

# *On the Necessity of the Application of China's Constitution in Civil Trials*

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**Abstract:** Promoting the application of China's Constitution is not only an important part of governing the country in accordance with the Constitution, but also a way to solve the problem of "difficult to invoke" in civil trials. Any law in a country is the embodiment of its constitution. In civil trials, there are inevitably cases involving infringement of citizens' fundamental rights. When specific laws and regulations are hard or cannot be used as the basis for invoking, by solving the problem of "difficult to invoke" by the court through reasonable constitutional application, we can give consideration to the protection of citizens' fundamental rights and civil rights in civil trials and promote the development of the rule of law.

**Keywords:** Chinese constitution, application of the constitution, civil trial, fundamental rights

## 1. Introduction

The core of governing the country according to law is to govern the country according to the Constitution, which will inevitably involve relevant issues of the application of the Constitution. Because the institutional mechanism and guarantee for the implementation of the Constitution in China are not complete, the Constitution cannot be used as a direct basis for judicial application in principle. However, this does not mean that the Constitution of our country cannot be applied at all. This article intends to take the academic research and theory related to this issue as the starting point, based on the current practice in China, and combine with the case of "Guanfei v. Tianjin Futai Real Estate Development Company for infringement of copyright and privacy" for further research.

## 2. Overview of Relevant Theories on the Application of the Constitution

The application of China's Constitution has long been the focus of academic circles. As far as the application of the Constitution to judicial trial is concerned, the main research focuses on civil, criminal and administrative trials. At present, the academic community has basically reached the consensus that "the Constitution cannot or is not convenient to apply in criminal and administrative trials", but there is considerable controversy about the application of the Constitution in civil trials. With the continuous development of society, the protection of rights faced by courts in civil trials is no longer limited to civil rights. The problem of infringement of citizens' fundamental rights in civil cases is also urgent to be solved. The academic community also has a high concern about the correct application of laws and the making of fair judgments by people's courts at all levels.

In principle, the Constitution of China is not applicable to civil trials, that is to say, the Constitution cannot bypass the civil law and directly play a role in civil trials. However, some rights with the dual attributes of fundamental rights and civil rights often present the characteristics of “incomplete symmetry” in the protection of civil law [1] (the author will temporarily call this right: “Dual Attribute Rights”) – “Dual Attribute Rights”, including both the right to personality, property rights and other rights that have been confirmed in civil law, as well as the right to education, the right to vote and the right to be elected are not specifically confirmed in civil legislation (They are generally included in some broad concepts of rights). For those confirmed by the civil law, the author will not discuss in detail here, but will only question the “Dual Attribute Rights” that have not been specifically confirmed by the civil law: since in the specific civil trial, these “Dual Attribute Rights” of citizens cannot or hard be retrieved from the specific civil law, does this mean that we can’t conduct a trial for such civil cases? If it is to be carried out, then the basis for the trial is indispensable. How can we deal with the protection of citizens’ fundamental rights in civil trials without violating the current constitution and constitutional system?

Whether China’s courts can apply the Constitution in the judgment documents is not only a theoretical issue, but also a practical issue: based on the current status and power of China’s courts in the constitutional system, in principle, the courts cannot conduct constitutional review [2],<sup>1</sup> nor do they have the basic conditions to apply the Constitution alone as the basis for judgment, as well as use it together with other laws as the basis for judgment [3]. However, in some special circumstances, if it is really necessary to apply it, the Constitution can be applied in the part of the reasons for adjudication, so as to explain the principles of the Constitution, help understand the specific meaning of departmental legal norms, and enrich the reasons for adjudication. This will not only help the court clarify the basis of judgment in the specific trial work, but also integrate the spirit of the Constitution into the judicial work, and explore the necessary practice of more fair, comprehensive and accurate protection of civil rights in civil trials in China.

Article 16 of the French Declaration on Human Rights and Citizenship in 1789 once explained that “there is no constitution in any society where rights are not guaranteed and decentralization is not established”.<sup>2</sup> The core principles and values of a constitution are human rights and democracy [4, 5]. Chinese constitutional scholars should not neglect their understanding of the true situation of the application of the Constitution by the people’s courts in judicial practice when we are committed to safeguarding the people’s sovereignty and democracy and promoting the judicial application of the Constitution of China. To explain and respond to the implementation characteristics of the Chinese Constitution at the actual level is the due meaning of the open Chinese constitutional research [6]. At present, China protects the fundamental rights of citizens, and specific departments have specific actions. Among them, the national judicial organs, namely the people’s courts at all levels, their function is to make specific and final decisions in cases involving rights disputes [7]. From this point of view, the protection of civil rights by the courts is of special and important significance, which has high reference value for the study of the necessity of the application of the Constitution in specific trials. The author will discuss it in detail in the second part of this article.

### 3. Application of the Constitution in Specific Civil Cases

“Only the application of the Constitution can make the Constitution truly have a realistic normative

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<sup>1</sup> The Constitution of our country is promulgated and revised by the highest authority, and the court is subordinate to and supervised by the highest authority. Therefore, it is impossible for the court to implement the unconstitutional review power on the National People’s Congress and its Standing Committee.

<sup>2</sup> Declaration of the Rights of Man and of Citizens by The National Assembly of France: “Every community in which a separation of powers and a security of rights is not provided for, wants a constitution.”

adjustment significance for social life” [8]. The author holds a positive attitude towards whether the Constitution is necessary to be applied in specific trials. In this part of this article, we will take the case of “Guanfei v. Tianjin Futai Real Estate Development Company for infringement of copyright and privacy disputes” as an example, and analyze the necessity of the application of the Constitution in China’s civil trials from three levels.

### 3.1. The House Copyright

Tianjin Higher People’s Court (1999) GZZZ No. 33 Civil Judgment explains as follows: “The decoration of the appellant’s room (excluding furniture placement) , it is a three-dimensional shape with aesthetic significance that is designed according to its own aesthetic concept, selected specific decorative materials and processed and combined with the house structure. As a part of the residence, the decoration has both the use function and certain aesthetic requirements. It is the original creation of the appellant and belongs to the category of architectural art works. Because architectural works of art have the basic characteristics of works of art and are generally protected as works of art, the decoration of the appellant’s room constitutes works of art. The appellant, as the designer of the house decoration, has made creative efforts, so the appellant is the author and copyright owner of the work.” It is learned that Guan Fei, as the designer of the house decoration involved in the case, enjoys the copyright of the house involved.

### 3.2. The Infringed Copyright and Privacy

The court found out that on January 6, 1998, with the permission of Guan Fei, Futai Company took photos of Guan Fei’s decorated residence and used the photos in the photo album of the company’s sales office. In March of the same year, Futai Company hired the staff of Tianjin Bohai New Century Advertising Co., Ltd. (Hereinafter referred to as the advertising company), an outsider, to shoot Guan Fei’s residence again with his permission. Later, Futai Company used one of the photos in the company’s light box ads, sales brochures and sales advertisements published in Tianjin Daily and Tonight News. At the time of the lawsuit, Futai failed to provide evidence that was agreed by the appellant. Here, the author will not discuss whether the photo belongs to the reproduction behavior of making a copy of the work in the same form as stipulated in the copyright law of China, but will analyze the use of this photo by Futai.

According to the provisions of Article 39 of our Constitution, citizens’ houses are inviolable. The appellant’s residence is his personal domain, and the appellant has the right to protect, keep secret and use his personal domain which is not related to the public interest. The privacy of the appellant’s residence belongs to the category of privacy and should be protected by law [9]. Although Guan Fei agreed to take photos of her residence and display them in the photo album of the company’s sales office at the early stage, this does not mean that Futai’s use of Guan Fei’s privacy is unlimited. The author believes that the photo album in the sales office is a kind of publicity aimed at a small number of audiences. If Futai Company, in compliance with relevant laws and regulations, entrusts outsiders to take photos based on Guan Fei’s decorated residence and places the photos in the photo album in the sales office of the company for small publicity, it is an acceptable use of its privacy with the consent of the privacy owner.

However, the light box ads, media ads, and the real estate brochures distributed in a large range for the non-specific and most consumers are all the specific forms of real estate advertising. With the development of the real estate market, real estate advertisements published by radio, television, newspapers and periodicals can be seen everywhere. Due to the large transaction volume and strong influence of real estate projects, once false, misleading and other illegal problems appear in the advertisements, the social harm is more serious than that of ordinary goods or services [10]. Therefore,

the real estate advertisement published to the public and the photo album used for small-scale publicity in the sales office of the real estate company have similar contents, but the potential impact it may cause is different. For Futai, the wider the audience the advertisement is targeted at, the greater the possibility that the photos will potentially bring benefits to the company, and the greater the economic value it will ultimately create for the company.

However, for Guan Fei, the picture information of her residence is viewed by a few people who consult with the house source in the sales office. In this case, the impact on the privacy and safety of Guan Fei and residence is certainly lower than the situation of her residence “Directly facing the public and countless people”! Once the advertisement is targeted at a large number of audiences, it will increase the possibility and risk of violating the security and privacy of Guan Fei and his property at any time, which is very likely to bring a lot of inconvenience to Guan Fei’s future life. In this case, Futai Company applies the photos to the real estate advertisements for the non-specific and majority of people without authorization, which is an illegal use of the privacy of Guan Fei.

From the perspective of protecting the copyright of Guan Fei’s architectural works, the design of the house involved in the case itself is an artistic work. Even if Futai wants to use the photos for real estate advertising, because the photos themselves are two-dimensional plane works adapted from the three-dimensional works of Guan Fei’s residence, Futai, as the owner of the adapted works, must obtain the permission of the original copyright owner before using them.<sup>3</sup> But here, Futai deliberately applies the photos of Guan Fei’s residence to various forms of real estate advertisements for the public without the permission of Guan Fei, instead of only storing the photos in the photo album of the company’s sales office according to the agreement reached by both parties. There is the fact that Guan Fei’s copyright is illegally used for profit, which constitutes an infringement of copyright.

So far, this case involves two infringed rights: copyright and privacy. Among them, the right to privacy has the characteristics of “Dual Attribute Rights” described by the author above.<sup>4</sup>

### 3.3. The Connection Between the Constitutional Quotes and Applications

For the copyright infringement part of this case, the Tianjin Higher People’s Court, in accordance with Article 12 of the Copyright Law of the People’s Republic of China (1991), Article 4 (7) and Article 5 (8) of the Regulations for the Implementation of the Copyright Law of the People’s Republic of China (1991), determined that Futai Company infringed the copyright of Guan Fei, and made a judgment of “Stop infringement”, and found that the facts were clear, the applicable law was correct, and there was no doubt. The most ingenious part of the judgment in this case, which can best reflect the reasonable application of the Constitution to the specific trial, lies in the part against the infringement of the right to privacy.

Since the General Principles of the Civil Law of the People’s Republic of China (1987 edition, Hereinafter referred to as the General Principles of the Civil Law) was in force at that time, Article 5 only summarized a broad concept of citizens’ right: the “Lawful Civil Rights”. It can be seen from Article 1 of the General Principles of the Civil Law that “This Law is formulated in accordance with the Constitution and the actual situation in our country,••• so as to meet the needs of the developing

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<sup>3</sup> Article 12 of the Copyright Law of the People’s Republic of China (1991): “The copyright of a work created by adaptation, translation, annotation and arrangement of an existing work shall be enjoyed by the person who adapted, translated, annotated and arranged the work. However, when exercising the copyright, the copyright of the original work shall not be infringed.”

<sup>4</sup> The right to privacy belongs to the Personality Rights in the constitutional rights, and also belongs to civil rights. See Article 38 of the Constitution of the People’s Republic of China (1999) and Article 5 of the General Principles of the Civil Law of the People’s Republic of China (1987). Now, as the fourth part of the Civil Code of the People’s Republic of China, the right to personality has received high attention, which fully reflects the good situation that the Constitution plays an active role in civil legislation.

socialist modernization.” That the “Lawful Civil Rights” stipulated in the General Principles of the Civil Law must also originate from the Constitution and practice. The author found that Article 38 of the 1999 Constitution of the People’s Republic of China (Hereinafter referred to as the Constitution) once stated that “The Personal Dignity of citizens of the People’s Republic of China is inviolable.” From the perspective of legislative intent and specific judicial practice, here, the “Lawful Civil Rights” in the General Principles of the Civil Law should be stipulated and implemented in accordance with the “Personal Dignity” (i.e. Personality Rights) in the Constitution, which also means that the “Personal Dignity” in the Constitution have been further confirmed in the General Principles of the Civil Law. Therefore, at this level, the “Lawful Civil Rights” should be specifically interpreted as the “Right to Privacy”, it is a restrictive interpretation. It is carried out in accordance with the Constitution as the legislative basis of the departmental law and the fundamental law status of the Constitution. Its form is to invoke the relevant provisions of the Constitution, and its essence is to map the spirit and connotation of the Constitution to an “indirect application” of civil legislation and civil trial.

The ingenuity of this approach lies in that the court has achieved two effects, namely, ensuring the accuracy of the application of the law and enhancing the persuasiveness, by invoking the provisions of the Constitution on the protection of citizens’ residential secrets and privacy. It has not only solved the problem of infringement of citizens’ fundamental rights through civil trials, but more importantly, the Constitution has not been directly used as the basis for the judgment in the whole process. It fully conforms to the system and guarantee mechanism implemented by the Constitution of China. In my opinion, this is reasonable, and it is also an effective way to study the “Indirect Application” of the Constitution to civil trials in China at present.

#### 4. Conclusions

In the process of the court’s interpretation and reasoning, it is inevitable to encounter the situation of “Competing” between fundamental rights and civil rights. When deciding the infringement case of “Dual Attribute Rights”, the practice of invoking the relevant provisions of the Constitution to ensure the accuracy of the application and interpretation of the departmental law and to enhance the persuasiveness of the judgment is an affirmation of the status and value of the Constitution. Here, the Constitution is only the basis of interpretation, not the object of interpretation, and also reflects the obligation of judicial organs to abide by the Constitution [11]. In the author’s view, this “Indirect Application” method of invoking the provisions of the fundamental rights of the Constitution is a useful exploration under the situation that the mechanism and guarantee of the implementation system of the Constitution in China are not yet complete. It has broad practical prospects, and also strongly proves the necessity of applying the Constitution to specific trials, especially civil trials. The author believes that after continuous exploration, the method and path of constitutional application that is really suitable for our country will meet with us in the near future.

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