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Judicial Review System in
Safeguarding Human Rights
-From International Perspective
and Domestic Perspective
Especially in China

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Summary

This thesis concerns the importance of judicial review system in safeguarding human rights. It examines different review systems on international level, regional level and domestic level. In the second half of the thesis, China, as a specially targeted country, has been examined in better detail of its judicial review system. The aim of this thesis is to, through introduction of, and comparison with other systems developed in the world, examine situations and problems existing in present judicial review system in China, and try to find, at the end of the thesis, some useful solutions for China's possible further reform in related legal area, specially in its judicial review system.

The reason as to why this topic is chosen mainly lies in the fact that the author has been thinking since the programme started in September 2005: What is the most important aspect in safeguarding human rights and bringing them into reality in Public International Law? Formulation of legal instruments, reform of international institutions or other? And my answer is: the implementation of International Law.

The world incorporates moral values into law mainly because the values in the form of legitimacy can be realized through enforcing the law. If a law containing moral values remains on paper and symbolic, no matter how perfectly it is formulated, it is meaningless. As long as the law is enforced, the values enshrined in it can come true. The more effectively it is enforced, the better the values are realized. As part of International Law, international human rights law require states parties take all possible measures to implement the law, among those measures, an effective remedy for violation of human rights is required, and if a state fails to do so, there are remedies available on higher level in regional scope or in the spectrum of the UN. The remarkable achievements made by the European Court of Human Rights testified the significant role of judicial review in safeguarding human

rights, and the development and functioning of the Human Rights Committee also proves its value.

China, as a member of most international human rights instruments, under the obligation of which, is expected to build up an effective judicial review system in safeguarding people's rights. The economic development, the accession to the WTO and practical situation in China also require the country to do so.

The judicial review system in China is shaped mainly by its Administrative Procedure Law (APL). The system has been functioning pretty well since the adoption of the APL in 1989. However, with the time going, some concerns and problems have been shown, the most important one of which seems to be the application scope of the law which shall be enlarged in order to better its function in supervising administrative actions. Concerning the legislation, the country lacks an effective constitutional review system at present. This is also one of the directions to which the reform shall be targeted.

On international level, China has signed the ICCPR but not yet ratified it, and the country is neither a member of the Protocol to the ICCPR. This makes citizens in China have no recourse to the Human Rights Committee, an international monitor body of implementation of the Covenant, to seek remedies for violations of human rights committed by the State government. But it can be expected that China will join the system sooner or later.

Preface

The accomplishment of this thesis not only implies the end of my study in the LL.M. Programme, but also testifies a lot of meaningful work many people have done.

Firstly, I would like to say I very much appreciated the International Human Rights Law Programme the RWI and Faculty of Law of Lund University provided and the Scholarship the RWI has offered. With this kind financial support, I learn much from the Programme and am ready to contribute more to the area in my future career.

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friend who did me a big favor at the tough time when I just arrived in this city.

Abbreviations

ACHR	American Convention on Human Rights
APL	Administrative Procedure Law
ARL	Administrative Reconsideration Law
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention of the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GATT	General Agreement on Tariffs and Trade
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IBHR	International Bill of Human Rights
NPC	National People's Congress
OAS	Organization of American States
OAU	Organization of African Unity
PRC	People's Republic of China
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
US	United States of America
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

1 Introduction

After World War II, where grave and large-scale violations of basic human rights and incredible atrocities were committed, especially under the responsibility of the German Nazi government inside and beyond the territory of the German Reich, the idea of human rights emerged stronger. At the end of the war, the world realized that the protection of human rights could no longer be left to the discretion of the government of each state, not only aliens but also the citizens living in their own country needed some international protection. The calls came from across the globe for human rights standards to protect citizens from abuses by their governments, standards against which nations could be held accountable for the treatment of those living within their borders. These voices played a critical role in the San Francisco meeting that drafted the United Nations Charter in 1945. By stating that: “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.....” in its preamble of the Charter, people started their long and determined march towards a Human Rights World, wanted to ensure that never again would anyone be unjustly denied life, freedom, food, shelter, nationality so on and so forth.

1.1. Framework of International Human Rights Instruments

In December 1948, the General Assembly of the United Nations adopted the famous Universal Declaration of Human Rights (UDHR). The UDHR, commonly referred to as the international Magna Carta¹, extended the

¹ Magna Carta (Latin for "Great Charter", literally "Great Paper"), also called Magna Carta Libertatum ("Great Charter of Freedoms"), is an English charter originally issued in 1215. Magna Carta was the most significant early influence on the long historical process that led to the rule of constitutional law today. Magna Carta was originally created because of disagreements between Pope Innocent III, King John and his English barons about the

revolution in international law ushered in by the UN Charter – namely, that how a government treats its own citizens is now a matter of legitimate international concern, and not simply a domestic issue. It claims that all rights are interdependent and indivisible. Its Preamble eloquently asserts that:

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.

The influence of the UDHR has been substantial. Its principles have been incorporated into the constitutions of most of the 192 nations now in the UN. Although it is not a legally binding document, the UDHR has achieved the status of customary international law because people regard it "as a common standard of achievement for all people and all nations." With the goal of establishing mechanisms for enforcing the UDHR, the UN Commission on Human Rights proceeded to draft two treaties: the International Covenant on Civil and Political Rights (ICCPR) and its optional Protocol and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In 1966, the above two Covenants were adopted and ten years later, entered into force. Together with the UDHR, they are commonly referred to as the International Bill of Human Rights (IBHR).²

In addition to the covenants in the IBHR, the UN has adopted more than 20 principal treaties further elaborating human rights. These include conventions to prevent and prohibit specific abuses like torture and genocide and to protect especially vulnerable populations, such as refugees (Convention Relating to the Status of Refugees, 1951), women (Convention

rights of the King. Magna Carta required the king to renounce certain rights, respect certain legal procedures and accept that the will of the king could be bound by law. The influence of Magna Carta outside England can be seen in the United States Constitution and Bill of Rights. Indeed just about every common law state has been influenced by Magna Carta, making it one of the most important legal documents in the history of democracy.

² See: <http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.htm>

on the Elimination of All Forms of Discrimination against Women, 1979), and children (Convention on the Rights of the Child, 1989).

Steps in formulating Human Rights Mechanisms were undertaken on the universal as well as the regional level. In Europe, the America, and Africa, regional documents for the protection and promotion of human rights extend the IBHR. The Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by Council of Europe in 1950 and in force since 1953, was modeled after the UDHR of 1948. The American Convention on Human Rights (ACHR) was adopted in 1969 and entered into force in 1978. African states have created their own Charter of Human and People's Rights (1981), and Muslim states have created the Cairo Declaration on Human Rights in Islam (1990). The dramatic changes in Eastern Europe, Africa, and Latin America since 1989 have powerfully demonstrated a surge in demand for respect of human rights. Popular movements in China, Korea, and other Asian nations reveal a similar commitment to these principles.

As we can see, on the international plane much has been achieved at the level of formulation³: the UDHR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention of the Rights of Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), Conventions on Genocide, on the Status of Refugees, on aspects of Slavery, on Racial Discrimination, on the Suppression and Punishment of the Crime of Apartheid, the European Convention on Human Rights⁴ (ECHR), the American Convention on

³ See <http://www.ohchr.org/english/law/>

⁴ See <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>

Human Rights⁵ (ACHR) and the African Charter on Human and People's Rights⁶ (ACHPR), ect. The list is long and impressive, and still keeps growing. In a word, in contemporary world, respecting and safeguarding human rights have turned to be one of the objectives and principles of the UN, and have become an essential component of international peace and development.

But between the formal legality of human rights and their actual enjoyment, there is still a gap. The world write human rights into instruments, namely laws, by doing so the moral rights become legal, but if human rights remain on the paper, in the form of legality, their actual enjoyment, the full realization of human rights, as an ideal pursued by all mankind, will never come true. Only when enforcing the law, the legal rights can become true, become actual rights. Therefore, law enforcement is essential in safeguarding human rights.

Then what is the effective way to enforce law and to realize the common goal of all these human rights instruments so that to bring human beings the true protection against violations of rights which shall be legally enjoyed by those as human beings?

1.2. Judicial review-----An Effective Way to Protect Human Rights

As the individual's needs and participation, human rights, from the minute of their born, is against ruling powers, or we can say "restrict" those powers. In 17th century England, the protection of the people's rights (especially the right to political participation, and freedom of religious belief and observance) against an oppressive government was the catchcry of the

⁵ See http://www.hrcr.org/docs/American_Convention/oashr.html

⁶ See <http://www1.umn.edu/humanrts/instree/z1afchar.htm>

English Revolution of 1640 (which led to rebel leader Oliver Cromwell heading the government, and the King being executed). It was also the catchcry for the rebellion against the civil administration - the 'Glorious Revolution' - of 1688 which saw another King on the throne, but also led to the English Bill of Rights, in 1689. Towards the end of the 18th century, according to the philosopher John Locke, it was argued that it was part of God's natural law that no one should harm anybody else in their life, health, liberty or possessions. These rights could never be given up. The existence of this natural law also established the right to do whatever was necessary to protect such rights. This view limited the role of government. No one could be subjected to another's rule unless they consented. A government's responsibility became the duty to protect natural rights. This limited what it could legitimately do and gave its citizens the right to defy and overthrow a government that overstepped its 'legitimate' authority.⁷

When time comes to the 20th century, all the human rights instruments require state responsibility for promoting and protecting citizen's human rights. General Assembly Resolution 53/144, adopted on 8 March 1999, in its Preamble stressing that "the prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the State.....", and its Article 2 further elaborates state responsibility to protect human rights.⁸ All the instruments stipulate that state parties have both passive responsibility not to violate human rights and positive responsibility to take

⁷ See <http://www.universalrights.net/main/histof.htm>

⁸ See General Assembly resolution 53/144, adopted on 8 March 1999, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Article 2 reads as the following:

1. Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.

2. Each State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed.

active actions to protect human rights⁹. Signing or ratification of a convention should actually be a positive statement by the executive government of one country to the world and to its own people that the executive government and its agencies will act in accordance with the convention, or at least not in collide with the purposes and objectives of the convention when a state has signed but has not ratified the convention. Even though international law has traditionally been defined as consisting of the norms that govern the conduct of relations between sovereign states, if someone looks into international human rights law, the conventions, it is apparent that the responsibility of a state in relation to individuals and defined groups within the state is increasingly the subject of international law. Each convention contains provisions that prohibit or prescribe particular conduct on the part of a state party in its dealings with defined individuals or groups.

In addition, contemporary international events also warn the world abuses might played by administrative powers and the need of supervision on the power in safeguarding human rights. Either the indictments against Saddam Hussein¹⁰ for crimes against humanity, war crimes and genocide or condemnns made by all over the world on Bush's Administration dealing with the Guantanamo unlawful detainees¹¹, both proved the need for limit and supervising the power of government.

From above, it seems obvious that though actualizing the moral rights by way of formal legitimating is a systematic project, the most direct requirement of which is to strengthen the supervision upon all authorities, especially administrative authorities. This requirement also accords with the

⁹ Article 2 of the ICCPR; Article 2 of the ICESCR; Article 2 of the ICERD, etc.

¹⁰ Saddam Husein: the former President of Iraq, in power from July 16, 1979 until April 9, 2003. On 1 July, 2004, Saddam was charged with the premeditated murder, torture and forced expulsion and disappearance of the residents of Dujail, a Shia Muslim town, after rebels there made an attempt to assassinate him in 1982. The 1980-88 Iran-Iraq war, the 1988 massacre in the Kurdish town of Halabjam, the extermination of Shia Muslims after their 1991 revolt, and the 1990 invasion of Kuwait are among events to further charges against Saddam Hussein.

¹¹ See <http://web.amnesty.org/pages/guantanamobay-index-eng>;
http://hrw.org/doc/?t=usa_gitmo

meaning of human rights, which by broadly speaking, is an allegation of all people against all others which includes governments and any other organizations or individuals beyond governments; nevertheless by narrowly speaking, human rights is an allegation of an individual against only his or her government, is a resort countering the government, so its counter part is just government.¹²

Then by what way the states or relevant international institutions can effectively monitor the conducts of a government, provide remedies for human rights violations and redress government wrong doings? Certainly legal ways of remedy such as administrative objection and the ombudsman or the due process of law can play a role of decreasing unlawful administrative action¹³ or activities and so forth, then in most western liberal democracies, final say over the disputes concerning human rights between individual and government or government agencies is accorded to judges, typically sitting either as ordinary courts, constitutional courts, or human rights courts, engaging in what is known as “Judicial Review”.

This study, in the following chapters, will examine the concept of judicial review and its functioning models in contemporary world on different levels and at the end, China (or PRC, shall mean mainland China in this thesis) will be targeted in this respect by a comparative approach, aiming at finding some valuable solutions for the on-going Chinese legal reform to better protect human rights in China and eventually fulfill its duty under international human rights law or conventions.

¹² Long Li: *Legal Theory*, People’s Court Press, China Social Science Press, 2003, P 150

¹³ Y. Zhang: *Comparative Studies on Judicial Review in East and Southeast Asia*, 1995
<http://www.ias.nl/iiasn/iiasn6/iiasnews/zhang.html>

2 The Concept of Judicial Review and Models Adopted at Different Levels.

2.1 The Concept of Judicial Review

Judicial review, as an American innovation, refers to the power of a court to determine whether the acts of all branches, namely the legislative, judiciary and executive powers of government and government officials comply with the Constitution which normally adopts state policies of “rule of law”, “protection of human rights”, “Democracy”, etc. Actions that do not conform are unconstitutional and therefore null and void. The practice is usually considered to have begun with the ruling by the Supreme Court of the United States in *Marbury v. Madison* (1803), in which case the Court ruled an act of Congress unconstitutional. In *Marbury* Chief Justice John Marshall reasoned that since it is the duty of a court in a lawsuit to declare the law, and since the Constitution is the supreme law of the land, where a rule of statutory law conflicts with a rule of the Constitution, then the law of the Constitution must prevail. Marshall asserted that it is "emphatically the province and duty of the judicial department, to say what the law is."¹⁴

Now, as an important legal system, judicial review has been widely established in modern democratic countries, entailing an independent examination of the authorities of other national organs primarily by the judicial organs, correction activities violating the law, and making compensation to the citizens and organizations whose legal rights have been damaged. But nothing actually mandates that the last word on human rights must be deposited in the judiciary. It could also be given to a democratic

¹⁴ See: <http://www.answers.com/topic/marbury-v-madison>

body instead, like the parliament, or to a review council created for this purpose. However, it has become increasingly common to allocate this power to courts. The interpretation of law and legal rights is thought to be the special preserve of the judiciary. No matter to whom the power to review belongs, judicial review has been proved an effective way to monitor state authorities and safeguard human rights. The primary reason why legal human rights are different from moral ones lies on this very fact that citizens can seek legal protection against the violations of the rights assured by law, and judicial review can provide an effective remedy for human rights violations committed by executive branches or its agencies.

Both from the concept and the practice, judicial review can be looked into through two different directions: one can be called as “Review of Legal Norms”, “Constitutional Review” or “Review of Legislative Actions” which is usually an examination of the constitutionality of legal norms; and the other can be called as “Review of Administrative Actions”, which is an examination of the legitimacy¹⁵ of conducts of executive authorities or their agencies.

2.2 Judicial Review Models Adopted at Different Levels

2.2.1 Countries with a Common Law Tradition

2.2.1.1 United States of America

First of all, the US, the mother country of the idea of judicial review will be examined.

¹⁵ Here the “legitimacy” refers to both conformity with the Constitution and the other laws, regulations and other legal norms functioning in relevant states.

In the US, the judiciary is responsible for judicial review. The US is the first country using this system. The doctrine of judicial review was built on the political and philosophical foundation of separation of three powers and was first established as part of Federal law in 1803 in the Supreme Court decision *Marbury v. Madison*.¹⁶, where the first decision of the Supreme Court of the United States to declare an act of Congress unconstitutional was made, which also became the first case of judicial review world-wide. Before this case, the father of US Constitution, Mr. Hamilton used to say, “Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty is to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing”; and that “the interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.”

The power of judicial review is held by courts in the United States which while developing out of British law is based fundamentally on the tripartite nature of governmental power as enunciated in the United States Constitution. The only explicit definition given in the Constitution is in Article 3, which states:

¹⁶ In 1801, newly elected Pres. Thomas Jefferson ordered Secretary of State James Madison to withhold William Marbury from the commission of his appointment by former Pres. John Adams as justice of the peace in the District of Columbia. Marbury then requested that the Supreme Court compel Madison to deliver his commission. In denying his request, the court held that it lacked jurisdiction because the section of the Judiciary Act passed by Congress in 1789 that authorized the Court to issue such a writ was unconstitutional and thus invalid. Chief Justice John Marshall, writing for the Court, declared that the Constitution must always take precedence in any conflict between it and a law passed by Congress. Subsequently, in 1803, first decision of the Supreme Court of the United States to declare an act of Congress unconstitutional was made and thus the doctrine of judicial review was established.

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish... The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution..."

The power to strike down laws is not specifically listed, but is an implied power derived from Article 3, and Article 6, which declares that the Constitution is the supreme law of the land: no state or federal law is allowed to violate the Constitution.

The ultimate court for deciding the constitutionality of federal law under the Constitution of the United States is the Supreme Court of the United States. And the ultimate court for deciding the constitutionality of state law under state constitutions is the highest appellate court in each state — usually called a Supreme Court, but also sometimes known as the Court of Appeals. Even before Marbury, the doctrine of judicial review was specifically enshrined in some state constitutions, and by 1803 it had been employed in both state courts and federal courts in actions dealing with state statutes.

Since 1960s, the scope of judicial review in the US has been further enlarged and almost all administrative actions have been brought into the scope of judicial review and non-reviewable administrative actions must be strictly certified.¹⁷ Sovereign Immunity, as a principle, has been abolished from the Federal level down to the state level, while the ideal of “No Remedy, No Right” has been manifested. According to article 704 of the Federal Administrative Procedure Act of the USA, reviewable administrative acts are pretty broad, which includes: agency action made reviewable by statute; final agency action for which there is no other adequate remedy in a court and the review of the final agency action of a preliminary, procedural, or intermediate agency action or ruling not directly

¹⁷ Qunlin Wei: A Study on Reviewable Administrative Actions of the PRC under the Environment of the WTO. http://www.law-lib.com/lw/lw_view.asp?no=1739

reviewable. In addition, even through article 701 exempts two types of administrative actions from the scope of judicial review which are administrative actions that statutes preclude judicial review and agency action committed to agency discretion by law, the two situations never operated during last several decades. It is obvious that reviewable administrative actions are pretty broad in the US.

Now there are over 60 countries copied the US model. But many countries make specific rules according to their national context, for example, only the supreme court can review the unconstitutional legislation; the court needs to have legal professors and politicians; the review procedure should be different from average procedures.¹⁸

2.2.1.2 The United Kingdom

In the UK, since there is no such a written or codified Constitution as a fundamental law of the Country, it seems unnecessary to talk about the review of constitutionality of legal norms. All we need to know is that only the parliament, the supreme power and also the highest court of the UK, has the power to adopt, revise and annul a legislation,¹⁹ including constitutional documents consisting of both written and unwritten sources.

While concerning the review of administrative actions in the UK, when citizens think their legal rights are violated by illegal administrative actions and wish to challenge the decision of a public body such as the police, a government department or a local authority, they may be able to do so by taking judicial review proceedings in the High Court. Judicial review can be applied for in relation to any organisation which performs a public function. A person who wants to apply for judicial review must be seen to have a

¹⁸ Buyun Li: Constitutionalism and China Law Press China 2006 P 241

¹⁹ See <http://www.parliament.uk/about/how/role/legislation.cfm>

'sufficient interest' in the case.²⁰ The grounds for such cases will usually be that:

(i) the body acted illegally. Under the heading of 'illegality'²¹ are encompassed the following grounds of review:

- a public body does something for which it has no positive legal authority
- a statute places a duty on a public authority and that duty has not been carried out
- a statute confers a power on an authority and that power is used for a purpose other than that intended by the statute
- in exercising a public power an authority takes into account an irrelevant consideration or fails to take into account a relevant consideration
- a statute confers a power on public body 'X' but it was taken by public body 'Y' ("unlawful delegation")
- a statute confers discretion on a public authority and that authority adopts an overly rigid policy as to how that discretion will be exercised ("fettering discretion")
- a public authority makes a factual error in arriving at its decision.

(ii) or the body acted irrationally. Under the heading of 'irrationality'²² are encompassed the following grounds of review:

- the decision is obviously perverse or absurd
- the decision is illogical
- the decision is disproportionate

Irrationality is also known as Wednesbury unreasonableness after the case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* (1948) which stated that a decision would be unreasonable if it "is so unreasonable that no reasonable authority could ever have come to it" (per Lord Greene).

²⁰ See <http://www.yourrights.org.uk/your-rights/chapters/how-to-get-redress/civil-actions-and-judicial-review/judicial-review.shtml>

²¹ See <http://www.publiclawproject.org.uk/simpleguide.html>; <http://www.answers.com>

²² See <http://www.publiclawproject.org.uk/simpleguide.html>; <http://www.answers.com>

It is very difficult to establish and rarely submitted as a ground on its own. There is also a sliding scale of intensity of review on the grounds of unreasonableness:

Non-Justiciable --> Ordinary Wednesbury --> Super Wednesbury --> Anxious Scrutiny

Non-justiciable cases are those which involve matters best left to the executive (such as national security), and courts will refuse to review such cases on the basis of irrationality. Anxious scrutiny applies to cases involving human rights. As a general rule, the further to the right of the scale the case falls, the more likely the courts are to find that a decision was unreasonable.

(iii) or that the decision was reached unfairly²³ due to procedural impropriety. Under the heading of 'procedural impropriety' are encompassed the following grounds of review:

- the decision-maker was biased
- the decision-maker failed to provide a fair hearing
- the decision-maker failed to provide reasons for the decision after it was taken

Concerning the scope of the judicial review, three situations in the UK have been exempted from the reviewable list: the situations may be refused for judicial review; the acts not under the jurisdiction of the courts and the legal clauses exempting judicial review. However, some scholars, based on their study, believe that “All the legal clauses exempting judicial review can not function as such”, and for “those listed situations may be refused for judicial review” such as “the application has been undue delayed”, “applicant’s fault”, etc. on the situations the court only have the power to refuse taking

²³ Also the courts have recently extended the idea of fairness to prevent abuses of power where public bodies have sought to go back, without sufficient justification, on promises made (called 'legitimate expectations').
<http://www.publiclawproject.org.uk/simpleguide.html>

action, but not exempting them from the scope of judicial review.²⁴ So in this sense, in the UK, administrative actions which can be excluded from judicial review only exist in the Act of State, which has been listed under “the acts not under the jurisdiction of the courts”.

Finally, in the UK, a successful action for lodging a judicial review can compel a public body to do something or prevent them from doing it. The court can also reverse a decision made by a public body or make them reconsider that decision. Damages may be available as a remedy in certain circumstances.

2.2.2 Countries with a Civil Law Tradition

2.2.2.1 France

Constitutional review in France is performed by the Constitutional Council, a special political agency which is composed of nine members, is responsible in particular for overseeing the proper functioning of elections and for ruling on the constitutionality of organic laws and legislation submitted to it. Article 61 of the Constitution of France states that all organic laws, as well as those proposed statutes that garner sufficient parliamentary opposition (in practice, most of them do) must pass before it at the end of the legislative process. The Constitutional Council can strike down the controversial bill in full or in part, and its decisions cannot be appealed.²⁵

The problem with this mechanism is that in France, the Constitutional Council is the only judicial body having authority for constitutional review. It cannot be seized by ordinary citizens, who also cannot invoke

²⁴ Qunlin Wei: A Study on Reviewable Administrative Actions of the PRC under the Environment of the WTO. http://www.law-lib.com/lw/lw_view.asp?no=1739

²⁵ For detailed information, please see: Buyun Li: Constitutionalism and China Law Press China 2006 P242

unconstitutionality of a law as a defense. This means that unconstitutional laws cannot be fought anymore if they somehow evade the Constitutional Council.

In practice, the French supreme courts who deal with individuals (Conseil d'état and Cour de Cassation) do their best to interpret the law in a manner consistent with the Constitution. In particular, French administrative law defines a category of case law known as principles of constitutional value (*principes à valeur constitutionnelle*), such as human dignity and continuity of the state, that rule over the executive branch of the government even if the legislator omits to say so in statute law.

Concerning review of administrative actions, France is recognised as “the mother land of administrative law” for its flourish in this area. And the core of French administrative mechanism lies in its administrative courts system. And the significant feature of this system is the bi-functions of the administrative courts as both government advisory body and judiciary body.

The "guardian of individual liberty"²⁶, the French legal system is organized on the basis of a fundamental distinction between civil courts, with jurisdiction in disputes between private individuals or bodies, and administrative courts, with jurisdiction in all cases involving some form of dispute between a private individual or body (company, association, etc.) and a public body. Judicial control of the administration is entrusted to a specialist corps of judges who sit in administrative courts. These courts now form a three-tier hierarchy headed by the Conseil d'Etat (the supreme administrative court) in Paris, below which are the seven regional Courts Administratives d'Appel and the Tribunaux Administratifs, which number 27 in metropolitan France. Also in France's overseas départements and territories) there are the four Tribunaux Administratifs of Antilles, Réunion,

²⁶ Article 66 of the French Constitution reads as follows:

No one shall be arbitrarily detained.

The judicial authority, guardian of individual liberty, shall ensure the observance of this principle as provided by statute.

Nouméa and Papeete. In addition to these administrative courts of general jurisdiction, there are a number of other administrative jurisdictions exercising judicial functions in particular spheres, like Audit Courts and Financial Courts.

The reviewable administrative actions (the scope of judicial review) by the above administrative courts in France include all official actions taken by administrative organs except actions with a private nature, legislative actions, foreign organs' actions and actions taken in name of the state.

2.2.2.2 Germany²⁷

In Germany, judicial review is a legal principle defined and guaranteed by the German constitution (often referred to as the Basic Law or Grundgesetz).²⁸ The constitutional court in Germany, is responsible for constitutional review. This model was invented by Austria in 1920 and followed by many European countries including Italy and Spain. Many Asian, African and Latin American countries take this model too.

Judicial review in Germany is indeed intended as a safeguard against tyranny of the majority and has been successfully employed to challenge, for example, the national census efforts of the German government in the 1980s. In particular, article 93 states that the Federal Constitutional Court shall rule:

- 1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body;*
- 2. in the event of disagreements or doubts respecting the formal or substantive compatibility of federal law or state law with this Basic*

²⁷ For detailed information concerning judiciary of Germany, please visit: http://en.wikipedia.org/wiki/Judiciary_of_Germany

²⁸ See <http://www.answers.com>

- Law, or the compatibility of state law with other federal law, on application of the Federal Government, of a state government, or of one third of the Members of the Bundesrat;*
- 2a. in the event of disagreements whether a law meets the requirements of paragraph (2) of Article 72, on application of the Bundesrat or of the government or legislature of a state;*
- 3. in the event of disagreements respecting the rights and duties of the Federation and the states, especially in the execution of federal law by the states and in the exercise of federal oversight;*
- 4. on other disputes involving public law between the Federation and the states, between different states, or within a state, unless there is recourse to another court;*
- 4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been infringed by public authority;*
- 4b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a state law, however, only if the law cannot be challenged in the constitutional court of the state;*
- 5. in the other instances provided for in this Basic Law.*

Also, article 93 provides that any court, as part of its proceedings, may request the Federal Constitutional Court or the appropriate land court to review a particular statute's constitutionality or compatibility with applicable international law.²⁹

In Germany, concerning administrative actions, a specialized court-administrative court, out of five specialized courts dealing with five distinct subject areas: administrative, labour, social, fiscal, and patent law has the power to review. Administrative courts consist of local administrative

²⁹ See http://en.wikipedia.org/wiki/Judiciary_of_Germany; <http://www.answers.com>

courts, higher administrative courts, and the Federal Administrative Court. In these courts, individuals can seek compensation from the government for any harm caused by incorrect administrative actions by officials. For instance, many lawsuits have been brought in administrative courts by citizens against the government concerning the location and safety standards of nuclear power plants.

According to German Basic Law and Administrative Court Law, the administrative courts do not accept and hear the charges made by citizens for unconstitutionality of administrative actions and property disputes between citizens and administrative organs, except these, all allegations against administrative actions come under the scope of administrative litigation and the aim of administrative litigation is to protect citizens' personal and property rights, for those administrative lawsuits concerning political, cultural and religious rights, administrative courts have no power to examine.

It seems from the above the scope of administrative litigation in Germany is pretty narrow, whereas since citizen has the Constitutional Litigation Right, those disputes which are difficult to be resolved under administrative litigation can in other way be settled through constitutional litigation.

These various judicial review systems have played an important role in safeguarding human rights, the authority of the constitution, the integrity of the legal system, the principle of democracy and rule of law as well as the political and social stability of the states.³⁰ And the countries in the world are still endeavouring to improve the system.

2.2.3 Appeal Procedures on Regional and International Level

³⁰ Buyun Li: Constitutionalism and China Law Press China 2006 P 243

Generally speaking, Western Countries have a longer history of advocating and promoting individual rights than the east, and thus in these countries the balance of various state organs, restrictions and supervisions on those organs, especially administrative organs assuring good governance and individual rights are normally emphasized. These countries keep developing and perfecting their judicial review systems at home, at the same time, they take active action to formulate new mechanisms abroad on regional or international level, to ensure relevant administrative and legislative actions of a state could get more opportunities to be examined and redressed if found in violation of human rights the states have duties to protect. By doing so, even though a country failed in protecting certain rights of a citizen or citizens' rights were violated by their state and got no remedy, an appeal procedure on a higher level- either regional or international level is available, and individuals could, resort to these mechanisms, seek reasonable remedies to protect their legal rights.

2.2.3.1 Regional Mechanisms

2.2.3.1.1 European System

The council of Europe³¹ and protection of civil and political rights: The council of Europe is an intergovernmental organisation established in 1949 with the objective, inter alia, of strengthening democracy and human rights. The current membership of the Council of Europe is forty-six, including all EU member States. Under the auspices of the council of Europe, various important regional human rights treaties have been concluded, the most prominent one being the European Convention for Protection of Human Rights and Fundamental Freedoms (ECHR). The ECHR was opened for signature in Rome on 4 November 1950 and entered into force in September 1953.

³¹ For detailed information, please visit: http://www.coe.int/T/e/Com/about_coe/

The ECHR, despite being a regional convention, reflects the influence of and similarities with the principles contained in the 1948 Universal Declaration of Human Rights. In contrast to the purely moral value of the UDHR, the Convention establishes binding obligations (to which, admittedly, certain reservations are permitted). Article 1 of the ECHR provides that the parties “shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention”. Hence, by way of a radical departure from the traditional refusal of international law to concern itself with the relations between a state and its own nationals, the Convention and its Protocols govern the relations between a state and all persons within its jurisdiction so far as they fall within the scope of the Convention.

In addition to an enumeration of civil and political rights and freedoms derived in part from the UDHR, the Convention set up a mechanism for the enforcement of the obligations entered into by Contracting States. Three institutions were originally entrusted with this responsibility: the European Commission of Human Rights (set up in 1954), the European Court of Human Rights (set up in 1959) and the Committee of Ministers of the Council of Europe. Under the Convention in its original version, complaints had inter-state and individual complaints procedures for redress of grievances, recognition of the right of individual application was, however, optional and it could therefore be exercised only against those States which had accepted it. As of 1 Nov. 1998 when the Protocol 11 came into operation the individual complaints procedure has become automatic and a compulsory procedure for all States parties. And according to art. 34 of the Convention.....Complaints may be brought only against a State or State bodies. This would cover the activities of such public bodies as the courts, the security forces, or local or provincial governments and for admissibility, the matter raised must have exhausted all domestic remedies³². This means that if a high contracting state fails to prevent and redress the inconformity of its legislation and administrative practice with the requirements of the

³² See art. 35 (1) of the Convention

Convention and the Court's case-law, simply the rights assured in the Convention, the ECHR provides an appeal procedure on regional level, which will review the legislations and the administrative actions in question.

The ECHR has over years been amended through 14 additional protocols. It currently provides protection to well over 800 million people. Protocols Nos. 1, 4, 6, 7, 12 and 13 added further rights and liberties to those guaranteed by the Convention, while Protocol No. 2 conferred on the Court the power to give advisory opinions. Protocol No. 9 enabled individual applicants to bring their cases before the Court subject to ratification by the respondent State and acceptance by a screening panel. Protocol No. 11 restructured the enforcement machinery by fusing the Commission and the Court into a single institution, which means the Commission, as a admissibility-examining organ, was abolished, and claimants from then can submit applications directly to the Court and the committee of ministers are responsible for supervising execution of court's judgements. This Protocol made the system entirely judicial. Protocol No.14 required measures ensuring the long-term effectiveness of the Control System and its explanatory report reiterates the principle of subsidiarity of the Court, and stresses that "the rights and freedoms enshrined in the Convention must be protected first and foremost at national level. Indeed this is where such protection is most effective. The responsibility of national authorities in this area must be reaffirmed and the capacity of national legal systems to prevent and redress violations must be reinforced. States have a duty to monitor the conformity of their legislation and administrative practice with the requirements of the Convention and the Court's case-law."³³ This also explains the importance of reinforce of judicial review system on domestic level. The remaining Protocols concerned the organisation of and procedure before the Convention institutions.

³³ See Measures to be taken at national level 15 Protocol No. 14 to the ECHR, Amending the Control System of the Convention

The adoption of Protocol No. 11 aims to simplify the structure with a view to shortening the length of proceedings while strengthening the judicial character of the system by making it fully compulsory and abolishing the Committee of Ministers' adjudicative role. Because, from 1980 onwards, the steady growth in the number of cases brought before the Convention institutions made it increasingly difficult to keep the length of proceedings within acceptable limits. The problem was aggravated by the accession of new Contracting States from 1990. The number of applications increased from 5279 in 1990 to 10335 in 1994 (+96%), 18 164 in 1998(+76%) and 34 546 in 2002 (+90%).³⁴ The increasing case-load prompted a lengthy debate on the necessity for a reform of the Convention supervisory machinery, resulting in the adoption of Protocol No. 11 to the Convention, replaced the existing, part-time Court and Commission by a single, full-time Court. For a transitional period of one year (until 31 October 1999) the Commission continued to deal with the cases which it had previously declared admissible.

During the three years which followed the entry into force of Protocol No. 11 the Court's case-load grew at an unprecedented rate. The number of applications registered rose from 5,979 in 1998 to 13,858 in 2001, an increase of approximately 130%. Concerns about the Court's capacity to deal with the growing volume of cases led to requests for additional resources and speculation about the need for further reform.

A Ministerial Conference on Human Rights, held in Rome on 3 and 4 November 2000 to mark the 50th anniversary of the opening of the Convention for signature, had initiated a process of reflection on further reform of the system. In November 2002, as a follow-up to a Ministerial Declaration on "the Court of Human Rights for Europe", the Ministers' Deputies issued terms of reference to the Steering Committee for Human

³⁴ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS No. 194, Explanatory Report. <http://www.echr.coe.int/NR/rdonlyres/1EC62EF1-E72F-4B6A-976C-7CBB22CFCAC8/0/Protocol14Explanatory.pdf>

Rights to draw up a set of concrete and coherent proposals covering measures that could be implemented without delay and possible amendments to the Convention. Thus on 13 May 2004, the Protocol No. 14 was adopted for this sake in giving the Court the procedural means and flexibility it needs to process all applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination.

Remedies before the ECHR: The European Court of Human Rights judgments are of a declaratory nature and, even though “the high contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties”, cannot of themselves repeal inconsistent national law or judgment.³⁵ Equally the State is not obliged to give direct effect to the decisions of the Court in their national laws. The defendant State therefore remains free to implement them in accordance with the rules of its national legal system. One case where a State has patently refused to accept or comply with the European Court’s Judgment is *Brogan v. UK*³⁶. In this case the UK informed the Committee of Ministers that it could not repeal its legislation on prevention of terrorism. The UK then made a derogation provision under Art.15, which was subsequently upheld by the Committee of Ministers.

On the finding of a breach, the Court’s powers are limited to the awarding of compensation and the granting of legal costs. As regards the award of compensation, the Court has made awards under two heads: pecuniary and non-pecuniary damage³⁷ and costs and expenses. In proceedings before the Court it is not possible to obtain specific relief. In *Selcuk and Asker v. Turkey*³⁸ applicants asked to be re-established in the village, a request that was turned down by the Court. The case law of the Convention is also impressive in the sense that the judgments of the European Court of Human

³⁵ *Marckx v. Belgium*, 6833/74[1979], ECHR 2 Judgment of 13 June 1979

³⁶ *Brogan and others v. UK*, 10/1987/133/184 -187, Judgment of 29 Nov. 1988

³⁷ For example loss of past and future earnings, loss to property, loss of opportunity.

³⁸ *Selcuk and Asker v. Turkey*, 23184/94; 23185/94 [1998] ECHR 36, Judgement of 24 April 1998

Rights have influenced many states to change their laws or reformulate their administrative policies. Such a situation compares favourably with other systems protecting human rights, where the system of implementation is hampered by absence of bodies with the authority to deliver binding judgments.

European Court of Human Rights, as the most successful international monitor mechanism, has played a significant role in safeguarding human rights and provided abundant experience in this field to the world. However, even though the reformed system, thus far, appears to be producing its intended results, to adapt to the changing needs and developments in European Society, not only in the enlargement of the membership, also in the increasing individual caseload and other issues such as diversity of legal traditions, European system in safeguarding human rights is facing new opportunities and also a bigger challenge.

2.2.3.1.2 Inter-American System

The Organisation of American States³⁹ and Protection of Human Rights: The Organisation of American States (OAS) is an intergovernmental organisation established in 1948 with the objective, inter alia, promoting good governance, strengthening human rights, fostering peace and security, expanding trade, and addressing the complex problems caused by poverty, drugs and corruption. Through decisions made by its political bodies and programs carried out by its General Secretariat, the OAS promotes greater inter-American cooperation and understanding. Its membership is thirty-five at present.

The inter-American system for the protection of human rights emerged with the adoption of the American Declaration of the Rights and Duties of Man in April 1948 – the first international human rights instrument of a general

³⁹ <http://www.oas.org/main/english/>

nature, predating the Universal Declaration of Human Rights by more than six months. In 1969, the guiding principles behind the American Declaration were taken, reshaped, and restated in the American Convention on Human Rights (ACHR). The Convention defines the human rights that the states parties are required to respect and guarantee, and it also ordered the establishment of the Inter-American Court of Human Rights⁴⁰. The Convention is currently binding on 24 of the OAS's 35 member states.

The OAS human rights system provides recourse to people in the Americas who have suffered violations of their rights by the state and who have been unable to find justice in their own country. The pillars of the system are the Inter-American Commission on Human Rights, based in Washington, D.C., and the Inter-American Court of Human Rights, located in San José, Costa Rica. These institutions apply the regional law on human rights.

According to article 44 of the Convention, “Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.” And in its article 61, the Convention stipulates “only the States Parties and the Commission shall have the right to submit a case to the Court.” So that means, in Inter-American System, individual complaints and inter-state complaints are allowed and States becoming parties to ACHR automatically recognise the competence of the Commission to receive complaints from persons alleging violation of their rights. Whereas the individual petitions (unlike the new procedure under the ECHR) has no locus standi⁴¹ before the Court, they are not allowed to submit allegations directly to the Court. The petitions or communications have to be examined by the Commission first, then according to different situations, the petitions

⁴⁰ Chapter VIII of the ACHR.

⁴¹ Latin for 'place to stand', in law, the right to bring an action or be heard. It has been called one of the most amorphous concepts in the entire domain of public law. In common law the litigant has locus standi if a private right is interfered with; in statute law the right is conferred by the statute. For detailed introduction, see <http://www.ipaustralia.gov.au/pdfs/patents/manual/Part304.PDF>

or communications will be determined whether or not to be submitted to the Court for a binding decision by either the Commission if the country involved has accepted the Inter-American Court's jurisdiction, or the state concerned.

Remedies before the Inter-American System: The recommendations of the Inter-American Commission are conducted on merit but are not legally binding. Like the ECHR, the American Court's decisions are also of a declaratory nature, in that while the Court declares a violation of particular rights of the Convention, it does not institute the required changes at the domestic level. The decisions of the court are binding on State parties⁴². The contracting parties agree to abide by its judgment⁴³ and compensatory damages can be executed in the country concerned in accordance with domestic procedures governing the execution of the judgments against the State⁴⁴. The court's judgment is final, and it is not possible to appeal against it⁴⁵. If a State refuses to abide by the judgment of the Court, the Court is limited to documenting it in its annual report.

It should be noted that its article 25 of the ACHR, which lays down a Right to Judicial Protection stipulating that "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. And the States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted." and taking Exhaustibility of Local Remedies as one of the criteria

⁴² Article 63 (1) of the ACHR

⁴³ Article 68 (1) of the ACHR

⁴⁴ Article 68 (2) of the ACHR

⁴⁵ Articles 66 (1) and 67 of the ACHR

for admissibility of a petition, again, revealed the importance of judicial review system in domestic level, and also shows the significant role an international monitor system as an appeal procedure on international level has played in safeguarding human rights.

2.2.3.1.3 African System

The Organization of African Unity⁴⁶ and Protection of Human Rights:

The Organization of African Unity (OAU) was established in 1963. The independent Member States of Africa are now 53.

The African human rights system is primarily based on the African Charter on Human and Peoples' Rights adopted by the OAU on 27 June 1981 and entered into force on 21 October 1986. African Human rights law has been aptly described as: the newest, the least developed or effective...the most distinctive and most controversial of the three [i.e. the European, the Inter-American and the African] established human rights regimes. The Charter recognised and stressed the significance of a review system by stipulating in its article 26, and an African Commission on Human and People's Rights was established within the OAU to promote human and peoples' rights and ensure their protection in Africa under article 30 of the Charter. And the Commission is authorised to consider inter-state complaints for violations of human rights stipulated in the Charter, and the principle of exhaustibility of local remedies is evoked⁴⁷. For African system, more significantly the need for a body to deliver authoritative and binding judgments led to demands for the establishment of a Court of Human rights.

2.2.3.1.4 Asian System

⁴⁶ <http://www.itcilo.it/english/actrav/telearn/global/ilo/law/oau.htm>;
<http://www.africa-union.org/>

⁴⁷ Article 56 (6) of the Charter

Till now, Asian countries have not yet established its substantial regional human rights protection mechanism like the other three continents have done. This is mainly due to the huge diversity of the Asian states in terms of their political systems, economies, cultures, histories and social regimes. However, it should be noted that since the Asian-African Conference held in 1955, Human Rights have become a major concern of intergovernmental affairs among Asian countries. The adoption of the so-called ‘unprecedented in the history of human rights development in Asia’ - Asian States Human Rights Charter on 22 November 2005 by the Sixth General Assembly of the Association of Asian Parliaments for Peace⁴⁸, draws the world’s attention to the process of regionalizing Human Rights Protection in Asia⁴⁹.

From above, it is clear that currently at the stage of development of international human rights law, the violations of human rights in a sovereign state, if can be attributed to state actions, if unable to get examined and redressed, under the condition of exhausting all domestic remedies, on international level, only Europe and America have regional human rights courts, as an appeal procedure, can be recourse to adjudicate state legal responsibility in violation of human rights. While under the spectrum of the UN, another sort of monitoring mechanism is provided.

2.2.3.2 International Mechanisms

Human Rights Bodies⁵⁰ -Appeal Procedures for Human Rights Violations: Since the IBHR and the other five core human rights instruments were formulated and became legally binding documents, the State parties have become legally bound to give effect to its provisions. Importantly, each state undertakes to adopt such legislative measures in their domestic jurisdiction as may be necessary to give effect to the rights

⁴⁸ For information about the AAPP, please visit
http://thailand.prd.go.th/the_inside_view.php?id=1073;
<http://b.noyes.com.cn/view/265903.htm>(in Chinese)

⁴⁹ To know more about Asian human rights protection, see
<http://www.ahrchk.net/index.php>

⁵⁰ <http://www.ohchr.org/english/bodies/>

listed in the conventions and also to provide an effective remedy. Moreover, because these obligations are binding in international law, a violation of the Covenants gives rise to international responsibility, that means after the documents were achieved, the implementation of these standards realizing effective supervision on states parties' performance of their obligations and protecting human rights enshrined in these instruments became essential and the practice of concern is that of International Judicial Review of Human Rights, where an international panel of judges could rule states parties' legislations or state actions in violation of their obligations under these international human rights instruments. The UN for this purpose set up seven corresponding human rights bodies respectively for the seven instruments, and made them as monitors of implementation of the treaties. The bodies are of a group of independent experts in charge of the implementation. Although as we shall see, the procedure for enforcement of the obligations in concrete cases is not particularly rigorous. The effect of the treaties is to provide a framework for the protection of those rights most commonly regarded as being essential for the dignity and liberty of mankind.

There are three main procedures for bringing complaints of violations of the provisions of the human rights treaties before the human rights treaty bodies:

Individual Communications

The ability of individuals to complain about the violation of their rights in an international arena brings real meaning to the rights contained in the human rights treaties.

Four of the human rights treaty bodies (HRC, CERD, CAT and CEDAW)⁵¹ may, under certain circumstances, consider individual complaints or communications from individuals, and by far the most significant in so far

⁵¹ For detailed information, see <http://www.ohchr.org/english/bodies/petitions/index.htm>

as individuals are concerned, is the individual complaints procedure under the first optional protocol to the ICCPR:

Human Rights Committee: Monitoring civil and political rights may consider individual communications relating to States parties to the First Optional Protocol to the ICCPR, which emerged as a separate treaty, came into operation on 23 March 1976 and by 19 September 2006 there were 106 States parties to it. According to Article 1 of the Protocol, a State party to the Covenant that also becomes a party to the Protocol, and its article 2 stipulates that “Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.” The Committee considers communications from individuals in closed meetings and formulates its views in the light of all the written information made available to it by the individual and by the State party concerned.⁵² There are thus no apparent mechanisms for oral on-site investigations. The committee forwards its formulated views to the State party and to the individual.⁵³ The Committee’s views are not legally binding, carrying only moral and political obligations.

In addition, the CEDAW may consider individual communications relating to States parties to the Optional Protocol to CEDAW; the CAT may consider individual communications relating to States parties who have made the necessary declaration under article 22 of CAT; and the CERD may consider individual communications relating to States parties who have made the necessary declaration under article 14 of ICERD. The Convention on Migrant Workers also contains provision for allowing individual communications to be considered by the CMW; these provisions will

⁵² See article 5 (1) ICCPR-OP1

⁵³ See article 5 (4), ICCPR-OP1

become operative when ten states parties have made the necessary declaration under article 77.⁵⁴

According to these conventions, any individual who claims that her or his rights under the covenant or convention have been violated by a State party to that treaty may bring a communication before the relevant committee, provided that the State has recognized the competence of the committee to receive such complaints. Complaints may also be brought by third parties on behalf of individuals provided they have given their written consent or where they are incapable of giving such consent.⁵⁵

Inter-State Complaints⁵⁶

Several of the human rights treaties contain provisions to allow for State parties to complain to the relevant treaty body about alleged violations of the treaty by another State party. According to this procedure a State (A) which considers another State (B) is violating a treaty can bring that fact to the attention of the State Party concerned. State B must respond to the allegations within certain time. If, however, the matter had not been resolved within the time limit of the receipt of the initial communication, either State may bring the matter to the attention of relevant monitoring body.

Article 21 of the CAT and article 74 on the CMW set out a procedure for the relevant Committee itself to consider complaints from one State party which considers that another State party is not giving effect to the provisions of the Convention. This procedure applies only to States parties who have made a declaration accepting the competence of the Committee in this regard. And articles 11-13 of the ICERD and articles 41-43 of the ICCPR set out a more elaborate procedure for the resolution of disputes between States parties over a State's fulfillment of its obligations under the relevant

⁵⁴ See <http://www.ohchr.org/english/bodies/petitions/individual.htm>

⁵⁵ See article 2 OP-CEDAW

⁵⁶ See <http://www.ohchr.org/english/bodies/petitions/index.htm>

Convention/Covenant through the establishment of an ad hoc Conciliation Commission. The procedure normally applies to all States parties to ICERD, but applies only to States parties to the ICCPR which have made a declaration accepting the competence of the Committee in this regard.

Like other international procedures of a similar nature the inter-state complaints procedure has not proved to be of any major significance. States often feel reluctant to challenge other States for political and diplomatic reasons. As yet the inter-State complaints procedure has not been used.

Inquiries⁵⁷

The CAT and the CEDAW may, on their own initiative, initiate inquiries if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions in a State party.

Inquiries may only be undertaken with respect to States parties who have recognized the competence of the relevant Committee in this regard. States parties to CAT may opt out, at the time of ratification or accession, by making a declaration under article 28; States parties to the CEDAW Optional Protocol may similarly exclude the competence of the Committee by making a declaration under article 10. This procedure is confidential and the cooperation of the State party must be sought throughout.

Remedies before Human Rights Bodies (take the HRC as an example):

Several countries have changed their laws as a result of decisions by the Committee on individual complaints under the Optional Protocol. In a number of cases, prisoners have been released and compensation paid to victims of human rights violations. In 1990, the Committee instituted a mechanism to assist it in monitoring more closely whether States parties

⁵⁷ See <http://www.ohchr.org/english/bodies/petitions/index.htm>

have given effect to its final decisions on the merits; cooperation from States parties has been encouraging.⁵⁸

Since human rights were explicitly set forth in multiple international and regional declarations, to apply and enforce these legal regimes, various international and regional tribunals or monitoring bodies have been created, many in the last few decades, including the UN Human Rights Bodies, the European Court of Human Rights, the Inter-American Court of Human Rights, the War Crimes Tribunals for Former Yugoslavia and Rwanda, the International Criminal Court, and more. These legal regimes that apply to a given sovereign state are only those that the state chose to accept as applicable. Most international tribunals operate on a consent basis, such that they have jurisdiction to hear a case only if the states involved in a dispute agree to allow them to hear the case. There is no effective standing institutionalized apparatus to enforce sanctions, so compliance with adverse decisions is often left to the good faith or self-interest of the losing party. The nature of the limitations will vary with the society, culture, political and economic arrangements, but the need for limitations on the government will never be obsolete. As Lord Acton said: “Power tends to corrupt and absolute power corrupts absolutely”.⁵⁹

One of the clearest signs of progress in human rights is the fact that individuals who claim that their rights and freedoms have been violated may call the State in question to account for its actions - if it is a party to the relevant treaties. And in this point, the ICCPR, as part of international human rights bills, though thirty-five out of the total membership of 192 in the UN today have lacked the resolve and assurance to accede to or ratify the Human Rights Covenants, while more than eighty deny their citizens access to the Human Rights Committee established to oversee the implementation at the national level of civil and political rights and freedoms, the Committee is not a court of law and its views have not been

⁵⁸ See <http://www.unhchr.ch/html/menu2/8/over.htm>

⁵⁹ <http://www.libertystory.net/LSTHINKACTON.html>

readily endorsed by States parties and international control is limited to a supervisory function, the efforts made and fruits achieved by the HRC can not be denied. In contrast to the ECHR, it does have positives, such as under the HRC, the grounds for rejecting individual communications are restrictively applied; there is no time limit, again in contrast to the ECHR's six month rule; with regard to submitting communications, the costs of petitioning are relatively small and there are no specific requirements relating to the language in which communications ought to be made. Since the procedure came into effect in March 1979, an upsurge in the number of communications it received from individuals complaining of violations of their rights and the Committee has found nearly 300 violations of various rights contained in the ICCPR. An analysis of the jurisprudence of the Committee provides an impressive exhibition of the manner in which a body with limited resources and powers could nevertheless exert influence to protect the rights of individuals. The Committee has, over the last two decades, persuaded many states to change their laws and administrative practices and emerged as the most important organ striving for the universal enforcement of human rights within the framework of the United Nations.

It is not sure whether or not the Committee could develop into a Supreme Court for international protection of human rights. As it is certainly unsatisfactory when compared to the European human rights system. Human rights have a largely paper or symbolic presence when they can not achieve remedies when violated, no matter how perfectly the international review systems are formulated. Since more difficulties concerning the formulation of a common effective international mechanism do exist, and human rights are always closely linked to a sovereign state, primary responsibility for protecting human rights through any measures including an effective judicial review system, is still incumbent upon the State Parties within the scope of their national legal systems.

3 Judicial Review in China

3.1 Necessity of Strengthening Judicial Review System in China

For any country engaging in the Constitutionalism, going for democracy and rule of law, taking human rights and human beings' freedom and happiness as both the starting point and the final goal of its governance, judicial review shall be one of the key factors in achieving its above goals and objectives. For China, it shall specially be the case.

First of all, besides the universally binding documents of the UN Charter and the UDHR, up to 1996, China has ratified or acceded to 15 international human rights conventions⁶⁰, such as, the CEDAW, the ICEDR, the CAT and the CRC⁶¹ – the four core international human rights instruments all entered into force in China by either ratification or by accession. What is a milestone for China in this respect is that Chinese government signed the ICESCR and the ICCPR respectively in 1997 and in 1998. Even though China has not ratified the latter, the ICESCR has been ratified in 2001. By becoming a member of all these international human rights instruments, the Chinese government should, under the obligations prescribed in these conventions, committed itself to take every possible ways through legislative, judicial and administrative measures to protect human rights, among those measures, judicial review, when relevant legislative and

⁶⁰ These international human rights conventions includes the four Geneva Conventions of August 12, 1949, and their two Additional Protocols; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Suppression and Punishment of the Crimes of Apartheid; the Convention on the Elimination of All Forms of Discrimination Against Women; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention Relating to the Status of Refugees; the Protocol Relating to the Status of Refugees; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of Children and the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.

⁶¹ China signed and ratified the CEDAW in 1980; became a member of the ICEDR in 1981 by accession; signed and ratified the CAT respectively in 1986 and 1988; signed and ratified the CRC respectively in 1990 and 1992.

administrative measures are already perfectly formulated, is a powerful weapon and last resort to counter governmental improper conducts and to remedy human rights violations committed by administrative powers, or even more important when the domestic legislative or administrative measures are lacking or in conflict with international standards.

Secondly, the PRC became the 143rd member of the World Trade Organisation in December 2001, one of requirement under WTO is that members establish independent judicial or administrative tribunals to review administrative agencies' decisions on disputes related to trade, intellectual property protection and trade services. The Agreement on Implementation of Article VI of GATT 1994, the TRIPS and article 10 of the GATT all require judicial review mechanisms in member states. The common point of the three important WTO agreements is the following: there must be an impartial and neutral judicial review mechanism available; an impartial and impersonal procedure should be set up; grant the party who has been effected by administrative acts the right to seek judicial review and remedy; all administrative cases related to international trade should be guaranteed to be brought into the scope of judicial review and the decisions made by judicial review institutions should be in conformity with the content and the spirit of WTO regulations. So, even though WTO regulations seems have no direct relations with human rights, since "all rights are interdependent and indivisible", good fulfillment of the WTO regulations will certainly benefit China's economy, improve people's living standard and speed up the legal reform in the country, and thus will eventually contribute to human rights protection in China. Therefore, from this point, strengthening judicial review in China is important.

Thirdly, lack of regional and international remedy procedures (appeal procedures)⁶² makes the internal supervision on the state behaviors more necessary in protecting human rights in China. In Chapter 2, we examined

⁶² Except the reporting supervision system, China usually does not recognize the competence of a treaty body to supervise state actions through other forms.

existing regional and international human rights monitoring mechanisms. Asia is not in the list of the regions which have achieved a common human rights document, let alone a human rights court. And even though the ICCPR in international level could provide an appeal procedure for human rights violations, since China has not ratified the Convention and its First Protocol, the HRC has no competence to deal with individual complaints flowing from the Country, which makes China lack the last remedy in the World for human rights violations while the remedy provided by an international body who is supposed to be impartial and impersonal will certainly benefit the victims whose human rights have been injured by the state by providing one more avenue or we can call it the last resort to get the abuses redressed. So for this reason, internal review is inevitable in improving and bettering human rights protection in China.

Finally, the long established supremacy of Communist Party policy over the law and the current situation and reality of human rights protection in China shows the need to strength judicial review system in the country, and the state needs to do more to assure the actual enjoyment of human rights in all its generations. Human rights tend to be so differently perceived in rich countries and in poor. The industrialized countries, assured of material prosperity and, to a large degree, of civil liberties, tend to view human rights as an external issue, and to react with hostility to critics who suggest internal imperfections. The Third World, where hundreds of millions subsist at the very margin of existence, is concerned primordially with economic and social rights and are sometimes less than zealous in the basic human need, human rights can have no meaning unless they begin with the right to life itself at a tolerable level of existence. It could be agreed upon that during the process of modernizing a country's economy, citizen's rights are quite easy undermined for the sake of efficient and powerful state administration. This can be indicated in the process of enactment of legal norms in which the executive is vested with extremely wide, discretionary

powers not only in administration but also in legislation.⁶³ Due to this, rights of citizens may be greatly limited in the process of legislation or the rights of citizens can be violated before the administration has been put into practice, to say nothing of the remedies in the judicial review system being limited. In some Asian countries, like China, Indonesia and Malaysia, development of the economy usually has priority over any other things including the protection of rights of citizens, or we can say civil and political rights on the larger scale. China is a huge country founded on a big population and a very poor economic foundation. It is only after 1978, when the country's "opening up policy" came into function, reforms in economic, legal and other areas took place, the overall situation in all the aspects of the Society was getting better and better, especially in the area of economy. Till today, the whole world can witness the big progress the Chinese government has made in the development of economy during the past 28 years, and Chinese people have to admit that they have enjoyed many benefits from the reform and by which their human rights have been better realized, it is especially the case when we talk about the second generation of the human rights, namely the economic, social and cultural rights. However, in the meanwhile, we have to admit that compared with the achievement made in economy, legal reforms in China much lags behind and promoting and protecting citizen's civil and political rights should be paid more attention. Some human rights issues like the lack of due process, the freedom of speech or expression, problems of the right to vote and the existence of administrative detention without judicial review as such, remain a problem, which are quite often challenged by international society. The speed and the efficiency of Chinese legal reform are just inconsistent with the success of economic development has been made by the government. This situation can certainly be attributed to plenty of reasons, like historical, cultural, practical ones, but the most matters should be the insufficiency of the efforts have been put on this area while economic development and the social stability have been the first priority and some

⁶³ Y. Zhang: Comparative Studies on Judicial Review in East and Southeast Asia, 1995
<http://www.ias.nl/iasn/iasn6/iasnews/zhang.html>

times over stressed. However, the development of economy will certainly require a comprehensive set of corresponding legal, cultural, political and other systems adapting to the level of the economy has reached, in other word, if the process of other reforms can not catch up with the process of the economic ones, to be clear, if human rights in areas other than the rights directly linked to the economic situations can not be realized or even ignored, the society will probably result in some chaos or even worse situations, so that the relation between the party in power and other individuals or groups, simply the citizens, may be in tension even result in conflicts eventually. The tension or the conflicts will in turn lead to more human rights violations and may destroy the stability and harmony of a society. So, for China, when the government is concentrating on the development of the economy, devoting itself to improve the living standard of its people, legal reform should also be emphasized, or at present better emphasized. Protecting citizen's overall human rights should be put on agenda. The Country should balance the developments in all aspects of the society. Therefore, in this sense, judicial review, as both an important component of legal reform and a powerful weapon to supervise government's actions in protecting its people's human rights, should be further developed in China.

3.2 Present Judicial Review System in China

Before coming to the issue of judicial review system in China, the legal framework and human rights legislations in China will be briefly examined.

China has presently signed or acceded 17 International Human Rights Conventions⁶⁴ including six out of seven core Conventions which are ICERD, ICCPR, ICESCR, CEDAW, CAT and CRC with the only one

⁶⁴ See 14

ICCPR not ratified yet. But in China, respecting and safeguarding human rights had been on the level of Party and government policy and stand instead of on the level of a constitutional principle before the Second Session of the Tenth National People's Congress (NPC, the supreme legislative power of the state) in 2003, during which Session, an amendment to the Constitution was adopted by adding a provision reads: "the state respects and safeguards human rights,"⁶⁵ for the first time ever. This shows a big and positive step in the course of human rights protection in China, both in terms of legal system reform and state development strategy.

Human rights like civil and political rights and economic, social and cultural rights etc.⁶⁶ enjoyed by Chinese people are mainly stipulated in the Chinese Constitution. In its Article 2, the Constitution reads as follows:

"All power in the People's Republic of China belongs to the people. The organs through which the people exercise state power are the National People's Congress and the local people's congresses at different levels."

That means that unlike the western developed countries, China has not adopted the principle of separation of state powers. The National People's Congress (NPC) is the highest organ of state power, deciding on the major policies and exercising the legislative power of the state. The NPC and the local people's congresses at different levels are instituted through democratic election, and they are responsible to the people and subject to their supervision. All the administrative, judicial and procuratorial organs at all levels of the state are created by the people's congresses to which they are responsible and under whose supervision they operate, which means the NPC and its Standing Committee when the NPC is not in session shall supervise the State Council, the Supreme People's Court and the Supreme People's Procuratorate. The scope of supervision mainly includes the

⁶⁵ See Article 33 (3) , Chinese Constitution

⁶⁶ See 2nd Chapter of the Chinese Constitution

supervision over their daily administrative work and supervision over their legal decisions.

In China, 451 laws, interpretations of laws and decisions concerning legal issues enacted by the NPC and its Standing Committee take the first dominant position on the top of the legal system centered on the Constitution, then the second place come the 966 administrative regulations issued by the State Council and its departments, followed by some 8000 local laws and regulations drawn up by the local people's congresses and their standing committees and over 480 regulations on the exercise of autonomy and other separate regulations enacted by the ethnic autonomous areas.⁶⁷ International treaties signed are in practice automatically incorporated into PRC laws, they are superior to the relevant stipulations of PRC laws. Since the legal system of China is considered part of the Continental Legal System, the courts and relevant institutions in China at different levels must follow the above mentioned legal hierarchy in doing their law-related works.

3.2.1 Review of Legal Norms

3.2.1.1 The Significance of Establishing Constitutional Review System

To build a meaningful and effective judicial review mechanism, a comprehensive Constitutional Review System should be established.

Constitutional Enforcement Mechanism is essential to realize the rights stipulated in a Constitution, and the enforcement of a constitution can not really be efficiently achieved without introducing a Constitutional Review System, a Mechanism by which legal norms, such as civil, criminal and administrative laws, regulations etc can be deliberated and revised or

⁶⁷ <http://www.humanrights.cn/zt/magazine/200402004921165524.htm>

annulled when it is found in contradiction with a Country's top law - Constitution. If there are plenty of laws, regulations in a country in conflict with the Constitution, no matter how perfect the Constitution has been formulated and how wonderful the human rights have been stipulated in it, there will be a tremendous gap between the ideal expressed by the articles of the Constitution and the social reality, and the significance of a Constitution will be fundamentally limited in assuring a good governance and human rights.

In China, review of legal norms seems even more important. As in China, the number of regulations and detailed rules issued by administrative organs far exceed the number of laws enacted by the Congress and its Standing Committee. Under this condition, different department interests and regional protectionism may very easily infringe rights protected by the Constitution and lead to the inconsistency between these delegated administrative regulations and the Constitution. And the fact is that in China, administrative regulations such as various so called "Documents", "regulations", "indications" and "replies" rather than the NPC and its Standing Committee legislations tend to more frequently and heavily infringe citizen's rights. Therefore, in this sense, review of legal norms is indispensable for Chinese legal system.

3.2.1.2 Relevant Legal Regulations in China

In China, according to the Constitution, the NPC is vested the power to amend and supervise the enforcement of the Constitution, to enact and amend basic statutes concerning criminal offences, civil affairs, the state organs and other matters⁶⁸; and the NPC's Standing Committee has the power to interpret the Constitution and supervise its enforcement, to enact and amend statutes with the exception of those which should be enacted by the National People's Congress, to enact, when the National People's

⁶⁸ Article 62 (1), (2), (3) of the Constitution of the People's Republic of China, adopted on 4 December 1982.

Congress is not in session, partial supplements and amendments to statutes enacted by the National People's Congress provided that they do not contravene the basic principles of these statutes, to interpret statutes; to annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the statutes and to annul those local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the Central Government that contravene the Constitution, the statutes or the administrative rules and regulations. The Legislation Law of the People's Republic of China⁶⁹ in its Article 90 reads as follows:

“Where the State Council, the Central Military Committee, the Supreme People's Court, the Supreme People's Procuratorate, the various special committees of the Standing Committee 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 committees for review and comments.

Where any state organ and social group, enterprise or non-enterprise institution or citizen other than the bodies enumerated above, deems that an administrative regulation, local decree, autonomous decree or special decree contravenes the Constitution or a national law, it may make a written proposal to the Standing Committee of National People's Congress for review, and the office of operation of the Standing Committee shall study such proposal, and where necessary, it shall distribute such proposal to the relevant special committees for review and comments.”

⁶⁹ Adopted by the 3rd Session of the Ninth National People's Congress on March 15, 2000.

And in its Article 91, the Legislation Law also further expatiates upon the procedure and the way by which a special committee of the National People's Congress dealing with the review performs its function.

From the above, it can be concluded that in China, the power to review legal norms is given to the NPC⁷⁰ and its Standing Committee. That is to say the courts are not in the capacity to review legal norms, and because of lacking an independent monitor of human rights related legislation and measures provided for by Chinese law, if relevant legislation in this country is in contravention of the international human rights norms, the NPC or its standing committee but not any court in China should be invited to review the provisions on the law in question. However look back into the history, the NPC and its Standing Committee have never exercised this authority.

Nevertheless, this regulation of granting the power of review of legal norms to the NPC and its Standing Committee is actually believed to correspond well to the Country's practical situation.

3.2.1.3 Practical Situation in China

The reason for believing that it is a good choice for China to endow the NPC and its Standing Committee with the power to handle constitutional review, mainly lies in two practical situations: one is that Chinese laws are made and passed through a precise and strict legal procedure by a legislative organ which is logically an agent of Chinese people. During the process of law formulating, the drafts are usually discussed, revised and consulted time after time, so generally speaking, the procedure of formulating is pretty democratic and scientific. But if the judges had the power to annul such a law through a review of legal norms, due to the fact of the lack of independence of individual judges within their own court in China and the dependency of local court presidents and judges on local organs of power,

⁷⁰ For detailed NPC's power of supervision, see http://english.gov.cn/2006-03/04/content_217973.htm

the procedure would be probably not as scientific and democratic as legislative procedure. And on the other hand, the fact that the overall capacity of the judges still can not satisfy the requirement of performing this task also proves granting the constitutional review power to the NPC and its Standing Committee a better choice for present China. With the time being, when the judges are more qualified and the Courts are more competent to conduct judicial review in real sense, the review power can be handed over to the courts and by then a special constitutional court might be a good choice for China. But for present China, it is more reasonable and proper to give the power to the NPC and its Standing Committee, and the main point is by what way, the effectiveness of their work relating to constitutional review can be further improved and fully realized.

3.2.2 Review of Administrative Actions

Judicial review, as a mechanism of supervising the conducts of state organs and protecting citizen's rights against abuse of powers, since 1960s, has further enlarged its scope and it is now not only a safeguard of constitutionality of legal norms, but also an examiner of legality of almost all administrative actions.

Montesquieu used to say that "power is easily abused unless it is checked by power through certain institution"⁷¹, Chinese scholars also said that "the spirit of rule of law of modern society is that state agents conduct according to law, and only when they so behave and engage themselves to certain legal restrictions, rule of law can be realized and the objective of law can be achieved." and "Abuses of power by administrative organs in fact will much more easily jeopardize human rights and the society than citizens' unruliness."⁷² These remarks point out the significance of controlling

⁷¹ 11 Chapter, 4, The Spirit of Laws, 1748

⁷² Wenxian Zhang: Study on Legal, China University of Political Science and Law Press, 1993, P286.

administrative power in realizing rule of law and protecting human rights. And the fact is also in favor of this view, like in China (probably in most countries), the problem is not that the Country has no laws and regulations for state organs to follow, but the laws and relevant regulations are usually ignored or not followed strictly so that citizens or legal persons' rights occasionally are violated by administrative actions. That is why judicial review- supervising administrative actions- a remedy for redressing administrative wrongdoings in safeguarding human rights is so essential and should be strengthened in China.

China has presently developed the following laws to regulate and restrict administrative actions: Law of the PRC on Administrative Punishments⁷³, which provides for administrative supervision of administrative punishments issued by administrative bodies; Law of the PRC on Administrative Supervision⁷⁴ and Implementing Regulations⁷⁵ provides for system of administrative supervision of actions of government officials and administrative bodies; Administrative Reconsideration Law⁷⁶ which provides for right of administrative review of administrative decision by an administrative body prior to bringing lawsuit and Administrative Licensing Law⁷⁷, which sets out the circumstances in which local administrative bodies can require a licensing procedure or approval.

And most importantly, when citizens, legal persons or other organisations feel unsatisfied with the decisions a relevant administrative organ has made against them or simply they believe their legal rights have been infringed by administrative wrongdoings, the Administrative Procedure Law (APL, enacted by the NPC in 1989) gives citizens the right to institute a lawsuit to complain about infringement of individual rights. The adoption of the APL established the administrative litigation mechanism in China and the People's Courts since then have been given the power to review

⁷³ Enacted by NPC in 1996

⁷⁴ Enacted by NPC in 1997

⁷⁵ Enacted by State Council in 2004

⁷⁶ Enacted by Standing Committee of the NPC in 1999

⁷⁷ Enacted by Standing Committee of the NPC in 2003

administrative actions. The adoption of the APL symbolizes that the Chinese Judicial Review System has been formally established, and the system through which administrative power can be restricted by judicial power, that is to say the Courts can redress illegal administrative acts to ensure the administrative organs conduct their activities according to law, and therefore, the individual's rights can be safeguarded from violations committed by administrative actors. In addition, the State Compensation Law⁷⁸ gives citizens the right to compensation in case of infringements on personal and/or property rights. Now in China, together with the mechanism established under the APL, there is a legal path to get administrative actions examined and redressed and compensated if they are found in violation of law.

3.2.2.1 Administrative Review System in China

3.2.2.1.1 Constitutional Basis for Judicial Review

Present Chinese Constitution⁷⁹ formulates, from three dimensions, the framework of review of the administrative actions. The APL explicitly grants the power of review to the courts and further formulates the implementing procedures in better detail with an aim to put this work into effect.

Article 5 of the Constitution reads: “.....All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated.....No organization or individual may enjoy the privilege of being above the Constitution and the law”. This Article actually figures out the principle of rule of law in ruling the country. For administrative organs that means they

⁷⁸ Enacted by Standing Committee of the NPC in 1994

⁷⁹ For full text, please visit <http://english.people.com.cn/constitution/constitution.html>

are required to conduct administrative activities according to law, otherwise they will be held accountable for the violations. And in its Article 41⁸⁰, the Constitution vests citizens in subject qualification for accusing state organs and their personnel for illegal conducts or omissions, and for claiming compensation for the violations committed by relevant administrative personnel or organs. Articles 123 and 126 state that the people's courts are the judicial organs of the state and the courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals. These two articles establish judicial subject status of the courts in performing jurisdiction.

As mentioned above, although there is a constitutional basis for China's judicial review mechanism against administrative actions, nevertheless there is no such articles in the Constitution explicitly granting this authority to the courts. Now with the adoption of APL, the courts were empowered to review the administrative actions, however, with certain exceptions.

3.2.2.1.2 APL of the PRC

The Administrative Procedure Law of the People's Republic of China is a legislation passed in 1989 that authorized private individuals to sue against administrative organs and/or personnel on the grounds of infringement of their rights. The law is often referred to in English as the Administrative Litigation Law which is a closer translation of the Chinese, but which is not the official English translation used by the PRC government, so in this study, the APL is used.

⁸⁰ Article 41: Citizens of the People's Republic of China have the right to criticize and make suggestions to any state organ or functionary. Citizens have the right to make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary; but fabrication or distortion of facts with the intention of libel or frame up is prohibited.

In case of complaints, charges or exposures made by citizens, the state organ concerned must deal with them in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures, or retaliate against the citizens making them.

Citizens who have suffered losses through infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with the law.

In its article 1, the APL points out the objective and the purpose of the law: to assure the People's Courts examine administrative cases correctly and timely, to safeguard citizens, legal persons and other organisations' legal rights, to maintain and supervise administrative organs functioning in accordance with law. Article 3 stipulates that the Courts, according to law, have independent jurisdiction on administrative cases, for which administrative division should be established within the courts at all levels and they are responsible for hearing administrative cases. The APL, through these two articles, grants the power of review of administrative actions to the courts.

In its articles of 2, 5, 11 and 12, the APL prescribes the types of administrative actions that can be challenged, and article 11 actually lists the reviewable actions in a form of enumeration, the so-formulated "concrete actions" which mean the actions not of a legislative nature include:

- (i) administrative punishments (such as detentions and fines);
- (ii) administrative coercive measures;
- (iii) interference with the operations of enterprises;
- (iv) refusal to take action or perform an obligation;
- (v) unlawful demands for performance of duties; and
- (vi) violations of rights of a personal or a property right.

The review of administrative actions is carried out in the local people's courts. While article 12 limits the scope of the law by exempting state action involving national defense or foreign affairs, administrative legislations (in the APL, referred as "abstract administrative actions", in comparative with the notion of "concrete administrative actions"), "inner administrative actions"⁸¹ and "final administrative actions"⁸², from the judicial reviewable list.

⁸¹ Inner administrative actions: the decisions made by administrative organs on promotion or removal of the personnel working in the organs.

Article 5 of the APL stipulates that the Courts should examine the legitimacy of a concrete administrative action, and articles 52 and 53 line out the laws and regulations the courts should referred to when examining an act concerning its legitimacy. Among those legal instruments listed which can be relied upon, only the constitution is lacking, other instruments like basic laws, administrative regulations and administrative rules at all levels are all can be based upon or made reference to. These articles reveal that the directly application of the Constitution by judicial proceedings remains uncertain, and in the process of review, only relevant actions rather than legal instruments can be challenged and examined in an administrative division of a court. That means, for example, if in China, a terrorist suspect was ill-treated when detained and interrogated for confessions, then the suspect could, according to the APL, sue the police for violating his civil rights in an administrative division of a proper court and get the relevant actions examined on its legality. While the legitimacy of the legislation or rules concerned will not be examined by the court, in other word, if the legislation or relevant rules authoring such kind of harsh interrogation methods to be used in interrogation, like the US Military Commission Instrument No. 10⁸³ did, the court will not be in the capacity to provide remedies to the victim.

In addition to the APL, prior to raising an administrative lawsuit according thereto, in China another legal instrument-Administrative Reconsideration Law (ARL) enacted by the ninth Session of the ninth NPC's Standing Committee in 1999 offers a self-supervision procedure for redressing administrative wrongdoings. According to the ARL, if citizens, legal persons or other organizations consider that their legal rights have been violated by concrete administrative actions, they have the right to apply to

⁸² Final administrative actions: the administrative actions, according to law, on which an administrative organs have final say.

⁸³ Issued by the General Counsel of the Department of Defense of the US on 24 March 2006

relevant administrative organs for reconsideration on the case in question⁸⁴ and relevant organs should admit the application and deal with it according to this law. After the decision of reconsideration has been made, if the applicant is still not satisfied with the decision, they usually have the right to institute an administrative lawsuit to a competent court challenging the decision unless the administrative decision should be final according to law.

Apart from China's Administrative Procedure Law, on May 12, 1994, the NPC passed the Law of the People's Republic of China on State Compensation, which divides the state compensation into two categories: administrative compensation and criminal compensation. In China, the problem of criminal compensation is not solved by general judicial proceedings. The decision for compensation is made by the compensation commission within the intermediate court and its higher courts. In order to meet the needs of lower courts in handling compensation cases, the Compensation Commission Office of the Supreme People's Court edited the Handbook on State Criminal Compensation (People's Court Press, 1995) which includes the laws and regulations of the NPC, the State Council, judicial documents of the Supreme People's Court and the Supreme People's Procuratorate concerning criminal compensation promulgated or issued from 1979 to 1995.

Despite the lack of independence of Chinese judiciary and its occasionally subjection to interference by people holding positions of power which may leave the administrative abuses unredressed, in the single year of 2003, according to White Paper: Progress in China's Human Rights Cause in 2003 issued by Information Office of the State Council of the PRC in March 2004, the people's courts concluded the investigations of 88,050 administrative lawsuits of first instance, of which 10,337, or 11.74 percent, of the administrative actions were annulled. And the people's court handled 3,124 state compensation cases, where a compensation sum totaling 89,74 million Yuan (amount about to 11,21 million USD) was ordered.

⁸⁴ Article 2, the ARL (1999)

We can reach the conclusion that the APL has really furthered the spread of rule of law within the PRC. An estimated one fifth of the cases in which the law has been invoked have been decided against the government. Many legal experts have argued that the number of cases decided against the government is far higher because more often the state will tend to settle a case rather than risk losing it in court. All these have served to protect the legitimate rights and interests of citizens, legal persons and other organizations suffered from illegal exercise of power by government functionaries.

4 Concerns and Possible Solutions of Strengthening Judicial Review System in China

4.1 Concerns and Possible Solutions on Constitutional Review

With respect to review of legal norms, the system in China till now has shown little efficiency due to heavy legislation workload and lack of detailed and practical mechanism. The NPC and its Standing Committee have seldom exerted their supervising functions in practice.

Judicial review was born from the Constitutional Review, the constitutionality of legal norms in a state is a fine start of good governance assuring harmony and happiness of a society. Different from the US, France and Germany, China endows the legislative body, the NPC and its Standing Committee with the power to review legal norms. The courts in China, according to the APL⁸⁵, only have the authority to deal with “Concrete Administrative Actions” but not those “abstract actions” with a legislative nature.

Since Chinese basic laws and laws⁸⁶ enacted by the NPC and its Standing Committee are usually passed or revised through a pretty strict and scientific procedure which the courts lacks and the content of these legal instruments is not only consulted to and upheld by representatives of Chinese people elected democratically for ruling the country, but also closely linked to the interests of the people, it is reasonable and persuasive to give the power of

⁸⁵ To know more about the APL, visit http://en.wikipedia.org/wiki/Administrative_law_in_mainland_China

⁸⁶ For legislative activities in China, see http://en.wikipedia.org/wiki/Law_of_the_People's_Republic_of_China#Lawmaking_and_legislative_authority

review laws as such to the country's top power and top legislature-the NPC and its Standing Committee. However, the fact of continuous expansion of delegated legislations, especially various administrative regulations, rules and orders, often leads to serious legal conflicts among all kinds of legal norms in China, and this part of "law" in fact is the main source of violations of human rights. Considering the workload of the NPC and its Standing Committee and the less importance of these administrative regulations, rules etc. than the basic laws, together with the tendency of infringing human rights by these delegated legislations, it is recommended to enlarge the scope of the APL by involving laws under the level of basic laws and laws enacted by the NPC and its Standing Committee, namely the regulations, rules or orders with an administrative nature into the scope of the APL, make such abstract administrative actions reviewable in administrative courts.

For the NPC and its Standing Committee, since China has ratified the ICESCR and will ratify the ICCPR eventually, intensifying its legislative work in formulating new laws, examining and revising existing laws is pretty important for fulfilling its obligations under the Covenants and realizing the rights which should be enjoyed by its people. For China today, there are still plenty of constitutional rights⁸⁷ which have not been elaborated into basic laws by the NPC and its Standing Committee for practical protection, such as "freedom of press", "freedom of association" stipulated in article 35 of the Constitution. Till now there is no corresponding legislature to assure the rights' actual enjoyment while these rights are those should be protected under the ICCPR, and must be enforced and safeguarded through government's responsibility. Even though Chinese legislature started drafting Press Law in 1980s, and at the beginning of 1990s, tried to initiate and pass Publication Law and lots of proposals for drawing up Association Law, these motions till now have not turned into realistic legislatures. This makes the realization of some rights enshrined in

⁸⁷ For rights protected under the Chinese Constitution, see Chapter II The Fundamental Rights and Duties of Citizens of the Constitution.
<http://english.people.com.cn/constitution/constitution.html>

the Constitution lack a powerful implementation instrument. In order to meet the requirements of international standards, China shall take active action on formulating new legislatures for better protection of human rights. And with the emergence of new situations in the society, the NPC and its Standing Committee also shall keep an eye on the existing legislatures and examine and revise them if found in conflict with international standards so that the Country can better prepared to ratify the ICCPR and fulfil its obligation to protect their people's rights.

4.2 Concerns and Possible Solutions on Review of Administrative Actions

With respect to the application of law in examining administrative actions, since direct application of Chinese Constitution into administrative trials is not stipulated explicitly in Chinese law, and plus the lack of an effective constitutional review mechanism, the Constitution, as the country's fundamental law and human rights instrument, is very easily to be built on stilts, and the rights and ideas enshrined in the Constitution will tend to be left symbolic.

Realizing judicial application of the Constitution is an inevitable choice through practical experiences from the world. In contemporary western countries, it is a prevalent practice to invoke Constitution to make judicial decisions. In the UK, despite the lack of a written Constitution, Magna Carta of 1215, the 1628 Petition of Rights, English Bill of Rights (1689), as core content of the constitutional legal instruments can be applied directly in judicial decisions. And in the US, Germany and France, no matter which body wields the power of review, violations of rights advocated by constitution can be instituted for a lawsuit.⁸⁸

⁸⁸ Ping Zhou: On the Legality Standard of Judicial Review of Administrative Actions – Judicializing the Constitution, 2006. http://www.law-lib.com/lw/lw_view.asp?no=5467

In addition to the world's experiences, the important status in legal system as a fundamental law and the character as a principled document of a Constitution also requires its direct application to practical life. It should be known that to fulfill the content stipulated in a Constitution, it is necessary to incorporate the generalized content into relevant concrete legal regulations, while it can not be denied, as a principled legal document, not all the values enshrined in constitution can be incorporated into corresponding instruments, it can hardly be exhausted. In this sense, only direct application of a Constitution can assure better realization of spirits embodied in it. So to better realize the value of the Constitution and effectively protect rights stipulated in it, direct application of the Constitution in Chinese judicial proceedings, should be promoted. For China in this point, the decision made by the High Court of Shandong Province evoking directly to article 46 of the Chinese Constitution in 2001 on the "Right to Education Case" instituted by Yuling Qi is believed to have opened the door to judicializing the Constitution.

When it comes to the concrete administrative actions, the scope of reviewable matters shall also be extended. Such as both final administrative actions and internal administrative actions should be brought into the scope of jurisdiction of the courts, and for state actions related to national defense or foreign policies, in this system should better be strictly construed. For final administrative actions, because of defects of self-supervision, judicial review is needed, and good balance of powers among legislative, executive and judicial organs also requests so because if final say on administrative affairs lodged upon administrative power itself and with no any supervision from other organs, the power tends to be abused. According to WTO regulations, final administrative actions should be construed as final only within administrative organs, review of administrative actions and final decisions should be lodged on judicial review system.⁸⁹ The cancellation of final administrative actions related to patent and trademark issues in

⁸⁹ Qunlin Wei: A Study on Reviewable Administrative Actions of the PRC under the Environment of the WTO. http://www.law-lib.com/lw/lw_view.asp?no=1739

revisions of Chinese Patent Law (2001) and the Trademark Law (2001) are partly results of this requirement. Concerning inner administrative actions, according to article 12 (3) of the APL, they can not be examined by the courts. However, since civil servants, a particular group of people are sometimes more vulnerable to human rights violations under inner administrative actions than under external actions, judicial review in this sense should be extended to these actions as well. Presently in Germany, the US, even in Taiwan, administrative actions relating to the appointment and removal of personnel are under the supervision of judicial review.⁹⁰ This method can effectively avoid elusion of judicial review by administrative organs or exceptional person in power. With regard to state actions of a national defense or foreign policy nature, it is somehow in its rationality and necessity to not have been brought into judicial review system, as in the world, only a few countries like the US and Belgium can review such actions. But due to the lack of formulation about the subjects, the content and the ambit of the concept in China, state actions are pretty difficult to be confined. It seems feasible to allow some actions like issue of passports or visas for personal reasons, in condition of relative person not satisfied with the decisions, to be challenged to better protect citizen's rights.

Generally speaking, China has established its own judicial review system, the urgent task now is to enhance its effectiveness of the system, to speed up its legal reform corresponding to its economic development so that the society can develop evenly and comprehensively. The above mentioned concerns of the current system may in some way hamper the effectiveness of judicial review in China. Therefore, if some solutions as mentioned above are considered and incorporated as appropriate, it is believed the system will be functioning much more efficiently.

In addition, besides strengthening its domestic judicial review system at home, China shall at abroad be more open to accept supervision from

⁹⁰ Qunlin Wei: A Study on Reviewable Administrative Actions of the PRC under the Environment of the WTO. http://www.law-lib.com/lw/lw_view.asp?no=1739

international human rights implementation mechanism, for example trying to accept jurisdiction of international human rights bodies because active participation in the international human rights protection area and good cooperation with other states will definitely benefit China both in terms of its image and in terms of its studies in the area of human rights theories and practices with an aim to build up and optimize effectiveness of its human rights protection system.

5 Conclusion

Human rights are rights possessed by people simply as, and because they are, human beings. Universal human rights are, historically, the flower of what was originally an European plant.⁹¹ They have now received the support of world nations and taken the catalyst of World War II to propel the term onto the global stage and into the global conscience. Respect for human rights is becoming a universal principle of good governance.

One of the most significant advances of international law in the second half of the twentieth century was the development of rules and principles governing the rights and obligations of individuals. It is only because of the incorporation into treaty form or customary law that states have accepted concrete obligations in the area of human rights. Although the binding force of human rights obligations must rest ultimately in treaty or custom, the inspiration for these obligations lies in morality, justice, ethics or a simple regard for the dignity of mankind. The protection of human rights as an abstract moral or legal concept will do little to enhance the existence of even one individual unless it is firmly rooted in the day-to-day experience of the people who are to be protected and so the governments who are supposed to be doing the protection in which sense judicial review is thought to be an effective and the ultimate safeguard of citizen's rights.

Whatever the substance of a Government's or international law, the expectation would be that it would be subject to judicial review. Any law that burdened or withheld a benefit from an individual or group must meet the standards of justice. In the meanwhile, as someone has said: "Notorious human rights abusers... have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to

⁹¹ Moira Rayner: History of Universal Human Rights - Up to WW2.
<http://www.universalrights.net/main/histof.htm>

international human rights monitors". State actions especially should be under control in the promotion and protection of human rights.

On international level, the Human Rights Bodies have been established under four core instruments. On regional level, in America, Africa provide review systems in safeguarding human rights protected in their instruments, and in western europe, the Council of Europe created a more progressive or innovative system for the regional protection of human rights. Activities (and omissions) of state organs – including the legislature and national courts – are the objects of international judicial control. The International Courts or monitor bodies have to decide whether a certain behavior of state organs is compatible with the Convention or not. In European system, acts of the executive and of administrative agencies of any kind fall under the control of the organs instituted by the European Convention and all national courts are under European supervision. No national court is excluded from this European control, even a constitutional court can be found in breach of the Convention ⁹² . The European Convention and the international machinery for the protection of human rights have been successful. Human rights and judicial review have gained, in addition to the rules applicable exclusively inside States, an international dimension.

On domestic level, effective protection of human rights requires a network of complementary norms and mechanisms, among which, an effective judicial review system is essential.

The Chinese Constitution guarantees many of the same rights and freedoms enjoyed by people of other western democracies. A fairly complete legal system has taken shape, with the Constitution as the core. There are laws covering almost all fields of social life, providing a comprehensive judicial guarantee for the various human rights of the citizens.

⁹² See the Ruiz-Mateos judgment of 23 June 1993 where the European Court found that a procedure before the Spanish Constitutional Court violated Art. 6 of the Convention.

However, in general, there seems to be a consensus about the concerns and problems of the Chinese legal institution, for instance, the ineffectiveness of the People's Congress in the performance of their constitutional functions of legislation and supervision of government; lack of supremacy of the Constitution and unenforceability of the constitutional provisions; and lack of genuinely independent judiciary and an adequate legal profession. These all hamper the effectiveness of judicial review system. Participatory democracy is not incompatible with a one-party state, whereas the potential for abuse in such a system may be greater, therefore, the need for safeguarding human rights in China seems to be more pressing.

China definitely has a long march to take in strengthening its judicial review system. But for the time being, we can still cheer up for the ratification of the ICESCR and the signature of the ICCPR. Even though the country has not ratified the ICCPR and its protocol, it has attached much more importance to human rights protection in recent years. With the development of society, there is no excuse for China to say it does not want to ratify the ICCPR. After all the Chinese government has signed it eight years ago, and will ratify it sooner or later.

In the world today, keeping state actions within the bounds of legality without *ex post*⁹³ authorization of illegal acts by strengthening judicial supervision is essential for protecting human rights. The world community must continue to assert its legitimate role in the advancement of human rights through the rule of law world-wide, and it must be in the vanguard of enlightened response to the insistent intimations of our common humanity that so characterize our time.

⁹³ Latin for "after the fact", which refers to laws adopted after an act is committed making it illegal although it was legal when done, or increasing the penalty for a crime after it is committed. Such laws are specifically prohibited by the U.S. Constitution, Article I, Section 9. Therefore, if a state legislature or Congress enacts new rules of proof or longer sentences, those new rules or sentences do not apply to crimes committed before the new law was adopted.

We are looking forward to a world based less on power and status, more on justice and contract; less discretionary, more governed by fair and open rules. Judicial review is not only an important measure to ensure law enforcement and administration based on law, but also a crucial means to safeguard people's legal rights.

Using foreign experiences for reference, establishing and strengthening a unique Chinese judicial review system is an inevitable content of building a rule-of-law country. China has made remarkable progress in its development of economy, it is expected the country could achieve more in its legal reform so that the country can improve the overall situations and better fulfill its obligations under international human rights law enabling its people enjoy more human rights in all aspects.

Every day governments that violate the rights of their citizens are challenged and called to task. Every day human beings worldwide mobilize and confront injustice and inhumanity. Like drops of water falling on a rock, they wear down the forces of oppression and move the world closer to achieving the principles as set out in the UDHR.⁹⁴

⁹⁴ Adapted from David Shiman, *Teaching Human Rights*, (Denver: Center for Teaching International Relations Publications, U of Denver, 1993): 6-7
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