

## A Thought of Taking CPPCC as Chinese Professional Supervisory Institution of Unconstitutional Behavior in Applying Law

### UNE PENSÉE DE PRENDRE LA CCPPC COMME CHINOISE INSTITUTION DE SURVEILLANCE PROFESSIONNELLE DE COMPORTEMENT INCONSTITUTIONNEL CHINOIS TOUT EN APPLIQUANT LE DROIT

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**Abstract:** Since unconstitutional behavior has its duality, it is necessary to establish a separate supervisory system of unconstitutional behavior in applying law, which could together with supervisory system of unconstitutional behavior in legislation build Chinese dual-track constitutional supervisory system. The constitutional status of CPPCC is rather obscure, thus it becomes necessary to enrich its main functions by taking it as Chinese professional supervisory institution of unconstitutional behavior in applying law. As the origins of the legitimacy of People's Republic of China, the core elements of "people's democratic dictatorship" and representatives of differentiated public opinions, CPPCC is competent in its new role and is not contradictory with institutions of Chinese National People's Congress. This paper expounds how to build Chinese supervisory system of unconstitutional behavior in applying law under the management of CPPCC's chairman conference from perspectives of its composition, terms, proceedings and sanctions.

**Key words:** CPPCC; Constitutional supervision; Unconstitutional behavior in applying law

**Résumé** Depuis que le comportement inconstitutionnel a sa dualité il est nécessaire d'établir un système distinct de surveillance de comportement inconstitutionnel dans l'application de la loi, ce qui pourrait en collaboration avec le système de surveillance de comportement inconstitutionnel dans la législation chinoise construire à deux voies système constitutionnel de surveillance. Le statut constitutionnel de la CCPPC est assez obscure, il devient ainsi nécessaire d'enrichir ses principales fonctions en le prenant comme le chinois institution de surveillance de conduite professionnelle dans l'application de la loi inconstitutionnelle. Comme les origines de la légitimité de la République populaire de Chine, les éléments de base de «dictature démocratique du peuple» et des représentants de différencier les opinions publiques, la CCPPC est compétent dans son nouveau rôle et n'est pas contradictoire avec les institutions de l'Assemblée populaire nationale chinoise du. Ce document expose la façon de construire chinoise système de surveillance du comportement inconstitutionnel en appliquant le droit, sous la direction du président de la conférence de la CCPPC à partir de perspectives de sa composition, les modalités, les procédures et les sanctions.

**Mots clés:** La CCPPC; Contrôle constitutionnel; Le comportement anticonstitutionnel en appliquant le droit

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## 1. REASONS OF ESTABLISHING CHINESE PROFESSIONAL SUPERVISORY SYSTEM OF UNCONSTITUTIONAL BEHAVIOR IN APPLYING LAW

The constitutional supervision has always been the hot issue among Chinese scholars of constitution. It came into scholars' attention again when the judicial interpretation of the case of Qi Yuling was abolished. Whatever perspective

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scholars take to study the constitutional supervision, it should start from the supervisory targets. It has been agreed upon that targets of constitutional supervision is unconstitutional behaviors. However, how to define the unconstitutional behaviors is divergent. Actually, the definition of unconstitutional behaviors could be found from researching the aims of constitutional supervision.

The aim of supervision is to ensure the constitution's implementation. The implementation of constitution and the constitutional norms themselves have determined the duality of unconstitutional behaviors. Unconstitutional behaviors refer to behaviors that violate the written constitutional norms during the implementation, go against the unified constitutional values those norms demand, and depart the real constitution from the written one. The realization of constitution is a circle. The real constitution, after being abstract from conceptual constitution, becomes the written constitution through legislation (constituent) process; then, after being evaluated by the conceptual constitution, the written constitution will adjust the real constitution. It contains two links. One is the process that written constitution adapts to and reflects the real constitution. In this process, written constitution is required to faithfully reflect the real constitution in order to make sure the conformation of each other in a certain period. The other is the process that written constitution regulates and adjusts the real constitution, and its core is the conformation of real constitution to written constitution. (LIU, 2009) The second link has its two branches on the basis of the duality of constitutional norms in the written constitution. Those clear and specific norms which could directly regulate the related organizations and individuals in the written constitutions are called direct norms, and these norms could directly act on real constitution; while indirect norms are those more basic and general norms, and they could act on real constitutions via the specialized legal which could give more specific content. In the two-link and three-level realization of constitution, the different types of unconstitutional behaviors could be defined. The first link could be achieved by constitutionalism, amending and interpreting constitutions. The second level of the second link reflects the legislative activities under the principle of constitution as fundamental guidance. It should be noted here that different from the common legislation, these legislative activities are legislation of basic law. It is a kind of normative legal documents drafted by Chinese National People's Congress, aimed at regulating particular aspect of national and the social life with universal social relations, e.g. criminal law, civil law, procedural law, etc. (QIAO, 1997) They just adjust the basic rights and obligations prescribed in indirect norms of constitutions. Compared with the written constitution as the form of constitution in general term, these basic law belongs to the second level of constitutions in general term; and other common laws of basic rights and obligations derived from other regulations are exemplifications of the third, fourth or even lower level.

In constitutional implementation, unconstitutional behaviors refer to those behaviors violating the principles and regulations stated in the constitution. Then, since basic law and even common law respectively belong to the different levels of constitution in general term, violating these laws is considered as unconstitutional behaviors. However, it is not so. The unconstitutional behaviors resulted from violating common laws is not violating the rights and obligations in common laws. We talk about such kind of unconstitutional behaviors in terms of the legislative activities of common laws themselves: whether legislative methods, procedures and the contents of common laws are in accordance with the constitutional norms; or say, the legislative activities should be carried out under the constitutional principles and in line with the constitution. Both the aforesaid first link and the second level of the second link are legislative activities. The unconstitutional behaviors in these activities are unconstitutional behavior in legislation. Specifically, when laws, acts, regulations and judicial interpretations of Supreme Court and Supreme Procuratorate go against the norms, principle and spirits of the constitution or higher-level law, it is seen as unconstitutional behavior in legislation. The first level of the second link reflects the specific targets' actions with separate legal effect upon which the constitution directly behaviors, and the applicable behaviors which the constitution indirectly regulates with the help of common laws. Both behaviors form the constitutional applicable behaviors in general term, or say, applicable legal behaviors. When violating against the constitution, these behaviors are unconstitutional behavior in applying law. To be specific, the governmental institutions, social organizations and citizens violating the constitutional norms, spirits and principles in applicable behaviors should bear the relevant constitutional responsibility.

Both unconstitutional behaviors, although belonging to different types, should be the targets under constitutional supervision in China. With issuing and implementation of China Legislation Act and China Various Standing-committee of NPC Supervision Act, the supervision system of unconstitutional behavior in legislation has been established. However, the supervision only acts upon the unconstitutional behavior in legislation while neglecting the unconstitutional behavior in applying law. In China, the present model of monitoring the legislature is normally a pattern of examination by authority. In one aspect, the acts drafted by the legislature are monitored in advance through different-level legislation procedures. In the other, the administrative, local and other laws and regulations formulated by the subordinated legislature are monitored afterwards by examining the related records. Nevertheless, there are no clear directions on how to dispose the unconstitutional behaviors in the implementation of these laws and regulations and those unconstitutional problems undiscovered in examination but revealed in application: whether the examination is proposed by the party in action to the legislature or by the relevant judgment institutions, or is initiated by the legislature to examine. There are no applicable acts of constitutional supervision procedures to state it clearly. Surely, the unconstitutional behavior in legislation comes into the constitutional supervision with the increasing focus on the unconstitutional behavior in

applying law. The constitutional supervision institutions just passively get involved. Before solving this problem, it is emergent to solve the problems in monitoring the unconstitutional behavior in applying law. Thus, it is necessary to establish a separate supervisory system of unconstitutional behavior in applying law, forming Chinese dual-track constitutional supervision system together with the supervisory system of unconstitutional behavior in legislation. Organically connected, both systems could release the legislature from the passive examination of specific behaviors in applicable laws, and focus its attention on the formulation of specific laws and examination of legislation.

## **2. REASONS OF TAKING CPPCC AS CHINESE PROFESSIONAL SUPERVISORY INSTITUTION OF UNCONSTITUTIONAL BEHAVIOR IN APPLYING LAW**

In order to establish the dual-track constitutional supervisory system in China, the core is at the design of the monitoring system of unconstitutional behavior in applying law: who and how to monitor the unconstitutional behavior in applying law. If Chinese National People's Congress takes the responsibility, there will be no improvement in Chinese present constitutional supervisory system. It actually needs another full-time and professional organization to balance the power. It is improper to set an Office of Applicable Legal Action Examination as the Office of Acts Recorded for Examination founded by Legal Affairs Commission under the National People's Congress Standing-Committee in 2004. Obviously, this kind of office is unable to compete with the state department, the Supreme Court and the Supreme Procuratorate in Chinese national power system, let alone the central military committee as the supreme national military institution and the chairman as the chief of the state.

Instead, to set a constitution court, which is hotly discussed before the interpretation of Qi Yuling Case was abolished, is as well not applicable in China. The Chinese National People's Congress is the supreme institution of Chinese state power, and the system of the Chinese National People's Congress is the form of state power, so, there is no proper position for a newly built constitution court. If it is under the leading of Chinese National People's Congress, there is no difference between the CNPC Standing-Committee and the constitution court in terms of performing constitutional supervision. Besides, being full-time and professional, this organization cannot balance the power. The concepts of unconstitutional behavior in legislation and unconstitutional behavior in applying law are at the same level, but their respective supervisory institutions are hierarchical. Consequently, the constitution court cannot balance the power and rightly highlights the out-of-balance. If it is at the same level with the Chinese National People's Congress, the latter cannot represent as the supreme organization of state power. Certainly, there cannot be two paralleled supreme institutions of state power, and the system of the Chinese National People's Congress cannot work any longer. Except these problems, the composition, appointment, election and related issues of the constitution court need more consideration because there cannot be a dual-track election system. China in its transformation does not need such huge reform. Actually, the stabilization of China is the core.

The constitution committee, highly praised by many Chinese scholars, is ideal to be a special committee under the leading of the CNPC Standing-Committee. The system of the Chinese National People's Congress will not be challenged, and the composition and running of constitution committee could follow the present rules and experience. However, the newly added institution seemingly goes against with the principle of simplified administration and higher efficiency. With the perfect system of constitutional supervision, the establishment of monitoring system of unconstitutional behavior in applying law actually does not need another new institution. Instead, CPPCC, as one of the existing organizations with proper-position and less obligation, will be competent.

Due to CPPCC's ambiguous constitutional position, it needs the function of monitoring the unconstitutional behaviors to enrich itself. The issue of enriching the system of CPPCC is a classical proposition of Chinese constitutional study. The key is that, as the patriotic united front organization, the CPPCC's constitutional proposition is rather vague. It is not a governmental organization, not a party and not a social organization. It maintains exercising political consultation, democratic supervision and participation in deliberating and administration of state affairs. Then, the legal validity of the resolutions after the consultation, supervision, deliberating and administration is doubtful. Whether these solutions are laws or policies becomes nonsense. Consequently, in order to avoid such dilemma, the CPPCC's constitutional proposition needs to be more specific, and its functions need to be enriched. Three characteristics of the CPPCC determine that it is competent to fulfill the responsibility of supervising the unconstitutional behaviors. The strengthened power will not collide with the system of CNPC and influence it as the organization of supreme state power.

First, the CPPCC is the rightful and legitimate origin of the government of People's Republic of China. According to the theory of constituent power in ideal state, there should be a country with sovereignty, and a rightful and legitimate government after formulating the constitution under people's consensus. Contrastively, in reality, there is generally a government succeeded from a monarchy with sovereignty before scholars who will make the constitution. To formulate the constitution, it is required to fundamentally change the ownership of sovereignty first. The use of resistance right is the best way to realize fighting against the existed governmental system. After revolution overthrows the existed government,

the new one will be established with its legitimacy in people's resistance. Within the frame of constitutionalism government, superseding is certainly carried out through election; while, outside the frame, superseding is through the violent revolution based on people's resistance rights. When the revolution comes to its success, the revolutionary government faces changing its legitimacy origins. Changing the legitimacy from in resistance rights to within the constitution, a new constitutional government will be founded in the replacement of the revolutionary government and in accordance with people's desire. Chinese sovereignty has long been existed. Before 1911 Revolution, the legitimate representative of China was Qing Dynasty. After overthrowing it, the government of Republic of China came to its rightfulness and legitimacy within the frame work of Provisional Constitution. In 1949, the government of Republic of China was overthrown through violent revolution. Soon, the convening of CPPCC, publishing of the temporary constitution and the official version revised in 1954 successfully gave the rightfulness and legitimacy to People's Republic of China. The CPPCC functioned equivalently as the CNPC after the foundation of PRC and is naturally considered as the legitimate origin of PRC. In 1954, the formal constitution stated its new function as the patriotic united front organization, but its characteristics as the legitimate origin did not change. It is naturally seen as a part of the system of CPNC. Since it temporarily functioned on behalf of CPNC from 1949 to 1954, it is competent for supervising unconstitutional laws, as a part of CPNC's constitutional supervisory right.

Secondly, the characteristic of CPPCC as the patriotic united front organization is an important element in depicting China as a country of people's democratic dictatorship instead of the proletarian institutionalization. Different from the latter, the former is more open and tolerant. The "proletariat" is a closed concept with accurate definition and connotation, while "people" is not. The concept of citizen in People's Republic of China's framework is more general than "people", whereas in China the concept of "people" is more general than "citizen". The difference rests with the patriotic united front of CPPCC. The connotation of the patriotic united front has enlarged gradually from the labor for socialism, the patriots supporting socialism, the patriots supporting united motherland to the erectors of socialism. At the same time, the connotation of "people" in the people's democratic dictatorship also enlarged because the patriots supporting united motherland to the erectors of socialism certainly go across the national boundaries and nationality and include the overseas Chinese. It can be concluded that the CPPCC is also the token of PRC's important characters. It is practical to make it, on behalf of CPNC, fulfill the duty of supervising unconstitutional laws.

Last, composed of representatives in all circles, the CPPCC can represent differentiated public opinions in different fields while the CNPC represents the general public opinions in different regions. As a supplement to the CNPC, the CPPCC could avoid adopting some ideas supported by many representatives while neglecting partial, local and minor interests supported by minority representatives. The election and constitution of the CPPCC members is quite different from those of CNPC members. The members are usually the elites of all fields and more qualified than CPNC members. The members of both organizations are part-time job, the CPPCC members have less powerful actions than CPNC members do. Thus, their job or other interests will less influence their participation in making policies. In a word, built on more general public opinions, the CPPCC is capable of supervising unconstitutional actions of legal institutions. It could avoid the minority's paradox that non-elected organizations monitor elected organizations under the system of American judicial review or Germany and French special supervising organization. Besides, the high-quality members of CPPCC provide necessary and abundant human resources for supervising unconstitutional laws.

### **3. OPERATION OF CPPCC AS CHINESE PROFESSIONAL SUPERVISORY INSTITUTION OF UNCONSTITUTIONAL BEHAVIOR IN APPLYING LAW**

The constitutional position as a patriotic united front organization of the CPPCC is comparatively obscure, but there is no need to improve through revising the constitution. The constitutional interpretation by the CPNC could sufficiently grant that the CPPCC is also an organization of supervising unconstitutional behaviors. It is noteworthy that CPPCC is but not equivalent to the monitoring organization. The composition of CPPCC is as complex as the CPNC. Take the 11th CPPCC conference as an example, there are 2237 members and 298 members of the standing-committee. Concerning the number of members, it is roughly the same as the 11th CPNC conference with 2987 members and 161 members of the standing-committee. So if the whole body of CPPCC will fulfill the new function, being full-time and professional becomes problematic. However, this could be solved through the more specific provisions.

#### **3.1 Composition**

The composition of the organization on the basis of the CPPCC could learn from other countries. In Austria, the constitution court includes one president and one vice-president, twelve regular judges and six alternate judges. The Korean constitution court has one president and nine judges. In Germany, there are one president, one vice-president and sixteen judges. French constitutional committee court has nine members. Spanish constitution court has twelve judges, Italian twelve, and Portuguese thirteen. The Pole constitution court has one president, one vice-president and other ten

judges. The terms of service are six years in Korea and Portugal, eight years in Poland, nine years in Spain and Italy and twelve years in Austria and Germany. (WANG, 2007) The conclusion can be drawn that small scale and long term of service is a common sense in composing a full-time supervisory institution of unconstitutional behavior. In China, the separate supervisory institution of unconstitutional behavior in applying law could be limited to the CPPCC's chairman conference composed of chairman and vice-chairman. Take the 11th CPPCC conference as an example, there were one chairman and twenty-six vice-chairman. They could be categorized into three kinds of people: the former provincial or ministry-level persons responsible for CCP affairs and administration, persons in charge of other democratic parties, former Chief Executive of HKSAR and prominent figures in Hong Kong society. Except the senior politicians, there were also famous businessmen, scholars and the former principles of well-know universities. They all have abundant political experience, professional knowledge and life experience. They have the same ability as staff in other countries' full-time supervising system, but there are fewer people with background of law study in China. The chairman and vice-chairman of CPPCC usually serve for 5 years, or ten years with the only chance of continually elected. The longer term of service actually could guarantee stableness and independence in applying the right of supervising unconstitutional behaviors.

As a political organization, the CPPCC should follow the legal routine and introduce the constitutional proceedings to ensure the openness and justice during its supervision. Due to the concreteness and easy occurrences of unconstitutional behaviors, the separate supervisory system of unconstitutional behavior in applying law could set a system of two-level and twice-judgments. The provincial CPPCC's chairman conference could also participate in supervising unconstitutional behaviors and accept cases. The verdict of national CPPCC's chairman conference adopts one-level and final judgment. The verdict of provincial CPPCC's chairman conference could be appealed to the national CPPCC's chairman conference, whose second judgment will be the final verdict.

### **3.2 Terms**

The power to supervise of unconstitutional behavior in applying law is the power to judge and investigate unconstitutional cases when applying laws. Judging the cases is only in accordance with the constitution and nothing could interfere with it. Performing the power of judge and investigation usually occurs when finding the related behaviors, administrative regulations and local acts contradictory with the constitution in checking unconstitutional cases. The CPPCC's chairman conference will propose an amendment or annulment to the standing-committee of the CPNC, and the legislation supervision will be started. The decision of legislation examination will help the institution to make final judgment of the case. Only the cases of unconstitutional behavior in applying law (excluding unconstitutional behavior in legislation) are accepted in following three aspects.

First, when the citizens' or organizations' basic rights prescribed in the constitution are infringed upon by other citizens or organizations, and the present department laws concerned are so obscure that victims cannot get legal help, such a kind infringement of the department, citizens and organizations involved belongs to the unconstitutional behavior and the victims can take legal proceedings. For example, the infringement of citizens' rights of equality of men and women, equality of education and freedom of religious belief; the illegal interference of organizations' march and assembly in lawful procedures, or the illegal and unnecessary impediment of legal organizations' regular activities are considered as infringing the organizations' basic constitutional rights. These basic rights are touched upon in department laws but not clearly stated on how to help, or such help is given on the basis of protecting other interests instead of the constitutional relationship of rights and obligations. Therefore, the degree of protection and sanction is not strong enough, and the help for victims and the proper punishment for unconstitutional acts cannot be performed.

Second, when citizens and organizations are exercising their basic constitutional rights but exceeding its limits, it is a disturbance of constitutional order. The institution concerned could further investigate borrowing other department laws in the name of maintaining other social relations instead of protecting the rights and obligations of the constitution as a victim. Under such circumstance, the citizens and organizations cannot realize their invasion of constitutional order so that they cannot be educated with a stronger constitutional sense. When borrowing other department laws, the sanction is not the sanction for unconstitutional actions, and then the proper and real sanction cannot be made. As far as this problem is concerned, the public power organs can take a legal proceeding, and the CPPCC's chairman conference could make the sanctions for unconstitutional behaviors.

Third, when the special civil servants (the head of the state, heads of government, senior official of government, judges and etc.) violate the constitutional obligations, they usually violate the common laws at the same time and must bear the responsibilities. The special duties of these people make them as a symbol of constitutional order because their power is entrusted directly by the constitution. Their own existence could be seen as a part of the constitutional order. Therefore, they have the responsibility to obey the law and even the obligations to obey the constitution. When breaking the law, they break the constitution. They should first be blamed for their unconstitutional behaviors though constitutional proceedings and then for breaking common laws.

### 3.3 Proceedings

The jurisdiction of two-level by the CPPCC's chairman conference could be defined according to the jurisdictional principle of rank and regions in common proceedings. All the unconstitutional behaviors of central power institutions, other central state institutions, the same level administrative institutions of CPC and provincial power institutions are in the jurisdictional area of the national CPPCC's chairman conference. The unconstitutional behaviors made by the state offices and institutions of CPC under provincial level, social organizations and citizens could be judged by the provincial CPPCC's chairman conference according to the different provincial regions.

The acceptance of unconstitutional behaviors cases has two ways. One is that the institutions, organizations and citizens actively make the appeal. They could make an appeal to the institutions, organizations and other citizens who invade their constitutional rights, or the institutions make an appeal when organizations and citizens exercise rights exceeding the constitutional limits. The other way is that after finding the cases out of their acceptance limits and need constitutional proceedings, the common court will transfer the case to the CPPCC's chairman conference. In Germany, thirty-four thousand people brought an action against the Germany government for the *Law of Data Storage*. It pictured an ideal state of the first way. In order to avoid abuse of lawsuits and lighten the burden of the CPPCC's chairman conference, the principle of exhausting help need to be established. Usually, before seeking constitutional lawsuit, people find aids through other legal ways to protect their basic rights. When the methods are exhausted, the invaded rights still cannot be restored or remedied, and then people could take the constitutional proceedings. If there is universal significance of constitutional proceedings before exhausting other methods, or huge or unavoidable damages will be made after exhausting other methods, people can directly take proceedings to the CPPCC's chairman conference. Except requiring the party concerned who makes the proceedings exhausts other legal methods, he also need to have close relations with the invaded rights. The victim should be himself, and the damage is at present and it is a direct result of the law accused. Before the CPPCC's chairman conference accepts the case, the general office of the CPPCC will check the case first and decide the necessity to accept.

The organizational form of trials can adopt the collegiate system. All the members of chairman conference are required to participate, but when over half attend, the decision is also valid. The chairman of the CPPCC must attend every time. The investigation of cases will start from the chairman's presentation, and other members will interpret to the party concerned in turn the key points which they are responsible for investigation. Later, the party concerned will defend himself. The trial process should be open to the public, except that trials related to national secrets. In the trial, the parties concerned are equal. The final judgment will be made in the secret meeting with over half support of present members. The chairman will not vote until the original vote result is equal. The final judgment is announced at the end of the trial and later published on the press communiqué of the CPPCC's chairman conference.

### 3.4 Sanctions

Different from the sanctions of common illegal behaviors, the sanctions of unconstitutional behavior in applying law need to present the characteristics of constitutional lawsuit. Besides, the sanctions need to be different from sanctions of unconstitutional behavior in legislation with a more specific target. There are general four types of sanctions.

One is to deprive basic rights. If citizens misuse basic constitutional rights, the institutions concerned could ask for checking unconstitutional acts. After trial, if the CPPCC's chairman conference identify that citizens misuse basic rights and violate the constitutional order, the CPPCC's chairman conference could make the judgment to deprive the rights concerned of citizens.

The second is to impeach. Impeachment is a way to accuse the head of the state, heads of government, senior officials and judges of their unconstitutional responsibilities. The result may be depriving their duties. They will be dismissed from their posts by the relevant CPNC after the impeachment of the CPPCC's chairman conference. Later, other civil and criminal liabilities will be affixed by common court.

The third way is to ban. Ban is a way to blame the social organizations for their unconstitutional behaviors. Ban includes that a) declaring that the organization violates the constitution and needs disbanded; b) forbidding establishing substitutions; c) confiscating properties of the organization; d) further affixing the criminal responsibilities of leaders and active participants. (LIU, 1998)

The last one is to annul decisions. When the CPPCC's chairman conference confirm that the state institutions, organizations and citizens invade other citizens' and organizations' constitutional rights, the CPPCC's chairman conference could make decisions of annulment. The relevant CPNC standing-committee will make the specific annulment with retroactive force. In other words, the annulment could confirm that the decision is invalid since it is put into effect and the victims will restore their rights. As for other common legal responsibilities, common legal proceedings will start to investigate. The state institution of law supervision, citizens or organizations suffered will lodge a state-level claim. The state institution of law supervision will take an action against the state civil servants for dereliction of duty in illegal performance. Or, citizens and organizations lodge a claim for their loss through civil suit.

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