freedom. Second, in the information age, within an increasingly competitive society, the opportunity to receive a higher education has significant value.⁵² In the principal case, when Qi Yuling filed the suit, she had already lost her job, while Chen Xiaoqi was able to secure a bank job after she assumed Qi's name, and Qi's right to enroll in school.⁵³ Courts should be able to creatively define the right to receive an education as inherent to human dignity under the modern civil law. Lastly, how civil law institutions and legal scholars in other jurisdictions define the right to receive education can also provide valuable references.

It is possible to incorporate the right to receive education in the private law system through creative judicial interpretation of the civil law.⁵⁴

⁵¹ SHI SHANGKUAN, *MINFA ZONGLUN [GENERAL EXPOSITION OF THE CIVIL LAW]* 126 (2000).

⁵² However, this does not mean that the importance of receiving an education has only been demonstrated in modern society, but rather that only in societies where human nature and equality prevail do issues arise on how to create conditions conducive to personal development and to reduce inherent restrictions. The right to receive education is one of the most important social rights. The resumption of systems of examination for admittance to schools and universities after the end of the Cultural Revolution is a reflection of the belief that everyone can obtain corresponding level of education by way of his or her efforts. This belief demonstrates a consciousness of rights. As society has evolved from primarily agricultural, to industrial, to information-based, the right to receive education is more and more closely associated with the free development of individuals.

⁵³ *Qi Yuling v. Chen Xiaoqi Case*, *supra* note 2.

⁵⁴ During the writing of this Article, a question came up to me: "when others violate my legitimate rights and interests, must I identify the specific right or interest violated in order to obtain protection from the court?" After the first draft of this article, I discussed this with Mr. Ge Yunsong, a lecturer of Civil and Commercial Law at Peking University. He said that there are three types of tortious acts in German civil law: first, to intentionally or negligently violate specifically defined rights in the Civil Law; second, is intentionally or negligently violate provisions of other laws that do not specifically define the rights that have been violated; and third, to intentionally violate laws intended to maintain public order, which do not specifically provide a clear definition of the violated right either. Apparently, this seems to provide another way to break through the current judicial practice, which overemphasizes the significance of identifying a defined right in the black letter law in order to grant remedy.

Other scholars have similar viewpoints, arguing that the determination of a tortious act should not be confined to violations of recognized rights. "With tortious acts, one should first be clear what right was violated. Right to life, right to health, right to one's image, right to one's personal name and right to reputation, etc., are all clearly defined personal rights in the civil law. Article 120 of the General Principles of the Civil Law provides that those who violate these categories of rights shall be held civilly liable. For example, it could be argued that the defendant in the principal case appropriated another's name and acted in another's name and, therefore, violated the right to one's personal name. On the other hand, it could also be argued that although the defendant took the plaintiff's name, the primary right violated was the plaintiff's opportunity to receive an education. However, the categories of rights defined in the General Principles of the Civil Law do not include the right to receive an education. In the author's view, even if

However, the incorporation of the right to receive education into private law and the direct application of the Constitution in deciding private disputes have distinct precedents, as well as distinct consequences.

V. PRIVATIZATION OF THE CONSTITUTION: GOOD POLICY OR A DANGEROUS SIGNAL?

In the *Qi Yuling* case, the Supreme People's Court established its basic premise that the Constitution could be judicially applied when defects or gaps emerge in ordinary laws and regulations. From this premise, it follows that in any dispute, whether between private entities (private law relationship), or between a private entity and the State, or a public entity that exercises public power (public law relationship), courts can directly apply the Constitution. Thus, the Constitution, generally regarded as governing only public law relationships, now may be applied in the area of private law. The phrase "privatization of the Constitution," as used in this article, refers to this possible trend.

All disputes are disputes over rights, but judicial settlement is generally based on the prior allocation of rights and obligations by law. However, no law is perfect, and the Constitution is no exception.⁵⁵ Constitutional norms are highly principled and generalized allowing a more flexible and broad application than ordinary laws. China is in a dramatic period of social transition, whereby the old system of rules is gradually being replaced by a new system of rules. Therefore, courts must be able to effectively respond to disputes that are rapidly increasing in variety and number. In the past, courts have remedied gaps in ordinary laws and even

the plaintiff's loss cannot be covered by the right to personal name, that is an insufficient basis on which to introduce constitutionally protected rights, let alone raising the issue to one concerning the Constitution. However, this does not mean that tort law cannot develop to provide remedies. Tort law in the civil law system is not confined to violations of only those recognized rights." See Zhu Xiaoji, *Constitutional Justiciability Between Awareness and Ignorance*, 6 HUADONG ZHENGFA XUEYUAN XUEBAO [E. CHINA SCH. OF L. & POL. J.] (2001).

However, some scholars have proposed that if some rights provided by the Constitution cannot be safeguarded due to the lack of concrete legislation, citizens can sue the legislature for "inaction in legislation" and demand that the State fulfill its obligation to enact laws in addition to filing a civil suit for interpretation of ordinary laws. The applicable rights for such an action are those social rights provided in the Constitution, such as the right to receive education, the right to work, etc. This is because these rights themselves connote that the State assumes a positive obligation. See Xu Chongde & Zheng Xianjun, "Constitutional Justiciability" Is a Misleading Theory in the Science of Constitutional Law, 6 FA XUE JIA [LAWYERS] (2001).

⁵⁵ Law is destined not to be able to achieve perfection—to provide clear-cut rules in advance for all the disputes, because of the limitation of human beings' intelligence, the limitation of symbols (languages) that are used in laws, and the conflict between the people's desire for stable laws and society's continuous development.

created laws under the guise of judicial interpretation. The incorporation of the right to receive education into the system of private law is in essence an extension of this methodology. In the *Qi Yuling* case, the Supreme People's Court has pioneered a new trail—direct application of constitutionally derived rights. The long dormant Constitution can now be used in litigation in order to remedy the gaps in concrete legislative provisions, allowing constitutionally recognized rights to be realized in the event of inadequate statutory laws.

However, is this new approach really cause for optimism? In *Qi Yuling*, the Supreme People's Court considers what has long been a controversial issue in the Western constitutional theory—whether the Constitution can be directly applied to disputes between private parties. This controversy arises from the tension between the classic Western notion of constitutionalism and the development of human rights.

Under modern Western constitutional jurisprudence, the constitution is created to regulate government powers, to prevent the arbitrariness of government's exercise of these powers, and to safeguard individual freedom.⁵⁶ The constitution thus has always been regarded as consisting of general principles that regulate the primary components of government, government's power and operation, and the relationship between government and citizens.⁵⁷ The constitution regulates the relationship between government and individuals, rather than the relationships between individuals.⁵⁸ Further, constitutional rights are aimed at safeguarding the people from the abusive power of the state. According to classic theory,

⁵⁶ The famous Australian scholar Hayek notes an episode of history as recognition of the American contribution to constitutional government. When the British Parliament declared in 1767 that Parliament could adopt or approve any laws it saw as proper, both the British people, who believed in the traditional principle of freedom, and Americans, who were then still a British colony, objected. See HAYEK, ZIYOU ZHIXU YUANLI [CONSTITUTION OF LIBERTY] 221-23 (Deng Zhenglai trans., 1997). Americans firmly believed that "any power should not be monopolistic and any power should be restricted by a higher law." *Id.* They considered the fundamental principle that "a fixed constitution is the necessary basis for any free government, and such a constitution also means a limited government." *Id.* The Constitution, therefore, is "protection for the people to resist any monopolistic actions, whether from the legislature or from other government agencies." *Id.*

As known to Chinese scholars, the "higher law" refers to the Constitution. "Government" here refers to the entity that exercises governing powers within a country, consisting of the legislature, judiciary and executive, although in the Chinese context, government generally refers to entities with central or local administrative powers.

⁵⁷ See WILLIAM JENNINGS, FA YU XIANFA [THE LAW AND THE CONSTITUTION] 24 (Gong Xiangrui & Hou Jian trans., 1997). According to Jennings, the "constitution" as referred to by Jennings has two meanings—written and unwritten. *Id.* at 24-26. However, despite the distinction in format, the two types of constitution in essence regulate the same thing. *Id.*

⁵⁸ See BARRON & DIENES, MEIGUO XIANFA GAILUN [THE UNITED STATES CONSTITUTIONAL LAW IN A NUTSHELL] 290 (Liu Ruixiang et al. trans., 1995).

constitutional rights only concern the exercise of the state power and have no effect between individuals.⁵⁹

United States jurisprudence can serve as an example of the limited scope of constitutional review. Courts' constitutional holdings often involve personal rights in marriage, family, and birth—usually understood as private law relationships. These holdings often determine the constitutionality of federal or state laws concerning those rights; that is, whether the United States Congress or a state legislature has the constitutional power to enact the relevant laws.⁶⁰

Constitutional judicial review was initiated in 1803, in the landmark case of *Marbury v. Madison*,⁶¹ and was aimed at limiting the abuse of legislative power. Without applicable legislation, how do American courts decide the applicability of the Constitution in the private domain? *Corrigan v. Buckley*⁶² provides an example:

⁵⁹ See CHEN XINMIN, *Xianfa Jiben Quanli Ji Dui Disanzhe Xiaoli Zhi Lilun [Fundamental Constitutional Rights and the Third Party Effect Theory]*, 1 DEGUO GONGFA XUE JICHU LILUN [BASIC THEORIES OF GERMAN PUBLIC LAW] 288 (2001). See also LIN LAIFAN, CONG XIANFA GUIFAN DAO GUIFAN XIANFA [FROM CONSTITUTIONAL NORMS TO NORMAL CONSTITUTION] 100-01 (2001).

⁶⁰ For example, in *Griswold v. State of Connecticut*, 381 U.S. 479 (1965), appellant Griswold and another appellant gave information, instruction and medical advice to married persons as to the means of preventing conception. The General Statutes of Connecticut provides that:

[A]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

Id. The appellants were found guilty as accessories and fined USD 100 each. *Id.* The Supreme Court upheld their claim that the statute as so applied violated the Fourteenth Amendment, and moreover, explained the constitutional basis of the right of privacy and its basis in the traditional values of a free society. *Id.*

Another example is *Michael H. et al. v. Gerald D.*, 491 U.S. 110 (1989). A child, Victoria, was born to Carole D., the wife of Gerald D. *Id.* Although Gerald was listed as father on the birth certificate and has always claimed Victoria as his daughter, blood tests showed a 98.07 percent probability that Michael, with whom Carole had had an adulterous affair, was Victoria's father. *Id.* In 1982, Michael filed a filiation action in California Superior Court to establish his paternity and right to visitation. *Id.* Victoria, through her court-appointed guardian ad litem, filed a cross-complaint asserting that she was entitled to maintain filial relationships with both Michael and Gerald. *Id.* The court ultimately granted Gerald summary judgment and confirmed his status as father on the ground that there were no triable issues of fact as to paternity under Cal. Evid. Code § 621, which provides that a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage, and that this presumption may be rebutted only by the husband or wife, and then only in limited circumstances. *Id.* The California Court of Appeal rejected Michael's procedural and substantive due process challenges to § 621, and the Supreme Court affirmed. *Id.*

⁶¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁶² 271 U.S. 323 (1926).

In 1921, thirty white persons, including Corrigan . . . executed an indenture, duly recorded, in which they recited that for their mutual benefit and the best interests of the neighborhood comprising these properties, they mutually covenanted and agreed that no part of these properties should ever be used or occupied by, or sold, leased or given to, any person of the Negro race or blood...

In 1922, Corrigan entered into a contract with Curtis to sell her a certain lot, with dwelling house, knowing her a person of the Negro race.⁶³

Other parties to the indentures pleaded to the court for an injunction "preventing the defendants from carrying the contract of sale into effect."⁶⁴ "Corrigan moved to dismiss the bill on the grounds that the 'indenture or covenant made the basis of said bill'" was void in that it is contrary to and in violation of the Constitution of the United States and contrary to public policy.⁶⁵ Curtis also moved to dismiss the bill on the ground that the indenture or covenant was void, in that it attempted to deprive Corrigan, herself, and others of property, without due process of law, "abridge[d] the privilege and immunities of citizens of the United States" within this jurisdiction, and "denie[d] them the equal protection of the law, and therefore, is forbidden by the Constitution of the United States, and especially by the Fifth, Thirteenth, and Fourteenth Amendments thereof."⁶⁶ The Supreme Court of the United States held in its judgement that:

[T]he Fifth Amendment "is a limitation only upon the powers of the General Government," and is not directed against the action of individuals. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the Negro race. And the prohibitions of the Fourteenth Amendment "have reference to state action exclusively, and not to any action of private individuals." . . . It is obvious that none

⁶³ *Id.* at 327.

⁶⁴ *Id.* at 328.

⁶⁵ *Id.*

⁶⁶ *Id.* at 328-29.

of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property.⁶⁷

Ab uno disce omnes, this case demonstrates how constitutions limit public power but not relationships between individuals. The traditional theory that constitutional rights, however, do not apply to private relationships has been challenged under the pressure of changing social and economic conditions, as well as the development of human rights. In Germany, “the third party effect theory” posed by Hans Carl Nipperdey emerged after World War II. According to this theory:

1. Private law is the most important component of the overall legal order in a unified and free society. Human dignity is not only the basis of the overall legal order, but also the basis of the system of private law.
2. Structural changes in society result in powerful social groups and economic associations. The Constitution serves to protect individual rights from the social and economic powers.
3. Most of these constitutional rights are protected only against state infringement and are not applicable to private

⁶⁷ *Id.* at 330 (citations omitted). Compare this with *Buchanan v. Warley*, 245 U.S. 60 (1917) where the U.S. Supreme Court unanimously held that an ordinance of the city of Louisville was unconstitutional. This ordinance prevented the occupancy of a lot in the city of Louisville by a person of color in a block where the greater number of residences are occupied by white persons; where such a majority exists colored persons are excluded. *Buchanan*, 245 U.S. at 70-71.

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the U.S. Supreme Court restated the principle of *Corrigan v. Buckley*:

[T]he restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

Id. at 13. But there was more. After citing certain cases after 1880, the Supreme Court further stated that “the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment.” *Id.* at 14. Thus, once state courts enforce the restrictive agreements, it is violation of the Constitution. *Id.* at 20.

Apparently, the Supreme Court has gradually changed its position since *Corrigan v. Buckley*, where the parties to the indenture sought enforcement of their indenture by the courts through an injunctive action. Nevertheless, the “state action” standard still exists in constitutional jurisprudence.

relationships. However, some fundamental rights can be directly applied in private relationships and can abolish, modify, supplement, and even reestablish private law rules.

4. Only the German Basic Law explicitly provides that the Constitution applies directly to private law. Viewed historically, this omission in other state constitutions is most likely because people in the nineteenth century were primarily concerned about the abuse of the state power and regarded private social groups as only a secondary concern. However, in industrial societies, individuals are more easily subject to the possible infringement of constitutional rights by other individuals or social groups. Therefore, rigid adherence to the traditional notion of constitutional rights is undesirable.⁶⁸

Thus, "the third party effect theory" first recognizes that most of the fundamental constitutional rights are generally not applicable to private relationships. However, the theory also recognizes that the traditional notion of "equality" within the private sphere is illusory, and that personal dignity is more likely to be compromised by stronger groups or individuals in an industrial society. Consequently, some fundamental rights should have direct applicability in private law.

American and Japanese scholars share similar concerns about the applicability of the constitution to private relationships. Scholars Barron and Dienes explain that determining when a private action is truly private is extremely problematic. They note that, "privately owned corporations today exercise power over persons comparable to that of government agencies and much of that private power is attributable to benefits provided by government."⁶⁹ Japanese scholar Ashibe Nobuyoshi notes that:

Along with the development of capitalism, many private groups, such as enterprises, labor unions, economic groups, and professional groups have come into being, with enormous power resembling that of a state. Human rights of ordinary citizens may also be threatened by them. Recently, with the development of urbanization and industrialization, public nuisance and the intrusion on the right of privacy by public

⁶⁸ See CHEN, *supra* note 59, at 292-97.

⁶⁹ BARRON & DIENES, *supra* note 58, at 290.

media in a society of information have also become serious social problems.⁷⁰

This “third party effect theory” did not prevail in Germany, as most German scholars objected to it. For example, Gunter Durig offers the following counter-argument: (1) Fundamental constitutional rights are intended to limit state power. Civil trials are state actions and as such are bound by the constitutional provisions concerning fundamental rights, but only indirectly; (2) Private law should be highly independent. Individuals should be free to alter their reciprocal relationships, and may even agree to give up some fundamental rights as between themselves; (3) Fundamental constitutional rights can be realized indirectly, by way of general clauses in private law (such as “good faith and customs”).⁷¹ This theory does not deny the effect of the Constitution in private law relationships, but emphasizes indirect rather than direct application. Thus, it can be called “indirect application theory.”⁷²

In judicial practice, Germany by and large favors Gunter Durig’s opinions and has adopted the “indirect application theory,” and would directly apply the constitution in private law cases only with extreme caution.⁷³ Nevertheless, judges must examine, interpret, and apply civil law provisions in the spirit of fundamental constitutional rights when they try cases as the Basic Law provides that the Constitution bind the legislature, executive, and judiciary. Non-conformance could, therefore, possibly infringe on fundamental rights resulting in a constitutional claim to be reviewed by the Constitutional Court.⁷⁴

In the United States, courts can review the constitutionality of laws made by the legislature concerning private relationships. However, courts’ actions are also regarded as “governmental action,”⁷⁵ making courts bound by constitutional law when trying civil cases. Both aspects of the function

⁷⁰ ASHIBE NOBUYOSHI, CONSTITUTION 121 (Li Hongxi trans., 1985).

⁷¹ See CHEN, *supra* note 59, at 302-07.

⁷² NOBUYOSHI, *supra* note 70, at 122-24.

⁷³ See CHEN, *supra* note 39.

⁷⁴ See CHEN, *supra* note 59, at 313-14.

⁷⁵ It is necessary to emphasize that the phrase “state action,” derived from the Fourteenth Amendment and other amendments of the U.S. Constitution, refers to action by state governments rather than by the federal government. However, when courts apply the doctrine of state action to determine whether a seemingly private action is a state action and hence subject to constitutional provisions, it is implied that courts generally view constitutional law as a basic law defining the relationship between individuals, citizens and the government, and constitutional protections against governmental action, whether it is state or federal, not against private action. Dr. Lin Laifan also points this out, but unlike him, I don’t believe that the courts’ understanding of state action as one kind of governmental action is a recent phenomenon. See LIN *supra* note 59, at 103 n. 56.

of American courts help the value of fundamental constitutional rights grow in civil law.

In addition, United States courts apply the "state action" standard to some social or economic powers, thus deeming some seemingly private action as bound by the constitution. U.S. courts have established three ways to determine what private actions may be deemed state action: (1) whether an activity has a "public function"; (2) whether the government is so significantly involved with the private actor as to make the government responsible for the private conduct; and (3) whether the government may be said to have approved or authorized (or perhaps significantly encouraged) the challenged conduct sufficiently to be responsible for it.⁷⁶ Because the "state action" doctrine is very complex, elaboration would be beyond the scope of this article. Hence, only one case is offered by way of illustration.

In *Lebron v. National Rail Passenger Corporation*,⁷⁷ the National Rail Passenger Corporation, commonly known as Amtrak, was established pursuant to a congressional statute in order to provide inter-city and commuter rail passenger service. The plaintiff Lebron signed a contract with TDI, a company that managed billboard leasing for Amtrak.⁷⁸ However, Lebron's design for the display of an advertisement had political content, as it criticized the Coors family for its support of right-wing causes, particularly the contras in Nicaragua.⁷⁹ Amtrak's vice president disapproved of the advertisement, invoking Amtrak's policy "that it will not allow political advertising on the Spectacular advertising sign."⁸⁰ Lebron in his suit claimed that the defendants had violated his First Amendment rights. The U.S. Supreme Court held that Amtrak is a government entity subject to the Constitution because it is controlled by the federal government.⁸¹ This is because the Rail Passenger Service Act of 1970 ("RPSA") provides for a nine-member board with six members appointed directly by the President of

⁷⁶ See BARRON & DIENES, *supra* note 58, at 294-302; see also NOBUYOSHI, *supra* note 70, at 127; LIN, *supra* note 59, at 103. After the first draft of this article, I discussed the *Qi Yuling* case with two U.S. scholars at the Peking University, Douglas B. Grob and Allison Moore. According to them, had this case occurred in America, and had Qi Yuling wanted to file a constitutional suit rather than an ordinary civil suit, she could have sued Jining Municipality School of Commerce, Tengzhou Municipality No. 8 High School, and Tengzhou Municipal Education Commission because both Jining Municipality School of Commerce and Tengzhou Municipality No. 8 High School are organizations with connections to the government, and Tengzhou Municipal Education Commission is itself a government organization. Thus, a constitutional suit could have been brought based on the "state actor" concept.

⁷⁷ *Lebron v. National Rail Corporation*, 115 S.Ct. 961 (1995).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

the United States, two appointed by the Secretary of Transportation, and the final member appointed by the other eight members.⁸²

Thus far, this Article has outlined the disputes centering on the issue in Western constitutions as to whether it can be directly applied to the domain of private relationships. Although societal development continues to raise new issues regarding the scope of constitutional application, both Germany and the United States continue to follow the classic notion of constitutionalism, as well as the principles of freedom of contract and individual autonomy⁸³ that coexist with classic constitutionalism. Both cautiously develop the jurisprudence of constitutional justiciability to respond to new circumstances despite the German Federal Constitutional Court's adoption of the doctrine of "indirect application" to private relationships or United States courts' adoption of the "state action" doctrine that subjects private actions to constitutional regulation. Thus, China's "first constitutional case" might be regarded as a dangerous signal had it been compared to its Western counterparts. According to German scholar Jugen Salzwedel:

People are free to hold prejudicial opinions as long as they do not violate the rights of others. The State cannot command equality and universal brotherhood among the people. Nor does the Constitution require that citizens lead a rational and moral life. Therefore, to force state power into private lives in a quest for equality among individuals is to toll the death knell of freedom.⁸⁴

VI. THE PROSPECTS OF CONSTITUTIONAL JUSTICIABILITY IN CHINA

With the rise of capitalism and the subsequent development of the modern legal system, seeking a delicate and complex balance between

⁸² *Id.*

⁸³ Classic constitutional government safeguards individual freedom from the infringement of state power. This is consistent with the emphasis in private law on individual autonomy.

When the Constitution's framers prohibited the states from impairing the obligation of contracts, they sought to prevent government interference with the autonomy of the individual will. It was through contract that the individual had the greatest opportunity to increase the scope of individual discretion in resource utilization. The emphasis on contract thus marked the transition from law as a system designed to maintain the social status quo to law intended to secure maximum individual self-assertion.

BERNARD SCHWARTZ, MEIGUO FALU SHI [THE LAW IN AMERICA: A HISTORY] 26 (Wang Jun trans., 1997).

⁸⁴ CHEN, *supra* note 59, at 312.

individual freedom and state intervention has raised a host of paradoxes. Westerners in earlier times who sought individual autonomy and freedom of contract were actually asking the State to "leave me alone." They rejected state infringement on their freedom of thought, consciousness, speech, press, association, personal bodily integrity, etc. They were afraid of the oppressive power of the state and sought the right to defend themselves against state power; yet they were very confident in themselves, their rational life, and their capacity for autonomy. The eighteenth century enlightenment was based on the belief that if human potential could be realized, then human achievement would be unlimited.⁸⁵ However, at the same time, economic inequality, race and gender discrimination, and dehumanizing industrialization were dividing society. With increasing urbanization, greater access to information, and technological and organizational progress, individuals began to feel more and more powerless. The optimistic belief in individual autonomy was being challenged.

Notions of humanism and constitutionalism, the assertion of dignity, the free development of individuals, and new constitutional rights became accepted:

These new rights had an economic and social character and included the right of social security, the right to work, the right of rest and leisure, the right to receive education, the right to achieve reasonable living standards, the right to participate in cultural life, and even the right to turn to an international order for safeguarding of these rights. These rights were not created to protect individuals from government or other authorities, but to submit to public authorities to have their attention that these rights to individual freedom shall be realized through other freedom.⁸⁶

However, the emergence of these rights and the corresponding obligation of positive action assumed by the State have actually resulted in restrictions that threaten individual autonomy and freedom of contract. Private law has lost its sacred status. Those who previously defended the State must now rely on it even more. The State has transformed from a night watchman to

⁸⁵ See ALAN BULLOCK, XINFANG RENWEN ZHUYI CHUANTONG [THE HUMANIST TRADITION IN THE WEST] 135-36 (Dong Leshan trans., 1997).

⁸⁶ CARL JOACHIM FRIEDRICH, CHAOYAN ZHENGYI: XIANZHENG DE ZONGJIAO ZHI WEI [TRANSCENDENT JUSTICE: THE RELIGIOUS DIMENSION OF CONSTITUTIONALISM] 94-95 (Zhou Yong & Wang Lizhi trans., 1997).

the *pater familias*. As a result, people are now faced with new, troubling questions: "Will this powerful parent act as he pleases to interfere with my freedom of love and freedom of belief? If I like someone but he forces me to dislike this person, and if I have my own way of understanding and pursuing life but he just insists on designing a blueprint for me, will I become an obedient slave? It seems, however, that I cannot do without him. When I have difficulty in making a living, when I cannot find a job, I must always turn to him for help."

Caught between self-reliance and dependency, this is the modern Westerners' puzzle and also the root of the conflict between constitutional and private law. But Westerners are not alone. Chinese society has experienced a different process of evolution. The reform and opening-up since the 1980s has first slowly, and then more rapidly, been dissolving and reconstructing "the society looked after by the State." This process has combined the two-step approach in the West: first, gradually developing the division and confrontation between the state and the society; and second, recognizing that the state must still be involved in the economy and society to ensure stable development and to satisfy various needs. This framework of dissolution and reconstruction makes the contradiction between private autonomy and state intervention, and individual independence and reliance on public power, unavoidable. Dr. Zhao Xiaoli's observations illustrate the conundrum:

The summer of 1995, after the *Labor Law* had entered into force on January 1 of the same year, I was doing social investigation studies in Zhenjiang Municipality and its vicinity in Jiangsu Province. It impressed me very much when I visited a lock factory, how much it resembled the pin workshop described in Adam Smith's *The Wealth of Nations*. The workers were all women and their kids were playing in the workshop. These woman workers were assembling locks manually, fitting in springs and some yellow tiny parts, not even raising their heads. Not one worker would stop to talk to us. Only the director of the factory would speak with us. The director told me that he did not quite understand why the State limits their workdays to eight hours even in the township enterprises. This factory permits employees to bring their kids to work. Even working ten hours a day is better than working somewhere else. Many people compete for each position. In the eyes of the legislature and intellectuals, this tedious work

for ten hours everyday may be unhealthy and prevent the full development of human beings. Nevertheless, these rural woman workers were willing to make this choice in return for the possibility of better lives for their children. When we were there, many of the local township enterprises were still in their initial stages of development. In some places you could even see straw sheds. The factory director told me that because of the implementation of the Labor Law, the local labor administration agency had conducted inspections several times. Despite the dinner they were invited to, these inspectors still charged some fines. I know that the fines must have been comprised of the salaries the woman workers may have expected to earn.⁸⁷

It seems to me that there ought not to be an artificial distinction between public law and private law on the complicated subject of relationship between private autonomy and state intervention. There is no consensus on this issue, but Western jurisprudence seems to maintain constitutional law in the area of public law. Western jurists review the text of constitutional law to understand the law's spirit and principles, then use these principles cautiously to interpret private law. This is to protect independence in the private domain and individual freedom.⁸⁸ In fact, as early as 1993, Professor Liang Huixing clearly indicated his position on private autonomy when discussing the relationship of public law and private law in China, although he did not explicitly refer to the issue of constitutional application in the private domain:

Public law should safeguard private rights. Private rights are so sacred that they are not subject to restraints or deprivation

⁸⁷ Zhao Xiaoli, *Freedom of Contract and the Protection of the Weak*, THE WORKING PAPERS OF SCHOOL OF LAW OF PEKING UNIVERSITY 8 (2001). The reason for citing this case is not to do away with the eight-hour workday, nor to say that we must respect freedom of contract and look down upon the right of rest, which is within the meaning of the right to work. This article is meant simply to highlight an unavoidable contradiction.

⁸⁸ Of course, it is not absolute that the constitution cannot be directly applied to private relationships. There are exceptions. For example, German scholars generally acknowledge that Article 9 of the Basic Law of Germany can be directly applied to private legal relationships. They believe this is the intent of the Constitution's drafters, although it must be strictly interpreted and cannot be widely applied. See CHEN, *supra* note 59, at 296, 329. Item 3 of Article 9 of the Basic Law of Germany provides that "the right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and for all professions. Agreements that restrict or seek to impair this right are null and void, and measures directed to this end are illegal." Basic Law of Germany, http://www.uni-wuerzburg.de/law/gm00000_.html (last visited Apr. 23, 2002).

without significant and legitimate justifications. Public law and private law should be strictly distinguished and different legal principles applied. In the private domain, the principle of private autonomy and freedom of thought governs. People with equal legal status determine their own rights and obligations through free negotiations. The state should not intervene unless disputes arise that cannot be resolved through negotiations. Under such cases, the judiciary must step in to provide a solution.⁸⁹

According to Dr. Lin Laifan, if constitutional rights cannot be applied to the private domain, problems will inevitably arise.⁹⁰ For example, may a restaurant post an ad that says, “waitress wanted only”? When a company hires employees, may it add a provision in the employment contract that says, “employees who spread rumors against the company will be fired”? May atheist organizations prohibit any person with religious beliefs from becoming members?

Therefore it seems to me that the intention of Supreme People’s Court to use *Qi Yuling* as a breakthrough to create a precedent of the judicial application of the Constitution is worthy of compliments. However, the breakthrough seems not quite appropriate according to the above arguments. As established in the Constitution, the role of the People’s Congress corresponds to the “Supremacy of Parliament” model of Great Britain, such that no power of judicial review vests in Chinese courts to directly examine the constitutionality of laws and regulations.

Thus, the current prospects for Chinese constitutional justiciability may be as follows. First, the notion of the supremacy of the Constitution and constitutional rights should be upheld, but this concept should be understood as mainly aimed at the exercise of state power. Second, administrative litigation is the best means to implement the justiciability of the Constitution. In situations where ordinary laws are not available or vague and the plaintiff raises the issue of unconstitutionality of administrative actions, the Constitution can be directly applied to regulate executive actions.⁹¹ Third, in any litigation, if the plaintiff claims that

⁸⁹ Liang Huixing, *The Notion of Public Law Superiority Must Be Changed*, FAXHI REBAO [LEGAL DAILY], Jan. 21, 1993. However, it may be questionable as to whether or not the previous Chinese legal system was one where public law was superior.

⁹⁰ LIN, *supra* note 59, at 104.

⁹¹ During the course of this article, I had the opportunity to obtain a copy of a complaint filed by high school graduates from Qingdao Municipality suing the Ministry of Education concerning their enrollment plan for colleges and universities in 2001. The plaintiffs claimed that the enrollment plan

certain administrative regulations, local regulations, autonomous regulations, or separate regulations are unconstitutional, the lower court should turn directly to the Supreme Court, and then to the Standing Committee of the National People's Congress, in accordance with the Legislation Law.⁹² Lastly, courts should continue to interpret and create private law rules in civil litigation in accordance with the fundamental rights provisions of the Constitution.

Constitutional governance means that state power is derived from the constitution, is regulated by the constitution, and should comply with the constitution. It does not mean that that the constitution directly governs the people.⁹³

violated their equal rights to receive education provided by the Constitution. In fact, if viewed simply from the literature, the Constitution did not provide the "equal" right to receive education. The equality principle of the right to receive education, however, is explicitly provided for in Section 2 of Article 9 of the Education Law: "All citizens are entitled to equal opportunity to receive education regardless of ethnic status, race, gender, occupation, property status or religious belief." Nevertheless, the principle of equal treatment or protection is inherent in the Constitution. If the court accepts this case and interprets the equality principle and the provision in the Education Law, this will become a true constitutional case regardless of whether or not the court upholds the plaintiff's claim.

⁹² Article 90 of the Legislation Law provides that:

the State Council, the Central Military Commission, Supreme People's Court, the Supreme People's Procuratorate, and the Standing Committee of People's Congress of provinces, autonomous regions and municipalities directly under the Central Government, finding administrative regulations, local regulations, autonomous regulations, and separate regulations conflicting with the Constitution or the laws, can request review by submitting written requests to the Standing Committee of the National People's Congress. The working organizations of the Committee then distribute the request to specialized committees for examination and opinions.

Legislation Law of the People's Republic of China (2000) (P.R.C.),
http://www.novexc.com/legislat_law_00.html (last visited Jan. 20, 2003).

Relevant institutions also need to be created to review of the constitutionality of laws. At present, no laws expressly provide who is authorized to conduct constitutional review of laws passed by the National People's Congress and its Standing Committee.

⁹³ The reason that Supreme People's Court judges, some scholars, and the media all consider the *Qi Yuling* case to be "the first Constitutional case," and that they think the Constitution can be applied to private domain, may be attributed to the fact that there is no notion of classic constitutional government in China's constitutional theory. The concept of a classic constitutional government is centered on the idea that the Constitution is a contract between the people and the government, and acts to restrain the government from abusing its powers. The reason may also lie in the understanding that the Constitution is the "parent" of all legal orders, and all legal orders derive from the Constitution. It may also relate to China's historical lack of division between the public and the private domain, with social life governed by the public power, and the difficulty of developing civil rules under a planned economic scheme. This may be reflected in the vague concept of "constitutional justiciability." Professor Xu Chongde and Professor Zheng Xianjun recently conducted a detailed analysis of the misunderstanding in theory created by the concept of "constitutional justiciability." First, they maintain that "Constitutional justiciability" emphasizes the application of the Constitution in judicial proceedings. In fact, the implementation of the Constitution requires the application of and compliance with the Constitution by the all state organs and the whole of society in order to ensure the inherent value of the Constitutional system and the maintenance of

the Constitutional principle and spirit. The judiciary is only one instrument for implementing the Constitution. Second, most people regard "constitutional justiciability" as equal to such a formula: Constitutional justiciability = Constitutional litigation = Invoking the Constitutional provisions to decide an ordinary case in a trial. However, constitutional litigation should review the actions of state organs or organizations or groups that exercise public power, and decide whether not certain constitutional liability should be imposed. Finally, "Constitutional justiciability" implicitly recognizes that the fundamental rights of citizens under the Constitution have direct legal effect. In other words, the constitutional provisions concerning fundamental rights can be directly invoked by courts as grounds for decisions in ordinary trials. However, this does not conform to the rationale of the Constitution. The direct effect of constitutionally provided rights of citizens does not refer to the direct invocation by the courts as grounds for civil or criminal decisions. The direct effect of constitutionally provided rights of citizens refers to the power to bind the State. It is a negative power. See Xu & Zheng, *supra* note 54.