

Comparison study of the 1923 and 1947 constitutions of the Republic of China regarding democratic rights and freedoms

Jizhuo Chen

Beijing Jiaotong University, Beijing, China

cjz1046696527@163.com

Abstract. The 1923 *Constitution of the Republic of China*, constrained by the warlord fragmentation, political turmoil, and legislative ideology of the time, adopted a legal restrictionist approach. It only symbolically enumerated the rights of the people, failing to effectively safeguard democracy and freedom. In contrast, the 1947 Constitution, drafted after the War of Resistance, absorbed modern constitutional concepts and attempted to build a substantive rights protection system. This Constitution not only detailed citizens' rights to freedom, participation in politics, and social security but also improved the effectiveness of rights protection through mechanisms such as the separation of powers and judicial remedies, presenting more substantial democratic characteristics. However, despite its formal progress, the practical political environment and social conditions limited its implementation, and it became a mere formality after the Nationalist government retreated to Taiwan.

Keywords: People's democracy, freedom, 1923 Constitution of the Republic of China, 1947 Constitution of the Republic of China

1. Introduction

Mr. Liang Qichao once said in his article *On the Constitution* that "the constitution is the vital force of a nation" [1]. The issue of citizens' democratic rights and freedoms is a question that most modern and contemporary countries' constitutions must address and cannot avoid. The 1923 Constitution of the Republic of China and the 1947 Constitution of the Republic of China are two important constitutional texts in China's modern legal history, drafted during the turbulent warlord era and the eve of the Chinese Civil War, respectively. Both constitutions marked attempts at democratization in China but showed significant differences in the specific provisions and practical implementation of citizens' rights and freedoms.

2. Provisions on democratic rights and freedoms in the 1923 *Constitution of the Republic of China*

The 1923 *Constitution of the Republic of China*, also known as the "Cao Kun Constitution," was so named because the delegates who passed the Constitution were bribed by Cao Kun. It is also referred to as the "Bribed Election Constitution." The Constitution, promulgated on October 10, 1923, was the first constitution in modern Chinese history. At the time, China had just ended its feudal imperial system, and under the leadership of the Beiyang Government, the Constitution aimed to establish a new political order and, influenced by the May Fourth Movement, placed a renewed emphasis on democracy and human rights. However, as China was in the midst of warlord fragmentation and political instability, the implementation of this Constitution was greatly limited and hindered.

The Constitution consists of thirteen chapters and one hundred and forty-one articles, with the first chapter on the form of the state, the second chapter on sovereignty, the third on national territory, the fourth on nationals, the fifth on state powers, the sixth on the National Assembly, the seventh on the President, the eighth on the State Council, the ninth on the courts, the tenth on laws, the eleventh on accounting, the twelfth on local systems, and the thirteenth on amendments, interpretations, and validity of the Constitution [2]. In Chapter 4, "Nationals," it stipulates that the people of the Republic of China are all equal, with no distinctions based on race, class, or religion. The people enjoy freedoms such as the right to own property, engage in business, freedom of speech, publishing, assembly, association, communication secrecy, the right to residence and migration, and freedom of religion. It also grants the rights to petition, litigation, elections, being elected, and public office. No one can be arrested, detained, interrogated, or punished except according to the law. On the surface, this Constitution affirms bourgeois democratic freedoms.

However, due to the fragmentation of warlord rule and internal political instability, the provisions of the 1923 Constitution were difficult to enforce nationwide. The central government lacked the authority to ensure the enforcement of the Constitution, while local warlords did not recognize its authority, which directly led to the constitutional provisions for the protection of democratic rights remaining largely theoretical. For ordinary citizens, the rights stipulated in the Constitution were rarely realized in practice.

3. Provisions on democratic rights and freedoms in the 1947 *Constitution of the Republic of China*

After the outbreak of the national civil war in 1946, the government completely ignored the decision made by the Political Consultative Conference (PCC) that the National Assembly should only convene after the cessation of the civil war, government reorganization, and the completion of the constitutional draft. Instead, it convened the National Assembly in Nanjing. The representatives at the assembly and the resolutions passed were entirely controlled by one faction. Over 1,600 representatives participated in the assembly, with one faction occupying 85% of the seats. The core task of this National Assembly was to draft the Constitution, thus it became known as the “Constitutional National Assembly.” On November 25, the assembly passed the 1947 *Constitution of the Republic of China*. On January 1, 1947, the government promulgated this Constitution, deciding it would take effect on December 25 of the same year. This Constitution was drafted against the backdrop of the Chinese Civil War. Although the war was still ongoing, the warlord fragmentation was less severe than in the early Republic period, and the country had nominally achieved unity. Moreover, according to Sun Yat-sen’s outline for national construction, after the victory in the Northern Expedition in 1928, the country entered a period of political tutelage, which, after its completion, was meant to transition into a constitutional period. The drafting of this Constitution marked the country’s transition from the period of political tutelage to the constitutional period.

The 1947 *Constitution of the Republic of China* consists of fourteen chapters and one hundred and seventy-five articles. These include: Chapter I, General Principles; Chapter II, Rights and Duties of the People; Chapter III, National Assembly; Chapter IV, The President; Chapter V, The Executive; Chapter VI, The Legislative; Chapter VII, The Judiciary; Chapter VIII, Examination; Chapter IX, Supervision; Chapter X, Powers of Central and Local Governments; Chapter XI, Local Systems; Chapter XII, Elections, Recall, Initiative, and Referendum; Chapter XIII, Basic National Policies; Chapter XIV, Implementation and Amendments of the Constitution. It borrowed several “freedom” and “equality” clauses from Western bourgeois constitutions and incorporated some phrases from the PCC’s constitutional draft resolutions. In essence, it was a version of the *Wuwu Constitutional Draft*, completely violating the basic principles established by the PCC [3]. In Chapter II, “Rights and Duties of the People,” further provisions are made regarding citizens’ democratic rights and freedoms. These include the rights to “freedom of residence and migration,” “freedom of speech, academic discussion, writing, and publishing,” “freedom of assembly and association,” “the right to petition, litigate, and sue,” as well as “the right to elect, recall, initiate, and referendum.” Chapter XII, “Elections, Recall, Initiative, and Referendum,” outlines citizens’ political rights, while some provisions in Chapter XIII reflect the state’s provision of social security services for citizens. These freedoms and rights abolished the “unless restricted by law” phrase in the “Wuwu Constitutional Draft,” adopting a more direct and affirmative approach. This marked a certain progress in the Nationalist government’s protection of citizens’ rights and freedoms compared to previous constitutional documents [4]. Although the 1947 Constitution appeared to address a wide range of issues, in practice, its inherent characteristics of personal dictatorship remained evident. Premier Zhou Enlai commented, “The PCC advocated safeguarding the people’s freedom, while Chiang’s Constitution restricted the people’s freedom. The PCC supported the autonomy of minority groups, while Chiang’s Constitution abolished their autonomy [5].” Essentially, it reflected the following: the people have no rights, the government holds power, the localities have no power, the central government has power; the legislature has no power, the president holds power.

With the end of the civil war and the Nationalist Party’s retreat to Taiwan, Chiang’s Constitution lost its foundation for implementation in mainland China and became a mere formality, signaling the complete failure of the old democratic revolutionary framework.

4. Key differences between the two constitutions regarding democratic rights and freedoms

From the perspective of constitutional history, the 1923 *Constitution of the Republic of China* and the 1947 *Constitution of the Republic of China* reflect a significant turning point in the development of constitutionalism in China, particularly in terms of the scope and content of the people’s democratic rights and freedoms. The differences between the two constitutions not only highlight different institutional designs but also reflect the varying political and social contexts in which they were enacted.

4.1. Background of the creation of democratic rights and freedoms

The 1923 *Constitution of the Republic of China* was drafted during the period of the Beiyang government, a time marked by warlord conflicts and political instability. Yuan Shikai attempted to use the constitution to restore the monarchy, and after his death in 1916, various warlords, seeking to legitimize their vested powers and interests, often used the constitution as a form of embellishment. They viewed constitutional drafting as an important means of consolidating their rule [6]. Against this backdrop, the constitution was more a product of power struggles and political compromises within the Beiyang government. The drafting

process was controlled by specific political groups, resulting in a constitution that lacked genuine operational mechanisms and substantive commitments to protecting the people's rights. As a document tainted by political bargaining, the primary purpose of this constitution was to reconcile internal conflicts within the Beiyang regime and to legitimize warlord rule, without deep consideration for the protection of democratic rights and freedoms.

The 1947 *Constitution of the Republic of China* was drafted after the victory in the War of Resistance Against Japan, during the period of the Chinese Civil War. The Nationalist government, seeking to consolidate its power and establish a centralized system, used the constitution to define the political system and power structure. It aimed to implement a modern constitutional system in the post-war reconstruction. This constitution was revised based on the *Draft Constitution of the Republic of China* and passed by the National Assembly, reflecting the intellectual and political elite's demands for "constitutionalism" and "civil rights." The drafting of the constitution referenced Western constitutional models and incorporated the ideas of the Three Principles of the People and the Five-Power Constitution. It "used the name of the Five-Power Constitution to implement the British and American-style constitution" [7], aiming to balance public power and individual rights through institutional design. As a key document for the Nationalist government to rebuild its political legitimacy after the war, the 1947 Constitution provided more specific and comprehensive protections for democratic rights and freedoms, reflecting a higher pursuit of democratic governance.

4.2. Methods of establishing democratic rights and freedoms

Constitutions in various countries typically adopt one of two approaches to defining the people's rights and freedoms: constitutional protectionism or legal restrictionism. Constitutional protectionism refers to the detailed specification of citizens' rights within the constitution itself. Once the constitution is promulgated, citizens immediately enjoy the rights it grants. Legal restrictionism, on the other hand, only outlines the scope or principles of the rights in the constitution, with citizens only able to enjoy specific rights after the government enacts relevant laws based on the constitution [10]. The legal restriction clause for basic rights is often considered to originate from Article 4 of the French Declaration of the *Rights of Man and of the Citizen* of 1789: "Freedom is the ability to do anything that does not harm others; thus, the exercise of natural rights by each person can only be limited by laws that ensure the enjoyment of the same rights by other members of society. Such limits can only be decided by law [8]." This legal restriction clause evolved into the "legal reservation principle" in constitutional theory, most famously articulated by German public law scholar Otto Mayer: "Several constitutional drafts have described legal reservation in different ways. The classical form is the establishment of basic rights or freedoms, which regulate individual freedom. By explicitly or implicitly reserving these basic rights, the constitution ensures the inviolability of personal freedom, property, and other rights, except when laws or statutory reasons allow interference with these rights [9]."

The 1923 *Constitution of the Republic of China* adopted a legal restrictionism approach, focusing mainly on the formal enumeration and generalization of democratic rights. On the surface, it granted citizens significant rights, but the constitution was filled with restrictive clauses that stated "except by law, no restrictions" on rights, with the emphasis not on effectively safeguarding citizens' rights but rather on emphasizing the legislative body's authority to restrict fundamental rights and freedoms. Among the enumerated rights in the legal provisions, those concerning personal rights—such as freedom from detention, arrest, interrogation, or punishment; the right to residence; freedom of occupation; and the most basic political rights like freedom of speech, press, assembly, association, and religious belief—were all accompanied by the clause "except by law, no restrictions." Although the clause "except by law, no restrictions" emphasized that the restriction of citizens' fundamental democratic rights and freedoms must have a legal basis, it reflected the state's power to limit these rights. Given that government departments are most closely connected to citizens' daily lives, with administrative power being the most expansive, it was also stated that the government could not interfere with citizens' rights through administrative regulations and departmental rules, which to some extent reflected an awareness of safeguarding citizens' fundamental rights.

In contrast, the 1947 *Constitution of the Republic of China* adopted constitutional protectionism, constructing a relatively comprehensive rights system. It specifically enumerated citizens' freedoms, political participation rights, social security rights, and economic rights, demonstrating clear structural and systemic characteristics. Chapter II, "Rights and Duties of the People," detailed freedoms such as those related to residence, migration, speech, and communication, while Chapter XII granted citizens' rights to participate in politics, including the rights to elect, recall, initiate, and referenda. This design reflected the "civil rights" ideology of the Three Principles of the People, aiming to embed rights within the constitution itself to ensure political participation and fundamental freedoms. Furthermore, Chapter XIII provided additional protections for economic rights and social welfare, such as property rights, labor rights, and the right to education—provisions that were absent in the 1923 Constitution. This expansion of rights was driven not only by the public's higher expectations for rights but also by the post-war Nationalist government's intent to build a stable society and foster national development.

4.3. Differences in power checks and safeguard mechanisms

The 1923 *Constitution of the Republic of China* includes relatively brief provisions on safeguarding basic human rights, focusing mainly on a formal listing and generalization of democratic rights, such as freedom of speech, publication, assembly, and association. The 1923 Constitution fails to establish a systematic framework for rights protection and remedial mechanisms, thus lacking substantive constraints. Due to the highly centralized nature of the warlord regime, the realization of democratic rights

largely depended on the practical operation of the government, with the Constitution serving only as a formal declaration of power, unable to effectively safeguard the people's rights through institutional means.

As the fundamental law of the nation, Article 103 of the Constitution states, "Members of the two chambers and the government may each propose bills, but those rejected by one chamber may not be reintroduced in the same session." Article 108 further stipulates, "Laws in conflict with the Constitution are invalid," indicating that the Constitution holds the highest legal authority. The Constitution grants the legislature the authority to enact laws that limit citizens' basic rights, enabling the legislature to impose arbitrary restrictions or amendments on citizens' fundamental rights by enacting lower-ranking laws. This renders the Constitution's protection of citizens' rights largely formal. The renowned human rights scholar Louis Henkin once pointed out: "It is generally believed that human rights are fundamental. This means that human rights are important, and that life, dignity, and other significant human values depend on human rights. It does not mean that human rights are absolute and cannot be deprived under any circumstances for any purpose... If human rights do not easily yield to public concerns, then, if the social interests opposing human rights are sufficiently important, under certain conditions, for a limited time, and for a specific purpose, human rights can be sacrificed to a necessary degree" [10]. While individuals enjoy the rights granted by the Constitution and laws, they must also assume corresponding duties. Therefore, certain restrictions on the exercise of citizens' rights are necessary. However, limitations on citizens' fundamental rights must have legitimate purposes, lawful forms, and clear procedures; the lack of any of these components results in the formalization of the protection of citizens' basic rights. The "non-restriction except by law" clause in the 1923 Constitution merely addresses the form of restricting citizens' basic rights, without specifying the purpose or procedure for such restrictions. Moreover, although basic rights were established, the mechanisms for limiting power were very briefly outlined, with weak internal checks on government power, lacking effective supervision and safeguard mechanisms. For example, the Constitution lacked an independent judicial remedy mechanism, making it impossible to ensure the protection of people's rights from infringement. The concentration of power led to excessive legislative interference with democratic rights, hindering the realization of people's democratic freedoms.

For rights not explicitly listed in the Constitution, Article 14 of the 1923 *Constitution of the Republic of China* provides that, "All freedoms of the people of the Republic of China, except as specified in this chapter, and as long as they do not contradict constitutional principles, shall be recognized." The 1923 Constitution, being a rigid constitution, contained specific provisions regarding the constituent body and the amendment process, but its enumerative method could not exhaust all citizens' rights. Therefore, a reserved clause for basic citizens' rights was established. *The Explanatory Notes to the Draft of the Constitution of the Republic of China* stated, "Citizens have the right to be protected by national law and the obligation to obey state power. Since citizens cannot exist independently of the state, they must be protected under the law. Hence, the freedom enjoyed by citizens is always limited by the law, or by what the law does not prohibit. Any attempt to seek freedom beyond the law cannot be protected by law. Freedom that is not protected by law is not true freedom" [11]. This perspective was deeply influenced by traditional Chinese legal concepts, where the focus was on duties rather than rights. In traditional China, rights were granted by rulers rather than being considered inherent, which is why the concept of "inalienable human rights" did not exist. People's rights needed to be explicitly granted by rulers. Thus, this clause, which recognized citizens' rights not listed in the Constitution at the time, held significant progressive meaning.

In terms of constitutional design, the 1947 *Constitution of the Republic of China* divided democratic rights into three chapters: Chapter 2, "Rights and Duties of the People"; Chapter 12, "Election, Recall, Initiative, and Referendum"; and Chapter 13, "Basic National Policies," which included social rights and safeguard provisions. This Constitution placed more emphasis on the separation of powers and checks and balances, with the establishment of a five-branch system at its core. The division of powers into the executive, legislative, judicial, examination, and supervisory branches aimed to ensure the independence of each institution and their mutual checks. Notably, the independent judiciary provided judicial remedies to ensure the protection of citizens' rights. Moreover, the Constitution explicitly limited the expansion of government power to protect individual rights and freedoms, reflecting a cautious attitude toward the exercise of power. This design reflected a dual commitment to democracy and the rule of law, ensuring that people's rights were more comprehensively safeguarded through institutional mechanisms.

Furthermore, although the 1947 *Constitution of the Republic of China* removed the phrase "non-restriction except by law," Article 23 still broadly states: "The freedoms and rights enumerated in the preceding sections shall not be restricted by law except for preventing the infringement of others' freedoms, avoiding emergencies, maintaining social order, or promoting public welfare." Sam Wu criticized this provision, stating: "It is no different from the distinction between 'changeable' and 'unchangeable'" [12].

4.4. Differences in the rights system

The 1923 *Constitution of the Republic of China* did not address social and economic rights. The primary legislative intent of this Constitution was to provide a general provision for citizens' basic political rights in response to democratic ideologies, with little attention paid to livelihood and social rights. It overlooked the protection of social welfare and failed to reflect institutional concern for the overall well-being of society. While it introduced the concept of democratic freedoms, it did not provide for institutional designs or specific mechanisms for their implementation. The generality of the rights provisions and the lack of concrete implementation mechanisms led the 1923 Constitution to lean more towards "formal democracy." Its constitutional provisions failed to produce substantive constraints at the practical level, and the realization of democratic rights was extremely limited.

The 1947 *Constitution of the Republic of China* incorporated legislative ideas from modern constitutional democracies of the time, extending the scope of constitutional protection to include social rights. The establishment of provisions on labor rights, the

right to education, and social welfare marked a shift from the traditional focus on civil liberties to a broader scope covering economic and social rights. The inclusion of these provisions reflected a concern for the welfare of the people and sought to use legal means to guarantee citizens' quality of life and basic social needs, signaling a pursuit of "substantive democracy" in the Constitution and giving it a broader social foundation. The 1946 *Constitution of the Republic of China* not only included a list of rights in Chapter 2 but also set conditions for the limitation of rights. Article 23 of the Constitution stipulated, "The freedoms and rights enumerated in the preceding sections shall not be restricted by law except for preventing the infringement of others' freedoms, avoiding emergencies, maintaining social order, or promoting public welfare." In practice, constitutional interpreters derived three rights-limiting principles from this article: the legal reservation principle, the proportionality principle, and the clarity principle, all of which are of constitutional status. The 1946 Constitution fully considered the limitations of the rights list, particularly through Article 22, which provided that "other freedoms and rights of the people, as long as they do not harm social order or public interests, are protected by the Constitution." This provision also served as the basic clause for protecting rights not enumerated in the Constitution.

Through detailed provisions on rights and a relatively well-developed system of safeguards, the 1947 Constitution sought to achieve a transition from "formal democracy" to "substantive democracy." The 1947 Constitution met the basic standards of modern constitutions in both content and institutional arrangements, ensuring that democratic freedoms no longer remained theoretical but were legally supported by a practical safeguard system, bringing it closer to the realization of the constitutional ideal of "civil rights."

4.5. Fundamental differences in constitutional culture

From the perspective of constitutional culture, modern Chinese history reflects the profound impact of Western constitutional culture on traditional Chinese political culture, which was centered around monarchical autocracy. The 1923 *Constitution of the Republic of China*, as a product of the spread of democratic republican ideals after the Xinhai Revolution, was a significant manifestation of Western constitutional principles in the development of Chinese society. With the deepening influence of democratic republican ideas, direct military rulers dared not openly oppose democracy and republicanism in institutional terms. Figures like Cao Kun adopted the so-called "advanced" constitutional provisions in form, using democratic language to cover up the essence of feudal warlord dictatorship. In terms of its provisions, the 1923 *Constitution of the Republic of China* was an improvement over the 1912 *Provisional Constitution* in constructing a democratic system. However, because it was enacted during a period of warlord fragmentation, the deep-rooted political culture of the Beiyang warlords was still anti-democratic. Cao Kun, who obtained the presidency through electoral bribery, used the Constitution as a tool to consolidate power, while bribed legislators also used it as a cover for their personal interests. Thus, the 1923 *Constitution of the Republic of China* became a symbol of the deep conflict between bourgeois democratic ideals and military dictatorship, where democracy and republicanism were mere empty titles, and the Constitution became a means for the distribution of warlord interests. This deep political cultural tension doomed the 1923 Constitution to failure, reducing it to a symbolic document [13].

In contrast, the 1947 *Constitution of the Republic of China* reflected a more complex constitutional culture, showing both the absorption of modern constitutional principles and clear limitations imposed by the political realities and needs of the time. The 1947 Constitution was deeply influenced by Western constitutional thought, adopting "legal protectionism" and establishing the people's democratic rights and freedoms, as well as social rights and their protective system in the form of constitutional provisions. Moreover, the drafting of the Constitution was influenced by Sun Yat-sen's "Three Principles of the People," which sought to establish a political structure of "the people have, the people govern, the people enjoy," reflecting a combination of Chinese and Western characteristics. Overall, the 1947 *Constitution of the Republic of China* attempted to strike a balance between tradition and modernity, reflecting the efforts of the Nationalist Government to build a constitutional state, but was constrained by social circumstances and thus remained largely formal.

5. Conclusion

In general, the 1947 *Constitution of the Republic of China* has greater breadth and depth in terms of the protection of people's democratic rights, institutional design, and social rights. It sought to establish an order of democratic rule of law within the framework of the Constitution, providing more effective protection for the rights of the people. In contrast, the 1923 *Constitution of the Republic of China*, constrained by the political and social environment and legislative goals of its time, failed to make in-depth arrangements in terms of rights protection and institutional development. It remained at the level of formal declarations of rights and lacked substantial democracy.

References

- [1] Liang, Q. (2015). The ten principles of national vitality. In *Collected works of the Ice-drinking Studio* (p. 385). Zhonghua Book Company.
- [2] Zhu, Y. (Ed.), Zhu, Y., Wang, Y., Zhao, X., Gao, H., Zhang, D., Li, Q., & Li, C. (2021). *History of Chinese law* (p. 338). China University of Political Science and Law Press.
- [3] Qin, Y. (Ed.). (1988). *A brief history of modern China* (pp. 432-433). Henan University Press.

-
- [4] Zhang, Z., & Li, X. (2011). Constitutional evolution and the constitutional changes of the Nanjing National Government. *Theoretical Monthly*, 11, 12-18.
- [5] Zhou, E. (n.d.). On Marshall's statement on leaving China. In *Selected works of Zhou Enlai* (Vol. 1, pp. 264-265).
- [6] Chen, X. (2019). *A history of modern Chinese constitutionalism* (pp. 218, 364). Commercial Press.
- [7] Zheng, D. (2003). Reassessing the 1946 Constitution of the Republic of China. *Historical Studies Monthly*, 2, 45-53.
- [8] Zhang, X. (2023). From legal restrictivism and constitutional protectionism to the principle of legal reservation: A historical examination of constitutional limitations on fundamental rights. *Zhejiang Social Sciences*, 9, 118-127.
- [9] Meyer, O. (2002). *German administrative law* (Liu, F., Trans., p. 72). Commercial Press.
- [10] Henkin, L. (1997). *The age of rights* (Xin, C., Trans., p. 6). Knowledge Press.
- [11] Zou, T. (1946). *Study on the constitutional draft*. Dalian Dazhong Bookstore.
- [12] Sa, M. (2004). New theory on the constitution of the Republic of China. In W. Geng (Ed.), *Constitutional interpretation and application* (3rd ed., p. 84). Sanmin Bookstore.
- [13] Hou, Q., & Cao, K. (2005). The "bribed election constitution" and its value assessment. *Journal of Chongqing Education College*, 1.