Application of the Economic Provisions in the Constitutional Law —Beginning from the Debate of the German Economic Constitution Law*

*Huang Hui***

ABSTRACT

The Economic Constitution Law Study can be seen as a sub-discipline of the Constitution Law Study. It explores how to carry the constitutional economic norms into effect. In other words, it explores how to ensure the governmental and social economic powers operate within the constitutional framework. The Paragraph 1 of article 15 of the Chinese Constitution Law, which provides that "the state practices socialistic market economy," is the key norm of the Chinese Economic Constitution. In view of that the interpretation and application of the constitutional law is still in the blank, we might draw inspiration from the Debate on the Economic Constitution in Germany during the 1950s. The German experience tells that the uncertainty at the economic constitutional norms could be clarified by the joint efforts of the scholars and judicial practitioners. Therefore, the present starting point and the constructive work way of the Chinese constitution law scholars is to get the intent and the application method of the constitutional law norms gradually from the case-based constitutional study and the relevant comparison law.

---

* The Chinese version of this Article was published in *Peking University Law Journal* (volume 4, 2009). The author kindly accepted *Peking University Transnational Law Review*'s invitation to adapt this Article into English, with certain changes approved by the author.

** The author is the Vice Dean and Associate Professor of the Law School of Beihang University. She is also the Executive Director of the Germen Legal Study Centre of the Law School of Beihang University. She obtained her Doctorate in Law at Humboldt University, and was a Humboldt Scholar of 2009. Her major research interests include constitutional law, state liability law, juristic methodology, and case-guiding systems in civil law countries.

Key Words*: economic constitutional law; application of constitutional law; comparison of constitutional case.*

I. INTRODUCTION

Article 15(1) of the *Constitution of the People's Republic of China* (the *PRC Constitution*) provides that "[t]he state practices socialist market economy." Does such a consequential but abstract constitutional provision possess any legal-normative effect under the notion that the Constitution is law as well? What is its meaning? How should it be understood in conjunction with other constitutional provisions related to the economy, also known as the Economic Constitution? These are unavoidable questions facing every constitutional law scholar in China, since the study of the Economic Constitution is as integral as the studies of the *PRC Constitution* in its political, social, marital and familial aspects. Inspired by the Debate on the Economic Constitution in Germany during the 1950s, the author raises the above questions in an attempt to use them as a starting point for analyzing whether the provisions related to the economic system in the *PRC Constitution* are applicable and the scope of their application.

This Article consists of five parts. Part I delineates the concept of the "Economic Constitution," which falls within the study of constitutional law and is gaining familiarity and acceptance from Chinese legal scholars. Part II outlines the history of the Debate on Economic Constitution in Germany during the 1950s. In particular, it illustrates how the Federal Constitutional Court (*Bundesverfassungsgericht*) deliberately denied the existence of any particular economic system in the text of the German Constitution. This also leads to this Article's main conclusion: the Federal Constitutional Court's denial of a particular economic system in the German Constitution was driven by the objective to avoid losing its discretion in constitutional review, which is likely to happen if constitutional review is over-reliant on economic theories. Part IV, by way of questions, discusses whether the German experience is illuminating for us to understand article 15(1) of the *PRC Constitution* and its scope of application. Part V points out that the methods of comparative law and case-based analysis will be the most useful for research in this area.

II. DELINEATION OF CONCEPT

To discuss constitutional provisions related to economic system, we must begin with a superordinate concept, which is the concept of "Economic Constitution." Economic Constitution, *Wirtschaftsverfassungsrecht* or *Wirtschaftsverfassung* in German, is a concept of great importance in German public law. Specifically, it refers to all the constitutional norms related to the economic life and order as can be found in the German constitution, i.e. the *Basic Law for the Federal Republic of Germany* (the *Basic Law*). The Economic Constitution is as an integral part of the German Constitution as its political, social, marital and familial aspects. Accordingly, it is an important subject of research in the area of constitutional law. To some extent, the Economic Constitution Law Study can be viewed as a subordinate discipline of the constitutional law Study. Its research centers on how to implement the economic norms in the Constitution. In other words, its study focuses on how to ensure that the economic powers of the state as well as that of the society operate within the constitutional framework.[1]

Since the above understanding on Economic Constitution is based on the existing constitutional text, it is considered as an understanding in a formalistic as well as a narrow sense. Under German law, the Economic Constitution is otherwise defined in a broad and substantial sense, and would accordingly cover all legal norms relating to economic systems and developments. That is to say, in addition to all the economic norms found in the *Basic Law*, the Economic Constitution should also include regulations and rules such as the *1957 Act Against Restraints of Competition* (*Gesetz gegen Wettbewerbsbeschränkungen*, or GWB), the *1965 Stock Corporation Act* (*Aktiengesetz*, or AktG), the *1967 Law to Promote Economic Stability and Growth* (*Gesetz zur Förderung*

[1] For the concept of the German Economic Constitution, *see* Peter Badura, *Wirtschaftsverwaltungsrecht* [*Economic Administrative Law*], *in* BESONDERES VERWALTUNGSRECHT [SPECIAL ADMINISTRATIVE LAW] 245, 262 (Eberhard Schmidt-Assmann ed., 12th ed. 2003) (hereinafter *Wirtschaftsverwaltungsrecht*); Peter Badura, *Grundprobleme des Wirtschaftsverfassungsrechts* [*Basic Problems of Economic Constitutional Law*], 16 JURISTISCHE SCHULUNG [LEGAL TRAINING] 205, 205, 207 (1976) (hereinafter *Grundprobleme*); 乌茨·施利斯基 (UTZ SCHILESKY), 经济公法 [PUBLIC ECONOMIC LAW] at 4, 7 (喻文光 (Yu Wenguang) trans., 2006).

der Stabilität und des Wachstums der Wirtschaft, or StabG), and *the 1976 Codetermination Act* (*Mitbestimmungsgesetz*, or MitbestG), all of which have massive impact on the formation as well as the development of the actual economic order.[2]

Why would legal norms unrelated to the Constitution Law be referred to as the "Economic Constitution"? To answer this question, it is helpful to give some explanation of the German term "*Verfassung*." In English, the corresponding term for "*Verfassung*" is "Constitution." Its ordinary meaning is the basic and fundamental state of human beings, things and matters. For example, one can ask questions about the other's "*Verfassung*" as a way to inquire the latter's health conditions. The term "*Verfassung*," in legal parlance, is understood to mean the law concerning the basic state, especially when the suffix "*Recht*" (law) is added to form the term "*Verfassungsrecht*." Generally, *Verfassung* means written constitution. It should be noted, though, that the ordinary meaning of "*Verfassung*" is also frequently used in legal contexts.[3] However, it should not be difficult to distinguish between the two meanings as long as the context is taken into account.

"Economic Constitution," in its broad sense, is derived from the ordinary meaning of "Constitution." Hence, it should be understood as the "law" concerning "the basic state of the economy." According to the prevailing opinion in the German public law academia, Economic Constitution is an independent area of law with its own subject of research. Thus, its meaning should be limited to a narrow sense, which includes only the economic norms contained in the *Basic Law*. The renowned constitutional jurist Badura is of the opinion that Economic Constitution Study in the broad sense is prone to certain systemic influence and dogmatism, and thus such a structural presumption is beyond the com-

---

[2] For categorization of the Economic Constitution, *see* Badura, *Wirtschaftsverwaltungsrecht*, *supra* note 1, at 262; 施利斯基 (SCHILESKY), *supra* note 1, at 20.

[3] For example, the German *Company Organization Act* (*Betriebsverfassungsgesetz*) uses "*Verfassung*" in its original German title. However, "*Company Organization Act*" is a more appropriate translation than "*Company Constitution Act*" considering its contents. Another example is the *German Stock Corporation Act* (*Aktiengesetz*): Part Four of which is entitled "*Verfassung der Aktiengesellschaft*." This title should be translated as "the Organization of the Company," rather than "the Constitution of the Company."

petence of law as a discipline.[4]

In addition to the broad and narrow understandings discussed above, German "Economic Constitution" has a third definition that is further narrowed, in that it includes only norms relating to economic system in the constitutional text. "Economic Constitution," therefore, refers to some kind of economic system or regime that is substantially certain and institutionalized, such as planned economy, free market economy, or social market economy.[5] Such a definition embraces the ordinary meaning of "*Verfassung*," i.e. "basic state." In the author's view, the most appropriate translation for this "*Versfassung*" should be "economic system" or "economic regime." This is vital for this Article. "Debate on Economic Constitution," as is seen in the subtitle of this Article, is intended to refer to the debate during the 1950s among German legal scholars on whether the *Basic Law* establishes some kind of "social market economy." This makes it necessary to adopt different translations [to the same German term]. Otherwise, confusing statements such as "whether the German Economic Constitution includes some kind of Economic Constitution" may come about. In the same vein, article 15(1) of the *PRC Constitution*, which provides that "[t]he state practices socialist market economy," should be understood as an Economic Constitution provision in the narrowest sense. To distinguish, the author calls such an article an "economic system provision" or an "economic system norm."

Chinese literature contains other explanations of "Economic Constitution." The most widespread one sees Economic Constitution as synonymous with anti-monopoly law. This viewpoint has gone beyond the legal profession after the media's reporting on the legislative events associated with the Chinese *Anti-Monopoly Law* around the year 2007. The literature also shows a fifth explanation of "Economic Constitution," which studies the relationship be-

---

[4] *See* Badura, *Grundprobleme*, *supra* note 1, at 207. Moreover, some scholars expressly argue that the broad sense of "Economic Constitution" should be abandoned. They contend that this sense confuses constitutional law with ordinary statutes. Consequently, it might, on the one hand, cause the danger of elevating economic policies that at best have ordinary legal authority onto a constitutional level; and on the other hand, it leaves a mistaken impression that any real-life "economic" phenomenon has a constitutional basis, *see* 施利斯基 (SCHILESKY), *supra* note 1, at 7, 20.

[5] *Compare* 施利斯基 (SCHILESKY), *supra* note 1, at 7, 19, 20.

tween economy and constitution from a law and economics perspective. Since these two explanations are unrelated to the thesis of this Article, they will not be discussed.[6]

III. DEBATE ON ECONOMIC CONSTITUTION IN THE 1950S GERMANY

A. Background

In the year of 1949, the Federal Republic of Germany promulgated a written constitution entitled the "*Basic Law*." Unlike the Weimar Constitution, the *Basic Law* does not have a separate chapter for provisions governing the economic life and order.[7] Instead, these economic norms are spread out all over the whole text. These norms include, *inter alia*, first, economic basic right provisions that bear close relation to the economic life, such as freedom of action (*Handlungsfreiheit*) in article 2, occupational liberty (*Berufsfreiheit*) in article 12, property protection (*Eigentumschutz*) in article 14; second, provisions establishing Germany as a social federal state (*sozialer Bundesstaat*) in article 20; third, provisions governing the division of legislative powers as regards the economy between the Federation and the States in article 70 and below; fourth, constitutional principles and doctrines that constitute the foundation of rule of law in modern nations (*Rechtsstaat*), such as the principles of legal reservation, proportionality, and judicial review of discretionary powers.

In spite of the dispersion of these economic provisions, German law scholars swiftly offered an outline of the German economic order presumably intended by the drafters of the *Basic*

---

[6] Chinese translators tend to translate "*Verfassung*" and "constitution" into "宪法" in Chinese, but "宪法" generally refers only to the formal text of the Constitution. Therefore, it is necessary to distinguish between the meanings of "宪法" and "constitution." Prof. Chen Duanhong has done a thorough analysis of the two meanings of the English word "constitution" (*i.e.* "*Verfassung*" in German). *See generally* 陈端洪 (CHEN DUANHONG), 宪治与主权 [CONSTITUTIONALISM AND SOVEREIGNTY], 3–5. (2007).

[7] The Weimar Constitution, officially titled Verfassung des Deutschen Reichs (Constitution of the German Reich), was promulgated on Aug. 11, 1919. Its Chapter 5 (arts. 151–165) is titled *Economic Life* (*Das Wirtschaftsleben*). The content of this chapter, though inheriting the liberal element of liberal economy, includes socialist-characterized provisions about labor and about social security.

Law. First, considering the inclusion of broad provisions governing freedom of action, occupational liberty and property protection, it is confirmed that the *Basic Law* has abandoned the extreme planned economy as practiced by the Third Reich, the (former) Soviet Union, and (former) socialist Eastern bloc countries. Second, the *Basic Law* disagrees with the laissez-faire pioneered by Adam Smith and championed in the United States prior to President Roosevelt's "New Deal," because article 20(1) of the *Basic Law* provides that the Federal Republic of Germany is a democratic and social federal state. Here the word "social" (*sozial*) implies the state's power and duty to intervene in the economy for the purpose of remedying defects in the market economy as well as achieving social fairness and justice.[8] In other words, economic provisions in the *Basic Law* consist of two factors on both ends of the spectrum: the first one is a market economy with freedom and basic civil rights as its essential features, and the second one is a social factor allowing government intervention. The *Basic Law* demands that these two factors exist simultaneously. Such an objective is easily understandable, as the German constitutional law scholars and the judiciary would both agree.

Nonetheless, "economic freedom" and the "social principle" are still antitheses of each other. The former asks the government to sit back while the latter requires intervention by the government. In such a case, apart from not holding on to any extreme, what is actually the scope of government intervention potentially permissible under the *Basic Law*? For those who have to study and apply the *Basic Law*, this is a principal and eternal question, especially during the 1950s. Article 1(3) of the *Basic Law* expressly states that "[t]he following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." This means that the *Basic Law* is the supreme law that binds all government branches.[9] Thus, the vague conclusion that "the *Basic Law* not only protects civil liberties and basic rights, but also allows reasonable intervention in respect of such liberties and rights" is simply insufficient. Practitioners need a constitutional theoretical

---

[8] *See eg,* WERNER FROTSCHER, WIRTSCHAFTSVERFASSUNGS und WIRTSCHAFT -VERWALTUNGSRECHT [ECONOMIC CONSTITUTION AND ECONOMIC ADMINISTRATIVE LAW], at 19 (4th ed. 2004).

[9] HARMUT MAURER, STAATSRECHT I [STATE LAW, VOLUMNE ONE], at 23 (4th ed. 2005).

framework that is more detailed and rigorous than the slogan of "searching for a unity of opposites." For this purpose, in the 1950s, German constitutional law scholars engaged in a debate over whether the *Basic Law* establishes or favors a particular economic system. The debate essentially discussed the lawful scope of the state's intervention in the economy. This is what is meant by the subtitle of this Article, i.e. the "Debate on Economic Constitution."

B. Hans Carl Nipperdey and the Freiburg School

German constitutional law scholars disagreed widely in relation to issues concerning Economic Constitution. Among all those disagreements, the one attracting most attention is certainly the intense Debate on Economic Constitution between the Federal Constitutional Court and Hans Carl Nipperdey, an eminent jurist as well as the inaugural president of the Federal Labor Court.[10] Nipperdey first made known his opinion in March 1954, during a presentation before the Legal Research Association (*Juristische Studiengesellschaft*) in Karlsruhe. His opinion can be summarized as follows: after an "overview" of the *Basic Law*,[11] it can be said

---

[10] There are another two major opinions: the first is the "Hybrid Economic System" conclusion proposed by E.R. Huber after analyzing collectively all the provisions of the *Basic Law*, balancing economic freedom and the Principle of Social State; the second is an opposite view proposed by Abendroth, arguing that the *Basic Law* failed to make any decision on economic system, hence both liberal economy and socialist economy are permitted. For various opinions on the topic of the Economic Constitution, *see generally* Peter J. Tettinger, *Neuer Streit um die "Wirtschaftsverfassung"* [*New Dispute over the "Economic Constitution*"], 32 BETRIEBS-BERATER [THE OPERATION CONSULTANTS] 1617, 1617–21 (1977).

[11] "Overview" is a technique used in the application of law. In the context of applying the constitution to solve a constitutional problem, it means reaching a conclusion not through one or more particular constitutional provisions, but through the Theories of State and an overall view (*Gesamtschau*) of the constitution. According to Frotscher's introduction, this technique was used in the "*Cologne Opinion*" (*Koelner Gutachten*), or "*Common Opinion*" (*Gesamschaftsgutachten*). "*Korlner Opinion*" was drafted by three famous professors (Badura, Rittner and Ruethers) and submitted by enterprises to challenge the *Codetermination Act*. It did not point to any specific provisions, but instead reached the conclusion of unconstitutionality based on the "institutional connection of the economic constitution" (*institutionellen Zusammenhang der Wirtschaftsverfassung*) and "the overall order and protection mechanism formed by various basic rights" that had great significance in German economic and labor order, *see* Frotscher, *supra* note 8, at 7 n.6,. Frotscher also opined that, the "overview" technique has its earlier root in the judgment of the

that the relevant articles and their meanings imply that the social market economy (*soziale Marktwirtschaft*) has been designated by the *Basic Law* to be Germany's fundamental economic system.[12] Nipperdey did not invent such a "social market economy" theory out of nowhere. Instead, he aligned himself with the then highly influential economic theory of Ordoliberalism (*Ordoliberalismus*), which was led by Walter Eucken and Franz Böhms, who were both professors in the Freiburg University at that time. This economic theory is also referred to as the neo-liberal theory (*Neoliberale Theorie*), the "Freiburg School" (*Freiburger Schule*), or the Freiburg School of National Economy (*Freiburger Schule der Nationaloekonomie*). Supporters of the Freiburg School are cognizant of the severe social problems that will arise if the national economy is entirely left to the "invisible hand." They support government intervention in preventing over-concentration of economic power, i.e. economic monopoly, on the ground that the market's private power, similar to the state's public power, can also disturb free competition in the market. The Freiburg School is still part of the school of liberalism, with small adjustments to the traditional theory of classical liberalism, because it also recognizes full market competition as the foundation of the economy, while defending the government's role in maintaining market order, rather than in regulating the economy by way of self-engagement or intervention in specific economic activities. The key words of the Freiburg School are "privatization" and "deregulation" (*Deregulierung*).[13] Thus, their theory suits Nipperdey's argument

1954 *Investment Aid* Case (*Investitionshilfe-Entscheidung)*. This case will be briefly introduced later in this Article.

[12] Hans Carl Nipperdey, *Die soziale Marktwirtschaft in der Verfassung der Bundesrepublick* [*The Social Market Economy in the Constitution of the Federal Republic of Germany*], *in* 10 SCHRIFTENREIHE DER JURISTISCHEN STUDIENGESELLSCHAFT KARLSRUHE [SERIES OF KARLSRUHE LEGAL STUDIES SOCIETY] 5 (1954). In 1960, Nipperdey published his article *Economic Constitution and Federal Constitutional Court* (*Wirtschaftsverfassung und Bundesverfassungsgericht*), in which he further explained his position; afterwards, in an effort to correct people's misunderstandings about him, he published a second version of this article in 1961, titled "Social Market Economy and Basic Law" (*Soziale Marktwirtschaft und Grundgesetz*), and in 1965, he published a third version.

[13] *See generally*, WALTER EUCKEN, GRUNDSAETZE DER WIRTSCHAFTSPOLITIK [PRINCIPLES OF ECONOMIC POLICY] (1953); 德国秩序政策理论与实践 [THE THEORY AND PRACTICE OF THE GERMAN REGULATORY POLICY], (何梦笔 (Carsten Herrmann-Phillath) ed., 庞健 & 冯兴元 (Pang Jian & Feng Xingyuan) trans.,

perfectly.

C. Opinions of The Federal Constitutional Court

The Federal Constitutional Court of Germany clearly disagreed with Nipperdey. Several months after Nipperdey delivered the speech, the Federal Constitutional Court was finally able to issue its opposing opinion in the famous *Investment Aid* case (*Investitionshilfe-Entscheidung*), where the Court found that the principle of neutrality shall govern the issue of economic system in the *Basic Law*.[14]

The *Investment Aid* Case involved *the Law on Investment Aid for Industrial Economy* (*Gesetz über die Investitionshilfe der gewerblichen Wirtschaft*) (hereinafter the "*Investment Aid Law*"), a law issued by the federal government on January 7, 1952. According to the *Investment Aid Law*, the industrial and commercial sector was obliged to raise 100 million Deutschmarks at once and loan these funds to the coal, steel, energy production enterprises that had been running into difficulties for their severe lack of investment. Specifically, relevant institutions devised a plan: each enterprise was required to calculate its amounts of payable funds based on the its profit and revenue during the preceding two years, and then report the calculation result and pay the funds to the financial department with appropriate jurisdiction. This is a legal obligation, so should any enterprise refuse to perform or improperly perform that obligation, the financial department was authorized to determine the amount of payable funds for them. The benefited enterprises, after receiving the funds, were required to issue stock or bond of the same value, and the contributing enterprises could claim the stock based on the payment receipt. Before a contributing enterprise claims the stock, the annual interest of the contributed payment was 4%, and 5% beginning from the 18th month from payment of fund.

Needless to say, the fund-raising required by *Investment Aid*

2000)；冯克利 [Feng Keli], *Translator's Comments* to GEOFFREY BRENNAN & JAMES BUCHANAN, 宪政经济学 [CONSTITUTIONAL POLITICAL ECONOMY], at 6–7. (冯克利等 (Feng Keli) et al. trans., 2004).

[14] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court of Germany] July 20, 1954, 4 BUDESVERFASSUNGSGERICHTSENTSCHEIDUNG [BVERFGE] 7 (Ger.).

Law was coercive, and was therefore subject to strong protest of the entire industrial and commercial sector. Administrative litigations continuously initiated in various states, and the disputes ultimately merged into one before the Federal Constitutional Court. Hundreds of business owners challenged the constitutionality of the *Investment Aid Law* on various grounds,[15] including: that it violated article 1 of the *Basic Law* that protects human dignity because it forced some enterprises to finance others; that it violated the right to freedom of action in article 2(1) because it had deprived enterprises' autonomy; that it violated the protection of property in article 14 because the insufficient consideration and compensation for the fund raised constituted "deprivation of property"; that it violated the negative freedom of assembly in articles 2 and 9 because it forced enterprises to purchase other enterprises' stock or bonds; that it violated the principle of equality because it financed some enterprises at the cost some others; that it violated the legislative mandate in articles 74(1) and 115; that it violated the basic right of civilian and enterprise because a mere adherence to the principle of legislative reservation was not adequate to pass such a law, a specific constitutional authorization should be required, but it lacked such an authorization; that it violated the basic principle of Rule of Law (*Rechtsstaat*) because of the retroactive nature of its means of calculation. Among these various reasons, there was one submission relevant to our analysis. This submission directed towards the principle of market. That is to say, it argued that the *Investment Aid Law* was unconstitutional because it used non-market method and violated the economic order set forth by the *Basic Law* (i.e. the Economic Constitution).

The Constitutional Court denied all these submissions (its arguments are omitted here because they are irrelevant to this Article). Regarding the allegation of "violation of economic system" and "non-market means," the court made its famous declaration of "neutrality in economic policy" (argument D/5 of

[15] *See generally* 克劳斯·施莱希、斯特凡·科里奥特 (KLAUS SCHLAICH & STEFAN KORIOTH), 德国联邦宪法法院：地位、程序与裁判 [THE FEDERAL CONSTITUTIONAL COURT: POSITION, PROCESS, DECISIONS], at 198–283. (刘飞 (Liu Fei) trans., 2007).

the opinion)[16]:

> "The Basic Law warrants neither the neutrality in economic policy nor some 'social market economy' that uses market method only." The "neutrality in economic policy" denotes only that the framers of the Constitution did not endorse any specific economic system. This means that the legislators could adopt any economic policy they deemed necessary, so long as it is consistent with the specific provisions in the Basic Law. The present economic and social order is permitted by the Basic Law, but it is by no means the only permissible order. The order is based on the decision of the legislators on economic and social policy, which can be replaced or interrupted by another decision. Therefore, the discussions of whether the Investment Aid Law is consistent with the economic and social order, and whether the regulatory means fits the market economy is meaningless in the sphere of Constitution.[17]

In 1958, the Federal Constitutional Court re-stressed the Constitution's neutral stance on economic order in the *Pharmacy* case (*Apotheken-Entscheidung*). [18] The petitioner in this case, Mr. A, is a pharmacist with a practice qualification. After being an employee for 10 years, Mr. A planned to open a pharmacy in the Traunreut county of Bavaria state. In 1956, Mr. A applied to relevant authorities for an enterprise license (*Betriebserlaubnis*), but was rejected. Mr. A satisfied all the subjective conditions

---

[16] According to the judgment's wording and scholars' relatively consensual understanding, the "neutrality in economic policy" used in the judgment does not mean that the Constitution does not care about this question. At least the Constitution has outlawed the extreme planned economy and the extreme laissez faire. Accurately speaking, the legislature is entitled to adopt any economic policy it deems appropriate only when it does not violate the distribution of legislative power between the federation and state, the rule of law principle, and the *Basic Law* provisions on protecting the basic rights of citizens. *See* Badura, *Wirtschaftsverwaltungsrecht*, *supra* note 1, at 262–65; 施利斯基 (SCHILESKY), *supra* note 1, at 20–24; FROTSCHER, *supra* note 8.

[17] BVERFGE, *supra* note 14.

[18] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court of Germany] June 11, 1954, 7 BUDESVERFASSUNGSGERICHTSENTSCHEIDUNG [BVERFGE] 377 (Ger.).

required by the *Bavarian Apothecary Act* (*Bayerisches Apothekengesetz*), namely that a pharmacy operator must (1) hold a pharmacist qualification certificate, (2) have an experience practicing as a pharmacist for a certain period, (3) be a German citizen, and (4) have a dependable character and be suitable for operating a pharmacy. However, article 3(1) of that law also provided two objective requirements: (1) the newly established pharmacy must meet the public interest, and (2) the petitioner must have an economic basis as an assurance, and the newly established pharmacy must not influence the existing pharmacy owners' economic basis. Mr. A's petition was rejected on these two objective requirements, as the newly established pharmacy would not meet the public interest because there were already sufficient pharmacies in this region, and Mr. A had no economic basis as an assurance, and allowing his new business would impact the economic assurances of the neighboring pharmacy owners.

Following the failures in an administrative review and an administrative litigation, Mr. A petitioned to the Federal Constitutional Court on the ground that article 3(1) of the *Bavarian Apothecary Act* and the rulings of the administrative agencies and of the administrative court violated the occupational freedom provided in article 12 of the *Basic Law*, and the petition finally succeeded. Interestingly, although Mr. A did not assert a violation of market economic order as a basis of argument, the Federal Constitutional Court, in analyzing whether the legislators of the *Bavarian Apothecary Act* had exceeded their legislative discretionary power, incidentally mentioned that:

> We can be entirely certain that, the only reason to restrict legislative discretion is the protection of basic rights. On the issue of economic policy, the *Basic Law* remains neutral (BVerfGE 4, 7). Specifically, the legislature may adopt any policy it deems proper for a realistic need, so long as it respects the *Basic Law*, especially the basic-right provisions (BVerfGE 4, 7, 17–18). Therefore, a legislation promulgated based on article 12, section 1, sentence 2 of the *Basic Law*, would not be constitutionally problematic simply because that legislation is in conflict with other economic policies, or certain national economic theory

> which bases on such economic policies. That the judge disfavors the economic policy in a certain legislation is an even less persuasive reason to find unconstitutionality.[19]

As can be seen from these two judgments, in examining the constitutionality of certain economic legislations, administrative rulings, or judicial decisions, the Federal Constitutional Court adhered only to the bottom line of basic rights, and firmly set aside restrictions of any economic theory. The legal academia was touched by this position of the Federal Constitutional Court, and adopted it as the prevailing opinion. Its direct consequence being: if anyone challenges the constitutionality of a certain legislation, authorized legislation, autonomous protocol or relevant judicial decision based on infringement on economic freedom, an assertion of a "violation of market economic institution" will not be supported. His or her silver lining must be searched in the provisions of specific basic rights.[20]

IV. THE SIGNIFICANCE OF THE DEBATE ON ECONOMIC CONSTITUTION

From some German textbooks related to State Law (*Staatsrecht*),[21] constitutional law, economic law, economic administrative law, the author learned about the history of this "Debate on Economic Constitution" in the 1950s, the various opinions of scholars, and the sharp disagreement between the Federal Constitutional Court and Nipperdey. All the materials, however, were conclusive opinions, and their reasoning was mainly the technique of constitutional application. An overall impression summarized from those materials, therefore, is that different schools, starting from the same historical background and the same constitution, through their respective verbal tricks,

---

[19] *Id.*

[20] 施利斯基 (SCHILESKY), *supra* note 1, at 21. The explanation of R. Schmidt is quite apt: The Economic Constitution that the Federal Constitutional Court failed to specifically define is actually the aggregated scope of all the basic freedom and rights of citizens. The legislature cannot violate these basic rights in regulating the economy.

[21] The part of German constitutional law that deals with the rules that establish the government and regulate the relationship between different institutions of government.

reach their respective opinions. For example, relying on article 2, section 1, the catch-all provision of constitutional basic rights,[22] and the freedom of occupation in article 12, section 1, Nipperdey managed to deduce a "market economy institution," arguing that the "Principle of Social State" grammatically modifies and limits "market economy," while the "market economy" is the essence. Facing the same materials, other scholars failed to deduce such a meaning, or only deduced a "mixed" system.[23] On the other hand, while the Federal Constitutional Court strongly opposed Nipperdey's opinion, it only stated its own opinion without specific illustration as reflected in the above-quoted judgment.

Apparently, this debate is connected to the basis used in constitutional review: if the court accepted Nipperdey's opinion, then "social market economy" would become a legal norm, and would be used as an important standard in examining the constitutionality of an economic legislation. Otherwise, the grounds for unconstitutionality can only be found in the specific provisions of the *Basic Law*. The good thing about the latter approach is that the Constitutional Court, as well as all the other courts, was exempted from having to closely examine the "social market economy."

However, is this serious debate merely about a technical question of constitutional application? Or, maybe the debate has a more profound significance. With such questions and guesses, the author recently read Nipperdey's pamphlet *Social Market Economy and the Basic Law* re-published in 1965,[24] and finally came

---

[22] Art. 2(1) of the *Basic Law* provides that "[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." This provision grants individuals a broad freedom of action (*Handlungsfreiheit*). Gradually, through judicial practice and academic interpretation, this provision was developed into a "catch-all" provision of basic rights. That is, where an individual considers that one of his or her critical interest was violated, but such interest is not expressly listed as a basic right in the *Basic Law*, she can allege a violation of basic right based on art. 2(1) of the *Basic Law*. Article 12(1) of the *Basic Law* provides that "[A]ll Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation (*Berufsausuebung*) or profession may be regulated by or pursuant to a law."

[23] Tettinger, *supra* note 10.

[24] Nipperdey, *supra* note 12.

to understand that Nipperdey was unconfident as to whether the basic-right mechanism of the constitution could prevent Germany's economic order from leaning again towards a farfetched "state interventionism." He, therefore, took every effort to tie the economic order in the *Basic Law* to the "Ordoliberalist economic institution" that he advocated. If his opinion were accepted by the legal profession, then no matter how a court applying the constitution expands the connotation of "sociality," the intervention [of state] would still be limited. Apparently, Nipperdey had seen that "the Principle of Social State" could tolerate very broad economic intervention. His concern is understandable, as we have seen that under the Weimar Constitution, the final result was a disastrous nationalist planned economy, and that is not what Nipperdey and a considerable number of scholars would like to see. Therefore, Nipperdey wished to use "market economy" to restrain the connotation of "social."

Nevertheless, how come the judges in the Federal Constitutional Court could not tolerate a few abstract words? This interpretation was merely an academic one from a jurist, so if the court did not want to adopt it, would it be more appropriate to simply ignore it?

Here, it is necessary to give some background information regarding the relationship between Germany's judicial practice and legal study. The primary mission of jurisprudence includes, *inter alia*, the study of the application of legal norms, the meaning of individual norms and the distinction between related norms (overlapping norms), as well as the jurisprudential rationale behind every norm. The purpose of such study is to better serve the legal practice, thereby living up to the notion that "[t]he legal study is a practical science." In this respect, there is no essential distinction between civil law and common law systems despite the fact that legal norms mainly derive from case law in common law countries and from statutes in European continental countries. Legal study whose focus is on the application of laws, cannot run from the task to examine decisions resulting from judicial practice, especially court judgments, in order to know whether laws are applied properly, so that affirmation or criticism can be given. And the outcome of such examination is supposed to influence legislation when the timing is right, by supporting proposals to enact new laws or amend existing laws. This can correct the normative

defects that judges cannot overcome within the limits of their adjudicative discretion, namely through methods such as statutory interpretation, gap filling and reconstruction. Although judges' interpretation of the law has "final effect," they cannot ignore jurists' opinions for several reasons. First, litigants often cite the views of jurists to defend themselves, forcing the judge to respond. This is a basic requirement of judicial adjudication in nations ruled by law. Secondly, judges themselves welcome jurists' to join the discussion on questions regarding application of laws. On one hand, jurists can help better analyze the meaning of individual legal norm as well as the relationship among various norms.[25] On the other hand, jurists' opinions can help examine defects of judicial decisions from an "outsider" perspective. Although they cannot correct decided cases, but they may prevent the same defects from occurring in future cases. If we admit that the judicial works in every country are subject to dual pressures caused by large caseload and limited resources, then there is no reason to disapprove of a "judicial inspection" team that spreads over the whole country and consists of numerous jurists, whom are funded by the state? This understanding leads to amicable interactions between the German legal academia and the judiciary.[26] As a matter of fact, Chinese judges often seek opinions from jurists on how to handle individual cases, even though such practice is neither formally recognized in official documents nor reasonably reflected in adjudicative documents.

Back to this Article, in the *Investment Aid* case the petitioner did raise the argument that the *Investment Aid Law* constituted a breach of the "social market economy" system, thus the court cannot stay away from Nipperdey's opinion that the "*Basic Law* did establish social market economy of Ordoliberalism." However, the judicial response to the parties' arguments is not necessarily one or the other. The most ingenious way to avoid such tough

---

[25] *See* 卡尔·拉伦茨 (KARL LARENZ), 法学方法论 (METHODOLOGY OF LAW), (陈爱娥(Chen Ai'e) trans., 2005) (Section 3 of Chapter 4 "The overlaps of most provisions and norms," at 146–49, Section 3 of Chapter 7 "internal system," at 348–55.).

[26] *See generally* Ye Bifeng, *Foreword* to PIHLIP KUNING, ADMINISTRATIVE LAW AND ADMINISTRATIVE LITIGATION LAW PAGE (2007). English translation *available at* http://huang20000hui.fyfz.cn/blog/huang20000hui/index.aspx?blogid=422505 (last visited May 4, 2009).

questions, proficiently used among senior judges in many countries, is to issue an opinion that says "The question raised is immaterial to the present case, therefore the Court will not analyze it in detail." Faced with Nipperdey's social market economy theory, judges in both the *Investment Aid* case and the *Pharmacy* case did not want to give vague response and hide their opinions as usual. Even in the *Pharmacy* case, which has nothing to do with this question, judges actively chose to repeat the conclusions in the *Investment Aid* Case. Why?

If historical assumption is permitted, assuming that Nipperdey did not enjoy such a high prestige in the legal academia, or that he left room for discussion in the report, meaning instead of firmly asserted that "if the economic legislation and policies deviate from market economy of Ordoliberalism, amendment to the constitution is the priority," he mildly state something like "when balancing 'social' and 'market economy,' the latter should be given more preference." In that case, the Federal Constitutional Court may not have to directly tackle Nipperdey's opinions. Even if the Federal Constitutional Court disagreed with the boundaries of government intervention given by Nipperdey, there is no need to set a "neutral principle" which seems suitable for any economic system but is practically impossible. Does the *Basic Law* permit planned economy? Nontheless, it is possible to consider a "social market economic order" with rather open contents. In fact, the Federal Constitutional Court was also unclear about the boundary for government intervention under the "Principle of Social State." It also needed to wade the river by groping for stones. However, history cannot be rewritten.

Assuming the role of judges in the Federal Constitutional Court, how should we deal with the argument that "the *Investment Aid Law* violates the principle of social market economy" as supported by Nipperdey's views? Apparently, the Court rejected such argument in its judgment, but conclusion alone is not sufficient, it must be justified by legal analysis. Moreover, once the court expressed opposition to the Ordoliberalism, it needs to answer another unavoidable question: Which economic system is favored by the Court?

To judge which economic system is better, judges are required to tell apart the great thoughts and defects of economists. Apparently, judges and jurists are not competent to do that. The

Federal Constitutional Court had been pushed to face with Nipperdey's challenge. They responded by holding that when judging the constitutionality of a legislation, "it will not be considered constitutionally flawed on the ground that it is inconsistent with other economic policies, or a particular national economic theory that is based on such policies." (see above the *Pharmacy* case) As a result, the debate on Economic Constitution Law was blocked outside the constitutional legal analysis.

Perhaps, this is the most sensible choice. Once the economic norms in the *Basic Law* are linked with a fixed economic model and its theory, the specific contents can be decided only by economists. As mentioned above, judges and jurists will not be able to revise economic theories as efficiently as economists. As a result, judges would end up following economists' work. Even worse, if judges oppose the theories of authoritative economists, they have to explain why the non-authoritative theory should prevail over the authoritative theory. However, judges can do nothing but obtain an appraisal report from other economists. Consequently, a constitutional court's possible function in providing relief in the economic field will be greatly weakened.

Judges at the Federal Constitutional Court are forward looking. They not only saw the danger, but also the division of work and responsibilities between judges and economists. [27] Economists can fully explore the economic order on the purely abstract and theoretical basis, without the risk of bearing any legal consequence for their miscalculation or unwise advice. For the politicians who followed their orders, the worst result is to step down from power. The role of judges is rather different. Their focus is to maintain the legal order, whose fundamental value is institutional stability and security. If theories of economics or other

[27] Interestingly, reading the dissenting opinion written by Justice Holmes in the famous *Lochner v. New York*, the author finds a sentence that coincides with the German Federal Constitutional Court's refusal to recognize that its constitution endorses any economic system: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," *see Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., Dissenting). Moreover, Justice Black, in his majority opinion in *Ferguson v. Skrupa*, made the same declaration in 1963: "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' ... Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." *See Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963).

social sciences can freely enter the legal context without any paradigm shifts, the stability of law will be destroyed.[28]

Based on above considerations, the Federal Constitutional Court insists on keeping distance with economists, asserting their freedom to adopt the economists' theories rather than obligations to take orders from them. In this way, the Federal Constitutional Court maintains its discretion in the adjudicative process: the primary basis for determining whether the economic power exercised by the state or the society exceeds constitutional limits should be the economic rights provisions in the *Basic Law*, whose interpretations fall within the expertise of constitutional scholars.

V. INSPIRATIONS FROM THE GERMAN DEBATE ON ECONOMIC CONSTITUTION

What use is the German Debate on Economic Constitution in the 1950s in helping us understand and apply our own Economic Constitution, especially the constitutional provisions relating to economic system? The direct connections are too obvious. The initial question would certainly be: In light of the German experience, should China abandon the economic system provisions? When answering this question from an what-ought-to-be point of view, jurists who believe that legal principles should not be excessively restricted by economic principles are mostly willing to learn from the German experience. They also agree that the constitutional rights provisions should be the primary basis for reviewing the constitutionality of economic power in the coming future. This is also the view of the author.

However, we are not living in an era without constitutional arrangement on the economic system. As a result of the seventh amendment in 1993, article 15(1) clearly states that, "[t]he state

[28] The constitutional practice proves that the constitutional judges made a wise decision. In 1967, a provision that requires the federation and states to maintain an overall economic balance in their economic plans was added into art. 109, § 2 of the *Basic Law*. This economic theory was developed based on Keynesian theory and convinced Schiller, then minister of the Ministry of Economy, who used his personal influence to successfully convinced the legislature and added this provision into the constitution. This provision, though fairly intelligible to economists, troubled constitutionalists significantly, because they were unable to ascertain whether this duty had been fulfilled, or even whether those in power took this duty seriously. Frotscher, *supra* note 8.

practices socialist market economy." This legislation arrangement is very different from that of the German *Basic Law*. The *Basic Law* contains no similar provision. Scholars like Nipperdey saw a system of "socialist market economy" from the "comprehensive observance" of the Principle of Social State in article 20 and a number of economic rights provisions in the *Basic Law*, and were more guided by their own political and economic convictions than the *Basic Law* (see "Section 1 Part II" above). The Federal Constitutional Court, in terms of legal interpretation, clearly refused or even despise this "comprehensive observing" technique which is similar to the mathematical equation of "A + B = C." In the judgments of the *Investment Aid* case and the *Pharmacy* case, the Federal Constitutional Court directly pointed out that "the *Basic Law* itself does not establish any economic system." without further explanation, which in my opinion, suggests that the Court considered it unnecessary to defend its conclusion. In sum, the Federal Constitutional Court rejected the existence of any economic system provision at the level of constitutional application and interpretation without any difficulty. The only possible pressure came from Nipperdey's elevated status within the legal world. Nevertheless, under normal circumstances, if jurists' opinions are not supported by legal dogmatism or internalized by judges, then they cannot defeat the judicial authority.[29]

The text of the *Basic Law* does not include economic system provisions, indicating that in addition to the warning that judicial practitioner should maintain an appropriate distance with economic theories, there is no direct technical support for us to refuse to apply article 15(1). We must find the most appropriate method

[29] Scholars, however, do not have to subject themselves to judicial authority in their studies. They may well insist on their view and make it the "minority opinion" (*Mindermeinun*) on this matter; should it attract numerous followers; it may even become the "prevailing opinion" (*herrschende Meinung*). As time passes by, their view might be finally accepted by the judicial system, reaching the consensus between the academia and the judiciary. Matters like this occasionally happen, but Nipperdey's view in the Debate on Economic Constitution has been remaining a minority opinion among German scholars, because his rigid "A+B=C" interpretation had become a negative example on constitution interpretation. *See* Franz Jürgen Säcker, *Die soziale Marktwirtschaft—ein wirtschaftsverfassungsrechtliches Leitbild im Wandel der Zeiten: Von Hans Carl Nipperdey zu Klaus Adomeit*, *in* FS FUER ADOMEIT 661–72 (Luchterhand Verlag 2008).

within the framework of existing constitutional theories and constitutional application techniques. For a constitutional text that has legal effect as a whole, it is not easy to screen out which provisions have the legal effect, which are merely declaratory, especially in the main body of the text rather than the preamble. The purpose of such screening is to allow us to understand which provisions should be excluded from application. This is a process that requires legal reasoning and analysis. Unfortunately, I have to admit that at present we do not have sufficient theoretical and technical basis to exclude the legal effect of article 15(1) of the *PRC Constitution*.

The dilemma is that neither denying nor admitting the legal effect of article 15(1) is easy. Even if the provision is given minimum legal effect to constrain legislators, we also need to inquire, how to understand the scope of such effect? In other words, since the core issue of Economic Constitution is to explore the boundaries of state's economic intervention, how could we find the possible boundaries from the abstract text such as "socialist market economy"? To determine the boundaries—it seems we are back to the starting point, should we take orders from some authoritative socialist market economists or learn from the German experience, in which the Federal Constitutional Court firmly rejected the use of economic theories without any paradigm transformation, and simply treated those theories as references available to the court. What is the difference between China's "Socialist market economy" and Germany's "market economy"? What are the differences between China's "Socialist State" and Germany's "Social State"?

A question more realistic and more challenging is, what is the relationship between article 15(1) (the "Socialist Market Economy Provision") and article 6 (the "Ownership Provision") of the *PRC Constitution*? The latter provision uses the term "economic system" twice, so at least literally, this provision is also an economic system provision:

> Article 6 The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of from each ac-

> cording to his ability, to each according to his work.
>
> In the primary stage of socialism, the State upholds the basic economic system in which the public ownership is dominant and diverse forms of ownership develop side by side and keeps to the distribution system in which distribution according to work is dominant and diverse modes of distribution coexist.[30]

These two "economic system provisions" conflict with each other in both their wording and their substance, thus these provisions will be considered overlapping norms in their application. Therefore, we must find out the hierarchy between the two, and determine which one, judged from its legislative technique, is a more general provision in nature and consequently can be considered an economic provision with a nature of general principle.

This determination work is realistic and challenging because the great constitutional debate caused by the *Property Law (Draft)* in 2005–2006 clearly placed this work in front of every scholar that cares about the implementation of the *PRC Constitution*. In the great debate about whether the *Draft* was unconstitutional due to its equal protection on state-owned property and private property, Prof. TONG Zhiwei, an important scholar of constitutional law, arguing for differentiated protection, tended to deem article 6 of the *PRC Constitution* as the economic system provision,[31] whereas Prof. LIANG Huixing, a civil law authority arguing for equal protection, insisted that article 15(1) of the *PRC Constitution* is the most basic economic system provision.[32] Both sides of the debate focused on expressing their own views, but ignored the fact that reasonable arguments of the other side had already jeopard-

---

[30] 中华人民共和国宪法(2004 年修正) [CONST. OF THE PEOPLE'S REPUBLIC OF CHINA (amended 2004)] art. 6, CLI.1.51974(EN) CHINALAWINFO.

[31] 童之伟 (Tong Zhiwei), 物权法(草案)该如何通过宪法之门[*How Could the Property Law (Draft) Pass the Gate of Constitution*], 法学 [LEGAL SCI.], issue 3, at 4 (2006); 童之伟 (Tong Zhiwei), 再论物权法草案中的宪法问题及其解决路径[*On the Constitutional Question in the Property Law (Draft) and Its Solutions*], 法学 [LEGAL SCI.], issue 7, at 3 (2006).

[32] 梁慧星 (Liang Huixing), 谁在曲解宪法、违反宪法？——正确理解宪法第十一条、揭穿个别法理学教授的谎言[*Who is distorting and violating the Constitution?—Correctly Understand Art. 11 of the Constitution and Exposing A Certain Law Professor's Lies*], *in* "巩献田旋风" 实录——关于<物权法（草案）>的大讨论 [MEMOIR OF THE "GONG XIANTIAN TORNADO"—THE DEBATE ON THE PROPERTY LAW (DRAFT)] 334–46 (Liu Yiqing eds., 2007).

ized the persuasiveness of their own arguments. Finally, this constitutional crisis was resolved through a political, i.e. legislative manner, and the debate, though unsettled, eventually ceased to attract any attention. The author here also has an opinion on this topic, but would rather discuss it in detail in another article to limit the length of this Article.[33]

In fact, as far as the author is concerned, there remain numerous questions to be asked: the starting point of the supporters of equal protection on properties is that the principle of equality is a requisite content of market economy; in other words, an economy without equality cannot be called "market economy." Thus, is there any other "requisite" content of market economy out there, and, what normally "requisite content" of market economy would cease to be requisite because of the "socialist" requirement? For those arguing for unequal protection, it must be questioned that why the ownership provision should not give way to the market economy provision. In addition, no matter which provision is finally granted the title of "economic system provision," there is a question that cannot be avoided: what is the relationship between this provision and other economic provisions, e.g. the provision concerning the state's exclusive ownership of special resources (articles 9–10), the property protection provision (articles 12–13), the enterprise system provisions (articles 16–18), and the labor system provision (article 42)? In other words, how to reconcile various single economic provisions under one constitutional economic system provision? Further, how should the various Economic Constitutional provisions be organized? What is the relationship between the Economic Constitution and other constitutional provisions?

The questions can be expanded even further. These questions, however, cannot be answered abstractly, nor can this Article solve them. This inability is not only due to the limitation on length, but more importantly, is due to the fact that we lack complementing

---

[33] *See generally* 黄卉 (HUANG HUI), *supra* note 27, at 74–75. The author tends to take article 15(1) as generally principled economic system provision, and suggests deeming article 6 and subsequent economic provisions, e.g. ownership provisions in articles 6–8, provisions concerning the state's exclusive ownership and its protections in articles 9–13, and enterprise institutions in articles 16–18, all as (partial) specifications of article 15.

institutions to implement the *PRC Constitution*, and it is the extent of constitution implementation that determines the level of relevant theoretical research.

VI. METHODOLOGY AS CONCLUSION: COMPARISON OF LAWS AND CASE STUDY

What, then, is the approach and possible breakthrough for a deeper research? This question involves methodology. In the author's opinion, the most effective approaches nowadays to break through in the field of Economic Constitution, and to push forward the whole normative constitutional research, are comparative legal study, and case study.

In an exploration for a Chinese answer to a Chinese question, we are not bound, of course, by systems, theories, and studies of Germany or any other country; however, foreign experience can be borrowed, and for some reasons, comparative law has become a basic method of legal studies. Borrowing foreign experience, whether positive ones or negative ones, will inspire our work and reduce costs. For example, the German Debate on Economic Constitution in the 1950s has helped the author to realize that, a constitution interpreter who is restricted by certain economic theories in interpreting the Economic Constitution would cause legal remedies to be excessively passive. Such a passivity in turn causes the author to wonder, is it possible to avoid relevant theories of economic system when the *PRC Constitution* has clearly provided that "[t]he state practices socialist market economy"? Moreover, in converting between the economic paradigm and the legal paradigm, is it possible to limit the constitutional judgment's reliance on economic theories within an acceptable scope? It is crucial for comparers of laws to remember the main reason, if not the only reason, of comparison: to facilitate the legal construction of our own country. Otherwise, we would be easily lost in exotic sentiments of foreign laws.

For the legal study, an applied study, case study is largely both a method and a purpose. By starting from specific cases to reflect and analyze the legal norms that are potentially applicable, we would be able to better understand their requirements and contents, and better discover their uncertainty; thus, a norm can only be understood in its application. Here, a Chinese perspective

should also be emphasized, and understanding the Chinese constitution necessitates Chinese constitutional cases. The incident of the *Property Law* is a good example: before that incident, discussions on the market economy provision and the public ownership provision could freely cite academic resources of any time and any country, and make arguments either generally or specifically; after all the discussions would not harm anyway. After the incident, however, questions and answers were no longer ample or vague, because a real-world question has been placed in front of every discusser: one side was citing article 6, the public ownership provision of the Constitution to oppose the equal protection adopted by the *Property Law*, while the other side was citing article 15, the market economy provision to support it. How should such a contradiction be solved? In this great debate with a clear purpose, the academia of constitutional law, together with that of civil law, held a forum of constitution application and constitutional review; and in practically understanding constitutional theories and applying the theories to reality, scholars had sufficiently displayed their capability and incapability; the incident also enabled other attentive persons in the legal profession to realistically recognize and understand relevant provisions in the *PRC Constitution*, hence the abstract constitutional provisions were gradually vivified. The function of case study here is more than significant.

Now, we can continue to question, under the topic of methodology, the manner and scope of the case-study method: after such a heated constitutional case that tapped significant amount of legal resources, in what manner should we normalize the constitutional knowledge and experience gained, in order to provide theoretical and technical support for resolving later constitutional crises, and in order to release later constitution interpreters from having to start over?

We have our own subtle understandings and manners to handle constitutional questions. The final say on the case of *Property Law* was from the National People's Congress, which declared that an equal protection on both public and private properties is constitutional by officially passing the *Property Law*, merely failing to directly express this meaning due to political and legislative strategy. The constitutional crisis was indeed solved effectively. However, we must also admit that we are

losing those precious insights and opinions about important substances like the constitutional economic system provision and those consensuses of constitutional norms. This phenomenon is unavoidable, because legislation, in the nature of its work, does not comprehensively analyze the nature and content of constitutional provisions; nor is it the most appropriate tool for constitutional interpretation. For example, legislation cannot possibly respond to questions like the hierarchy among Economic Constitutional provisions, though it must have formed its understanding about relevant provisions as required by "legislating in compliance with the Constitution."

The German Debate on Economic Constitution and the German constitutional court's cases like the *Investment Aid* case and the *Pharmacy* case have taught us that, the difficult legal thoughts and progress in perception about how to apply Economic Constitutional provisions, as well as other legal norms, can be materialized in the form of adjudicative documents. Judicial decisions, in adjudicating specific cases, grant the law-application and arguments some kind of authority because of the decisions' authoritative nature. The decisions thus direct legal studies into an organized process: conscientious scholars would begin another round of analysis and research, probably inspired by a later similar case, based on the conclusions and arguments of the judicial decisions; rather than evading issues, disguising their avoidance of making legal judgments with the excuse of "pursuing the truth," or ignoring their major opponents' opinions because of pride. The relationship between constitution researchers and reviewers thus become an interaction of combining theories with reality; this interaction accumulates judicial practical experience and academic research in the form of case law, and at some point, will also enter into legislation when the time is ripe. In this interactive structure of legislature, judiciary, and academic studies, the function of case study would apparently be maximized, which is a quite desirable prospect that is worth borrowing and exploring.

Nonetheless, we have our unique history (perhaps millstone) and understanding concerning legal culture, legal theories and constructions, and the whole modern concept of rule of law. More crucially, whether we should and could successfully borrow foreign experience would depend on our constitutional reality. The reality is, first, despite the fact that the PRC Constitution's

text has vested the power to supervise its implementation in the National People's Congress and its Standing Committee (articles 62(2) and 67(1)),[34] and a power of constitutional review can be theoretically inferred, in reality this power has never been exercised at the level of constitutional review, the academia even diverge on whether such a power really exists; second, adjudicative documents have always been adopting a "minimalist" style that rarely reflects the true process and true reasons of the judgment, and even if a few judgments contain excellent reasoning and conclusions, since we have not yet established a system of *stare decisis*, alleged guiding-case system[35] necessary for civil law countries, they are not sure to influence later judgments, let alone binding them; third, though the academia has been changing its habit of ignoring legal practice into occasionally participating in discussing difficult cases or spotlight cases, scholars have not widely realized that the major subject-matter of legal studies is the existing law and its application, and the consciousness of a positive interaction between scholars and judicial personnel has just started. To summarize, we are on a different stage in the construction of rule of law from other countries, we have huge practical and theoretical work to do to find out whether and how to borrow their experience.

Back to methodology, comparative law and case study from the perspective of Chinese law should both be emphasized; otherwise, in trying to analyze the scope of our economic provisions under the stimulation of the German Debate on Economic Constitution, a highly similar foreign case, any legal thinking would, due to the fear of giving overly arbitrary judgments, stop after raising questions, as described in this Article. Of course, the

---

34 中华人民共和国宪法(2004 修正) [CONS. OF THE PEOPLE'S REPUBLIC OF CHINA (2004 amended)] art. 62, § 2, art. 67, § 1, CLI.1.51974 CHNALAWINFO.

Article 62 provides that "the National People's Congress exercises the following functions and powers: . . . (2) to supervise the enforcement of the Constitution; . . . ." Article 67 provides that "the Standing Committee of the National People's Congress exercises the following functions and powers: (1) to interpret the Constitution and supervise its enforcement; . . . ."

35 *See generally* 黄卉 (Huang Hui), 关于判例形成的观察和法律分析——以我国失实新闻侵害公众人物名誉权案为切入点 [*Observations and Legal Analyses of the Formation of Precedents: Starting from Cases on Defamation of Public Figures Caused by Misreported News in China*], 华东政法大学学报 [J.E. CHINA U. POL. SCI. & LAW], issue 1, at 114 (2009).

construction of necessary legal conditions cannot be completed suddenly, so every legal professional who is part of this progress needs to be, apart from hardworking, patient.