Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects

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Abstract

This article explores the implementation of human rights treaties by courts in the People’s Republic of China. The general applicability of treaties in China is not mentioned in its Constitution, which leaves the status of treaties unclear in Chinese courts, and varying from area to area. In the human rights area, the application of treaties at the domestic level requires incorporation. The status of general comments and concluding observations made by treaty bodies is unclear, too. On the basis of the current human rights legislation in China, the problems and prospects of four different kinds of litigation (constitutional, civil, criminal and administrative) in Chinese courts are discussed separately.

I. Introduction

1. The implementation of international human rights standards at a domestic level is well recognized as crucial for protecting human rights, and legal enforcement through courts is one of these key implementation measures. The People’s Republic of China (China) has ratified six of nine core human rights treaties and is also considering ratifying the International Covenant on Civil and Political Rights (ICCPR), which it signed in 1998. Sun notes that further research is required before the ratification of the ICCPR in China, including, among others, the problem of “what status will be given to the Covenant and how the provisions of the Covenant will be implemented in [the]

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Chinese domestic legal system.” On the other hand, the lack of ratification of the ICCPR does not mean that China has no laws and regulations to protect relevant civil and political rights. Besides the ICCPR, it is also important for Chinese courts to implement other human rights treaties that China has ratified, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on Children’s Rights (CRC), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on Elimination of Discrimination against Women (CEDAW), the Convention on Elimination of Racial Discrimination (CERD) and the Convention on the Rights of Persons with Disabilities (CRPD).

2. In general, human rights treaties require States to take appropriate and/or effective measures, including judicial ones, to protect and promote human rights. Article 2(3) of the ICCPR expressly requires States to ensure that any person whose rights are violated shall have an effective remedy, and that those who claim a remedy have the right thereto determined by competent judicial or other authorities. Accordingly, domestic courts should take active measures to implement human rights treaties. But the relationship between human rights treaties and domestic courts varies from State to State. The first issue that this article examines is whether or how human rights treaties can be directly applied, or incorporated in some ways, by Chinese courts. The paper will also examine whether human rights legislation in China forms legal bases that courts can rely on in their decision-making. Since there are or should be four different types of litigation (constitutional, civil, criminal and administrative) in China, each of them is explored in relation to the problems and prospects of human rights protection and promotion.

II. Application of human rights treaties by Chinese courts

II.A. Direct application of human rights treaties from the perspective of relationship between international and domestic law

3. According to Henkin, “how a state carries out its international legal obligations to other states is its own concern, so long as it carries them out in fact... International human rights obligations are no different in this respect from other international obligations.” With regard to the relationship between international and domestic law, it is commonly held that there are two approaches. The first is the so-called “monist approach”, where international law automatically becomes part of the domestic law system when adopted. The other is the dualist view that international law must be

1 SUN Shiyan, The Understanding and Interpretation of the ICCPR in the Context of China’s Possible Ratification, 6 Chinese JIL (2007), 17, 19.
transformed into domestic law by legislation. The former approach includes mainly the United States (US) and continental Europe, and the latter includes British Commonwealth countries, Ireland and Nordic countries. In this paper, only treaties will be discussed and not other international law sources such as customary law.

4. In the States adhering to the monist view, there are still some differences in direct applicability of a treaty. For instance, under the French Constitution, treaties and international accords do not need formal reception in French law. No distinction is made between self-executing and non-self-executing agreements, though they must be published. On the other hand, the US is widely considered “moderate monist” because treaties ratified there shall be treated as US laws. Meanwhile, not all treaties can be applied directly by US courts; only self-executing ones can be. In Sei Fujii v. State of California, the court held that the human rights provisions in the United Nations Charter are non-self-executing. When the US ratified the ICCPR, it declared clearly that the ICCPR is a non-self-executing treaty. At the same time, it is observed that there are not many human rights rules found in treaties that are not included in US laws and customs, and that US civil rights and liberties law are more protective of individual rights than the laws of any other countries. In other words, there are not many cases where US courts must apply human rights treaties to protect human rights.

5. Unlike other countries, China’s Constitution is silent on the general domestic status of treaties, making the status of treaties unclear in the Chinese legal system. Some scholars regard this silence as excluding treaties as part of Chinese law, while most Chinese international lawyers agree that the Constitution should expressly


5 Art. VI, clause 2 of the US Constitution states that “... all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

6 US Sei Fujii v. State of California (1952), 38 Cal.2d 718. See also GONG, above n.3, 100.


clarify the issue and its silence does not mean the rejection of direct effect of treaties in domestic law. Secondly, there are many specific laws and regulations concerning this issue in China, but they do not provide clear answers. Article 142 of the General Principles of Civil Law (GPCL) is often referred to in this regard. It provides that,

if any international treaty concluded or acceded to by the People’s Republic of China contains provisions differing from those in the civil laws of the People’s Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People’s Republic of China has announced reservations.

Article 238 of China’s Civil Procedure Law has exactly the same wording as does Article 142 of the GPCL. Because of the silence of China’s Constitution, scholars use different approaches to interpret such provisions. Some take the conflict between a treaty and domestic law as implying that the treaty has come into effect in the domestic legal system, while others think that the conflict is a precondition of the coming into effect of the treaty in domestic law. Some scholars have pointed out the difference between the application of treaties in Chinese courts and its effects in the Chinese legal system, arguing that the monist view on the relationship between treaties and domestic law cannot be inferred from provisions like Article 142. On the other hand, the fact that China’s Regulations Concerning Diplomatic Privileges and Immunity and Consular Privileges and Immunity were enacted pursuant to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations is not proof that China has adopted the transformation approach.

6. In April 1990, Chinese representatives stated in a report that,

...according to the legal system of China, as soon as the Chinese government approves or participates in any related international treaty it becomes effective in China and the Chinese Government will be responsible for the respective

13 LIU, above n.9, 145–146.
14 GONG, above n.3, 101.
obligations. In other words, the Convention against Torture has become directly effective in China. Acts of torture, as defined by the Conventions, are strictly prohibited according to the laws of China.15

7. It seems that this statement represents to some extent the official stance of the Chinese government in the application of human rights treaties in China, though final clarification in China’s Constitution is still pending.16 By referring to the Permanent Court of International Justice’s advisory opinion in the case of the Legal Status of Eastern Greenland, a Chinese scholar has pointed out that this governmental expression “should be regarded as a valid and accountable expression of China’s general position as to the issue of validity of treaties in general position as to the issue of validity of treaties in general, and the issue of the validity of treaties on human rights in particular, within the Chinese legal system.”17

8. It may also be observed, however, that Chinese courts are not very willing to apply treaties.18 For example, in the case of WU Guanzhong v. Shanghai Duoyunxuan and Hong Kong Yongcheng Antique Co., Ltd., the court did not apply treaties where China’s Copyright Law conflicted with some treaties to which China is party.19 Additionally, it is widely accepted that sources of Chinese law include constitutional law, statutes promulgated by the National People’s Congress (NPC) or its Standing Committee (NPCSC), administrative laws, ministerial regulations, and local laws and regulations. But there seems to be no space for treaties, even if they are sometimes given high priority in the Chinese legal system.20

9. More importantly, even though China adopts or will adopt the monist view in the relationship between treaties and domestic law, there are still gaps between the incorporation of treaties in domestic law and the direct application of treaties in domestic courts, which is somehow similar to the difference between self-executing and non-self-executing treaties in the US. In addition, direct application of treaties in some cases does not mean the superiority of treaties over domestic law in general. According to Gong, there are actually four different types of laws regarding the superiority of treaties and domestic law:21

16 Kent, above n.11, 61; GONG, above n.3, 104.
18 CHEN Hanfeng et al., above n.11, 121.
19 Ibid.
20 SHEN Zongling, Falixue [Jurisprudence] (1996), 303; GONG, above n.3, 105; LIU, above n.9, 144–145.
21 GONG, above n.3, 102–103.
(1) Treaties superior to domestic law. This category covers mainly commercial, economic, managerial and administrative laws, which are also the areas mentioned above as examples of direct application of treaties. Based on statistics, there are approximately 70 laws or regulations in this regard;²²

(2) Domestic law superior to treaties, such as Article 32 of the Law on the Management of Entry and Exit of Foreigners;

(3) Some articles of treaties are mentioned, but not the relationship between the whole treaty and domestic law. China’s Criminal Procedure Law (CrPL) is one example of this category; and

(4) Treaties do not apply directly in domestic laws to which most human-rights-related laws and regulations belong.

10. Thus, it can be concluded here that no matter which approach we use to interpret the relationship between treaties and domestic law in China, in practice, human rights treaties generally may not be directly applied by Chinese courts. As we know, there is not much difference on the direct application of treaties between dualists and monists regarding non-self-executing treaties.²³ Gong does not explain why China does not apply human rights treaties in domestic law, but the situation is easy to understand because even fundamental rights in China’s Constitution have yet to be applied directly by Chinese courts.

11. Although Chinese courts have generally remained silent about the direct application of human rights treaties, they have cited treaties in some cases. For example, in 1986 and 1990, the Harbin court applied the Tokyo Covenant on the Prevention of Illegal Hijacking of Aircraft and the Montreal Covenant because Chinese criminal laws have no applicable corresponding provisions. Additionally, similar to the US and other countries, the fact that Chinese courts do not directly apply human rights treaties in general does not mean that there is no human rights protection in Chinese courts because many human rights norms in human rights treaties have been incorporated in Chinese domestic laws.

II.B. Application of human rights treaty bodies’ general comments, individual communication’s final views, and concluding observations in a domestic court

12. There is no doubt that from the perspective of international law, general comments and concluding observations of human rights treaty bodies are not legally binding instruments. But no one would deny their significance in the interpretation of human rights treaties. The question is whether there is any chance to apply them in domestic courts.

13. Interestingly, in some traditionally dualist countries, such as the United Kingdom, Australia and New Zealand, courts sometimes apply international human

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²² CHEN Hanfeng et al., above n.11, 122; LIU, above n.9, 145.
²³ CHEN Hangfen et al., above n.11, 119–120.
rights standards (e.g. international or regional jurisprudences) that have not been transformed into domestic laws.\textsuperscript{24} Though it is fair to say that there is no legal obligation to apply general comments, concluding observations and jurisprudences of human rights treaty bodies at a domestic level, they have been applied in some domestic courts.

14. In China, even the attention paid to international human rights primary documents, such as general comments, concluding observations and international jurisprudences, by Chinese international human rights scholars, who supposedly should be bolder than judges, is insufficient.\textsuperscript{25} There is quite a long way to go for Chinese courts and judges to apply the interpretation of human rights treaties from general comments, concluding observations and international jurisprudences.

II.C. China’s domestic human rights legislation

15. It is well recognized at both international and domestic levels that there is a big gap between \textit{de jure} and \textit{de facto} implementation, or legal implementation and practical implementation, of human rights treaties. In this article, only legal implementation will be discussed.

16. First of all, no matter whether a State is a dualist or monist (including a moderate one), domestic courts normally apply national laws rather than human rights treaties to protect human rights. There are several ways to protect human rights at a domestic level. For instance, the US is not fond of ratifying human rights treaties, but relies more on its own constitutional amendments.\textsuperscript{26} The United Kingdom finally passed a Human Rights Act in 1998 to implement the European Convention on Human Rights that was ratified in 1953.\textsuperscript{27} And, in Australia, there are two State or territorial level human rights acts, but no Commonwealth human rights bills. Since 1981, however, there has been a national human rights institution act in Australia (i.e. the Human Rights Commission Act 1981 and then the Human Rights and Equal Opportunity Commission Act 1986).\textsuperscript{28}


\textsuperscript{25} SUN, above n.1, 34–35.


17. In China, the primary human rights provisions are in the Constitution. Chapter II provides for equality in law and equal protection before law, freedom of religion, freedom of speech, peaceful assembly and association, and so on. In 2004, Article 33 was amended to declare that “the state respects and safeguards human rights”. Despite the fact that China’s Constitution also includes duties of citizens, the major shortcoming of rights under the Constitution lies in the non-enforceability in courts of constitutional provisions. Put simply, the rights provisions in the Constitution cannot be applied directly by Chinese courts.

18. To implement international human rights standards in China, we must refer to specific laws and regulations rather than rely on the Constitution. Due to the broad scope of human rights, human rights legislation in China is also distributed in many areas and laws. Some scholars place China’s human rights legislation in criminal justice. But due to the gradual recognition of the importance of economic, social and cultural rights, and the wide acceptance of the indivisibility of civil and political rights on the one hand and the economic, social and cultural rights on the other, the focus on criminal justice might to some extent limit the understanding of human rights protection through legislation in China.

19. Mo divides human rights legislation in China into constitutional law, civil laws, administrative laws, procedure laws and special laws on group rights like minorities. But under this division, all laws and regulations in China would become human rights law because laws always relate to rights and rights relate to human beings if we take human rights as rights of a human being. Defining human rights is not the purpose of this article, but it is certain that human rights are not equal to legal rights although human rights are legal rights. Despite the fact that exhausting the list of all human rights substantive laws would be impossible, this article hereafter tries to put human rights legislation into five categories based on international bills of human rights.

20. The first category is related to criminal justice rights, to which many scholars pay much attention when discussing human rights in China. This refers mainly to China’s Criminal Law (revised in 1999), Criminal Procedure Law (revised in 1996) and Prison Law (1994), among others. In this category, compared with the ICCPR, the key rights are about the right to life (capital punishment, Article 6 of the ICCPR), the right not to be tortured (Article 7), the right of liberty and detainee’s rights (Articles 9 and 10) and

29 Ann Kent, China, the United States, and Human Rights: The Limits of Compliance (1999), 201–215.
32 Kent, above n.29, 201–215.
due process (Articles 14 and 15). Another law in this category is Regulations on Re-Education through Labor (Article 8), which has been criticized widely in China.  

21. The second area is other civil and political rights, including freedom of movement, freedom of religion, minority rights, freedom of association, freedom of expression, freedom of peaceful assembly and so on. With respect to minority rights, China revised its Law on Ethnic Groups’ Autonomy in 2001; freedom of religion is mainly dealt with by the State Council’s Regulations on Religious Affairs in 2004 and freedom of association can be found partially in the Law on Trade Union and Regulations on the Registration of Social Organizations. Due to the passive nature of civil and political rights, less regulation may in fact provide broader freedom. For instance, to protect freedom of movement, the extent to which the Regulations on Household Registration is needed is arguable. On the other hand, in some cases like the right to vote or to be voted for, the active provisions in the Law on Elections enhance human rights.

22. Third, due to the existence of the International Labor Organization (ILO) and its importance, labour rights can be categorized as a special group. In this category, China’s Labor Law (1994), Labor Contract Law (2008), Employment Promotion Law (2008) and Regulations on Prohibition of Use of Child Labor (revised in 2002) are key laws. Since most discrimination cases in China fall in the employment area, the Employment Promotion Law fulfils partially the role to provide the legal basis to fight against discrimination in court that was unavailable before, and it can also be seen as the implementation of ILO Convention number 111 for which China deposited its ratification on 12 January 2006.

23. Fourth, as for other economic, social and cultural rights, among others, China enacted the Law on Compulsory Education (revised in 2006) to promote the right to education and the Marriage Law (revised in 2001) for the rights of marriage.

24. The fifth human rights legislative category concerns the rights of people who are in a special group, such as women, children and disabled persons. China has promulgated related laws in each area including the Law on the Protection of Rights and

33 Ibid.

25. Although Chinese scholars agree that human rights legislation in China has been improved greatly, problems remain. Firstly, there are still many gaps and inconsistencies between Chinese human rights legislation and international human rights standards. Take minority rights for example. China’s Law on Ethnic Minorities’ Autonomy does include some ethnic minority rights, but there is no legal concept of language or religious minority in China’s current legal system. Put simply, not all human rights areas are covered by Chinese human rights legislation. More importantly, even for the same right recognized in both treaties and Chinese domestic law, the interpretation and scope of that right can be very different. Article 12 of the CrPL prescribes that no person shall be found guilty without being judged as such by a court according to the law. As scholars and commentators have noticed, however, there are differences between “not guilty without being judged” and “presumption of innocence” because the former does not mean non-self-incrimination and exclusion of illegally gathered evidence, while the presumption of innocence does. Secondly, most legislation with human rights components as listed above does not focus on human rights protection, but has a much broader purpose, which puts human rights legislation in an awkward position. As far as China’s Law on Compulsory Education is concerned, it deals with not only the right of education but also an obligation to accept compulsory education. Even fundamental rights in China’s Constitution are in the same situation because citizens must bear obligations when they have rights, while the obligator under human rights treaties refers to the State rather than individuals. Thirdly, it is common to incur administrative and criminal responsibilities in the violation of human rights legislation, but not all of them include civil responsibility. For example, the Employment Promotion Law mentions civil, administrative and criminal responsibilities, while the Regulations on the Prohibition of Use of Child Labor do not include civil but mainly administrative and criminal responsibilities. Fourthly, Chinese human rights legislation includes many different levels of legal force, from the Constitution to administrative regulations and local laws, but because there is no judicial review of laws and regulations in China, they are sometimes in conflict and it is hard to apply them uniformly across the country. In the aftermath of the SUN Zhigang case, the Measures for the Sheltering and Send-off of Urban Vagrants and Beggars was abolished and replaced by another set of administrative regulations under social pressure, but its legality was not officially reviewed by a court or any other State organ.

38 WANG Guanghui, Reflection and Prospect of New China’s Human Rights Legislation, Zhengzhou Daxue Xuebao (Zhexue Shehui Kexue Ban) [Journal of Zhengzhou University (Philosophy and Social Science)] (2007), No. 6, 50–51.

26. Any proposal to solve the above problems would go far beyond this article’s scope. But as Gong argues, a Bill of Rights may be the best way to ensure the implementation of human rights treaties in China.40 An alternative solution might be a national human rights institution act like Australia’s, although Australia is debating the possibility of passing a national human rights bill.41

III. Constitutional litigation and human rights protection

27. As discussed above, there is no provision in China’s Constitution regarding the relationship between treaties, including human rights treaties, and domestic law, but it does include a chapter on “fundamental rights and obligations of citizens”. However, there has been no meaningful constitutional litigation in China. In 1955, China’s highest court, the Supreme People’s Court (SPC), issued a reply to the Xinjiang High Court saying that “the PRC’s Constitution is not proper to be the legal basis of conviction and punishment in criminal judgment”. 42 Although this reply referred only to the inappropriateness of using the Constitution as a legal basis in criminal judgments, it has become the main reason Chinese courts hesitate or refuse to apply the Constitution in all cases—including civil and administrative litigation. In addition, another SPC reply to the Jiangsu Provincial High Court in 1986 listed standardized documents Chinese courts can cite as legal bases when making judgments, omitting the Constitution.43 Whether these two replies can be considered sufficient reasons to exclude the application of the Constitution is arguable, but the fact is that the Constitution has not been used in Chinese court judgments and it does not mention the judicial review of laws and regulations, although the NPC or NPCSC theoretically could be requested to review constitutional issues in accordance with the Law on Legislation. 44

28. If fundamental rights in China’s Constitution have not yet been specified in laws and regulations, or the legislative act itself violates any human right, then it will be difficult to cure such violations of human rights with judicial remedies. Understandably, a judge cannot make decisions without the power to interpret laws, but this does not

40 GONG, above n.3, 106.
43 Guanyu Zhizuo Falu Wenshu Ying ruhe Yinyong Falu Gui faxing Wenjian de PiFu (The Reply on People’s Courts Using Standardized Legal Documents When Making Judgments), 28 October 1986, cccc.gov/pages/newLaws/standardLegalDocs.php?PHPSESSID=074622a55e0c2660f1ae1ad1639e485b (17 June 2008).
44 Law on Legislation, Art. 88.
mean a judge should have the power to interpret constitutional law. Due to the special status of constitutional law, its interpretation is regarded as an important political power, which is the reason why Chief Justice Marshall did not get his desired result in *Marbury v. Madison* but achieved an essential political win in the long run. Whether the power to interpret constitutional law should be given to the judiciary, therefore, depends on different solutions based on different political traditions.

29. Pursuant to Article 67(1) of China’s Constitution, the NPCSC is in charge of constitutional interpretation. Because the NPCSC is part of the NPC, the NPC also has the power to interpret the Constitution. The problem lies in whether such a constitutional provision excludes the possibility of a court interpreting the Constitution. There are two views: first, the Constitution only empowers the NPC and NPCSC to interpret the Constitution, and no court has such power. Because courts cannot interpret the Constitution, courts shall not quote the Constitution as a legal basis in any judgment. Second, there is no prohibition against courts interpreting the Constitution. The reason for this has been well stated in *Marbury v. Madison*. The court should have the power to interpret the law to perform its function and constitutional law should not be an exception. China basically adopted the former interpretation so that courts cannot apply constitutional provisions. Surely this does not mean there is no way in Chinese law to review constitutional violations. As a matter of fact, as mentioned above in Article 88 of the Law on Legislation, the NPC and NPCSC have the power to abolish laws or regulations that violate the Constitution. It can be said that the legislative branch partially performs the review function for constitutional violations. So far, the NPC and NPCSC have not used their powers to review the constitutionality of laws, although sometimes they have abolished laws that violated the Constitution, such as the above-mentioned Measures for the Sheltering and Send-off of Urban Vagrants and Beggars in the *SUN Zhigang* case.45

30. It is also recognized that the current Chinese practice of constitutional review does not imply that China will not establish judicial review of constitutional violations in the future. Mo emphasizes that constitutional litigation is the prerequisite of the judicial remedy of human rights because “common litigation can only solve the problem where concrete administrative actions violate human rights, and only when abstract administrative acts (especially laws promulgated by the legislature) shall comply with human rights protection requirements, can the legal protection of human rights be fully realized.”46 Jiao argues that common litigation can provide remedies to some human rights violations, but cannot solve the problem of legislative violation.47 It is fair to say that constitutional

45 The *SUN Zhigang* case has started a great discussion on constitutional review in China. See MA Ling, Revelation of *SUN Zhigang* Case: Review of Violation of the Constitution or Review of Violation of Laws, *Guojia Xingzheng Xueyuan Xuebao* [Journal of China National School of Administration] (2005), No. 1, 79–82.
46 MO Jihong, above n.30, 86–87.
47 Surely, legislative infringement cannot be solved only by constitutional litigation, but mainly self-correction in the legislature. See JIAO Hongchang, Constitutional Analysis on ‘State Respects and Safeguard Human Rights’, *Zhongguo Faxue* [China Legal Science] (2004), No. 3, 48.
litigation is not the most common way to protect human rights, but it might often be the last remedy. In accordance with the principle of the “exhausting of rights remedy procedure” under constitutional litigation, only in disputes that regular laws and regulations cannot solve should the Constitution apply, including both concrete and abstract state actions.\textsuperscript{48} Since the direct violation of constitutional law is concerned not only with legislative acts, but also, more importantly, with the concrete actions of administrative organs, it is necessary to establish a certain level of judicial review of such violations. At the same time, the entrance of the Constitution into litigation does not mean that any court can have jurisdiction over constitutional litigation. Generally, there are three types of judicial review of constitutional law violations: one is a common law system like the US and Australia; the second is a constitutional court like that in Germany and the third is a constitutional commission like that in France. China has not decided which model to adopt. But as far as human rights are concerned, it may be advisable to establish a human rights court or branch.\textsuperscript{49}

31. The \textit{QI Yuling} case in 2001 is regarded as the first constitutional case in China. The SPC held that the Shandong High Court could apply the constitutional provision on the right of education.\textsuperscript{50} But, as has been argued, the Constitution should not have direct effect on the relations among individuals, that is to say, the court should not decide whether CHEN Xiaoqi violated QI Yuling’s constitutional rights.\textsuperscript{51} On the one hand, it is good to see the application of the Constitution in Chinese courts to protect individual rights, but on the other, a better understanding of constitutional litigation and human rights in China still requires more research and development.


\textsuperscript{49} MO Jihong mentions in Art. 30 of his draft of the PRC’s Law of Human Rights Protection (expert draft) that it shall establish a human right branch in the People’s Court (at Provincial level and Supreme Court level). See MO, above n.30, 350.

\textsuperscript{50} QI Yuling v. CHEN Xiaoqi et al., Shandong Provincial People’s Court, www.chinalawinfo.com (23 June 2008).

IV. Civil litigation and human rights protection

32. Like other civil law countries, China’s legal system recognizes three other forms of litigation besides constitutional: civil, criminal and administrative, based on the nature of the remedy. Specifically, if the violator will bear civil responsibility, then the action is termed civil litigation and civil procedures apply.

33. Pursuant to Article 121 of the GPCL, if a State organ or its personnel, while executing its duties, encroaches on the lawful rights and interests of a citizen or legal person and causes damage, then it shall bear civil liability. Applying this article to human rights cases, a State organ or State official could be responsible for the violation of a citizen’s human rights under special tort liability (Teshu Qinquan Zeren), which is in contrast to ordinary torts (Yiban Qinquan Zeren) in Chinese legal system in terms of the subject and the object of the tort, the element and the remedy. In addition, this article applies to both State organs and State officials. There is no clear distinction on its application from its wording.

34. Under the GPCL, special torts apply the strict liability principle, while State compensation under the State Compensation Law is an administrative responsibility requiring proof of negligence. On the other hand, the State’s civil compensation could be a full-amount equivalent to the damages caused to the person, and the State compensation under administrative liability is statutory so that it may not be a full amount of the damages. But as some scholars have noted, although civil liability would be more favourable to the victim compared with State compensation under the State Compensation Law, the nature of responsibility of State organs for their violation in the process of their duties is a public rather than civil responsibility.52 A draft of the Civil Code published by the Working Group on Laws of the NPCSC deleted Article 121 of the GPCL, seemingly adopting the above idea that a State organ’s liability in the violation of human rights is administrative rather than civil.53 Undoubtedly, it is possible for State organs or officials to become subjects of tort liability, such as for the collapse of a State organ’s building. The violation of citizens’ fundamental rights while executing their duties, however, should fall within the scope of administrative rather than civil liability. As Zhang notes, the application of the Constitution should not lead to pure civil liability.54 It is also true that Article 121 of the GPCL has been seldom cited as a legal basis for human rights violations in practice.

35. In other countries, there are indeed some tort cases for the violation of human rights. In the US, under the Federal Tort Claims Act (FTCA), federal agents may be

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53 Ibid., 138.
sued for torts on their violation of human rights. Because the FTCA was designed mainly for the “garden-variety” torts, such as the negligent operation of government vehicles, inadequacies of tort law exist. Additionally, human rights violations may lead to “constitutional tort claims” against government officials, which was established in Webster Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics where the US Supreme Court held that “a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment.” Finally, the US Alien Tort Statute might make an alien’s tort claims against foreign government officials’ human rights violation possible, such as in Filártiga v. Peña-Irala. Of course, whether constitutional torts claims are a civil liability or a special constitutional liability is an arguable issue.

Besides Article 121 of the GPCL, we can also find other civil remedy clauses in China’s human rights legislation, especially those laws on the protection of rights of those who belong to especially vulnerable groups, such as women, the elderly and disabled persons. Under Article 56 of the Law on the Protection of Rights and Interests of Women, civil liability can apply if property and other damages occur. Article 51 of the Law on the Protection of Rights and Interests of Disabled Persons has a similar provision. In both laws, however, there are also other provisions related to State officials that stipulate when State officials neglect their duties in violation of the law and infringe on the lawful rights and interests of relevant persons, the State organs to which they belong, or their higher authorities, shall instruct such persons to correct their wrongdoings or subject them to administrative sanctions. The question is whether the State officials will bear only administrative liability or whether civil liability will also apply. At least partially due to different understandings on the nature of human rights violations, that is, whether the human rights violators are mainly State organs/State officials, the civil liability issue becomes complex. Where the violator is not a State organ or official, there will not be a problem in applying civil liability to human rights cases. But if we strictly understand human rights violators as those organs and persons who perform State power, then it will be arguable whether Chinese human rights legislation has settled on the application of civil liability. Additionally, learning from the experience of other countries, the proper demarcation between the responsibilities of State organs and State officials might be a way to solve the problem. That is to say, Chinese human rights legislation could consider whether State officials should bear civil liability if State organs already bear administrative responsibility.

57 US 630 F.2d 876 (2d Cir. 1980).
V. Criminal litigation and human rights protection

37. It is easy to connect human rights protection with criminal cases, especially for first-generation human rights (i.e. civil and political rights). The gaps between the ICCPR and Chinese criminal law and criminal procedure law have been widely discussed for China in order to prepare for the ratification of the ICCPR. How China will revise relevant laws or apply ICCPR directly after ratifying the ICCPR will be an important issue.

38. Firstly, we should notice that human rights protection in criminal procedure is different from, though closely related to, what we call criminal remedies for human rights violations. For example, China’s CrPL strictly prohibits torture. Torture may also be a tort as discussed above and give rise to criminal procedure remedies, such as the exclusion of unlawfully obtained evidence. Punishment for torture is also available. Chen distinguishes between procedural and substantive remedies for human rights violations in criminal cases, and what we discuss here regarding human rights litigation is mainly about substantive remedies rather than procedural remedies.

39. Secondly, if we agree that human rights violators are primarily State or government (although in some cases applicable to non-state actors), most civil and criminal cases are not human rights cases, and only those that relate to governmental acts can be seen as such. For example, murder in general is not viewed as a human rights violation case while capital punishment is. But capital punishment is closely related to criminal laws. The abolition of capital punishment is not a criminal litigation issue, but more a criminal justice policy or legislative issue.

40. In China it is regulated that serious violators of human rights should bear criminal responsibilities that fall mainly in Chapter 4 of “Violation of Citizens’ Civil and Political Rights” and Chapter 9 of “Crime of Dereliction of Duty” in China’s Criminal Law, including illegal detention, torture, obtaining evidence by violence and illegal searching. Take torture as an example. Chinese courts have investigated a large number of torture cases in recent years. According to the data, 4000 cases were filed and investigated from 1979 to 1989, 472 cases and 921 persons in 1990, 407 cases and 831 persons in 1991, 352 cases and 705 persons in 1992, 398 cases and 849 persons in 1993, 409 cases and 828 persons in 1994 and 412 cases and 843 persons in 1995. Someone even proposed to establish a crime titled “crime against human rights”. But, as Han argues, such a proposal is not enforceable and should not be supported because, due to the nature of human rights, it is impossible to use the one name


“crime against human rights” to cover criminal responsibility of human rights violations.61

VI. Administrative litigation and human rights protection

41. Compared with civil and criminal responsibilities of human rights violations, administrative litigation is mainly against State administrative organs and should be the most important litigation procedure in China to fight against human rights violations. Since China’s Administrative Procedure Law (APL) applies only to “concrete administrative actions” (Juti Xingzheng Xingwei) but not “abstract administrative actions” (Chouxiang Xingzheng Xingwei), human rights violations in abstract administrative actions such as laws and regulations cannot be litigated in accordance with the APL, which is also the reason why constitutional litigation becomes essential. Undoubtedly, administrative litigation is one of the key parts of judicial review. But there are still many problems. The first is the scope of rights protected under the APL. Even though there is not much restriction in the law itself on the nature and scope of rights protected, in practice, the current administrative litigation shows that it falls mainly in personal and property rights that are not too sensitive, but rarely touches on civil and political rights that are much more sensitive in China. Shen observes that there has not yet been any political-rights-related judgment in administrative litigation.62 Furthermore, due process rights can seldom be supported in administrative litigation, except extraordinary cases.63

42. Secondly, the implementation and enforcement of judgments in administrative cases is limited. In the first HIV-AIDS discrimination case in 2005, the victim won the administrative case but could not get a remedy due to an enforcement issue. Meanwhile, the scope and amount of State compensation is limited and cannot safeguard the legal interests of the victim.

43. Thirdly, the withdrawal rate of administrative litigation in China is very high. According to “Statistic Chart on All-China’s First Trial Administrative Cases from 1989 to 2002” provided by the Statistic Division of Research Department of the SPC, the withdrawal rate of administrative cases is 43.2 per cent. And according to scholarly data, the withdrawal rate was 57 per cent by 2003.64 Surprisingly, the reason for this high withdrawal rate is not traditional Chinese culture being afraid of taking the government to court, but judicial corruption and non-independence of the judicial

63 Ibid.
64 YING Songnian, To Advance China’s Administrative Remedy System, Jianghai Xuekan [Jianghai Academic Journal] (2003), No. 1, 123.
system that makes people think litigation cannot solve the problem. On 17 December 2007, the SPC issued Provisions on Withdrawal Issues of Administrative Cases. XI Xiaoming, SPC Vice President, said “this mechanism is a new creation within the legal framework, an effective procedure to settle administrative disputes under new circumstances, and a requirement of realizing ‘close the case and finish the disputes’ and promoting harmony between the officials and civilians”.

But whether this new procedure will bring the pressure on applicants by courts and administrative organs remains to be seen.

44. Fourthly, the scope of claimants and defendants should be further adjusted. The requirement of “legal standing” has blocked the possibility of public interest administrative litigation, and whether “organizations authorized by laws and regulations” include public schools, villagers’ committees or professional associations also needs to be interpreted broadly.

VII. Conclusion

45. China has ratified most human rights treaties and is seriously considering ratifying the ICCPR. But the direct application of human rights treaties in Chinese courts may not happen, although in some commercial and civil areas treaties could apply directly. China’s Constitution lacks provisions on the relationship between treaties and domestic law. At the same time, China has promulgated many domestic laws and regulations to implement international human rights standards.

46. It would be unfortunate that China’s Constitution cannot be cited as a legal basis in China’s courts. Meanwhile, China has neither any meaningful constitutional litigation nor any specialized human rights court, although there have been some developments recently, such as the QI Yuling case in 2001. In accordance with Article 121 of the GPCL, individuals can sue the State for civil liability to protect their legitimate rights and interests. The nature of this provision was criticized, however, and it has not been used much to protect human rights in practice. As for criminal liability in relation to human rights violations, it is offered through procedural and substantive remedies. Administrative litigation is supposed to be the main channel in Chinese courts to deal with human rights issues, but it is limited in many ways. Firstly, the scope of the admissibility is rather narrow being only “concrete administrative actions” and excluding any “abstract administrative actions”, such as administrative regulations. Secondly, the rights covered in administrative litigation mainly fall in the area of personal and property rights. It is believed that no political rights cases have ever been raised or heard in China’s courts. Thirdly, the case withdrawal rate is quite high, for instance, 57 per cent in 2003, and the SPC issued a notice at the end of 2007 encouraging claimants

65 Zuigao Renmin Fayuan Gongbu Liangge Xingzheng Susong Sifa Jieshi [Supreme People’s Court Published Two Administrative Litigation Judicial Interpretations], www.gov.cn/jrzg/2008-01/17/content_860784.htm (14 June 2008).
to withdraw lawsuits after the accused administrative organs correct their misconduct. To solve a problem is much more difficult than to identify it. Amending the Constitution regarding the relation of treaties to domestic law appears to be a way forward along with adopting a national human rights act.