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# The Incorporation of Human Rights Clauses into the Constitution and the Innovation of Fundamental Rights Hermeneutics

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**Abstract:** *The incorporation of human rights clauses into the constitution has propelled the innovation of fundamental rights hermeneutics in terms of the subjects of the legal relationships of fundamental rights, the nature of fundamental rights, the forms of state obligations, the scope of fundamental rights, among other aspects. Regarding the subjects of the legal relationships of fundamental rights, human rights clauses have expanded the subjects of fundamental rights from citizens to natural persons. They have also narrowed down the duty-bearing subjects directed by fundamental rights in clauses that do not define duty-bearing subjects from all entities to state public power. Additionally, in fundamental rights clauses that stipulate private entities as duty-bearing subjects, the duty-bearing subjects have been narrowed down from all private entities to social public power entities. In terms of the nature of fundamental rights, human rights clauses have endowed each specific basic right with dual characteristics of the right to respect and the right to protection. Regarding the forms of state obligations, human rights clauses have established the state obligations corresponding to each specific basic right as obligations to respect and to protect. In terms of the scope of fundamental rights, human rights clauses do not have the function of independently justifying unenumerated fundamental rights, but they can assist other clauses in justifying unenumerated fundamental rights, thereby expanding the scope of fundamental rights to a limited extent.*

**Keywords:** human rights ♦ fundamental rights ♦ state obligations ♦ unenumerated fundamental rights

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## Introduction

As Xi Jinping, general secretary of the Communist Party of China (CPC) Central Committee highlighted: “The rule of law is the most effective guarantee for human rights.”<sup>1</sup> In the legal system for the protection of human rights, the constitution, as the fundamental and supreme law, plays a primary and even decisive role.<sup>2</sup> In 2004, the phrase “The State respects and protects human rights” was incorporated into the constitutional text, “laying the fundamental legal foundation for the protection of human rights under the current constitution.”<sup>3</sup> This marked a significant advancement in China’s human rights endeavors and represented a milestone in the history of China’s constitutional development. From an exegetical perspective, the incorporation of human rights clauses into the constitution has greatly optimized the modes of stipulating fundamental rights, the normative structure, and the normative connotation in China. In terms of the modes of stipulating fundamental rights, the constitutions of countries around the world can generally be categorized into three types: the presumptive mode, the enumerative mode, and the integrative mode.<sup>4</sup> Overall, the integrative mode of stipulating fundamental rights combines the advantages of both the presumptive and enumerative modes, while overcoming their respective shortcomings. It represents a more scientific and rational approach. Through the establishment of human rights clauses, China’s mode of stipulating fundamental rights has been upgraded and transformed from the enumerative mode to the integrative mode. In terms of the normative structure, the human rights clause is positioned before the specific fundamental rights clauses and serves as a general provision within the system of fundamental rights. It leads and governs the various specific fundamental rights clauses. The human rights clause and the specific fundamental rights clauses together form a hierarchical structure that progresses from abstract principles to concrete provisions. Regarding the normative connotation, human rights serve as an abstraction and generalization

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<sup>1</sup> Xi Jinping, “Steadfastly Following the Chinese Path to Promote Further Progress in Human Rights,” *Qiushi* 12 (2022): 7.

<sup>2</sup> Li Buyun and Deng Chengming, “On the Human Rights Protection Function of the Constitution,” *China Legal Science* 3 (2002): 44.

<sup>3</sup> Mo Jihong, “Fully Exerting the Important Role of the Constitution in Protecting Human Rights,” *Democracy & Legal System* 47 (2023): 61.

<sup>4</sup> Existing studies have categorized the modes of stipulating fundamental rights into three types: enumerative, general, and a combination of the two. Hu Jinguang, Han Dayuan, *Chinese Constitution* (5<sup>th</sup> edition) (Beijing: Law Press • China, 2024), 155-156. This paper, however, adopts a slightly different classification and terminology for the modes of stipulating fundamental rights. The presumptive mode refers to the approach of either not enumerating or enumerating only a few fundamental rights, and protecting these rights based on the principle that everything not prohibited by law is permitted. The enumerative mode refers to the approach of specifically listing each basic right. The integrative mode refers to the approach of enumerating fundamental rights as comprehensively as possible while also including a catch-all clause for fundamental rights.

of the specific fundamental rights. They clarify the human rights attributes of each specific fundamental right, which in turn are the concrete manifestations of human rights. Human rights are defined as “the rights that a person should enjoy based on their natural and social attributes,”<sup>5</sup> and they possess the attributes of moral rights in the sense of what ought to be. By characterizing fundamental rights through the lens of human rights, the human rights attributes of these rights are explicitly established.

After more than two decades of research, the academic community has accumulated a wealth of research findings on the incorporation of human rights clauses into the constitution and the innovation of fundamental rights hermeneutics. It is widely recognized in the academic community that the human rights clause is the central provision for constructing China’s fundamental rights system. It possesses the attributes of a general fundamental rights clause and serves functions such as expanding the subjects of fundamental rights, integrating the enumerated fundamental rights, and safeguarding the unenumerated fundamental rights.<sup>6</sup> To be objective, the existing research has achieved remarkable results and has already outlined the framework of a fundamental rights hermeneutics system based on the human rights clause. At the same time, there is still room for further exploration in the existing research. The normative logic of the changes in the subjects of fundamental rights legal relationships triggered by the incorporation of human rights clauses into the constitution still awaits detailed analysis. Additionally, the changes in the nature of fundamental rights, the forms of state obligations, and the scope of fundamental rights that this incorporation brings about still require in-depth interpretation.

To elucidate the innovative function of the incorporation of human rights clauses into the constitution for fundamental rights hermeneutics, it is essential to start from the normative content of the human rights clause itself and

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<sup>5</sup> Research Group on Human Rights, Guangzhou University, Li Buyun, “Outline of the Theoretical System of Human Rights in Socialism with Chinese Characteristics,” *Chinese Journal of Law* 2 (2015): 57.

<sup>6</sup> Han Dayuan, “Normative Analysis of the ‘Human Rights Clause’ in the Constitutional Text,” *The Jurist* 4 (2004): 8-13; Jiao Hongchang, “Constitutional Analysis of ‘The State Respects and Protects Human Rights,’” *China Legal Science* 3 (2004): 42-49; Lin Laifan and Ji Yanmin, “Human Rights Protection: The Significance as a Principle,” *Studies in Law and Business* 4 (2005): 64-69; Qin Qiang, “Logic Construction of the Clause Providing That ‘The State Respects and Protects Human Rights,’” *Journal of Guangzhou University (Social Science Edition)* 11 (2011): 20-27; Zhang Weiwei, “The ‘Human Rights Clause’: A ‘Haven’ for Unenumerated Constitutional Rights,” *Law Review* 1 (2011): 10-17; Zhang Xiang, “Systematic Thinking of Fundamental Rights,” *Tsinghua Law Journal* 4 (2012): 30-34; Li Zhongxia, “Constitutional Interpretation of the ‘Human Rights Clause’: Methodological and Systemic Perspectives,” in *Studies in Human Rights*, vol. 12, Xu Xianming ed. (Jinan: Shandong People’s Publishing House, 2013), 1-24; Guan Hua, “From Rights to Human Rights: A Contemplated Terminological Exchange — Reflections Based on the Basic Categories of Constitutional Law in China,” *Law Review* 2 (2015): 34-35; Yan Hailiang, “The Concept of Human Rights in the Constitution and Its Functional Significance,” *The Journal of Human Rights* 1 (2023): 46-76.

confine the analysis strictly within the boundaries of this normative content, without exceeding them. In the provision “The State respects and protects human rights,” the terms “State” and “human” point to the subjects of the legal relationships of human rights and serve as the logical starting point of the normative content of the human rights clause. The phrase “respects and protects” indicates the rights and obligations between the subjects of the legal relationships of human rights. It not only characterizes the specific content of the rights of “human” but also reflects the forms of the obligations of the “State,” representing two aspects of the normative content of the human rights clause. The term “rights” delineates the boundary between rights and interests. It clarifies the nature of the respect and protection due to the subjects of human rights and defines the scope of these rights, thus serving as the boundary of the normative content of the human rights clause. It is evident that the human rights clause encompasses four interrelated aspects: the subjects of the legal relationships of human rights, the nature of the rights, the forms of state obligations, and the scope of the rights. These four aspects correspond respectively to the four dimensions in fundamental rights hermeneutics: the subjects of the legal relationships of fundamental rights, the nature of fundamental rights, the forms of state obligations regarding fundamental rights, and the scope of fundamental rights. Therefore, to elucidate the innovative function of the incorporation of human rights clauses into the constitution for fundamental rights hermeneutics, the analysis should be systematically unfolded in sequence from these four dimensions of fundamental rights hermeneutics.

## **I. The Determination of the Scope of Subjects of the Legal Relationships of Fundamental Rights**

The incorporation of human rights clauses into the constitution defines the scope of the subjects of the legal relationships of fundamental rights. In human rights theory, the subject of human rights determines the entire content of human rights, involving the value orientation of human rights and the practice of human rights protection. It serves as the foundation for constructing the theoretical framework of human rights.<sup>7</sup> At the same time, “all rights are relationships between right holders,” and “no matter what the reason, without a relationship, there can be no rights.”<sup>8</sup> The subjects of human rights and the duty bearers corresponding to human rights form a pair of corresponding legal concepts. The realization of human rights by the subjects depends on the fulfillment of corresponding obligations by the duty bearers. Together, the

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<sup>7</sup> Qu Xiangfei, *How Far Are Human Rights from Us? The Concept of Human Rights and Its Evolution in Modern China* (Beijing: Tsinghua University Press, 2015), 6-8.

<sup>8</sup> Georg Jellinek, *System of Subjective Public Rights (Revised Translation)*, translated by Zeng Tao and Zhao Tianshu (Beijing: The Commercial Press, 2023), 54.

subjects of human rights and the duty bearers constitute the logical starting point of human rights theory. To analyze the innovative function of the incorporation of human rights clauses into the constitution for fundamental rights hermeneutics, one should begin with the scope of the subjects of the legal relationships of fundamental rights.

### **A. The normative logic of determining the scope of legal relationship subjects**

After the incorporation of human rights clauses into the constitution, the scope of the subjects of fundamental rights and the duty bearers corresponding to these rights has undergone significant changes. In terms of the subjects of fundamental rights, the human rights clause has expanded the scope of fundamental rights subjects from “citizens” to “natural persons.”<sup>9</sup> From a textual perspective, Chapter Two of China’s *Constitution* is titled “Fundamental Rights and Duties of Citizens,” specifying “citizens” as the subject preceding “fundamental rights.” Moreover, each specific fundamental rights provision explicitly identifies the rights holder as a “citizen.” In contrast, the human rights clause designates the rights holder as a “person.” While the title of Chapter Two and the specific fundamental rights provisions emphasize the identity attributes of the rights holder, the human rights clause highlights the natural attributes of the rights holder. This creates a conflict between the subjects of fundamental rights as defined in the general human rights clause and the specific fundamental rights provisions. From a systemic perspective, the human rights clause is positioned as the first article of Chapter Two, and its systemic role is to govern the various specific fundamental rights provisions. In this sense, the human rights clause functions to expand the scope of the subjects of each specific fundamental rights provision. However, it is worth noting that the human rights clause is also part of Chapter Two, titled “Fundamental Rights and Duties of Citizens,” and it seems logically challenging within the systemic framework to coherently interpret the subjects of fundamental rights as “persons” rather than “citizens.”

“Any interpretation should contribute to the realization of the normative purpose pursued by the normative content.”<sup>10</sup> To reconcile the semantic conflict between the general fundamental rights provisions, specific fundamental rights provisions, and the title of Chapter Two, it is necessary to refer to the normative purpose of the fundamental rights provisions. The title of Chapter Two of the current *Constitution*, “Fundamental Rights and Obligations

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<sup>9</sup> Mo Jihong, “The Evolution of the Concept of ‘Citizen’ in the Chinese Constitutional Text,” *The Journal of Human Rights* 4 (2010): 6; Yang Xiaomin, “On the Changes of Fundamental Rights Subject in Constitution Versions of New China,” *Legal Forum* 2 (2011): 86-87.

<sup>10</sup> Bernd Rüthers, *Rechtstheorie*, translated by Ding Xiaochun and Wu Yue (Beijing: Law Press • China, 2013), 309.

of Citizens,” originates from the provisions of the 1954 *Constitution*, which in turn replaced the 1949 *Common Program*. The fundamental rights provisions in the *Common Program* defined the subjects of fundamental rights as the “people.” The 1954 *Constitution* established the chapter “Fundamental Rights and Duties of Citizens,” formally designating “citizens” as the subjects of fundamental rights. During the process of distinguishing between “citizens” and “people,” the Legal Affairs Group of the Constitutional Drafting Committee explained the rationale for using “citizens” as the subjects of basic rights: “People” refers to the various democratic classes and is a political concept denoting the holders of state power; in contrast, “citizens” refers to individuals with the nationality of the People’s Republic of China and is a legal concept denoting the holders of legal rights. The scope of “citizens” is broader than that of “people.”<sup>11</sup> In the comparative sense of the political and legal nature of the subjects of fundamental rights, the choice of “citizen” as the subject of fundamental rights already implies the normative purpose of expanding the scope of the subjects of fundamental rights. However, despite the Constitutional Drafting Committee’s group explanation of the meaning of “citizen,” the constitutional text does not explicitly stipulate what constitutes a “citizen.” The absence of a textual specification has led to divergent understandings of the concept of “citizen.” Some people argue that “landlords, rich peasants, and counter-revolutionaries are not within the scope of citizens,” while others believe that “anyone who has the nationality of the People’s Republic of China and enjoys rights and duties in accordance with the law is a citizen of the People’s Republic of China.”<sup>12</sup> In 1982, the Constitutional Amendment Committee adopted Li Buyun’s suggestion regarding the definition of “citizen” and explicitly stipulated in Article 33, Paragraph 1 that “All persons holding the nationality of the People’s Republic of China are citizens of the People’s Republic of China.” This provision included special groups such as landlords, rich peasants, counter-revolutionaries, and criminals within the scope of “citizens,” thereby clearly demonstrating the normative purpose of expanding the scope of the subjects of fundamental rights.<sup>13</sup> The incorporation of human rights clauses into the constitution in 2004 represented another expansion of the scope of the subjects of fundamental rights by the constitutional amenders in response to the demands of the times. Regarding the purpose of including the human rights clause in the constitution in 2004, Wang Zhaoguo, then Vice-Chairman of the Standing Committee of the National People’s Congress, explicitly explained in the amendment rationale that: “This

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<sup>11</sup> Xu Chongde, *History of the Constitution of the People’s Republic of China (2<sup>nd</sup> edition)* (Fuzhou: Fujian People’s Publishing House, 2005), 132-133.

<sup>12</sup> Xiao Weiyun, *The Birth of the Current Constitution in China* (Beijing: Peking University Press, 2024), 160.

<sup>13</sup> Li Buyun, *On Human Rights* (Beijing: Social Sciences Academic Press, 2010), 269-278.

is a consistent policy of our Party and the state,” “It reflects the essential requirements of the socialist system, is conducive to promoting the development of China’s socialist human rights cause, and is beneficial for our engagement in exchanges and cooperation in the international human rights arena.”<sup>14</sup> His explanation of the purpose of the amendment has clearly demonstrated the intention of the Constitution to expand the scope of the subjects of fundamental rights. The subjects of fundamental rights have been expanded from “citizens” to “persons,” which is in line with the normative purpose of the fundamental rights provisions.

The innovation function of the incorporation of human rights clauses into the constitution in terms of the subjects of fundamental rights is manifested in the expansion of their scope, while its innovation function in terms of the duty bearers is reflected in the narrowing of their scope, limiting the duty bearers of fundamental rights from “the state, society, and individuals” to the state alone. Prior to the incorporation of human rights clauses into the constitution, there were three modes of stipulating the duty bearers in China’s constitutional fundamental rights provisions. First, some provisions only specify the rights holders without mentioning the duty bearers. For example, Article 35 of the *Constitution* only stipulates the freedom of speech and other rights of citizens without specifying the duty bearers of these rights. This omission allows for the interpretation that “the duty bearers of fundamental rights are all other subjects except the rights holders.” Second, some provisions focus on specifying the rights holders while also clearly identifying the duty bearers. For example, Article 36, Paragraph 2 of the *Constitution*, specifies that the duty bearers for the freedom of religious belief are state organs, social groups, and individuals, and Article 45 specifies that the duty bearers for the right to material assistance are the state and society. Third, some provisions generally and implicitly stipulate that all possible subjects are duty bearers. Article 51 of the *Constitution*, the general provision on the limitation of fundamental rights, does not explicitly specify the duty bearers of fundamental rights as the specific fundamental rights provisions do. However, it can be inferred from the phrase “shall not undermine the interests of the state, society or collectives, or infringe upon the lawful freedoms and rights of other citizens” that the state, society, collectives, and other citizens can all serve as the duty bearers of fundamental rights. It is evident that, overall, the fundamental rights provisions before the incorporation of human rights clauses into the constitution tended to regard the state, society, individuals, and all other subjects as the duty bearers of fundamental rights.

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<sup>14</sup> Wang Zhaoguo, “Explanation of the ‘Amendment to the Constitution of the People’s Republic of China (Draft)’ — Presented on March 8, 2004, at the Second Session of the Tenth National People’s Congress,” *The People’s Congress of China* 6 (2004): 20.

The incorporation of human rights clauses into the constitution has fundamentally altered the structure of the duty bearers for fundamental rights. As a general fundamental rights provision, the human rights clause governs all specific fundamental rights provisions. Its stipulation of the state as the duty bearer for human rights can be extended to each specific fundamental rights provision, thereby narrowing the scope of the duty bearers for these specific rights. On the one hand, for fundamental rights provisions that do not specify the duty bearers, the connection between the general human rights clause and these specific fundamental rights provisions clarifies that the duty bearer for fundamental rights is the state. On the other hand, for specific fundamental rights provisions that already explicitly identify the state, society, and individuals as the duty bearers, the human rights clause still serves to narrow the scope of the duty bearers. From a relational perspective, rights that exist between private entities and the state, especially between citizens and the state, are essentially different from those that exist among private entities. The former, which includes a master-servant relationship, determines that the rights and obligations within it are somewhat skewed. The latter, however, points to relationships among equal entities, where the rights and obligations are reciprocal. Therefore, in addition to clarifying that the state is the duty bearer for human rights, the human rights clause also implies an asymmetric allocation of rights and obligations in the legal relationships of human rights, that is, the protection of the rights of “persons” and the restraint of state power. At the same time, this creates a certain gap between the specific fundamental rights provisions that designate private entities as the duty bearers and the asymmetric protection concept of the human rights clause. In particular, indiscriminately treating all private entities as the duty bearers for fundamental rights can disrupt the overall system of fundamental rights as a mechanism for asymmetric protection and may easily deviate from the normative purpose of the human rights clause. To ensure the coherence of the fundamental rights normative system and to achieve the normative purpose of “the state respecting and protecting human rights,” it is necessary to purposefully narrow the scope of the duty bearers in the specific fundamental rights provisions that designate private entities as the duty bearers. State power is a public power, and publicness and power are the two most fundamental characteristics of state power. Correspondingly, among private entities, only those with these two characteristics — social public power holders — can serve as the duty bearers for fundamental rights, while other private entities do not possess the qualifications to be the duty bearers for fundamental rights.<sup>15</sup>

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<sup>15</sup> Li Haiping, “On the Paradigm Transformation of the Inter-Private Effect of Fundamental Rights,” *China Legal Science* 2 (2022): 26-44.



## **B. The content elaboration of determining the scope of legal relationship subjects**

Regarding the expansion of the scope of fundamental rights subjects by the human rights clause, the expansiveness of fundamental rights subjects is reflected in three dimensions: “life-personality-nationality.” Firstly, the natural person perspective of fundamental rights reveals the issue of the life dimension concealed beneath the citizen perspective of fundamental rights, which can be specifically divided into three dimensions: the length of life, the state of life, and the space of life. The issue of the length of life of fundamental rights subjects refers to the beginning and ending points of the life of natural persons as subjects of fundamental rights. With natural persons designated as subjects of fundamental rights, questions arise about whether unborn individuals and deceased individuals can be considered subjects of fundamental rights. These two categories of “persons” are not general subjects of fundamental rights in the usual sense and do not enjoy all fundamental rights; they can only be regarded as special subjects of fundamental rights. For instance, unborn individuals possess the “right to an open future,”<sup>16</sup> while deceased individuals are entitled to the right to dignity of the person.<sup>17</sup> The issue of the life state of fundamental rights subjects pertains to whether the state of a person’s life affects their status as a subject of fundamental rights. The life state includes health status, age status, and so on. The life state issue is unrelated to whether one is a subject of fundamental rights. This is because the capacity for fundamental rights is essentially different from the capability to exercise fundamental rights. All persons in a biological sense possess the capacity for fundamental rights, but not necessarily the capability to exercise them. One cannot deprive a person of the capacity for fundamental rights on the grounds of lacking the capability to exercise them. For example, individuals with mental illness and minors, although not meeting health or age standards, are still persons in a biological sense and should be regarded as subjects of fundamental rights.<sup>18</sup> The issue of the life space of fundamental rights subjects concerns whether “electronic persons,” “digital persons,” and other “persons” in virtual spaces can be considered subjects of fundamental rights. These “persons” in virtual spaces are merely technological extensions of the personalities of natural persons in physical space and exist in dependence on natural persons in the physical realm. They themselves cannot become independent entities with moral significance.<sup>19</sup> Therefore, “persons” in virtual

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<sup>16</sup> Sun Haibo, “Reflection on Genome Editing in the Perspective of Legal Philosophy,” *Journal of Comparative Law* 6 (2019): 105.

<sup>17</sup> Xiao Zesheng, “Constitutional Rights in the Cemetery,” *Law Science* 7 (2011): 74-75.

<sup>18</sup> Li Zhenshan, *Human Dignity and Human Rights Protection (5<sup>th</sup> edition)* (Taipei: Angle Publishing Co., Ltd., 2020), 18-21.

<sup>19</sup> Liu Zhiqiang, “On ‘Digital Human Rights’ Not Constituting a Fourth Generation of Human Rights,”

spaces cannot serve as subjects of fundamental rights.

Secondly, the natural person perspective of fundamental rights expands the personality dimension under the citizen perspective of fundamental rights, primarily involving whether legal persons and non-legal person organizations, which are legally constructed entities, can be considered subjects of fundamental rights. The reason legal persons can become subjects of fundamental rights lies in the dual relationship between legal persons and natural persons: The first relationship is the “means-end” correspondence between legal persons and natural persons. Legal persons are the legal personality extensions of natural persons and serve as a means for natural persons to engage in social activities. The ultimate goal of recognizing legal persons as subjects of fundamental rights is still to safeguard the fundamental rights of natural persons. The second relationship is the equal relationship between the “legally constructed personality” of legal persons and the “biological personality” of natural persons. Both have equal legal personalities, and legal persons and natural persons are independent legal personalities that should be equally respected and protected by the constitution.<sup>20</sup> Of course, the recognition of legal persons as subjects of fundamental rights does not imply that they enjoy all the fundamental rights that natural persons possess. The scope of fundamental rights enjoyed by legal persons needs to be defined based on their attributes and the nature of the fundamental rights in question.<sup>21</sup> Legal persons are divided into private legal persons and public legal persons. Private legal persons, based on their inherent status as private entities, enjoy fundamental rights and are subjects of fundamental rights, possessing specific fundamental rights. For example, private legal persons may enjoy economic fundamental rights such as property rights, but they do not possess personal fundamental rights like the right to personal liberty, nor do they have political fundamental rights such as the right to vote and the right to be elected.<sup>22</sup> Unlike private legal persons, public legal persons are subjects of fundamental rights only as an exception.<sup>23</sup> When performing public affairs, public legal persons cannot act as subjects of fundamental rights.<sup>24</sup> Public legal persons can only enjoy certain fundamental rights closely related to themselves as subjects of

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*Chinese Journal of Law* 1 (2021): 24-28.

<sup>20</sup> Xu Xianming, *Principles of Human Rights Law* (Beijing: China University of Political Science and Law Press, 2008), 115-120.

<sup>21</sup> Ashibe Nobuyoshi, with supplements by Takahashi Kazuyuki, *Constitution (6<sup>th</sup> edition)*, translated by Lin Laifan, Ling Weici and Long Xuanli (Beijing: Tsinghua University Press, 2018), 65-67.

<sup>22</sup> Lin Laifan, *Theory of Normative Constitution: An Introduction* (Beijing: The Commercial Press, 2017), 94-95.

<sup>23</sup> Li Zhongxia, “‘State Ownership’ in the Constitution: A Beautiful Misunderstanding,” *Tsinghua Law Journal* 5 (2015): 71.

<sup>24</sup> Qin Aolei, “The Status of Public Legal Persons as Bearers of Fundamental Rights under the German Basic Law,” *Journal of Zhengzhou University (Philosophy and Social Sciences)* 6 (2012): 47.

fundamental rights when they are in a position equivalent to or very similar to that of private individuals or private legal persons. Non-legal person organizations are also legally constructed entities with legal personality and can act as subjects of fundamental rights. However, due to the imperfections in their legal personality and their inability to independently bear responsibility, the status of non-legal person organizations as subjects of fundamental rights is more restricted compared to that of legal persons.

Lastly, the natural person perspective of fundamental rights challenges the dimension of nationality under the citizen perspective of fundamental rights. A natural person is a human being in the biological sense, while a citizen is a person in the political sense, with the difference lying in whether one holds the nationality of a country. The scope of meaning for natural persons is significantly broader than that for citizens, including foreigners and stateless individuals. When natural persons are considered subjects of fundamental rights, according to the general method of interpretation, foreigners and stateless individuals can be interpreted as subjects of fundamental rights. However, the fundamental rights enjoyed by foreigners and stateless individuals are limited. Firstly, rights such as the right to vote and other political rights, as well as social rights like the right to education, do not possess the attributes of natural rights, unlike personal liberty and human dignity. Instead, they are somewhat dependent on the state and exist contingent upon it. Therefore, they do not necessarily become fundamental rights for foreigners and stateless individuals. Secondly, the primary issue facing modern states is “who is the master of the political community that is the state, and on what characteristics do ‘we,’ as members of this political community, distinguish ourselves from ‘others.’” Modern states emphasize the “construction of citizens’ identification with the state through the primacy of citizenship.”<sup>25</sup> The primacy of citizenship is reflected in the fact that certain fundamental rights are enjoyed by citizens of the country but are not available to foreigners or stateless individuals. Therefore, the enjoyment of fundamental rights that are contingent upon the state must be predicated on having citizenship. The determination of which fundamental rights foreigners and stateless individuals can enjoy should be based on the degree of closeness between the fundamental rights and the state. For fundamental rights with attributes of natural liberty, such as freedom of expression, personal liberty, and human dignity, foreigners and stateless individuals can enjoy these rights. However, for political rights such as the right to vote and the right to be elected, which are premised on the state, or social rights like the right to material assistance, which are conditioned upon state provision, foreigners and stateless

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<sup>25</sup> Yin Dongshui, “The Four Dimensions of National Identity,” *Nanjing Journal of Social Sciences* 5 (2016): 53.

individuals do not enjoy these fundamental rights. Of course, the fact that foreigners and stateless individuals do not enjoy these fundamental rights does not preclude the state from granting them legal rights to material assistance and other benefits through ordinary laws or policies.

Regarding the narrowing of the scope of the duty bearers by the human rights clause, it is primarily reflected in the reduction of the duty bearers for fundamental rights from “state public power subjects + all other subjects” to “state public power subjects + social public power subjects.” State public power subjects serve as the duty bearers for fundamental rights in provisions that do not specify a duty bearer. In contrast, social public power subjects act as the duty bearers only for fundamental rights in provisions that explicitly designate private entities as the duty bearers. As social public power subjects, they possess at least the following characteristics: (1) Sociality: Social public power is a form of power that arises from interactions between private entities and is not derived from legal authorization or delegation. Private entities that exercise public power through state authorization or delegation are still considered state public power subjects. (2) Publicness: Private entities can influence public interests within a certain scope by leveraging their possession of political, economic, cultural, technological, and informational resource advantages. (3) Powerfulness: Power means “the chance of a man or of a number of men to realize their own will in a communal action even against the resistance of other who are participation in the action,” regardless of the basis of the chance.<sup>26</sup> In this sense, the essence of power is a form of control and dominance. The possession of significant resource advantages by private entities is merely a formal requirement for them to be recognized as social public power subjects. However, this formal requirement alone is insufficient to determine that a private entity belongs to the category of social public power. In addition to meeting the formal requirement, a social public power subject must also satisfy the substantive requirement that its resource advantages are sufficient to exert coercion and dominance over other private entities. This necessitates a comprehensive assessment that takes into account factors such as resource advantages, the level of competition, and the freedom of choice available to private entities. State public power is derived from explicit legal provisions, making its identification relatively straightforward. In contrast, social public power is a factual power with more principled and abstract criteria for determination, and its identification is more challenging compared to state public power. However, this does not imply that social public power does not exist, nor does it mean that the identification of social public power is entirely infeasible. Rather, it indicates that there is a certain degree of

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<sup>26</sup> Max Weber, *Economy and Society*, translated by Lin Rongyuan (Beijing: The Commercial Press, 1997), 81.

discretion involved in recognizing social public power.

## II. Establishment of the Dual Nature of Fundamental Rights

By linking the human rights clause with specific fundamental rights provisions, the subjects of fundamental rights are expanded from citizens to natural persons, and the duty bearers of fundamental rights are narrowed down from the state, society, and individuals to state public power and social public power. This determination of the subjects of the legal relationships of fundamental rights addresses the logical starting point for the innovation of fundamental rights hermeneutics. In addition to this, the human rights clause also establishes the dual nature of fundamental rights.

### A. Normative logic of the dual nature of fundamental rights

According to the human rights clause, the nature of fundamental rights should be established as the right to respect and the right to protection, both of which possess the nature of subjective rights. In the human rights clause, the phrase “respect and protect” connects the “person” and the “state” as subjects of the legal relationships of fundamental rights, reflecting the relationship between these subjects and serving as the hermeneutical basis for determining the nature of fundamental rights. The nature of fundamental rights should be interpreted based on the meaning of “respect and protect.”

In the Chinese language, the term “尊重” (respect) has three meanings: (1) to hold in high regard, to honor; (2) to value and treat seriously; (3) to act with dignity (referring to behavior).<sup>27</sup> Depending on the context, the verb forms of meanings (1) and (2) should be selected. The words “尊” (to honor), “敬” (to respect), and “重” (to value) have clear value orientations and imply an asymmetrical relationship between the two parties in terms of psychology or emotion. At the same time, phrases such as “to hold in high regard,” “to honor,” and “to value and treat seriously” all point to actions, indicating that one party should express its clear attitude toward the other party through certain behaviors. From a semantic perspective, “respect” has both value and behavioral significance.<sup>28</sup> The behavior of “respect” originates from the attitude of “respect,” and the attitude of “respect” is expressed and realized through the behavior of “respect.” In terms of relational form, “respect” typically characterizes the relationship between two subjects. In terms of behavioral form, “respect” can manifest as either negative non-action or positive action. In the human rights clause, the content of human rights that is subject to the state’s “respect” is endowed with the attribute of “rights.”

<sup>27</sup> Institute of Linguistics, CASS, *Modern Chinese Dictionary (7<sup>th</sup> edition)* (Beijing: The Commercial Press, 2016), 1754.

<sup>28</sup> Liu Fengjing: “The Connotations and Reflections of State’s ‘Respect’ for Human Rights,” *Academic Exchange* 3 (2019): 69.

Accordingly, “the state respects human rights” can be interpreted as: the right of individuals, as subjects of human rights, to be respected by the state. By extending the normative connotation of this general provision to specific fundamental rights provisions, specific fundamental rights come to include the meaning of the right to be respected by the state. Whether the behavior of “respect” manifests as action or non-action depends on the specific right being respected. The specific fundamental rights subject to respect include both liberty rights and social rights.<sup>29</sup> If the right subject to respect is a liberty right, “respect” is primarily manifested as non-action; if the right subject to respect is a social right, “respect” is primarily manifested as positive action. From the perspective of the subjects of fundamental rights, the fundamental rights of the subjects being respected by the state can be termed as the “right to respect.”

Semantically, the term “保障” (safeguard or protection) has two meanings: (1) to protect (life, property, rights, etc.) from infringement and destruction; (2) something that serves as a safeguard.<sup>30</sup> In terms of relational form, “protection” typically characterizes a tripartite relationship between the protector, the protected, and a third party. In terms of behavioral form, “protection” requires positive action from the protector and does not include negative non-action. Similar to “the state respects,” the human rights clause endows the protection of human rights by the state with the attribute of “rights.” Accordingly, “the state protects human rights” can be interpreted as: the right of individuals to be protected by the state from infringement by others, or the right to state protection for the provision of benefits by others to human rights subjects. By extending the normative connotation of this general provision to specific fundamental rights provisions, each specific fundamental right acquires the meaning of the right to state protection. From the perspective of the subjects of fundamental rights, the right of the subjects of fundamental rights to be protected by the state can be termed as the “right to protection.”

Starting from the wording of the human rights clause and extending its connotation as a general provision to specific fundamental rights provisions, we can broadly determine the nature of the right to respect for fundamental rights and the nature of the right to protection for fundamental rights. Among these two types of rights, the nature of the right to respect for fundamental rights is relatively easy to understand, while the nature of the right to protection for fundamental rights may inevitably give rise to comprehension difficulties. Therefore, it is necessary to provide supplementary arguments for the right to protection of fundamental rights from the perspectives of systemic logic, purpose logic, and justiciability.

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<sup>29</sup> Han Dayuan, “Normative Analysis of the ‘Human Rights Clause’ in the Constitutional Text,” *The Jurist* 4 (2004): 12.

<sup>30</sup> Institute of Linguistics, CASS, *Modern Chinese Dictionary (7<sup>th</sup> edition)* (Beijing: The Commercial Press, 2016), 47.

Firstly, determining the nature of the right to protection for fundamental rights is consistent with systemic logic and purpose logic. The “and” in the human rights clause connects “respect” with “protection,” indicating that “respect” and “protection” are in a parallel relationship. In legal hermeneutics, “adjacent concepts may help to interpret the elements of the legal provisions to be clarified.”<sup>31</sup> This means that the nature of the respect relationship and the protection relationship should be interpreted in the same or a similar manner. Determining the nature of one dimension of the dual relationship of “respect” and “protection” between the state and the individual helps to clarify the nature of the other dimension. Similarly, the “right to respect” derived from the “respect” relationship and the “right to protection” derived from the “protection” relationship are in a parallel relationship. This also implies that determining either the respect or protection relationship as having the nature of a subjective right simultaneously means determining that fundamental rights have a dual subjective right nature. Since the respect relationship has the nature of a subjective right, the protection relationship, which is parallel to it, should also possess the nature of a subjective right. For the vast majority of specific fundamental rights provisions, they typically reflect only one aspect of the respect or protection relationship between the state and the citizen, and it is not possible to deduce from them that the specific fundamental right enjoys both the right to respect and the right to protection as dual subjective rights. However, due to the overarching nature of the human rights clause as a general fundamental rights provision over the specific fundamental rights provisions, the nature of fundamental rights determined by the human rights clause can be extended to all specific fundamental rights. This means that specific fundamental rights also have the dual subjective right nature of the right to respect and the right to protection.

Moreover, in terms of the strength of the two modes of human rights protection — subjective rights and objective law — the subjective rights model, with its attribute of justiciability, provides stronger protection for legal interests compared to the objective law model that merely defines obligations. This makes it more beneficial for the beneficiaries of protection. Interpreting the protection of legal interests in both the respect and protection relationships as a subjective rights model better aligns with the constitutional amendment’s purpose of “the consistent policy of the Party and the state,” “reflecting the essential requirements of the socialist system, and facilitating our engagement in exchanges and cooperation in the international human rights arena.”<sup>32</sup>

<sup>31</sup> Thomas M. J. Möllers, *Legal Methods (4<sup>th</sup> edition)*, translated by Du Zhihao (Beijing: Peking University Press, 2022), 226.

<sup>32</sup> Wang Zhaoguo, “Explanation of the ‘Amendment to the Constitution of the People’s Republic of China (Draft)’ — Presented on March 8, 2004, at the Second Session of the Tenth National People’s Congress,” *The People’s Congress of China* 6 (2004): 20.

Secondly, the right to protection of fundamental rights possesses a certain degree of justiciability. Rights imply justiciability; without justiciability, there is no right. The question of whether the content of the right to protection, as a subjective right, is certain and, by extension, justiciable, has been subject to scrutiny. In terms of implementation, the fulfillment of protection obligations indeed takes various forms and is not confined to any specific method. However, this does not mean that the fulfillment of protection obligations lacks any certainty. In practice, the fulfillment of protection obligations typically manifests in two primary forms: whether the obligation is fulfilled and the extent to which it is fulfilled. Regarding the issue of whether the obligation is fulfilled, if the duty bearer fails to act, the certainty of non-fulfillment of the protection obligations is beyond doubt. As for the issue of the extent of obligation fulfillment, although there are often multiple ways to fulfill the obligation and it is difficult to specify clear standards for the quantity and quality of fulfillment, a minimum level of fulfillment still retains a certain degree of certainty, which determines that the right to protection also has justiciability.

### **B. The content elaboration of the dual nature of fundamental rights**

The right to respect and the right to protection are the dual subjective rights of fundamental rights. They share similarities but also have many differences. The similarity is that both apply to all specific fundamental rights, including liberty rights and social rights, and serve as a common analytical framework for each specific fundamental right. The differences are mainly reflected in the relational structure of fundamental rights and the specific content of fundamental rights.

The relational structure of the right to respect is a binary structure of “private entity-state,” reflecting the relationship between these two subjects. Here, the private entity is the rights holder of the right to respect, and the state is the duty bearer. The fundamental rights relationship between the private entity and the state is essentially a “rights-power” one, not a “rights-rights” one between private entities. For liberty rights, the right to respect manifests as a conflictual relationship between “rights-power,” where the private entity has the right to demand non-action from the state. If the state infringes upon the fundamental rights of the private entity through action, the private entity has the right to demand that the state cease the infringement. For social rights, the right to respect manifests as a cooperative relationship between “rights-power.” Although the constitutional provisions on social rights cannot serve as a basis for private entities to directly request material benefits from the state, private entities enjoy the right to demand legislative action from the state, empowering them to request that the legislative body enact laws providing for material benefits.



Compared with the right to respect, the relationship structure and content of the right to protection are more complex. Its relationship structure is a ternary structure of “private entity-state-private entity.” Regarding liberty rights, the right to protection of fundamental rights means that a private entity has the right to request the state to protect its fundamental rights from infringement by another private entity.<sup>33</sup> In this structure, one private entity is the victim and the rights holder in the dimension of the right to protection of liberty rights; the state is the protector of the right and the duty bearer of the right to protection; the perpetrator is the third party private entity, which is not a direct duty bearer of fundamental rights but assumes certain obligations under the state’s protective intervention. Regarding social rights, the right to protection of fundamental rights means that the state has the obligation to compel other private entities to fulfill the duty of providing for the protection of fundamental rights. Here, one private entity is the beneficiary of social rights and the rights holder of the right to protection of fundamental rights; the state is the guarantor and the duty bearer in the dimension of the right to protection of social rights; the provider of material benefits is the third party, which is not the duty bearer of the right to protection of fundamental rights but assumes corresponding legal obligations to provide for the rights holder under the state’s protective intervention.

The above analysis helps to clarify the misunderstandings in the academic community regarding the nature of fundamental rights. For a long time, the academic community has tended to believe that fundamental rights possess the dual nature of subjective rights and objective law. Among them, the subjective right nature of fundamental rights emphasizes the aspect of the fundamental rights subject’s right to request state action or non-action, while the objective law nature of fundamental rights emphasizes the value orientation of fundamental rights norms constraining all state public powers.<sup>34</sup> There is no doubt that fundamental rights have the nature of subjective rights, but the objective law nature of fundamental rights is worth reconsidering.

Firstly, characterizing objective law as the “nature” of fundamental rights makes it difficult to distinguish between fundamental rights norms and non-fundamental rights norms. Rudolph von Jhering pointed out that the concept of law is applied in both an objective and a subjective sense. The so-called objective law refers to the totality of legal principles applicable by the state, the order of life in law, while the so-called subjective law is the individual’s specific right formed by concretizing abstract rules.<sup>35</sup> In this regard, subjective

<sup>33</sup> Wang Jinwen, “Explanation and Development of State’s Protection Obligation of Basic Rights: Theory Tracing, Normative Practice and Localization Construction,” *China Law Review* 4 (2019): 106.

<sup>34</sup> Zhang Xiang, “Dual Nature of Fundamental Rights,” *Chinese Journal of Law* 3 (2005): 24-27.

<sup>35</sup> Rudolph von Jhering, *The Struggle for Law*, translated by Hu Baohai (Beijing: China Legal Publishing House, 2004), 4.

rights and objective law are in a relationship of inclusion, not a parallel one. Not only do fundamental rights norms possess the nature of objective law, but all norms contained in China's *Constitution* also have the nature of objective law. The nature of objective law is a common attribute of both fundamental rights norms and non-fundamental rights norms. It is just that in the objective law norms of fundamental rights, subjective rights are included, whereas in the objective law norms of non-fundamental rights, subjective rights are not included, and the interests they protect are merely reflected as incidental benefits. "Nature" refers to "the fundamental attribute that distinguishes one thing from other things."<sup>36</sup> When non-fundamental rights norms also possess the nature of objective law, characterizing objective law as the "nature" of fundamental rights norms can easily blur the differences between fundamental rights norms and non-fundamental rights norms, and also fails to reveal the fundamental attributes of fundamental rights norms.

Secondly, regarding objective law as the "nature" of fundamental rights can obscure the relational connotations of fundamental rights. Using objective law to represent the nature of fundamental rights largely expresses the idea of fundamental rights as a value order. Undoubtedly, fundamental rights as a value order are valid. Any norm in the constitution and laws contains value connotations and value judgments and represents the legal form of a value order. Fundamental rights norms are, of course, no exception. In this regard, Claus-Wilhelm Canaris refers to the characterization of fundamental rights as a value order as a "cliché."<sup>37</sup> While somewhat radical, it is not without a grain of truth. "All rights are relationships between right holders; without a relationship, there can be no rights."<sup>38</sup> In discussions of positive law rights as relational entities, neglecting to focus on and reveal their relational connotations easily leads to conflating positive law rights with natural law rights. Regarding the issue of fundamental rights as a value order, the truly meaningful question is not whether fundamental rights serve as a value order, but how to define the relational connotations of fundamental rights as a value order, clarifying what kind of relational value order it is and the scope of relationships it can cover. From the perspective of the human rights clause, fundamental rights as a value order exist within two types of relationships: the respect for fundamental rights and the protection of fundamental rights. In the relationship of respect for fundamental rights, fundamental rights as a value order exist between private entities and the state, forming a value order within the binary relationship

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<sup>36</sup> Institute of Linguistics, CASS, *Modern Chinese Dictionary (7<sup>th</sup> edition)* (Beijing: The Commercial Press, 2016), 1470.

<sup>37</sup> Claus-Wilhelm Canaris, "Fundamental Rights and Private Law," translated by Zeng Tao and Cao Yuchen, *Journal of Comparative Law* 1 (2015): 184.

<sup>38</sup> Georg Jellinek, *System of Subjective Public Rights (Revised Translation)*, translated by Zeng Tao and Zhao Tianshu (Beijing: The Commercial Press, 2023), 54.

structure of “private entity-state.” In the protection relationship of fundamental rights, the value order of fundamental rights exists among three parties: the private entity, the state, and another private entity. It is a value order within the ternary relationship structure of “private entity-state-private entity.” The value order of fundamental rights in this ternary structure is particularly unique. It encompasses the value order within the respect relationship for fundamental rights between one private entity and the state, the value order within the protection relationship for fundamental rights between the other private entity and the state, and the value order within the indirect fundamental rights relationship between the two private entities, which is derived from the aforementioned direct fundamental rights relationships. Since the indirect fundamental rights relationship is derived from the direct fundamental rights relationships, and the value order in the direct fundamental rights relationships is a value order within a power relationship, the value order in the indirect fundamental rights relationship must be constrained by the value order in the direct fundamental rights relationships. It should be confined within the scope of value orders that involve power relationships.

Thirdly, regarding objective law as the “nature” of fundamental rights can easily lead to a separation between the negative defense aspect and the positive protection aspect of fundamental rights. Defining the nature of fundamental rights in their positive dimension as objective law results in the denial of the subjective right attribute of fundamental rights in the protection relationship, and the determination of the obligations in this relationship as objective law obligations. From the provision “the state respects and protects human rights,” both respect and protection are contents of human rights; respect is a “right,” and protection is also a “right.” Following the general principles of constitutional hermeneutics, the right attribute of human rights and fundamental rights in both the respect and protection dimensions should be established, clarifying their dual subjective right nature. Of course, acknowledging the nature of the right to protection of fundamental rights does not mean denying the inherent objective law nature of the protection dimension of fundamental rights, nor does it mean that the right to protection of fundamental rights is completely identical to the right to respect of fundamental rights. As a positive right, the right to protection of fundamental rights is a “nascent” right,<sup>39</sup> which has its own particularities in terms of the content of the right and the mechanisms for its realization.

### **III. Formation of the Dual Obligations of the State**

“In the realm of law, one’s obligation is always predicated on the rights of

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<sup>39</sup> Robert Alex, *A Theory of Constitutional Right*, translated by Julian Rivers (New York: Oxford University Press, 2002), 303.

another.”<sup>40</sup> The nature of fundamental rights and the forms of state obligations are two sides of the fundamental rights hermeneutics system. While the human rights clause establishes the dual nature of fundamental rights, it also shapes the dual obligations of the state in relation to fundamental rights.

### **A. Foundation of state obligations**

Corresponding to the dual rights of the right to respect and the right to protection of fundamental rights, state obligations also have the dual nature of respect obligations and protection obligations. The understanding of this dual obligation should be unfolded from the following two aspects:

On the one hand, the state’s dual obligations are obligations based on subjective rights. With the foundation for the establishment of state obligations as the standard, state obligations can be divided into two types: state obligations based on subjective rights and state obligations based on objective law. State obligations based on subjective rights correspond to fundamental rights and are legally remediable; whereas state obligations based on objective law do not correspond to fundamental rights and are not legally remediable, and their fulfillment mainly relies on the self-restraint of public power and political supervision. The dual nature of fundamental rights determines that both the state’s respect obligations and protection obligations are obligations based on subjective rights.

On the other hand, the obligation to respect is one within a bilateral relationship and may take the form of either positive action or negative inaction, whereas the obligation to protect is one within a trilateral relationship and only takes the form of positive action. To summarize the previous analysis, “respect” in the human rights clause is a concept that characterizes the bilateral relationship between private entities and the state, encompassing both action and inaction; “protection” is a concept used to characterize the trilateral relationship of “private entity-state-private entity,” referring to the state’s protection of one private entity from infringement by other private entities or the state’s ensuring that one private entity provides benefits to other private entities. As a general fundamental rights provision, the dual obligations of the state determined by the human rights clause can be extended to all specific fundamental rights. Accordingly, for each fundamental right, whether it is a liberty right or a social right, the state has both the obligation to respect and the obligation to protect. Regarding the obligation to respect, it may involve either negative inaction or positive action, depending on the nature of the specific fundamental right to which the obligation corresponds. If the right in question is a liberty right, the content of the obligation to respect is manifested as the

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<sup>40</sup> Gustav Radbruch, *Einführung in die Rechtswissenschaft*, translated by Mi Jian and Zhu Lin (Beijing: Encyclopedia of China Publishing House, 1997), 6.

state's negative inaction; if the right is a social right, the content of the obligation to respect is manifested as the state's positive duty to provide benefits. As for the obligation to protect, regardless of whether the obligation targets a liberty right or a social right, the state's obligation is always one of positive action and does not include negative inaction.

There are some understandings regarding the forms of state obligations that require clarification in the academic community. First, the relationship between the names of state obligations and the constitutional text needs to be clarified. In the application of law, "if the language of the text is clear, then the judge should apply this meaning and should not interpret it otherwise."<sup>41</sup> Similarly, the human rights clause has already explicitly employed "respect" and "protect" to characterize the forms of obligation, which has been sufficiently clear. Unless it involves further specification and categorization of the obligations to respect and protect, other terms should not be used as substitutes to avoid confusion and uncertainty, which would undermine the authority of the constitution. Existing academic proposals to divide state obligations into negative obligations of non-action and positive obligations of action,<sup>42</sup> negative obligations of respect and positive obligations of protection,<sup>43</sup> obligations to respect, safeguard, and promote, and obligations to protect,<sup>44</sup> as well as obligations to respect, protect, and provide,<sup>45</sup> although they all contain elements of truth, do not seem to strictly describe the forms of state obligations based on the human rights clause and may deviate, to varying degrees, from the text of China's *Constitution*. The understanding of the state obligations corresponding to fundamental rights requires establishing the baseline of respect obligations and protection obligations, and then expanding upon this foundation in conjunction with specific fundamental rights relationships. Accordingly, the state obligations corresponding to fundamental rights can be broken down into four specific forms of obligations: respect obligations for liberty rights, protection obligations for liberty rights, respect obligations for social rights, and protection obligations for social rights.

Second, the relationship between the state's obligation to respect and negative obligations needs to be clarified. Although various proposals acknowledge the state's obligation to respect, they generally equate the

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<sup>41</sup> Wang Yunqing, *The Dilemma and Future of Constitutional Interpretation Theory in America* (Beijing: Tsinghua University Press, 2017), 217.

<sup>42</sup> Zhang Xiang, *Legal Construction of Fundamental Rights Norms* (Beijing: Law Press • China, 2023), 47-51.

<sup>43</sup> Shangguan Piliang, "On the Dual Obligations of the State Towards Fundamental Rights — Taking the Right to Life as an Example," *Jianghai Academic Journal* 2 (2008): 150-155.

<sup>44</sup> Jiang Yinhua, *Deontology of State — From the View of Safeguarding Human Rights* (Beijing: China University of Political Science and Law Press, 2012), 151-215.

<sup>45</sup> Gong Xianghe, *State Obligations of People's Livelihood Guarantee* (Nanjing: Southeast University Press, 2019), 58-60.

obligation to respect with negative obligations, without fully revealing the proper connotations of the obligation to respect. According to the human rights clause, the state's obligation to respect applies to all fundamental rights, including both liberty rights and social rights. It may take the form of either the state's negative obligation of non-action or its positive obligation of action. Whether it is a negative or positive obligation depends on whether it is the right to respect for liberty rights or the right to respect for social rights. For the right to respect for liberty rights, the corresponding state obligation is a negative obligation of non-action. In contrast, for the right to respect for social rights, the corresponding state obligation is a positive obligation of action, which inherently includes the connotation of a duty to provide benefits.

Third, the existence of state protection obligations in the realm of social rights needs to be clarified. The tripartite relationship of the right to protection of fundamental rights exists only in the realm of liberty rights, and there is no tripartite relationship of fundamental rights protection obligations in the realm of social rights yet — this is a relatively common theoretical understanding in the academic community.<sup>46</sup> While this understanding may be applicable to countries with constitutions that only stipulate liberty rights, it is clearly insufficient to explain the situation in China, where social rights are extensively provided for in China's *Constitution*. Starting from the text of China's *Constitution*, all fundamental rights, including both liberty rights and social rights, have the dimension of the right to protection. Not only do liberty rights have fundamental rights protection obligations in the tripartite relationship of "private entity-state-private entity," but social rights also have fundamental rights protection obligations in this tripartite relationship. For liberty rights, the obligation to protect liberty rights is manifested in the state's protection of the liberty rights of one private entity from infringement by another private entity. For social rights, the obligation to protect social rights is manifested in the state's legislative establishment of the obligation of one private entity to provide benefits to another private entity, compelling one private entity to provide benefits to another.

Fourth, the notion of hierarchical state obligations is debatable. Some scholars have proposed that the state's obligation to respect is the first level, while the state's obligation to protect and promote or to protect is the second level, and the state's obligation to protect or to provide is the third level.<sup>47</sup> Categorizing specific forms of state obligations into three hierarchical levels implies that there is a primary and secondary relationship and a sequential

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<sup>46</sup> Chen Zheng, "The State Protection Obligation Function of Fundamental Rights," *Chinese Journal of Law* 1 (2008); Gong Xianghe and Liu Yaohui, "The State Obligation System of Fundamental Rights," *Journal of Yunnan Normal University* 1 (2010).

<sup>47</sup> Gong Xianghe, *State Obligations of People's Livelihood Guarantee* (Nanjing: Southeast University Press, 2019), 106.

order of fulfillment among these specific forms of state obligations. In fact, there is no primary or secondary distinction among specific forms of state obligations, nor is there a sequential order of fulfillment. The human rights clause places “respect” before “protection,” which to some extent expresses the foundational status of the obligation to respect. The use of “and” to connect them indicates a relationship of “parallelism and equality”<sup>48</sup> between the obligation to respect and the obligation to protect, without any distinction of primary or secondary importance. This judgment can not only be derived from the human rights clause but also aligns with the essential nature of China’s *Constitution* as a socialist constitution. In a purely liberal constitution, fundamental rights primarily emphasize formal freedom and equality. As a constitutional form that transcends liberal constitutions, a socialist constitution regards substantive freedom and substantive equality as the inherent meanings of fundamental rights. This determines that liberty rights and social rights hold equally important positions in a socialist constitution, and the corresponding state obligations to respect and protect should not be understood in terms of different levels and sequential order.

### **B. Performance of the state obligations**

The state is a highly abstract concept, and the fulfillment of state obligations ultimately requires specific state organs such as the legislative, executive, and judicial branches to implement. The legislative organ is the primary state organ responsible for fulfilling state obligations, and both the respect and protection obligations of fundamental rights need to be realized through the exercise of legislative power by the legislative organ. There are certain differences in the legislative fulfillment of the respect and protection obligations. For the respect obligation of liberty rights, the negative nature of the state obligation determines that the legislative organ should adopt a position of legislative restraint, with necessity as the principle. If legislation is deemed necessary, it should follow the principle of legal reservation and be enacted by the highest state legislative organ in the form of law. Even if the highest state legislative organ delegates legislative authority, it should comply with the conditions for delegation, specifying the scope of matters, principles, and duration of the delegation. In terms of legislative content, the legislative content for the respect obligation of liberty rights often manifests as mandatory norms and should comply with the principle of proportionality, prohibiting excessiveness. For the respect obligation of social rights and the protection obligations of both liberty rights and social rights, the positive nature of state obligations determines that the legislative organ should adopt an activist stance

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<sup>48</sup> Institute of Linguistics, CASS, *Modern Chinese Dictionary (7<sup>th</sup> edition)* (Beijing: The Commercial Press, 2016), 95.

in legislation, with possibility as the principle. Whenever it is possible to promote the realization of private entities' liberty rights or social rights through legislation, the legislative organ should actively initiate the legislative process to fulfill its legislative obligations. In terms of legislative content, it should follow the principle of prohibiting insufficient protection and meet the requirements of the three sub-principles of suitability, minimum effectiveness, and balance. Moreover, the legislative organ should promptly enact, amend, abolish, or interpret laws according to the needs of social development to ensure legislative quality and avoid situations that infringe upon citizens' fundamental rights, such as legal vacuums or legal conflicts.

The executive branch should fulfill state obligations through the enforcement of laws. There are primarily two ways in which the executive branch enforces laws: First, by concretizing the content of laws through administrative legislation, or by engaging in creative administrative legislation in the absence of legal provisions; second, by making specific administrative actions in accordance with the law. When enforcing laws, the executive branch should start from the premise of respecting and protecting fundamental rights, formulate regulations that are in line with fundamental rights, and provide legal interpretations and applications that are consistent with fundamental rights in individual cases.

The judiciary fulfills state obligations through judicial decisions. From existing judicial cases, the judiciary primarily uses the human rights clause or specific fundamental rights provisions as a basis for reasoning or decision-making to fulfill the state's obligation to protect. Regarding only the human rights clause, the judiciary employs methods such as value declaration, supplementary argumentation, and constitutional interpretation when using the human rights clause for judicial reasoning.<sup>49</sup> In the methods of value declaration and supplementary argumentation, the human rights clause does not substantially affect the connotations of specific legal norms or decisively influence the final judicial decision. However, in the method of constitutional interpretation, since the connotations and spirit of the human rights clause are infused into specific legal norms, it substantially affects the connotations of these norms and thereby determines the judicial decision. Reflecting on these methods of judicial reasoning, the method of constitutional interpretation deserves particular attention. The use of constitutional interpretation in adjudicating cases should become the primary means for the judiciary to fulfill its obligations to respect and protect fundamental rights. However, this does not mean that the judiciary can unconditionally and unlimitedly apply the human rights clause to interpret specific legal norms in a constitutional manner.

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<sup>49</sup> Zheng Ruohan, "Human Rights in Civil Judicial Documents: Conception and Function," *The Journal of Human Rights* 4 (2023): 136-139.



In terms of application conditions, since fundamental rights are rights that regulate relationships within a certain scope, the constitutional interpretation by the judiciary should also be limited to the scope of relationships regulated by fundamental rights. In terms of application limits, since the use of the method of constitutional interpretation involves the relationship between judicial power and legislative power, the judiciary's application of constitutional interpretation should also pay attention to the boundaries of judicial power and should not exercise legislative power through judicial decisions, thereby exceeding the limits of judicial power. It is worth emphasizing that the judiciary's obligation to respect and protect fundamental rights is also reflected in the proposal of suggestions and requirements for constitutional review. When exceeding the boundaries of judicial decision-making authority, the judiciary has the duty to submit fundamental rights protection issues to the constitutional review authority for handling. In this regard, Article 110 of China's *Legislation Law* and Article 6 of the *Decision of the Standing Committee of the National People's Congress on Improving and Strengthening the System of Recording and Review* have already clearly stipulated the responsibilities of the judiciary to propose requirements and suggestions for constitutional review. This is an important manifestation of the legalization of the judiciary's obligation to respect and protect fundamental rights.

#### **IV. Limited Expansion of the Scope of Fundamental Rights**

Fundamental rights include both enumerated and unenumerated fundamental rights,<sup>50</sup> and the scope of fundamental rights is constrained by the scope of unenumerated fundamental rights. Prior to the incorporation of human rights clauses into the constitution, unenumerated fundamental rights were primarily justified based on the enumerated fundamental rights provisions. The incorporation of human rights clauses into the constitution has provided a new normative basis for the justification of unenumerated fundamental rights, leading to a limited expansion of the scope of fundamental rights.

##### **A. Normative logic of the limited expansion of the scope of fundamental rights**

The incorporation of human rights clauses into the constitution is the legal form of the Party's policy. Long before this clause was included in the Constitution, the reports of the Party's 15th and 16th National Congresses explicitly proposed to ensure that the people enjoy extensive rights and freedoms in accordance with the law and to respect and protect human rights. Human rights refer to the essential rights that a person should have as a human

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<sup>50</sup> Wang Guanghui, "On Unenumerated Rights in the Constitution," *Studies in Law and Business* 5 (2007): 60-61.

being,<sup>51</sup> which is an abstract and generalized expression of fundamental rights. The inclusion of this highly open-ended concept in the Constitution provides a normative basis for the justification of unenumerated fundamental rights, the expansion of the scope of fundamental rights, and the guarantee of more extensive fundamental rights and freedoms for the people. However, it must be pointed out that the justificatory function of the human rights clause for unenumerated fundamental rights is limited; it only has a limited hermeneutic significance in expanding the scope of fundamental rights.

Firstly, the textual position of the human rights clause has a significant impact on the scope of fundamental rights that it can expand. During the constitutional amendment process, there were debates regarding the placement of the human rights clause, including three proposals: placing it in the preamble, in the general principles chapter, or in the chapter on the fundamental rights and duties of citizens. The constitutional amending body ultimately chose the third option, reasoning that this placement would help strengthen the connection between human rights and fundamental rights.<sup>52</sup> From a systemic logic perspective, the radiating effect of the human rights clause diminishes progressively among the three proposals. Placing it in the preamble or the general principles chapter implies to some extent that the values contained in the human rights clause can extend to the national tasks and goals stipulated in these sections, providing a basis for deriving unenumerated fundamental rights from these provisions. By placing it in the chapter on the fundamental rights and duties of citizens, not only is the connection between human rights and fundamental rights strengthened, but also the scope of the values radiated by the human rights clause is clarified to a certain extent. This scope is primarily confined to the fundamental rights provisions and is inappropriate to be fully extended to national tasks, goals, or other provisions outside this chapter, from which unenumerated fundamental rights could be derived.

Secondly, the relationship between the human rights clause and specific fundamental rights provisions determines the limited nature of the human rights clause in expanding the scope of fundamental rights. The human rights clause governs specific fundamental rights provisions, forming a “general law and special law” relationship with them. Specific fundamental rights provisions have priority in application over general fundamental rights provisions.<sup>53</sup> When

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<sup>51</sup> Xia Yong, *The Origin of Human Rights Idea — A Philosophy on the History of Rights* (Beijing: China Social Sciences Press, 2007), 146.

<sup>52</sup> Liu Songshan, “The Background, Proposals, and Textual Interpretation of the Incorporation of Human Rights into the Constitution,” *ECUPL Journal* 5 (2014): 61-63.

<sup>53</sup> Yu Jun, *Unenumerated Constitutional Rights: Arguments, Norms, and Methods — From the Perspective of the Justification of New Rights* (Beijing: China University of Political Science and Law Press, 2017), 259-260.

justifying unenumerated fundamental rights, specific fundamental rights provisions should be applied first. Only when it is impossible to justify them based on specific fundamental rights provisions, or when the justification based on these provisions is insufficient, should the human rights clause be adopted to justify the unenumerated fundamental rights.

Furthermore, the connotation of human rights constrains the boundaries of the expansion of the scope of fundamental rights. The incorporation of the human rights clause into the constitution clarifies the human rights attribute of fundamental rights. This indicates that unenumerated fundamental rights must also possess the attribute of human rights; only rights derived from specific fundamental rights provisions that have the attribute of human rights can be considered unenumerated fundamental rights. In terms of the types of rights, the fundamental rights in China's *Constitution* are divided into three categories: liberty rights, political rights, and social rights. Under the constraints of the human rights clause, the function of these three types of fundamental rights provisions in deriving unenumerated fundamental rights is correspondingly weakened. Liberty rights, which have the attributes of natural rights and freedom, allow for a relatively broad scope in justifying unenumerated liberty rights in their provisions. Political rights and social rights do not possess the attributes of natural rights and freedom, and deriving unenumerated fundamental rights from provisions under these two categories should be subject to more restrictions, resulting in a relatively narrower scope for unenumerated political and social rights. Particularly for unenumerated social rights, since this type of right mainly manifests as special favor and gratuitous assistance to specific groups of people, deriving unenumerated social rights from social rights provisions should be strictly limited.

Finally, we must adhere to the principle that the expansion of the scope of fundamental rights by the human rights clause is limited, in accordance with the constitutional amendment's purpose of maintaining the unity of the constitution's stability and adaptability. Regarding the 2004 constitutional amendment, Wu Bangguo, the then Chairman of the Standing Committee of the National People's Congress pointed out: "The current Constitution is a good one, and overall it meets the needs of reform and opening-up as well as the construction of socialist modernization. It should remain stable." "This constitutional amendment is not a major overhaul but a partial revision," and "if a provision can be amended or left as it is, it should not be amended."<sup>54</sup> His statement clarified the constitutional amendment's purpose of "maintaining the dialectical unity of the Constitution's stability and adaptability" as followed in this amendment. According to this purpose, it is not advisable to

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<sup>54</sup> Wu Bangguo, *Wu Bangguo on Work at People's Congress (Part I)* (Beijing: People's Publishing House, 2017), 129, 133, 139 and 140.

overemphasize the function of the human rights clause in expanding the scope of fundamental rights. The specific rights included in “human rights” are extremely vague. If unenumerated fundamental rights are justified and the scope of fundamental rights is expanded solely based on the human rights clause, it is highly likely to dilute the specific fundamental rights provisions, undermine the stability of the constitutional text, and damage the authority of the constitution.<sup>55</sup> The excessive incorporation of natural rights into the list of fundamental rights may indirectly increase the risk of infringement by constitutional interpretation bodies and legislative organs. It may also lead to a lack of initiative on the part of constitutional amendment bodies to include some unenumerated fundamental rights in the constitutional text.<sup>56</sup>

### **B. Specific manifestations of the limited expansion of the scope of fundamental rights**

The limited expansion of the scope of fundamental rights by the human rights clause is specifically manifested in its three limited functions for justifying unenumerated fundamental rights: the function of not justifying unenumerated fundamental rights, the function of supplementary justification of unenumerated fundamental rights, and the function of parallel justification of unenumerated fundamental rights. From the perspective of the justificatory function of the human rights clause, it is neither the sole item for justifying unenumerated fundamental rights nor a mandatory option for such justification, and it can only expand the scope of fundamental rights in a limited manner.

First, the function of not justifying unenumerated fundamental rights means that the human rights clause is not used as a normative basis for justifying unenumerated fundamental rights. In this case, the interpreter only needs to use other provisions of the constitution as the normative basis and justify unenumerated fundamental rights according to general methods of interpretation such as textual interpretation, systemic interpretation, and purpose interpretation. Based on the nature of the constitutional provisions relied upon, the justification of unenumerated fundamental rights is divided into two scenarios: justifying unenumerated fundamental rights based on specific fundamental rights provisions and justifying unenumerated fundamental rights based on both specific fundamental rights provisions and non-fundamental rights provisions. In the first scenario, the specific fundamental rights provision serves as the sole normative basis for justifying unenumerated fundamental rights. The interpreter can justify unenumerated

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<sup>55</sup> Li Zhongxia, “Constitutional Interpretation of the ‘Human Rights Clause’: Methodological and Systemic Perspectives,” in *Studies in Human Rights*, vol. 12, Xu Xianming ed. (Jinan: Shandong People’s Publishing House, 2013), 23.

<sup>56</sup> Jiang Feng, “The Hidden Concerns of Rights Constitutionalization — Reflections Centered on Social Rights,” *Tsinghua Law Journal* 5 (2010): 55-57.

fundamental rights by interpreting the specific fundamental rights provision. For example, in justifying that the right to life is an unenumerated fundamental right in China, one only needs to rely on Article 37 of the *Constitution*, which stipulates “personal freedom,” and Article 38, which stipulates “dignity of the person.” By interpreting life as a prerequisite for bodily integrity and personal dignity, the right to life can be derived from these two fundamental rights provisions.<sup>57</sup> When justifying unenumerated fundamental rights solely based on specific fundamental rights provisions is insufficient, the second scenario arises, which involves justifying unenumerated fundamental rights based on both specific fundamental rights provisions and non-fundamental rights provisions. This scenario still needs to meet one condition: the non-fundamental rights provisions should correspond one-to-one with the specific fundamental rights provisions. For example, Article 34 of the *Constitution*, which stipulates “the right to vote and the right to be elected,” corresponds to Article 3 in the General Principles, which stipulates the “electoral system.” By using these two categories of provisions as the normative basis, the interpreter can derive unenumerated fundamental rights.<sup>58</sup>

When the human rights clause does not function to justify unenumerated fundamental rights, the justification of unenumerated fundamental rights must meet the following two conditions: First, there must be specific fundamental rights provisions as the normative basis; second, the specific fundamental rights provisions must serve as the primary normative basis, with non-fundamental rights provisions merely providing supplementary argumentative utility. Therefore, in justifying unenumerated fundamental rights, one cannot rely solely on non-fundamental rights provisions as the normative basis, nor can one simply “engage in inductive construction of multiple norms.”<sup>59</sup>

Second, the supplementary function of justifying unenumerated fundamental rights means that specific fundamental rights provisions serve as the primary normative basis for justifying unenumerated fundamental rights, while the human rights clause acts as a supplementary basis to these specific provisions, thereby playing a role in justifying unenumerated fundamental rights. Under this function, there are two modes: the supplementary normative basis mode and the supplementary interpretative basis mode. In the former mode, the specific fundamental rights provision serves as the main normative basis, and the human rights clause acts as a supplementary normative basis to the specific fundamental rights provision, together forming a normative system for justifying unenumerated fundamental rights.<sup>60</sup> For example, in justifying

<sup>57</sup> Zhang Zhuoming, “Unenumerated Fundamental Rights in China,” *Chinese Journal of Law* 1 (2014): 18.

<sup>58</sup> Wang Liwan, “Institutional Rights: on the Interactive Model between General Principles and Fundamental Rights in Chinese Constitution,” *Zhejiang Social Sciences* 1 (2019): 37.

<sup>59</sup> Lei Lei, “The Criteria for Justifying Emerging (New) Rights,” *Legal Forum* 3 (2019): 26.

<sup>60</sup> Li Zhenshan, *Pluralism, Tolerance, and Human Rights Protection — Centered on the Protection of*

that the right of parents of procreate and nurture is an unenumerated fundamental right in China, the terms “procreate” and “nurture” do not necessarily fall within the semantic scope of Article 49, Paragraph 1 of the *Constitution*, which stipulates that “marriage, family, mothers, and children are protected by the state.” This provision alone is not sufficient to serve as the sole normative basis for justifying the right to procreate and nurture. In such cases, the interpreter may link “procreation” and “nurturing” to human dignity and use the human rights clause as a supplementary normative basis, thereby justifying that the right to procreate and nurture is an unenumerated fundamental right.<sup>61</sup>

Corresponding to the supplementary normative basis mode, the supplementary interpretative basis mode involves the interpreter using the human rights clause as an interpretative basis for specific fundamental rights provisions rather than a normative basis. That is, the human rights clause exerts a value radiation on specific fundamental rights provisions, infusing human rights values into the normative purpose of these provisions, thereby incorporating unenumerated fundamental rights into the scope of protection of specific fundamental rights.<sup>62</sup> For example, in justifying information freedom as an unenumerated fundamental right, one can use Article 35 of the *Constitution*, which stipulates “freedom of expression,” as the normative basis. By using the human rights clause to distill an objective purpose of the “freedom of expression” clause — “protection of the interests of the listener” — information freedom can then be incorporated into the semantic scope of the “freedom of expression” clause. In this way, the “freedom of expression” clause becomes the sole normative basis for information freedom.<sup>63</sup>

Comparing the aforementioned supplementary normative basis mode with the supplementary interpretative basis mode, the human rights clause plays only a supplementary role in both. The difference is that the supplementary normative basis mode applies to situations where the partial semantics of the unenumerated fundamental rights to be justified fall outside the semantic scope of the specific fundamental rights provisions. The human rights clause, as a direct normative basis, can supplement the content of unenumerated fundamental rights not included in the specific fundamental rights provisions. In contrast, in the supplementary interpretative basis mode, the human rights clause does not serve as a normative basis and cannot itself interpret any substantive content of unenumerated fundamental rights. Its function is to

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*Unenumerated Rights in the Constitution* (Taipei: Angle Publishing Co., Ltd., 2007), 32.

<sup>61</sup> Li Haiping, “Constitutional Boundaries of Application of Human Gene Enhancement Technique,” *Law Science* 1 (2024): 49-50.

<sup>62</sup> Han Dayuan, “Normative Analysis of the ‘Human Rights Clause’ in the Constitutional Text,” *The Jurist* 4 (2004): 11-12.

<sup>63</sup> Ao Haijing, “The Constitutional Basis of Freedom of Information,” *ECUPL Journal* 2 (2023): 42-44.

derive the objective normative purpose of the specific fundamental rights provisions and then, through purposive interpretation, fully incorporate the semantics of the unenumerated fundamental rights to be justified into the semantic scope of the specific fundamental rights provisions. This mode carries the risk of over-expanding the scope of protection of specific fundamental rights and requires cautious treatment.

Third, the function of parallel justification of unenumerated fundamental rights means that the human rights clause and non-specific fundamental rights provisions jointly serve as the normative basis for justifying unenumerated fundamental rights. The non-fundamental rights provisions in China's *Constitution* include the preamble provisions, the general principles provisions in Chapter One, the state organs provisions in Chapter Three, and the provisions on the national flag, national anthem, national emblem, and capital in Chapter Four. The provisions on the national flag, national anthem, national emblem, and capital in Chapter Four have no direct connection with fundamental rights, and even in combination with the human rights clause, they cannot derive unenumerated fundamental rights. Although the preamble provisions have the same legal force as the provisions in other chapters, they are more abstract compared to the general principles provisions and the state organs provisions. It is difficult to fully justify unenumerated fundamental rights based solely on the human rights clause and the preamble provisions.

For the general principles provisions, it is necessary to discuss different scenarios based on the specific articles of these provisions. The general principles provisions can be broadly divided into the following two types: general principles provisions equivalent to specific fundamental rights provisions and other general principles provisions. The so-called general principles provisions equivalent to specific fundamental rights provisions refer to those that, although not listed in the chapter "Fundamental Rights and Duties of Citizens," can be justified as fundamental rights through the human rights clause. For example, Article 13 of the *Constitution*, which stipulates the right to property, falls into this category.<sup>64</sup> As for the other general principles provisions, the human rights clause cannot be used in parallel with them to justify unenumerated fundamental rights.

The state organs provisions can also be divided into two basic types: purely organizational provisions and other state organs provisions. Purely organizational provisions are concerned only with organizational norms such as the establishment of state organs, the relationships between state organs, and the powers and functions of state organs. They are unrelated to fundamental rights and cannot be used in conjunction with the human rights clause as a normative basis for justifying unenumerated fundamental rights. In contrast,

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<sup>64</sup> Zhang Xiang, "Systematic Thinking of Fundamental Rights," *Tsinghua Law Journal* 4 (2012): 33-34.

other state organs provisions are closely related to fundamental rights, and these provisions themselves may require justification as unenumerated fundamental rights. For example, combining the provision on “the right of the accused to defense” with the human rights clause can justify that the right to defense is a fundamental right.<sup>65</sup>

When justifying an interest as an unenumerated fundamental right, the three functions of the human rights clause are not arbitrarily chosen but should follow a certain logical order. The specific sequence is as follows: First, unenumerated fundamental rights should be justified directly based on specific fundamental rights provisions. Second, when it is not possible to justify unenumerated fundamental rights based on specific fundamental rights provisions using general methods of interpretation such as textual interpretation, systemic interpretation, and purpose interpretation, the human rights clause should be used as a supplementary basis for justification. Finally, when neither of the first two methods of justification is sufficient, the function of the human rights clause in justifying unenumerated fundamental rights in parallel may be employed. According to this logical sequence, the role of the human rights clause in justifying unenumerated fundamental rights increases progressively.

## Conclusion

As General Secretary Xi Jinping pointed out in his speech: “We must put forward original theories and views on the basis of studying China’s conditions, and develop distinctively Chinese disciplinary, academic and discourse systems. This is the only way for Chinese philosophy and social sciences to develop independent properties and strengths.”<sup>66</sup> As an institutional expression of China’s human rights values, cultural spirit, and governance wisdom as well as a general provision of China’s fundamental rights hermeneutics system, the human rights clause is an important normative basis for building China’s fundamental rights hermeneutics system. Clarifying its hermeneutic function and adopting it as a basis to explain the normative connotation and structure of fundamental rights is the only and necessary way to construct the knowledge system of fundamental rights hermeneutics in China. The incorporation of human rights clauses into the constitution has propelled the innovation of fundamental rights hermeneutics in terms of the subjects of the legal relationships of fundamental rights, the nature of fundamental rights, the forms

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<sup>65</sup> Yin Xiaohong, “The Right to Defense as a Fundamental Right of the Accused — A Legal Interpretation of the ‘Right to Defense’ Provision in Article 125 of the *Constitution*,” *Law Science* 3 (2012): 66; Zhang Xiang, “The Constitutional Limitation on the Compulsory Testimony of Close Relatives,” *ECUPL Journal* 1 (2016): 58-59.

<sup>66</sup> Xi Jinping, *Speech at the Symposium of the Work of Philosophy And Social Sciences* (Beijing: People’s Publishing House, 2016), 19.



of state obligations, the scope of fundamental rights, etc. This progress has expanded the subjects of fundamental rights from citizens to natural persons, narrowed the duty bearers from all entities to state public power and social public power, clarified the dual nature of the right to respect and the right to protection for fundamental rights, and shaped the dual obligations of the state to respect and protect. It has also maintained the limited openness of the scope of fundamental rights. With the continuous development and progress of China's human rights endeavors and the comprehensive implementation of the Constitution, the theory and practice of fundamental rights hermeneutics, based on the human rights clause, will also continue to evolve and improve.

(Translated by *LI Donglin*)