A Comparative Study of the Role of the Supreme People's Court within the P.R.C.: Judicial Interpretation and Judicial Review

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Introduction

This paper is a comparative study of the role of judicial review and judicial interpretation within the United States, German, and Chinese judicial and legal systems. I will study the German and United States models of judicial review and judicial interpretation in order to provide a template for China. The first chapter of this study will analyze the role and development of judicial review within the German and United States judiciary, focusing careful attention on their respective similarities and differences. The second section of the first chapter will discuss the sources of jurisprudence in the United States and Germany. I will utilize the State Supreme Courts of the United States and the German Federal Supreme Courts as examples of successful judicial interpretation in both common law and civil law systems. The second chapter will examine the history and current status of judicial interpretation and judicial review in China. The Chinese judicial system has been gradually increasing in power, influence, and independence over the past two decades but remains far behind those of Germany and the United States.[1] This chapter will inspect the application and theory of judicial interpretation within the Supreme People's Court (SPC). The conclusion will explain the differences and similarities among these three systems of law. From cultural and historical background to the fundamental legal theories and values, each country is unique, but the various functions of their legal systems are not necessarily incompatible. Finally, the conclusion will also offer some recommendations for China.

Based upon the successes and failures of the American and German jurisprudence, I will suggest possible actions to strengthen Chinese judicial independence. Because China currently

[1] Randall Peerenboom, China's Long March toward Rule of Law 280-82 (2002); see Stanley Lubman, Bird in a Cage: Legal Reform in China After Mao 384-85 (2001) for a specific discussion of China's legal reform from 1979-1999.

has no official system of judicial review, I will evaluate the viability of implementing either the German or United States model of judicial review within the Chinese political system. Because of the significant differences in structure and practice among the United States, German, and Chinese legal systems, I will pay particular attention to functional equivalence in determining the relative success of the German and United States models and the current state of the Chinese judicial branch.

The Chinese legal system is often misunderstood in the West. Because the Chinese system of law is based upon a unique mix of socialist law and civil law, it is particularly difficult for American scholars to comprehend.[2] Despite common misconceptions, the People's Republic of China (PRC) does have a constitution that is, in theory, the foundation of Chinese law.[3] This constitution was little more than a symbol for many years: Chinese law was confusing, ambiguous, and subject to the whims of corrupt officials. However, following China's economic development and the increase of international pressure, the Chinese National People's Congress (NPC) and the Standing Committee have made an effort to adapt Chinese society and government to operate more efficiently and successfully with outside investors, businesses, and foreign countries.[4]

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[2] *Id.* at 2-6. For an extended clarification of misconceptions and stereotypes concerning Chinese law see also Yujie Gu, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 Drake L. Rev. 173 (1999); and Marc Rosenberg, *The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System under the Constitution and Major Statutes of the People's Republic of China*, 9 U. Miami Int'l & Comp. L. Rev. 225 (2001)

[3] Introduction to Chinese Law (Wang Chenguang & Zhang Xianchu eds., 1997)

[4] The economic motivation for developing the Chinese legal system is well documented. Legal reform has been directed toward providing strong commercial and business law for foreign investors. Improving rule of law and developing a civil society have only become goals of the CCP over the past decade. See Zou Keyuan, China's Legal Reform (2006).

This change has been accomplished through new legislation by the NPC and an increased emphasis on developing an independent and impartial justice system and rule of law.[5] Chinese political leaders realized that in order to attract foreign direct investment, foreign investors needed to be assured that their money would not be subject to vague and poorly implemented laws. This inspired changes in the constitution and civil code and brought about significant policy changes as well. Despite significant new legislation and improvements in legal education, the development of rule of law is still incomplete.[6]

Judicial review and judicial interpretation are both essential to establishing a stable rule of law.[7] Judicial review and judicial interpretation are not as similar as their titles would suggest. In this paper, judicial review will refer to constitutional interpretation and review of the constitutionality of actions taken by other branches of government and courts,[8] whereas judicial interpretation will refer to the interpretation of statutes and other laws.[9] The courts in which judicial interpretation is vested vary from country to country. What is known as judicial interpretation in China and other civil law countries is not strictly applicable in the United States common law system. Judges in the United States are far more than interpreters of the law. Because the United States legal system is based on common law, what I will refer to as judicial interpretation is in fact the derivation of first principles and the application of precedent to specific cases.[10] In practice, questions about judicial interpretation in this sense are primarily

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[5] Shen Kui, Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case," 12 Pac. Rim L. & Pol'y J. 199 (2003).
[6] Huang Lie, *Rule of Law in China: Ideal and Reality, in* Constitutionalism and China 175, 189 (Li Buyun ed., 2006)
[7] Miguel Schor, Mapping Comparative Judicial Review, 7 Wash. U. Global Stud. L. Rev. 257, (2008)
[8] M. Ulric Killion, China's Amended Constitution: Quest for Liberty and Independent Judicial Review, 4 Wash. U. Global Stud. L. Rev. 43 (2005)
[9] John Henry Merryman and Rogelio Perez-Perdomo, The Civil Law Tradition, 39 (3rd ed. 2007)
[10] Judicial interpretation has widely different connotations in the United States, Germany and China. Judicial interpretation within the PRC refers to the documents propagated by the SPC. In Germany, judicial interpretation is the application and interpretation of statutes and legislation by courts.

resolved in the State Supreme Courts.[11] By contrast, in civil law systems, judges should theoretically not conduct any interpretation; however, no legal code ever developed has been completely adequate to meet the constantly changing and broadening demands of the real world.[12] Civil law has developed to be more accepting of this reality, and the German judiciary is permitted a greater degree of flexibility to conduct judicial interpretation.[13] German judicial interpretation has been shaped by the Basic Law.[14] Courts conduct a holistic form of judicial interpretation in order to keep the meaning of statutes in compliance with the principles espoused in the Basic Law.[15]

Judicial interpretation in China is subject to a number of restrictions peculiar to China. The term judicial interpretation in China refers to a specific responsibility limited to the SPC; local courts are required by law to refer any questions or requests for clarification to the SPC.[16] Judicial interpretation in China is not the same as legislative interpretation. Judicial interpretation is limited to the ability to clarify the meaning of existing laws. This power has been expanded through practice, however, to allow the SPC to create and alter the meaning of laws. This application of judicial interpretation is illegal according to the constitution, since legislative interpretation, or the ability to change and create laws, is given only to the NPC and the Standing Committee.[17] The development of judicial interpretation is therefore one of great interest to the legal community, both within China and without. China's civil code has improved greatly over

[11] Common Law Theory, (Douglas E. Edlin ed., 2007)
[12] Merryman and Perez-Perdomo, *supra* note 9, at 40-41.
[13] *Id*. at 42.
[14] The Federal Constitutional Court has ruled that judges must balance the values of the Basic Law against the specific letter of the law when making rulings. See *infra* note 23.
[15] Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, *in* Interpreting Statutes: A Comparative Study. Pp. xiv, 567 (D. Neil MacCormick and Robert S. Summers eds., 1991) *reprinted in* 81 Cornell L. Rev. 513 (1996)
[16] Nanping Liu, Judicial Interpretations in China 37 (1997)
[17] *Id.* at 17, 30, 88.

the past two decades, but it still contains gaps and remains ambiguous in certain areas.[18] Judicial interpretation as practiced by the SPC over the past decade has played a large part in filling these gaps.[19]

The power of judicial review is normally vested in a country's supreme court to defend the rights of citizens from unconstitutional legislation. Judicial review was first developed in the United States as a power of the judicial branch to maintain the checks and balances on the executive and legislative branches as stipulated by the Constitution.[20] Judicial review was intended to counterbalance the power of the federal government. During the early 19th century, the individual states remained hesitant to grant inordinate amounts of power to the federal government. Judicial review provided a means of protecting states' rights and guaranteeing individual rights from any federal abuse of power. Over the next century and a half, judicial review developed into the primary function of the Supreme Court.[21] Judicial review is not limited to the United States, nor even to common law legal systems. Since World War II, judicial review has become increasingly universal. Germany, Canada, and many other developed and developing countries all implement judicial review to some degree.[22] Currently, the most successful alternative to the United States model of judicial review is that of Germany.[23]

Judicial review, by contrast, is forbidden under Chinese law. The Chinese Constitution is not justiciable; it may not be cited in court cases as a source of law. Only the NPC has the

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[18] Ronald C. Keith and Zhiqiu Lin, *Judicial Interpretation of China's Supreme People's Court as "Secondary Law" with Special Reference to Criminal Law,* 23 China Information 223, 225 (2009).
[19] Shizhou Wang, *The Judicial Explanation in Chinese Criminal Law*, 43 Am. J. Comp. L. 569 (1995); see also Li Wei, *Judicial Interpretation in China*, 5 Willamette J. Int'l L. & Disp. Resol. 87 (1997).
[20] Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 Tex. L. Rev. 1463, 1464 (2009)
[21] *Id.* at 1466-68
[22] Miguel Schor, *Mapping Comparative Judicial Review*, 7 Wash. U. Global Stud. L. Rev. 257, 259-61, 266 (2008)
[23] Danielle E. Finck, *Judicial Review: The United States Supreme Court versus the German Constitutional Court*, 20 B.C. Int'l Comp. L. Rev. 123, 127-28 (1997); Peter E. Quint, "*The Most Extraordinarily Powerful Court of Law the World Has Ever Known"? Judicial Review in the United States and Germany*, 65 Md. L. Rev. 152, 152-53 (2006)

authority to interpret and alter the Constitution.[24] This situation bears a striking resemblance to European attitudes toward judicial review before WWII, when parliaments were considered the supreme law making bodies. The NPC theoretically represents the will of the people; therefore, its decisions cannot be challenged by the judiciary.[25] A cynical observer might consider the restraints on the power of the judiciary as a way for the Chinese Communist Party (CCP) to guarantee that it retains its hold on power. Recent developments in Chinese case law have brought the concept of judicial review to the forefront of the debate over rule of law in China. In a 2001 decision, the Supreme Court ruled that Qi Yuling – a girl whose identity was stolen – was illegally denied her right to education as guaranteed by the Constitution.[26] Because it was the first time the Constitution had ever been cited in a ruling, this case was groundbreaking. Chinese and Western legal scholars alike hailed this landmark case as the beginning of a loosening of the NPC's monopoly on constitutional interpretation and another step toward establishing rule of law.[27] Some scholars argue that without judicial review, the Chinese Constitution is nothing more than a political document intended only to give the PRC government legitimacy in the eyes of the world.[28]

I have chosen to compare the United States and German legal systems to the Chinese system for a number of reasons. Given that judicial review was first established in the United States, it is natural to look at the United States model of judicial review for lessons to apply to China; however, because the United States model is a common law based legal system, it is

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[24] See Peerenboom, *supra* note 1, at 281; see also Keith and Lin, *supra* note 18, at 225
[25] *Id.* at 282-85; see also Schor, *supra* note 22, at 264
[26] See Kui, *supra* note 5, at 201-9.
[27] See Huang Lie *supra* note 6; Li Buyun, Constitutionalism and China (2006); Zou Keyuan, *Judicial Reform in China: Recent Developments and Future Prospects*, 36 Int'l Law. 1039 (2001); Thomas Kellogg, "*Courageous Explorers"?: Education Litigation and Judicial Innovation in China*, 20 Harv. Hum. Rts. J. 141 (2007), M. Ulric Killion, *supra* note 8.
[28] See Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 Int'l J. Const. L. 215, 217 (2009)

helpful to also look at a successful example of judicial review implemented in a civil law system. I have chosen to examine Germany for two reasons: 1) because China's civil code is based on the German civil code, and 2) because the German system of judicial review is the most successful and robust example of continental judicial review. Following the fall of the Qing Dynasty in 1911, the newly established Republic of China (ROC) developed a civil code based largely on the civil code of Germany.[29] At that time, the German Bürgerliches Gesetzbuch (BGB) was the most modern and comprehensive civil code in existence. The BGB had come into being only ten years before in 1900, after more than twenty years of debate. It was the culmination of 19th century liberal idealism in Germany.[30] Writing and developing the BGB was a monumental task. Due to its comprehensive nature, with amendments, the BGB has successfully served as the basis of German civil law since 1900.[31] Although more than seven decades of revolution, civil war, and rule under socialist law separate the establishment of the civil law of the Republic of China in 1911 and the reestablishment of Chinese civil law in 1986, much of China's civil code remains based upon the BGB.[32]

German judicial review differs from that of the United States. The Federal Constitutional Court (in German: *Bundesverfassungsgericht*, or BVerfG) was established for the sole purpose of reviewing the Basic Law.[33] In the aftermath of World War II, rather than creating a single supreme court to handle all federal issues, the German Constitution, or Basic Law, established five federal courts, each heading a different branch of law.[34] This method has successfully created a powerful and reliable system of judicial review. The Federal Constitutional Court has

[29] See Peerenboom, supra note 1, at 43.
[30] Margaret Barber Crosby, The Making of a German Constitution: A Slow Revolution 189-190 (2008)
[31] Hannes Rosler, *Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution – The Luth Revolution 50 Years ago in Comparative Perspective*, 23 Tul. Eur. & Civ. L.F. 1, 15-16 (2008).
[32] Zhang Lihong*, The Latest Developments in the Codification of Chinese Civil Law*, 83 Tul. L. Rev. 999, 1001-1002 (2009)
[33] See Quint, *supra* note 23, at 153-54; Grundgesetz [GG] [Constitution] art. 92 (F.R.G.)
[34] Grundgesetz [GG] art. 95(1) (F.R.G.)

original jurisdiction over all constitutional issues, and it is not attached to the rest of the judicial system as an appellate court. The Federal Constitutional Court is also possessed of a number of powers that the United States Supreme Court does not have. The Basic Law grants to the Federal Constitutional Court the authority to review the constitutionality of any action of any branch of the German government.[35]

The German model of judicial review provides a distinct contrast to the United States model. The similar civil law legal systems in Germany and China will simplify comparison of the relative efficiency of Chinese and German interpretation of civil law. Therefore, I have chosen to base my comparative study of judicial interpretation and judicial review on the German and United States models.

I. Western Judicial Review and Judicial Interpretation

In this chapter, the United States and German approaches to judicial interpretation and judicial review will be examined in detail. Part I briefly examines the historical development of the United States and German legal systems. Part II focuses on the theories and judicial decisions that have had the greatest impact on German and United States judicial review and the factors that caused them to develop divergent judicial models. The differences between the German and United States legal systems stem from the fundamental legal theories and principles underlying each system, and these differences can be seen manifested in every aspect of the practice of law within these systems. Part III will look at forms of judicial interpretation in Germany and the United States.

[35] Grundgesetz [GG] art. 93(1) (F.R.G.)

Germany and the United States are both federal, constitutional based republics. The constitutions of both nations establish a government carefully structured to maintain separation of powers. The United States and Germany each have a powerful judiciary intended to check the power of the federal government and protect the rights and freedoms of the individual states and citizens. However, there are significant differences between the two systems. The German and United States constitutions were drafted in different eras, within dissimilar cultures. These two constitutions were the products of very different, very specific sets of circumstances and pressures. The United States was recovering from a war to gain independence from an external power, whereas Germany was recovering from abuses of power and a war of aggression started by a domestic government. Part III examines the role of judicial interpretation within German and United States jurisprudence and the degree of latitude given courts to conduct interpretation. Judicial interpretation is being utilized in the SPC in a manner similar to the common law practice of *stare decisis*, but the German Federal Constitutional Court has certain common law principles integrated into its authority.[36] German law implements an expanded form of judicial interpretation, and certain decisions of the Federal Constitutional Court are granted equal status with statutes.

A. Historical Background

The American legal system is based upon the Constitution: all other law is subordinate to it. The United States Constitution is the shortest and oldest constitution extant.[37] It was the first modern constitution, and the political and legal system that it ordained were original and untested. The Constitution stipulates the duties, responsibilities, and limitations of each branch of

[36] See Merryman and Perez-Perdomo, *supra* note 9, at 40
[37] Constitutional Law: Structure and Rights in Our Federal System (Daan Braveman, William C. Banks & Rodney A. Smolla eds., 1996)

the government, and it establishes the relationship between the federal and the state governments.[38] The Constitution is binding upon individuals and upon the government. Appended to the Constitution is a bill of rights that guarantees individual liberties. The United States government is organized in a federal system, with state governments retaining a large amount of independence. Because the Constitution reserves all powers not specifically granted to the federal government for the states, the United States system of government gives states wide leeway to design and develop divergent systems of law. Louisiana, for example, bases its legal system on civil law because of its history as a French colony.[39] States' legal and political systems have varying degrees of codification and differing balances of power. As a result of the large degree of autonomy and self-determination reserved to the states under the Constitution, United States law is among the most complex in the world.[40]

In accordance with the Constitution, the federal government is ordered into three branches: legislative, executive, and judicial. The Supreme Court is equal in rank to Congress and the president.[41] This produces a unique system of checks and balances that places limits on legislation that can be passed by Congress, and it prevents the executive branch from becoming unduly ascendant. The current balance of power between the three branches of the federal government is not explicitly prescribed by the Constitution but has been developed gradually through case law. The case that played the most significant role in developing the authority of the Supreme Court is *Marbury* v. *Madison*.[42] This case is the foundation of the judicial review

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[38] *Id.*
[39] Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 La. L. Rev. 775 (2005)
[40] See *supra* note 11.
[41] U.S. Const. art. I, II, III.
[42] The actual influence that *Marbury* had on the Supreme Court is debated. Some scholars argue that the ruling was not viewed as a landmark case at the time, but was gradually developed into the basis of judicial review much later. See Schor, *supra* note 20, at 1465-68. Regardless, *Marbury* is considered the foundation of modern judicial review in the Supreme Court.

doctrine. It was the first case to formally confer upon the Supreme Court the authority to judge the constitutionality of actions taken by legislative and executive branches of the federal government. Later cases have built upon *Marbury*. *United States* v. *Nixon* and *Martin* v. *Hunter's Lessee* solidified and expanded the power and jurisdiction of judicial review.[43] Today, judicial review is the most important power of which the Supreme Court is possessed.[44]

The balance of power between the federal government and the states has been gradually shifting towards the federal government since the early 19th century.[45] As the attitudes of American citizens, politicians, and judges became more accepting and trusting of the national government, the scope of the federal government's authority has correspondingly increased. However, state governments continue to have the authority to administer and legislate private law. Because there are fifty different state legal systems, and forty-nine of these are based upon the relatively unsystematic workings of common law, there is wide variation among states' laws. State laws have been under continuous case law development since the courts were first established. The necessity of maintaining a certain degree of inter-state legal compatibility has resulted in the development of a process of writing and publishing "Restatements" of existing case law.[46] This process does not change the meaning of the laws; rather, the process extracts general principles from past cases and presents those principles in straightforward and reformulated treatises. This process clarifies case law and assimilates existing State laws into a single unified text to be used as a resource for judges and legal scholars.[47]

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[43] See *supra* note 37.
[44] Randal N.M. Graham, *What Judges Want: Judicial Self-Interest and Statutory Interpretation,* 30 Statute L. Rev. 38 (2009).
[45] Joyce A. McCray Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 How L.J. 43, 62-65 (1993)
[46] Konrad Zweigert and Hein Kötz, Introduction to Comparative Law 57 (1998)
[47] *Id.*

Another method by which states have developed unified laws has been the drafting of Uniform Acts.[48] Like restatements, these Uniform Acts are not binding, but they are intended to be enacted into law by state legislation. The commercial code has been the most successful example of a Uniform Act. It has been adopted with minimal alterations by each state in the Union, and this created a convenient and consistent set of laws regarding interstate commerce.[49]

United States laws have been gradually developed through the common law principle of *stare decisis*.[50] This development occurs when there is no direct precedent for a case. The judge must look at related cases, consider first principles, and then make a decision. This decision will fill the gap in case law and serve as a precedent in the future. This gives non-federal judges a great deal of independence to develop law. Because each state has a separate set of laws and statutes, judicial interpretation in the United States is primarily vested in state courts, with state supreme courts being the final court of appeals. Decisions made by state supreme courts can only be overturned by the United States Supreme Court in cases that give rise to a federal issue.[51]

Like the United States, Germany's system of government is federalist.[52] According to Miguel Schor, this gives Germany a significant advantage in implementing judicial review. The structure and authority of the German government and legal systems is based upon and established by the German constitution, known as Basic Law.[53] The *Bundestag* is the legislative body of Germany and the executive branch is headed by the chancellor. Within German politics, although the position of chancellor is technically lower than that of the president, the chancellor is vested with more power and has more real influence. Unlike the United States, Germany's

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[48] *Id*. at 60.
[49] *Id.*
[50] Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Geo. L.J. 1863 (2008)
[51] U.S. Const. art. III, § 2.
[52] See Quint, *supra* note 23, at 156.
[53] See Schor, *supra* note 22, at 263-4.

judicial branch is more powerful than the legislature. The Federal Constitutional Court is the most powerful body in the German government.[54]

The Basic Law has been the foundation and impetus of the development of the German legal system since World War II. The Basic Law was adopted by West Germany in 1949 as a provisional constitution anticipating the future reunification of Germany. Thus, Basic Law was regarded by its drafters as a short-term solution. They presumed that West and East Germany would soon be reunited and that a new constitution would be developed to synthesize legal theory and represent the ideals and values of the unified nation. However, the reunification of Germany did not occur for more than forty years. During this time, the Basic Law emerged as a dependable and robust foundation for German society and governance.[55]

The Basic Law completely and fundamentally altered the German legal system. Starting a trend away from parliamentary primacy after World War II, the Basic Law was established as the basis of all law in Germany.[56] The ideals and structure of the Basic Law were largely intended to correct and fix specific flaws in the legal system that permitted the atrocities of World War II to occur. Bruce Ackerman refers to the Basic Law as a "central symbol of the nation's break with its Nazi past."[57] This can be seen in the first article, which establishes human dignity as the most fundamental right. Another significant feature of the Basic Law is the balance of power that it establishes. Germany is unusual among European civil law systems because of its powerful system of judicial review. The Nazi experience convinced German politicians and lawmakers

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[54] Jan S. Oster, *The Scope of Judicial Review in the German and U.S. Administrative Legal System* 9 German L.J. 1267 (2008); see also Quint, *supra* note 23, at 153.

[55] The term "constitution" was rejected in order to avoid excluding the future possibility of reunification with East Germany. However, after reunification, the Basic Law was confirmed as the permanent constitution of Germany. See Joseph M. Mclaughlin, *The Unification of Germany: What Would Jhering Say?*, 17 Fordham Int'l L.J. 277, 281 (1994); Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 SMU L. Rev. 477, 490 (2000).

[56] *Id.*

[57] See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771, 772 (1997)

that political power must be diffused and that there must be a restraining authority to protect freedom and human rights. The Federal Constitutional Court is given the responsibility of ensuring that the principles and ideals laid out in the Basic Law are respected.[58]

German law is distinguished by a unique amalgamation of civil law principles offset by judicial interpretation in the Federal Supreme Courts and an active system of judicial review in the Federal Constitutional Court. Despite the far-reaching influence of the United States Supreme Court, the German Federal Constitutional Court surpasses it in the scope and breadth of judicial review.[59]

Germany's laws are, of course, based upon the principle of civil law; private and public law are codified. The BGB has served as the civil code in Germany for more than a century since its inception in 1900. The different eras in which the BGB and the Basic Law were formulated played a large role in the values emphasized and the structure of the law.[60] The BGB is comprised of the public law, which includes criminal, administrative, civil procedure, commercial, and constitutional law. Each sector of law is overseen by a Federal Supreme Court with jurisdiction over that branch alone. The BGB has been amended several times since WWII in order to make it compatible with the more modern and advanced Basic Law.[61] This has facilitated application to modern legal issues and facilitated the legal practice of judicial balancing as mandated by the *Luth* decision.[62]

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[58] Grundgesetz [GG] art. 93(1) (F.R.G.)
[59] See Quint, *supra* note 23, at 153.
[60] The Basic Law and the BGB are made compatible with each other through the concept of judicial balancing as established in the *Luth* case. See Rosler, *supra* note 31.
[61] Mathias Reimann, *The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations*, 83 Tul. L. Rev. 877, 882-85 (2009).
[62] See Rosler, *supra* note 31, at 21. Erich Lüth was a high official of the city of Hamburg who called for a boycott of the first post-war film directed by Veit Harlan at an address to the Hamburg Press Club. Veit Harlan had written and directed the anti-Semitic film "*Jud Süß*" under the Nazi regime with the support of the Nazi Propaganda office. Lüth later referred to Harlan as "Nazi film director No. 1" in a public letter promoting the boycott. The production company and distributor of Harlan's new film sued Lüth in the District Court

B. Judicial Review

1. Background

To understand the development of judicial review in Germany and the United States, the origins of the history, culture, and society of each must be considered. The development and direction of any society is determined to a large degree by the motivations and context of the founding of that society. The People's Republic of China, the Federal Republic of Germany, and the United States of America were all established for different reasons and under differing circumstances. This has resulted in different ideals. The United States was established in response to the tyranny of an oppressive foreign government. The rallying cry of the American Revolution can be summed up by Patrick Henry's famous quote, "Give me liberty or give me death."[63] The first amendment of the United States Constitution is the protection of free speech.[64] This idealization of liberty has continued to inform American political and legal discourse to the present day. The Federal Republic of Germany was founded in the aftermath of World War II, when the horrors of the holocaust were still fresh in the minds of legislators and leaders. The Basic Law reflects this political reality.[65] The first article of the Basic Law is the protection and supreme importance of human dignity. "Human dignity shall be inviolable. The

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Hamburg and obtained a ruling enjoining Lüth from calling for a boycott under the provision § 826 BGB. However, the Federal Constitutional Court overturned the District Court's ruling. The Constitutional Court concluded that the objective value system of the basic law must guide legislation, administration, and judicature. As it also influences private law, all civil law rules must be construed in accordance with the Constitution's spirit. Unlike public law, the basic rights have no direct binding effect on private individuals. However, according to the intermediate position taken by the Federal Constitutional Court, since the judge is constitutionally bound, his or her interpretation must be guided by an overriding constitutional aspect, which can entail a modification of content of the private law norm. The *Lüth* case was a landmark decision that has had a large influence on both German law and on other countries' supreme courts.

[63] See Moses Coit Tyler, Patrick Henry 358 (1887)

[64] U.S. Const. amend. I.

[65] See Rosler, *supra* note 31, at 4-7.

German people therefore acknowledge…human rights as the basis of every community, of peace and of justice in the world."[66] The primacy of human dignity in Germany has led to a relative decrease in the importance and protection of free speech.[67]

The Federal Constitutional Court and the United States Supreme Court play similar roles within their respective legal systems, but the legal foundations of their authority are different. The Supreme Court developed its power and influence gradually. Today, *Marbury v. Madison* is considered to have established the Supreme Court as the supreme arbiter of constitutionality; however, the development of the Supreme Court's influence was quite gradual.[68] The Federal Constitutional Court on the other hand, was established for the specific purpose and given the sole responsibility of conducting judicial review.[69] Although it has equal status with the other federal supreme courts under the law, the Federal Constitutional Court also has the authority to review the constitutionality of rulings by the other courts, and some of its decisions are given equal weight as legislated laws. The Federal Constitutional Court did develop and wield its power and influence gradually, but its authority was established in the Basic Law.[70] The SPC is disadvantaged in that its rulings are not legally equal in status to legislated laws, and it is given relatively little power according to the Chinese Constitution.[71]

2. Judicial Review in Practice

Judicial review in the United States was developed gradually and intermittently through a number of cases. The Supreme Court expanded its power of constitutional review and its ability

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[66] Grundgesetz [GG] art. 1 (F.R.G.)
[67] Guy E. Carmi, *Dignity versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. Int'l L.J. 277, 290 (2008).
[68] See Schor, *supra* note 20, at 1466-69
[69] Grundgesetz [GG] art. 93 (F.R.G.)
[70] *Id.*; see also Kommers, *supra* note 55, at 489.
[71] Zhonghua renmin gongheguo Xianfa [PRC Const.] art. 128 (1982).

to restrain the power of the executive branch and legislative branch only as the need became apparent. Moreover, although the Supreme Court does have the power to review the constitutionality of any action by the federal or state governments, judicial review is also a duty of every court in the United States. This decentralized aspect of judicial review in the United States has the result of making the Supreme Court more of a final court of appeals. Cases only come before the Supreme Court if lower courts are unable to adequately resolve the issue. This is in contrast to the German Federal Constitutional Court, which is granted nearly comprehensive original jurisdiction over constitutional cases by the Basic Law.[72]

Marbury v. *Madison* was the impetus of judicial review as a balance constraint on the power of legislature in the United States.[73] However, in 1958, the German Federal Constitutional Court took the concept of judicial review even further. The *Luth* case expanded upon the theory of judicial interpretation, creating the innovative concept of judicial balancing.[74] Jeffrey B. Hall elucidates this principle. He argues that German courts do not only have the duty to determine the validity of laws, but courts must also interpret ambiguous terminology and make value judgements.[75] There exist basic principles arising from the morality of society independent of legislation and codified law. The Federal Constitutional Court stated in *Luth*, "the Basic Law is not value neutral."[76] Hall's analysis of the similarities between Dworkin's legal philosophy and the Federal Constitutional Court's "objective order of values" provides insight into the methods and reasoning of the Federal Constitutional Court. Hall looks at human rights decisions by the

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[72] Grundgesetz [Const] art. 93(1) (F.R.G.)
[73] See Schor, *supra* note 20.
[74] The concept that there is an objective set of values underlying the Basic Law and that civil law must be interpreted by judges in light of these values, thus influencing private law is referred to variously as the "horizontal effect" of constitutional rights or holistic judicial interpretation. See Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 Mich. L. Rev. 387, 388-90 (2003); see also Rosler, *supra* note 31, at 21-23.
[75] Jeffrey B. Hall, *Taking 'Rechts' Seriously: Ronald Dworkin and the Federal Constitutional Court of Germany*, 9 German L.J. 771 (2008).
[76] *Id.*

Federal Constitutional Court and concludes that the results of Dworkinian legal reasoning and the Federal Constitutional Court's decisions are substantially different, but he argues that the methodology used is similar.[77] The concept of an "objective order of values" is an unusual concept in a civil law legal system and affects the application of judicial review in Germany.[78]

These differences between the Supreme Court and the Federal Constitutional Court mean that, while both courts are the highest court in their respective countries, the Constitutional Court is significantly more influential in the political process and has more power over other government bodies. On the other hand, the Supreme Court, while less immediately apparent in the political process, has made a number of rulings that are far more wide-reaching than any decision in the Federal Constitutional Court. Peter E. Quint argues that *Brown v. Board of Education*, *Reynolds v. Sims*, and *Youngstown Sheet & Tube Co. v. Sawyer* have enacted broad political and social changes that have no parallel in Germany.[79]

The Supreme Court and the Federal Constitutional Court are each a powerful check on the strength of the other branches of government. The Federal Constitutional Court takes a more immediate approach with original jurisdiction, while the Supreme Court tends to play a large role when there is a significant social or constitutional issue.

C. Judicial Interpretation

1. Background

[77] *Id.*; Dworkin is a legal philosopher whose theories made one of the most significant contributions to the modern understanding of Natural law and legal positivism in the twentieth century. His theories can be considered to lie somewhere between Natural and Positive law. He argues that there is a necessary link between law and morality, but also holds that the study of law should primarily focus on actual positive laws.
[78] *Id.*
[79] See Quint, *supra* note 23, at 162-165.

To explain the differences between German and United States judicial interpretation, many underlying theories must be considered. Common law versus civil law, Positive law versus Natural law, and the influence of cultural value systems all play a role. There are significant similarities between Germany and the United States. The political structure of each country is a federalist liberal democracy with definite separation of powers within the government and a robust rule of law.[80] Although the sources and formation of the law are different, both Germany and the United States accept the law as the highest authority, holding that the government is subject to the law.

German judges are required to apply statutes as they are legislated by the German parliament; value judgements and flexible interpretation are disallowed.[81] In the United States, however, judges are given wide latitude to interpret the law according to the justice and the circumstances of each case. Relying upon the morality and judgement of judges, the United States case law system aggregates the rulings of judges and produces guidelines for adjudication that are based upon *stare decisis* and judges' value judgements.[82] These differences between German and United States judicial interpretation are the result of different theories about what makes law legitimate. Germany's legal system is based upon civil law, also known as Continental or Roman law. The United States legal system is modeled after that of Great Britain, which utilized a form of common law.[83]

The most fundamental difference between civil law and common law is that civil law gives legislators the sole authority to create law, and common law gives courts the power to

[80] U.S. Const. art. 1 § 1, amend. X; GG art. 20(1)
[81] Merryman and Perez-Perdomo, *supra* note 9, at 12. However, the concept of judicial balancing has significantly altered the role of German judges even within the civil law system.
[82] See *supra* note 11.
[83] *Id.*

develop large swaths of law gradually.[84] This difference is derived from different philosophical theories. Civil law is based upon Positive law and common law is based upon the theory of Natural law.[85] Natural law has been prominently featured in the works of Aquinas, Locke, and Kant.[86] Natural law requires that laws be judged and interpreted in light of their morality. In other words, a law is only valid if it is a just and moral law.[87] Positive law theory was a reaction to Natural Law. In its original form, Positive Law theory held that laws have absolutely no connection with morality. Thus, a law's validity is based upon the legitimacy of its legislative process rather than its content. A law is legitimate if it is produced through the proper democratic channels.[88]

The theories of Positive law and Natural law have changed substantially since the days of Locke, Kant, and Aquinas. Natural law has maintained its position on the legitimacy of laws being linked to morality; however, the basis of morality has been significantly altered. Locke and Aquinas based the concept of Natural law on the existence of God and his "perfect law."[89] However, modern Natural law bases the morality of law upon the inconstant values of society. Ronald Dworkin has had a significant influence upon the development of modern Natural law.[90] He suggests that morality is drawn from the consensus of society as a whole. This represents a strong break with traditional Natural law. Although the link between morality and the legitimacy of a law is maintained, the basis of morality is now subjective and mutable. Thus, a law's legitimacy may be revoked when the opinion of society changes. Exemplifying this idea, the

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[84] *Id.*
[85] *Id.*; See also Merryman and Perez-Perdomo, *supra* note 9, at 10.
[86] See Carmi, *supra* note 67, at 280.
[87] Daniel Westberg, *The Relation Between Natural and Positive Law in Aquinas*, 11 J.L. & Religion 1, (1995); Thomas Aquinas, *Summa Theologiae* 1-II 95.2
[88] Merryman and Perez-Perdomo, *supra* note 9.
[89] See Westberg, *supra* note 87, at 11-12.
[90] Thom Brooks, *Between Natural Law and Legal Positivism: Dworkin and Hegel on Legal Theory*, 23 Ga. St. U. L. Rev. 513 (2007); See Hall, *supra* note 75.

concept of a "living Constitution" is a central part of United States law.[91] With the marginalization of religion and the concept of objective right and wrong, the differences between Positive law and Natural law have become superficial differences in terminology.[92]

Positive law was originally a reaction to Natural law and posited that there was absolutely no connection between law and morality.[93] However, the events of the twentieth century discredited pure Positive law to some degree. When faced with the inhumanity that unconstrained Positive law allowed, German law was altered to allow that certain values have an objective morality and must not be legislated against.[94] The German conception of Positive law thus changed to include certain aspects of Natural law. In the Lüth case, the Federal Constitutional Court ruled that general law and statutes should be interpreted within the context of the basic principles contained in the Basic Law.[95] This ruling gave the German legal system the principle of judicial balancing.

Combined with the removal of objectivity and the "natural" aspects of Natural law, the legal systems of Germany and the United States have become increasingly similar, with each adopting significant portions of the other's legal theory. The Supreme Court interprets the Constitution according to the changeable morality of society, whereas the Federal Constitutional Court refuses to accept any compromise of certain basic values.[96] Some Federal Constitutional Court decisions have the force of law in Germany. The Lüth decision and the Princess Soraya

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[91] See Carmi, *supra* note 67, at 374 n.3.
[92] Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union,* 7 Colum. J. Eur. L. 63 (2001); Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence*, 42 Tex. Int'l L.J. 625 (2007).
[93] Zdenek M. Krystufek, *The Historical Significance of the Fiction of Natural Law*, 46 U. Colo. L. Rev. 365, 366 (1975).
[94] *Id.*, at 374.
[95] See Rosler, *supra* note 31, at 21-24.
[96] Hannes Rosler, *Dignitarian Posthumous Personality Rights -- An Analysis of U.S. and German Constitutional and Tort Law,* 26 Berkeley J. Int'l L. 153, 168-69 (2008).

case also demonstrate the Federal Constitutional Court's willingness to interpret cases in light of the values espoused in the Basic Law.[97] These aspects of the German legal system suggest an acceptance of the necessity of an objective morality to support the legitimacy of law. Balancing the values of the general law versus the values of the Basic Law gives courts much more independence and responsibility than previously experience. The civil law foundation of the German legal system is thus offset by the necessity of making value judgements when interpreting the law. Similarly, the United States system of case law has inevitably come to resemble civil law. As the amount of case law increases, the opportunity to make new laws decreases. For the sake of order and clarity, much of the case law of the United States has been synthesized into legal codes.[98]

The change in the foundation of morality within the theory of Natural law makes it more palatable to modern secular societies. Given the non-Christian history and culture of China, this "subjectification" of Natural law may increase its compatibility with Chinese culture and society.[99] In light of the way that Natural and Positive law are gradually coming to resemble each other, it is easily concluded that China should adopt a synthesis of the two interpretive theories.

2. Judicial Interpretation in Practice

Germany is unique among civil law legal systems because of its endorsement of holistic judicial interpretation in applying the law. However, the German and United States legal systems have widely disparate models of judicial interpretation. Traditionally, civil law judges are

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[97] See Farber, *supra* note 15, at 520; See also Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 Tul. L. Rev. 1549, 1569-70, 1585-89 (2004).
[98] See Del Duca, *supra* note 92, at 641.
[99] See Rosler, *supra* note 96, at 205.

expected to interpret statutes according to the intent of the legislator. A judge's only goal in the interpretation of statutes is to discover and apply the will of the legislative author. The interpreter's role is nothing more than that of an historian determining how the law applies to each individual case. Germany has developed a unique system of holistic judicial interpretation based on the Basic Law.[100] Judges do not have to stop at the wording of a statute. Holistic judicial interpretation does not require literal application of the letter of the law, but rather respect for the sense and purpose of the law. Since German codes contain a considerable number of broad legal concepts and abstract rules, the courts have considerable room for interpreting and adjusting statutory rules. Thus, both German and United States judicial interpretation are explicit about applying societal values.[101]

Germany's method of judicial interpretation is derived from the value system of the Basic Law. Germany is, of course, a civil law country. This is often taken to imply that precedent has no role in German law, because the doctrine of *stare decisis* is usually considered the dividing line between common law and civil law. Precedent is actually a significant part of German law. German lawyers are required to cite governing precedents or they could face liability for malpractice.[102] However, while giving weight to precedent, the Germans have made a conscious decision to ignore reliance on prior decisions as a factor in determining whether to overrule prior law. Precedents do not have the status of a formal source of law in Germany.[103] Precedents do play a significant role in justifying judicial decisions. Whoever wishes to depart from a precedent

[100] See *supra* note 63.
[101] See Farber, *supra* note 15.
[102] *Id.*, at 519.
[103] *Id.*

carries the burden of argument. However, this burden of argument does not prevent a line of decisions from being changed simply because it already exists.[104]

The openness of German courts toward evolutionary interpretation is also found when the statute invokes a social norm that has changed over time, such as norms about improper sexual behavior. The well-established rule is that the court should apply the contemporary norm rather than the one in existence at the time the statute was passed.[105] A critical question is when to depart from the ordinary meaning of the statute. German judges are effectively required to respect the law generally rather than the letter of a particular statute, so the general value system of the legal system may be applied when interpreting statutes.[106]

The *Soraya* case illustrates this principle of interpretation. Princess Soraya, a former wife of the Shah of Iran, brought an action for invasion of privacy, alleging that the defendants had written and published a fictitious interview in which she had purportedly revealed intimate details of her private life.[107] The Civil Code expressly provided that damages for nonpecuniary injury could be awarded only in cases specified by statute. No statute authorized such damages for invasion of privacy, but the Federal Court of Justice (Bundesgerichtshof) held that they could be awarded anyway.[108] The defendants argued that the court had disobeyed its constitutional obligation to respect the limitations imposed by the Civil Code; the Constitutional Court held that the court had acted within its powers.[109]

The Court of Justice seems at first to have contradicted the statute. The Civil Code did not merely fail to authorize damages for emotional harm; it flatly forbade them in the absence of

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.,* at 520.
[108] See Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory,* 48 Md. L. Rev. 247, 278 (1989).
[109] *Id.,* at 280.

statutory authority, which admittedly did not exist.[110] Indeed, the Constitutional Court began its discussion with a passage that seemed to suggest that the courts were not always bound by statute after all. By altering the traditional formulation so that judges were no longer bound simply by "Gesetz" but by "Recht" as well, the Basic Law had deliberately abandoned "a narrow statutory positivism."[111] "Recht" within the meaning of Article 20(3) was not coextensive with statutory law; under some circumstances it could include additional norms derived by judges from "the constitutional legal order as a whole" and functioning "as a corrective to the written law."[112] It followed, said the Constitutional Court, that the judges could fill gaps in the statutes "according to common sense and 'general community concepts of justice."'[113] The one noncontroversial conclusion of the *Soraya* opinion was that Article 20(3) did not preclude the courts from creating common law when the statutes were silent. The authority to do so, the Court has argued, is implicit in the grant of jurisdiction to resolve disputes.[114]

Methods of judicial interpretation in the United States are highly debated. A number of methods can be used in determining the meaning and application of statutes and legislation.[115] One method is to take the statute literally and to accept its plain meaning. Another method is for judges to look at the intent of the legislators and to attempt to apply the law in accordance with the aims and goals of legislature. These varying and often conflicting methods of interpretation and many others are used to apply existing laws and to adapt the laws to each case.[116]

Some scholars recommend changing or reforming the methods of interpretation used, and still others suggest that the methods of interpretation ostensibly in use are actually subject to

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[110] *Id.*
[111] See Hall, *supra* note 75.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] See Foster, *supra* note 50, at 1872-1874
[116] *Id.*

other influences.[117] Sydney Foster suggests that the doctrine of *stare decisis* be applied to interpretation.[118] He suggests that statutory interpretation doctrines can be classified according to whether they are derived from a statute, the common law, or the Constitution. But within each of these three categories, the case for applying the doctrine of *stare decisis* is stronger in the statutory interpretation context than it is in the substantive law context.[119] The Supreme Court should apply a presumption against overruling decisions concerning questions of statutory interpretation methodology, and the presumption against overruling statutory interpretation precedent derived from a given source should be even stronger than the presumption against overruling substantive law precedent derived from that same source. That is, the Supreme Court should give doctrines of statutory interpretation deriving from the Constitution stronger *stare decisis* effect than doctrines of substantive law deriving from the Constitution; doctrines of statutory interpretation deriving from statutes stronger *stare decisis* effect than doctrines of substantive law deriving from statutes; and doctrines of statutory interpretation deriving from the common law stronger *stare decisis* effect than doctrines of substantive law deriving from the common law.[120] In addition, lower courts should strictly adhere to higher-court decisions regarding questions of statutory interpretation methodology.[121]

Randal Graham argues that the accepted belief that judges are neutral and objective when they interpret legislation is flawed.[122] On this conception of the interpretive process, a judge's only goal in the interpretation of statutes is to discover and apply the will of the legislative author. According to Graham, this idealized view is wrong. In the real world, judges (whether

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[117] Realists argue that outside influences and personal opinions play a large role in judges' decisions.
[118] See Foster, *supra* note 50, at 1884
[119] *Id.*
[120] *Id.*
[121] *Id.,* at 1869.
[122] See Graham, *supra* note 44, at 38-40.

consciously or unconsciously) manipulate the text of legislation in ways that are affected by ideological preferences.[123] By emphasizing elements of the text that support his or her opinions, the judge inevitably gives official approval to his or her own privately held beliefs. The values of the law are thus shaped by the values of those who interpret the law. "The meaning of a legal rule is not discovered by a neutral arbitrator, but selected from a wide array of interpretive possibilities 'by the people who had the power to make the choices in accord with their views on morality and justice and their own self-interest.'"[124] This argument suggests that any judicial interpretation will invariably alter the meaning and application of laws, effectively creating law.

The role of judicial interpretation in the United States is undeniably central to the development of jurisprudence. Each court interprets and applies laws to cases, but because of the system of appeals, common law is primarily made at the state supreme court level. Appellate courts in the United States not only quash incorrect decisions of the lower court, but also indicate the proper answer to legal questions. This leaves the final decision regarding controversial interpretation and law-making to the state supreme courts.[125]

II. Chinese Judicial Review and Judicial Interpretation

The PRC was established in 1949, but modern China did not begin to develop until Mao's death and Deng's opening up and reform policy. The emphasis on economic development is reflected in the development and direction of Chinese society and the Chinese legal system.[126] Chinese government encourages the ideal of a "harmonious society" (*hexie shehui*), wherein

[123] *Id.*
[124] *Id.,* at 42-43.
[125] See *supra* note 11.
[126] See Peerenboom, *supra* note 1, at 75

every member of society is equal and happily cooperative for the good of society as a whole.[127] This (in Western terms) suppression of the individual has resulted in a different emphasis for the development of the legal system. Western scholars often criticize China for its underdeveloped civil society, but most Chinese people accept this delay in the development of civil rights as a necessary evil to first improve the economy and modernize society. Many Chinese people believe that once China has caught up with the West, civil liberties will gradually and naturally develop.[128]

A. Chinese Legal History

To determine what elements of Western judicial review and judicial interpretation to adopt and from which legal systems to draw, China must first examine the philosophical foundations of its own legal system and then consider the suitability and desirability of Western legal theories and value systems for China's own society and culture.

Much of Western legal theory has no foundation in Chinese history and culture. China has no part in what Ulric Killion refers to as "the commonality of the Enlightenment."[129] Positive law and Natural law have no direct philosophical parallels in Chinese history. Historically, Chinese law was merely a tool of the Emperor.[130] This perception of law as a tool to be utilized by the government persisted throughout the rule of Mao. Only after the reform and opening up in the late 1970s was the concept of rule of law viewed favorably in China.[131] The establishment of rule of law has developed slowly in China. The one-party system in China, as well as the absence

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[127] *Id.*, at 427-430.
[128] *Id.*, at 87-89
[129] See M. Ulric Killion, *"Building Up China's Constitution: Culture, Marxism, and the WTO Rules*, 41 Loy. L.A. L. Rev. 563, 569 (2008).
[130] Peerenboom, *supra* note 1, at 36-37.
[131] *Id*, at 55-56.

of a separation of powers, impedes the progress and development of rule of law.[132] However, the very desirability of a Western style rule of law in China is debated. The future of China's legal system and the development of rule of law must take into account possible cultural implications. Wang Zaikui, a judge in the Higher People's Court of Guangdong Province, argues that a case law system is a necessary prerequisite for increasing judges' judicial independence.[133] This assumes that greater judicial independence is advantageous for China and presupposes the benefit of democracy and rule of law. Is granting judges the authority to interpret and create law a change that would improve Chinese law? Or should the NPC continue to legislate and codify law for judges to rigidly apply? Given China's long history of rule of man, increasing judicial independence at this point may not actually strengthen rule of law in China.

Confucius espoused a situational morality based upon societal relationships; the correct action in one situation might be different under different circumstances.[134] The other important legal philosophy in Chinese history is that of legalism. Introduced by Han Feizi, legalism assumed the depravity of unrestrained human nature and endorsed strict laws to govern and control the people.[135] These two schools of thought continue to play a large role in modern Chinese society. The situational ethics of Confucianism suggest that common law is more suitable, and the rigid nature of legalism resembles civil law in that it promotes increased legislation and reduced individual responsibility.

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[132] *Id.*, at 81. Although Peerenboom argues that China's one-party system is not *necessarily* incompatible with rule of law, it is clearly currently hampering the rate of progress of rule of law.
[133] Keith and Lin, *supra* note 18, at 241.
[134] Confucianism relied primarily upon ritual (i.e. ancestor sacrifice) and proper respect for human relationships to guide human behavior. Confucius believed that by respecting the relationships of ruler and subject, father and son, husband and wife, elder brother and younger brother, and friend and friend, one would be virtuous and have no need for formalized public law. Of course, even the earliest Confucian philosophers such as Confucius, Mencius, and Xunzi each had significant philosophical differences. Furthermore, followers of Confucianism have had different goals throughout history. See Peerenboom, *supra* note 1, at 28-33, 49 n.4.
[135] *Id.*, at 33-34, 42.

Despite the fact that Confucianism and common law would both seem to promote increasing the individual responsibility of judges, the foundations for recommending greater individual independence in the judiciary could not be more different. Confucianism is actually based upon the concept of rule of man.[136] Each situation and case is judged upon its individual circumstances with little consideration for how the law applies to the case. Rule of man increases reliance on judges, but decreases the importance and influence of the law. Confucianism would give judges more independence but would likely reject the concept of *stare decisis*. Common law requires acceptance of rule of law. Under common law, cases are judged on an individual basis but with regard to how the law applies to that particular situation. This fundamental difference illustrates the difficulty that adoption of rule of law has encountered in the Confucian Chinese society.

Legalism holds that maintaining social order took is of primary importance.[137] Freedom and independence are sacrificed in favor of peace and order. Although Legalism advocates a strict adherence to the law, the ruler is viewed as being above the law, and he is permitted to make any changes to the law he believes are necessary to maintain order.[138] This clearly is a form of rule by law, and China would not be served well by returning to the rule by law of the Mao period.

Legalism and civil law each require the establishment of comprehensive laws and strict adherence to the law by the judiciary; however, the philosophical basis for requiring a specific and extensive legal code and the governmental structure that results are dissimilar. Legalism assumes a strong monarchy or emperor who rules the country through absolute adherence to the letter of the law. Civil law, on the other hand, is based on the idea that the legitimacy of laws is

[136] *Id.,* at 29-30.
[137] *Id.,* at 33-34
[138] *Id.*

drawn from the acquiescence of the people.[139] The legislature, being elected by the people, creates and codifies laws. The judges are then required to adhere strictly to the laws because they represent the opinion and morality of the people.

These significant and unavoidable differences in Western and Chinese philosophy make direct implementation and transplantation of Western values and legal theories difficult. Some scholars argue that if the PRC can join the international community without first adopting democracy as its political model, then perhaps China should be allowed to develop and implement a uniquely Chinese system of law as well. Others argue that democracy is the most effective and best form of government and that as China develops more liberties and becomes increasingly modernized and open to Western influence, democracy will eventually be adopted.[140] According to this line of reasoning, rule of law is a necessary and positive step towards developing a free society.

B. Modern Chinese Law

During the twentieth century, China underwent a myriad of social, economic, and political changes. The first half of the twentieth century was a time of war and civil unrest. The end of World War II and the triumph of the communist faction placed Mao Zedong and the Chinese Communist Party (CCP) in control of Mainland China.[141] For the three decades after the establishment of the People's Republic of China (PRC) in 1949, China was dominated by the so-called "cult of Mao."[142] Despite a number of positive steps toward increasing gender equality and decreasing the economic disparity between rural and urban communities, Mao's leadership

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[139] Merryman and Perez-Perdomo, *supra* note 9.
[140] See Peerenboom, *supra* note 1, at 21, 516.
[141] See Peerenboom, *supra* note 1, at 43-46.
[142] Frederic Wakeman, Jr., *Mao's Remains, in* Death Ritual in Late Imperial and Modern China, 254, 256 (James L. Watson and Evelyn S. Rawski eds., 1988).

ended in chaos with the Cultural Revolution and the Gang of Four's rise to power. However, after the death of Mao Zedong in 1976, China began a new period of reform and opening up (*gaigekaifang*) under the leadership and guidance of Deng Xiaoping.[143] The focus on industrialization and urban development put into effect by Deng certainly had negative ramifications, but the overall effect on the economy and Chinese society was positive. Deng wanted to prevent another tragedy like the Cultural Revolution from disrupting China's society and economy and to begin the process of modernization.[144] He also recognized that without a stable and reliable system of law, China could not enter the international business arena. Deng espoused a modern, Western-style legal system intended to create an environment welcoming to foreign investors. The 5th National People's Congress took a large step toward this goal when it adopted a revised and updated constitution in 1982.[145]

The road to the adoption of the 1982 Constitution was not easy. Chinese law was traditionally feudalistic and remained based upon customary law until the promulgation of the Civil Code of the Republic of China in 1929.[146] This civil code was based largely upon the German BGB. However, after the establishment of the PRC, Mao abolished this civil code and implemented a system of socialist law styled after that of the Soviet Union. During Mao's rule, the legal system and rule of law were neglected in favor of CCP control. This left China with a defunct and largely unused legal system.[147]

After the death of Mao, the National People's Congress (NPC) debated developing a new comprehensive civil code, but upon encountering numerous difficulties resolving problems with

[143] See Peerenboom, *supra* note 1, at 55.
[144] *Id.*
[145] See Killion, *supra* note 8, at 45-46.
[146] See Lihong, , *supra* note 32, at 1000.
[147] See Peerenboom, *supra* note 1, at 43-46

Soviet economic theory, the idea was abandoned.[148] Instead, the NPC enacted the General Principles of Civil Law (General Principles). This is currently the only comprehensive civil act of the NPC.[149] Specific laws are promulgated separately and individually by the NPC as it becomes necessary. This is an inefficient process that leaves significant gaps in the law.[150]

The 1982 Constitution has been amended four times: in 1988, 1993, 1999, and 2004.[151] Each amendment was motivated by a change in economic policy or the discovery of an inadequacy in the law. The fourth set of amendments, in 2004, was prompted almost solely by the need to bring Chinese law into accordance with WTO requirements.[152] Practical implementation of the Constitution and the law has been deficient, but a number of factors suggest that the Chinese legal system is making progress.[153] From an increase of the amount of foreign direct investment to an increase in the amount of litigation brought before the courts, the legal and judicial systems have made great strides toward becoming a reliable source of justice.[154]

The Chinese judicial system is hierarchically structured with four levels: the Supreme People's Court (SPC) at a national level, High People's Courts at a provincial level, Intermediate People's Courts at the city and prefecture level, and Basic People's Courts at the county and district level.[155] The legal profession is structured in a manner more similar to that of Germany than the United States. Judges are not necessarily chosen from the ranks of lawyers. Despite the relatively recent creation of the legal community in China, the number of law schools and

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[148] See Lihong, *supra* note 32, at 1000-02.
[149] *Id.* Although China does not a have a comprehensive civil code like the BGB, the General Principles are drawn largely from the BGB.
[150] See Keith and Lin, *supra* note 18, at 225.
[151] See Killion, *supra* note 8, at 56.
[152] See Killion, *supra* note 129, at 563; See also Killion, *supra* note 8, at 73.
[153] See Lihong, *supra* note 32, at 1038-39.
[154] See Benjamin L. Liebman, *China's Courts: Restricted Reform* 21 Colum. J. Asian L. 1, 5-9 (2007).
[155] See Peerenboom, *supra* note 1, at 283-84.

lawyers has soared. In 1979, there were fewer than five thousand lawyers and only two law schools. Today, there are more than 120,000 lawyers and three hundred law schools.[156] To put this into context, the United States has only 191 law schools. However, due to China's large population, there remains only one lawyer for every eight thousand people. The United States has 1.1 million lawyers, for a ratio of one lawyer for every three hundred people. Given the current transitory status of China's society and the quickening development of China's business sector, the need for lawyers and judges will only increase.

The Chinese judiciary still has a number of limitations and inadequacies. First and foremost amongst these is the lack of independence from the NPC and the CCP. The judicial branch is subject to the authority of the NPC and the Standing Committee.[157] Although the amount of influence to which the judiciary is subjected is difficult to determine, rulings rarely stray from the party line, and judges can be subject to penalization for incorrect decisions.[158] Ambiguity in the legal code also makes consistency and clarity of reasoning in court decisions difficult and uncommon. Courts are not required to publish the legal reasoning behind their conclusions, nor do they offer any dissenting opinions.[159] This often makes it difficult to determine at what point policy ends and legal reasoning begins.

Another problem facing the courts is corruption. It is difficult to quantify the amount of corruption in the judiciary, but the cause of corruption is simple: a low salary that is not commensurate with the demanding job of being a judge.[160] Despite inadequate laws and

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[156] Stephen L. McPherson *Crossing the River by Feeling the Stones: The Path to Judicial Independence in China* 26 Penn St. Int'l L. Rev. 787, 793 (2008).
[157] Xian fa, art. 128, § 7.
[158] See Peerenboom, *supra* note 1, at 292-94; See also Liebman, *supra* note 110, at 17.
[159] *Id.*, at 287.
[160] *Id.*, at 294-97.

continued corruption within the judiciary, the amount of litigation has multiplied over the past decade.

C. Judicial Review

The Chinese Constitution is formally the most important legal document in China and the foundation of the legal system. However, due to restrictions regarding its application and influence, it is also one of the most irrelevant and useless legal documents in China.[161] Despite heavy pressure from the international community and Chinese legal scholars, the NPC and CCP remain firmly opposed to allowing review of the Constitution by the courts. Only the NPC and the Standing Committee have the authority to review and interpret the Constitution and this authority is seldom utilized.[162]

Judicial review has two important and controversial aspects. Judicial review makes protection of civil rights much easier and effective; however, it also reduces the power of the legislature and increases the influence of the judiciary. For China, increasing the effectiveness of civil rights protection is no longer as significant a problem as it was in decades past. Although human rights abuses continue and Chinese civil society remains severely underdeveloped, Chinese government and society have greatly matured over the past two decades, and despite significant exceptions, actions by the government are occasionally reversed when widely criticized by the public.[163] However, the NPC remains unwilling to increase the power and influence of the SPC at their expense of the CCP.

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[161] See Kellogg, *supra* note 28, at 216-17; see also Kui, *supra* note 5, at 199.
[162] Xian fa, arts. 62(2), 67(1) § 1.
[163] There have been numerous instances where media coverage or public outrage has forced the courts to act when it would have preferred to ignore an inconvenient or controversial case. See Wu Chuntao and Chen Guidi, Will the Boat Sink the Water? (2006). The government has also backed down from proposed policy decisions in the face of overwhelming public disapproval. See Michael Wines, *After Outcry, China Delays*

Opposition to giving the courts the authority to conduct judicial review is a pragmatic opposition. Conducting judicial review would not merely increase the power and influence of the courts; it would completely rearrange the power structure of the PRC. Judicial review is a much more guarded right than the right to judicial interpretation because giving the freedom to conduct constitutional interpretation to the courts would jeopardize the CCP's current monopoly on power. Granting the power of judicial review to the courts would give the judiciary direct control of Chinese law.[164] The NPC is the highest government organ in China, and its power is unchecked by any outside agency. However, if the SPC had either the United States or German system of judicial review, the NPC's actions would be subject to approval by the SPC.

One theory regarding judicial review emphasizes the role of elites in granting courts the power to conduct judicial review. Tom Ginsburg considers judicial review an essential building block of democracy.[165] However, he dismisses the desire to protect human rights as a motivating factor. He suggests that the recent trend toward constitutionalized rights and judicial review is motivated by elites who only favor judicial review because political power is widely diffused. These elites hope that judicial review will protect their position and status should they be removed from power.[166] Ran Hirschl, while much less optimistic about the overall effect of judicial review on government and society, similarly asserts that nations only implement judicial review because elites fear democracy and anticipate that the courts will insulate them from the

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Requirement for Web-filtering Software, N.Y. Times, June 30, 2009, available at http://www.nytimes.com/2009/07/01/technology/01china.html (last visited March 11, 2010). This new rule would have required manufacturers to install Internet filtering software on all new computers.

[164] See Killion, *supra* note 8, at 70.

[165] Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (2003)

[166] See Schor, *supra* note 22, at 267-69.

whims of the masses.[167] Although Hirschl and Ginsburg hold differing opinions regarding the effects of judicial review, the conclusions they draw are almost indistinguishable.

While the Chinese government is willing to go to great lengths to demonstrate its progress toward becoming a nation ruled by law, the implications of judicial review are more broad and wide-ranging than the CCP is willing to allow. Even if the NPC were willing to give the SPC the power to review the constitutionality of its legislation, the possible ramifications that this would have on Chinese politics would still be unacceptable. For these reasons, many scholars maintain the view that the Chinese Constitution is essentially a political document with no legal binding force.[168]

Recent developments in Chinese jurisprudence show some indication of constitutionalism developing in China. The judiciary has taken the initiative and actually conducted judicial review, to a certain degree. Formally, no case can be tried using the Constitution as a source of law, and unconstitutional actions must be found to be illegal by other laws.[169] However, in 2001, *Qi Yuling v. Chen Xiaoqi* became the first instance of constitutional interpretation in China.[170]

Qi Yuling was a girl from Zaozhuang Municipality of Shandong Province whose acceptance letter into a prestigious middle school was fraudulently appropriated by a classmate, Chen Xiaoqi, who failed to gain acceptance. Chen Xiaoqi continued to impersonate Qi Yuling for many years, throughout attendance and graduation from a school of commerce to taking a job at the Tengzhou Branch of the Bank of China under Qi's name. After a decision by the

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[167] Ran Hirschl, The Political Origins of the New Constitutionalism 11 Ind. J. Global Legal Stud. 71 (2004)
[168] See Mcpherson, *supra* note 156.
[169] See Killion, *supra* note 8, at 46.
[170] Zui gao ren min fa yuan guan yu yi qin fan xing ming quan de shou duan qin fan xian fa bao hu de gong min shou jiao yu de ji ben quan li shi fou ying cheng dan min shi ze ren de pi fu [The Official Reply of the Supreme People's Court On Whether the Civil Liabilities Shall Be Borne for the Infringement Upon a Citizens Basic Right of Receiving Education Which is Under the Protection of the Constitution by Means of Infringing Upon His/Her Right of Personal Name] (promulgated by the Sup. People's Ct., Jun. 28, 2001, effective Aug. 13, 2001), (annulled Dec. 18, 2008, effective Dec. 24, 2008), (P.R.C.);

Intermediate People's Court in favor of only some of Qi Yuling's appeals, the Higher People's Court submitted the case to the SPC for interpretation. In the Reply of the Supreme People's Court Concerning Whether Civil Liability Arises When the Constitutionally-Protected Fundamental Right of Citizens to Receive Education Is Violated by Means of Violating Rights in a Person's Name, the SPC ruled that Chen Xiaoqi's conduct led to a "violation of Qi Yuling's constitutionally-protected right of citizens to receive education." This response is not an example of judicial law-making by judicial interpretation; rather, the significance of this interpretation lies in the constitutional basis of the SPC's ruling.[171] However, the SPC formally withdrew the interpretation of the *Qi Yuling* case in 2009.[172] This suggests that the development of judicial review is not currently a priority of the SPC. This might also reflect the determination of the CCP to maintain the current balance of power.

This case has given rise to a renewed debate over the role of the Constitution in Chinese law. Many Western legal scholars hailed this case as a breakthrough in the development of judicial independence and as a landmark case in Chinese jurisprudence. However, some scholars take a more practical view of the case.[173] Tahirih V. Lee examines the possibility of transplanting American style judicial review and concludes that judicial review as practiced in the United States is not compatible with the Chinese legal system and government structure.[174] Thomas Kellogg recognizes the difficulty that transplanting Western ideals and theories entails. He points out that the Qi Yuling case has not had a significant impact on Chinese law. He

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[171] See also Songyou Huang (Chief Judge of the First Civil Division of the Supreme People's Court), Making the Constitution Justiciable and its Significance, People's Court Daily, Aug. 13, 2001. This article was written by the Chief Judge of the First Civil Division of the Supreme People's Court at that time. He proclaimed that this decision established judicial review in the SPC made the Constitution justiciable. See also Kui, *supra* note 5; Kellogg, *supra* note 28; Killion, *supra* note 8.

[172] See Kellogg, *supra* note 28, at 246 n.89; see also Lihong, *supra* note 32, at 1039 n.30

[173] See Kellogg, *supra* note 28, at 233.

[174] See Tahirih V. Lee, *Exporting Judicial Review from the United States to China*, 19 Colum. J. Asian L. 152, 183-84 (2005)

suggests that judicial review in China should be founded upon Chinese values and historicity and not upon transplanted Western legal philosophy.[175] Shen Kui argues that despite this development in the justiciability of the Constitution, judicial review should adhere to the structure laid out in the law. Kui concludes that "[c]onstitutional governance means that state power is derived from the constitution, is regulated by the constitution, and should comply with the constitution. It does not mean that that the constitution directly governs the people."[176] Huang Lie suggests that judicial review need not be vested in the judiciary at all. He argues that judicial review is in fact necessary, but that the best way for China to utilize judicial review would be to establish a Constitutional Review Committee under the Standing Committee of the NPC.[177] He argues that this would leave the power structure of the Chinese government unchanged, but would resolve the problem of China's lack of constitutionalism.

The debate concerning judicial review has continued as other cases have touched upon constitutional rights and issues. According to Kellogg, one of the most prominent examples of this is the series of hepatitis B discrimination cases litigated over the past six years.[178] These cases rely on the Constitution for a legal basis because of underdeveloped anti-discrimination laws in China. Hepatitis B discrimination lawsuits have been successful because they do not directly challenge the government's authority, and they are easily proven. Since 2002, dozens of these cases have been brought before courts and have resulted in plaintiffs regaining jobs.[179] The use of health as a basis for developing anti-discrimination law in China seems unusual to Western observers, but widespread ignorance about the spread of hepatitis causes many cases of discrimination with no scientific basis. This provides plaintiffs with a strong argument and subtly

[175] See Kellogg, *supra* note 28, at 231-33.
[176] See Kui, *supra* note 5, at 230.
[177] See Lie, *supra* note 6, at 243.
[178] See Kellogg, *supra* note 28, at 234-35.
[179] *Id.*

increases the legitimacy of utilizing constitutional rights as a basis for litigation. In response to this increase in discrimination cases, specific legislation has been propagated.[180] This improves China's anti-discrimination law and decreases the need for citing the Constitution. However, the confirmation of these judgements by legislation reinforces the argument that the Constitution should be justiciable.

D. Judicial Interpretation

The Chinese Supreme People's Court is vested with the authority to propagate judicial interpretations (*sifa jieshi*).[181] These interpretations are intended to clarify legislation by the NPC and to give instructions to the lower courts on particularly difficult cases. However, recent judicial interpretations have been directed toward filling in the gaps of the civil code in a sort of jurisprudence, or secondary law.[182]

The SPC's judicial interpretations are binding on all lower courts, and only the SPC is permitted to conduct judicial interpretation. This function is utilized when lower courts request an interpretation of an unclear case or when the SPC decides to clarify an unclear statute before it is encountered in an actual case.[183] This has become one of the main functions of the SPC. Given the complexity and ambiguity of much of Chinese law, interpretations clarifying statutes and providing guidelines for deciding cases play a large role in the development of Chinese law. Despite the civil law background of the Chinese legal system, the SPC has, out of necessity, become a law-making body similar to that of common law legal systems.[184] The difference is

[180] *Id.*, at 243-44.
[181] P.R.C. Organizational Law of People's Courts art. 33.
[182] See Keith and Lin, *supra* note 18, at 224.
[183] PRC Court Org. Law art. 33
[184] See Keith and Lin, *supra* note 18, at 230.

that the SPC need not have a specific case before it can make a decision. This increased flexibility has greatly simplified the law-making process in China.[185]

The NPC only meets once per year, and the Standing Committee often focuses more on economic and political issues. These are the two legislative bodies that are designated by the Constitution to legislate law.[186] The relative infrequency of meetings and the inattentiveness to law of these two bodies means that few legal issues can be discussed and resolved each year. A significant number of problems are then left to be resolved as the other government organs see fit. The Supreme People's Procuratorate also has the power to conduct judicial interpretation regarding its duties and responsibilities, but there are rarely overlaps between the jurisdiction of the SPC and the Supreme People's Procuratorate.[187]

Chinese law makes a clear distinction between "judicial interpretation" and "legislative interpretation."[188] Legislative interpretation is interpretation that changes or alters the meaning of laws and statutes. This power is limited to the NPC and the Standing Committee. This means that many of the judicial interpretations that the SPC has propagated over the past two decades overstep the bounds of their authority and usurp the authority of the NPC.[189] This usurpation of authority can be viewed as a problem or as a solution. The SPC's actions cannot have gone unnoticed by the NPC; however, the fact that nothing has been done to stop the SPC or even to discourage these judicial interpretations implies that the use of judicial interpretations to make

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[185] *Id.*, at 233.
[186] Xian fa, art. 58 § 1.
[187] See Keith and Lin, *supra* note 18, at 229-30.
[188] Xian fa arts, 67(1), 67(4).
[189] In his 1997 work, Nanping Liu strongly argues that the SPC has overstepped the bounds of its authority and that it needs to stop usurping the authority of the NPC. However, the role of judicial interpretations in developing rule of law and filling gaps left by the NPC's legislation have led most legal scholars to at least partially approve of the actions of the SPC. Even those who would like for the SPC's influence to be reduced and judicial interpretation to be given to all courts in China admit that the SPC has been a force for positive change. See Liu, *supra* note 16; and Keith and Lin, *supra* note 18, at 238-40.

and alter laws is condoned and even encouraged by the NPC.[190] The SPC and the NPC are both largely controlled by the CCP. Some scholars believe that this makes the question of which government body is responsible for decisions irrelevant. In all probability, the decisions of the SPC are not significantly different from the way that the NPC would have ruled. As the number of cases brought before the court grows, the variety and scope of the cases grows as well. The law must be adapted in order to respond to these changes. The necessity of someone to fill the gaps in legislation by the NPC and respond to the needs of the people makes the SPC's judicial interpretations an attractive choice. This utilization of the SPC and its judicial interpretations as an "improvisatorial agent" has strongly affected the Chinese legal system.[191]

Although the Chinese legal system has developed more quickly than anyone would have imagined before the reform and opening up (*gaigekaifang),* the focus of legal reform is and has been on developing the economy.[192] Anything not necessary to that end is tossed aside. One of the most glaring examples of this single-minded focus on economic development is China's underdeveloped tort law.[193] I have personally seen the breakdown of the courts' effectiveness when it comes to tort law. While in Beijing, China, I met a middle aged, impoverished migrant worker in a bookstore. He told me that his son had been killed at a construction site in a workplace accident. When the father sued the construction company for damages and for his son's back wages, he lost because of a technicality. The father's lack of money and education left him desperate and with little chance for a successful appeal. He was researching applicable laws and statutes at the bookstore and approached me because I was also browsing the legal section. I was unable to offer this man any useful advice, but the experience piqued my interest in tort law.

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[190] See Keith and Lin, *supra* note 18, at 229-30.
[191] *Id.*
[192] See McPherson, *supra* note 156, at 808-10
[193] See Andrew J. Green, *Tort Reform with Chinese Characteristics: Towards a "Harmonious Society" in the People's Republic of China* 10 San Diego Int'l L.J. 121 (2008).

Although partially codified, the law contains considerable gaps that are easily exploited by large companies at the expense of the expendable migrant workers and peasants.

Chinese tort law is hampered by a number of problems. Corruption remains a significant problem. The Chinese legal system is heavily weighted in favor of large corporations.[194] Lack of effective implementation produces a general distrust of the legal system. Thus, many cases that might otherwise be decided in favor of the injured party are never brought before the court because of distrust or ignorance. The lack of a strong civil society also impedes the implementation of tort law. Unions are nearly non-existent in China, and those that do exist are largely controlled by the CCP.[195] This gives injured workers little legal recourse.

Beyond simple corruption, the very attitude of the government hampers the implementation of tort law. When a single worker or a group of workers is injured or killed by a large industrial corporation, officials and judges tend to favor the company, because ruling against the company could affect the economy. The workers' cause is not helped by Chinese overpopulation and a glut of migrant workers. If one worker refuses to work, there is always another worker who is willing.[196]

Despite these negative aspects of Chinese tort law, the number of cases brought before the courts is increasing.[197] The increasing willingness of the Chinese public to litigate is compelling the Chinese government and courts to improve and develop tort law. The increasing number of cases is also bringing the flaws in Chinese tort law to light and compelling the SPC to clarify and expand tort law.[198] The NPC is clearly incapable of responding quickly enough to

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[194] *Id.*, at 123.
[195] See Lawrence Cox, *Freedom of Religion in China: Religious, Economic and Social Disenfranchisement for China's Internal Migrant Workers* 8 Asian-Pac. L. & Pol'y J. 370, 410-13 (2007).
[196] *Id.*; see also Green, *supra* note 193, at 128-30.
[197] See Liebman, *supra* note 110, at 6-8; see also Green, *supra* note 193, at 148.
[198] See Green, *supra* note 193, at 122-24.

satisfy the demands of the public; therefore, the SPC has assumed the duty and responsibility of creating tort law.

Tort law is an excellent field of law to illustrate the effectiveness and comprehensiveness of the SPC's judicial interpretations, because there is currently little legislation by the NPC. Therefore, the majority of tort law has been drawn from judicial interpretations. After the *gaigekaifang*, the NPC chose not to legislate a comprehensive civil code but to promulgate a set of general principles instead.[199] This left a great deal of ambiguity for courts to deal with torts. In addition to the ambiguity, many aspects of tort law considered central in Western courts were left out or glossed over. In order to create guidelines for adjudicating tort law and personal injury cases and to develop tort law, the SPC propagated a judicial interpretation of the General Principles known as the Opinion on the General Principles of Civil Law.[200] This judicial interpretation was nearly as comprehensive as the General Principles. It was a thorough set of guidelines for adjudicating tort cases and it expanded and clarified much of the General Principles of Civil Law. This opinion has served as the basis for tort law from the time it was propagated in 1988. It has only recently been supplanted by the codification of tort law that will come into effect in July 2010.[201]

All judicial interpretations are binding upon the lower courts, but the Opinion on the General Principles of Civil Law became the basis for an entire field of Chinese law. The NPC waited twenty-two years to finally legislate a formal codification of tort law. If any judicial interpretation of the SPC has taken upon itself the role of legislative interpretation, it is this Opinion. Courts often utilize this opinion in judging tort law cases. Although it does not have

[199] See Lihong, *supra* note 32, at 1000-02.
[200] General Principles of the Civil Law (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987, (P.R.C.).
[201] Tort Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective Jul. 1, 2010), (P.R.C.).

formal status as law under the Chinese legal system, usage of the opinion has been indistinguishable from that of legislation by the NPC.[202]

The SPC has also put out multiple interpretations regarding specific aspects of tort law. These interpretations have greatly increased the scope of cases eligible to sue for compensation. Most notably, the SPC provided a legal basis for compensation for emotional distress, an aspect of Western tort law that has been traditionally ignored by Chinese law. Another judicial interpretation also increased the scope of personal injuries that can be granted compensation and clarified existing guidelines on torts. I will examine and analyze the effect and role of these interpretations in order to gain a better understanding of the role that judicial interpretations are playing in Chinese jurisprudence.

The Interpretation on Problems Regarding Ascertainment of Compensation Liability for Emotional Damages in Civil Torts (hereafter referred to as the Interpretation on Emotional Distress) was a groundbreaking interpretation in Chinese jurisprudence.[203] Before the Interpretation on Emotional Distress was propagated by the SPC in 2001, emotional distress was not considered a tort under Chinese law.[204] The fact that this interpretation expanded tort law to include an entirely new field demonstrates the inadequacy of previous tort law. Moreover, it illustrates the central importance that judicial interpretations play in developing Chinese law. This interpretation is incontrovertibly legislative interpretation, and, because of its unique content, is being used in an increasing number of cases.[205]

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[202] See Keith and Lin, *supra* note 18, at 225-26, 239.
[203] See Green, *supra* note 193, at 136-38; see also Lihong, *supra* note 32, at 1034-36; Zui gao ren min fa yuan guan yu que ding min shi qin quan jing shen sun hai pei chang ze ren ruo gan wen ti jie shi [Interpretation of the Supreme People's Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts] (promulgated by the Sup. People's Ct., Mar. 8, 2001, effective Mar. 10, 2001), (P.R.C.) [hereafter Interpretation on Emotional Distress].
[204] See Green, *supra* note 193, at 137.
[205] Lihong, *supra* note 32, at 1034-36.

In a 2002 decision by the Chengdu Intermediate People's Court, Peng Jiahui was granted compensation from the *Zhongguo gushi* magazine for emotional distress caused by the vilification and slander of her older brother's name and reputation in a story published in 1998.[206] Peng Jiahui's older brother was killed during the 1911 revolution that overthrew the Qing Dynasty, and the story gave a negative and slanderous description of him. The ruling on this case cited the General Principles of Civil Law, the Opinion on the General Principles of Civil Law, and the Interpretation on Emotional Distress as the basis for ruling in favor of Peng. This demonstrates the law-making role that the Interpretation on Emotional Distress and the Opinion on General Principles of Civil Law has played. Because these two interpretations are not legally considered law, the court also cited the General Principles of Civil Law.[207] However, the citation of the General Principles of Civil Law is only a formality. The General Principles only tangentially relate to this case, and if judicial interpretations held legal status as law, it would not have needed to be cited at all.

The Judicial Interpretation on Personal Injury Compensation (hereafter referred to as the Personal Injury Interpretation) was propagated by the SPC in 2003.[208] This interpretation serves to clarify and expand the guidelines for personal injury torts. Personal injury tort law was not created by this interpretation in the same way that emotional distress tort law was created by the Interpretation on Emotional Distress, but the Personal Injury Interpretation has played a large role in expediting decisions and easing the burden of courts faced with an increasing number of lawsuits. The Personal Injury Interpretation clarifies significant aspects of personal injury law

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[206] Peng Jiahui su *zhong guo gu shi* za zhi she ming yu quan jiu fen an [Peng Jiahui v. *Zhong guo gu shi* magazine], Qin Quan Fa: Yuan li Jing yao yu shi wu zhi nan, (Yingwen Cai ed., 2006) 534 (Sup. People's Ct., Dec. 15, 2002).

[207] *Id.*

[208] Zui gao ren min fa yuan guan yu shen li ren shen sun hai pei chang an jian shi yong fa lu ruo gan wen ti de jie shi [Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury] (promulgated by the Sup. People's Ct., Dec. 4, 2003, effective May 1, 2004), (P.R.C.) [hereafter Personal Injury Interpretation].

and expands the area of torts that can be compensated.[209] This interpretation serves both the technically legal role of clarifying existing legislation and the currently disallowed function of altering and improving previous legislation. This interpretation has made an important impact on the Chinese legal community and has inspired conferences and books.[210]

The Personal Injury Interpretation's most significant contributions to Chinese jurisprudence are in the areas of vicarious liability, comparative negligence, and joint liability.[211] In the fields of comparative negligence and joint liability, the Personal Injury Interpretation improves on the language of the General Principles of Civil Law. While the General Principles of Civil Law ambiguously states that negligence on the part of the plaintiff may reduce the liability of the defendant, the Personal Injury Interpretation specifically states, "the plaintiff's own negligence will reduce the defendant's liability unless the defendant acted intentionally or was grossly negligent."[212] This is both a clarification and an expansion of the law. This aspect of the interpretation is arguably still judicial interpretation rather than legislative interpretation; however, Article 9 significantly expands the area of vicarious liability. Under this article, employers can be held at fault for torts committed by employees in the normal scope of their duties regardless of whether the torts were due to negligence or committed intentionally. Articles 6, 7, and 16 all provide guidelines for specific situations. These articles establish liability for injuries at public accommodations, schools, and construction sites.[213]

These interpretations are not always propagated before they are needed. Increasing litigation of torts is bringing to light many aspects of torts that had not been addressed previously. In the 2001 Wang v. Shanghai Galaxy Hotel case, the Shanghai Intermediate

[209] See Green, *supra* note 193, at 137-38.
[210] *Id.*
[211] *Id.*
[212] See Personal Injury Interpretation, *supra* note 208, art. 2.
[213] *Id.*, arts. 6, 7, 9, 16.

People's Court held Shanghai Galaxy Hotel partly liable for a crime committed on its premises.[214] Obviously, this case occurred before the Personal Injury Interpretation was propagated, but this illustrates the inadequacy of the law and the need for judicial interpretations to fill the gap. Less than a year after this case was decided, the judgement was confirmed by the Personal Injury Interpretation. Under article 6, a breach of the newly established duty of security at a public accommodation leaves the business responsible.[215]

The Judicial Interpretation Regarding Compensation Liability for Personal Injury Caused by High Voltage Electricity that was propagated in 2001 clarifies a section of article 123 of the General Principles.[216] This interpretation gives detailed guidelines regarding what voltage constitutes negligence and what injuries and losses can be granted compensation. It expands a half-sentence in the NPC's legislation into five articles and multiple specific guidelines for each point. This illustrates the flexible role that judicial interpretations play in Chinese jurisprudence. This interpretation does not provide broad guidelines for lower courts to rule but does give specific rules for one tort.

The 2003 Response Regarding Whether Having Consensual Sexual Relations with an Underage Girl Constitutes Rape when the Feasor Did Not Know the Girl was Under Fourteen is an illustration of the most common type of judicial interpretation.[217] This response is a single

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[214] Wang Liyi, Zhang Lixia su Shanghai yin he bin guan pei chang jiu fen an [Wang v. Shanghai Galaxy Hotel] (Shanghai No.1 Interm. People's Ct., Jan. 17, 2001), reprinted in 2002 Zhongguo fa lü nian jian [2002 Law Y.B. China] 971-75.

[215] See Personal Injury Interpretation, *supra* note 208, art. 6.

[216] Zui gao ren min fa yuan guan yu shen li li chu dian ren shen sun hai pai chang an jian ruo gan wen ti de jie shi [The Chinese Supreme People's Court's Judicial Interpretation Regarding Compensation Liability for Personal Injury Caused by High Voltage Electricity] (promulgated by the Sup. People's Ct., Nov. 13, 2000, effective Jan. 21, 2001), (P.R.C.); See also General Principles, supra note 200, art. 123.

[217] Zui gao ren min fa yuan guan yu xing wei ren bu ming zhi shi bu man shi si zhou sui de you nu shuang fang zi yuan fa sheng xing guan xi shi fou gou cheng qiang jian zui wen ti de pi fu [The Chinese Supreme People's Court's Response Regarding Whether Having Consensual Sexual Relations with an Underage Girl Constitutes Rape when the Feasor Did Not Know the Girl was Under Fourteen] (promulgated by the Sup. People's Ct., Jan. 8, 2003, effective Jan. 24, 2003), (P.R.C.); see also Keith and Lin, *supra* note 18, at 237. In the case that gave rise to this response, six adult men were prosecuted by a district people's procuratorate in Liaoning Province

sentence responding to a request for clarification from a lower court. It holds that if the feasor knows that the girl is underage, even if the sex was consensual, he is still guilty of rape. However, if the feasor had no knowledge of the girl's age and the sex is consensual, then it does not constitute rape. This response demonstrates the wide variety of judicial interpretations propagated by the SPC.

This response also highlights the most commonly criticized aspect of the SPC's judicial interpretation. Although the judicial interpretation is binding upon the lower courts and is probably the correct response to the problem, it does not provide the legal reasoning behind its decision. This is in contrast to United States courts' decisions that provide exhaustive reasons for the conclusion. Although this difference is to some extent a matter of civil law versus common law, civil law courts such as those of Germany also provide a significant amount of research and reasoning for their rulings.[218] Improving the transparency of judicial interpretations and court rulings is an essential part of improving judicial independence and increasing public reliance on the courts for litigation and dispute resolution.

E. Comparative Implementation

Chinese judicial interpretation as applied by the SPC seems to be taking a middle path between Germany and the United States. The Common Law model of judicial interpretation in the United States is a gradual, bottom-up system. Germany's Civil Law system has a top-down model where the legislature codifies law and the courts implement it. The development of

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for rape. The girl was only 13 years old but seemingly deceived these men regarding her true age and separately had consensual sexual intercourse with each. However, Section Two of Article 236 of the Criminal Law states that any person who has sexual intercourse with a girl under the age of 14 is guilty of the crime of rape. A people's district court criminal tribunal was unable to come to a conclusion, and it appealed to the Intermediate People's Court. However, the Intermediate People's Court was also unable to make a decision and requested guidance and clarification from the SPC. The SPC expanded upon Article 236 of the Criminal Law by ruling that ignorance does absolve guilt in such cases.

[218] See Farber, *supra* note 15, at 513-14

China's system of judicial interpretation is different from the United States statutory interpretation in that only the SPC can conduct judicial interpretation. But it is also different from Germany's in that the SPC's judicial interpretations are gradually developing law in a way similar to that of case law in the United States. Chinese judicial interpretation as it is currently utilized needs to be given recognition of its increased authority under the law. The effectiveness of judicial interpretation has simplified, streamlined, and improved the Chinese law-making system, and legal recognition of this reality in the Constitution is needed.

Chinese judicial review obviously requires development and legislation. Judicial review is unlikely to be gradually adopted by the SPC the way the judicial interpretation has been. There is much greater opposition to judicial review in the CCP, and there is no legal foundation upon which to expand.[219] However, judicial review is as important as judicial interpretation, and, arguably, even more crucial to the development of a reliable and independent rule of law.

III. Conclusion

The role of the SPC continues to evolve within the Chinese government. Although the Constitution clearly gives the SPC a subordinate status, subject to the NPC and the Standing Committee, the necessity of utilizing the SPC's judicial interpretations as a stopgap to relieve stress on the judicial system in the absence of effective and complete legislation has resulted in the development of the SPC's power and influence.[220] Although the SPC remains hesitant or unwilling to directly challenge the authority of the NPC and CCP on certain sensitive political

[219] See Lihong *supra* note 32, at 1004.
[220] Keith and Lin, *supra* note 18, at 224.

issues, it has not been reluctant to produce hundreds of interpretations that establish the SPC as an influential player in the formulation and creation of law in China.[221]

Although the Chinese legal system is largely based upon the civil law system of Germany, much of the Chinese legal community advocates a judiciary based on common law.[222] This has given rise to a broad debate over the future of the SPC and the judicial system. The introduction of a case law system would strengthen the judiciary, increase rule of law, and give the judicial system needed independence. However, it would also significantly decrease the influence of the CCP and alter the balance of power within the Chinese government.[223]

In contrast to the government structures of the United States and Germany, the PRC has no separation of powers. The Chinese government is intended to have a system of checks and balances within a single cohesive administrative unit.[224] The NPC is the sole body vested with the authority to make law and conduct legislative interpretation. The SPC is the highest judicial organ in China, and has the authority to oversee and direct the adjudication of all lower courts.[225] To Western observers, the structure of the Chinese government does not seem conducive to developing democracy or rule of law. However, the greatest obstacle to rule of law in China is not the governmental structure but the one-party political system.[226] The continued prioritization of policy over law and the preeminence of the CCP leave both the NPC and the SPC subordinate.

The theoretical system of checks and balances within the Chinese government has been altered in practice. The law-making ability of the SPC has been greatly expanded through the use of judicial interpretations. The SPC has been trusted by the NPC to conduct legal affairs in order

[221] *Id.*, at 229-231; see also Liu, *supra* note 16, at 74.
[222] Keith and Lin, *supra* note 18, at 241.
[223] Kellogg, *supra* note 28, at 218-220; see also Kui, *supra* note 5, at 218-19
[224] Keith and Lin, *supra* note 18, at 224-25
[225] Xian fa, art. 127.
[226] Peerenboom, *supra* note 1, at 80-81

to relieve the legislative burden of the NPC.[227] The NPC codifies and legislates law as it is able; however, this is a lengthy process that is assisted by the temporary utilization of judicial interpretations as "secondary law."[228] The approval of this usage of judicial interpretations by the NPC is indicated by the fact that the interpretations of the SPC have been supported in the laws that the NPC propagates. The NPC rarely contradicts judicial interpretations, and this legal confirmation of the accuracy of the SPC's interpretations has played a large role in expanding the scope of judicial interpretations.

The SPC has not always acted to further the rule of law. When Falun Gong cases were brought before the lower courts, the SPC promulgated an interpretation that increased the range of offenses for which the state could prosecute Falun Gong followers.[229] In this case, the SPC followed party policy and showed no hint of independent or objective legal reasoning. Similarly, the Qi Yuling Case suggests unwillingness on the part of the SPC to challenge the political will of the CCP. Although the Qi Yuling case was groundbreaking in its use of the Constitution as a basis for finding the defendant guilty, the SPC later formally withdrew this interpretation.[230] This could mean that the court bowed to political pressure from the CCP or NPC and is rejecting the possibility of developing a system of judicial review within the judiciary.

What then is the current role of the SPC? Is it a subordinate government organ subject to the political whims of the CCP or is it an independent law-making body capable of independent action and advocating the democratic process and rule of law? The SPC has occupied both roles over the past three decades. A great deal of authority has been delegated to it from the NPC;

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[227] Keith and Lin, *supra* note 18, at 229, 231.
[228] *Id.*, at 226.
[229] *Id.,* at 235-36; Zui gao ren min fa yuan guan yu ban li zu zhi he li yong xie jiao fan zui an jian ju ti ying yong fa lu ruo gan wen ti de jie shi [Interpretation on Questions Concerning the Concrete Application of Laws in Handling Criminal Cases of Organizing and Using Evil Cult Organizations] (promulgated by the Sup. People's Ct., Oct.. 20, 1999, effective Oct.. 30, 1999), (P.R.C.); see also Peerenboom, *supra* note 1, at 91-102, 123 n.144.
[230] See Kellogg, *supra* note 28, at 246 n.89; see also Lihong, *supra* note 32, at 1039 n.30.

however, sensitive and important political issues remain firmly under the authority of the CCP and the NPC. This limited independence has been greatly beneficial to the development of most civil and criminal law. Considering the current political situation of China, submission to the NPC and CCP on political matters may continue to be a necessity.

The development of the SPC's law making ability remains limited. With the increasing comprehensiveness of legislated and codified Chinese law, the influence and necessity of judicial interpretations must also fade and decrease in importance. Once the Chinese system of laws is fully modernized and complete, the need for judicial interpretations will be diminished, and it will resume its original role of clarifying specific statutes and giving guidelines on specific cases.[231]

The Chinese judicial system must be reformed and improved. The necessity of an independent judiciary is undeniable. The question is how to develop judicial independence in China. One possibility is that the independence and responsibility of individual judges be increased and a case law system be implemented. Another solution could be that the SPC be granted the power to conduct judicial review. Both of these options would significantly redistribute power and authority throughout the Chinese political and judicial system.

What difference does having a civil law system or a common law system really make? The fundamental difference between civil law and common law is that law making is controlled by different government agencies.[232] The Chinese government must decide who should create law. Under common law, judges who are experts in legal matters are trusted to have the knowledge and expertise to make informed and accurate legal decisions on behalf of the public. Under civil law, the legislature is expected to legislate according to the will of the people who

[231] See Keith and Lin, *supra* note 18, at 248-49.
[232] See supra note 11.

elected them.[233] Thus, civil law has an essentially democratic nature and common law has a basically elitist character. The problem with the Chinese political system is that the NPC is not directly elected.[234] This removes the democratic element of civil law without introducing the expert opinions of specialist judges. Civil law puts the creation of law into the hands of politicians and assumes that influence of political pressure will result in a faithful representation of the will of the people. Common law insulates judges from political pressure and trusts that this isolation will result in justice that is uninfluenced by special interests. The role of the judiciary can be subordinate to the legislature or it can be independent and balance the influence of the legislature. The SPC is currently subordinate to the legislature and clearly influenced by political pressure. The red versus expert debate that was deliberated within the CCP and the demonstrated tendency of the NPC to entrust the SPC with legal matters indicate that the preference of the Chinese government is to grant authority to judges.[235] Only when legal matters and political issues connect do the NPC and CCP assert their authority and political will.[236]

Another difference between civil law and common law is the speed of development and responsiveness to change. Because of the specific case-by-case nature of common law, judges are able to incrementally develop laws. Common law is adaptable to changing circumstances and easily responds to social change. Civil law, on the other hand, must propagate laws in a general form, attempting to anticipate the needs and problems of society. Past judicial interpretations of

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[233] Merryman and Perez-Perdomo, *supra* note 9.
[234] See Peerenboom, *supra* note 1, at 172.
[235] The red versus expert debate during the Maoist era was a political debate over who was more qualified to lead China, scientists and intellectuals or the common people. Mao and other advocates of the "reds" attacked the experts' position and influence during the Cultural Revolution; however, the death of Mao and the rise of Deng Xiaoping, an advocate of the experts, led to an embracement of science and technology. See Lowell Barrington, Michael J. Bosia & Kathleen Bruhn, Comparative Politics: Structure and Choices 305 (2010).
[236] See Keith and Lin, *supra* note 18, at 236, 247.

the SPC have taken both forms.[237] Although the judicial interpretations have been incremental and responded to individual cases and issues, the fact that the SPC oversees the entire country requires these judicial interpretations either be specific enough to prevent misapplication or broad enough to be applicable to all courts.

The differences amongst the German, United States, and Chinese systems of judicial interpretation and judicial review are not remarkable given the different social, economic and political histories of each country. However, despite significantly different underlying philosophies and legal theories, the three systems either have or are developing quite similar functions. German and United States judicial review is implemented and utilized in different courts and within the constructs of different legal systems; however, the resulting role of the Federal Constitutional Court and the Supreme Court are similar.[238] Judicial interpretation is increasingly similar amongst the three systems. The United States has introduced certain elements of continental law, while Germany has increased the responsibility and flexibility given to judges to interpret and create laws. The judicial interpretations of the SPC remains unrecognized by law; however, they are increasingly similar to that of Germany and the United States. Chinese scholars heatedly debate the advantages and disadvantages of the different Western legal systems, with most scholars espousing a combination of elements from common law and civil law legal systems.[239]

The PRC has already codified almost all civil and criminal law; however, much of this remains ambiguous.[240] Many legal scholars support introducing a case law system. China has

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[237] See the Interpretation on Emotional Distress, *supra* note 203; see also the Response Regarding Whether Having Consensual Sexual Relations with an Underage Girl Constitutes Rape when the Feasor Did Not Know the Girl was Under Fourteen, *supra* note 217.
[238] See Rosler, *supra* note 31, at 15; Farber *supra* note 15, at 519-21.
[239] See Lie, *supra* note 6, at 241-43; Keith and Lin *supra* note 18, at 239-41.
[240] Keith and Lin, *supra* note 18, at 231.

already implemented a case guidance system, and although previous cases are still not binding, this system could easily be changed to introduce legal precedents.[241] However, in other areas China remains firmly in the civil law camp. Because of the growing influence of the SPC, lower court judges have become less independent.[242] With the exception of the SPC, judges in China have less responsibility and authority to adjudicate than judges in most other civil law legal systems. The NPC also continues to increase the codification of laws and to update and improve previous legislation.[243]

Although the SPC has played the role of a stopgap for several decades to relieve pressure on the judicial system, the NPC slowly but surely follows, formally legislating much of what were previously only judicial interpretations.[244] This suggests that a partial adoption of the United States case law system would not be disruptive. In the United States, the case law system exists to create law. Once laws are established through precedent, they are collected and codified. However, these laws remain subject to interpretation and change under the principles of common law. Because China has already codified most laws, implementation of a case law system would merely increase the power of judges to rule on individual cases and to continue to develop the legal system. Judicial interpretations of the SPC have done much to alleviate stress on the judicial system, but because the SPC must formulate these judicial interpretations with respect to the entire nation, judicial interpretations are often generalized principles or case specific.[245] The centralized character of Chinese legal development in the past has played a large role in the uneven development of law.[246] The Chinese central government is focused on

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[241] *Id.*, at 240-41.
[242] *Id.*
[243] See Lihong, *supra* note 32, at 1006-15
[244] See Green, *supra* note 193, at 150-51; Tort Law, *supra* note 201.
[245] Keith and Lin, *supra* note 18, at 240.
[246] See Peerenboom, *supra* note 1, at 432-34.

developing the country as a whole. This requires an emphasis on economic and commercial law. Opening judicial interpretation to each court would greatly increase the speed of the development of Chinese law.

As can be seen from the expansion of judicial interpretation and the aborted development of judicial review, the role of the SPC is changing but remains subordinate to the NPC. Judicial interpretations have increased the respect, authority, and independence given to the judiciary. The limited judicialization of the Constitution indicates the increasing confidence and independence of the SPC. However, the CCP and NPC continue to oppose such a significant increase in judicial independence. The reversal of the Qi Yuling interpretation illustrates the inability or unwillingness of the SPC to directly challenge or contest the authority of the NPC over the justiciability of the Constitution.