

# On the Concept of “Basic Rights and Interests” in Recordation Review

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**Abstract:** *The concept of “basic rights and interests” in the recordation review system serves as a key to understanding the mixed use of review standards by the review authorities. The essence of the “basic rights and interests” concept is the value foundation established by the community for individuals, playing a legitimizing role in the actual operation of the state power system. Through the method of “triple abstraction,” the substantive construction of “basic rights and interests” can be achieved. Ensuring the “basic rights and interests” of citizens can effectively fulfill the functional purpose of the recordation review system. The diverse human rights norms in China’s legal system are the formal carriers of basic rights and interests, which can be categorized into four types: human rights norms in policies, human rights norms in the Constitution, human rights norms in departmental laws, and human rights norms in social and cultural consensus. By examining the interactive connections of these diverse human rights norms, citizens’ “basic rights and interests” can be organized into such five categories as survival care, democratic participation, cultural education, well-being development, and ecological harmony. The protection of “basic rights and interests” depends on the review authorities’ application of the “basic rights and interests” concept to conduct mixed reviews of relevant normative documents. The application method should be based on the principles of integration, effectiveness, entirety, and harmony.*

**Keywords:** recordation review ♦ “basic rights and interests” ♦ human rights norms ♦ review principles

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At the 32<sup>nd</sup> session of the Standing Committee of the 13<sup>th</sup> National People’s Congress (NPC) on December 21, 2021, the Legislative Affairs Commission of the NPC Standing Committee submitted the *Report on the Recording and Review Work of the Legislative Affairs Commission of the NPC Standing Committee in 2021* (hereinafter referred to as the “Annual Report 2021”) for review. In the third chapter of the Annual Report 2021, titled “Adhere to the Principle of “Mistakes Must Be Investigated,” and Effectively Safeguard the Unity of China’s Rule of Law,” it is pointed out that “The parent-child relationship involves citizens’ personal dignity, identity, privacy and the harmony and stability of family relationships. It is a basic right of citizens and is protected by the constitution and laws. Local regulations should not stipulate the content of mandatory paternity testing, nor should they set corresponding administrative penalties, sanctions, or handling measures for this.”<sup>1</sup> This review case is referred to as the “Mandatory Paternity Testing Case.” From the perspective of China’s positive law system, the four “basic rights and interests” mentioned in the “Mandatory Paternity Testing Case,” namely, personal dignity, identity rights, privacy rights, and the

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<sup>1</sup> Shen Chunyao, “Report on the Recording and Review Work of the Legislative Affairs Commission of the NPC Standing Committee in 2021 — At the 32<sup>nd</sup> session of the Standing Committee of the 13<sup>th</sup> National People’s Congress on December 21, 2021,” *Gazette of the Standing Committee of the National People’s Congress of the People’s Republic of China* 1 (2022): 245.

harmony and stability of family relationships are based on Articles 38 and 49 of the *Constitution* and Articles 990 and 1001 of the *Civil Code*. It can be seen from this that the newly emerging concept of “basic rights and interests” in this recording and review practice presents a rights structure that is a complex and intertwined combination of civil rights in private law and basic rights in the constitution.

Academic views suggest that the logical connection between civil rights and basic constitutional rights can be constructed through argumentation methods that do not enumerate basic rights, i.e., a general basic right can be seen as the “legal interest” of civil rights.<sup>2</sup> However, the problem that arises is that basic rights and civil rights are based on different legal principles.<sup>3</sup> Basic rights are the contractual consensus reached between the sovereign and the people,<sup>4</sup> while civil rights regulate the relationship between equal subjects, so in fact there is no relationship between “power” (Macht) and “domination” (Herrschaft).<sup>5</sup> This means that the approach of integrating basic rights and private law rights from the perspective of subjective rights is likely to lead to legal confusion between the two. To avoid this problem in the study of recording and review, it is necessary to conduct separate reviews of the basic rights and civil rights involved in the case. Therefore, some people believe that in the study of the recording and review of normative documents, constitutionality review and legality review should be distinguished into two situations: “inconsistency with the spirit of the constitution” and “conflict with higher-level laws” when different subjects review normative documents,<sup>6</sup> and both should follow the principle of “review from the outside to the inside.”<sup>7</sup> However, it should be pointed out that according to the content of the Annual Report 2021, constitutionality review and legality review do not follow a sequential logic, but rather reflect a model of mixed reviews. In other words, there is no substantive distinction between

<sup>2</sup> The argumentation that does not enumerate basic rights needs to rely on the channeling function of the general human rights clauses. In China’s *Constitution*, some scholars believe that Article 33 of the *Constitution*, “The state shall respect and protect human rights,” is a general human rights clause. See Zhang Weiwei, “‘Human Rights Clause’: A Home for Rights Not Listed in the Constitution,” *Law Review* 1 (2011): 10. While some scholars believe that it is necessary to use a model that combines Article 33 with Article 38 on “personal dignity” to complete the argument for unlisted basic rights. See Wang Xu, “Constitutional Dignity Theory and Its Systematization,” *Chinese Journal of Law* 1 (2016): 44. For a discussion of general human rights clauses in foreign constitutions, see Yu Jun, “Due Process: As a General Human Rights Protection Clause — An Investigation Based on the Judicial History of the U.S. Supreme Court,” *Zhejiang Academic Journal* 6 (2014): 159-169. See Yu Jun, “The General Human Rights Protection Clause in the German Constitution — the Functions, Status, Normative Structure and Normative Scope of Art. 2, Para. 1 of the Basic Law,” *Public Law Research* 17 (2017): 140-167.

<sup>3</sup> Regarding the distinction between the legal basis of basic rights and civil rights, the argument of Japanese scholar Kazhiyouki Takahashi is a model. The core legal principle of the *Constitution* is to “directly regulate the state,” with the aim of limiting state power and making it passive and inactive. Civil law, on the other hand, encourages “active action” among individuals and the establishment of contracts by establishing “private autonomy.” See [Japan] Kazhiyouki Takahashi, “On the Role of the Constitution and Civil Law in Protecting Human Rights,” translated by Hong Ying and Pan Xiuli, *Study and Exploration* 2 (2008): 111. Kazhiyouki Takahashi, “The Effectiveness of ‘Constitutional Human Rights’ Does Not Extend to Private Parties: A Re-Evaluation of the ‘Ineffectiveness Argument’ of Human Rights on Third Parties,” translated by Chen Daoying, *Law and Economy* 5 (2018): 64-76.

<sup>4</sup> Basic rights are inherent in the social contract, and their legitimacy comes from the consent of the people. Therefore, in order to obtain the consent of the largest number of groups, the list of rights should be “short rather than long.” Only in this way can the majority decision-making method of the democratic mechanism be used to collectively review the “core consensus” or “second-order consensus” of community members. See Chen Jinghui, “The Nature of the Constitution: General Principles of Law or Legal Environment?” *Peking University Law Journal* 2 (2021): 302-303.

<sup>5</sup> “Power” (Macht) refers to a social relationship in which one party is able to impose its will regardless of the opposition of another party. “Domination” (Herrschaft) refers to the probability that a command with specific and explicit content will be obeyed by a specific group. The boundary between public law and private law can be distinguished by the categories of “power” and “domination.” The concept of equality in private law refers to the relationship between the two parties in private law, where one party cannot impose their will on the other party against their objections to reach a legitimate and lawful contract, and the other party is not obligated to comply with such commands. Therefore, there should be no “power” and “domination” relations in the field of private law. See Max Weber, *Economy and Society* (vol. 1), translated by Yan Kewen (Beijing: Commercial Press, 2019), 184-185.

<sup>6</sup> Some scholars point out that the reviewer of constitutionality review is the *Constitution* and Law Committee of the National People’s Congress, while the reviewer of legality review is the Legislative Affairs Committee of the NPC Standing Committee. See Hu Jinguang, “On the Relationship Between Recording & Review and Constitutionality Review,” *Journal of East China University of Political Science and Law* 4 (2018): 27.

<sup>7</sup> That is, between constitutionality review and legality review, the logic is to conduct legality review before constitutionality review. See Wang Kai, “Differences and Connections Among Constitutionality, Legality and Appropriateness Reviews,” *China Legal Science* 1 (2019): 23.

constitutionality review and legality review. Further investigation reveals that the model of mixed reviews does not only appear in the Annual Report 2021. First, there are provisions in China's legislation that put constitutionality review and legality review on a par with each other and confuse legality review with appropriateness review.<sup>8</sup> Second, there are also situations in which political review and constitutionality review, as well as constitutionality review and legality review, are intertwined in recording and review.<sup>9</sup> Therefore, the political review, constitutionality review, legality review, and appropriateness review applied in recording and review practice only constitute clues and reminders of the review standards, and there is no clear distinction among them in such practice. In this regard, relevant research not only ignores the interaction among various review standards, but also is not conducive to improving the intensity of review of normative documents.<sup>10</sup>

Thus, the author believes that in the review practice where the constitution and laws are used in parallel as the basis of higher-level laws, basic rights and civil rights can be understood from the perspective of objective law as value elements of the objective order of individuals' integration into a community, while "basic rights and interests" are the objective values set by the community for individuals.<sup>11</sup> According to this approach, due to the complexity of the content of multiple values in the community, basic rights and civil rights interact in the review process. This is why the existing review standards appear to be parallel, mixed, and intertwined. Furthermore, if the review authority uses the concept of "basic rights and interests" to handle various cases, it will be in line with the mixed review logic of relevant cases, which will help to increase the intensity of the review. In this regard, the concept of "basic rights and interests" that appeared in the "Mandatory Paternity Testing Case" can, on the one hand, effectively explain the operation of the review standards in the recording and review practice; on the other hand, through the method of concept construction, it can be used as an "opportunity" to promote the further development of the recording and review practice. Based on this academic interest, this paper intends to analyze the new concepts emerging in this practice from the perspectives of nature, form, and application.<sup>12</sup> First, this paper clarifies the theoretical basis of "basic rights and interests" in recording and review, analyzes the principle that how "basic rights and interests" can become "values set by the community for individuals," points out how to obtain "basic rights and interests," and proposes a review plan based on the functional perspective of the recording and review system. Second, based on the above theory, this paper comprehensively examines the state's political obligations, basic norms, and the operational forms of recording and review practices, and carries out substantive construction of the specific content of "basic rights and interests" from such five levels as survival care, democratic participation, cultural education, well-being development, and ecological harmony. Finally, based on the nature and characteristics of "basic rights and interests," this paper points out the various applicable methods in specific

<sup>8</sup> For example, Article 81, Paragraph 1 of the *Legislation Law of the People's Republic of China* provides that "The Standing Committee of the People's Congress of a province or autonomous region shall review the legality of local regulations submitted for approval and shall approve them within four months if they do not conflict with the Constitution, laws, administrative regulations and local regulations of the province or autonomous region." Here, "do not conflict with the Constitution" is taken as the content of the legality review. For related views, see Wang Kai, "Differences and Connections Among Constitutionality, Legality and Appropriateness Reviews," *China Legal Science* 1 (2019): 9.

<sup>9</sup> As listed in the Annual Report 2021, cases involving constitutional issues and constitutionality are also reviewed for both constitutionality and legality.

<sup>10</sup> Zheng Lei and Wang Xiang, "Summary and Commentary on the Recording and Review Work Report 2021 — Based on the 'Three-Have Principle'," *China Law Review* 4 (2021): 188-190.

<sup>11</sup> Konrad Hesse, *The Federal German Constitution Outline*, translated by Li Hui (Beijing: Commercial Press, 2007), 238.

<sup>12</sup> As mentioned above, the constitutional principle of "basic rights and interests" involves the theory of constitutional integration. If the basic law theory is applied to China's rule of law practice and related cases, and communicated with these institutional system arrangements and practical cases, it can produce a "chemical reaction" and extract constitutional theories with local characteristics from reality. As Professor Zhang Jiansheng points out, the attitude toward legal theory should fully consider complex factors such as the constitutional system, judicial structure and the protection of citizens' rights, so that it can produce a chemical reaction with constitutional practice, in order to truly digest legal theory. See Zhang Jiansheng, "The Judgment Structure of 'Interests Relationship' in the Qualification of Plaintiffs in Administrative Litigation," *China Legal Science* 4 (2019): 245.

review cases. Therefore, through the analysis, construction and application of “basic rights and interests,” a dynamic and interactive “basic rights and interests” review logic is constructed, completing the Chinese narrative of the basic theory of constitutional law and providing theoretical resources for the timely recording and review system.

## **I. Theoretical Construction of “Basic Rights and Interests” in Recording and Review**

### **A. Definition of the concept of “basic rights and interests”**

Conceptual construction of the “basic rights and interests” that appear in China’s recording and review system is a non-positivist constitutional thinking approach. Positivist constitutional law takes the binary opposition between what ought to be and what is its position, believing that individuals and communities are separate from each other, and thus concludes that human rights are merely individual subjective rights whose function is mainly manifested as subjective rights of defense.<sup>13</sup> In contrast, non-positivist constitutional law holds that “the essence of the state lies in integration, and the constitution is the legal order of the integration process.”<sup>14</sup> Human rights are elements of substantive integration, that is, as a specific cultural and value system, they carry the significance of community integration and national life. In this sense, the human rights system in the process of national integration is not an exclusive domain of constitutional norms, but a source of values shared by both constitutional norms and departmental law norms, because the areas of national life regulated by constitutional norms and departmental law norms overlap to a large extent. Therefore, based on the approach of non-positivist constitutional law, the scope of the effectiveness of human rights can be summarized into two levels. First, the effectiveness of human rights is aimed at authorities such as legislators, specific administrative agencies, and judicial agencies, serving as a criterion for the constitution, legislation, and administration. Second, if human rights cannot have direct effect on the above-mentioned authorities, then they should also serve as the interpretation principle of all departmental laws and as a source of value in a cultural sense.<sup>15</sup> This means that the human rights system is not only the individual’s subjective rights of defense against the state, but also plays the objective value function of enabling community integration and guiding the construction of state power.

From the perspective of non-positivist constitutional law, it can be found that the objective value principles abstracted from the human rights system are aimed at achieving the integration of the community. They belong to the substantive part of the community integration and undertake the task of legitimizing the political community. Legitimacy is an issue that any type of community needs to address, and the function of substantive integration is to give legitimacy to the political community. In the institutional construction of modern countries, the concretization of human rights is generally used as the main form of substantive integration, that is, the concretization of human rights is completed through the explicit confirmation of human rights in the constitution, thereby injecting elements of legitimacy into the integration process of the community. For example, substantive integration is reflected in the general provision of Article 33 of the *Constitution* that “the state shall respect and protect human rights”. This provision creates the overall task of concretizing human rights and justifies the national life order itself. Therefore, the concept of “basic rights and interests” refers to a series of objective value principles obtained through the general abstraction and refinement of China’s diverse human rights norms. It serves as the value basis set by the community for individuals and plays the function of legitimizing the national power system.

### **B. Ways to obtain “basic rights and interests”**

The various “basic rights and interests” of citizens need to be referenced to China’s human rights normative system, that is, to obtain pure objective value principles by reviewing and abstracting various human rights norms in China’s legal field. The acquisition of “basic

<sup>13</sup> Zhang Xiang, “On the Defensive Function of Basic Rights,” *The Jurist* 2 (2005): 67.

<sup>14</sup> Rudolf Smend, *Constitution and Real Constitution*, translated by Zeng Tao (Beijing: Commercial Press, 2020), 98.

<sup>15</sup> *Ibid.*, 202.

rights and interests" is primarily achieved through the method of "triple abstraction," which involves abstracting the rights holder (obligee), the rights recipient (obligor), and the modalities of the rights object (non-infringement).<sup>16</sup> Take Article 37 of the *Constitution*, which stipulates that "the personal freedom of citizens of the People's Republic of China shall not be violated," as an example. The basic right of 'personal freedom shall not be violated' primarily serves as a subjective right of defense, with the state taking a passive stance toward the personal freedom of citizens and bearing the obligation of non-interference. However, although personal freedom is of great significance to the legal system, this right is difficult to directly radiate to departmental laws such as civil law, civil procedure law, and economic law, and cannot become an objective principle of a legal system. Therefore, by eliminating the obligee, the obligor and the object of the right, "personal freedom shall not be violated" is abstracted into "personal freedom shall exist purely as it should be." For another example, Article 39 of the *Constitution* stipulates that "the homes of citizens of the People's Republic of China are inviolable," which can also be abstracted into "home freedom shall exist purely as it should be."<sup>17</sup> These two objective value principles become the basic structure of "basic rights and interests." Therefore, it can be seen that if we take various human rights norms as the object and use "triple abstraction" as the method, we can obtain various "basic rights and interests" in many aspects and at many levels.

### **C. Review plan from the perspective of institutional function**

Based on the concept of "basic rights and interests," the mixed review model in the recording and review practice can be effectively explained, but it also puts forward requirements for the review authorities to construct a review based on institutional functions. The standards of politics, constitutionality, legality and appropriateness construct the basic review framework in current practice,<sup>18</sup> and formally divide the normative areas into four categories: policy norms, constitutional norms, legal norms, and social and cultural norms. But if we follow the idea of non-positivist constitutional law, then the formal, static review standard should be transformed into a substantive, dynamic review standard. This requires reconstructing the four review standards in practice from the perspective of the functions of the recording and review system. In other words, the recording and review system includes five functions: "ensuring the implementation of the CPC (Communist Party of China) Central Committee's orders, guaranteeing the implementation of the constitution and laws, protecting the legitimate rights and interests of citizens, maintaining the unity of the country's legal system, and promoting the improvement of the formulation of normative documents."<sup>19</sup> First, institutional functions are reflected in an interactive relationship of mutual construction and support. The major reforms and policy adjustments of the CPC Central Committee are the political will with direct guiding force in the implementation of the constitution and laws and are the political guarantee for the realization of the normative effect of the constitution and laws. The implementation of the constitution and laws provides a specific implementation mechanism for the major reforms and policy adjustments of the CPC Central Committee, ensuring that the political will of the CPC Central Committee is realized in practical forms. The implementation of the constitution and laws aims to protect the legitimate rights and interests of citizens, and it also relies on the unity of the country's legal system and the targeted, timely, and enforceable nature of normative documents. Second, "protecting the legitimate rights and interests of citizens" requires respecting and safeguarding the citizens' "basic rights and interests," and the four functions of "ensuring the implementation of the CPC Central Committee's orders," "guaranteeing the implementation of the constitution and

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<sup>16</sup> Robert Alexy, *Law, Reason, Discourse: Studies in Legal Philosophy*, translated by Zhu Guang and Lei Lei (Beijing: China Legal Publishing House, 2011), 267.

<sup>17</sup> Ibid.

<sup>18</sup> Regulations Recording and Review Office of the Legislative Affairs Commission of the NPC Standing Committee, *Recording and Review of Normative Documents: Theory and Practice* (Beijing: China Democracy and Legal System Publishing House, 2020), 108.

<sup>19</sup> Ibid., 6-9.

laws,” “maintaining the unity of the country’s legal system,” and “promoting the improvement of the formulation of normative documents” have a supporting and promoting role in respecting and safeguarding the citizens’ “basic rights and interests.” Thus, due to the coherent structure among the five functions, the function of “protecting the legitimate rights and interests of citizens” can become the main line for realizing other functions. The functional review of relevant normative documents is to ensure that the normative documents are consistent with the requirements of respecting and protecting the “basic rights and interests” of citizens. They should not infringe upon the “basic rights and interests” involved, but should also ensure that the “basic rights and interests” are implemented in a concrete manner. This means that with the application of “basic rights and interests” as the main line, “ensuring the implementation of the CPC Central Committee’s orders,” “guaranteeing the implementation of the constitution and laws,” “maintaining the unity of the country’s legal system” and “promoting the improvement of the formulation of normative documents” are all regarded as tasks of functional thinking, so as to more fully realize the effectiveness of the recording and review system.

Based on the above analysis, we can formulate a theoretical structure of the concept of “basic rights and interests” in the recording and review system: (1) “Basic rights and interests” in recording and review are the value foundation set by the community for individuals, which belong to the substantive part of the national integration process and play the role of legitimizing national power; (2) The formal carrier of “basic rights and interests” in recording and review is composed of a system of diverse human rights norms; (3) Through the method of “triple abstraction,” the substantive value of “basic rights and interests” can be abstracted from the formal carrier; and (4) “Basic rights and interests” should be subject to substantive and dynamic functionalist review standards in the recording and review system. The following discussion will be based on this theoretical construction.

## **II. Human Rights Norms: The Carrier of “Basic Rights and Interests” in Recording and Review**

“Basic rights and interests” are based on China’s diverse human rights norms. Human rights norms rest on the claims of justice implicit in the legal order; if political decisions and institutional systems can no longer be properly attributed to the law, then specific rules will lose their claim to legitimacy.<sup>20</sup> From the perspective of the “structural coupling” relationship between the political system and the legal system,<sup>21</sup> the concretization of human rights is the completion of two links: the concretization of human rights values and the concretization of human rights concepts in the process of substantive integration of the community. The concretization of human rights values is the establishment of common values such as freedom, equality, survival, and development as collective goals of the community, while the concretization of human rights concepts is the establishment of a constitutive relationship between the concept of human rights and the system of positive law in terms of prerequisites and outcomes. Therefore, the substantive integration of the community not only integrates the concepts of morality and justice into the positive law system in formal concepts, allowing human rights to permeate public law, private law and the intersection of public law and private law, but also transforms it into China’s human rights policy and social human rights consensus in the substantive dimension.

In terms of substantive integration, China’s human rights norms system can be categorized into four categories: human rights norms in the constitution, human rights norms in departmental laws, human rights norms in policies, and human rights norms in social and

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<sup>20</sup> Neil MacCormick, *Institutions of Law: An Essay in Legal Theory*, translated by Chen Rui and Wang Lin (Beijing: Law Press • China, 2019), 400.

<sup>21</sup> Observing the political system and the legal system from the perspective of structural coupling, we find that they are two separate yet interdependent and mutually borrowing systems. See Pan Weijiang, “Sociological Enlightenment of the Constitution: On the Constitution as a Structural Coupling of the Political System and the Legal System,” *Journal of East China University of Political Science and Law* 3 (2019): 11.

cultural consensus. Human rights norms are the carriers of “basic rights and interests,” and “basic rights and interests” are the value content of human rights norms. In the current practice of review activities, the review process of normative documents based on standards of politics, constitutionality, legality, and appropriateness is, in fact, a review based on diverse human rights norms. Therefore, the standards of politics, constitutionality, legality and appropriateness applicable to the review of normative documents constitute a formal division of diverse human rights norms. Specifically, first, human rights norms in policies serve as political review’s criteria. Political standards refer to the criteria used to review whether regulatory documents, judicial interpretations, and other normative documents are consistent with the major policies, decisions, and reform directions of the CPC Central Committee and the state.<sup>22</sup> Therefore, human rights norms in policies exist in relevant human rights policies, decisions, plans and other documents or statements, and need to be comprehensively reviewed and integrated. For example, General Secretary Xi Jinping points out that “we should take the right to development and the right to subsistence as the primary basic human rights, and promote the economic, political, social, cultural, and environmental rights of all people in a coordinated manner.”<sup>23</sup> The *Human Rights Action Plan of China (2021-2025)* (hereinafter referred to as the *Human Rights Action Plan*) also provides detailed lists and explanations of economic, social and cultural rights, civil rights and political rights, environmental rights, and rights of women and children.<sup>24</sup> Second, the human rights norms in the constitution serve as standards for constitutionality review. The constitutionality standard refers to the standard applicable when examining whether normative documents such as laws, regulations, and judicial interpretations comply with the provisions, principles, and spirit of the constitution.<sup>25</sup> The human rights norms in the constitution are mainly composed of citizens’ basic rights norms. In the provisions of the *Constitution*, from Article 34 to Article 50, the basic rights of citizens are comprehensively stipulated, and the “basic rights and interests” abstracted from them are directly binding in the recording and review system. In addition, national obligation norms are also the carriers of “basic rights and interests.” For example, Paragraph 2 of Article 11 states that “the state shall protect the lawful rights and interests of non-public economic sectors such as individually owned and private businesses.” Paragraph 2 of Article 19 states that “the state shall run schools of all types, provide universal compulsory primary education...” These regulations are not empty declarations, but obligations that legislative bodies must fulfill, requiring the derivation of individual rights from the overall interests of society.<sup>26</sup> Third, human rights norms in departmental laws serve as standards for legality review. Legality review refers to the standards applied when examining whether normative documents such as laws, regulations, and judicial interpretations are “incompatible” with higher-level laws.<sup>27</sup> Some scholars have introduced the thinking of “the essence of things” to construct the standard of “incompatibility” as an evaluative structure that discovers the relevance and similarity between norms and facts, thereby adapting the evaluation of norms to specific, historical practical situations.<sup>28</sup> In fact, when judging whether a lower-level law

<sup>22</sup> Regulations Recording and Review Office of the Legislative Affairs Commission of the NPC Standing Committee, *Recording and Review of Normative Documents: Theory and Practice* (Beijing: China Democracy and Legal System Publishing House, 2020), 114.

<sup>23</sup> Xi Jinping, *Xi Jinping on Respecting and Protecting Human Rights* (Beijing: Central Party Literature Press, 2021), 22.

<sup>24</sup> State Council Information Office, “Human Rights Action Plan of China (2021-2025),” *People’s Daily*, September 10, page 12.

<sup>25</sup> Regulations Recording and Review Office of the Legislative Affairs Commission of the NPC Standing Committee, *Recording and Review of Normative Documents: Theory and Practice* (Beijing: China Democracy and Legal System Publishing House, 2020), 108-109.

<sup>26</sup> Robert Alexy, *Law, Reason, Discourse: Studies in Legal Philosophy*, translated by Zhu Guang and Lei Lei (Beijing: China Legal Publishing House, 2011), 270.

<sup>27</sup> Regulations Recording and Review Office of the Legislative Affairs Commission of the NPC Standing Committee, *Recording and Review of Normative Documents: Theory and Practice* (Beijing: China Democracy and Legal System Publishing House, 2020), 116.

<sup>28</sup> Wang Xu, “The Construction of the ‘Incompatibility’ Standard in Constitutionality Review,” *China Legal Science* 6 (2021): 125.

conflicts with a higher-level law, “basic rights and interests” can be used as substantive value standards, and the dynamics and updates required for normative evaluation in the field of social life are completed by the interpretation of “basic rights and interests.” For example, the promulgation of China’s *Civil Code* marks another update of institutional practice of the socialist human rights concept with Chinese characteristics, and one of the important innovations is that personality rights occupy an independent book, because the book of personality rights “makes a clear list of rights in a panoramic manner.”<sup>29</sup> Since civil rules are characterized by clarity and practical adaptability, legal interpretation should focus on the changes in their meaning in real social life. Fourth, human rights norms in social and cultural consensus serve as appropriateness review standards. Appropriateness review refers to the standards applied when reviewing whether normative documents such as laws, regulations, and judicial interpretations are consistent with the general public’s perception of the value of law and whether they are understood by the general public.<sup>30</sup> Some scholars also believe that appropriateness review is “rationality review” or “purposefulness review,” and its basis is Paragraph 2 of Article 7 of the *Legislation Law of the People’s Republic of China*, which stipulates that “legal norms should be clear, specific, targeted, and enforceable.”<sup>31</sup> This means that the human rights norms in social and cultural consensus have significantly different characteristics from other types of human rights norms. In China, they are manifested as the core socialist values, public order and good customs, and the cognitive expectations of the general public. They do not have a clear entity form of rights, but are similar to optimization commands that require that a certain “basic right and interest” of citizens be realized to the greatest extent possible in fact and law.<sup>32</sup> In the construction of “basic rights and interests,” although the human rights norms in the social and cultural consensus are relatively vague, they can provide hints and assistance for the content of “basic rights and interests” due to the communication and interaction with other human rights norms in terms of value principles.

However, the above four types of human rights normative systems are not completely separate, but an overlapping and interactive normative system structure. In the sense of substantive integration, “basic rights and interests” are abstracted from the human rights normative system as the legitimacy basis of the community. On the one hand, politics, constitutionality, legality, and appropriateness reviews are formal requirements of the human rights norms system. Through the “channel” effect of the four review standards, human rights norms can be transformed into actual human rights. On the other hand, the human rights normative system also constitutes a substantive and functional unified whole,<sup>33</sup> forming a series of diverse and interactive “basic rights and interests.” Therefore, with the four review standards as the type structure at the formal level, it is possible to identify the human rights normative system in the overall legal order and provide a basis for the transformation of the construction of substantive “basic rights and interests.”

### III. Value Structure: The Construction of “Basic Rights and Interests” in Recording and Review

Taking into account the human rights norms in the constitution, policies, departmental laws, and social and cultural consensus, they are characterized by the fact that different types of human rights norms overlap in form and mutually construct in content. For example, in terms of form, the rights to work, education, culture, life, expression and supervision,

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<sup>29</sup> Wang Xigen, “On the Human Rights Spirit of the Civil Code: Focusing on the Book of Personal Rights,” *The Jurist* 2 (2021): 4.

<sup>30</sup> Regulations Recording and Review Office of the Legislative Affairs Commission of the NPC Standing Committee, *Recording and Review of Normative Documents: Theory and Practice* (Beijing: China Democracy and Legal System Publishing House, 2020), 125.

<sup>31</sup> Wang Kai, “Differences and Connections Among Constitutionality, Legality and Appropriateness Reviews,” *China Legal Science* 1 (2019): 9.

<sup>32</sup> Robert Alexy, *Law: As the Rationalization of Reason*, translated by Lei Lei (Beijing: China Legal Publishing House, 2012), 132.

<sup>33</sup> Konrad Hesse, *The Federal German Constitution Outline*, translated by Li Hui (Beijing: Commercial Press, 2007), 5.



personal rights, and environmental rights listed in the *Human Rights Action Plan* all have the same provisions in the constitution and departmental laws; in terms of content, the values of freedom and equality in the core socialist values are also expressed in specific rights discourses in the constitution, policies, and departmental laws. It can be said that the multiple interactive relationships of human rights norms present a complex aspect, so the construction of "basic rights and interests" in recording and review also needs to be based on the interactive structure of rights concept analysis and legal practice interpretation.

#### **A. The open value structure of "basic rights and interests"**

The protection of citizens' "basic rights and interests" depends on the substantive review of relevant normative documents by the recording and review system, thereby promoting the legitimate operation of the state power system. However, the practice of normative documents usually occurs in specific, historical social life scenarios, and the value structure based on the internal normative system often cannot fully encompass the various rights protection issues that arise in practice. In the "Mandatory Paternity Testing Case," the multiple power structures involved create a mixed logic in the value structure for "basic rights and interests." Therefore, further exploring the value structure of "basic rights and interests" lies in clarifying the relationship between constitutional basic rights and "basic rights and interests." First, the objective value order constructed by the basic rights in the positive constitution has a radiating effect on all legal domains, thus forming an interactive relationship based on human rights values between basic rights and specific legal rights. Second, basic rights play a mediating role in this interactive relationship, linking the human rights discourse that appears in human rights policy norms with specific legal rights, so that rights discourse with strong policy colors such as the right to subsistence, the right to development, and the right to a happy life can be transformed into more specific basic rights in the constitution. In the implementation of the constitution, the interpretation of the normative content of basic rights through constitutional doctrine forms the scope of protection for individual basic rights, while more specific legal rights serve as constructive interpretations of individual basic rights to adapt to new contexts.<sup>34</sup> Therefore, the logical structure of "basic rights and interests" presents a hierarchical progressive structure of "super-level — medium — extension." Due to the inherent ambiguity of human rights policy discourse to a certain extent, the recording and review adopts the "medium-extension" approach, which combines constitutional basic rights with specific legal rights as the review framework. This approach not only facilitates the realization of the objectives and purposes of human rights policies but also ensures precision in the review process. Finally, in the implementation of relevant normative documents, many practical situations that are difficult to anticipate during the legislative process touch upon unenumerated specific legal rights. In such cases, general and catch-all rights provisions provide a normative basis for the protection of citizens' rights and interests. For example, Article 109 of the "General Part" of the *Civil Code*, "the personal liberty and dignity of a natural person is protected by law," and Paragraph 2 of Article 990 of the "Book Four: Personality Rights," "other personality rights and interests arising from personal liberty and human dignity," can serve as the catch-all normative basis for the argumentation of specific legal rights. However, Article 33 of the *Constitution*, on "Human Rights," and Article 38, on "Personal Dignity," continue to allow for the possibility of evaluating the constitutionality of specific legal rights, thereby retroactively protecting the "basic rights and interests" of citizens. Therefore, based on the open value structure of the concept of "basic rights and interests" in recording and review, to maximize the listing of various forms of citizens' "basic rights and interests," this paper preliminarily realizes the typological construction of "basic rights and interests" from the perspective of the basic norms of the political entity and legal system.

#### **B. Typological construction of "basic rights and interests"**

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<sup>34</sup> Zhang Xiang, "Typification of Constitutional Personal Dignity — Based on the Protection of Civil Personality Rights and Personal Information," *China Law Review* 1 (2023): 59-60.

From the perspective of political entity, the political obligations of the state can clarify these multiple interactions. General Secretary Xi points out that “promoting the economic, political, social, cultural and environmental rights of all people in a coordinated manner”<sup>35</sup> guides the human rights value goals of the political community and further proves the political obligations of the state. In addition, the higher law background of the Preamble to the *Constitution* can also provide reference and assistance. Referring to the provisions of the Preamble of the *Constitution*, which stipulates “promote coordinated material, political, cultural-ethical, social and ecological advancement,”<sup>36</sup> the value structure of “basic rights and interests” can be typified, that is, categorizing citizens’ various “basic rights and interests” into five categories: survival care, democratic participation, cultural education, well-being development, and ecological harmony.

(1) “Basic rights and interests” related to survival care are connected to the objective value connotation of the right to subsistence and are based on the socialist principles in China’s *Constitution*. In the history of the development of modern constitutions, both the *Soviet Constitution* of 1918 and the *Weimar Constitution* of 1919 took socialist principles as the basis of constitutional order, with the idea of social balance at its core.<sup>37</sup> The concept of social balance, on the one hand, advocates restricting the property rights and economic freedom of the economically powerful to a certain extent, while on the other hand, it focuses on protecting the social rights of the economically weak.<sup>38</sup> Since the arrival of the new era, the national policy has further emphasized the economic development concept of “common prosperity”,<sup>39</sup> and the goal of “complete poverty alleviation” has been finished as scheduled,<sup>40</sup> reflecting the basic function of socialist principles in protecting the “basic rights and interests” in terms of survival care. In departmental laws, civil law, social insurance law, charity law, labor law, and tax law all provide for this as specific norms of socialist principles. Therefore, based on the abstract way of “basic rights and interests,” the “basic rights and interests” of Chinese citizens in terms of survival care mainly include life and health, property ownership, obtaining material help, participating in social insurance, enjoying social welfare, obtaining social assistance, employment, and obtaining labor remuneration. (2) “Basic rights and interests” related to democratic participation are inherent in the socialist democratic political system with Chinese characteristics, and their characteristics are mainly reflected in the “whole-process people’s democracy.”<sup>41</sup> In China’s democratic structure, based on the objective value of people’s democracy as the principle, the constitution and laws establish the democratic and political rights of citizens, and construct a specific institutional framework for

<sup>35</sup> Wei Zhezhe, “Xi Jinping’s letter to the symposium commemorating the 70<sup>th</sup> anniversary of the publication of the *Universal Declaration of Human Rights* emphasizes: Adhere to the human rights development path that suits China’s national conditions and promote the all-round development of people,” *People’s Daily*, December 11, 2018, page 1.

<sup>36</sup> The Preamble of the *Constitution* reflects the interactive relationship between individuals and the community by setting the national goals of prosperity, democracy, cultural advancement, harmony, and beauty. Based on this, Chen Minghui points out that the socialist state as a national goal itself encompasses the principle of human rights protection. For example, prosperity, democracy and cultural advancement correspond to the economic, political and cultural rights of citizens respectively. See Chen Minghui, “What Kind of Republic — The Nature and Connotation of ‘Socialist State’ in the Current Constitution,” *Peking University Law Review*, vol. 20, no. 2 (2019): 71.

<sup>37</sup> Zhang Xiang, “The Normative Connotation of ‘Common Prosperity’ as a Constitutional Socialist Principle,” *Science of Law* 6 (2021): 23.

<sup>38</sup> *Ibid.*, 24.

<sup>39</sup> “Common prosperity” is a goal that has been emphasized since the founding of New China. For example, Comrade Mao Zedong proposed that the prosperity under the socialist system is common prosperity. Comrade Deng Xiaoping also pointed out that the essence of socialist principles lies in developing productivity and achieving common prosperity. See Mao Zedong, *Selected Works of Mao Zedong*, vol. 6 (Beijing: People’s Publishing House, 1990), 495. See Deng Xiaoping, *Selected Works of Deng Xiaoping*, vol. 3 (Beijing: People’s Publishing House, 1993), 373.

<sup>40</sup> The comprehensive battle against poverty has solved regional overall poverty, eliminated absolute poverty, and achieved comprehensive victory on the occasion of the 100<sup>th</sup> anniversary of the founding of the Communist Party of China. See Xi Jinping, “Speech at the National Poverty Alleviation Summary and Commendation Conference (February 25, 2021),” *People’s Daily*, February 25, 2021, page 2.

<sup>41</sup> Xi Jinping, “Xi Jinping delivered an important speech at the Central People’s Congress Work Conference, emphasizing the need to uphold and improve the people’s congress system and continuously develop whole-process people’s democracy,” *People’s Daily*, October 15, 2021, page 1.

the operation of people's democracy, ensuring the completion and realization of the dual normative goals of democratic legitimacy and governance effectiveness of democratic centralism.<sup>42</sup> Therefore, based on the multiple human rights system norms in the process of democratic operation, the "basic rights and interests" of citizens in terms of democratic participation can be summarized as participating in elections and being elected, making criticisms and suggestions to state organs and state staff, filing complaints, accusations or reports to state organs, participating in legislative activities, making review suggestions on normative documents, and applying for government information disclosure. (3) "Basic rights and interests" related to culture education are stipulated in the provisions of the right to education and cultural rights in Articles 13 and 15 of the *International Covenant on Economic, Social and Cultural Rights*. Through China's agreement, signature and ratification, the right to education and cultural rights have formed a communication and complementary relationship with the norms of China's human rights law. First of all, Articles 19, 20, 22, 24, 46 and 47 of the *Constitution* stipulate the state's cultural education obligations and citizens' basic cultural and educational rights. These constitutional norms are stipulated in a more detailed way in China's laws such as the *Higher Education Law*, the *Compulsory Education Law*, the *Teachers Law*, the *Family Education Promotion Law*, the *Public Cultural Service Guarantee Law*, the *Cultural Relics Protection Law*, and the *Copyright Law*, thus building an institutionalized guarantee system for citizens' right to education and cultural rights.<sup>43</sup> In this regard, the basic cultural and educational rights of Chinese citizens can be summarized as free compulsory education, equal educational opportunities, freedom to choose education, administrative protection during the education process, appeal and relief during the education process, access to comprehensive public cultural service infrastructure, access to excellent public cultural products, and learning and using the national common language. (4) "Basic rights and interests" related to well-being development emphasize the right of individuals to pursue happiness and personal development, and advocate the use of the rule of law to clarify the boundaries of individual rights and guarantee a happy life. The constitutional structure of a happy life can be reflected in the national goal of "the greatest human right is the people's happy life."<sup>44</sup> Articles 37, 38, 39 and 40 of the *Constitution*, respectively, stipulate that citizens' personal freedom, personal dignity, homes, freedom and confidentiality of correspondence shall not be violated. These basic rights lay the institutional foundation for citizens to enjoy a happy life. The basic rights have been further concretized in China's specific departmental laws such as the *Criminal Procedure Law*, the *Law on Administrative Penalty*, the *Civil Code* and the *Population and Family Planning Law*. Therefore, based on the above-mentioned institutional foundation, the "basic rights and interests" in terms of well-being development can be summarized as personal freedom, personal dignity, reproduction, freedom and confidentiality of correspondence, name, title, portrait, privacy, personal information, etc. (5) "Basic rights and interests" related to ecological harmony are based on the human rights theory of environmental rights. They advocate the use of new legal thinking to construct a human perspective of harmonious coexistence between human and nature, and set "ecological rationality" as a new standard of human nature.<sup>45</sup> It can be said that the concept of environmental rights in the new era is born in the context of the new era, transcending the paradigm of opposition between human and nature in traditional theory. It has new ideological theories, independent rights connotations and rights functions, and should

<sup>42</sup> Democratic legitimacy means upholding the effective constraints of the people's congress system on other state institutions, while governance effectiveness requires state institutions to resolve risks, contradictions, and complex problems in social reality. See Wang Xu, "Democratic Centralism as a Principle of State Institutions," *Social Sciences in China* 8 (2019): 74.

<sup>43</sup> The legal theory of institutional protection is the "legal source connotation" of the constitution as departmental laws. The legislator takes the value and normative settings of the constitution as the cognitive premise and implements them as departmental legal order through specific legal norms. See Zhang Xiang, "The Triple Relationship Between the constitution and Departmental Laws," *China Law Review* 1 (2019): 28.

<sup>44</sup> Liu Zhiqiang and Yan Naixin, "On the Right to a Happy Life as a Human Right," *Human Rights* 6 (2020): 120.

<sup>45</sup> Lyu Zhongmei, "People and Nature in the Perspective of *Environmental Code* Compilation," *Peking University Law Journal* 3 (2022): 610-611.

be regarded as an emerging human right.<sup>46</sup> Based on this epistemological premise, although the existing environmental rights normative system can provide relatively sufficient legal protection for environmental rights, it obviously needs to adapt to the social changes in the concept of environmental rights. Therefore, the compilation of the environmental code has been included in the 2021 legislative plan of the NPC Standing Committee,<sup>47</sup> and has also become a theoretical issue that Chinese scholars focus on.<sup>48</sup> Thus, according to the connotation and normative basis of the concept of environmental rights in the new era, the “basic rights and interests” in terms of ecological harmony can be summarized as ecological security, environmental equity, environmental pollution prevention and control, environmental resource protection, environmental information disclosure, public participation in environmental decision-making, environmental procedural relief, and environmental ecological compensation.

In a nutshell, with diverse human rights norms as the institutional carrier and through “triple abstraction,” the various “basic rights and interests” of citizens can be constructed into “basic rights and interests” in terms of survival care, democratic participation, cultural education, well-being development, and ecological harmony. These five categories of “basic rights and interests” are interrelated and mutually constitutive, and their close interaction together constructs a historical, dynamic and open “basic rights and interests” system. The protection model of the socialist human rights normative system with Chinese characteristics lies in the fact that the recording and review authorities cite the “basic rights and interests” of citizens as the basis for their reasoning. Through the review of normative documents such as laws, regulations and judicial interpretations, the review authorities have made the normative system of socialism with Chinese characteristics revolve around the “basic rights and interests” of citizens, ensuring that these “basic rights and interests” are fully and comprehensively protected.

#### **IV. Argumentation Principle: The Application of “Basic Rights and Interests” in Recording and Review**

The review and application of “basic rights and interests” requires that the recording and review authority should focus on the “basic rights and interests” of citizens and use the concept of “basic rights and interests” as a reasoning discourse, because only in the review process can the specific reality regulated by this concept be examined. The recording and review system’s functions of ensuring the implementation of the CPC Central Committee’s orders, guaranteeing the implementation of the constitution and laws, maintaining the unity of the country’s legal system, and promoting the improvement of the formulation of normative documents have also put forward the requirement of mutual verification for the review and application of “basic rights and interests.” Therefore, the review plan from the perspective of institutional functionality advocates for a coherent approach to the review standards of

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<sup>46</sup> Qin Tianbao, “On the Concept of Environmental Rights in China in the New Era,” *Law and Social Development* 3 (2022): 9.

<sup>47</sup> The second part of the NPC Standing Committee’s 2021 annual legislative work plan, titled “Coordinating the Quality and Efficiency of Legislation, Scientifically and Reasonably Arranging the Review of Legal Cases,” mentions “studying the initiation of the compilation of codes in the administrative legislative field, such as the *Environmental Code*, the *Education Code*, and the *Administrative Basic Code*, when conditions are ripe.” “Legislative Work Plan of the Standing Committee of the National People’s Congress in 2021,” accessed May 24, 2022, <http://www.npc.gov.cn/npc/c30834/202104/1968af4c85c246069ef3e8ab36f58d0c.shtml>.

<sup>48</sup> The research results mainly include: Zhang Zhen, “Constitutional Basis and Constitutionality Control of the Compilation of the *Environmental Code*,” *Oriental Law* 3 (2022); Liu Chao, “Legislative Focus and Normative Structure of the Pollution Control Part of the Environmental Code,” *Science of Law (Journal of Northwest University of Political Science and Law)* 3 (2022); Zhu Xiao, “Comparative Law Reference and Compilation Ideas of the Part of Ecological and Environmental Responsibility,” *China Law Review* 2 (2022); Lyu Zhongmei, “Do a Good Job in Compiling China’s Environmental Code,” *Legal Forum* 2 (2022); Lyu Zhongmei, “Methodology of Environmental Code Compilation: Sustainable Development Value Goals and Their Realization,” *Tribune of Political Science and Law* 2 (2022); Gong Gu, “Ideas on Compilation of the Natural Ecological Protection Part in Environmental Code,” *Science of Law (Journal of Northwest University of Political Science and Law)* 1 (2022); and Peng Feng, “Dilemma and Way out of Codification of China’s Environmental Law,” *Tsinghua University Law Journal* 6 (2021).

normative documents, emphasizing the application of substantive and dynamic review criteria. Consequently, the principles of review can be constructed as the principle of promoting the unity of political entities, the principle of exerting normative effectiveness, the overall principle of legal order, and the principle of harmony of state governance, serving as the argumentative principles for the application of "basic rights and interests." At the same time, this paper attempts to select typical cases from the "Annual Report" of recording and review in recent years for analysis and demonstration, so as to provide ideas for the review and application of "basic rights and interests" in specific cases.

#### **A. Principle of integration: building a people-centered political entity**

The principle of integration requires that the application of "basic rights and interests" should first consider the construction and development of a people-centered political entity. The institutional basis for recording and review is China's people's congress system and unitary state structure.<sup>49</sup> As a provider of political values, the leadership of the CPC can not only provides the basis and mechanism for reaching political consensus based on diverse representation, but also helps avoid conflicts of interest in legislation.<sup>50</sup> This means that in terms of the relationship between the CPC leadership and the people's congress system, the people's congress system can ensure that the Party's lines, principles, policies, decisions and arrangements are fully implemented and effectively carried out in the government's work, so that the people's congress, as a fundamental political system, can implement the people-centered reform concept and better represent the people's will. Therefore, the primary institutional function of reviewing the normative documents related to major reforms and policy adjustments decided by the CPC Central Committee through the recording and review system is to build and develop the "political entity" led by the CPC Central Committee so that the country's political will can truly embody and reflect the people's wishes. Under the leadership of the Party, the people-centered political entity needs to play a role in communication and consultation through the people's congress system, coordinate the diversity of different interests, demands and behaviors in community life, win extensive recognition of community members, and standardize them as unified behavior or collective action. State power is legitimately created in the process of building and developing a political entity, thus becoming a functional entity that protects the "basic rights and interests" of citizens. Therefore, since the principle of integration originates from the principle of building and maintaining a political entity, it constitutes an important consideration factor for prioritizing the evaluation of diverse viewpoints and becomes an important foundation for examining and arguing the essence and significance of "basic rights and interests." For example, the application of the principle of integration has been reflected in the current special reviews and proactive reviews. The cleanup of laws, regulations and normative documents on the implementation of the *Yangtze River Protection Law*, the newly revised *Law on Administrative Penalty* and the revised *Population and Family Planning Law*<sup>51</sup> reflects the protection of "basic rights and interests" related to ecological harmony such as ecological security, environmental pollution prevention, and environmental resource protection, as well as the protection of "basic rights and interests" related to well-being development, such as personal dignity, personal freedom, and reproduction. In 2020, the review and cleanup of laws, regulations, and normative documents in the fields of wildlife protection, implementation of the *Civil Code*, food and drug safety, and optimization of the

<sup>49</sup> Hu Jinguang, "On the Relationship Between Recording & Review and Constitutionality Review," *Journal of East China University of Political Science and Law* 4 (2018): 24.

<sup>50</sup> Shao Liuyi, "Why the Party Should Lead Legislation — Taking the National People's Congress Legislation as an Example," *Studies on Mao Zedong and Deng Xiaoping Theories* 7 (2021): 34.

<sup>51</sup> Shen Chunyao, "Report on the Recording and Review Work of the Legislative Affairs Commission of the NPC Standing Committee in 2021 — At the 32<sup>nd</sup> session of the Standing Committee of the 13<sup>th</sup> National People's Congress on December 21, 2021," *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China* 1 (2022): 245.

business environment<sup>52</sup> focused on protecting the “basic rights and interests” related to survival care. It can be seen from this that the above-mentioned protection of “basic rights and interests” has fully implemented the major decisions and arrangements of the CPC Central Committee, among which the principle of building a unified political entity with people at the center plays a major role. In short, the principle of integration, as the primary consideration for the application of the “basic rights and interests” system, stems from the people-centered political entity that gives the human rights normative system a political quality and contains the rules for interpreting the “basic rights and interests” system. The interpretation of various “basic rights and interests” needs to be based on the purposefulness of “ensuring the implementation of the CPC Central Committee’s orders.”

### **B. Principle of effectiveness: the practice of the socialist normative system with Chinese characteristics**

The principle of effectiveness requires that the application of “basic rights and interests” should promote the realization of the effectiveness of the socialist normative system with Chinese characteristics. If the constitution and laws are not transformed from normative provisions into normative practices, they will not have any effect. This means that the socialist normative system with Chinese characteristics, which is based on the constitution and laws, needs to be widely recognized and followed within the community, that is, to shape the historical and realistic constitutional and legal order through normative practical mechanisms. The constitutional and legal order based on practice requires that the concept of normative effectiveness includes both the ethical concept of effectiveness and the sociological concept of effectiveness. The ethical concept of effectiveness guarantees the legitimacy of the content of the normative system, while the sociological concept of effectiveness ensures that the normative system is effective in legislative power, administrative power and judicial power through the criterion of “sanctions for non-compliance.”<sup>53</sup> Therefore, as an important form of implementation of the constitution and laws, the principle of effectiveness applicable to “basic rights and interests” is mainly reflected in the review authorities’ “careful review opinions” and “decisions on corrective measures” on laws and regulations and judicial interpretations. On the one hand, the interpretation of “basic rights and interests” should be based on the specific practice of the current socialist normative system with Chinese characteristics, that is, the application of the “basic rights and interests” system should be consistent with the established facts and social effects of the normative system. For example, although administrative regulations do not provide explicit authorization for the formulation of regulations on the carrying of passengers on electric bicycles, based on the need for convenient travel for citizens, the exploratory regulations made by the Standing Committee of the Provincial People’s Congress in the form of local regulations are in line with the spirit of the higher-level laws.<sup>54</sup> From this, it can be seen that the review of local regulations here mainly considers the social effects of the implementation of the law and determines that the provisions of the local regulations protect the “basic rights and interests” of citizens in convenient travel and there is no conflict with higher-level laws. On the other hand, the application of “basic rights and interests” requires the review authorities to make corrective decisions on normative documents that are not in line with social development. For example,

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<sup>52</sup> Shen Chunyao, “Report on the Recording and Review Work of the Legislative Affairs Commission of the NPC Standing Committee in 2020 — At the 25<sup>th</sup> session of the Standing Committee of the 13<sup>th</sup> National People’s Congress on January 20, 2021,” *Gazette of the Standing Committee of the National People’s Congress of the People’s Republic of China* 2 (2021): 351-352.

<sup>53</sup> The sociological and ethical concepts of effectiveness can be pure and do not necessarily include elements of other concepts of effectiveness. However, since the legal concept of effectiveness focuses on the positive law system, the concept can be expanded from the dual dimensions of the sociological and ethical concepts of effectiveness. See Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, translated by Wang Pengxiang (Beijing: Commercial Press, 2015), 90-91.

<sup>54</sup> Shen Chunyao, “Report on the Recording and Review Work of the Legislative Affairs Commission of the NPC Standing Committee in 2020 — At the 25<sup>th</sup> session of the Standing Committee of the 13<sup>th</sup> National People’s Congress on January 20, 2021,” *Gazette of the Standing Committee of the National People’s Congress of the People’s Republic of China* 2 (2021): 354.

the Supreme People's Court of China's judicial interpretation on personal injury compensation cases once set different calculation standards for urban and rural residents. The review authority believes that with social development and the state's proposal of urban and rural integrated development, the urban-rural development gap and the gap in residents' living standards will gradually narrow. The differences in the calculation standards for compensation for personal injury to urban and rural residents should also be eliminated accordingly.<sup>55</sup> This case involves "basic rights and interests" related to survival care, such as human dignity, personality equality, judicial fairness, and the right to obtain compensation for damages, as well as "basic rights and interests" related to well-being development. The review of judicial interpretation mainly focuses on the mismatch between normative documents and the current social and economic development situation. Therefore, the application of "basic rights and interests" should be based on the actual effectiveness of the socialist normative system with Chinese characteristics as an important consideration dimension. On the premise that the actual situation of society has changed, if the normative documents are in line with reality, then it is required to carefully consider the legitimacy and rationality of the content of the normative system. If the normative documents do not conform to reality, then it is required to make corrective decisions on the normative documents that do not adapt to the changes in social reality.

### **C. Principle of entirety: the unity of the overall significance of the legal order**

The principle of entirety requires that the application of "basic rights and interests" should be considered in the context of the harmony and entirety of individual norms and the overall significance of the legal order. The meaning correlation of internal elements of the normative system generates mutual influence among the norms, and this continuous interaction makes the legal order increasingly complete and rational. On the one hand, systematic thinking requires finding the context of meaning among norms and examining the consistency of the context in terms of facts and logic, so that the normative documents to be reviewed conform to the internal conceptual system of the legal order. The internal conceptual system of the legal order not only needs to be clarified from the aspects of normative setting, normative logic, normative technology, etc., but also should lead to the teleological interpretation position, because the teleological interpretation requires that the objective value principles in the legal order be used as the interpretation goal and task in the process of legal interpretation. As a result, traditional interpretations based on semantics, history, system, and purpose appear intertwined rather than following a fixed order. For example, the "basic rights and interests" involved in the "forced marriage examination case" include marriage autonomy, personal freedom, privacy, etc. Although the *Marriage Registration Regulations of China* and the *Law on Maternal and Child Health Care of China* are inconsistent in the requirement for a pre-marital medical examination certificate for marriage registration, the review process was mainly based on Article 1053 of the *Civil Code*, which stipulates "if one of the parties suffers from a serious disease, he shall truthfully inform the other party of such disease prior to marriage registration..." It can be seen that the *Civil Code* does not set this obligation as a situation prohibiting marriage. The purpose of the regulation is to protect marital autonomy, personal freedom and privacy rights. At the same time, it uses the right of revocation as a way to correct defects in the expression of intention, thus reflecting the spirit of the *Civil Code* with autonomy of will as the basic principle. Reviewing and judging the *Marriage Registration Regulations* in accordance with the spirit of the *Civil Code* requires that the value order consistency of citizens' freedom of marriage, personal freedom and privacy rights be fully respected and protected. It retains the provision that premarital medical examinations are voluntary acts of citizens, while at the same time using the normative techniques of the *Civil Code* to promote further revision and improvement of relevant laws, so that individual regulations are developed toward the purpose of establishing the legal system, avoiding

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<sup>55</sup> *Ibid.*, 353.

conflicts in normative evaluation. On the other hand, the normative purpose based on “basic rights and interests” as the value principle will play a reflective and corrective role, so that the normative documents to be reviewed are restricted by “basic rights and interests.” For example, the constitution and laws stipulate that the national common language and characters should be promoted and popularized, which has protected the basic cultural and educational rights of citizens. However, some local regulations concerning language and characters teaching are not conducive to citizens learning and using the national common language and characters. Therefore, the review authority believes that the content of the relevant regulations should be corrected.<sup>56</sup> Participating in the election of the owners’ committee is a basic right of citizens related to democratic participation, and their eligibility to be elected is based on their identity as an apartment owner of the neighborhood. However, some local regulations stipulate that “paying service fees and other related fees on time” is a qualification condition for running for the owners’ committee, so the review authority also believes that the relevant provisions of the regulations should be amended.<sup>57</sup> In the above-mentioned cases, the decisions made by the review authorities are in line with the purpose of reflecting and correcting individual regulations based on “basic rights and interests,” restricting the substantive content of relevant normative documents. Therefore, in the application and review of “basic rights and interests,” through the consideration of consistency and restrictiveness of the value order, the normative meaning between individual norms and the legal system is made more coordinated, thus ensuring the unity of the country’s legal system.

#### **D. Principle of harmony: striking a balance between the goals of promoting good laws and good governance in a systematic way**

The principle of harmony requires that the application of “basic rights and interests” should maintain a functional interactive relationship with the goal of systematically promoting good laws and good governance. The formulation of normative documents is an important part of the national governance system. The rational exercise of the power to formulate normative documents holds the key to achieving the goal of good laws and good governance. This requires that the authority responsible for drafting normative documents shall correctly understand, apply, and implement the constitution and laws. They should fully understand the legislative purpose, spirit, content, and application conditions of the constitution and laws and also formulate normative documents based on the objective reality. It can be said that the constitutional and legal systems at the normative level and the specific social conditions at the practical level jointly construct a complex and multi-level knowledge landscape for the normative document drafting body. Therefore, it is necessary to understand and apply the “basic rights and interests” of citizens from a dynamic perspective and to weigh the “basic rights and interests” of citizens within the framework of the national governance system. This can not only ensure that “basic rights and interests” are protected in the process of systematically advancing the goals of good laws and good governance, but also promote the improvement and development of the national governance system through the protection of “basic rights and interests.” The principle of harmony will promote the construction and realization of this functional interactive relationship. The core connotation of the principle of harmony is to correctly handle the relationship between public interests and individual “basic rights and interests.” If there is a conflict between the two, we cannot achieve one legal interest at the expense of another through abstract balancing of interests or values. Instead, we shall try our best to achieve a perfect balance between the two legal interests. Considering public safety and individual rights and interests from a practical perspective can help both achieve the best results. For example, the review opinion on the “case of prohibition of

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<sup>56</sup> Shen Chunyao, “Report on the Recording and Review Work of the Legislative Affairs Commission of the NPC Standing Committee in 2021 — At the 32<sup>nd</sup> session of the Standing Committee of the 13<sup>th</sup> National People’s Congress on December 21, 2021,” *Gazette of the Standing Committee of the National People’s Congress of the People’s Republic of China* 1 (2022): 246.

<sup>57</sup> *Ibid.*



qualifications for employment in special industries" reflects the application of the principle of harmony. On the one hand, public safety serves the interests of the community, and setting conditions for prohibiting qualifications for certain professions does have a positive impact on safeguarding public interests. However, on the other hand, the qualifications for special industries also involve the labor and employment rights of citizens, which requires a balance between public safety and labor employment rights in practice. Review authorities may consider that in areas where laws and regulations do not specify restrictions on employment, local regulations should not stipulate "lifetime bans."<sup>58</sup> It can be seen that drawing the boundary between public safety and employment rights and interests from the actual socio-economic field of normative adjustment can help achieve the goals of both. Therefore, the principle of harmony emphasizes the discovery of factual elements in specific life behaviors regulated by norms and the proposal of problem-solving solutions that conform to objective laws in accordance with the characteristics of things in social life. In this way, the relationship between public interests and citizens' "basic rights and interests" can be coordinated, with not only the boundary between the two reasonably divided, but also the public interests and citizens' "basic rights and interests" can be properly settled in specific cases. As a result, the authority to formulate normative documents has obtained a space for formation that conforms to objective reality, ensuring that the "basic rights and interests" of citizens are not arbitrarily restricted and promoting the achievement of the goal of good law and good governance.

## V. Conclusion

In summary, this paper explains the necessity for the review authorities to adopt mixed reviews through the analysis of "basic rights and interests," a new concept that has emerged in the practice of recording and review, and finds that its core meaning lies in that as the principle and foundation of the national power system, it plays the function of legitimizing national power in the operation of the recording and review system. In terms of normative carriers, "basic rights and interests" are not stipulated by constitutional provisions alone, but are also carried by diverse human rights norms. In terms of acquisition methods, the conversion and refinement of "basic rights and interests" can be achieved through the "triple abstraction" method. In terms of review application, a review plan based on system functions should be adopted. In view of the above theoretical construction, the preliminary conclusions drawn in this paper are:

(1) China's human rights norms can be categorized into four types: human rights norms in policies, human rights norms in the constitution, human rights norms in departmental laws, and human rights norms in social and cultural consensus. In the process of recording and review, they serve as standards of politics, constitutionality, legality, and appropriateness, thus constituting the formal carrier of "basic rights and interests."

(2) The protection of citizens' "basic rights and interests" depends on the substantive review of relevant normative documents by the recording and review system, which means that they need to be transformed from formal carriers into the construction of "basic rights and interests" with substantive value content. By examining the multiple interactive connections of human rights norms, they can be classified into "basic rights and interests" in terms of survival care, democratic participation, cultural education, well-being development, and ecological harmony.

(3) Based on the interactive relationship among the functions of the recording and review system, with the function of protecting citizens' "basic rights and interests" as the main line, the four functions of the system, namely, ensuring the implementation of the CPC Central Committee's orders, guaranteeing the implementation of the constitution and laws, maintaining the unity of the country's legal system, and promoting the improvement of the formulation of normative documents, can also be realized during the review process.

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<sup>58</sup> Ibid.

Therefore, the concept of “basic rights and interests” can be widely used in the recording and review system. In various types of normative document review cases, protecting citizens’ “basic rights and interests” can promote the realization of the institutional functions of the recording and review system. And at the same time, it can also continuously enrich the conceptual connotation of “basic rights and interests” in the practice of the recording and review system.

(Translated by *CHEN Feng*)