

大法官講堂：
中華民國憲法及政府（一）

第三十講
其他基本人權

授課教師：湯德宗教授
國立臺灣大學政治學系



【本著作除另有註明外，採取創用 CC「姓名標示
—非商業性—相同方式分享」臺灣 3.0 版授權釋出】

其他基本人權

湯德宗

憲法有聲書

目 次

壹、憲法 §22 之定性

一、「非基本權」說

等同於基本權之權利（grundrechtsgleiche Rechte）

📖 吳庚，《憲法的解釋與適用》，頁 92～98（2003 年）

1. 憲法權利

1.1 「基本權」指憲法 §§7～18 & 21（列舉規定）

1.2 「非基本權」= 憲法 §22 之「其他自由及權利」（概括規定）

「其他」者，前揭各條列舉基本權利以外之憲法權利也

2. 列舉「基本權」與概括「非基本權」之間，乃相對而流動之界限

3. 須是「不妨害社會秩序或公共利益」者

4. 「非基本權」不構成「修憲之界限」（Cf. 釋字 499）

二、「概括基本權」說

📖 李震山，〈憲法未列舉權保障之多元面貌-- 以憲法第二十二條為中心〉，輯於氏著，《多元、寬容與人權保障-- 以憲法未列舉權之保障為中心》，頁 18～48（2005 年 10 月）

1. 概括條款（§22）旨在補充前此列舉（基本權）之不足

《對話憲法·憲法對話》2016

2. 故須非屬第二章明文列舉之基本權利
 3. 主張者須舉證其具有（放諸四海皆準之）「普遍性」（*universality*）及（神聖不可侵犯之）「不可侵害性」（*inviolability*），因而「值得憲法保護」（*verfassungsschutzwürdige*）（亦即，具有憲法保障價值）者
 4. 須「不妨害社會秩序或公共利益」
- 三、「未列舉的根本基本權」（*unenumerated fundamental rights*）
- 📖 湯德宗，〈政府資訊公開請求權入憲之研究〉，收於湯德宗、廖福特主編，《憲法解釋之理論與實務》第五輯，頁261以下（頁274~279）（2007年3月）
1. 「基本權」的概念
 - 1.1 歐陸所謂「基本權」（*droit fondamentale, Grundrechte*）指在某個法律體系中受到憲法積極保護（*positive protection*）的人權
 - 1.1.1 實質上說，「基本權」係指在文化上及法律上具有人權保障價值的人權；
 - 1.1.2 形式上說，「基本權」乃憲法上具有拘束力的規定（*binding provisions*）

「基本權」拘束國家各權力部門（不論三權或五權）；
「基本權」遭受侵害時，並應有適當的司法救濟。
 - 1.2 美國所謂「基本權」（*fundamental rights*）乃指：那些「作為吾人一切公民暨政治制度基石的自由與正義基本原則」所隱含的權利（*the rights implicit in those “fundamental principles of liberty and justice that lie at the base of all our civil and political institutions”*）（*Hebert v. Louisiana, 272 U.S. 312, at 316 (1962)*）；或指

那些「秩序井然的自由概念所隱含的權利」(those rights “implicit in the concept of ordered liberty”) (*Palko v. Connecticut*, 302 U.S. 319, at 325 (1937))。準此，

1.2.1 美國所謂「基本權」只有實質意涵

聯邦最高法院：被歸類為「基本權」的權利，並不以列在憲法增修條文第一條至第八條（聯邦憲法「人權清單」）為充分條件或必要條件。換言之，縱使列在「人權條款」的權利，未必是「基本權」；沒有列在「人權條款」的權利，亦可為「基本權」。

1.2.2 認定是否為憲法未明文列舉之「基本權」時，美國聯邦最高法院主要審究：「系爭權利對於個人自主之重要性」（the importance of the right to the *autonomy of the individual*）。例如：

Griswold v. Connecticut, 381 U.S. 479, 485 (1965)：

「某些人權條款的保障具有半影（penumbra）...創造了隱私的地帶（zone of privacy）」；

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 847 (1992)：

「憲法承諾有個人自由的領域（a realm of personal liberty），政府不得介入」，「該自由之核心乃界定自我關於存在、意義、宇宙與人類生活奧秘的概念的權利」（the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life）。

2. 憲法 §22 固在補充第二章列舉基本權之不足，惟其內容應以「根本的基本權」（fundamental rights）為限，亦即，

《對話憲法·憲法對話》2016

須是表彰自由民主憲政秩序之核心價值，且為不可或缺的憲法權利，始足當之。如此從嚴認定，乃因

2.1 基本權原則上應為「主觀權利」，俾權利主體得本於自利動機，促成基本權之最大實現；至於以基本權作為國家「客觀法秩序」或「客觀原則」，終需承認國家履行其基本權保護義務時，猶有若干裁量空間。

2.2 (大) 法官造法(憲法解釋)「創設」憲法權利，應有界限。(因 institutional competence 而需 self-restraint)

2.3 關於法律對於「未列舉之根本基本權」所為之限制，法院原則上應以「高標」(從嚴)審查

2.4 修憲應循修憲正當程序，殆無「實質」界限可言

Cf. 釋字 721 〈湯大法官德宗部分協同暨部分不同意見書〉

Q 以上三說之同異

貳、隱私權 (right to privacy)

一、概念及分類

1. 身體(物理)隱私/空間隱私 (physical/ local privacy)

= 關於他人接近本人身體及其住宅之控制

1.1 例如：非經同意，不得抽血、驗尿、搜身；

不得無故侵入(含竊聽、偷窺等)他人住宅

1.2 保護之法益：solitude (獨處), intimacy (私密)

2. 決定隱私 (decisional privacy)

與個人切身相關(而與他人無涉)事務之決定(控制)權

2.1 Right to make “*intimate and personal choices*”

2.1.1 生殖/繁衍權 (reproductive rights)

· 避孕權

Griswold v. Connecticut, 381 U.S. 479 (1965)

未言明究係 a right to prevent conception (a right to

30 〈其他基本人權〉

act = positive freedom) 或 a right to privacy in the 14th Amendment sense (a right against government snooping = negative freedom)

· 墮胎權 (abortion right)

Roe v. Wade, 410 U.S. 113 (1973)

“the Fourteenth Amendment’s concept of personal liberty...encompasses *a woman’s decision whether or not to terminate her pregnancy.*”

Vgl. 德國「墮胎合法化違憲案」(BVerfGE 39, 1 - Schwangerschaftsabbruch I):「依基本法第二條第二項第一款的規定，可導出國家有義務保障人的生命。...根據聯邦憲法法院歷來的裁判，基本權條款不僅是個人對抗國家主觀的防衛權，同時也是客觀秩序...此一國家保障義務當然不僅禁止國家直接侵害形成中的生命，也要求國家在出生之前予以保護。換言之，防護來自他人非法的侵害。...在基本法價值秩序中，位階越高的法益，國家所負的保障義務也就越重大。毋庸贅言，人的生命在基本法的秩序中具有最高的價值，它是人性尊嚴的生命基礎，也是一切其他基本權的前提條件」。

· 尋死權 (right to die)

Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990)

The S. Ct assumed, though it did not actually decide, that competent people have a

constitutional right to refuse or discontinue lifesaving treatment.

Washington v. Glucksberg, 521 U.S. 702 (1997)

A state law against assisting suicide did not violate the Due Process Clause.

2.2 自我認同權 (the right to one's own identity)

The ability to define who you are and who you want to be in the world.

2.2.1 性別 (sex) / sexual identification

Transsexual Case I, 49 BVerfGE 286 (1978)

(The Constitution protects the dignity of a person as he understands himself in his individuality and self-awareness. This is connected with the idea that each person is responsible for himself and controls his own destiny. *Human dignity and the constitutional right to free development of personality demand that one's civil status be governed by the sex with which he is psychologically and physical identified.*)

Goodwin v. United Kingdom, 22 EHRR (2002)

(Goodwin is a post-operative male-to-female transsexual. Her claim against colleagues for sexual harassment failed because she was considered to be a man at law. Her request for a new ID that would reclassify her gender was rejected by the government. This case raise the issue *whether* or

not the respondent State has failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment. *The very essence of the Convention is respect for human dignity and human freedom.* Under Art. 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.)

2.2.2 性傾向 (sexual orientation)

參見 2.3.2

2.3 親密關係 (intimacy)

2.3.1 家庭 (family)

Moore v. East Cleveland, 431 U.S. 494 (1977)

(a constitutional right to family integrity)

2.3.2 親密伴侶 (intimate partners)

Loving v. Virginia, 388 U.S. 1 (1967)

(Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.)

Bowers v. Hardwick, 478 U.S. 186 (1986)

The S. Ct. upheld the constitutionality of a Georgia sodomy law criminalizing oral and anal sex in private between consenting adults when applied to homosexuals. The right to privacy did not protect homosexual sodomy.

J. White *dissent* asserted that the *essential meaning of the right to privacy was the freedom to choose what form one's intimate sexual relationships should take.* (Cf. 釋字 554 性行為自由)

Lawrence v. Texas, 539 U.S. 558 (2003)

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. *The petitioners are entitled to respect for their private lives.* The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” *Casey, supra*, at 847. The Texas statute *furtheres no legitimate state interest which can justify its intrusion into the personal and private life of the individual.*

釋字第 554 號解釋

理由書 [1]：「性行為自由與個人之人格有不可分離之關係，故得自主決定是否及與何人發生性行為，惟依憲法第二十二條規定，於不妨害社會秩序公共利益之前提下，始受保障」。

Q 準此，同性間合意之性行為應受憲法保護？

Q 禁止同性婚姻侵害什麼基本權？

2.4 保障之法益：intimacy, autonomy

3. 資訊隱私 (information privacy, informational privacy) / 資訊自決和匿名權 (informational self-determination & the right to anonymity)

Control over the Access to personal information,

The claim of an individual to *determine what information about himself or herself should be known by others*

- 3.1 個人資料 (personal data/information) 之蒐集、處理、利用 (揭露)

· 舊個資法 §3-(1)

· 新個資法 §2-(1)

- 3.2 敏感性個人資料 (sensitive personal data/information) 之蒐集、處理、利用 (揭露)

例如：基因資訊、醫療資訊

- 3.3 保護之法益：anonymity, reserve

4. 財產上隱私 (proprietary privacy)

Appropriation and ownership of interests in human personality

Ex：肖像、姓名、人格等之使用、收益權

→ 因隱私而獲得的財產利益 (應歸類為財產權)

Q 隱私權與其他基本權之關係？

二、UK_WC

§8 (respect for private and family life)

8.1 Everyone has the right to respect for their *private and family life*, their *home* and their *correspondence*.

8.2 There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society-

- .1 in the interests of national security or public safety; or
- .2 for the prevention of disorder or crime; or
- .3 for the protection of health or morals; or
- .4 for the protection of the rights and freedoms of others.

§13 (rights in respect of marriage)

13.1 Everyone of marriageable age has the right both to marry and to found a family.

適婚年齡者有結婚、成家之權

13.2 No marriage shall be entered into without the free and full consent of the intending spouses.

結婚須有當事人之自由及充分之同意

13.3

.1 Spouses have equality of rights and responsibilities as to marriage, during marriage, and at its dissolution.

男女婚姻平等

.2 In the case of dissolution, provision shall be made for the necessary protection of any children.

離婚時應適當保護子女

13.4 Every child has the right to such measures of protection as are required by their status as a minor, on the part of their family, society and public authorities.

未成年子女應受家庭、社會與公權力之保護



三、Checklist/ III. Fundamental rights

G. Freedom of privacy, home and correspondence, protection of honor and reputation

IV. Political, Social, Economic and Cultural Rights

C. Social rights

1. Family rights

- a. Right to marry and found a family
- b. Marriage only with free consent of intending spouses
- c. Equality of rights and responsibilities between spouses as to marriage, during marriage and at its dissolution



四、ICCPR

§17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)

& General Comment No. 16 (1988/04/08)



五、我國

1. 釋字 293 (資訊隱私權之濫觴) 銀行對於客戶之存、放、匯款資料，應予保密

2. 釋字 535

「臨檢實施之手段...不問其名稱為何，均屬對人或物之查驗、干預，影響人民行動自由、財產權及隱私權等甚鉅」

❏ 所謂「隱私權」係指？「身體／空間隱私」？

3. 釋字 585 解釋理由書 [17]

「隱私權雖非憲法明文列舉之權利，惟基於人性尊嚴與個人主體性之維護及人格發展之完整，並為保障個人生活秘密空間免於他人侵擾及個人資料之自主控制，隱私權乃為不可或缺之基本權利，而受憲法第二十二條所保障（本院釋字第五〇九號、第五三五號解釋參照）」

Q 上開釋示（載於理由書）係屬「傍論」（dictum）？

4. 釋字 603（解釋文）

「就個人自主控制個人資料之資訊隱私權而言，乃保障人民決定是否揭露其個人資料、及在何種範圍內、於何時、以何種方式、向何人揭露之決定權，並保障人民對其個人資料之使用有知悉與控制權及資料記載錯誤之更正權。」

Q 審查基準如何選定？

Cf. 「理由書」[10]；林子儀「協同意見」[5]；余雪明「協同及不同意見」[49]

湯德宗，〈違憲審基準體系建構初探--「階層式比例原則」構想〉，載《憲法解釋之理論與實務》第六輯（下冊），頁 581 以下（頁 646~658）。

5. 釋字 689

理由書[4]：「人民依其意志作為或不作為之一般行為自由，亦受憲法第二十二條所保障。人民隨時任意前往他方或停留一定處所之行動自由（本院釋字第五三五號解釋參照），自在一般行為自由保障範圍之內。」

理由書[8]：系爭規定（社會秩序維護法 §89-(2)）限制跟追人（記者）之行動自由（跟追），屬憲法 §22 所保障之「一般行為自由」之一種

Q此所謂「行動自由」係憲法 §11 所保障之「遷徙自由」？抑或憲法 §22 所保障之「一般行為自由」？

Cf. 釋字 699 湯德宗大法官〈部分協同暨部分不同意見書〉
「駕車自由」屬於憲法第二十二條所保障之「一般行為自由」，而「行動自由」（例如徒步或搭乘交通工具旅行各地的自由）則為憲法第十條所保障之「遷徙自由」

參、人格權 (right of personality)

一、姓名權 (命名權)

1. 釋字 399

姓名權為「人格權」之一種，命名自由為憲法第二十二條所保障

Q「人格權」為憲法哪條 (§22) 所保障？

2. 釋字 486

非法人團體，符合一定條件，亦有姓名權

3. 釋字 664

少年事件處理法第二十六條第二款「裁定命少年收容於少年觀護所」及第四十二條第一項第四款「裁定令少年入感化教育處所施以感化教育」規定，就限制經常逃學或逃家虞犯少年人身自由部分，不符憲法第二十三條之比例原則，亦與憲法第二十二條保障少年人格權之意旨有違

二、名譽權

釋字 656

理由書 [1]：「名譽權旨在維護個人主體性及人格之完整，為實現人性尊嚴所必要，受憲法第二十二條所保障」

理由書 [3]：「查系爭規定旨在維護被害人名譽，以保障被

《對話憲法·憲法對話》2016

害人之人格權」

三、血統知悉權

釋字 587 解釋文：

「子女獲知其血統來源，確定其真實父子身分關係，攸關子女之人格權，應受憲法保障。」

肆、婚姻自由&家庭保障

一、釋字 242 (鄧源貞案)

憲法 §22 保障「家庭生活及人倫關係」，重婚得撤銷之規定，(因情事變遷而)容有例外

二、釋字 362 & 釋字 552 (一夫一妻婚姻制度 v. 信賴保護)

憲法保障人民結婚自由權利；重婚無效之規定，容有例外

三、釋字 554 (婚姻制度 v. 性行為自由)

四、釋字 372 (婚姻制度 v. 人格尊嚴)

他方虐待已逾越夫妻通常所能忍受之程度，而有侵害人格尊嚴與人身安全者，得以「不堪同居之虐待」為由，訴請裁判離婚

五、釋字 502 (收養自由應受倫常限制)

民法 § 1073 關於收養者之年齡應長於被收養者二十歲以上，及 §1079 之 1 關於違反 §1073 者無效之規定，符合我國倫常觀念，為維持社會秩序、增進公共利益所必要，與憲法保障人民自由權利之意旨並無牴觸。惟應有例外。

Q 所謂「憲法保障人民自由」係指「收養自由」？

伍、政府資訊公開請求權 (right of access to government information)

30 〈其他基本人權〉

- 一、「知的權利」(right to know) 三層次
言論自由權→ 資訊受益權 (被動公開→ 主動公開)
- 二、UK_WC

§28 (access to official information)

28. 1 There is a right of access by the public to the information held by any public authority performing functions with respect to the government of the United Kingdom, a nation or a region, or to local government.

28. 2 This right is subject only to such limitations as are prescribed by law and are necessary in a democratic society-

- . 1 for the protection of *national security*;
- . 2 in the interests of *law enforcement* or the *prevention and detection of crime*;
- . 3 for the protection of *personal privacy, legal privilege or commercial processes or transactions*;
- . 4 to enable a public service to perform its constitutional functions or a public authority, when acting in the capacity of regulator, contractor or employer, to perform its functions.

28. 3 Act of Parliament shall-

- . 1 prescribe the procedures to enable the right of access to official information to be readily exercised and enforced; and
- . 2 make provision for the appointment, powers and procedures of a Parliamentary Commissioner for

Information.

28. 4 The Commissioner-

- . 1 shall investigate refusals of access to official information and complaints of delay or obstruction in the granting of such access; and
- . 2 may require public authorities to give access to official information or to compensate for unwarranted delays in giving such access.


§29 (use of official information)

29. 1 Any person required by law to provide information to a public authority shall *be informed of the purposes* for which that information is required.

29. 2 Any information so provided shall *be used for those purposes only*.

29. 3 No such information shall be communicated to any other public authority unless-

- . 1 that communication is authorized by law; and
- . 2 at the time the information was required, the person from whom it was required was informed that it might be communicated to the other public authority and of the purposes for which it might be used by that other public authority.

29. 4 Paragraph .3.2 does not apply where the communication of the information is sought for the purposes of investigating fraud or crime. 

三、釋字 532 (蘇俊雄大法官協同意見書)

區域計畫擬定過程中，政府有公開資訊的程序性義務

Q 人民僅就特定事項，抑或普遍，享有知的權利？

陸、其他

一、釋字 204（免於苛酷異常刑罰之自由）

Q 「免於苛酷異常刑罰之自由」應屬「人身自由」？

二、釋字 503（一事不兩罰：行為罰&漏稅罰應擇其一）

三、釋字 576（契約自由）

釋字 580（耕地三七五減租條例中限制地租、嚴格限制耕地出租人終止耕地租約及收回耕地之條件，皆為對出租人契約自由及財產權之限制，衡諸特殊之歷史背景及合理分配農業資源之非常重大公共利益，尚未違背憲法上之信賴保護原則）

釋字 643（契約自由）

釋字 716（契約自由 v. 利益衝突）

Q 「契約自由」為「財產權」之部分？

四、環境權？

Cf. 釋字 426（空污費為「特別公課」，非一般稅賦？）

【學思策問】

Q 大法官應如何解釋憲法第二十二條所稱「其他自由及權利」？

Q 「政府資訊公開請求權」應否入憲？（抑或由法律保障即足？）

《對話憲法·憲法對話》2016

【進階閱讀】湯德宗，〈政府資訊公開請求權入憲之研究〉，收於湯德宗、廖福特主編，《憲法解釋之理論與實務》第五輯，頁261～291（2007年3月）。




李震山，〈憲法未列舉權保障之多元面貌-- 以憲法第二十二條為中心〉，收於氏著，《多元、寬容與人權保障-- 以憲法未列舉權之保障為中心》，頁1～65（2005年10月）。

Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996).

【課後習作】

依照釋字 603 號解釋之論理，國民身分證與健保晶片卡制度亦應違憲？

版權聲明

頁碼	作品	版權標示	作者／來源
574-575,	8.1 Everyone has the right to respect for their private and family life, their home and their correspondence...on the part of their family, society and public authorities. 28. 1 There is a right of access by the public to the information held by any public...is sought for the purposes of investigating fraud or crime.		The Institute for Public Policy Research , 《The Constitution of the United Kingdom》 P53, 178 (http://www.ippr.org/files/images/media/files/publication/2014/01/the-constitution-of-the-united-kingdom_1991-2014_1420.pdf?noredirect=1) 瀏覽日期：2016/10/6， 本作品依據著作權法第46、52、65條合理使用。
575	Freedom of privacy, home and correspondence, protection of honor and reputation...during marriage and at its dissolution.		Albert P. Blaustein , 《Framing the Modern Constitution: A Checklist》本作品依據著作權法第46、52、65條合理使用。
575	§17 (The right to respect of privacy, family, home and		《International Covenant on Civil and Political

correspondence, and protection of honour and reputation) & General Comment No. 16 (1988/04/08)		Rights》 本作品屬公共領域。
--	--	----------------------