

The Changes of the Basic Rights in the Current Constitution of China

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<https://doi.org/10.21684/2412-2343-2024-11-2-91-112>

Abstract. The current Constitution of the People's Republic of China is the 1982 Constitution, which is the fourth constitution after the founding of the People's Republic of China. The provisions of the current Constitution on the fundamental rights of citizens are generally similar to those of the first Constitution of 1954, but are more specific, while the freedom of movement provided for in the 1954 Constitution is deleted. The 1975 Constitution and the 1978 Constitution are the second and third Constitutions, respectively. Because of their special historical period, the provisions on fundamental rights in these two constitutions are retrogressive and failing. The historical background of the revision of the Constitution, the possibility of realizing rights and the level of social development are the main reasons for determining the provisions of the basic rights of citizens in the 1982 Constitution. In 2004, the current Constitution was amended to include "the State respects and protects human rights," which establishes the constitutional obligation of the State to guarantee human rights. In practice, there is still ongoing debate over how the State's guarantee obligations are implemented and whether citizens can file lawsuits if they believe that their fundamental rights have been violated. In recent years, the recordation review has partially realized the supervision of legislation that may infringe on citizens' basic rights by reviewing the constitutionality and legality of laws and regulations, but citizens have not been able to directly protect their rights through litigation. The changes in the basic rights of citizens in terms of constitutional provisions and legal guarantees over the past 40 years are the result of the development of the rule of law in China. In order to more effectively solve the

problem of constitutional rights from text to reality, it is also necessary to further develop the constitutional review system.

Keywords: current Constitution of China; 1954 Constitution; fundamental rights; Recordation Review; constitutional review.

Recommended citation: Wang Weiming & Nina Symaniuk, *The Changes of the Basic Rights in the Current Constitution of China*, 11(2) BRICS Law Journal 91–112 (2024).

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Introduction

Modern constitutions usually contain two main subjects: one is the basic rights of citizens, the other is state institutions, the core of which is the horizontal and vertical

distribution and checks and balances of state power.¹ After the founding of the People's Republic of China, there were four constitutions,² each of which stipulated the basic rights of citizens.³ The 1954 Constitution was the first and was considered "a very good constitution."⁴ The provisions of the 1975 Constitution and the 1978 Constitution on the basic rights of citizens were failures and retrogressions, mainly because the constitutional amendments at that time did not depart from the guiding ideology of "continuing the revolution under the dictatorship of the proletariat."⁵ Therefore, the provisions on the basic rights of citizens in the Constitution were either very simple (there were only two articles on the basic rights of citizens in the 1975 Constitution), or they were not conducive to the construction of democracy and the legal system and the protection of citizens' rights (Article 45 of the 1978 Constitution stipulated that citizens have the right to "speak out freely, air their views fully, hold great debates and write big-character posters,"⁶ which led to the generalization of class struggle). The current constitution is the 1982 constitution, adopted by the fifth session of the fifth National People's Congress. It is the fourth constitution after the founding of the People's Republic of China. The Constitution is based on the 1954 constitution, but it is a comprehensive revision of the first constitution.

Compared with the 1954 Constitution, the provisions on the basic rights of citizens in the current Constitution are quite similar in terms of the number of articles and the types of basic rights. So, does this mean that the ideas about the basic rights of citizens have been relatively mature and perfect since 1954? To what

¹ In the *Declaration of the Rights of Man and of the Citizen* (1789), Article 16 regulates, any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution. But the socialist constitutions emphasize the unity of power instead of separation of power, so the socialist constitutions usually set up a chapter on "State Institutions" to regulate the distribution and exercise of state powers.

² In China, there are two ways to amend the constitution, namely comprehensive revision and partial revision, and comprehensive revision to form a new constitution. The 1954 Constitution was the first Constitution. After three comprehensive amendments, the 1975 Constitution, the 1978 Constitution and the 1982 Constitution were formed. The 1982 Constitution is the current Constitution, which has undergone five partial amendments in 1988, 1993, 1999, 2004 and 2018.

³ The 1949 *Common Program of the Chinese People's Political Consultative Conference* (Gongtong Gangling) laid the foundation for the establishment of state power and was considered as a provisional constitutional document.

⁴ *Report on the Draft Amendment to the Constitution of the People's Republic of China*, Peng Zhen's report at the Fifth Session of the Fifth National People's Congress on 26 November 1982.

⁵ For the guiding ideology of the 1975 Constitution and the 1978 Constitution, see Zhang Chunqiao, *Report on Amending the Constitution*, Report at the First Meeting of the Fourth National People's Congress of the People's Republic of China, 13 January 1975; Ye Jianying, *Report on Amending the Constitution*, Report at the First Meeting of the Fifth National People's Congress of the People's Republic of China, 1 March 1978.

⁶ In Chinese, "Speak out freely, air their views fully, hold great debates and write big-character posters" means "Daming, Dafang, Dabianlun and Dazibao," according to which, every person has absolute right to comment on someone and criticize someone.

extent are the basic rights of citizens realized? And, after forty-five years of reform and opening-up,⁷ we need to conclude, what problems still exist in the process of building a socialist country ruled by law with Chinese characteristics, and the basic rights of citizens have moved from text to reality? Based on the 1954 Constitution and the 1982 Constitution (including the five amendments to the current Constitution) and also the practice of rights, this article attempts to analyze and discuss the above-mentioned issues, and then summarizes the characteristics of the changes in the basic rights of the Chinese Constitution.

1. Comparison of the Basic Rights Clauses in the Current Constitution and the 1954 Constitution

1.1. Placement of Fundamental Rights Clauses in text of the Constitution: Is It an Important Issue?

The basic rights of citizens are placed in Chapter Three and Chapter Two in the 1954 Constitution and the current Constitution respectively. When the Constitution was amended in 1982, there were two different opinions on whether the “basic rights and duties of citizens” should be placed before the chapter on “State Institutions.” One opinion believed that the basic rights and duties of citizens should be placed before the chapter on “State Institutions,” and the other opinion believed that they should be placed after “State Institutions,” as the 1954 Constitution. The weird thing is that the reason for supporting these two different opinions was exactly the same, that is, to reflect the idea that all powers belong to the people.⁸ The current Constitution finally adopts the approach of placing the chapter on the basic rights and duties of citizens before the state institutions. Prof. Zhou Yezhong thought this did not mean that the arrangement of the 1954 Constitution reflects the state institutions managing the people, while the 1982 Constitution embodies a different concept that “the power of the state institutions comes from the people and serves the people.”⁹ There is indeed some truth to this view. After all, as long as a legal text is composed of multiple clauses, there must be a problem of the order of different clauses, and the sequence of different clauses in no way indicates that they are from strong to weak in importance. By the same token, a country’s constitution often stipulates a number of basic rights of citizens. Generally speaking, except for human dignity (*Die Würde der Menschen*), which has a superior position in the constitutional rank, other fundamental rights are usually considered to have the same value rank and legal rank.¹⁰

⁷ China’s reform and opening-up began in 1978.

⁸ Xiao Weiyun, *The Birth of Our Country’s Current Constitution* 29 (1986).

⁹ Zhou Yezhong (ed.), *Constitutional Law* 256 (2000).

¹⁰ See Li Huizong, *Essentials of the Constitution* 73 (2004). The book significantly uses “Human dignity as the basis of basic rights” as the title of the section.

It must be admitted that a very important reason why the current Constitution puts “citizens’ basic rights and basic obligations” before “state institutions” is the fact that during the “Cultural Revolution” civil rights were generally and comprehensively violated and could not be guaranteed.¹¹ Going back further: During the formulation of the Constitution in 1954, the report on the draft constitution stated that “citizens’ rights are generated in the political system.” This showed that the prevailing view at the time was that the politics of the country determined the rights of citizens, and the constitution failed to understand and straighten out the relationship between the state and citizens from the principles of the constitution.¹² This explained that, at least in the process of constitutional text changes, the relationship between the basic rights of citizens and state institutions is not a purely formal issue, but a question of substantive significance, that is, whether the basic rights of citizens are truly the basis of the actual power of the state and are guaranteed by state power. The current Constitution puts the basic rights of citizens before the content of state institutions. It is based on the summary of historical lessons, and the purpose is to emphasize the state’s obligation to attach importance to and protect citizens’ basic rights.

1.2. Comparison of the Similarities and Differences of Basic Rights in the Two Constitutions

Both the 1954 Constitution and the current Constitution stipulate citizens’ equal rights, the right to vote and be elected, the freedom of speech, freedom of religious belief, personal freedom, property rights, the right to inviolability of residence, freedom of communication, labor right, the right to education, the right to obtain material assistance, and the freedom to engage in scientific research. It can be seen that the provisions of the 1954 Constitution on the basic rights of citizens formally reflect the status of citizens in modern countries regarding state power (citizens’ political rights and personal freedom) and the characteristic content of the socialist Constitution (citizens’ socio-economic rights).¹³ The provisions of the current Constitution on basic rights are more specific than the 1954 Constitution. Peng Zhen, Vice Chairman of the Constitution Revision Committee at that time, pointed out in the “Report on the Draft Amendment to the Constitution of the People’s Republic of China,”

Citizens’ personal freedom, freedom of religious Belief, inviolability of citizens’ homes, freedom of communication and secrets of communication are protected by law, and citizens have the right to criticize and make suggestions to any state organ and state staff, and the right to file complaints, complaints

¹¹ See Luan Liyun, *60 Years: The Process of Changing the Rule of Law in China* 244 (2015).

¹² See Han Dayuan, *The Process of Formulating the Constitution in 1954* 410–11 (2014).

¹³ Constitutional borrowing is easy, while constitutional enforcement is often difficult.

or reports about illegal and dereliction of duty by any state organ or state staff, etc., are more specific than in the past.¹⁴

For example, on the basis of inheriting the 1954 Constitution, the 1982 Constitution has made new developments in the protection of personal freedom and human dignity. The current Constitution uses four articles to stipulate the content of personal freedom and human dignity, namely from Articles 37 to 40 of the Constitution, while the 1954 Constitution has only one clause (Art. 89).

There are two significant differences between the current Constitution and the 1954 Constitution regarding the basic rights of citizens. One is about freedom of movement, and the other is about human dignity.

Article 90, paragraph 2, of the 1954 Constitution stipulates that “citizens of the People’s Republic of China have the freedom of residence and movement,” while the 1982 Constitution abolishes the freedom of movement clause for citizens. Theoretically speaking, freedom of movement includes three aspects: first, the right to leave the current place of residence and move to other places; second, the right to travel without obstacles; and third, the right to choose a place to settle.¹⁵ During the formulation of the Constitution in 1954, there was a discussion on whether to provide for freedom of movement. The text of the Constitution finally provided for freedom of movement. The main reason is that Article 5 of the 1949 “Common Program of the Chinese People’s Political Consultative Conference” (Gongtong Gangling), which served as an interim constitution at the time of the founding of the People’s Republic of China, already provided for freedom of movement. If “it is not written in the Constitution, we will have to explain it when people ask.”¹⁶ But the reality was that citizen could not enjoy freedom of movement. Since 1953, China had “entered a period of planned economic construction,”¹⁷ forming a relatively fixed urban-rural binary system. It was impossible to move freely between urban and rural areas. Otherwise, during the discussion on the formulation of the constitution in 1954, Chairman Mao Zedong proposed that he did not agree to stipulate freedom of movement. He believed that people could not go wherever they wanted. It should be recognized that this view was realistic, and freedom of movement was difficult to become a reality under the duality of urban and rural areas. Moreover, in 1958, the Standing Committee of the National People’s Congress passed the “Regulations on Household Registration,” which stipulated the

¹⁴ Peng Zhen, *Report on the Draft Amendment to the Constitution of the People’s Republic of China*, 26 November 1982, Peng Zhen’s report at the Fifth Session of the Fifth National People’s Congress was published in the *Bulletin of the Standing Committee of the National People’s Congress* 5 (1982).

¹⁵ Sheldon E. Steinbach, *Constitutional Protection for Freedom of Movement: A Time for Decision*, 57(3) Ky. L.J. 418 (1969).

¹⁶ Han Dayuan, *The 1954 Constitution and the Constitution of New China* 249 (2004).

¹⁷ Political Group of the Research Office of the General Office of the Standing Committee of the National People’s Congress (ed.), *A Refined Interpretation of the Chinese Constitution* 14 (1996).

household registration system and solidified the closed urban-rural binary structure. The main legislative purpose of the regulations is to “stop the blind flow of rural population into cities.”¹⁸ Article 10 stipulated,

When citizens move from rural areas to cities, they must hold a certificate of employment from the urban labor department, a certificate of admission from a school, or a certificate of permission to move in from the urban household (Hukou) registration authority, and apply to the household registration authority of their permanent residence for relocation procedures.

Basing on the distinction between rural household and urban household, Article 10 established the principle that prior approval was required to obtain urban household, thus setting an institutional threshold for the free movement of citizens, which constituted a de facto restriction on freedom of movement.¹⁹ By the time the Constitution was revised in 1982, China was still in the stage of planned economy, and the dual urban and rural household registration system still existed. Therefore, the 1982 Constitution does not provide for the freedom of movement of citizens. In the final analysis, considering that the level of economic development is still relatively low, under this circumstance, it is “impossible for the state to provide sufficient and freely available conditions for the freedom of movement of citizens.”²⁰

The inviolability of human dignity is a basic right of citizens. Article 38 of the 1982 Constitution stipulates that “the human dignity of citizens of the People’s Republic of China shall not be violated. It is forbidden to use any method to insult, slander, and falsely accuse citizens.” However, neither the 1949 Common Program nor the 1954 Constitution provided for this basic right. An orderly society of the country and a sound implementation of the constitution are prerequisites for citizens’ rights to be guaranteed. The “Cultural Revolution” broke out in 1966, the National People’s Congress was suspended, and the Constitution was actually abandoned.²¹ The 1975 constitutional amendment tried to reverse the abnormal political situation and the chaotic state of the country, but, under the guiding ideology of “upholding the dictatorship of the proletariat and continuing the revolution,” the revised “Constitution lacks normative nature, is unlike law, but like political platforms, so it is a seriously flawed Constitution.”²² The 1978 Constitution also did not get out of the fog of history.

¹⁸ Luo Ruiqing, *Notes on the Draft Regulations on Hukou Registration of the People’s Republic of China* (1958).

¹⁹ Farzana Afridi et al., *Social Identity and Inequality: The Impact of China’s Hukou System*, IZA Discussion Paper No. 6417 (March 2012) (Nov. 4, 2023), available at <https://www.econstor.eu/bitstream/10419/58623/1/715721828.pdf>.

²⁰ Political Group of the Research Office, *supra* note 17, at 166.

²¹ *Id.* at 27.

²² *Id.* at 34.

“The basic spirit and some contents of the Constitution are seriously flawed.”²³ These two constitutions are constitutions produced under the wrong guiding ideology, and they are regressions in the history of constitutional development.

In the ten years of the “Cultural Revolution,” under the wrong route of the “Left,” the majority of cadres and the masses suffered cruel persecution, and the human dignity of citizens was not protected at the minimum.²⁴

The 1982 Constitution stipulates that the protection of the human dignity of citizens is the “first time” in the history of our country’s constitutional government, and it is a reflection and summary of history. Judging from the fact that the protection of human dignity from infringement was written into the 1982 Constitution, the basic rights of citizens are not abstract, but should be specific, closely related to the stage of historical development and the state’s conditions for guaranteeing citizens’ rights and other specific situations. From the 1954 Constitution to the current Constitution, the changes in the basic rights provisions of citizens reflect the “realistic” characteristics of basic rights.

2. The Changes in Basic Rights in the Current Constitution since the Reform and Opening-up

2.1. Five Amendments to the Current Constitution and Changes in Basic Rights

The history of the current Constitution is basically in line with the 45-year history of the country’s reform and opening-up. From the point of view of time, the current Constitution is comprehensively revised shortly after the reform and opening-up. In terms of content, the five amendments to the current Constitution reflect the process of gradually deepening the construction of the rule of law as the reform and opening-up and the reform of the economic system.

The current constitution has undergone five amendments. The main contents of the constitutional amendments in 1988 and 1993 were reflected in the economy. As a reference, we see that the stage from 1978 to 1992 happened to be the initial period of China’s reform and opening-up and the stage of rapid development of economic strength. Five of the six provisions of the 1999 Constitutional Amendment are related to the economic system, and one of the most striking provisions is Article 13 of the Constitutional Amendment, which stipulates that “The People’s Republic of China shall govern the country according to the law and build a socialist country under the rule of law.” This clause inherited the idea that the 15th National Congress of the Chinese Communist Party (1997) established governing the country according

²³ Political Group of the Research Office, *supra* note 17, at 39.

²⁴ *Id.* at 163.

to the law as the basic strategy of the Party leading the people to govern the country, and the 16th National Congress of the Party (2002) listed governing the country according to the law as an important content and goal of socialist democratic political construction and made important arrangements for the full implementation of the basic strategy of governing the country according to the law. From 1992 to 2002, it was not only the deepening stage of the reform of the country's economic system, but also the deepening stage of the construction of the rule of law. In terms of the construction of the rule of law, China has entered from the previous stage of utilitarian and emergency-type legal system construction to a higher stage with the basic goals of human rights protection, governing in accordance with the law, administration in accordance with the law, and the exercise of state power in accordance with the law. The initial result of this stage is that the party proposed the strategy of "governing the country according to the law," which was written into the Constitutional Amendment in 1999. The further result is that the 2004 Constitutional Amendment added "the state respects and guarantees human rights."²⁵

The clause of "the state respects and guarantees human rights" does not add a new type of basic rights of citizens, because the basic rights themselves contain the state's obligation to protect the rights of citizens, that is, "It is the state's obligation to guarantee the realization of the people's basic rights."²⁶ However, in view of the fact that since the founding of the P. R. of China, the understanding about the nature, type and function of basic rights has not been sufficient, and the concept of the protection of citizens' rights by state organs is still very weak. Therefore, if we put this clause in the process of the construction of the rule of law in China, we will realize that the state focused on economic construction in the first 25 years of reform and opening-up, and paid more attention to the balanced, while committed to all-round development of the economy, politics, culture and the rule of law in the next 20 years. We will recognize that the inclusion of "the state respects and guarantees human rights" in the Constitution is to strengthen the state's obligation to guarantee the basic rights of citizens and to build a socialist country under the rule of law. It is of practical and great significance.

The 2004 constitutional amendment also included a number of human rights provisions. Article 13 of the Constitution was amended to

citizens' legal private property shall not be infringed. The state protects citizens' private property rights and inheritance rights in accordance with laws and regulations. For the needs of the public interest, the state may expropriate or requisition and compensate citizens' private property in accordance with the provisions of the law.

²⁵ Article 33, paragraph 3, of the current Constitution, Article 24 of the Amendment.

²⁶ Li Huizong, *The Essentials of the Constitution* 89 (2nd ed. 2004).

Article 14 of the Constitution adds:

The state shall establish and improve a social security system that is compatible with the level of economic development.

These articles establish the content of the state's guarantee of citizens' private property rights and the state's promotion of the realization of civil society rights. The revision of the Constitution in 2004 is the main achievement of the country's strategy of governing the country according to the law since the 16th National Congress of the Communist Party, and it is also a guide for the Party and the state to further promote the protection of human rights.

On 11 March 2018, the First Session of the 13th National People's Congress passed the fifth Amendment to the current Constitution, with a total of 21 articles. The more important contents of this constitutional revision are two aspects. First, to enrich the guiding ideology of national construction and development, including the inclusion of Xi Jinping's socialist thought with Chinese characteristics in the new era and the leadership of the Communist Party as the essential characteristics of socialism in the Constitution. Second, to revise and improve state institutions, including the abolition of the restriction that the president of the country shall not serve more than two consecutive terms and the establishment of Commissions of Supervision. From the content point of view, the fifth constitutional amendment is not directly related to the basic rights of citizens. However, this revision changes the "improve socialist legal system" in the preamble of the Constitution to "improve socialist rule of law," which is beneficial to long-term and deep-level national governance and human rights protection, because the "socialist legal system" focuses more on institutional content, while the "socialist rule of law" emphasizes that legal norms based on the Constitution must be implemented and socialist fairness and justice should be achieved. The cornerstone of the socialist rule of law is that the Communist Party governs in accordance with the Constitution and the law, and state organs exercise state power in accordance with the Constitution and the law. Respecting for human rights and protection of human rights are the basic goals of governing in accordance with the Constitution and governing the country in accordance with the law.

2.2. Reasons for the Change and Development of Fundamental Rights

If 1978 was a turning point in China's economic construction, then the birth of the current Constitution in 1982 can be described as a watershed in China's construction of the rule of law. The socialist legal system has been fully launched, from property rights to socio-economic rights and political rights, the basic rights of citizens have gradually developed and changed. In our opinion, there are three main reasons that affect the development of basic rights.

One is the reflection on history. In any country, the text of the modern constitution must reflect the relationship between the formulation or revision of the constitution

and the historical background. For example, when Germany formulated the Basic Law after World War II, it took into account the profound disasters brought by the Hitler regime to Germany and the people of the world, and therefore placed human dignity and inviolable human rights in Article 1 of the Basic Law.²⁷ The 1954 Constitution was the first Constitution after the founding of the P. R. of China. The Constitution was “a summary of China’s modern historical experience on constitutional issues” and “a summary of new historical experience since the founding of the People’s Republic of China.”²⁸ This is true of the 1954 Constitution, and so is the current Constitution. The current Constitution is not only a reflection on the abnormal history of the previous two decades, but also a correction of the 1975 Constitution and the 1978 Constitution, which were failed as a whole. This reflection is deeply rooted in the provisions of Article 38 of the current Constitution on human dignity. Professor Xiao Weiyun, who participated in the work of revision of the Constitution in 1982, pointed out that in the

During Cultural Revolution, many people have been denounced for various political reasons, suffering indiscriminate criticism. They have been wearing very high hats when parading, being insulted and slandered with large-character posters, which were hanged on their chest.²⁹

Obviously, these caused great harm to human dignity and personal freedom. Basing on reflection on this period of history, we can say that if human dignity does not exist, the basic rights of citizens are meaningless, no matter how vividly the constitution is written.

The second is the relationship between the level of economic development and the possibility of realizing citizens’ basic rights. As some scholars have pointed out:

All physical rights are either a direct or indirect form of transformation of material wealth, or they are based on a certain level of production, accumulation and corresponding production, distribution, exchange, and

²⁷ Article 1 of the German Basic Law [Human dignity – Human rights – Legally binding force of basic rights]
(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
Basic Law for the Federal Republic of Germany (Nov. 4, 2023), available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019.

²⁸ Liu Shaoqi, *Report on the Draft Constitution of the People’s Republic of China*, Report at the First Session of the First National People’s Congress of the People’s Republic of China, 15 September 1954.

²⁹ Weiyun 1986, at 138.

consumption methods of material wealth as the conditions or basis for their existence.³⁰

Some of the rights in the pedigree of the United Nations human rights conventions have not yet fully entered the current Constitution, and there are also some kind of human right, which was stipulated in the previous constitution, deleted by the current Constitution. The reason is that the level of social development objectively restricts the realization of certain right, so it is temporarily impossible to become a legal right. As mentioned before, the current Constitution deletes the freedom of movement stipulated in the 1954 Constitution. The situation has changed. In 2013, Premier Wen Jiabao pointed out in the “Government Work Report” that with the development of urbanization in China, the government will

accelerate the reform of the household registration system, social management system and related systems, promote the orderly popularization of agricultural transfer population, and gradually realize that basic urban public services cover the permanent population, and create a fair institutional environment for people to move freely and live and work in peace.³¹

Today, although the household registration system still exists, the system has lost its function of restricting the flow of farmers to the city, and farmers are free to choose the jobs in the city. The farmers can enjoy the choice of settlement and barrier-free travel,³² so that, freedom of movement has essentially become an individual freedom.

The third is the state’s awareness of basic rights. The norms and practices of basic rights essentially reflect the relationship between the state and citizens. Which rights should be written into the Constitution, whether the state should restrict citizens’ rights, and what obligations the state assumes to citizens, the constitutional or legal provisions on these basic issues are a reflection of a country’s awareness of basic rights. Of course, cognition is the product of a certain historical stage and specific national conditions. After 1840, feudal China gradually became a semi-colonial and semi-feudal country.³³ This kind of history determined that new China has always regarded the strength of the country as its most fundamental goal.

³⁰ Tong Zhiwei, *Outline of the Unified Relationship Between Civil Rights and State Power Opposition*, 6 China L. (1995).

³¹ Wen Jiabao, *The Government Work Report*, Report at the First Session of the 12th National People’s Congress (Nov. 4, 2023), available at https://www.gov.cn/2014lhrd/content_2627985.htm.

³² They are often called “migrant workers,” namely farmers working in cities. Wang Hsiao-Zung, *The Current Situation and Issues regarding Migrant Farm-Workers in Mainland China*, in *Outlook and Exploration* 5 (2009).

³³ The second paragraph of the preamble to the current Constitution.

Therefore, economic construction, social stability and the development of the rule of law have different priorities as national goals. Accordingly, citizens' right to subsistence and development are considered to be the primary basic human rights.³⁴ This is significantly different from the traditional Western theory that human rights are mainly civil and political rights.

3. Problems Faced by the Protection of Basic Rights

With the continuous development of China's rule of law construction, people may have more expectations for the rights of personal freedom and freedom of expression. To a certain extent, there is sometimes contradiction and conflict between the government's choice and the individual's judgment and cognition. Especially during the prevention and control of the coronavirus epidemic, the legality and even constitutionality of the measures taken by the government will be questioned. The problems in practice come partly from the defects in the text of the Constitution itself, and partly from the legal means of guaranteeing citizens' basic rights.

3.1. Defects in the Basic Rights Clause in the Text of the Constitution

Although the basic rights provisions in the current Constitution are more comprehensive and practical, there are still some shortcomings in the basic rights provisions.

First, the current Constitution lacks "Schranken-Schranken" provisions on citizens' basic rights. When state organs implement acts that restrict citizens' basic rights, it is difficult to question the constitutionality of the restrictive acts. It is true that the basic rights of citizens are not absolute and not unlimited, and the exercise of basic rights will be subject to certain restrictions, but the constitutions of most countries usually restrict the restrictions on basic rights, that is, the constitutions must set strict conditions for the implementation of restrictions on basic rights. The above content is called the "Schranken-Schranken (restriction-restriction)"³⁵ clause in the German Basic Law. The "Schranken-Schranken" clause is determined by the essential attributes of basic rights. The purpose of this clause is to clarify as much as possible the conditions and ways in which the state can restrict the basic rights of citizens, and to limit as much as possible the scope of the state's violation of the basic rights of citizens. To this end, constitutional restrictions on the state's restrictions on basic rights usually take two forms. First, the Constitution itself clearly restricts the basic rights of citizens, such as Article 102 and Article 104, paragraph 1, sentence 2 of the German Basic Law. Second, the Constitution stipulates that only the law can

³⁴ Information Office of the State Council, *The Situation of Human Rights in China* (1991).

³⁵ Art. 2 Abs. 2 S. 1 GG: "Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person ist unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden."

set restrictions on the basic rights of citizens, and the law must clearly stipulate the conditions, methods, and scope of the restrictions, which means the restrictions must meet the clarity requirements of the law, otherwise the law may be found to be unconstitutional in constitutional litigation. Article 23 of the Constitution of Taiwan region stipulates:

The freedoms and rights listed in the above articles shall not be restricted by law except as necessary to prevent hindering the freedom of others, avoid emergencies, maintain social order, or promote the public interest.

The four situations in this article, such as “to prevent hindering the freedom of others,” are the reasons why the Constitution allows restrictions on the basic rights of citizens. Other than that, the basic rights of citizens cannot be restricted. The principle of the Constitution expressly stipulating the circumstances (reasons) for restricting basic rights is also called the “constitutional reservation” (Verfassungsvorbehalt). The current Constitution stipulates that

when citizens of the People’s Republic of China exercise their freedoms and rights, they shall not harm the interests of the state, society, and the collective, as well as the legal freedoms and rights of other citizens.

The biggest problem with this clause is that it leaves a huge power space for the state to restrict the basic rights of citizens, because “national, social and collective interests” are extremely uncertain concepts, and the state may use this clause at any time to restrict citizens’ basic rights such as personal freedom, freedom of communication, and freedom of expression. Moreover, the Constitution does not stipulate that only the law can set restrictions on the basic rights of citizens. In this way, local legislatures and administrative powers may interfere with and infringe on the basic rights of citizens in the name of the public interest. Typical examples are the measures to restrict citizens’ rights such as restricting personal freedom and restricting residential rights taken by local governments in the name of prevention and control during the coronavirus epidemic.³⁶

3.2. Absence of Direct Relief Mechanism for Violated Basic Rights

During prevention and control period of the coronavirus epidemic, some cities and regions have adopted measures such as silent management that prohibits residents from entering and leaving, and measures such as not returning to their homes at will without confirmation from the Epidemic Prevention and Control Headquarters. Undoubtedly there is a question of constitutionality and legality for

³⁶ Zhang Fan, *On the Construction Ideas and Value Basis of the Principle of the Lower Limit of the State of Emergency – Taking Our Country as the Object of Analysis*, 1 Pol. L. (2020).

these measures.³⁷ However, it is difficult for affected citizens to obtain relief through certain legal channels. Even during the normal period of society, civil rights such as freedom of speech and communication are improperly restricted by state power. For example, the more common restrictions on Internet communications in the name of national security raise uncertain questions: Do call records, communication information, etc. belong to the freedom of communication protected by Article 40 of the Constitution? Such issues in the data age are increasing day by day, but most of them are currently stuck at the level of academic discussion,³⁸ and it is difficult to enter the stage of guaranteeing citizens' rights through judicial or legislative review, because the Constitution does not set up such a mechanism.

It is easy for a constitution to provide for relatively complete basic rights of citizens, but it is very difficult to go from the basic rights in the text of the constitution to the true enjoyment of rights. The state power in the Constitution should be exercised constitutionally and lawfully, and the power should be effectively self-restrained, which is a legal requirement. But if the constitutional and legal provisions are missing of effective restriction on state power, then at most it is a moral requirement. If there is no specific relief mechanism for human rights, then the wonderful basic rights in the constitutional text can only be as "moon in the water, flower in the mirror" for individuals.

4. The Function of Recordation Review and the Guarantee of Citizens' Basic Rights

4.1. The Human Right Relief Mechanism Provided for in the Current Constitution and Laws

The realization of citizens' basic rights requires the Constitution to establish an effective guarantee mechanism. This guarantee mechanism is nothing less than the Constitution giving citizens the right to realize their rights through litigation. Around the world today, the litigation mechanism recognized by the Constitution can be the adjudication activities of ordinary courts or the constitutional court. In China, according to the text of the Constitution, it seems that there are two ways for citizens to obtain protection when their rights are violated: one is the protection obtained through petitions or complaints, and the other is the protection by filing a lawsuit in the court.

When one person believes his right has been violated by state organ, the person can seek to file petition or complaint with the corresponding supervisory authority. For individual's petition or complaint, the supervisory authority has obligations to

³⁷ Zhao Hong, *The Limitation and Boundary of Individual Rights under Epidemic Prevention and Control*, 2 Comp. L. Research (2020).

³⁸ Liang Zhicheng, *The Path of Interpretation of the Scope of Protection of Communication Secrets: Original Purpose Position and Comparative Investigation*, 22(2) Peking U.L. Rev. (2023).

investigate, disclose, and make decision, while the procedural requirements are not clear, and the obligations are in reality short of mandatory and clear legal effects. In short, for the channel of filing petition or complaint, its political supervision function is greater than the legal protection function for individuals.

The litigation channels for the protection of citizens' basic rights are strictly restricted by laws and regulations. In the current legal system, when citizens believe that their rights have been violated by the actions of administrative organs, they can file an administrative lawsuit in a people's court. However, the "Administrative Litigation Law" provides for a specific and limited scope of administrative litigation. In the aforementioned relevant cases, the restriction on freedom of communication does not belong to the scope of administrative litigation. The government's prevention and control measures during the period of the coronavirus epidemic are formally based on laws and regulations. Even if a person is dissatisfied with the government's actions, there has not been a case of administrative litigation in which the plaintiff has won the case. It's no doubt that the laws and regulations or government orders on which the prevention and control measures are implemented are suspected of being unconstitutional, but the people's court has no right to review this dispute. Therefore, the establishment of an appropriate constitutionality and legality review mechanism is a breakthrough in solving civil rights violation.

4.2. The "Legislative Law" Establishes a Constitutional Review System with Chinese characteristics

The current Constitution provides for a constitutional supervision system and a constitutional interpretation system. The preamble to the Constitution stipulates that "the Constitution has the highest legal effect," which is the cornerstone of constitutional supervision and constitutional interpretation. The power of supervision and interpretation shall be exercised by the National People's Congress and its Standing Committee. Article 62, item 2, stipulates that the National People's Congress has the power to supervise the implementation of the Constitution, and Article 67, item 1, stipulates that the Standing Committee of the National People's Congress has the power to interpret the Constitution and supervise the implementation of the Constitution. The objects of supervision are laws, administrative regulations enacted by the State Council, and local regulations enacted by local legislative organs, none of which shall conflict with the Constitution. From the point of view of the normative system, the supervision system in the Constitution contains the factor of constitutionality review. However, there is a lack of a clear mechanism, and the above-mentioned provisions have been dormant for a long time.

In 2000, the National People's Congress passed the "Legislative Law" (Lifa Fa). As constitutional law, the "Legislative Law" stipulates the country's legislative system and legislative supervision system. The fifth chapter of the "Legislative Law" is about "Application and Recordation Review" (Shiyong & Beian Shencha), so as to basically

establish an effective recordation review system. The recordation review system includes four aspects. First, the legal system and levels of effectiveness. The legal system is composed of the Constitution, laws and regulations. Article 87 stipulates that

the Constitution has the highest legal effect, and all laws, administrative regulations, local regulations, autonomous regulations, and individual regulations and regulations shall not conflict with the Constitution.

This clause can be regarded as the cornerstone of the recordation review system. Second, Article 97 provides for the power of review and revocation, centered on the right of review and revocation of the National People's Congress and its Standing Committee. Third, the recordation system provided for in Article 98. The recordation system mainly include: (1) The Administrative regulations formulated by the State Council are reported to the Standing Committee of the National People's Congress for recordation; (2) Local regulations formulated by the Provincial People's Congress and its Standing Committee, the larger municipal People's Congress and its Standing Committee are reported to the Standing Committee of the National People's Congress and the State Council for recordation. Fourth, the active review and passive review procedures provided for in Articles 99 to 102. These four articles stipulate the subjects submitted for review, the review process and the review decision. Essentially, the recordation review system is review of constitutionality and legality. The operation of recordation review has activated the constitutional supervision system, and at the same time indirectly promoted the protection of citizens' rights.

4.3. Recordation Review and the Indirect Protection of Citizens' Basic Rights

The review bodies for recordation review are the National People's Congress and its Standing Committee, namely the national legislative organs. The review by the legislature itself cannot directly resolve disputes over the constitutionality of restrictions on citizens' rights. Recordation review indirectly guarantees citizens' rights by reviewing the constitutionality of laws and reviewing the constitutionality and legality of regulations. For matters involving disputes over the constitutionality of citizens' basic rights, relevant state organs, representatives of the National People's Congress and members of the National Committee of CPPCC (the Chinese People's Political Consultative Conference) have right to submit for review, and the Standing Committee of the National People's Congress shall perform the review function in accordance with the law. Citizens may also have right to submit for review. The difference is that the Standing Committee of the National People's Congress decides whether or not to initiate the review process for the individual submission. The Standing Committee performs the review function after initiating the review. In existing practice, the examination of whether the "Measures for the Detention

& Education of Persons Engaging in Prostitution and Whoring” (hereinafter the “Measures”) formulated by the State Council infringes on personal freedom reflects the value of recordation review to protect citizens’ rights.

In March 2018, during the first meeting of the 13th CPPCC National Committee, a member of the CPPCC National Committee put forward a proposal to review the constitutionality of the “Measures.” The proposal points out that the “Decision of the Standing Committee of the National People’s Congress on Prostitution and Whoring” (hereinafter the “Decision”) regarding the legislative authorization of the State Council is suspected of violating the provisions of the Legislative Law and the constitutional principle of legal reservation,³⁹ and the “Measures” formulated by the State Council regarding restrictions on personal freedom exceed the provisions of the Legislative Law and are suspected of constitutionality. Although the “Decision” and the “Measures” were enacted before the Legislative Law, the provisions that are suspected of unconstitutional and illegal after the passage of the Legislative Law should be amended or repealed. After receiving the proposal, the Legislative Affairs Committee of the Standing Committee of the National People’s Congress began to communicate with the relevant ministries of the State Council which have power to implement detention and education for persons engaging in prostitution and whoring, in order to inquiry into the constitutionality of the “Measures.” Affirming the historical value of the “Decision” and “Measures,” the Legislative Affairs Committee pointed out that the detention and education measures for persons engaging in prostitution and whoring are no longer necessary. After that, the State Council submitted a “Bill on Abolishing the Detention & Education System” to the Standing Committee of the National People’s Congress. In December 2019, the Standing Committee of the National People’s Congress passed a decision to abolish the Detention & Education System. In March 2020, the State Council abolished the “Measures.”⁴⁰ For the implementation of the guarantee of basic rights of citizens in the current Constitution, the abolition of the Detention & Education System is an event of far-reaching significance: it confirms that personal freedom as a citizen’s right has a binding function on state organs, including binding on the Standing Committee of the National People’s Congress and on the State Council.⁴¹

³⁹ The proposal pointed out that the detention and education system is a restriction of personal freedom. According to the provisions of the Legislative Law, restrictions on personal freedom can only be stipulated by law, the State Council cannot be authorized to formulate administrative regulations.

⁴⁰ Recordation Review Office of the Legal Affairs Committee of the Standing Committee of the National People’s Congress (ed.), *Recordation Review of Normative Documents* 1–3 (2020).

⁴¹ Of course, in this case, the repeal decision of the Standing Committee of the National People’s Congress did not directly specify the constitutionality of the Detention & Education system, mainly because the “Decision” was also made by the Standing Committee of the National People’s Congress. For this reason, the unresolved questions are: What should the Standing Committee of the National People’s Congress do when a law formulated by itself is suspected of being unconstitutional? Is it possible to make an unconstitutional judgment? Does the Standing Committee of the National People’s Congress have the right to review

With the continuous improvement of the awareness of individual rights following the development of society and the progress of the rule of law, the proportion of individuals filing for recordation review has also been continuously increased. In 2021, the Recordation Review Office of the Legislative Affairs Committee pointed out,

The number of review proposals submitted by citizens and organizations received in the past year has reached a record high, and the vast majority of them are closely related to citizens' rights and obligations.

There was a history of nearly fifteen years for citizens filing recordation review. In 2009, citizen filed for review on the constitutionality and legality of the "Regulations on the Administration of Urban Housing Demolition" of the State Council. The main reasons included: the compensation procedures stipulated in the "Regulations" are unreasonable, and the subject of compensation is inconsistent with the Constitution and legal regulations. The Legislative Affairs Committee communicated with the relevant departments of the State Council and evaluated the legality of the "Regulations." Then, in 2011, the State Council promulgated the "Regulations on the Expropriation and Compensation of Houses on State-Owned Land," and at the same time abolished the "Regulations on the Administration of Urban Housing Demolition."⁴² In the past two decades, China's urbanization has developed rapidly. The process of urbanization is accompanied by the demolition of residents' houses. Demolition must involve property compensation for individuals and families. How to compensate is closely related to property rights. When government actions involve the fundamental rights of citizens, citizens need to have legal means to protect their rights and interests. In the case of housing demolition compensation, citizens submitted a review of the legality of the administrative regulations formulated by the State Council, which guaranteed citizens' property rights from the final result.

The objects of recordation review are administrative regulations and local regulations.⁴³ The result of the review is a judgment of constitutionality and legality of regulation involved in controversy. The judgment does not and could not directly resolve the individual's basic rights protection claim. However, through the above two cases, we can see that through recordation review, the regulation-making organs will repeal the illegal regulation or amend the corresponding provisions in accordance with the opinions and recommendations of the Legislative Affairs Committee of the Standing Committee of the National People's Congress, thereby indirectly guaranteeing citizens' rights.

laws formulated by the National People's Congress that are suspected of being unconstitutional? Obviously, there are still many problems in the current recordation review system that need to be solved.

⁴² Recordation Review Office, *supra* note 40, at 10–12 (2020).

⁴³ A complete systematic review of the constitutionality includes a review of the constitutionality of the law. But in practice it is limited to the review of administrative regulations and local regulations.

Conclusion

The changes in basic rights in the Chinese Constitution can be analyzed from two dimensions: the changes in the text of the Constitution and the changes in the mechanism of basic rights protection. From the text point of view, the basic rights of citizens stipulated in the current Constitution are foremost the inheritance of the 1954 Constitution. Based on historical lessons and the state's understanding of the basic rights of citizens, the basic rights of citizens in the current Constitution are also constantly developing. The basic rights provisions in the current constitution are similar to the content of most written constitutions in the world today. The guarantee of basic rights is also changing and developing from concept to mechanism. More important is that the Constitution establishes the state's obligation to guarantee citizens' rights, and gradually establishes a mechanism for indirectly guaranteeing citizens' rights through recordation review.

However, we have to admit that there is still a gap for the guarantee of the basic rights between in China and in the developed countries under the rule of law. In China, the realization of citizens' basic rights is right now affected by multiple factors. The first is the adverse impact of stability as the most important government goal on the basic rights of citizens, such as restrictions on citizens' freedom of expression. The second is that the concept of the right to subsistence and the right to development as the primary basic human rights objectively restricts the individual's pursuit of rights such as human dignity. And finally, the Constitution and laws have not yet established a mechanism for citizens to directly apply for right relief, and the lack of a mechanism further restricts questioning of the connotation of the basic rights of citizens stipulated in the Constitution, such as whether the closure during the coronavirus epidemic constitutes restriction on citizens' personal freedom. For the future development of guarantee of basic rights, the state should establish a system for citizens to seek protection of their rights through litigation.

At present, the recordation review system cannot really perform the function of constitutional review, even though the recordation review has some function for indirect protection for individual right. In reality, the Legislative Affairs Committee of the Standing Committee of the National People's Congress has excised the power of recordation review through the method of communication and negotiation with ministries of state government and local legislatures. In a certain sense, the method could be regarded as a political cooperation mechanism. In most cases, the Legislative Affairs Committee respects the executive legislative power and local legislative power.⁴⁴ Undoubtedly the Legislative Affairs Committee has no power to interpret the Constitution, and also could not make a judgment that a law or a regulation is not constitutional. Furthermore, the Legislative Affairs Committee could not directly make a judgment for human right violated by state organ.

⁴⁴ See Recordation Review Office, *supra* note 40.

The expansion of citizens' protection of basic rights means that the basic rights in the Constitution should be included in the court's decision-making activities, that is, on the one hand, citizens can file lawsuit in accordance with the basic rights in the Constitution, on the other hand, the court can judge cases based on basic rights. The court hearing the case could report the constitutional issues to the Supreme People's Court. According to the rules in the Legislative Law, the Supreme People's Court has power to submit a request for recordation review. This mechanism is totally based on the current Constitution and the Legislative Law. The only thing that needs to be done is to add a constitutionality judgment procedure for discussing damages to basic rights through specific cases, which is similar to the constitutional complaint procedure during legal transition in Eastern European countries.⁴⁵

After all, only individuals are most motivated to fight for their own rights. The guarantee of basic rights cannot be achieved only through political cooperation mechanism of recordation review. Frankly speaking, the basic rights of citizens from text to reality must be realized through the construction of an effective guarantee mechanism and through the improvement of the interpretation of the Constitution, which is actual content and real function of constitutional review in terms of guarantee of basic rights.

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⁴⁵ See Wang Weiming, *Comparative Study on the Constitutional Review System in Eastern European Countries* (2008), Ch. 2.

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