

Interpretation and Limitation of Paternalism in the Cultural and Speech Provisions of the Chinese Constitution

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Abstract: *Culture and freedom have a long history of evolution in both the East and the West, accompanied by legal protection and limitations, especially reflected in the provisions of modern constitutions regarding these fundamental rights of citizens. Paternalism, as one of the fundamental principles followed by many national constitutions, is also reflected in the Chinese constitution, and it imposes different types of restrictions on cultural rights and freedom of speech. It is necessary to clarify that paternalism in the Constitution is not inherently harmful to the basic rights of citizens, but should be subject to neutral passive restrictions from the perspective of respecting the basic rational existence of citizens in the public interest. In the face of the rigid restrictions imposed by paternalism and the abuse of lower level public power, it is more in line with the fundamental goal of safeguarding the spiritual interests of citizens to limit this basic concept to a certain extent.*

Keywords: *Constitution, Cultural Rights, the Right to Freedom of Speech, Paternalism*

1. Definition of Culture and Freedom of Speech

1.1. Definition of Culture

There is a long process for the evolution of cultural meanings, regardless of the East or the West. The most significant impact on its inherent meaning should be in two stages: the initial stage of the concept's emergence and the stage of defining culture in modern society.

1.1.1. The Original Concept of Culture

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The earliest definition of culture can be traced back to the ancient Roman period, when the philosopher Cicero referred to it as "cultura animi", which originally meant "cultivation of the soul" in Latin. cultura refers to the cultivation and cultivation of land or crops, while animi represents the meaning of the soul. For the early cultural meaning, it was mainly regarded as a process of continuous human development towards perfection^[1].

For the Eastern world, the definition of culture originated from ancient China. However, the "culture" referred to in China at this time is not similar to that in the West, and can be divided into two parts, namely "culture" and "culture". In the pre Qin period, literature mainly referred to textures, patterns, etc. with alternating colors. In the Book of Changes, it is said that "things are mixed, so it is called literature", while for transformation, it mainly refers to the meaning of change, generation, and creation. As for the combination of the words "wen" and "hua", it can be seen in the "Ben Gua" of the Book of Changes in the late Warring States period. It is called "the combination of hardness and softness, astronomy; civilization ends, humanities also. Observing astronomy, observing the changes of the times; concerning humanities, transforming the world". The meaning of "culture" can be summarized as the formation of human culture, which is the existence created by the interaction between people^[2].

In the early stages of the formation of cultural concepts, it is not difficult to see that the West mainly regards it as the refinement of human nature as its meaning, while the East tends to focus more on things achieved by universal human behavior and activities. The two are not the same, but both share the following common attribute words: artificial, cultivated.

1.1.2. The Concept of Culture in Modern Times

Entering the Middle Ages, Samuel Pufendorf of the classical legal school expanded the metaphorical interpretation of the concept of "cultura animi" based on the earlier one. He used agriculture as a metaphor for the philosophical development of the human soul and transformed it into the modern term "culture". He believed that philosophical perfection was no longer the perfect state of humanity, and that "freeing humanity from barbarism and becoming fully human through techniques" became the inherent meaning of culture. Therefore, the essence of culture has been expanded to the following levels: cultivating the soil and raising animals; Dressing, decorating, worshipping ancestors, and taking care of relatives and friends; Living in urban areas, cultivating morality and mentality; Wait. In the late Middle Ages, culture gradually began to be regarded as moral perfection and intellectual and artistic achievement.

In modern times, the definition of culture in the Eastern world has been largely influenced by the West. After the opening of the New Route around 1500, the feudal system in Europe was shaken, which immediately led to the spiritual shackles of the feudal system and the shaking of the Catholic faith. Therefore, Catholic missionaries, with the goal of "losing to Europe and repaying to Asia and Africa", organized the Jesuit Society funded by Portugal to sail to Japan during the Shogunate period, spreading Catholicism and medieval European culture. In addition, with the "Black Ships Incident" in 1853, the United States forcibly opened Japan's doors with naval guns, ending the period of seclusion that the Tokugawa Shogunate entered. [3]From then on, they "withdrew from Asia and entered Europe", developed capitalism, and expanded outward. As a result, many languages have been influenced to varying degrees by the Western world. In terms of "culture" in modern Chinese language, it is not native and is actually a reverse output word, originating from the modern Japanese word "bunka". Japan's definition of culture is directly influenced by the West.

An example can be used to briefly explain the meaning of culture in Japanese. The terracotta warriors in the Mausoleum of the First Emperor are made of clay, which is taken from "natural" materials. Craftsmen use their ingenuity and skills to fabricate and burn complete terracotta warriors, showcasing their "human achievements". After appreciating these exquisite terracotta warriors, later generations will exclaim in admiration of "cultural heritage". It is not difficult to see that "culture" is relative to "nature", which refers to the behavioral process in which human actions are imposed on "nature" to give it a certain value or meaning, as well as all the achievements (including material and spiritual) obtained in this process and the subsequent impacts or consequences^[4]. Tracing back to its origins, the definition of "culture" in modern language is similar in China and Japan, both of which have been greatly influenced by Western thought.

As mentioned above, in terms of culture in modern semantics, it should include all aspects of human society such as clothing, food, shelter, transportation, speech, entertainment, learning, thought, science, technology, art, morality, religion, customs, politics, economy, law, and system, all of which belong to the category of "culture".

1.2. Definition of Freedom of Speech

Freedom of speech, as an internationally recognized fundamental human right, mainly refers to the right of citizens to express their opinions and ideas according to their personal wishes. The earliest freedom of speech can be traced back to the Athenian style democratic ideology in the 5th century BC, and there was also the idea of freedom of speech during the Spring and Autumn Period and Warring States Period in China. Its main focus was on the people being able to criticize the government's governance measures, such as in the "Zuo Zhuan" where "Madam retreats day and night to discuss the goodness of governance. I will do what she does good, and I will change what she dislikes, which is my teacher". It is not difficult to see the tolerance of the people's right to discuss national politics, which has long existed and been recognized^[5].

But as a right closely related to political rule, although freedom of speech is recognized, it is not necessarily enjoyed by citizens in essence. It has been obtained through continuous games or struggles from the past to the present^[6]. In the medieval period, after the emergence of the printing press in the West, the Church, which held a decisive position in state rule, saw the spread of "heretical beliefs" that interfered with its position, and subsequently proposed a censorship system. The Pope of Rome also issued the first banned book catalog during this period, thereby controlling the thoughts and opinions of the people. The high-pressure censorship and restriction measures on speech have continued from the Middle Ages to modern times, not only in Europe, but also in ancient China, where there were national

coercive measures such as "literary inquisition". The main driving force behind the development of the right to freedom of speech comes from literary creation. Writers express their personal will through their creations, involving dimensions such as science, law, and politics, thereby promoting cultural progress.

After entering modern times, freedom of speech has been widely recognized and granted to citizens by various countries. Article 19 of the Universal Declaration of Human Rights adopted by the United Nations in 1948 and Article 19 of the International Covenant on Civil and Political Rights clearly defined freedom of speech, which can be broadly defined as the right of everyone to have freedom of opinion and expression, and to seek, receive, and disseminate information and opinions by any means without borders, and to maintain their views without interference^[7].

It is not difficult to see that freedom of speech has dual attributes, namely political and cultural. Participation in social life is inevitably accompanied by the acceptance of speech, otherwise it is difficult to reflect the independent will of individual citizens^[8]. On the other hand, speech needs to be expressed through various social existences, namely, as a projection of human inner rationality, it is widely distributed among numerous human creations, including knowledge, art, writing, science, politics, economy, etc. Freedom of speech is naturally intertwined with culture. Without culture, speech has nowhere to live, and if speech is stifled, culture is difficult to survive.

2. Parentism in the Constitutional Provisions of Culture and Speech

2.1. The Connotation of Paternalism: Protection and Suppression

The term paternalism, derived from the Latin word *pater*, means to act like a father or treat others as if they were children. American philosopher Gerald Dworkin described three characteristics of paternalism, particularly from a legal and policy perspective: 1) Government or other institutions implementing (or revoking) laws or policies that interfere with citizens' freedom or autonomy; 2) Implementing (or revoking) laws or policies without citizens' consent; 3) Implementing (or revoking) laws or policies based on the belief that such means can enhance or safeguard citizens' interests^[9].

If viewed from a basic perspective, paternalism may seem like an evil, anti liberal authoritarian ideology, but in reality, it is not uncommon in many modern democratic countries. For example, the law stipulates that both drivers and passengers must wear seat belts, or prohibits citizens from taking prohibited drugs. Obviously, the above-mentioned laws interfere with citizens' freedom of choice (feature one). Even if citizens are unwilling to comply (feature two), the purpose of the law is not to determine whether wearing seat belts or taking prohibited drugs will affect others, but to consider the safety of citizens themselves (feature three). It is not difficult to see that paternalism and totalitarianism can be distinguished. Although both inevitably restrict civil liberties in practice, the former is based on the importance of the interests of the people, while the latter leads to laws that purely suppress freedom and even harm the people for their own gain.

So, for the Constitution, does paternalism exist, and has there been any suppression of culture and speech?

2.2. The Restrictions Imposed by the Constitution on Culture and Speech

The public power naturally imposes certain restrictions on the basic rights of citizens, according to different standards of restriction: corrective restrictions & fixed restrictions.

2.2.1. Correction Type Restriction

In order to balance various public interests or fundamental rights, the state restricts basic rights such as culture and speech, promotes a certain public interest or protects a legitimate right of others, and restricts citizens' cultural rights. As stated in Article 51 of the Constitution of the People's Republic of China, citizens of the People's Republic of China shall not infringe upon the interests of the state, society, the collective, or the legitimate freedoms and rights of other citizens when exercising their freedoms and rights.

In the category of corrective restrictions, the Constitution imposes restrictions on culture, speech, etc., but does not explicitly and systematically provide cultural products to citizens, nor does it define existing social consciousness as the scope of citizens' spiritual activities. But rather, it corrects the imbalance of interests that may or has already been caused by intangible achievements related to social

and political activities such as culture and freedom^[10]. Non intervention unless necessary: (1) Whether there is a legitimate purpose, that is, whether restricting cultural rights is necessary to protect a public interest or the rights of others; (2) Does the restriction measure objectively contribute to achieving the above objectives; (3) Whether the restrictive measures are proportionate and do not cause excessive and unnecessary infringement on cultural rights.

2.2.2. Fixed Restrictions

Firstly, establish a definite "orientation", and then construct various levels of society based on this "orientation" as a standard. When implemented in the constitution, it is the first to clarify the approximate scope of culture or freedom, and then systematically and systematically restrict basic rights towards the previously determined "orientation"^[11]. Unlike the above-mentioned corrective restrictions, choosing a constitution with fixed restrictions will arrange the basic rights in the spiritual field of public power to varying degrees, that is, public power will surface its clear attitude through clear means, and then citizens' cultural and speech freedom will naturally be included in the large-scale plan.

In this situation, the restrictions imposed by the constitution make cultural life and freedom of speech a public good, and citizens can certainly distribute these products through the state, but at the cost is the freedom to choose basic rights.

2.3. The Abuse of Fixed Restrictions

Parents naturally regulate their children's behavior, exercising this authority through their superior status over the children. The same applies to the state. On the grounds that citizens are not yet mature in cultural life, the state perceives itself as having a "parent-child" relationship with its citizens. Therefore, in the interest of the citizens, the state's public power can act like a parent, caring for the "child." Since the basic rights of citizens are closely related to their interests, restrictions on citizens' cultural and speech rights are necessary. Just as parents provide care and attention, including restrictions on citizens' cultural rights, this is more common in laws guided by paternalism.

Based on the above content, an analysis of the provisions of the Constitution regarding cultural and speech rights can be conducted under a "parental" model. The provisions of modern constitutions regarding citizens' cultural rights are mainly concentrated in the field of spiritual achievements, often consisting of thoughts, morality, literature, art, education, and other content. The conscious products accumulated by a certain ethnic group in a certain region over a period of time constitute a cultural aggregate, which is the ethnic culture of that group, and civilization emerges from it. Civilization relies on culture and usually evolves alongside social systems. Especially after entering modern society, many basic rights of citizens have been recognized, and cultural rights, as an essential part, have also been included. As rights possessed by ordinary people, they are naturally regulated by public power, especially by the "parental" state, which needs to filter culture according to its nature being beneficial or harmful to citizens, and then deliver it to the "children". So, how should we define the superiority or inferiority of culture, or whether culture or civilization has superiority or inferiority?

For example, the ancient Chinese custom of foot binding is widely recognized as a feudal remnant that harms women and suppresses human nature. Should this custom be attributed to culture or civilization? Perhaps it can be analyzed from the perspective of sequence. In the 16th year of the Hongwu reign of the Ming Dynasty, Zhu Yuanzhang promulgated the "Royal Crown System," which stipulated "the complex and ornate headgear and foot binding for women," requiring women to undergo foot binding. However, the practice of foot binding itself had emerged since the Tang Dynasty and was widespread across various regions in China. It became more prevalent in the mid-Northern Song Dynasty, but was still limited to the eccentricities of some members of the royal family and was not enforced by clear legal provisions. The Ming Dynasty's foot binding order directly elevated this bad custom to a position akin to a "basic national policy." At this time, the emergence of foot binding predated the specific systems of the Ming Dynasty, which allowed the former to spread like a virus and linger for a long time. When the Manchu people established the Qing Dynasty, they once intended to abolish the foot binding system, but by then, the Han people had already immersed themselves in the morbid aesthetic of foot binding. Even though Huang Taiji and Shunzhi decreed that foot binding should no longer be allowed, the common people remained unmoved. Later, the Qing government discovered that foot binding for women was actually as beneficial to their rule as shaving men's heads, so they no longer strictly enforced it^[12]. By then, the Qing government's laws had not imposed substantial restrictions on foot binding, and due to its benefits to rule, they indulged in the bad custom

of foot binding, which intensified. The same was true for the shaving order. Originally a Manchu custom, it was imposed on all ethnic groups and implemented through laws.

Based on this description, it is not difficult to see that foot-binding, originally limited to personal preference, was elevated by national laws to a compulsory behavior, subsequently affecting society. Later rulers of the country were also keen on not restricting it through laws, and even intensified it, leaving its harmful legacy to this day. Initially, describing foot-binding as a non-popular hobby is more appropriate. It emerged based on local literature, morality, ideology, and other factors, reflecting the feminine and elegant side of ancient Chinese aesthetics, and should be called a culture^[13]. However, when foot-binding was used as a means of governance, it became a tool concocted by the government through a strong system, extracting it from existing culture and evolving it with public power. It should be considered one of the manifestations of civilization in that society. From this, it can be concluded that in a patriarchal society, the definition of cultural superiority or inferiority is often interpreted by the "parents." Culture is neutral and difficult to determine its superiority or inferiority, whereas civilization is born from culture and directly influenced by the state. When the highest authority implements a series of promotion measures to restrict or indirectly restrict citizens' behavior to achieve a certain goal, this is the essential reason for the "deterioration" of culture caused by the pursuit of established restrictions under patriarchy.

In terms of freedom of speech, as it directly pertains to social and political life, it faces relatively greater restrictions under the Constitution in the context of paternalism. Article 35 of the Constitution of the People's Republic of China stipulates that "Citizens of the People's Republic of China have freedom of speech, of the press, of assembly, of association, of procession, and of demonstration," enumerating a category of fundamental rights. However, unlike the press (Copyright Law) and assembly, procession, and demonstration (Law of the People's Republic of China on Assemblies, Processions, and Demonstrations) and association (approval-based association permits), which have relatively clear legal provisions, speech falls into a vague and gray area under the current constitutional provisions, and in practice, the evaluation of speech often results in negative outcomes.

2.4. The Current Situation Where Culture and Speech are Restricted

The TV program "If You Are The One" was required to undergo rectification by the State Administration of Radio, Film, and Television in 2010. This program is a typical cultural consumer product of the mass communication era, and the vast majority of TV viewers, as the audience of the program, naturally enjoy the right to consume—one of the rights and functions of cultural rights in this type of cultural lifestyle. The reason for the program's rectification was that the State Administration of Radio, Film, and Television criticized it for "some viewers having strong opinions." Some viewers were disgusted by the program due to its promotion of negative and erroneous values. However, it is not difficult to see from the program's high ratings and numerous commercial advertisement sponsorships that a considerable portion of the audience enjoys the program, namely, the audience other than the "some viewers" who are disgusted by the program's values. Regarding the incident of the program being taken off the air, the reason for the public authority to take this action is that the enthusiasts of the "If You Are The One" program are not in an irrational state and unable to discern their own true interests, so the law authorizes the state to replace these viewers in safeguarding their own interests^[14].

Article 22 of China's Constitution stipulates that the state shall develop cultural undertakings that serve the people and socialism, and Article 47 also stipulates that citizens have the freedom to engage in cultural activities. The cultural provisions in the Constitution clearly require the state to act as a passive protector to provide citizens with cultural life guarantees that meet the needs of the people. So, in the "If You Are The One" rectification incident, did public power act accordingly?

To be fair, a normal citizen certainly cannot discern right from wrong in everything. Otherwise, legal paternalism would have no justification at all—citizens themselves are capable of making fully rational judgments, and the intervention of public power would naturally be ineffective. However, it should be noted that our judgments or assumptions about citizens' "irrationality" require strict qualifications, otherwise individual rights will have no barrier against public power. And the claim that legislators can know all interests, even more aware of their own interests than the rights holders themselves, is extremely dangerous. Imagine that in the event of the aforementioned incident happening again, with only the basic declarative protection of cultural rights in the constitution, lower-level legislators or law enforcers may evade their necessary obligations to judge or protect the goodness or badness of citizens' cultural life. At this time, the will and wishes of citizens as rights

holders will be difficult to escape being suppressed, and they may even lose control over their own cultural life. This is one of the negative consequences brought by paternalism in the constitution. Such situations are often difficult to resolve from the source, but they are often verified in the results: the state, as the highest public authority, has not taken action to stop the aforementioned abuse of power, which is actually a kind of substantive acquiescence, that is, the state, acting as a "parent," needs to regulate citizens who lack rationality.

Similar incidents can also be seen in the "Li Wenliang incident" during the early stages of the COVID-19 pandemic. Dr. Li Wenliang, due to his professional vigilance, posted a message on WeChat regarding the detection of an outbreak at the Huanan Seafood Market within a classmates group, stating that novel coronavirus infection had been confirmed, virus typing was underway, explaining the origin of the virus, and advising classmates in the group to "not spread this information outside". However, as screenshots of the chat emerged, Li Wenliang was first asked by hospital leaders to write a "reflection and self-criticism on spreading false information", and Wuhan Central Hospital originally planned to dismiss him; later, he was warned and admonished by the Zhongnan Road Sub-district Police Station of Wuhan Public Security Bureau Wuchang Branch for "posting false statements on the internet", and was required to sign a written admonishment. Within a few days of his death from COVID-19, Weibo's trending searches suddenly rose on the evening of February 6, 2020, but the heat was quickly suppressed the next morning. At the same time, WeChat also blocked 19 phrases involving "Li Wenliang"^[15].

As mentioned above, after Dr. Li Wenliang published relevant information in a WeChat group, he was continuously subjected to restrictions on his speech by various lower-level public authorities, who claimed that his behavior constituted spreading rumors as stipulated in Article 25 of the Public Security Administration Punishments Law of the People's Republic of China. This hardly qualifies as respecting citizens' right to speech. Li Wenliang was merely expressing opinions on objective medical diagnostic facts within a limited private sphere, yet he was deemed to have committed the act of "seriously disrupting social order," which is clearly unfair and violates the constitutional protection of citizens' right to freedom of speech^[16]. Moreover, subsequent investigations by the National Supervision Commission revealed that Li Wenliang's actions did not violate the law, and his statements were all true. Instead, due to the undue restrictions imposed by Wuhan's medical and judicial systems on Li Wenliang and other early doctors who called attention to the new virus, as well as the blocking of related statements by numerous social media platforms, the epidemic was neglected, resulting in a delay of nearly two months in controlling the outbreak of COVID-19.

Tragedies of this kind, which occur during the legal enforcement process under the influence of paternalism, are not uncommon. When the original "parental care" measures, intended as corrective measures, are alienated into a priori decisions that disregard legal provisions and rational judgments, the protections for culture, speech, and the like stipulated in the Constitution are rendered meaningless.

3. Limitations on Paternalism in Fundamental Constitutional Rights such as Culture and Speech

The power of the state, as a "parent," to adjust and restrict cultural life and freedom of speech in accordance with the law stems from the need for citizens to specifically allocate public cultural and speech resources. It should be clear that paternalism is not inherently evil, but rather one of the neutral types of state means. The legitimacy of its existence should be to ensure that citizens can genuinely enjoy the right to choose and decide on their own cultural and speech realization, that is, citizens' "self-realization" in these fields, rather than the state replacing them in pursuing "self-realization." The state is not an organism, and it is impossible for it to perceive and evaluate the spiritual and emotional elements in the political, cultural, ideological, and other fields like a living person. A person can be moved by a piece of music or a passage of text, and citizens of a country can also be moved, but we would not say that an "abstract country" is moved. It may be more appropriate to define paternalism in the constitution from the following perspectives.

Firstly, the holders of fundamental rights such as culture and speech are not immature children who require state care. As Professor Xu Yudian stated, the role of cultural rights lies in "guaranteeing the greatest possible self-determination of individual cultural freedom". If citizens are regarded as "irrational" subjects with incomplete personalities, and therefore treated with a disciplinary rather than respectful attitude, this is actually contrary to the original intention of culture and speech. Within the scope permitted by the constitution, legislation can impose restrictions on cultural rights and freedom of speech, but this is not due to the immaturity of citizens^[17].

Secondly, when it comes to spiritual interests, the state is not necessarily the best judge of what constitutes the true interests of individual citizens in their daily lives. Only in rare cases, when a specific cultural element or speech can be reasonably deemed harmful to the interests of the rights holder, excluding purely subjective criteria, can such restrictions on behavior be considered consistent with the protection of the aforementioned fundamental rights of citizens under the constitution. For example, in the case of artistic performances involving a high potential for personal danger, such danger is objective and cannot be denied by the performer himself. Therefore, laws or other public authority actions that restrict such performances are justified. Otherwise, blindly substituting citizens' thinking and making decisions with the high-handed attitude of "mature individuals" not only fails to safeguard the true interests of citizens but may even further harm the public interest of society.

4. Conclusions

In its original sense, culture refers to human cultivation and creation, both in the East and the West. In modern semantics, it encompasses all material and spiritual achievements of humanity. Freedom of speech, on the other hand, has both political and cultural dimensions from the very beginning, representing the basic right of citizens to project their independent will in fields such as learning, art, and science. There are two modes of constitutional restrictions on these rights: corrective restrictions, which adhere to the principle of non-intervention unless necessary, aiming to balance public interests and individual rights; and predetermined restrictions, which preset certain value orientations and systematically plan the scope of citizens' spiritual activities. The latter, under the guidance of paternalism, is prone to abuse - where the state assumes the role of a "parent," viewing citizens as immature children, thus screening cultural quality and making negative evaluations of speech. Examples such as the legal instrumentalization of the foot-binding custom in culture, television programs being rectified due to "some audience opinions," and Dr. Li Wenliang being admonished for spreading real epidemic information in a private WeChat group, all show that under predetermined restrictions, public power may bypass the constitutional protection of fundamental rights. Therefore, paternalism in the constitution must be limited. Paternalism is not inherently harmful; its legitimacy lies solely in safeguarding citizens' "self-actualization" in the fields of culture and speech, rather than the state replacing citizens in pursuing so-called "true interests." Citizens are not irrational subjects in need of care, and the state is not the best judge of spiritual interests. Only in rare objective situations that exclude subjective criteria - such as when certain cultural elements or speech indeed pose verifiable harm to the rights holder themselves - do public power restrictions have constitutional legitimacy. Paternalistic intervention beyond this limit not only deviates from the original intention of cultural and speech freedom but also risks rendering constitutional protection meaningless.

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