

# The Concretization of the Principle of Equality: A Hermeneutic Reconstruction of Article 33, Paragraph 4 of the Chinese Constitution

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**Abstract:** *Traditional constitutional theory holds that Article 33, Paragraph 4 of the Chinese Constitution establishes the principle of the consistency of rights and obligations. However, with the evolution of constitutional theory and practice, its interpretation has shifted. It is increasingly viewed as a concretization of the principle of equality, although this perspective has not been thoroughly substantiated in academic circles. Upon closer analysis, interpreting this provision as the “consistency of rights and obligations” reveals several issues, including counterevidence from the constitutional drafting history, a lack of internal coherence, and a misalignment with the functions of the Constitution. By revisiting the specific context of this provision, it can be understood as an anti-privilege clause, serving as a special annotation of the equality principle. This approach enables a harmonious interpretation of this provision alongside other constitutional provisions.*

**Keywords:** principle of the consistency of rights and obligations ♦ principle of equality ♦ anti-privilege

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## How the Subject is Raised

Article 33, Paragraph 4 of the Chinese Constitution states, “Every citizen shall enjoy the rights prescribed by the constitution and the law and must fulfill the obligations prescribed by the constitution and the law.” It is generally believed that this embodies the principle of the consistency of rights and obligations at the constitutional level. In the 1950s, 1980s, and 1990s<sup>1</sup>, this

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<sup>1</sup> Zhang Qingfu and Pi Chunxie, *Fundamental Rights and Obligations of Citizens of China* (Chengdu: Sichuan People’s Publishing House, 1983), 19-22; Xiao Weiyun, *The Birth of China’s Current Constitution* (Beijing: Peking University Press, 1986), 54-56 and 133-134; Li Buyun and Xu Bing, *Rights and Obligations* (Beijing: People’s Publishing House, 1987), 42-49; Wang Shuwen, *The Constitution is the General Regulations for Governing the State and Maintaining National Security* (Beijing: Masses Publishing House,

provision, as one of the important principles of the Chinese *Constitution*, received widespread attention<sup>2</sup> in the constitutional academic community and a variety of theories were formed, which once triggered controversy.<sup>3</sup> However, with the development and changes of the constitution and constitutional theories, the understanding of it has also changed. Most textbooks and monographs either briefly mention it, reflect on it, or do not comment on it. Even if they follow the old theory<sup>4</sup>, most of them have reservations or even criticisms.<sup>5</sup> Additionally, some regard it as an aspect of the principle of equality.<sup>6</sup> Possible reasons for this change are as follows. Firstly, in terms of the form, the unity and indivisibility of rights and obligations are difficult to be proven directly by constitutional norms, so the internal consistency and coherence of the theory itself are questionable. Secondly, with the increasing diversification and standardization of constitutional theories, especially with the awakening of people's rights awareness and the development of human rights protection theories and practices, the "rights relativity" position contained in the theory is obviously not conducive to the establishment of constitutionalism concepts and the protection of fundamental rights.

In principle, the interpretation of the constitution shall follow the following principle: it shall be ensured that all provisions of the constitution are meaningful. Constitutional changes will lead to changes in the connotation of constitutional norms. Recognizing constitutional changes may lead to the loosening of constitutional constraints and undermine the stability, unity, and authority of the constitution, so they shall be treated with caution. In theory, constitutional changes shall only be resorted to after all possible interpretation options have

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1987), 168-171; Zhang Youyu, *Fundamental Rights and Obligations of Citizens* (Tianjin: Tianjin People's Publishing House, 1987), 27-36; Chen Baoyin, *An Introduction to the Chinese Constitution* (Beijing: Peking University Press, 1987), 105-106; Xu Chongde, *The Chinese Constitution* (Beijing: China Renmin University Press, 1989), 399-400 and 434-435; Xu Xiuyi and Wang Bixuan, *Outline of Constitutional Jurisprudence* (Beijing: Publishing House of Chinese People's Public Security University (PHCPPSU), 1994), 253 et seq.  
2 Xu Ruichao, "On the Principle of the Consistency of Rights and Obligations in the Chinese Constitution," *Human Rights* 1 (2023): 116.

3 Chen Yunsheng, "Rights Relativity," *Journal of Comparative Law* 3 and 4 (1994); Liang Huixing, "Is Primitive Regression Really Possible?—Thoughts on the Article 'Relativity of Rights'," *Journal of Comparative Law* 5 (1994).

4 Zhou Yezhong, *The Constitution* (Beijing: Higher Education Press, the 4<sup>th</sup> edition, 2016), 251-252.

5 Qin Qianhong, *New Constitutional Jurisprudence* (Wuhan: Wuhan University Press, the 2<sup>nd</sup> edition, 2009), 165-166; Xu Anbiao and Liu Songshan, *General Interpretation of the Constitution of the People's Republic of China* (Beijing: China Legal Publishing House, the 2<sup>nd</sup> edition, 2004), 118-119.

6 Hu Jinguang and Han Dayuan, *The Chinese Constitution* (Beijing: Law Press • China, the 3<sup>rd</sup> edition, 2016); Jiao Hongchang, *Constitutional Jurisprudence* (Beijing: Peking University Press, the 4<sup>th</sup> edition, 2010), 385; Lin Laifan, *From Constitutional Norms to Normative Constitutionality: A Preface to Normative Constitutional Jurisprudence* (Beijing: The Commercial Press, 2017), 262.

been exhausted. Based on the above considerations, this paper attempts to briefly sort out and review existing theories to reveal an explanation plan that has already been hidden in traditional theories.

## **I. Review of Existing Theories**

Regarding the meaning of Article 33, Paragraph 4 of the Chinese *Constitution*, some scholars believe this provision shall be understood from the perspective of the “consistency of rights and obligations.” This provision embodies the unity of citizens’ rights and obligations under the socialist system and is also a restriction on citizens’ rights<sup>7</sup>, reflecting the principle of the consistency of rights and obligations<sup>8</sup>. Some believe this provision has dual functions. It can be regarded as a concretization of the principle of equality, or as an independent constitutional principle that embodies the principle of the consistency of rights and obligations<sup>9</sup>. Others believe this provision is only one aspect of the principle of equality.<sup>10</sup> The above propositions can be summarized into two different academic positions: the theory of the consistency of rights and obligations and the theory of concretization of the principle of equality.

### **A. The theory of the consistency of rights and obligations**

It is generally believed that the theory of consistency of rights and obligations has the following connotations<sup>11</sup>.

Firstly, rights and freedom feature relativity. There is no absolute freedom in the world. “One cannot live in society and be free from society.”<sup>12</sup> The constitutions of all states have placed restrictions on the freedom and rights of citizens, and China is no exception.

Secondly, rights and obligations are interdependent and inseparable. Every citizen enjoys the rights granted by the constitution and the law, and must also fulfill the obligations prescribed by the constitution and the law. In other words, one cannot enjoy rights without fulfilling obligations, nor shall one fulfill obligations without

<sup>7</sup> Xu Chongde, *The Constitutional History of the People’s Republic of China: Part II* (Fuzhou: Fujian People’s Publishing House, 2003), 492.

<sup>8</sup> Xiao Weiyun, *The Birth of China’s Current Constitution* (Beijing: Peking University Press, 1986), 54-55; Chen Yunsheng, “Rights Relativity,” *Journal of Comparative Law* 3 and 4 (1994): 245-247.

<sup>9</sup> Wu Jie, “fundamental rights and Obligations of Citizens,” in *The Chinese Constitution*, Xu Chongde eds. (Beijing: China Renmin University Press, the 4<sup>th</sup> edition, 2010), 336-337; Zheng Xianjun, “Constitutional Interpretation of the Principle of the Consistency of Rights and Obligations: Taking Basic Social Rights as an Example,” *Journal of Capital Normal University (Social Sciences Edition)* 5 (2007): 44-45.

<sup>10</sup> Hu Jinguang and Han Dayuan, *The Chinese Constitution* (Beijing: Law Press • China, the 3<sup>rd</sup> edition, 2016), 196.

<sup>11</sup> Wu Jie, “Fundamental Rights and Obligations of Citizens of the People’s Republic of China,” in *Constitutional Jurisprudence*, Editorial Group of Constitutional Jurisprudence at Law Textbook Editorial Department eds. (Beijing: Masses Publishing House, 1985), 396-397.

<sup>12</sup> Vladimir Lenin, “Party Organizations and Party Publications,” in *V. I. Lenin Collected Works*, vol. 12 (Beijing: People’s Publishing House, the 2<sup>nd</sup> edition, 1987), 96.

enjoying rights. Correctly exercising rights and consciously fulfilling obligations are equally important to states and people.<sup>13</sup> Peng Zhen pointed out in his *Report on the Draft Amendment to the Constitution of the People's Republic of China* that, based on the basic principle that "Every citizen shall enjoy the rights prescribed by the constitution and the law and must fulfill the obligations prescribed by the constitution and the law," "the draft stipulates various obligations that citizens shall fulfill to the state and society. Only when everyone abides by and fulfills these basic obligations of citizens can we ensure that everyone enjoys the civil rights prescribed in the constitution."

Thirdly, some of citizens' rights and obligations are dual in nature. The current *Constitution* changed the previous constitutional provisions of "Citizens shall have the right to work" and "Citizens shall have the right to receive education" to "Citizens shall have the right and the obligation to work" and "Citizens shall have the right and the obligation to receive education," which clearly reflects the consistency of rights and obligations.<sup>14</sup> Additionally, although military service is an obligation in the literal sense, it also carries citizens' political rights (the right to hold public office).

Finally, rights and obligations promote and complement each other. In China, citizens enjoy extensive rights, which can inspire their sense of responsibility as masters of the country, mobilize their enthusiasm and initiative, and enable them to fulfill their obligations more consciously.<sup>15</sup>

## **B. The theory of concretization of the principle of equality**

As early as the 1980s and 1990s, a small number of scholars in constitutional law textbooks and works argued that Article 33, Paragraph 4 of the Chinese *Constitution* contains the connotation of the principle of equality. Since the 21<sup>st</sup> century, more and more constitutional law works and textbooks have either only seen its connotation of the principle of equality, or have placed more emphasis on its connotation of the principle of equality. However, most of them only have arguments but no evidence.<sup>16</sup> Some scholars believe: "The

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<sup>13</sup> Xiao Weiyun, *The Birth of China's Current Constitution* (Beijing: Peking University Press, 1986), 54-55; Cai Cheng and Liu Zhongde, *Speech on the Constitution of the People's Republic of China* (Beijing: Law Press • China, 1991), 70-71.

<sup>14</sup> Wu Jialin, "On Fundamental Rights and Obligations of Citizens of China," in *Papers on the Constitution*, Zhang Youyu eds. (Beijing: Masses Publishing House, 1982), 160-161; Wang Shuwen, *The Constitution is the General Regulations for Governing the State and Maintaining National Security* (Beijing: Masses Publishing House, 1987), 170.

<sup>15</sup> Wu Jialin, *Constitutional Jurisprudence* (Beijing: Masses Publishing House, the 2<sup>nd</sup> edition, 1992), 239-240.

<sup>16</sup> Hu Jinguang and Han Dayuan, *The Chinese Constitution* (Beijing: Law Press • China, the 3<sup>rd</sup> edition, 2016), 196; Xu Anbiao and Liu Songshan, *General Interpretation of the Constitution of the People's Republic of China* (Beijing: China Legal Publishing House, the 2<sup>nd</sup> edition, 2004), 119; Li Yuanqi, *A Monographic Study on Chinese Constitutional Jurisprudence* (Beijing: China Renmin University Press, 2009), 324; Xue Xiaojian,

establishment of such an important principle in the constitution is conducive to correctly understanding and handling the relationship between rights and obligations, that is, there are no rights without obligations, and no obligations without rights. No citizen can enjoy rights without assuming obligations, nor can he only assume obligations without enjoying rights. Going further, it is conducive to opposing the privilege of enjoying rights without assuming obligations, and opposing the discrimination of assuming obligations without enjoying rights to realize the equality of all citizens before the law.”<sup>17</sup> “It embodies the equality and consistency of citizens’ rights and obligations, a characteristic of socialist democracy and the rule of law...”<sup>18</sup>

## **II. Reflection on the Theory of the Consistency of Rights and Obligations**

As mentioned above, since the beginning of the 21<sup>st</sup> century, academic circles have generally regarded Article 33, Paragraph 4 of the Chinese *Constitution* as an integral part of the principle of equality. However, some scholars have pointed out that the consistency of rights and obligations should be rethought to seek more diverse interpretations. In this regard, it is necessary to conduct a more in-depth review of the problems existing in the theory of the consistency of rights and obligations, which will be discussed in detail as follows.

### **A. A study on the original intention of drafting the constitution**

As far as the wording of Article 33, Paragraph 4, of the Chinese *Constitution* is concerned, there is no precedent in the previous *Common Program of the Chinese People's Political Consultative Conference* and the three Constitutions promulgated in 1954, 1975, and 1978. During the drafting of the 1982 *Constitution*, the Constitutional Amendment Committee Secretariat only restored Article 85 of the 1954 *Constitution* in the Constitutional Amendment draft formed at the end of January 1981: “All citizens of the People’s Republic of China are equal under the law.”<sup>19</sup> After several discussions and revisions, the Secretariat changed “under the law” to “before the law” to clearly express the meaning of equality in the application of the law and added a new Paragraph 2: “The rights and obligations of citizens are inseparable. Every citizen shall enjoy the rights prescribed by the constitution and the law and must fulfill the

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“Fundamental Rights and Obligations of Citizens of China,” in *Constitutional Jurisprudence*, Jiao Hongchang eds. (Beijing: Peking University Press, the 4<sup>th</sup> edition, 2010), 385; Zhu Fuhui, *Principles of Constitutional Jurisprudence* (Xiamen: Xiamen University Press, 2011), 340.

<sup>17</sup> Xu Anbiao and Liu Songshan, *General Interpretation of the Constitution of the People’s Republic of China* (Beijing: China Legal Publishing House, the 2<sup>nd</sup> edition, 2004), 119.

<sup>18</sup> Editorial Office of Seek Truth From Facts, “Questions and Answers on the Draft Amendment to the Constitution of the People’s Republic of China,” *Seek Truth From Facts* 40 (1982): 7.

<sup>19</sup> Xu Chongde, *The Constitutional History of the People’s Republic of China: Part II* (Fuzhou: Fujian People’s Publishing House, 2003), 379.

obligations prescribed by the constitution and the law.” The new Paragraph was added as Article 30 of the *Draft Amendment to the Constitution of the People’s Republic of China (Discussion Draft)* submitted to the Second Plenary Session of the Constitutional Amendment Committee held from February 27 to March 16, 1982.<sup>20</sup> Subsequent discussions by the Constitutional Amendment Committee or the Standing Committee of the National People’s Congress adjusted the provisions of the draft constitutional amendment. After the adjustment, this provision became Article 32 of the *Draft Amendment to the Constitution of the People’s Republic of China* promulgated in April 1982 and the wording remained unchanged. While soliciting opinions, some scholars from the Chinese Political Science Association believed that the general statement that “citizens’ rights and obligations are inseparable” was “not accurate or scientific enough” and would cause many ambiguities and problems in interpretation and implementation. They suggested removing the statement that “citizens’ rights and obligations are inseparable” and making clear provisions for citizens’ rights and obligations respectively.<sup>21</sup> Others suggested that the first half of the provision was argumentative language rather than standardized legal terms and its content was repeated in the second half, so it should be deleted.<sup>22</sup> The Constitutional Amendment Committee deleted “citizens’ rights and obligations are inseparable” and made some wording changes to the second half of the sentence, resulting in the current wording. In this regard, it can be argued that the constitutional drafting history, in a certain sense, provides the most direct rebuttal to the theory of the consistency of rights and obligations.

### **B. The perspective of internal coherence**

The lack of internal coherence or consistency is the reason why the theory of the consistency of rights and obligations has been criticized. Specifically, the following problems arise when this provision is understood as the “principle of the consistency of rights and obligations”:

Firstly, as mentioned earlier, as early as when soliciting opinions for the draft constitutional amendment, some people pointed out that the statement was “not accurate or scientific enough.” For a particular subject, a particular right or obligation is not inseparable.<sup>23</sup> Take voting, a right of citizens, as an example. Voters can abstain from voting, but they cannot be held accountable for not fulfilling this “obligation”; “stipulating labor and education as both citizens’

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<sup>20</sup> Ibid., 390.

<sup>21</sup> Ibid., 451.

<sup>22</sup> Xiao Weiyun, *The Birth of China’s Current Constitution* (Beijing: Peking University Press, 1986), 133; Cai Dingjian, *A Detailed Explanation of the Constitution* (Beijing: Law Press • China, the 2<sup>nd</sup> edition, 2006), 245.

<sup>23</sup> Xu Chongde, *The Constitutional History of the People’s Republic of China: Part II* (Fuzhou: Fujian People’s Publishing House, 2003), 451.

rights and obligations will lead to many ambiguities and problems in interpretation and implementation.”<sup>24</sup> Xu Anbiao and Liu Songshan pointed out that in the relationship between citizens and the state and society, citizens sometimes only enjoy rights while the state needs to assume obligations. For example, when citizens are old, sick, or unable to work, they have the right to obtain help from the state and society, but they do not need to assume obligations to the state and society for receiving such material help.<sup>25</sup>

Secondly, under the existing normative structure, problems with the theory of the consistency of rights and obligations are also manifested in the following two aspects. The first one is that there is only general consistency between the fundamental rights and basic obligations of the constitution. They are not as consistent as those in general legal theories, especially civil law theory.<sup>26</sup> In a sense, this consistency of rights and obligations is interchangeable with what Fuller called the “principle of reciprocity”, that is, if you have a certain obligation to me or the state today, I or the state may have the same obligation to you tomorrow. Rights and obligations are therefore reversible.<sup>27</sup> However, the consistency of rights and obligations in this sense is obviously not what people generally refer to as the consistency of rights and obligations. The second one is that the constitution does not specify what obligations are attached to fundamental rights. In other words, obligations are in an open state in a certain sense, which runs the risk of hollowing out the connotation protected by fundamental rights.

Thirdly, the problems with the theory of the consistency of rights and obligations can also be proved to a considerable extent by refuting relevant examples. The details are as follows.

1. Article 49, Paragraph 2 of the Chinese *Constitution* states, “Parents shall have the obligation to raise and educate their minor children; adult children shall have the obligation to support and assist their parents.” At first glance, this provision seems to fully reflect the requirement of interdependence of rights and obligations. Parents have the obligation to raise and educate their (minor) children and therefore have the right to receive support and assistance from their children; conversely, children have the right to receive support and education from their parents and therefore have the obligation to support and assist their parents.<sup>28</sup> However, this view is somewhat questionable. Firstly, the obligation

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<sup>24</sup> Ibid.

<sup>25</sup> Xu Anbiao and Liu Songshan, *General Interpretation of the Constitution of the People's Republic of China*, 119.

<sup>26</sup> Xu Chongde, *The Constitutional History of the People's Republic of China: Part II*, 379, Cai Dingjian, *A Detailed Explanation of the Constitution*, 246.

<sup>27</sup> Lon L. Fuller, *The Morality of Law*, translated by Zheng Ge (Beijing: The Commercial Press, 2005), 24.

<sup>28</sup> Xu Chongde, *The Chinese Constitution* (Beijing: China Renmin University Press, the 4<sup>th</sup> edition, 2010),

of raising, educating, supporting, and assisting between parents and children is established based on a special identity relationship, not consideration. In other words, even if minor children show obvious tendencies to abuse or abandon their parents in the future, parents cannot refuse or fail to fully fulfill their obligation to raise and educate them because it is difficult to expect their children to fulfill the obligation of supporting and assisting them in the future; similarly, children's obligation to support and assist parents is not predicated on parents' fulfillment of their obligation to raise and educate them. In practice, even children who have been killed, abandoned, or abused by their parents are not exempt from the obligation to support their parents. However, since it has a sense of illegality to claim that children have an absolute obligation to support and assist their parents in such circumstances, the Supreme People's Court has relaxed its interpretation of this issue.<sup>29</sup> Secondly, by comparison, parents' obligation to raise and educate their children is more important than children's obligation to support and assist their parents. With the development and improvement of the social security system, in many European states, elderly care has been completely entrusted to the state or society, which has to a certain extent led to the deconstruction of traditional family relationships. As for raising and educating minor children, although Plato had long envisioned a system whereby the state would take children away to raise and educate them after they were born, this suggestion has been criticized for being contrary to human nature. Thirdly, although the concept of parental rights is still applicable to a certain extent, it is worth noting that parental rights themselves have evolved from the right of control to a duty of care, which shall serve the best interests of the children. Therefore, Austria's *Act to Amend the Law on the Relationship Between Children and Parents* promulgated in 1989 places education, care, agency, and property management under the concept of care (Obsorge).<sup>30</sup> In this sense, its main legal effect is to exclude the interference of the state, third parties, or even one parent in the way children are raised and educated.

2. As far as the right to education is concerned, on the one hand, as pointed out in previous opinions, the problem with making education a duty is that "students cannot be held legally responsible for failing to fulfill their civic obligations because they do not study hard"<sup>31</sup>; On the other hand, neither the advocates of the theory of the consistency of rights and obligations nor some scholars who have raised controversial opinions have realized that the parties

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<sup>29</sup> *Interpretation of Civil Legal Documents*, Issue 5 (2012) (Issue 89 in total), page 120 ("Parents who commit the crime of killing, abandoning, or abusing their children may request support from their children").

<sup>30</sup> Vgl. Ferdinand Kerschner, *Familienrecht*, 3. Aufl., Springer, 2008, S.37.

<sup>31</sup> Xu Chongde, *The Constitutional History of the People's Republic of China: Part II* (Fuzhou: Fujian People's Publishing House, 2003), 451.

and opposite parties of the right to education differ from the obligation subjects and rights holders of the obligation to education. As far as the right to education is concerned, the right holder is children of school age while the obligation holder is the state; as far as the obligation to education is concerned, the right holder is the state while the obligation holder is the guardians of children of school age, mainly their parents. If children of school age fail to receive compulsory education as required, relevant authorities may punish their parents for failing to fulfill their obligation to care for them.

3. As far as the right to work is concerned, firstly, the common view is that the right to work is a kind of socio-economic right or social right<sup>32</sup>. It only has an objective legal function, not a claim function. Individuals cannot require the state to provide them with job opportunities. After the founding of the People's Republic of China, for a long period of time, more emphasis was placed on labor as a glorious duty or even a mandatory obligation. For example, the *Decision of the State Council on Reeducation Through Labor* (1957) stipulates that those from government organs, groups, enterprises, schools, and other organizations who are able to work but have long refused to work or have disrupted discipline and public order, who have been expelled and have no way to make a living, who do not obey the assignment of work and the placement of employment or re-employment, who do not accept the persuasion to engage in labor production, and who constantly make trouble unreasonably, disrupt public affairs, and refuse to change their ways of behaving after repeated education shall be taken in and subjected to reeducation through labor. In the context of the traditional planned economy, this has actually eliminated the value of the right to work as a basic right. Secondly, with the development of China's social economy, the right to work has increasingly acquired the comprehensive nature of social rights and the right of liberty.<sup>33</sup> From the current perspective, the act of forcing someone to work against their will ignores the negative connotation of the right to work (individuals have the right not to work) and the freedom to choose their occupation, thus threatening to hollow out the connotation of the right to work and causing internal inconsistency in constitutional norms. To this end, a more appropriate approach shall be to understand labor obligations as declarative norms rather than mandatory norms. Correspondingly, it is difficult to say that the right to work has a dual nature of rights and obligations.

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<sup>32</sup> Wu Jie, "Fundamental Rights and Obligations of Citizens of the People's Republic of China," in *Constitutional Jurisprudence*, Editorial Group of Constitutional Jurisprudence at Law Textbook Editorial Department eds. (Beijing: Masses Publishing House, 1985), 377-379; Du Qiangqiang, "Normative Structure of the Right to Work and Its Effect on Third Parties," *Northern Legal Science* 5 (2018): 62.

<sup>33</sup> Wang Dezhi, "On the Theoretical Construction of the Right to Work in the Chinese Constitution," *China Legal Science* 3 (2014): 87; Du Qiangqiang, "Normative Structure of the Right to Work and Its Effect on Third Parties," *Northern Legal Science* 5 (2018): 62.

4. The traditional view is that military service is an obligation. However, as people who have been deprived of their political rights or have committed other criminal offenses cannot fulfill this obligation, it can also be said to be a right to a certain extent.<sup>34</sup> For one thing, although this idea makes sense, regarding military service as a political right goes against the common perception that military service is an obligation. For another, even if military service is recognized as a political right, it is undoubtedly different from other political rights such as the right to vote and the freedom of assembly, procession, and demonstration. After all, it denies the possibility of individuals passively exercising or giving up this right. However, the so-called basic right to military service is not derived from the basic obligation of military service. It can only be obtained through the deduction of the right to participate in politics (the right to hold public office), the right to equality, and the freedom of career choice. This is especially true after the introduction of the volunteer soldier system.

### **C. Positioning of constitutional functions**

Although the theory of the consistency of rights and obligations involves the right and obligation relationship between the state and citizens, it is more concerned with the right and obligation relationship among citizens. Therefore, some scholars have made profound criticisms of the hermeneutical positioning of the theory of the consistency of rights and obligations, believing that there is a misalignment of constitutional functions therein.<sup>35</sup> These objections also reveal the following problems with the theory of the consistency of rights and obligations.

Firstly, from the perspective of traditional constitutional theory, the constitution only regulates the relationship between the state and the people, not the relationship among the people. In the past two decades, various theories such as the direct or indirect third-party effect of the constitution, constitutional interpretation, and the state's obligation of protection have received increasing attention from the academic community, and have received some responses in practice, gradually becoming a common view. In a certain sense, it has promoted a change in the connotation of fundamental rights norms. However, as far as the

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<sup>34</sup> Wu Jie, "Fundamental Rights and Obligations of Citizens of the People's Republic of China," in *Constitutional Jurisprudence*, Editorial Group of Constitutional Jurisprudence at Law Textbook Editorial Department eds. (Beijing: Masses Publishing House, 1985), 396.

<sup>35</sup> Cai Dingjian, *A Detailed Explanation of the Constitution* (Beijing: Law Press • China, the 2<sup>nd</sup> edition, 2006), 246; Qin Qianhong, *New Constitutional Jurisprudence* (Wuhan: Wuhan University Press, the 2<sup>nd</sup> edition, 2009), 166. Professor Cai Dingjian's criticism may not be tenable, or is at least questionable. He argued that the Constitution "does not need to stipulate citizens' obligations" (page 246), which is obviously somewhat absolute. In the subsequent part of the book, he did not deny the citizens' obligations stipulated in Articles 51 to 56 of the Constitution (page 284-291).

original meaning of Article 33, Paragraph 4 of the Chinese *Constitution* is concerned, it shall be understood in the context of traditional constitutional theory. In this sense, since the theory of the consistency of rights and obligations emphasizes more on the right and obligation relationship between individuals, such as the adjustment of defamation, insults, and the relationship between parents and children, these may deviate from the main purpose of the constitution.

Secondly, although “rights are based on certain obligors assuming obligations, the main obligor of citizens’ fundamental rights is the state, not individual citizens, and the corresponding right holder of citizens’ fundamental rights and obligations is also the state, not individual citizens, so citizens’ rights and obligations do not directly correspond. Of course, all the resources and power of the state come from the citizens, and the obligations that the state bears to the citizens ultimately fall on the citizens, but this involves the distribution mechanism of public burdens, and these specific obligations are not borne by specific citizens.”<sup>36</sup>

Thirdly, adhering to the theory of the consistency of rights and obligations in a general way can easily lead to the following misunderstandings. This misleads people into believing that fundamental rights are created by the state and that the state can take them away at will, thus downgrading fundamental rights to statutory rights. This also leads people to mistakenly believe that if citizens fail to fulfill their obligations, their rights shall or can be deprived. However, on the one hand, the enjoyment of citizens’ rights is not premised on the fulfillment of certain obligations, such as the right to vote and the right to education are not premised on paying taxes or performing military service. On the other hand, with the development of fundamental rights theory and practice, the mainstream view is that the closer the intervention of state power is to the core area of fundamental rights, the higher the legislator’s obligation to protect fundamental rights. Additionally, there are core areas in the field of personal life that are absolutely protected, namely, the core content or essential content of the so-called fundamental rights protection. Their essence is human dignity. They exclude all forms of state intervention and are not subject to weighing in the sense of the principle of proportionality. In this regard, even constitutional amendments cannot detract from this core or essential content.<sup>37</sup>

### **III. The Normative Connotation of Article 33, Paragraph 4 of the Chinese *Constitution***

As pointed out earlier, understanding Article 33, Paragraph 4 of the Chinese

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<sup>36</sup> Qin Qianhong, *New Constitutional Jurisprudence* (Wuhan: Wuhan University Press, the 2<sup>nd</sup> edition, 2009), 166.

<sup>37</sup> Nobuyoshi Ashibe, *Constituent Power*, translated by Wang Guisong (Beijing: China University of Political Science and Law Press, 2012), 94-95.

*Constitution* from the perspective of the theory of the consistency of rights and obligations has certain problems in terms of the constitutional drafting history, doctrinal coherence, and the positioning of the constitution. The reasons for this situation may be as follows. For one thing, classical Marxist state theory is influenced by Hegel's philosophical theory and mainly understands the relationship between rights and obligations from the perspective of political philosophy and state survival. Here, the unity of rights and obligations is largely a moral obligation rather than a legal obligation. Therefore, Zhang Youyu pointed out clearly at the beginning that Marx did not propose it as a socialist principle of legality, but rather as a struggle slogan of the newly established International Workingmen's Association. Its direct purpose, as pointed out in the *General Rules of the International Workingmen's Association*, was to "fight for equal rights and obligations."<sup>38</sup> However, early constitutional theory equated the consistency of rights and obligations in an ethical sense with the consistency of rights and obligations in an abstract legal sense<sup>39</sup>, ignoring its ethical and political significance. For another, from the legal hermeneutical perspective, since the principle of the consistency of rights and obligations in civil law is generalized into a general legal principle and applied to the constitutional field, the essential differences between public and private legal relations are ignored, especially the principle embodied in Article 33, Paragraph 4 of the Chinese *Constitution*, which is that any citizen is both the subject of rights and the subject of certain basic obligations. In this sense, the subject of fundamental rights and the subject of basic obligations are identical, but this identity only excludes the privilege of enjoying rights without fulfilling obligations.<sup>40</sup> In this regard, both of them are the same — they both attempt to use the theory of rights and obligations association between the rights of one party and the obligations of the other party in the same legal relationship to explain the rights and obligations of the same subject in the same legal relationship or the rights and obligations of the same subject in different legal relationships<sup>41</sup>. This puts the understanding of Article 33, Paragraph 4 of the Chinese *Constitution* into a dilemma. With the changes of the times or the normalization of national life, as well as the "purification" of legal research, especially constitutional research, this dilemma

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<sup>38</sup> Zhang Youyu, "On the Inseparability of Citizens' Rights and Obligations," in *Constitutionalism Review: Part 2*, Zhang Youyu eds. (Beijing: Masses Publishing House, 1986), 212; Lin Laifan, *From Constitutional Norms to Normative Constitutionality: A Preface to Normative Constitutional Jurisprudence*, 260.

<sup>39</sup> Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, translated by Fan Yang and Zhang Qitai (Beijing: The Commercial Press, 1961), 172-173.

<sup>40</sup> Lin Laifan, *From Constitutional Norms to Normative Constitutionality: A Preface to Normative Constitutional Jurisprudence* (Beijing: The Commercial Press, 2017), 262.

<sup>41</sup> Lin Laifan, *From Constitutional Norms to Normative Constitutionality: A Preface to Normative Constitutional Jurisprudence* (Beijing: The Commercial Press, 2017), 260.

has become increasingly severe.

How to solve the above dilemma? It is important to note that the constitution has both political and legal attributes, and the interpretation of its provisions cannot be completely hermeneutical and ignore its historical background and political relativity.<sup>42</sup> Therefore, the understanding of Article 33, Paragraph 4 of the Chinese *Constitution* shall first trace back to the ethical and political significance of the theory of the consistency of rights and obligations, and then emphasize its anti-privilege connotation. It shall be noted that with the changes in social, economic, and political conditions, this connotation itself has also undergone changes. Although the principle of the consistency of rights and obligations, as one of the basic principles of the socialist constitution, was developed on the basis of criticizing class privileges and inequality in a hierarchical society, it strives for equal rights and obligations and eliminates any class rule, class privileges, and monopoly rights. Although class struggle will continue to exist within a certain scope for a long time in the primary stage of socialism, China completed its socialist transformation as early as 1956, and the exploiting class as a class was eliminated. In this regard, anti-privilege in the sense of class struggle no longer has an institutional and realistic basis. For one thing, however, with the reform and opening up, the market economy has grown stronger, and the gap between the rich and the poor has begun to appear among the people. Many people are worried that this will lead to the emergence of a new exploiting class and thus lead China onto the capitalist road.<sup>43</sup> For another, although class privilege has lost its institutional and realistic basis, “privileged ideas and phenomena still exist among some of our officials.”<sup>44</sup> However, “the growth and prevalence of privilege will not only harm the conduct of the CPC and the government, but also social fairness and justice. The reason is that privilege itself means inequality and will create more inequality.”<sup>45</sup> Therefore, this provision still has significance.

After clarifying its ethical and political significance, we need to answer the following question: how shall we understand the consistency of rights and obligations at the level of constitutional hermeneutics? It is located in Chapter 2 of the Chinese *Constitution*, “Fundamental Rights and Obligations of Citizens”. In this regard, it shall be understood on the basis of properly handling its relationship with Article 33, Paragraph 2, and Article 5, Paragraph 4. The details

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<sup>42</sup> Vgl. Carl Schmitt, *Verfassungslehre*, 11. Aufl., Duncker & Humblot, 2017, S. XIII

<sup>43</sup> Deng Xiaoping, “Socialism Can Also Have a Market Economy,” in *Selected Works of Deng Xiaoping*, vol. II (Beijing: People’s Publishing House, the 2<sup>nd</sup> edition, 1994), 235.

<sup>44</sup> Xi Jinping, “Severely Punish Corruption by Discipline and Law and Focus on Solving Prominent Problems that Have Been Strongly Reflected by the Masses,” in *Selected Important Documents since the 18<sup>th</sup> CPC National Congress* (Beijing: Central Party Literature Press, 2014), 137.

<sup>45</sup> Peng Zhengde, “On Xi Jinping’s Anti-Privilege Thought,” *Probe* 5 (2016): 27.

are as follows.

### **A. Relationship between this Paragraph and Article 33, Paragraph 2**

From a historical perspective, Article 33, Paragraph 2 of the Chinese *Constitution* contains the connotation of Paragraph 4 for the following reasons. For one thing, Enlightenment philosophy is the first to take the dignity of all people, which is prior to the state and does not require justification, as its starting point, advocating that all people enjoy equal freedom.<sup>46</sup> The principle of formal equality based on this idea — the principle of “equality before the law” — is essentially anti-feudal autocracy and church privilege. Only by recognizing this can we correctly understand why the equality advocated by the French Revolution was primarily formal. For another, since the principle of formal equality largely ignored issues such as slavery and unequal distribution of free opportunities, the French Revolution later turned to the implementation of radical concepts of equality under the intensification and exaggeration of the Jacobins. However, Germany in the 19<sup>th</sup> century basically abandoned the radical ideas of the French Revolution and returned to the principle of formal equality. At the same time, the complete liberation of economic power in the 19<sup>th</sup> century also gave rise to many social problems and exacerbated inequality among the new proletariat composed of industrial workers and small farmers. Marx’s idea of true equality in the dictatorship of the proletariat responded to this and advocated the consistency of rights and obligations.<sup>47</sup> This was absorbed into the subsequent Soviet *Constitution*. The constitution-drafting process of the People’s Republic of China was largely influenced by the Soviet *Constitution*, so the consistency of rights and obligations was regarded as an important constitutional principle very early, although the 1954 *Constitution*, the 1975 *Constitution*, and the 1978 *Constitution* did not explicitly stipulate this principle like the current *Constitution*.<sup>48</sup>

As national life was normalized and time passed, the weight between the political and legal nature of some parts of the constitution changed, tilting towards the legal nature. In this regard, it is necessary to understand this from a formal and legal perspective, such as the principle of equality before the law. Article 33, Paragraph 2 of the Chinese *Constitution* is increasingly seen as a provision prohibiting unequal treatment of people of equal nature or equal treatment of people of different natures. Although it is difficult to say that it has a subjective right function in itself, it can be combined with other rights to

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<sup>46</sup> Vgl. Friedhelm Hufen, *Staatsrecht II. Grundrechte*, 10. Aufl., C. H. Beck, 2023, S.730.

<sup>47</sup> *Ibid.*

<sup>48</sup> Yang Huayu, “The Fundamental Rights and Obligations of Citizens in the Chinese Constitution,” *Chinese Journal of Law* 3 (1954): 29; Wu Jialin, “The fundamental rights and Obligations of Citizens of the People’s Republic of China,” *Teaching and Research* 7 (1954): 19; B. A. Starodubsky, “The Rights and Obligations of Citizens in a Socialist State,” *Global Law Review* 4 (1981): 2.

produce a subjective claim function. Therefore, if we insist on the original political and ethical significance of the consistency of rights and obligations, we can say that the gap between the two is deepening and they are in a parallel relationship to a certain extent.<sup>49</sup>

It is worth noting that the background of the 1982 constitutional revision is very different from the making of the 1954 *Constitution*. If we insist on the traditional concept of the consistency of rights and obligations, the original Article 33, Paragraph 3 will lose its realistic basis. In this regard, it can only be understood from the perspective of people's concerns about the polarization between the rich and the poor that has emerged after the reform and opening up, and the long-standing ideas and phenomena of privilege. From this perspective, Article 33, Paragraph 4, unlike Paragraph 2, has only an objective law function for the following reasons. Firstly, in terms of its theoretical, historical, and institutional background, this Paragraph focuses more on the equality of classes at the institutional level rather than individuals' right to equality. Secondly, as far as privileges are concerned, to a large extent, there is usually no direct correlation between them and individual rights or interests. Thirdly, this is also the requirement of the principle of harmonious interpretation. When an individual is subjected to unreasonable differential treatment, he or she can obtain relief through Paragraph 2 without resorting to the provisions of this Paragraph.

#### **B. Relationship between this Paragraph and Article 5, Paragraph 4**

Article 5, Paragraph 4 of the Chinese *Constitution* states, "No organization or individual shall have any privilege beyond the constitution or the law." In theory, some people also believe that its intention is also to oppose privilege.<sup>50</sup> Therefore, how to deal with the relationship between this Paragraph and Article 5, Paragraph 4 is also a question that must be answered in theory. Article 5, Paragraphs 4 and 3 read, "All state organs and armed forces, all political parties and social organizations, and all enterprises and public institutions must abide by the constitution and the law. Accountability must be enforced for all acts that violate the constitution or laws." The last paragraph of the Preamble to the *Constitution* reads, "This *Constitution*...is the fundamental law of the state and has supreme legal force. The people of all ethnic groups, all state organs and

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<sup>49</sup> It is precisely because of this tension that there has been debate throughout history over whether "equality of citizens before the law" applies to overthrown reactionary classes. See Zhang Guangbo, "On the Significance of 'Equality of Citizens before the Law'," *Law Science* 5 (1957): 60.

<sup>50</sup> Wu Jie, "Fundamental Rights and Obligations of Citizens of the People's Republic of China," in *Constitutional Jurisprudence*, Editorial Group of Constitutional Jurisprudence at Law Textbook Editorial Department eds. (Beijing: Masses Publishing House, 1985), 395; Li Yuanqi, *A Monographic Study on Chinese Constitutional Jurisprudence*, 40; Xu Chongde, *The Chinese Constitution* (Beijing: China Renmin University Press, the 4<sup>th</sup> edition, 2010), 316.

armed forces, all political parties and social organizations, and all enterprises and public institutions in the country must treat the constitution as the fundamental standard of conduct...” I believe that, judging from the context, they have similar meanings and their purpose is to maintain the unity and dignity of the legal system and ensure the realization of the principle of law-based governance<sup>51</sup>, rather than equal protection of the law.<sup>52</sup> In this regard, it may be said that there is no direct connection between Article 33, Paragraph 4, and Article 5, Paragraph 4. The two are independent of each other, although equal protection of the law constitutes one of the essential elements of law-based governance.

### **C. The objective legal aspect of this Paragraph**

As mentioned above, privileges seriously affect social fairness and justice and are fundamentally contrary to the principle of equality. Article 33, Paragraph 4 of the Chinese *Constitution*, as an objective legal norm, requires the state to take legislative, administrative, and judicial measures to prevent, reduce, and eliminate the occurrence of privileges. The details are as follows.

Firstly, this Paragraph requires the legislature to enact laws against privilege and establish corresponding systems. For one thing, it requires the state to “minimize institutional barriers and system loopholes, strengthen constraints and supervision on power, and put power in a cage” from the legislative perspective, especially in terms of administrative law and criminal law<sup>53</sup>, to eliminate the space for privileges. In this regard, the *Civil Service Law*, the *Supervision Law*, the *Administrative Disciplinary Measures Law for Public Officials*, and the *Criminal Law* have provided a relatively strict system. For another, it requires the state to establish corresponding systems to implement the provisions of the constitution and laws. Previously, China established the criminal prosecution system, petition system, and administrative supervision and procuratorial system. It then carried out reforms to the national supervision system. These, to a certain extent, provided a strong institutional guarantee for preventing the occurrence of privilege. Additionally, the National People’s Congress and its Standing Committee also enjoy the budgetary power under Article 62, Paragraphs 11 and 12, and Article 67, Paragraphs 5 and 7 of the *Constitution*, and the power to revoke administrative regulations, decisions, and orders formulated by the State Council that are inconsistent with the constitution and laws. They can supervise and review the standards for officials’ wages and

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<sup>51</sup> Chen Yunsheng, *Principles of Constitutional Jurisprudence* (Beijing: Beijing Normal University Press, 2009), 243; Shao Zihong, “Basic Principles of the Constitution,” in *Principles of Constitutional Jurisprudence*, Zhu Fuhui eds. (Xiamen: Xiamen University Press, 2011), 118; Editorial Group of Constitutional Jurisprudence, *Constitutional Jurisprudence* (Beijing: Higher Education Press, People’s Publishing House, the 2<sup>nd</sup> edition, 2020), 99.

<sup>52</sup> Li Yuanqi, *A Monographic Study on Chinese Constitutional Jurisprudence*, 40.

<sup>53</sup> Xi Jinping, “Severely Punish Corruption by Discipline and Law and Focus on Solving Prominent Problems that Have Been Strongly Reflected by the Masses,” in *Selected Important Documents since the 18<sup>th</sup> CPC National Congress: Part 1* (Beijing: Central Party Literature Press, 2014), 136.

welfare benefits formulated by the State Council. Especially with the development of constitutional review practice, the Standing Committee of the National People's Congress can also review the constitutionality and legality of relevant standards.

Secondly, in a certain sense, it can be said that this Paragraph imposes more anti-privilege demands on the state. For example, when formulating standards for officials' wages and welfare benefits, we must adhere to the goals of fairness and justice pursued by the constitution and laws. The formulation and implementation of standards for officials' wages and welfare benefits fall to a certain extent within the scope of internal administration, and the State Council and its ministries and commissions have broad discretion. To this end, they are required to implement the principle of distribution according to work, reflect factors such as job responsibilities, work ability, work performance, qualifications, positions, and levels, and establish reasonable wage and welfare standards for officials that are consistent with the development of the national economy and social progress. Additionally, the appointment and removal organ and employing units are also required to implement the provisions of the *Civil Service Law*, the *Administrative Disciplinary Measures Law for Public Officials*, and other relevant laws.

Thirdly, this Paragraph also puts forward anti-privilege requirements for the supervisory, judicial, and procuratorial organs. That is to say, it requires them to supervise and control privileged behavior in the state and society and ensure the implementation of relevant provisions of the Civil Servants Law, the Supervision Law, the Administrative Disciplinary Measures Law for Public Officials, and the Criminal Law.

## **Conclusion**

To sum up, although the theory of the consistency of rights and obligations became a common view in the academic community in the 1950s, 1980s, and 1990s, it has some problems from perspectives such as the constitutional drafting history, the coherence of the theory, and the functional positioning of the constitution. Therefore, it needs to be rethought. With changes in the development of constitutional theories and practices, it is necessary to take Article 33, Paragraph 4 of the Chinese *Constitution* as one of the connotations of the principle of equality and combine it with the anti-privilege social background. It can be seen that the meaning of this Paragraph has changed from anti-class privilege in Marxist theory to anti-rich-poor polarization and the anti-privileges of the CPC and government officials. As a supplement to Article 33, Paragraph 3, it only has objective legal functions and requires legislative, administrative, judicial, procuratorial, and supervisory organs to take various measures to combat class privileges to ensure that everyone is equal before the law. The constitutional amendment of 2004 included "The state shall respect and protect human rights" in Article 33 of the Chinese *Constitution*, which to some extent had a new impact on the text structure of Article 33, especially the coherence of the original Article 33, Paragraphs 2 and 3, but did not change the

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overall connotation of this Article.

(Translated by *JIANG Yu*)