CHAPTER 13

Can the Human Rights Clause of the Chinese Constitution be Interpreted from the International Human Rights Law Perspective?

Qu Xiangfei*

1 The Background of the “Human Rights Clause”

The “human rights clause” is the 24th amendment of the 1982 Chinese Constitution, and it replaced the Third Clause of Article 33, Chapter 2 of the Constitution. Before the inclusion of this amendment, Chapter 2 of the 1982 Constitution already included fundamental rights provisions. The chapter is entitled “Citizen’s Fundamental Rights and Duties.” A major structural difference between the 1982 Constitution and its predecessor is this chapter; originally, it was Chapter 3, but now it precedes the “State Structure” as the second chapter. This order reflects the importance of citizens’ fundamental rights.

In contrast to prior versions of the Constitution, the scope of fundamental rights in the 1982 Constitution has also expanded. The number of fundamental rights provisions increased to 181 (the Constitution contains 138 articles in four chapters). The most important fundamental rights entrenched in this constitution include equality (Art. 33); right to elections (Art. 34); freedom of speech, press, assembly, and association (Art. 35); religious freedom (Art. 36); and personal freedom (Art. 37); personal dignity (Art. 38); privilege to residence (Art. 39); freedom and privacy of correspondence (Art. 40); and right to criticize, make suggestions, and receive compensation for losses caused by state infringements of civil rights (Art. 40). The last four provisions were included in the 1982 Constitution in response to the great atrocity on human rights and dignity committed during the Cultural Revolution.

* Qu Xiangfei, Associate Professor of the Institute of International Law, Chinese Academy of Social Sciences(CASS). Revised by Janai Gall & Elina Jonsson.

1 The 1954 Chinese Constitution is the first Chinese Constitution after 1949, and it had 16 fundamental rights Articles in total 106 Articles; The 1975 Chinese Constitution had 3 fundamental rights Articles in total 30 Articles; The 1978 Chinese Constitution had 13 fundamental rights Articles in total 60 Articles.
While the 1982 Constitution is an improvement from its predecessors due to the additional fundamental rights provisions, it is not perfect. The 1982 Constitution had a few flaws. First, there was no principle regarding what the national attitude towards human rights should be; second, the constitutional fundamental rights system is closed, so it is difficult to deduce new constitutional rights from enumerated fundamental rights; and third, rights that should have been included in the Constitution were not (e.g. right to subsistence, right to life, right to information, right to privacy, right to strike, right to health, freedom of movement, right to fair trial).²

Chinese society has undergone a huge transformation since the 1980s, mainly from the benefit of the Opening and Reform Policy, and market economy. Since the implementation of the Opening and Reform Policy in the late 1970s, Chinese society has been exposed to a myriad of new ideas and practices. Rights consciousness was an outcome of this transformation and it influenced further transformation. After the version of democracy enshrined in the text of the 1982 Constitution, the Western concepts of human rights, private property, rule of law, judicial review, and constitutionalism, to name a few, gradually found their way into the Chinese literature. Constitutional reform is a reflection of the social transformation. The fast changing demands arising from economic development and from legal and constitutional consciousness created an urge to amend the Constitution.³ The Sun Zhigang incident,⁴ which occurred in 2003 and succeeded in pressuring the State Council to rescind its odious Measures, was a landmark in the rights consciousness and human rights movements in China. These movements led to the enactment of the human rights clause.

⁴ Sun Zhigang was a 27-year-old graduate from the Wuhan Science and Technology College in Hubei province. He came to work as a fashion designer in the economically booming city of Guangzhou, once known in the West as Canton. On the fateful night of 17 March, he went to visit an internet cafe as usual, without bringing his temporary residence permit as an identification document. He was mistakenly detained by police as an illegal immigrant to the city and was brought to the Guangzhou internment and deportation transfer center. Apparently, having quarreled with the management personnel about his treatment, he was battered by fellow inmates and died a few days later. Sun Zhigang incident sparked national reactions in 2003, for example, several legal scholars petitioned the NPCSC and requested its review of the State Council’s Custody and Repatriation Measures. Then the State Council moved promptly to repeal the Custody and Repatriation Measures. See Zhang Qianfan, The Constitution of China—a Contextual Analysis, pp. 75–78.