

# WHAT CAN THE PEOPLE’S PROCURATORATE DO IN THE CHINESE CONSTITUTIONAL REVIEW MECHANISM?

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### Abstract

*The current constitutional review mechanism in China is so defective that it is incapable of solving the serious problem of recurring unconstitutional incidents. Thus, it is essential to introduce a new institutional solution to improve the constitutional review mechanism. Under the Chinese constitutional framework, the People's Procuratorate is the most appropriate organ to initiate complaints of constitutional review. The People's Procuratorate shall, in accordance with the Chinese Legislation Law, initiate a timely pilot program under which the new constitutional review mechanism will be tested, then gradually establish and improve the procuratorial role in the new constitutional review mechanism.*

### I. INTRODUCTION

In the process of pursuing a "rule of law" governance scheme in the People's Republic of China ("PRC"), a problem to which more attention should be paid is the recurring occurrence of many unconstitutional<sup>1</sup> incidents. In the Chinese legal system, various normative legal documents<sup>2</sup> contradict their superior counterparts – for example, administrative regulations contradict the legislations, judicial interpretations "amend" the laws that they set out to interpret, and ministerial administrative regulations often conflict with the Constitution and the laws. Despite such problems, the Chinese constitutional review mechanism is extremely limited, and unfortunately, is rarely effective in mending them.

Entering the new millennium, a handful of measures have been taken in an attempt to improve the constitutional review mechanism – the Legislation Law<sup>3</sup> was enacted in 2000, the State Council promulgated the *Regulation on the Procedures for the Formulation of Ministerial Rules* and the *Regulation on the Archivist Filing of Regulations and Government Rules*<sup>4</sup> in 2001, the Standing Committee of the National People's Congress ("NPCSC") established a sub-section under its Committee for Legislative Affairs in 2004, and the *Law on the Supervision of Standing Committees of People's Congresses at Various Levels*<sup>5</sup> was enacted in 2006. Unfortunately, these measures have not improved the effectiveness of the current constitutional review mechanism, and therefore, it is essential to introduce a new institutional solution to promote better constitutional review.

The author suggests that under the mainland Constitutional structure, the People's Procuratorate is the most appropriate body to initiate a complaint for constitutional review. In

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<sup>1</sup> The word "unconstitutional" in this paper basically refers to "normative legal documents at lower level contradict legal documents at higher level", unless the context indicates it means "contradict the Constitution".

<sup>2</sup> In the light of Article 2 of Legislation Law, normative legal documents include laws, administrative regulations, local regulations, autonomous regulations, separate regulations, ministerial rules and local administrative rules. In addition, judicial interpretation is another important legal document as well, although it is not mentioned in Legislation Law.

<sup>3</sup> Lifa Fa (立法法) [Legislation Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 311., art. 48 (China) [hereinafter Legislation Law].

<sup>4</sup> Fagui Guizhang Bei'an Tiaoli (法规规章备案条例) [Regulation on the Archivist Filing of Regulations and Government Rules] (promulgated by St. Council., Dec. 14, 2001, effective Jan 1, 2002), <http://www.chinalaw.gov.cn/article/fzjd/bagz/200603/20060300057123.shtml> (concerning the procedures for the formulation of administrative regulations) (China).

<sup>5</sup> Geji Renmin Daibiao Dahui Changwu Weiyuanhui Jiandu Fa (各级人民代表大会常务委员会监督法) [Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective Jan. 1, 2007) 2006 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 536 (China).

fact, the People's Procuratorate is not only capable of partaking in the constitutional review process, but also bound to do so.

## II. WHEN AND HOW ARE NORMATIVE LEGAL DOCUMENTS UNCONSTITUTIONAL?

In practice, there are a number of ways in which normative legal documents can be ruled unconstitutional, all of which have significant negative implications to the Chinese legal system.

### A. Administrative regulations that contradict the Constitution and the laws

In light of the Chinese Constitution and the Legislation Law, only the State Council has the authority to enact administrative regulations. In the Chinese legal system, the status of an administrative regulation is hierarchically lower than the Constitution and the laws, but higher than any other normative legislative documents. Thus, when administrative regulations contradict the Constitution or the laws, due to the higher hierarchical standing of these administrative regulations, its negative impact can be substantially far-reaching. The "Sun Zhigang Incident" in 2003<sup>6</sup> was a prototypical example that illustrated this problem. After this incident, three Chinese citizens with Ph.D. degrees in Law petitioned to the NPCSC to review the relevant administrative regulation – *The Measures for Custody and Sending Back of Vagrants and Beggars in Cities* ("Measures")<sup>7</sup> – arguing that this regulation illegally restricts the freedom of citizens and are consequently in conflict with the Chinese Constitution and the Legislation Law. On June 20, 2003, the State Council promulgated *The Measures for the Administration of Relief for Vagrants and Beggars without Assured Living Sources in Cities*,<sup>8</sup> which replaced the regulation in question.

### B. Judicial interpretations "amending" the laws being interpreted

In the last two decades, judicial interpretations in the mainland China have made great progress and have become one of the major resources, on which judges rely while adjudicating cases. However, the "legislative tendencies" of these judicial interpretations have surfaced as a problematic issue. That is, in practice, judicial interpretations have not only been able to prescribe matters that are not mentioned in the laws, but also *changed* the contents of the laws. A scholar acutely criticized that the Supreme People's Court has become "the third legislature" alongside the National People's Congress (and its Standing Committee) and the State Council.<sup>9</sup>

Some judicial interpretations, due to their inconsistencies with the laws they set out to interpret, have triggered heated discussions among scholars and have raised much public concern. In criminal law, for example, there is a judicial interpretation<sup>10</sup> that states that when having consensual sexual intercourse with a female minor, the perpetrator who does not know

<sup>6</sup> Chen Feng (陈峰), *Beishourongzhe Sun Zhigang Zhi Si* (被收容者孙志刚之死) [The Death of Sun: Vagrants and Beggars in Cities], NANFANG DUSHI BAO (南方都市报), Apr. 25, 2003.

<sup>7</sup> Chengsi Liulang Qitao Renyuan Shourong Qiansong Banfa (城市流浪乞讨人员收容遣送办法) [Measures for Custody and Sending Back of Vagrants and Beggars in Cities] (promulgated by the St. Council., May 12, 1982, effective May 12, 1982) (Lawyer) (repealed 2003) (China).

<sup>8</sup> Chengshi Shenghuo Wuzhuo De Liulang Qitao Renyuan Jiuzhu Guanli Banfa (城市生活无着的流浪乞讨人员救助管理办法) [Measures for the Administration of Relief for Vagrants and Beggars without Assured Living Sources in Cities] (promulgated by the St. Council., Jun. 20, 2003, effective Aug. 1, 2003) (Chinalawinfo).

<sup>9</sup> Yuan Mingsheng (袁明圣), *Sifa Jieshi "Lifahua" Xianxiang Tanwei* (司法解释"立法化"现象探微) [Explanations of the Phenomenon Why the Judicial Interpretation Turn to Function as Laws], FASHANG YANGJIU (法商研究) Jan.-Feb., 2003, at 3 (China).

<sup>10</sup> Zuigao Renmin Fayuan Guanyu Xingweiren Bu Mingzhi Shi Buman Shisi Zhousui de Younü Shuangfang Ziyuan Fasheng Xingguanxi Shifou Goucheng Qiangjianzui Wenti de Pifu (最高人民法院关于行为人不明知是不满十四周岁的幼女双方自愿发生性关系是否构成强奸罪问题的批复) [The Supreme People's Court's Reply to Whether Having Consensual Sexual Intercourse with a Female Minor Under the Age of Fourteen, Without Knowing Her Actual Age, Constitutes the Offence of Rape] (promulgated by the Sup. People's Ct., Jan 8, 2003, effective Jan 8, 2003) SUP. PEOPLE'S CT. GAZ., Jan. 1, 2003, at 16.

the minor's actual age is deemed innocent.<sup>11</sup> Similarly, in the civil law sector, there is a judicial interpretation<sup>12</sup> that states upon the occurrence of personal injury or death, compensation for such injury should be different depending on whether the victim resides in a city or in the countryside.<sup>13</sup> As a result, these judicial interpretations have caused heated debates across the country.

### C. Local regulations that are in conflict with the national legislations

Another means through which normative laws can be unconstitutional is when local regulations conflict with the national legislations. The "Li Hui-juan Incident" in 2003 provides an effective illustration. The incident involved Ms. Li Hui-juan, a judge in the Luoyang Municipal Intermediate People's Court, in the Province of Henan. In a case that she presided over, the Judge declared that certain provisions of a local regulation made by the Standing Committee of the Henan Provincial People's Congress – at a lower level than the National People's Congress in the legislative hierarchy – were void because they were inconsistent with the a national Seeds Law.<sup>14</sup> Since the power and functions of the Chinese judges are different from common law judges, Chinese judges are not entitled to directly announce legislations – even local regulations – as void. Ms. Li Hui-juan had paid extensive penalties for her fault in this case as she was removed from her post as a chief of the panel while the assistant judge also removed.<sup>15</sup> Essentially, this was ultimately a question of whether the local regulation contradicted national law, and yet, the Judge was without any means to rule the local regulation as invalid. In response to this incident, four lawyers jointly petitioned to the NPCSC to review the local regulation in question.<sup>16</sup>

### D. Ministerial rules and local administrative rules that contradict their superior law

According to the Chinese Constitution and the Legislation Law, an extensive number of bodies are entitled to make administrative rules. Article 71 of the Legislation Law authorizes various ministries, commissions, the People's Bank of China, the Auditing Agency, and a body directly under the State Council exercising the regulatory function to enact administrative rules

<sup>11</sup> This Reply contradicts Section 2 of Article 236 of the Criminal Law. *Compare id. with* Xing Fa (刑法) [Criminal Law] (promulgated by the Standing Comm., Nat'l People's Cong., Mar. 14, 1997, effective, Oct. 1, 1997) 1997 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 138, art. 236, § 2 ("The perpetrator who has sexual intercourse with a female minor under the age of 14 shall be deemed to have committed rape and shall be given a heavier punishment.").

<sup>12</sup> Zuigao Renmin Fayuan Guanyu Shenli Renshen Sunhai Peichang Anjian Shiyong Falü Ruogan Wenti de Jieshi (最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释) [The Supreme People's Court's Interpretation on Several Issues Concerning the Application of Laws in Cases Involving Compensation for Personal Injury] (promulgated by the Sup. People's Ct., Dec. 4, 2003, effective, Dec. 4, 2003) SUP. PEOPLE'S CT. GAZ., Feb. 10, 2004, at 3, art. 29.

<sup>13</sup> By contrast to the Supreme People's Court's Interpretation on Several Issues Concerning the Application of Laws in Cases Involving Compensation for Personal Injury, the provision in General Principles of the Civil Law does not differentiate the amount of compensation of victims who reside in a city and who reside in the countryside. *Compare id. with* Minfa Tongze (民法通则) [General Principles of the Civil Law] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) (Lawyer) art. 119 ("Anyone who infringes upon a citizen's person and cause him physical injury shall pay his medical expenses and his loss in income due to missed working time and shall pay him living subsidies if he is disabled; if the victim dies, the infringer shall also pay the funeral expenses, the necessary living expenses of the deceased's dependents and other such expenses.") (China).

<sup>14</sup> According to the Seed Law, the price of seed should be decided by the seeds market. However, the local regulation in question Henan Sheng Nongzuowu Zhongzi Guanli Tiaoli (河南省农作物种子管理条例) provides that the price of seed should be decided under the government guidance. *Compare* Zhongzi Fa (中华人民共和国种子法) [Seed Law] (promulgated by the Standing Comm., Nat'l People's Cong., July 8, 2000, effective Dec. 8, 2000) 2000 St. Council. GAZ. 5 (China) *with* Henan Sheng Nongzuowu Zhongzi Guanli Tiaoli (河南省农作物种子管理条例) [Regulation of Henan Province on Management of Crop Seeds] (promulgated by the Standing Comm., People's Cong. of Henan Province, May 23, 1997, effective May 23, 1997) art. 30 (Chinalawinfo) (repealed 2004).

<sup>15</sup> Tian Yi & Wang Ying (田毅 & 王颖), Falü Zeren Zhuijiu Youqi Xuanyi: Li Huijuan Shijian Zhuizong (法官责任追究又起悬疑: 李慧娟事件追踪) [The Judge's Accountability in Question: Investigation of the Li Huijuan Incident], 21 SHIJI JINGJI BAODAO (21世纪经济报道) [TWENTY-FIRST CENTURY ECONOMIC REPORT], Dec. 8, 2003, <http://finance.sina.com.cn/roll/20031209/102553494.shtml>

<sup>16</sup> Si lüshi Shangshu Renda Tiqing Shenchu Henan Sheng Nongzuowu Zhongzi Guanli Tiaoli (四律师上书人大提请审查河南省农作物种子管理条例) [Four Lawyers Urge the National People's Congress to review the Regulation of Henan Province on Management of Crop Seeds], Renmin Wang (人民网) [People] (Nov. 20, 2003), <http://www.people.com.cn/GB/14576/14528/2200792.html>.

within the scope of its authority. Article 73 also allows the People's Government of a province, autonomous region, municipality directly under the central government or a major city to enact local rules. As such, due to the enormous number of bodies capable of enacting administrative rules, there have been numerous instances where such rules and regulations have stood in contradiction with their hierarchically superior laws. From 2007 to 2008, the State Council and 31 provincial government took more than one year to "clean up" 12695 ministerial rules and local administrative rules. The result was astonishing — 2320 rules were declared invalid and 2542 rules had to be modified.<sup>17</sup>

### III. DEFECTS OF THE CURRENT CONSTITUTIONAL REVIEW MECHANISM

The current constitutional review mechanism is ineffective. Since the current Constitution was promulgated in 1982, the two institutions in charge of supervising the enforcement of the Constitution — the NPC and its Standing Committee — have never declared any legislation unconstitutional.<sup>18</sup> What are the reasons behind this phenomenon. . . The author believes that such phenomenon is attributed to the following defects prevalent in the current constitutional review regime:

#### A. *Infeasibility of the NPC and NPCSC's Reviewing the Legal Documents Actively*

In the light of the current Constitution, the NPC has the exclusive power to revise the Constitution, to supervise the enforcement of the Constitution and to alter or set aside inappropriate decisions made by its Standing Committee. Meanwhile, it is the NPCSC that harbors the exclusive power to interpret the Constitution, to supervise the enforcement of the Constitution and to repeal any unconstitutional administrative regulations enacted by the State Council as well as regional decrees promulgated by the provincial People's Congress. Thus, it is clear that the NPC and its Standing Committee shall bear the primary responsibility of constitutional review. However, the reality is that the NPC is a non-standing body which only holds its assemblies once a year. Meanwhile, although NPCSC is merely a standing body, it actually plays more pivotal role as the supreme organ of the nation, capable of exercising twenty-one powers and functions.<sup>19</sup> In fact, the NPCSC also does not assemble very frequently, which undercuts its effectiveness as an adequate constitutional reviewing organ. That is, even for the NPCSC, there are only six meetings every year, once every two months. In addition, the majority of the Standing Committee members as well as the People's Deputies only hold part-time posts. Thus, in effect, the NPC and its Standing Committee lack the necessary time and energy to sufficiently carry out the task of constitutional review.

Such a problem was demonstrated in the following example. In April 2000, the State Council thought that a local regulation passed by the Standing Committee of the Anhui Provincial People's Congress was in conflict with the corresponding administrative regulation. As such, the Legislative Office of the State Council wrote an official letter to the General Office of the NPCSC to request an appropriate resolution. The Agriculture and Countryside Committee of the NPC replied as following: "we suggest that the Legislative Office of the State Council shall study and handle the matter." Ironically, the State Council did not have the authority to set aside a regional decree. Thus, after carefully studying the case, the Legislative Office of the State Council had to seek the endorsement of the vice premier and write to the General Office of the NPCSC again, stating that the local regulation was in conflict with the relevant administrative

<sup>17</sup> Guowuyuan Fazhi Ban: Jianguo Yilai Zui Chedi de Guizhang Daqingli Jieshu (国务院法制办: 建国以来最彻底的规章大清理结束) [Legislative Affairs Office of the State Council: The Largest Cleanout of Regulations Ever Since the Establishment of the P.R.C. Completed] (July 23, 2008, 15:42), <http://society.people.com.cn/GB/8217/130138/130213/7598324.html>.

<sup>18</sup> The National People's Congress once declared that the Basic Law of Hong Kong Special Administrative Region and the Basic Law of Macau Special Administrative Region are consistent with the Constitution when these two laws were enacted.

<sup>19</sup> XIANFA art. 67 (1982) (China).

regulation in many aspects and suggested that the NPCSC repeal the regulation or halt its enforcement. However, the NPCSC had not responded to this suggestion for almost three years.<sup>20</sup> In sum, this case illustrates how both the NPC and its Standing Committee have been disinclined to attend to such requests for constitutional review and thus, have abandoned their duties. As such, it seems unrealistic to expect the NPC and the NPCSC to review potentially unconstitutional legislations proactively.

*B. Lack of effective and complete procedures that makes the Constitutional Review mechanism work*

The initiation mechanism is a pivotal aspect of a constitutional review regime. Although the civil and common law countries treat constitutional disputes differently – the former regarding them as special cases while the latter regarding them as normal ones – both systems have established a systematic initiation mechanism for lodging constitutional review complaints.<sup>21</sup> In mainland China, only Article 90 of the Legislation Law very simply says that some state organs can lodge a request of constitutional review to the Standing Committee of the NPC. In any other legislation, there is no mention of any further details about this process. How should a constitutional review be brought into action... What powers can the initiating agency exercise? What particular procedure shall the constitutional review act upon... The answers to all these questions are not clear, and in practice, the consequence is that even upon coming across a potentially unconstitutional question, such disputes are rarely brought into the constitutional review process and but rather, are often deserted.

*C. The People's Courts' unsuitability for constitutional review*

Precisely speaking, the current constitutional review regime does not include the process of hearing the actual cases, and there are no “constitutional cases” at all. However, in the last few years, academics have focused on the topic of “justiciability of Constitution”,<sup>22</sup> and some scholars have proposed, borrowing the idea from the United States, that the People's Courts should take active measure to capitalize on its jurisdiction on cases that involve questions of constitutional review. However, the author thinks that there are three reasons why the People's Courts are not suitable for hearing constitutional review cases in mainland China, and further, why the aforementioned American system is inconsistent with the realities of China.

1. Under the common law tradition, it is appropriate for normal courts to deal with constitutional review cases. Courts exercise the power of constitutional review to meet the needs of the common law tradition of the system of checks and balances among the three branches. That is, the judicial branch resorts to the power of constitutional review to check the other two branches. However, in mainland China, this system of checks and balances lacks both the cultural and historical basis. In Chinese ancient times, criminal and civil cases were tried by executive officers and judicial power was attached to executive power. Until now, judiciary never have independent and full authority to check legislative or executive branch.

2. Chinese People's Courts (including the Supreme People's Court) do not have the power to interpret the Constitution and the laws, and technically, this makes it impossible for the People's Courts to hear cases of constitutional review.<sup>23</sup> In the common law system, the power to interpret the law is combined with the power to adjudicate, but in China, the power to interpret the Constitution and the laws is vested only with the NPCSC, and is separate from the

<sup>20</sup> Song Dahan (宋大涵), *Falü Guizhang Guifanxing Wenjian Beian Gongzuo Shiyong Shouce* (法律规章规范性文件备案工作实用手册) [Working Handbook on Legal Rules and Normative Documents Filing] 118 (2003).

<sup>21</sup> Lin Guanghua (林广华), *Weixian Shencha Zhidu Bijiao Yanjiu* (违宪审查制度比较研究) [Comparative Study of Judicial Review System] 186 (2004).

<sup>22</sup> See, e.g., Wang Lei (王磊), *Xianfa de Sifahua* (宪法的司法化) [Judicial Enforcement OF Constitution] (2000).

adjudication process which the People's Courts are in charge of.<sup>24</sup> Since the People's Courts cannot interpret the Constitution and the laws, it seems impossible for them to announce any legislation unconstitutional through adjudicating cases.

3. Since judicial interpretations conducted by the Supreme People's Court are also a major target of further review, the Supreme People's Court and all its subordinate courts are not eligible to play a meaningful role in the constitutional review mechanism. That is, pursuant to Article 90 of the Legislation Law, where the Supreme People's Court deems that a normative legislative document contravenes the Constitution or a national law, it may make a written request to the NPCSC for review. A scholar points out that this article actually vetoes the possibility for the Supreme People's Court and all of its subordinate courts to have jurisdiction on constitutional review cases.<sup>25</sup>

#### VI. WHY THE PEOPLE'S PROCURATORATE IS EXPECTED TO INITIATE CONSTITUTIONAL COMPLAINTS?

Since there are some defects in the current constitutional review mechanism, it is essential to improve the whole system by introducing some new institutional factors.

After studying the different styles of the various constitutional review regimes of the world, a scholar found that each constitutional review regime is "consistent with the specific situation of the nation, and is the fruit under a comprehensive consideration on many factors, including historical background, political system, political tradition, political idea and legal tradition, and so on."<sup>26</sup> As such, the design of the constitutional review system should be based on the Chinese reality, including its own historical, political, and legal traditions. China's fundamental political system is the system centered around the People's Congress, and the working model of state power is that, under the supervision of the People's Congress, the three other branches – People's Government (executive branch), the People's Court and the People's Procuratorate – shall divide the work, cooperate, and sometimes keep one another accountable.<sup>27</sup>

In light of such a systematic foundation, the People's Procuratorate should participate in the process of constitutional review, as it is the most appropriate agency to initiate a complaint of unconstitutional incidents. No matter which decisive body of review ends up exercising the review power – the NPC and its Standing Committee under the current constitution, or the Constitution Committee or the Constitutional Court, which are widely accepted among academics to be the ideal reviewing body – there shall be an institution which can lodge a constitutional suit, and the People's Procuratorate is the most ideal agency to fulfill the task.

<sup>23</sup> XIANFA art. 67 (2004) ("The Standing Committee of the National People's Congress exercises the following functions and powers: (1) to interpret the Constitution and supervise its enforcement; . . . (4) to interpret laws.").

<sup>24</sup> In 1981, the NPCSC authorised the Supreme People's Court to make "judicial interpretations" when involving the specific application of laws in court trials, see Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falü Jieshi Gongzuo de Jueyi (全国人民代表大会常务委员会关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People's Congress on Strengthening the Work of Interpretation of Law], art. 2 (Chinalawinfo). Therefore, in the current Chinese legal system, if the meaning of a provision of law needs further clarification, it is the NPCSC which has the authority to officially interpret the law; if the question is how to apply a provision of law, the SPP can give a "judicial interpretation". However, the power of "judicial interpretation" does not entitle the SPP to share the authority with the NPCSC to interpret laws. That is, the "judicial interpretation" should not contradict the legislative interpretation, see WANG Xuanwei, *A New Constitutional Order in Hong Kong: Managing Conflict Over the Interpretation of the Basic Law*, 2 TSINGHUA CHINA L. REV., 139, 142-43 (2009).

<sup>25</sup> Wang Zhenmin (王振民), *Zhongguo Weixian Shenchazhidu* (中国违宪审查制度) [Chinese Judicial Review System] 117 (2004).

<sup>26</sup> Hu Jinguang (胡锦涛), *Weixian Shenchazhidu Bijiayao Yanjiu* (违宪审查比较研究) [Comparative Study of Judicial Review] 373 (2006).

<sup>27</sup> There is no balance among these three branches because people's government (executive branch) is much more powerful and influential than other two.



### A. *The People's Procuratorates' responsibility to maintain the unity of legality*

According to the Chinese Constitution and the People's Procuratorates' Organization Law, the People's Procuratorate is the legal supervisory organ bearing the important responsibility of maintaining the conformity of legality.<sup>28</sup> That is to say, procuratorial branch is supposed to check other power in public sector, to make sure that executive, judicial and local legislative body to abide by the Constitution and laws.<sup>29</sup> This makes the Chinese People's Procuratorate different from the prosecuting organ in common law jurisdictions, where the Attorney-General's chamber acts as both the prosecution as well as the legal consultation agency. Lenin once specified the nature of the socialist People's Procuratorate as the following:

*"The sole power and function of the Chief-Procurator is to monitor the whole Republic for uniform understanding of the legality, regardless of regional disparity, excluding the impact from any region. . . . The duty of the Chief-Procurator is to guarantee that any decision of local government does not conflict with laws. The Chief-Procurator must lodge a protest on any illegal decision only for legal unity. The Chief Procurator cannot directly stop the enforcement of illegal decision but manage to pursue that the whole Republic has genuinely uniform understanding of law."*<sup>30</sup>

In essence, legal conflict is the biggest infringement of the unity of the legality. Therefore, the People's Procuratorate should participate in the procedure of constitutional review by lodging complaints on normative legislative documents that are deemed to be unconstitutional or inconsistent with the laws at higher levels.

### B. *The People's Procuratorate's Exclusive Power to Initiate Different Charges of Offenses*

The power that the Chinese Constitution and relevant laws confer to the People's Procuratorate is a procedural one in nature, mainly to initiate different charges of offenses. For example, filing an anti-corruption case is an action to lodge a criminal investigation procedure; supervision of case-filing on public security organ initiates the police criminal investigation procedure; pursuing a prosecution initiates the hearing procedures of the People's Court; bringing forward a rectification opinion or a procuratorial suggestion allows the relevant department to enter into the substantial deciding procedures, and so on. Accordingly, the power to launch a review of an unconstitutional infringement – procedural in nature – can be reconciled with the nature and characteristics of the Procuratorates' other functions. At the same time, because the People's Procuratorate only initiates a certain procedure rather than to make substantial decisions on any constitutional disputes, it will not share the power of adjudication with the reviewing organ during the constitutional review process. As such, the People's Procuratorate will not break down the Chinese constitutional tradition to cause an imbalance in the Chinese separation of powers.

In fact, the idea of the People's Procuratorate being suitable for lodging constitutional review has drawn attention and expectation from academics. In 2002, during a conference on "China's rule of law and the reform of the People's Procuratorate," Professor Zhang Wen-xian suggested that the People's Procuratorate should extend its supervision realm to the enforcement of the

<sup>28</sup> Renmin Jianchayuan Zuzhi Fa (人民检察院组织法) [Law on the Organization of the People's Procuratorate] (promulgated by the Nat'l People's Cong., July. 1, 1979, effective Jan. 1, 1980) (Chinalawinfo).

<sup>29</sup> Wang Xuanwei (王玄玮), *Lun Jiancha Quan Dui Xingzheng Quan de Fai Jiandu* (论检察权对行政权的法律监督) [Study of the Procuratorate's Judicial Review Over the Executive Power], GUOJIA JIANCHA XUEYUAN XUEBAO (国家检察官学院学报) [JOURNAL OF NATIONAL PROCURATORATES COLLEGE], May-June, 2011, at 77.

<sup>30</sup> Lun "Shuangchong" Lingdao he Fazhi (论"双重"领导和法制) [A Discourse on "Double-act" Direction and Legislation], in 33 Lening Quanj (列宁全集) [The Collected Works of Vladimir Llich Lenin] 326-28 (2d ed. 1984) (China).

Constitution.<sup>31</sup> In 2004, Professor Han Da-yuan in a seminar on “The Reform of the People’s Procuratorate and the Amendment of the People’s Procuratorate’s Organization Law” also emphasized that the People’s Procuratorate should research how to exercise its powers in the enforcement of the Constitution.<sup>32</sup>

### *C. The People’s Procuratorate’s ability to provide regular professional supervision.*

Constitutional review is a crucial component in the process of a smooth judicial operation and political practice. As such, its review procedure should not be initiated casually, and more systematic standards should be established. The discretion of the initiating agency will directly influence how strict or lax these standards will be. On the one hand, if the standard is too high, the possibility of a complainant getting public remedy will be slim. On the other hand, if the standard is too low, where the initiating agency grants overly generous access to the opportunity for constitutional review for the complainants, the whole constitutional review mechanism will become ineffective as the review institution will simply become a mere “platform of public debate.”<sup>33</sup> The People’s Procuratorate is a professional agency that specializes in the task of legal supervision, and thus, is qualified to shoulder the responsibility of initiating constitutional review. If the People’s Procuratorate works as a bridge between the people and the reviewing organ, it will not only assure that a case of high quality will enter into the substantive review phase, but also prevent the reviewing organ from facing a flood of abreactions of individual grievances. All this is in addition to the fact that the People’s Procuratorate is a standing agency whose working pattern can satisfy the daily requirement of preliminary filtering.

## IV. LEGISLATIVE BASIS FOR THE PEOPLE’S PROCURATORATE TO INITIATE CONSTITUTIONAL COMPLAINTS

That the People’s Procuratorate participate in the constitutional review process is not merely a theoretical hypothesis. Under the current set of legal foundations, the role of the People’s Procuratorate in this constitutional review process can be justified by and grounded in the law.

### *A. Relevant prescriptions on the People’s Procuratorate’s function in the Chinese Constitution*

Article 129 of the Constitution states that “[the] People’s Procuratorate of the People’s Republic of China is the legal supervision organ of the nation.” That is, the Constitution defines the nature of the People’s Procuratorate, but does not particularize or restrict its specific powers. Thus, technically, the Constitution provides at least a feasible amount of room for the People’s Procuratorate to participate in the constitutional review process. As long as it is authorized by the laws of the nation and its mission consistent with the prescribed nature, the People’s Procuratorate can justifiably exercise this power, and such involvement will not be regarded as illegitimate, or at least, inconsistent with the existing laws.

Nonetheless, it is still questionable whether the People’s Procuratorate is authorized to partake in the process of constitutional review as Article 5 of the People’s Procuratorates’ Organization Law (1979), where the concrete functions of the People’s Procuratorate were particularized, does not mention its power to launch constitutional review cases. However, it is

<sup>31</sup> Sun Qian (孙谦), Fan Chongyi (樊崇义) & Yang Jinhua (杨金华), Sifa Gaige Baogao: Jiancha Gaige, Jiancha Lilun Yu Shijian Zhuanjia Duihualu (司法改革报告—检察改革、检察理论与实践专家对话录) [Judicial Reform Report: Procuratorial Reform, Procuratorial Theory and Collection of Expert Practitioners’ dialogues] 59 (2002) (China).

<sup>32</sup> Gao Jianyan (高检研), Jiancha Gaige Ji Renmin Jianchayuan Zuzhi Fa Xiugai Zhuanjia Lunzhenghui Jishi (检察改革暨《人民检察院组织法》修改专家论证会纪实) [Procuratorial Reform and Record of Experts’ Debate on Amendment to the Law on Organisation of People’s Procuratorate Law] in 10 Jiancha Luncong (检察论丛) [Collection of Studies on the Procuratorate] 66 (2005).

<sup>33</sup> Zheng Lei (郑磊), He Xianfaxing Shencha Gai Ruhe Qidong (合宪性审查该如何启动) [How to Start the Constitutional Examination], FAXUE (法学) [LEGAL SCI. MONTHLY], Feb. 2007, at 53.

notable that the Chinese Constitution (1978) had conferred the People's Procuratorate with the "general power to supervise".<sup>34</sup> As such, it could be argued that the People's Procuratorates' Organization Law illegally and unduly limited the People's Procuratorate's "general power to supervise" by failing to include the power of launching constitutional review cases, and as such, the People's Procuratorates' Organization Law itself may be viewed as unconstitutional.<sup>35</sup>

In fact, in accordance with the aforementioned broader construction of the People's Procuratorate's powers in the Chinese Constitution (1982), a handful of powers have been granted to the People's Procuratorate through other national legislations, those powers that are absent in the People's Procuratorates' Organization Law. For example, the Administrative Proceedings Law (1989) conferred the People's Procuratorate with the power to challenge an administrative judgment under question;<sup>36</sup> the Civil Proceedings Law (1991) vested the People's Procuratorate with the power to protest civil judgments;<sup>37</sup> and the Criminal Proceedings Law (1996) granted the People's Procuratorate the power to supervise the criminal case-filing process in police departments.<sup>38</sup> All these new powers were not mentioned in the People's Procuratorates' Organization Law. Furthermore, the power to participate in unconstitutional review was authorized by the Legislation Law (2000).<sup>39</sup>

### B. Article 90 of the Legislation Law

Article 90(1) of the Legislation Law states that:

*"Where the State Council, the Central Military Committee, the Supreme People's Court, the Supreme People's Procuratorate and the Standing Committee of the People's Congress of various provinces, autonomous regions and municipalities directly under the central government deems that an administrative regulation, local decree, autonomous decree or special decree contravenes the Constitution or a national law, it may make a written request to the Standing Committee of National People's Congress for review, and the office of operation of the Standing Committee shall distribute such request to the relevant special committee for review and comment".*<sup>40</sup>

On the surface, this Article vests the power to raise constitutional review equally in the four central organs and the Standing Committee of the People's Congress at the provincial level. However, in fact, the Supreme People's Procuratorate is the most likely organ to exercise this power. In Article 90, the objects of constitutional review are administrative regulations,

<sup>34</sup> XIANFA (1978) (repealed 1982) (China).

<sup>35</sup> "General power to supervise" was not written in the Constitution (1982), so this inconsistency was no longer a problem after the enactment of the Constitution (1982).

<sup>36</sup> See Xingzheng Susong Fa (行政诉讼法) [Administrative Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) art 64 (Chinalawinfo). ("In the event that a legally binding judgment or order of a People's Court is deemed to be in contradiction with laws and regulations, the People's Procuratorate was entitled to lodge a complain in accordance with procedures of judicial supervision.") (China).

<sup>37</sup> See Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm., Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) 2007 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 702, art 187 (1) ("If the Supreme People's Procuratorate discovers that a legally effective judgment or ruling made by a people's court at any level, or if a people's procuratorate at a higher level discovers that a legally effective judgment or ruling made by a people's court at a lower level, involves any of the circumstances specified in Article 179 of this Law, the Supreme People's Procuratorate or the People's Procuratorate at a higher level shall respectively file a protest.") (China).

<sup>38</sup> See Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by the Standing Comm., Nat'l People's Cong., Mar. 17, 1996, effective Jan. 1, 1997) art. 87 (Chinalawinfo) ("Where a People's Procuratorate considers that a case should be filed for investigation by a public security organ but the latter has not done so, or where a victim considers that a case should be filed for investigation by a public security organ but the latter has not done so and the victim has brought the matter to a People's Procuratorate, the People's Procuratorate shall request the public security organ to state the reasons for not filing the case. If the People's Procuratorate considers that the reasons for not filing the case given by the public security organ are untenable, it shall notify the public security organ to file the case, and upon receiving the notification, the public security organ shall file the case").

<sup>39</sup> Legislation Law, *supra* note 3.

<sup>40</sup> *Id.* art 90(1)

local decrees, autonomous decrees as well as special decrees. Administrative regulations are promulgated by the State Council, and thus, will most likely rule in favor of these administrative regulations' constitutionality; otherwise, the Council would not have promulgated them in the first place. As such, it is extremely unlikely that the State Council will put forth a request of constitutional review against the administrative regulations. In the same way, the Standing Committees of the People's Congress at the provincial level will not put forth a request of constitutional review on its local decrees, autonomous decrees or special decrees, all of which would have been promulgated or ratified by themselves. As for the Supreme People's Court, although it is possible for it to employ its power for constitutional review, it does not have a sufficiently meaningful number of opportunities to review such cases due to the passive nature of the judicial power. In addition, the Central Military Committee is mainly in charge of martial rules and hardly relates to the affairs of the civil society. Thus, only the Supreme People's Procuratorate has the incentive to effectively exercise the power of constitutional review because of its stature as a legal supervision organ. Also, because it is least impacted by any self-interest that plagues other potential organs<sup>41</sup>, the People's Procuratorate is most suitable for the purpose of carrying out the task of making the written request for constitutional review.

*C. Article 43 of the Legislation Law and Article 32-33 of the Supervision Law.*

Article 43 of the Legislation Law states that:

*"The State Council, the Central Military Committee, the Supreme People's Court, the Supreme People's Procuratorate, the various special committees of the National People's Congress and the Standing Committee of the People's Congress of various provinces, autonomous regions and municipalities directly under the central government may make a request for legislative interpretation to the Standing Committee of the National People's Congress."*<sup>42</sup>

Although Article 43 does not directly relate to constitutional review, its implications are extremely important to the People's Procuratorate as, to an extent, it solves the problem of how the People's Procuratorate can supervise the judicial interpretation of the Supreme People's Court. For example, in 2000, the Supreme People's Court made a judicial interpretation on "an organized crime with the characteristics of a criminal syndicate".<sup>43</sup> It stated that an underground organized crime will not be ascertained and adjudicated on unless it could be proved certain government officials had taken part in such acts or provided illegal protection. This interpretation was quite controversial because not every criminal syndicate included members from the government.<sup>44</sup> Two years later, based on the request from the Supreme People's Procuratorate, the NPCSC made a legislative interpretation on the same point to modify the judicial interpretation. According to the legislative interpretation, involvement of government officials is only a recommended element rather than an essential one.<sup>45</sup> In the same session, also

<sup>41</sup> Until March, 2009, the amount of judicial explanation published by Sup. People's Ct. is 3464 (including the ones published together with the Supreme People's Procuratorate), of which 914 was published by the Supreme People's Procuratorate (including the collaborative work with the Supreme People's Court).

<sup>42</sup> Legislation Law, *supra* note 3, art. 43.

<sup>43</sup> Zuigao Renmin Fayuan Guanyu Shenli Heshehui Xingzhi Zuzhi Fanzui de Anjian Juti Yingyong Falü Ruogan Wenti de Jieshi (最高人民法院关于审理黑社会性质组织犯罪的案件具体应用法律若干问题的解释) [Interpretation of the Supreme People's Court on Adjudicating Cases of Organized Crime with the Characteristics of a Criminal Syndicate] (promulgated by the Sup. People's Ct., Dec. 5, 2000, effective, Dec. 10, 2000) 2001 SUP. PEOPLE'S CT. GAZ. 15, 15, art. 1 (3) (China).

<sup>44</sup> See Wang Zishu (王子书), *Woguo Heishehui Xingzhi Zuzhizui de Lifa Bianqian* (我国黑社会性质组织罪的立法变迁) [*The Legislative Vicissitudes of Criminal Syndicates Crime in China*], SHEHUI KEXUEJIA (社会科学家) [SOCIAL SCIENTIST], Jan. 2003, at 62, 65 (suggesting that the requirement of the involvement of the government officials has been a bottleneck in cases of criminal syndicates).

<sup>45</sup> Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zhonghua Renmin Gongheguo Xingfa Di Erbai Jiushisi Tiao Di Yi Kuan de Jieshi (全国人民代表大会常务委员会关于《中华人民共和国刑法》第二百九十四条第一款的解释) [The Interpretation of the Standing

based on the request from the Supreme People's Procuratorate, the NPCSC made a legislative interpretation on the crime of "embezzlement for personal use." This legislative interpretation changed the relevant judicial interpretation that was made by the Supreme People's Court in 1998.<sup>46</sup>

In fact, in the *Law on the Supervision of Standing Committees of People's Congresses at Various Levels*, the NPCSC developed the manner of supervising judicial interpretation. Article 32 (1) of this law states that:

*"where the State Council, the Central Military Commission or the standing committee of the people's congress of the province, autonomous region or municipality directly under the Central Government finds that any interpretation of the Supreme People's Court or the Supreme People's Procuratorate regarding the specific application of laws conflicts with the law, or the Supreme People's Court or the Supreme People's Procuratorate considers that any interpretation of the other party conflicts with the law, it can put forward a written request for examination to the NPCSC, and the working body of the Standing Committee shall send it to the relevant special committee for examination and putting forward opinions."*<sup>47</sup>

Article 33 of this law further stipulates that where the Law Committee or any other special committee of the National People's Congress finds, upon examination, that any interpretation of the Supreme People's Court or the Supreme People's Procuratorate regarding the specific application of laws that conflict, and if the Supreme People's Court or the Supreme People's Procuratorate does not revise or abolish the said interpretation, it can put forward a bill requiring the Supreme People's Court or the Supreme People's Procuratorate to make revisions or to abolish the conflicting interpretation, or put forth a bill that the Standing Committee of the National People's Congress can make a legal interpretation on, and the directors' meeting can decide whether to submit the legal interpretation to the Standing Committee for deliberation.

#### *D. Two related administrative regulations*

Under the Legislation Law, ministerial and local administrative rules are reviewed by the State Council rather than the NPCSC, which is why ministerial and local administrative rules are not included in the list of objects of review in Article 90(1) of the Legislation Law. However, the People's Procuratorate can also participate in constitutional review on the ministerial and local administrative rules. For example, Article 35 of *Regulation on the Procedures for the Formulation of Ministerial Rules*<sup>48</sup> states that if any state organ, social organization, enterprise, public institution or citizen thinks that a government rule conflicts with the laws or administrative regulations, it may write to the State Council seeking review, after which the legislative affairs organ of the State Council will launch an investigation; alternatively, if the state organ, social organization, enterprise, public institution or citizen deems that a local rule of a major city conflicts with law or regulations at a higher hierarchical level, it may write to the

Committee of the National Peoples' Congress on Article 294 (1) of the P.R.C. Criminal Law] (promulgated by the Standing Comm., Nat'l People's Cong., Apr. 28, 2002, effective, Apr. 28, 2002) 2002 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 195

<sup>46</sup> Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zhonghua Renmin Gongheguo Xingfa Si Sanbai Bashisi Tiao Di Yi Kuan de Jieshi (全国人民代表大会常务委员会关于《中华人民共和国刑法》第三百八十四条第一款的解释) [Interpretation of the Standing Committee of the National People's Congress on Section 1, Article 384 of the P.R.C. Criminal Law]. (promulgated by the Standing Comm., Nat'l People's Cong., Apr. 28, 2002, effective Apr. 28, 2002) 2002 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 198.(China).

<sup>47</sup> Geji Renmin Daibiao Dahui Changwu Weiyuanhui Jiandu Fa (各级人民代表大会常务委员会监督法) [Law on Supervision of the Standing Committees of People's Congresses at Various Levels] (promulgated by the Standing Comm. Nat'l Peoples' Cong., Aug. 27, 2006, effective Jan.1,2007) art. 32 (1) (Chinalawinfo).

<sup>48</sup> Guizhang Zhiding Tiaoli (规章制度制定条例) [Regulation on the Procedures for the Formulation of Ministerial Rules] (promulgated by the Standing Comm. Nat'l Peoples' Cong., Nov. 16, 2001, effective Jan.1,2002) art. 35 (Chinalawinfo).

local provincial governments to seek review, and the legislative affairs organ of local provincial governments will launch an investigation.

Article 9 of *Regulation on the Archivist Filing of Regulations and Government Rules*<sup>49</sup> states that in cases where any state organ, social organization, enterprise, public institution or citizen believes that a local regulation is inconsistent with any administrative regulation or believes that the government rule or any other universally binding administrative decision or order issued by the departments of the State Council or the people's governments of the provinces, autonomous regions, municipalities directly under the Central Government or the comparatively large cities is in contradiction with any laws or administrative regulations, it may write to the State Council for further review, and the legislative affairs organ of the State Council shall examine the suggestion and put forth opinions on how to deal with the regulation or government rule and deal with them accordingly pursuant to the prescribed procedures.

However, since both Article 35 of *Regulation on the Procedures for the Formulation of Ministerial Rules* and Article 9 of *Regulation on the Archivist Filing of Regulations and Government Rules* are merely administrative regulations, they are impossible to confer any power on the People's Procuratorate. However, these two regulations confirm and support many supervision bodies, including the People's Procuratorate, to participate in the constitutional review process. In this way, these two regulations allow for the local People's Procuratorate to contribute in the constitutional review mechanism.

## V. SUGGESTIONS ON HOW THE PEOPLE'S PROCURATORATE MAKE TESTING EFFORTS

### A. *Make the pilot arrangement*

In order to execute a pilot program of procuratorial participation in the constitutional review mechanism, the relevant provisions of the current Constitution and the laws should be sufficient and no amendments needed. The current Constitution has affirmed the nature of the People's Procuratorate as "the legal supervision organ of the nation", and the Legislative Law has conferred the People's Procuratorate with the power to request constitutional review as well as legislative interpretation. As such, it is the People's Procuratorate itself which is not aware of its duty and the function of constitutional review. The Supreme People's Procuratorate could therefore issue an internal notification within its system to begin a pilot arrangement without any obstacles or hindrances in the law or the legal system.

However, before the pilot arrangement, the Supreme People's Procuratorate should ask the NPCSC's for consent and support, which will reasonably be granted for two reasons. First, the People's Procuratorate will only play the role of a bringing up cases for constitutional review and will not exercise the power to judge or ascertain any unconstitutional behavior. Rather, what the People's Procuratorate seeks to do will be to uphold the highest constitutional authority of the NPC and its Standing Committee rather than to undermine or share their authority. Second, when the People's Procuratorate participates in the constitutional review process, the NPCSC's pressure and workload will be alleviated.

### B. *Setting up various divisions within the constitutional review system*

The various divisions within the constitutional review system could be established in the following two ways:

1. Set up a special division that would specialize in the task of constitutional review. Due to the characteristics of the tasks involved with constitutional review, the special division will be required to be set up under the Supreme People's Procuratorate and the People's Procuratorates

<sup>49</sup> Falü Guizhang BeianTiaoli (法规规章备案条例) [Regulation on the Archivist Filing of Regulations and Government Rules] (promulgated by the St. Council, Dec. 14, 2001, effective Jan. 1, 2002) art. 9 (Chinalawinfo).

at the provincial levels. Meanwhile, it will be unnecessary to set up the division in the People's Procuratorates at the municipal or county levels. The costs incurred in implementing such a system will not be high. Also, the People's Procuratorates will not be confronted with the problem of a lack of qualified employees as the administrative law or jurisprudence can satisfy the recruitment needs.

2. Let the present Civil and Administrative Procuratorial Divisions take the duty of constitutional review. In fact, in the cases that it deals with, the Civil and Administrative Procuratorial Division faces situations where the normative legislative documents contradict each other. With decades of experience, the Civil and Administrative Procuratorial Divisions will be suitable to take on this task. However, if we consider the two divisions' already heavy workload in dealing with civil complaints, a separate division proposed in the earlier section will be more preferable.

### *B. Determining the contents of this task*

The role of the procuratorates in the process of constitutional review will be accepting the unconstitutional complaint or petition from state organ, social organization, enterprise, public institution or citizen, and putting forward a request of review to the relevant reviewing organs after conducting a preliminary assessment. In the light of the Legislative Law and the relevant administrative regulations, the duties of the People's Procuratorate will include the following:

1. If any administrative regulation, local regulation, autonomous regulation and special regulation is deemed to be in conflict with the Constitution or the laws, the Supreme People's Procuratorate shall make a written request to the NPCSC for further review;

2. If any judicial interpretation of the Supreme People's Court is deemed to be in conflict with the Constitution or the laws, the Supreme People's Procuratorate shall make a request to the NPCSC for further legislative interpretation;

3. If any ministerial or local rule is deemed to be in conflict with the Constitution, the laws or administrative regulations, the Supreme People's Procuratorate shall make a written suggestion to the State Council for further review; and if any local rule of a major city is deemed to be in conflict with the normative law at a higher level, the provincial People's Procuratorate where the major city is located shall directly make a written suggestion to the provincial People's Government for further review.

However, as to the constitutionality of the actions of the nation or those of the high officials in performing their duties, there is no legal basis to seek such review, as they are not the objects of procuratorial review yet. Also, yet another controversial aspect of this is the constitutionality of national legislations. Due to the superposition of the legislature and the constitutional reviewing institutions in mainland China, the academics have not reached a consensus as to whether national legislations could theoretically contradict the Constitution.<sup>50</sup> That is why national legislations have not been included in the list of targets of review in the Legislation Law. Therefore, for now, it is not the target of procuratorial review either.

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<sup>50</sup> See, e.g., Chen Liming (陈力铭), *Weixian Shenchu Yu Quanli Zhiheng* (违宪审查与权力制衡) [Judicial Review and the Balance of Powers] 167-68 (2005) (arguing that the National People's Congress should not adopt unconstitutional laws); Wang Zhengmin (王振民), *Zhongguo Weixian Shenchu Zhidu* (中国违宪审查制度) [Chinese Judicial Review System] 104 (2004) (arguing that the NPC's legislation can be unconstitutional, as laws adopted by a simple majority vote shall not contradict the Constitution which was adopted by a two-thirds majority vote).

*C. Putting forward a proposal to amend relevant laws after an adequate pilot experiment*

After several years of exploration, the People's Procuratorate will accumulate enough experience both in practice and in theory, and will be equipped to make suggestions during the legislation process as well as in amending the law. For the whole constitutional review regime, one possible means to improve its system would be to amend the Legislation Law or to promulgate a new Constitutional Review Law. No matter which route is taken, it is extremely important to prescribe a concrete set of procedures to be following in the constitutional review process, such as the organ authorized or responsible to initiate review, a set of time limits, and the punishments for unconstitutional actions, and so on. Only through such systematic prescriptions will the whole constitutional review regime be made practicable and useful. As to the role of the People's Procuratorate, the precise role should be written in the People's Procuratorates' Organization Law.

## VI. CONCLUSION

The current constitutional review mechanism in China is so defective that it is incapable of solving the serious problem of recurring unconstitutional incidents. Thus, it is essential to introduce new institutional solutions to improve the constitutional review mechanism. Under the Chinese constitutional framework, the Supreme People's Procuratorate is the most appropriate organ to initiate a complaint of constitutional review. The Supreme People's Procuratorate shall, in accordance with the Chinese Legislation Law, timely start testing job for the establishment of a new constitutional review mechanism, then gradually enlarge and improve the procuratorial role in the constitutional review mechanism.

If the suggestion of this paper could become reality, it would probably not only promote the People's Procuratorate's contribution to Chinese constitutionalism, but also contribute to the innovation and development of the procuratorial system throughout the world.