

法理文丛

公民基本人权法律制度研究

A Study of the Legal Institutions of Citizens' Fundamental Human Rights

□ 林喆 主著



北京大学出版社

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前 言

人类文明总是依其特有的运行规律向前迈进,尽管有无数次地区性乃至世界性的灾难羁绊着它的步伐,却完全不能阻止其前行的惯性。对于 20 世纪文明社会中的人们来讲,这个世纪后半叶在人类文明史上创建的最大业绩是,作为一种恒定的理念和生存样态的重要内容——人权和人权保障的信念,在各种意识形态中得到了肯定,于精神层面上得到了极为广泛的传播,在制度层面上被更大范围的建构。

中国近代社会之前,没有如西方古代社会那样植根于自然法基础上的权利观念。汉字“人权”概念是中国文化融合西方文明的产物。从 19 世纪末 20 世纪初西学东渐中人权概念传入中国,到 21 世纪初的第四年“国家尊重和保障人权”表述的入宪,经历了大约一百年的时间。其间公民权利保护道路的坎坷,及人权理论建树中所经历的风风雨雨,令人难以忘怀。

20 世纪 80 年代开始的体制改革,及随后 90 年代初掀起的市场经济浪潮,是中国历史上的一场深刻的思想革命和体制革新,它唤醒了中国人沉睡了几千年的对个人利益的诉求,中国民众在历史上从未像今天这样关注自己的人权及其实现状况。

这场革命蓬勃发展的趋势令人想起当年闻一多先生的话语:“有句话说出就是祸,能点得着火。别看五千年没有说破,你猜得透火山的沉默?”

二十多年的持续开放,足以使一个民族认清世界潮流,下决心迅速赶上时代的步伐。

近些年来,我国在公民人权保障的制度建设方面做了大量的工作。与之相适应,关于尊重和保障中国公民的人权及完善我国人权保障的法律制度,早已成为国内人权问题研究者的共识。

尽管与十多年前比较,国内人权研究在基础理论的深度和广度上有了很大的发展,涌现出一些专著和一系列论文集,但是始终存在着四大不足:一是将人权问题主要视为政治话题,而不首先将它看作是法理话题,从而难以从理论法学的层面将人权保障视作是现代国家法律制度的价值取向、生存基础和首要任务;二是缺乏对我国公民基本人权的具体内容及其法律制度建设的进程进行细致的研究;三是缺乏对当代中国社会主义人权保障法

律制度体系的内在结构,及其各个部分之间的有机联系,以及制度上的缺陷和解决对策进行系统的描述和分析,并与国外人权制度进行系统的比较研究;四是缺乏对中国社会转型期人权保障方面的典型案例和热点话题进行深入研究。

这种状况使得人们难以提出完善我国公民人权保障制度的良策,也难以从理论上弥合或化解西方国家对我国人权状况的陌生感或误解。

缺陷的存在,除了在于从整体上看,中国法理学界对于人权的研究起步较晚外(如果以1992年在武汉召开的第一次人权研讨会为标志的话),更在于不少学者(包括一些人权研究者)对于现实问题有意或无意的忽略或回避。

然而,理论史表明,大凡有生命力的理论,一定能够且很好地回答现实生活所提出的问题。中国人权问题的深入研究不能离开对中国现实社会的考查进行。

随着2004年全国人大十届二次会议上,“国家尊重和保障人权”表述的人宪,从我国法律制度上对于公民基本人权进行系统的描述和分析,并与国外人权制度进行比较,已成为人权研究方面的一项重要理论工作。

关注社会,关注民生,关注中国公民人权发展的现状,在关注宏大理论的同时不忽略社会的热点问题,一直是我們从事人权研究,进行理论建设的一个基点。

本书包括三编十九章。

前两编十五章的研究涉及一系列问题,如人权的概念及其内涵,人权与权利、公民基本权利、法律权利的区别,公民基本人权的主要类别、内涵、本质和渊源,人权保障的理由、历史教训、实现途径,中国社会转型期公民基本人权,尤其是弱势群体人权保障的法制建设现状,以及存在的主要问题。

本书最后一编四章对中国公民基本人权保障的难点与对策,中国社会转型期公民基本人权保障的热点问题和中外维权典型案例进行分析。

人权已入宪,要将纸面的人权宣言渗透于公民的日常生活中,变为实实在在的权力,还有许多路要走。而既然我们已经开始迈步,就得一直走下去,直到四季的阳光洒满大地,温暖了世间人生道路上行走着的每一个人,滋润了宇宙间生长着的每一个生灵……

Introduction

Human civilization has always moved forward according to its own law of operation; though it was delayed by endless regional or even world-wide disasters, its inertia to move forward has never been totally blocked. For the people living in the civilization of the 20th century, the greatest achievement of the latter part of the century in the history of human civilization is that the idea of human rights and its protection, as an important content of a permanent idea and life pattern, has been accepted by diverse ideologies; it has spread widely at the intellectual level and constructed at that of institution as well.

Prior to the modern Chinese history, there was no such concept of right as in the ancient Western Society which is deeply rooted in Natural Law. The Chinese characters “人权”, as a concept, is a product of the fusion between the Chinese culture and the Western civilization. Almost a whole century has passed from the end of the 19th century and early 20th century when the Western culture spread to China with the concept of human rights, to the year of 2004 when a Constitutional Amendment declares that “the state respects and protects human rights.” People could not forget, in this period, the difficulties in protecting human rights and the hard progress experienced in formulating human rights theories.

The systematic reform started in the 80s of the last century and the tide of market-oriented economy rose subsequently in the 90s has resulted in a deep idea revolution and system innovation, and woke up the Chinese people's desire for individual interests, which was suppressed for thousands of years; the Chinese never as today are so concerned about their human rights and its realization.

The trend of this vigorously developing revolution reminds people of what Mr. Wen Yiduo said: “There is a word which is a disaster if uttered, for it can spark a flame. It has never been spoken out, but who is able to tell what the silence of a volcano means.”

Two decades' continuous implementation of the reform and open-door poli-

cy is long enough for a nation to see clearly the tide of the world and makes up its mind to catch up with the steps of the time.

In recent years, the Chinese government has done much in constructing institutional protection of human rights. Accordingly, a consensus has been reached among the Chinese human rights scholars as to the respect and protection of Chinese citizens' human rights and the perfection of the Chinese legal institutions for its protection.

Human rights study in China has made great progress both in depth and breadth in the area of basic theory; a series of treatises and articles have been published. However, there remain four main defects. The first defect is that human rights issue is mainly treated as a political issue or a topic rather than a legal one, consequently it is hard to treat human rights protection at jurisprudential level as the value orientation of modern state legal system, its basis of existence and the essential task; second, there is a lack of the detailed study of the specific contents of the Chinese citizens' fundamental human rights and the process of the construction of legal institutions; third, there is a lack of a systematic description and analysis of the inner structure of legal system of protection of human rights in the contemporary China and the organic connection between its composite parts and inherent defects of the system and relevant countermeasures; fourth and the last defect is that there is a lack of thorough study of the cases concerning human rights protection occurred in the transitional Chinese society and the hot spots of the society.

In such a situation, it is hard for scholars to put forward good policy suggestions to perfect the Chinese institutions for the protection of human rights, and it is also hard for them to carry out discourse with Western countries which misunderstand and also feel strange about the state of human rights protection in China.

On the whole, for the existence of the above four defects, the fact can be said to be a cause that the Chinese scholars began to study human rights comparatively late (if the first human rights seminar held in Wuhan in 1992 can be considered as its starting point), but more lies in the fact that quite many Chinese scholars (including some human rights scholars) intentionally or not overlook or evade the actual social problems.

However, the history of theories indicates that any theory, to be vital, must

be able to provide answers to the questions raised in reality. The thorough study of the Chinese human rights issue can not be meaningfully carried out without inquiring into the reality of the Chinese society.

As the Constitutional Amendment ratified at the second session of the 10th National Peoples Congress states: "the State respects and protects human rights.", a systematic description and analysis of citizens' fundamental human rights from the perspective of the Chinese legal system, and to compare with the human rights institutions in foreign countries, have become an important theoretical task in the field of human rights study.

To be concerned about the society, to be concerned about peoples' life and to be concerned about the state of the development of human rights of the Chinese citizens, to be concerned about grand theories at the same time without overlooking hot spots of society, should be the starting point from which we carry out human rights study and formulate relevant theories.

This treatise consists of three parts or 19 chapters.

The study in the first two parts deals with a series of subjects, such as the concept of human rights and its connotation, the difference between human rights and rights, basic civil rights and legal rights, main classification of civil rights, their connotation, nature and sources, reasons for protecting human rights, historical lessons, means of realization, basic civil rights in the transitional Chinese society, especially the state of the legal construction for the protection of the human rights of the weak groups, and some existing problems.

The last part of the treatise, 4 chapters, analyzes the difficulties in protecting the Chinese citizens' basic human rights and proposition of their relevant countermeasures, hot spots in the protection of basic civil rights in the transitional Chinese society and some typical Chinese and foreign cases concerning the protection of human rights.

Protection of human rights has been written into the Chinese Constitution, but there is a long way to go to reduce the human rights on paper into the actual rights enjoyed in everyday life. However, since we have started to move forward, we have to go on until the sun of four seasons shines on the earth, gives warmth to everyone on the journey of human life, and moistens every life or creature living or growing in the universe.

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