



REMARKS AT THE OPENING CEREMONY OF THE BEIJING FORUM ON HUMAN RIGHTS

Luo Haocai

President of the China Society for Human Rights Studies

Distinguished guests, dear colleagues, ladies and gentlemen,

Let me start by extending my heartfelt thanks and welcome to you for attending the Beijing Forum on Human Rights that opens today on behalf of its organizer, the China Society for Human Rights Studies.

This year marks the 60th anniversary of the adoption of the Universal Declaration of Human Rights, the first UN document specializing in the human rights issue. As an influential historical document, it has played a positive role in imbuing people the world over with the ideal of human rights and guiding and promoting the development of human rights across the world. Inspired by the Universal Declaration of Human Rights, the international human rights cause has made great strides over the past six decades. The content of human rights also has been enriched. Development and security have gained increasing prominence in human rights since the beginning of the 21st century.

The theme of this forum is “Development, Security and Human Rights.” The right to development is an inalienable human right. Every person and every country have the right to pursue development and enjoy its fruits. Today, dozens of least developed countries have yet to join the global development process; more than 1 billion people suffer persistent starvation and poverty; and 11 million children die before the age of five and 3 million people die of AIDS every year. For these people, the right to development is of primary importance. Development is the central agenda for the overwhelming majority of developing countries and the biggest human rights problem facing the world today. That’s because development lays the groundwork for the full realization of human rights. To advance other human rights, we should first of all realize the right to development, eliminate starvation and poverty and provide basic health care services. The worth, dignity and freedom of the human person cannot be realized in a state of starvation and poverty.

Likewise, security is also a fundamental human right. Security is a state of existence free from fear. Everyone has the right to live peacefully and safely. Threats to peace and security come not only from international wars and conflicts but also from domestic violence, organized crimes, terrorism and weapons of mass destruction. Poverty, deadly infectious diseases and environmental degradation also severely threaten people’s security. It has long been a shared aspiration and a human rights objective sought by the international community to eliminate all these threats and

safeguard peace and security. The right to security lays the groundwork for the realization of other human rights. Because fear limits the scope of freedom, society can offer individuals more freedoms under the conditions of peace and security. Development, security and human rights are closely related and mutually reinforcing. Without development, we cannot enjoy security. Vice versa, without security, we cannot enjoy development. If human rights are not respected, we can enjoy neither security nor development.

Ladies and gentlemen,

This year marks the 30th anniversary of China's adoption of its reform and opening-up policy. Thirty years ago, the Chinese set about carrying out economic reforms at home and opening up their country to the outside world under the leadership of Mr. Deng Xiaoping. Over these years, China has not only scored remarkable achievements in economic development but also made great progress in human rights. Chinese people's civil and political rights have been fully protected. Under the system of people's congresses, they extensively participate in the political life, fully exercise the right to know, the right of oversight and the right to vote and stand for election and directly exercise the right of democratic election, democratic decision making, democratic management and democratic oversight in self-governed grass-roots mass organizations in urban and rural areas.

Economic, social and cultural rights have been advanced in China. China has made monumental progress in eliminating poverty and improving the basic living standards of people in impoverished regions, whose efforts have been highly recognized by the international community. It reduced the number of inadequately fed and clad poor people in its rural areas from 250 million in 1978 to 14.79 million in 2007. Its GDP has increased by about 9 percent annually on average in the past three decades, enabling the living standards of Chinese people to improve rapidly and making China a middle-income country.

Human rights protection in the judicial field has been improved. Despite the weak foundation, we have constructed the basic framework of a law-based socialist country and provided legal protection of human rights in a rather systematic manner. Chinese constitution has established "respecting and safeguarding human rights" as its important principle. China has adopted more than 800 laws and regulations and more than 7,500 regional laws and regulations. Many laws, such as the Property Law, the Law on State Compensation and the Administrative License Law, give protection to human rights. China also has enshrined the right to be presumed innocent until proven guilty in its revised Criminal Procedure Law. The Supreme Court began to review and made final decisions on all death penalties in 2007. As a result, the number of death penalties has drastically declined. As China's characteristic open trial system, lawyer system, legal remedy system and legal aid system improve, the people's right to a fair trial has been protected.

Over the decades, China has persisted in implementing the system of regional ethnic autonomy and protecting the ethnic minorities' right to equally participate in the administration of state affairs and exercise autonomy over their ethnic affairs according to law. China attaches great importance to protecting the cultures and distinctive characters of the ethnic minorities. All ethnic minorities in China have the right to use and develop their own written and spoken languages,



preserve their religious beliefs and customs and receive education in their own languages.

China's theoretical research on human rights has made headway. Since the 1990s, it has nurtured a specialized, multidisciplinary research team consisting of institutions of higher learning, research institutions and experts across the country with the China Society for Human Rights Studies at the center. Chinese academics have translated and published a large number of foreign human rights works, compiled systematic reference materials for human rights studies, published hundreds of books and thousands of academic papers on human rights and promoted the awareness of and education on human rights in society.

Despite the great progress China has made in its human rights cause, it still faces many problems and difficulties. China's political and economic systems are far from flawless. Its democracy and legal system have yet to be improved. Development between urban and rural areas and among different regions is still unbalanced. Problems exist in employment, education, health care, housing, social welfare, income distribution, production safety and environmental protection. The Chinese Government does not shy away from the problems. Instead, it has publicly pledged to resolve these problems by promoting all-round economic and social development and improving its democracy and legal system. In contrast, some Western countries always practice double standards on the human rights issue. While criticizing China and other developing countries from time to time, they turn a blind eye to their own human rights problems.

Distinguished guests, ladies and gentlemen,

China's pioneering efforts in the past 30 years have seen the country embarking on a road towards human rights progress with Chinese characteristics. Human rights protection in China obviously differs from those in Western countries. First, China believes that like other rights, human rights are not absolute. The rights a person enjoys should be commensurate with the obligations he shoulders. You cannot enjoy rights without shouldering obligations, nor do you shoulder obligations without enjoying rights. Your rights are the obligations of others, while your obligations are the rights of others. China stands against separating rights from obligations.

Second, China believes that human rights include not only civil and political rights but also economic, social and cultural rights. All these rights are related to each other and mutually reinforcing. Progress in civil and political rights is indispensable to the realization of economic, social and cultural rights. Without the development of civil and political rights to a certain degree, progress in economic, social and cultural rights is unimaginable. Human rights development in China provides compelling evidence for this view. It is universally acknowledged that China has dramatically raised Chinese people's living standards, strengthened its social security system and achieved all-round progress in health care, education and culture over the past three decades. But the fact that almost every human right listed in the International Covenant on Civil and Political Rights has been greatly advanced in China in the same period is often neglected. Today, Chinese people enjoy unprecedented freedoms and fundamental human rights including the freedom of religious belief and the right to political participation. In China, civil and political rights develop as rapidly as economic, social and cultural rights.

Finally, China believes that human rights are not only the rights of individuals but should

include collective human rights. Collective human rights and individual human rights are two sides of the same coin. There are no collective human rights to speak of if individual human rights are not protected. At the same time, collective human rights are the prerequisite and guarantee for the full realization of individual human rights. Individual human rights cannot be truly realized until progress is made in society as a whole. China sees great value in protecting both individual and collective human rights, a prime reason why it has achieved national stability, social harmony and freedom for its people.

Distinguished guests, ladies and gentlemen,

It is a common objective of all humanity to create a world where everyone is entitled to fundamental human rights. To realize this objective calls for strenuous efforts of the governments and people of all countries as well as close international cooperation. International cooperation is a good way to promote the progress of international human rights. China stands for strengthening exchanges and cooperation in the field of human rights to enhance mutual understanding, reduce disagreements and expand common ground. Different countries should tolerate, respect and learn from each other and treat each other equally in the spirit of jointly advancing the international human rights cause. China is ready to carry out even broader and deeper human rights exchanges and cooperation with other countries, draw on other countries' good experience and practices in developing human rights and redouble its efforts to promote its own human rights cause.

China always supports the purposes and principles of the UN Charter concerning the promotion and protection of human rights. It is also in favor of making human rights along with security and development the three pillars of the UN. China worked actively in the UN Commission on Human Rights, maintaining that the commission should take dialogue, instead of confrontation, as its working approach. It took an active part in creating the UN Human Rights Council and contributed to establishing the council's institutional framework with a constructive attitude. It has attended various UN conferences on human rights, taken part in deliberations and discussions on human rights issues, put forward its proposals in a highly responsible manner and made distinctive contributions to enriching the concept of international human rights, optimizing the approach to human rights protection and enhancing international cooperation in this field. China's efforts illustrate that the human rights cause is a lofty cause aimed at promoting peace, security and development for humanity. China will make its due contributions to the sound development of the world's human rights cause and join hands with people of all countries to create a bright future for this cause.

Ladies and gentlemen,

This year is China's Olympic year. The global torch relay of the Beijing Olympics is currently in full swing across the five continents. The Olympic flame will cover a distance of 97,000 km in 33 days outside the Chinese mainland. It will travel another 40,000 km or so in 97 days on the Chinese mainland before lighting the torch in China's National Stadium on August 8. During the Games, athletes from across the world will compete in China and jointly open a new chapter in Olympic history under the motto of "higher, swifter and stronger." Hosting the Olympics in Beijing is a century-old dream of the Chinese. Committed to the concepts of



“green Olympics,” “hi-tech Olympics” and “people’s Olympics,” China will make preparations for the Games in earnest under the theme of “One World, One Dream.” We believe that China will succeed in hosting distinctive, high-standard Olympic Games under the coordination of the International Olympic Committee and with the support of people from around the world.

Ladies and gentlemen,

We hope the Beijing Forum on Human Rights provides a platform for human rights experts at home and abroad to review the history of the world’s human rights development, summarize and share experience in human rights protection and look into the future of human rights. We expect the forum to be held regularly and achieve even greater success in the future with the concerted support of Chinese and foreign human rights experts.

We wish you a healthy, pleasant and fruitful stay in Beijing.

REMARKS AT THE OPENING CEREMONY OF THE BEIJING FORUM ON HUMAN RIGHTS

Wang Chen

Minister of the State Council Information Office, PRC

Distinguished guests, dear friends, ladies and gentlemen,

Good morning! The Beijing Forum on Human Rights sponsored by the China Society for Human Rights Studies is a great event for the international human rights community. Under the theme of “Development, Security and Human Rights,” the forum has gathered human rights experts and scholars, notable personages and officials from across the world in beautiful springtime Beijing. Please allow me, on behalf of the State Council Information Office of China, to extend sincere congratulations on the opening of the forum. I’d also like to take this opportunity to welcome you all to Beijing.

Respect for and observance of human rights is a major achievement in the evolution of human society, an important symbol of modern civilized society and a shared pursuit of people across the world. Six decades ago, the UN General Assembly adopted the world renowned Universal Declaration of Human Rights. As the first solemn declaration made by the organized international community on human rights and fundamental freedoms, it embodies the lofty aspiration of all nations to build “a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want” and has made indelible contributions to promoting the world’s human rights cause. Motivated by the declaration and the international community, nearly 100 nations have broken the shackles of colonialism and gained independence over the past half century. As a result, the colonial system that had ruled the world for centuries came tumbling

down, ushering in bright prospects for realizing fundamental human rights for all nations and peoples. In his report to the UN General Assembly three years ago, former UN Secretary General Kofi Annan put human rights on par with security and development for the first time. The report, entitled “In Larger Freedom - Towards Development, Security and Human Rights for All,” defines security, development and human rights as the three pillars of the UN - the three fronts that the world body will advance side by side in the 21st century.

Today, world multipolarization and economic globalization are deepening. While traditional security threats such as armed conflicts persist, non-traditional security threats such as terrorism, the proliferation of weapons of mass destruction and environmental pollution have become more prominent than ever. The gap between the South and the North and between the rich and the poor has widened. Against this backdrop, it is highly significant for human rights experts, scholars and officials from different countries and regions to hold in-depth discussions and conduct frank exchanges under the theme of “Development, Security and Human Rights.”

Development, security, and human rights are closely related, mutually reinforcing concepts that cannot be addressed separately. Security is the prerequisite for development and human rights. Common development and prosperity of all countries are the basis for maintaining international security and promoting human rights progress. Full realization of human rights is the goal of all humanity. History has repeatedly borne witness to the destructive effects of war on humanity, economy and society. Without a peaceful and stable international environment, not only is it impossible to carry out new constructions, but existing achievements may perish in wars. In that case, human rights are bound to be violated and trampled upon. Without the common development and prosperity of all humanity, there will be no lasting peace in the world. The goal of preserving and developing human rights will therefore be out of reach. Efforts to protect international security and stability and promote economic development and prosperity are ultimately aimed at achieving the all-round development of mankind and fully realizing the rights of the person.

As a founding member of the UN that holds a permanent seat in its Security Council, China always honors the principles and purposes of the UN Charter and the Universal Declaration of Human Rights, attaches great importance to putting people first, upholds the principle that development is for the people, by the people and with the people sharing in its fruits and entitles the people to political, economic, social and cultural rights according to law. Since the founding of the People’s Republic of China more than 50 years ago, especially since reform and opening up begun 30 years ago, the Chinese Government has always put the realization of the people’s right to life and development at the top of its agenda. By taking economic development as its central task and vigorously developing social productive forces, China has achieved rapid economic and social progress, enhanced its comprehensive national power and considerably improved Chinese people’s living standards. The Chinese have leapfrogged from suffering from poverty first to being adequately fed and clad and then to living a well-off life. Their right to life and development has been notably advanced.

China’s human rights cause has made historical strides. Civil and political rights have been effectively protected. Political democracy at the primary level has made headway, with steady



progress in the democratic systems of election, decision making, management and oversight. The legal framework for human rights protection with the Constitution at the center has been increasingly improved. Intensified efforts have been made to reform China's judicial system, leading to continued improvement of the system. Judicial protection of human rights has been strengthened. The political, economic, social and cultural rights of all members of society have been fully observed.

At the same time, we are clearly aware of the need to keep advancing human rights. China is a developing country with a population of 1.3 billion. Hindered by natural, historical and cultural conditions and economic and social development levels, it faces many problems and difficulties in its human rights development. China's political and economic systems are far from flawless. Its democracy and legal system have yet to be improved. The awareness of governments at various levels of exercising administrative power according to law and respecting human rights have yet to be enhanced. Development between urban and rural areas and among different regions is unbalanced. Problems in employment, social welfare, income distribution, education, health care, housing and safety production have adversely affected the interests of the general public. Enough is enough. It is a long-term, arduous endeavor of the Chinese Government and people to respect and preserve human rights and promote the all-round development of the human rights cause in China.

The 17th National Congress of the Communist Party of China (CPC) in October 2007 designated human rights development as one of the essential tasks of the Party and the state. After human rights were enshrined in the Chinese Constitution in 2004, respect for and observance of human rights was incorporated into the CPC Constitution for the first time at the congress. It has become an important concept that the Party and the government should bear in mind as they govern and rejuvenate the country in the new era and a major theme of the campaign to "build a moderately prosperous society in all respects." We believe that we will make our society more harmonious, our people's lives more beautiful and the rights they enjoy more substantial as long as we are committed to implementing the basic principle of respecting and preserving human rights, pursuing reform and opening up and promoting democracy and the rule of law.

Distinguished guests, dear friends, ladies and gentlemen,

China not only sees great value in and devotes itself to protecting and developing human rights for the Chinese but also seeks to promote the development of the international human rights cause. China has worked in the UN's human rights agencies and taken part in formulating international legal documents on human rights with a positive and responsible attitude. It has conducted extensive human rights dialogue, cooperation and exchanges with the international community through various channels. It has made full use of the international stage to strive to safeguard human rights for all nations. China's propositions that the universality of human rights must be adapted to the specific conditions of different countries, that the right to life and development is a fundamental human right of primary importance, that constructive dialogue and cooperation are crucial to the realization of human rights and that the rights of all members of society must be developed in a coordinated manner have been widely recognized in the

international community. China will, as always, make contributions to the development of the international human rights cause. We are willing to make concerted efforts along with the international community to build a harmonious world with lasting peace, common prosperity and human rights for all.

Pursuing a goal is like sailing across the boundless sea. The development of the human rights theory and the progress of the human rights cause call for unremitting efforts of every nation and every member of society. The Beijing Forum on Human Rights has offered a platform for us to share experience and exchange views. I hope that we inspire each other, pool our ideas, expand our common ground and enhance our friendship during our frank discussions at the forum.

I wish the Beijing Forum on Human Rights a great success. I wish you a happy, healthy stay in Beijing. Thank you.

ADDRESS BY MR. SERGEI A. ORDZHONIKIDZE

Sergei A. Ordzhonikidze
United Nations

Mr. Chairman, Ladies and Gentlemen:

It is a distinct pleasure for me to be with you. I greatly appreciate being back in China, which I have visited on several occasions in different capacities throughout my career. Allow me to thank the organizers for this opportunity to join you, and to present the United Nations' perspectives on the important issue of human rights. I know that many of you have travelled great distances to be here, and to me that is a very welcome illustration of a dedicated and sustained interest - across the globe - in the promotion and protection of human rights.

This year, the international community celebrates the 60th anniversary of the *Universal Declaration of Human Rights*. The Secretary-General, Mr. Ban Ki-moon, has called on the entire United Nations family to take part in a yearlong campaign to promote the *Declaration's* ideals and principles. It is in the context of this system-wide outreach effort that I am with you today.

Here, I intend to touch upon three main themes. First, I would like to highlight the connections between the human rights-related activities of the United Nations and its work in other areas. In my view, this is an essential dimension to appreciate fully the United Nations' strong focus on human rights. Second, I should like to share with you the latest developments in the work of the United Nations in the area of human rights, and third - in the context of the anniversary of the *Universal Declaration* - I will conclude by detailing the challenges before all of us - as the human family - to translate the promise of the *Universal Declaration* into reality for all. These themes will, of course, be well-known to you who are experts in the human rights

field. I hope, however, to place your discussions over the coming three days in a useful wider conceptual framework, and I trust that you will return to these issues in greater detail throughout your exchanges.

Allow me to start with the linkages between the promotion and protection of human rights, and other issues on the United Nations agenda:

Security, development and human rights form the three pillars of the United Nations work for a more secure, more prosperous and more just world for all. Let us be clear: Respect for all human rights is the indispensable foundation for lasting peace and long-term sustainable development. There is no inherent contradiction between human rights and security, or between human rights and economic growth. On the contrary, poverty and denial of human rights greatly increase the risk of instability and violence, just like war and conflict trap communities and countries in poverty and set back development.

The fight against terrorism is one example of this inter-relationship between security and human rights. In 2006, when the United Nations General Assembly unanimously adopted the United Nations Global Terrorism Strategy, they unequivocally stated that all counter-terrorism efforts must be undertaken in the framework of human rights law. Similarly, United Nations peace operations include a significant human rights component as a basis for helping to facilitate long-term stability.

Protection and promotion of human rights is closely connected to the need for disarmament. Together, disarmament and human rights form the core of the concept of human security. Armed violence breeds insecurity and instability, and has a profoundly negative impact on human development and the respect for fundamental rights. Conversely, the enjoyment of human rights contributes to prevention of conflict and to stability, which in turn facilitates further disarmament.

The need for respect for human rights applies equally to economic and social development. Full enjoyment of all human rights, from freedom of opinion and expression, equal protection before the law to the realization of the entire spectrum of economic, social and cultural rights, such as the right to health, the rights to water and sanitation and the right to food, is necessary for each individual to fulfil his or her potential and thus to contribute fully to the common good. Thus, lack of legal safeguards and basic rights inhibits economic growth, and undercuts progress for all.

We have now passed the halfway mark towards the deadline for the realization of the United Nations Millennium Development Goals - the MDGs. And, as you are all aware, we are not on track to meeting them. The current escalating food crisis is further hampering efforts to reach them. According to estimates by the World Bank, the doubling of food prices over the past three years could push up to 100 million people in low-income countries deeper into poverty. Hunger and other urgent development challenges not only constitute a violation of the human rights of hundreds of millions of people, but also potentially have larger political and security implications.

Also in this context, disarmament would facilitate more effective promotion and protection of human rights. According to the Stockholm International Peace Research Institute, annual world military expenditure has passed 1.2 trillion US dollars. At the same time, as calculated by the United Nations, developed countries spend only just over 100 billion US dollars on

official overseas development assistance a year. Strategic disarmament could potentially liberate significant resources, which could be channeled towards development efforts, such as the MDGs, which in and of itself would contribute towards respect for human rights. At the same time, strategic disarmament would bring greater stability, which also has a positive effect on the enjoyment of human rights. In this way, disarmament and respect for human rights can be seen as mutually reinforcing, and both should be pursued in parallel for a more secure and prosperous world for all.

The United Nations work - in security, development and in human rights - is shaped and driven by this fundamental understanding of the inter-relationship across these three pillars. Only when concerted and consistent efforts are made across all three pillars, can we hope to make progress on any of them. Just like advancing on any of the pillars will have a positive impact on efforts in respect of the other two. Strategies based on the protection of human rights are vital for the practical effectiveness of our actions in development and security.

Let me now turn to some of the latest developments in the United Nations human rights work, which reflect this conceptual understanding of human rights:

The establishment of the Human Rights Council in 2006, following the 2005 World Summit, to succeed the Commission on Human Rights, is both a political and institutional recognition of the centrality of human rights to the mission of the United Nations. With the creation of the Council, United Nations Member States raised human rights to a higher level within the Organization. As you are aware, the Council is a subsidiary organ of the General Assembly, which will review the Council's status after the first five years.

Members of the Human Rights Council, elected by the General Assembly, have pledged to abide by the highest human rights standards. Membership of the Council is not to be used as a shield against comments on an individual State's human rights record, but implies a solemn responsibility to work constructively and collaboratively for the promotion and protection of human rights, within one's own borders and internationally. Having started its work only in June 2006, the Council has just completed its institution-building phase and is, still, at an early stage.

An important part of the Human Rights Council's work is the Universal Periodic Review. The UPR - as it is known - is the first universal and comprehensive tool for overseeing the application of the principles of the Universal Declaration of Human Rights in a consistent manner, and it holds the potential to greatly influence the human rights situation on the ground. The objectives of the UPR are to improve the fulfillment of States' human rights obligations and commitments, and to provide an assessment of positive developments, as well as the challenges faced by States. It is intended to enhance both the capacity of States and the technical assistance provided, to share best practices among States and other stakeholders and to ensure support for cooperation in the promotion and protection of human rights. The outcome of the process will consist of recommendations to be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders.

Under the UPR mechanism, all United Nations Member States - without exception - will be reviewed within a period of four years in the first cycle, which means that 48 countries will be



reviewed each year. Thus, all Member States - also those that are not members of the Council - will be subjected to the same process, which addresses the issue of possible bias in the selection of countries.

The first two-week session of the UPR Working Group - consisting of all 47 members of the Human Rights Council - concluded on Friday of last week after review of the first 16 countries. The next sessions - again with 16 countries in each - are scheduled to be held in May and December respectively.

There is no doubt that the UPR will be a litmus test for the Council to see whether this new body can move beyond the polarization and politicization of the human rights agenda that all too frequently dominated its predecessor, the Commission on Human Rights. Together with the independent Special Procedure mandates, the UPR represents a key mechanism for sustained protection of human rights, and it is my hope that all States to make the best possible use of this opportunity.

Ladies and Gentlemen:

Allow me to conclude by sharing with you a few thoughts on the challenges ahead - at international and national levels - in the human rights area:

Since 1948, the *Universal Declaration of Human Rights* has inspired more than 60 human rights instruments at the international level. Together, they comprise a core of human rights law that States have negotiated and adopted voluntarily and that applies for all. Regardless of the historical background, cultural traditions, stage of socio-economic development of each individual State, all have accepted these norms and must abide by them.

The elaboration of these legal instruments and standards represents significant advances. Yet, despite these achievements, we still have a long way to go in ensuring that the fundamental norms enshrined in the Declaration become a practical reality for all fellow human beings. Regrettably, across the world, Governments frequently do not show the necessary political will to implement these norms that they willingly accepted to observe.

Ultimately, the work to uphold human rights rests on integrating human rights obligations into national legislation and policy, and on using these appropriately and resolutely to ensure implementation, and to prevent and punish violations. The focus of the United Nations is therefore on implementation.

The Universal Periodic Review mechanism of the Human Rights Council is one demonstration of this focus. For its part, the Office of the United Nations High Commissioner for Human Rights is widening its technical cooperation programmes and establishing an ever-denser network of field presences to assist countries to live up to their internationally agreed responsibilities. As a result, international human rights standards are now better implemented in many countries. In this connection, I welcome the participation in this Forum of many representatives of national human rights commissions, or other national human rights mechanisms. Constructive engagement between national human rights institutions and the international system is indeed vital to strengthening the respect for international norms at the national level everywhere. At the same time, the entire United Nations system is continuing efforts in support

of the mainstreaming of human rights to ensure that the critical human rights perspective is adequately reflected in policy and practice.

The focus on implementation of existing human rights law does not, however, entail that we should lose sight of the need to continuously bolster and expand the international legal framework itself. The adoption in 2006 of the *International Convention for the Protection of All Persons from Enforced Disappearances* and in 2007 of the *Convention on the Rights of Persons with Disabilities, and its Optional Protocol*, closes significant gaps in international human rights law. It is now a collective challenge to ensure that these treaties are implemented in national law as soon as possible.

A critical task to be accomplished at the international level is that of making the “right to development” clear and specific enough to be effectively enforced. The rights set out in the *Universal Declaration* are indeed inter-connected, and the *Declaration* does not make a distinction between civil and political rights on the one hand and economic, social and cultural rights on the other. It is imperative that discussions continue at the international level to ensure that economic, social and cultural rights may be upheld in the same way as civil and political rights.

Concerned by the growing number of incidents of serious and systematic human rights violations, world leaders at the 2005 World Summit - unanimously - adopted the principle of the responsibility to protect civilian populations against genocide, war crimes, ethnic cleansing and crimes against humanity. The responsibility to protect expresses the moral obligation of every State to protect its population from these serious crimes and violations, and it asserts the responsibility of the international community to take collective action, through the United Nations, when States manifestly fail to do so themselves.

Ladies and Gentlemen:

The United Nations and the entire international community share a responsibility in raising awareness of human rights. The *Universal Declaration of Human Rights* has so far been translated into 360 languages. Yet, it is often those who are in most dire need of protection of their human rights who also need to be informed that the Declaration exists for them. It is my hope that the discussions in this Forum may contribute to increasing the visibility of the Declaration and the continuing efforts to make it living reality for all.

Civil society is a key partner in these efforts. Non-governmental organizations continue to play an invaluable role in the promotion and protection of human rights at national, regional and international levels.

The 60th anniversary of the *Universal Declaration of Human Rights* is an opportunity to accelerate the pace for the promotion and protection of human rights worldwide, and I call on all of you to continue your efforts to advance the original vision of the *Declaration* - one set of indivisible, universal and inalienable rights for all humankind. Let us work together to move from declaration to deed, from aspiration to action, from promise to practical reality.

Thank you very much.

(The author is Director-General of the United Nations Office at Geneva.)



NEW CHALLENGES TO HUMAN RIGHTS AND INTERNATIONAL SECURITY

Nina Karpachova
Ukraine

Dear Mr. Chairman,

Dear ladies and gentlemen,

On behalf of the Ukrainian delegation allow me to greet all the participants of the Beijing Forum on human rights!

It is symbolic that this forum is taking place in the year of the 60th anniversary of the UN Universal Declaration of Human Rights. The Declaration expressed the hope of mankind to live a more secure and just world.

However, the Beginning of the new century showed that the world had not become either more humane or secure or just. Even today, over 60 years after that day, violations of human rights and freedoms occur in every country without exception. Mass human rights violations in all parts of our world have become more brutal than before. Human life loses its value. Double standards have more often become a norm of international dialogue. Mankind faces more challenges, among which the most dramatic ones are poverty, mass migration, trafficking in human beings, especially women and children, drug trafficking, corruption, torture, violence, use of secret prisons, environmental disasters, wars, and terrorism. All that calls on the world community to unite its efforts and establish close cooperation.

As the UN data attest, more than 1 billion people all over the world suffer from poverty. For those people human rights and fundamental freedoms remain an illusion. I believe that poverty, on the one hand, is a human rights violation in itself, on the other hand-poverty prevents implementation of all other human rights and freedom.

We have to note that poverty in our ever more globalized world is a consequence of the activities of transnational corporations that are beyond anyone's control and do not bear responsibility for human rights violations.

It is obvious that traditional means of fighting poverty are ineffective. New approaches, new mechanisms of ensuring equal access of all members of society to resources are required to prevent the widening gap between the poor and the rich inside the countries as well as between various countries and continents.

The increase of the social and economic development gap between the poor countries and the golden billion gives rise to enormous migration streams, numerous vulnerable groups of migrants, asylum seekers, incites racism, xenophobia, racial discrimination, and other forms of intolerance,

and leads to mass human rights violations.

More than 200 million people are involved in world migration processes according to official data. The labor migration issue is topical for many countries in the world and directly related to poverty reduction.

I should note that in most developed countries of the world the population decreases naturally as the result of its aging. According to the UN demography experts, the EU countries will need 135 million migrants in the nearest 25 years to maintain a balance between working population and pensioners, as well as provide enough labor force.

That is why the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990 should be ratified as soon as possible. As the Ukrainian Ombudsman, I have called upon the Government of my country to expeditiously ratify the convention, and I want to use this opportunity to ask the nations participating in this form to do the same.

The fact that Modern challenges influence most painfully the rights and freedoms of disabled people makes it necessary for the authorities to take extra measures to ensure rights and freedoms of these categories of people, and requires a special control over the rights protection by human rights institutions. Therefore another priority is ratification of the UN Convention on the rights of disabled people.

Ladies and gentlemen,

Continued world militarization, wars, armed conflicts, and international terrorism endanger the most fundamental human right - the right to life.

More and more countries are object to military aggression and wide-ranging terrorist acts with mass casualties. My position as Ombudsman is clear- it is impossible to fight terrorism as a global evil effectively without a rigorous observance of human rights.

We all have to acknowledge that the likelihood of aggression and terrorist acts will remain as long as there are violations of such fundamental principles:

- as national sovereignty,
- force is used instead of the law in international relations,
- economically potent countries allow themselves to declare the territory of other countries the zone of their interests, and they interfere into internal affairs of other countries and act from the position of strength.

The global nature of today's challenges to human rights and freedoms requires strengthening of international organizations' role, first and foremost the United Nations, as well as continental and regional organizations as instruments to ensure the rights and freedoms of every human being and the whole mankind, to exclude the policy of double standards as regards human rights and freedoms.

Taking this into consideration, drafting and adopting a UN Universal convention on fighting international terrorism becomes an urgent task of the world community.

Dear ladies and gentlemen,

Having been the participant of the Beijing Human Rights Forums starting from the very first one which took place 10 years ago, I'd like to stress that modern China demonstrates to the whole



world the new approaches in solving global problems of nowadays. During the past 10 years more than 30 million people have been torn out of the 50 million Chinese citizens living behind the poverty line. That was achieved thanks to the selfless work of hundreds of millions of Chinese people which double the GDP of the country every 7-8 years.

So it is not by accident that China has been granted the honor to receive XXIX Summer Olympic Games. I have no doubt that these Olympic Games will prove once again the peace-loving nature of China, its unifying role in achieving the world progress and that they will serve the course of consolidating the power of human spirit and human dignity. That fact was testified by the recent Special Olympics for the people with mental problems held in Shanghai last autumn and the coming Paralympics Games to be held after the Beijing Olympics in which disabled athletes from all over the world will take part.

During one of my stay in China I happened to visit the Tibet Autonomous Region, so it as with the pain that I perceived the news about the provoked violence that took place on the heels of the Kosovo events. Tibet is the integral part of China and sovereignty and territorial integrity as well as human rights in China should be respected by the international community.

All the attempts to wreck Beijing Olympics in fact are nothing but the attempt to interfere in the internal affairs of China which I stressed right after the mentioned events.

To my mind the real nature of these events lies in the fact that modern China, rising every year in its successful economic growth, with confidence and with every right occupies the place of the state which poses the balance in the one-polar world. And we have to appreciate in just manner that China, overcoming the global challenges of contemporaneity, harmonizes the world. This movement is progressive and it belongs to all the humanity.

I can't but recall the words of the first President of China Sun Yatsen: "The Land under Heaven is for everybody"

I wish all participants of the Forum every success in their work.

Thank you for your attention!

(The author is Ukrainian Parliament Commissioner for Human Rights)

TO BEIJING FORUM ON HUMAN RIGHTS

Vladimir Lukin
Russia

Ladies and Gentlemen,

I would like to greet in absentia all participants of the Beijing forum "Development, Security and Human Rights" as (since) my overcrowded working schedule has not allowed me to take part

in this event personally.

I am sure, that all topics, planned for discussion at the forum are of a special urgency at present. The society development, complication of relationships between a state and a socium make new demands to the mechanism of human rights observance and protection. Security is one of guarantees of a stable society development and, as consequence, of an effective human rights protection system. Such social evolution is impossible without understanding of the importance of originality and uniqueness of each nation, people, ethnos and its own distinctive history, traditions which have a special impact on the organization of both the state and civil institutions of the country.

The ombudsman institution development has continued by now in our country. The first Russian ombudsman was elected 10 years ago in accordance with the federal constitutional law. However, the institution of the Commissioner for Human Rights in the Russian Federation (this is the official title (appellation) of the ombudsman institution in Russia) has still remained today in some way an unusual body both for our society, and for the state.

The experience of many countries is a clear evidence of the effectiveness of a national human rights institution under condition of its proper organization. A willingness of citizens and society to maintain the ombudsman and the realization of ombudsman's recommendations by the state are the key prerequisites (preconditions) of the effective activity of this institution.

I am sure, that the discussion on the Forum topics, the exchange of views on these issues, which are of great importance for stable and effective development of national human rights protection institutions, will be mutually useful and will have the practical consequence of all participants of the Forum.

I would like to wish participants and guests of the Forum fruitful work and good luck.

(The author is the Commissioner for Human Rights of the Russian Federation)

SUMMARY SPEECH AT BEIJING FORUM ON HUMAN RIGHTS

Dong Yunhu
China

Ladies and Gentlemen,

This session of human rights forum is going to be close. Delegated by Luo Haocai, chairman of the China Society for Human Rights Studies, I will, on behalf of the organizing unit, present a brief open summary on this session of the forum, talking about my personal feelings and opinions.

This is a very successful forum. The two-day conference was compact, ardent and fruitful.



At the forum, 35 human rights officials, experts and scholars from different countries and regions presented a speech at the general meeting, while most of other participants made a speech at group meetings. Overall, all spoke enthusiastically and with zest and gusto, surrounding the theme of the conference, expressed many new views and opinions; some opinions are wonderful, penetrating, profound and inspiring. Some delegates might have had no time to peak or to speak fully, but most presented a written speech.

The forum received a total of nearly 80 papers submitted by participants. This is a considerable figure, also a significant achievement this forum has made. Abundant in contents, these papers involve wide-ranging issues in the field of human rights, reflecting the deep attendance that human rights experts and officials from countries with different historical, cultural and religious backgrounds and at different development stages have paid to and their systematic thoughts on development, security and human rights issues. In these papers, there are not only macro thoughts from varied perspectives of the relationship between development and security and human rights, as well as general grasps of international human rights development, but analysis of development, security and human rights issues performed in combination with the history, reality and experience of different regions and countries. Not only do they deal with the issues of human rights protection in general terms, such as international developments in human rights conception, relations between diversified cultures and civilizations, cross-cultural human rights dialogue and human rights development, relations between national security, social stability, civil security and human rights protection, relations between national sovereignty, international organizations, international protection systems and human rights development, and relations between legal system and human rights protection, but they probe into the protection of some specific human rights, including right of national self-determination, right of development, right to receive education, rights of women and children, rights of persons with disabilities, human rights of criminals and human rights of persons with leprosy. Some also deal with some very specific issues in human rights protection, for example, relations of human rights protection with social control over police activity, state of emergency, public participation, housing security system, administrative litigation, public welfare litigation, foreign assistance, Internet information environment and climate change. There are not only philosophical thoughts but positive studies. In a large number and with high quality, these papers reflect the combination of macro and micro perspectives, theory and practice, history and reality, individual country and the world; they provide wide-ranging contents, profound thoughts and original views.

It is believed that this session of forum has peculiar implications for it was held in a special context. This year is the 60th anniversary of the United Nations' Universal Declaration of Human Rights. Born on the basis of the Charter of the United Nations, the Universal Declaration of Human Rights is an important summary and introspective result of mankind from experiences in and lessons drawn from the two miserable world wars which took place in the first half of the 20th century, reflecting the profound thoughts on security, development and human rights issues in the international context where the members of the human family had increasingly close relations with each other. Over the past six decades, the Universal Declaration of Human Rights has

made indelible contributions in arousing the oppressed nationalities and people to pursue human rights, in impelling people of the postwar colonies and dependencies to fight against imperialism, colonialism and hegemonism, and in promoting world peace, development and human rights; so far it is still an important source of inspiration and a banner for people of all countries in the world to strive for, maintain and develop human rights under new historical conditions. It is believed that this forum provided an important communication and cooperation platform for people with lofty ideals of all nations to, from a new starting point, review and sum up the experiences in and lessons drawn from world human rights developments in six decades since the publication of the Universal Declaration of Human Rights, analyze opportunities and challenges currently confronted, and actively seek and promote benign interaction between and coordinated progress in the world's development, security and human rights.

China is victim of the two world wars and the cold war as well; it is also an active advocator and practitioner of the Universal Declaration of Human Rights. Fundamentally, China's revolution, construction and reform are to realize security, development and human rights of the Chinese people. Since China's reform and opening up to the outside world, the cause of human rights in China has made historical progress arresting worldwide attention in its healthy interaction with the international community. We hold this forum on the occasion of the 30th anniversary of China's reform and opening up, with an important goal to devise - together with world experts and scholars and in the spirit of reform and opening up - programmes of lasting importance for human rights development in China and in the world as a whole.

There is an old saying in China which goes "Learning without thought is labor lost; thought without learning is perilous." The process of China's reform and opening up is just a process in which China learns from the world and uses as reference all helpful experience and thinks independently about and seeks appropriate path of development by combining the actual national conditions of the country. This process is neither a one-off nor a temporary process, but one without end. Reform is to build a complete set of systems in line with development requirements of a modern society and with wishes of its people, while opening up aims to realize mutual benefit, win-win and common development in communication and cooperation with the international community. The present internal and diplomatic guidelines which China came up with to realize scientific development, build a harmonious society and promote the building of a harmonious world with lasting peace and of common prosperity, are a reflection of the requirement that China should stick to achieving sustainable development, security and human rights in the reform and opening up and in learning and thought, and of the wish that China devises and promotes together with other countries the world development, security and human rights. At the forum, Chinese scholars presented the experience of China in making efforts to realize development, security and human rights in the process of reform and opening up; they also learned about helpful experience and thought of countries with different historical and cultural backgrounds through communications and discussions. All felt that this forum is a rare opportunity for Chinese and foreign experts and scholars to learn and inspire each other, share achievements and make common progress.



All the participants hold that, the theme of this forum is very important, relating to the destiny of mankind and to the future of the world. Development, security and human rights relate directly not only to the common destiny of mankind and the world order in the 21st century, but to the future and destiny of each country and each individual, requiring common participation and efforts of the people of each country in the world. Particular in the context of in-depth development in economic globalization and social life informationization, the increasing interdependence and common benefit of mankind imperatively requires people of all countries to cooperate on an equal basis and meet challenge together, so as to achieve collective security, common development and universal human rights.

A far-ranging and in-depth discussion was made surrounding the theme of the forum, and a great many common understandings and similar views formed. You are human rights experts, having your own unique perspectives and original viewpoints. Once exchanged and communicated, these penetrating views are bound to collide and produce new sparks, allowing us to enlighten each other and form new understandings. In-depth exchanges and communications surely will also deepen understanding of our own views and expand our common understanding on some issues. I think we have reached common understanding on many things through discussion in these days.

For example, we all believe that development, security and human rights relate to each other and are inseparable. The right of development is an inalienable human right. Development functions as the key to solving all problems in the contemporary society, which is an important foundation and prerequisite of realizing security and human rights; living in a society with poverty, hunger, ignorance and deteriorating environment is neither safe nor in line with human dignity. Security is not only an important human right, but one of important conditions for realizing development and universal human rights. It's impossible to realize development and human rights in a national or international environment where there are wars, conflicts, violence and terrorism. Human beings are the main body of development and security, while development and security must be achieved relying on and for the good of human beings. Results of development and security must be in line with full realization of human rights. Without effective human rights protection, it's impossible to achieve sustainable development and lasting peace and stability.

For another example, we all hold that in realizing development, security and universal human rights, respect must be given to the diversity in civilization, culture and human rights development mode. It's indicted that human rights are of universality and human dignity, human values and humanitarianism are general principles which must be followed in pursuit of human rights; both eastern and western cultures contain human rights thoughts of universal value, and both developed and developing countries have provided their own experience for the realization of human rights. All civilizations, cultures and development modes have contributed in a unique way to the international development of human rights theories and practices. No single civilization, culture or development mode has a monopoly on human rights interpretation. To identify excellent human rights thoughts contained in different civilizations, cultures and development modes is important to promote the world's development, security and human rights. It is held that to realize universal



human rights must give full consideration to the history, culture and specific national situation of each country and pay adequate respect to the diversity in culture, civilization and development mode. The right approach to promote development, security and human rights is to carry out dialog and cooperation between different civilizations, human rights theories and practices; adhering solely to a civilization or development mode and advocating confrontation and collision with other civilizations are out of line with the world's trends of development, security and human rights.

One more example is the comparatively common recognition that power politics, hegemonism, selectivity and dual standard are fundamental roots which hinder development, security and human rights. Sticking to the purpose and principles of the Charter of the United Nations and carrying out international cooperation on the basis of sovereignty equality are the cornerstone for realizing development, security and human rights. Currently, to push on the democratization of international relations and to build new fair international political, economic and security orders are crucial for realizing development, security and human rights. We also expressed our deep concern with threats against development, security and human rights which today's world is facing, such as wars, conflicts, mass destruction weapons, violence and terrorist activities, as well as fatal infectious diseases and environment deterioration. Too many to be enumerated. These common understandings are the foundation for us to move ahead. Practice shows that exchanges and communications make a difference. Without exchanges and communications we cannot have so many common understandings.

I think this forum initiated a very good climate of discussing issues. At the two-day forum, the experts and scholars with different cultural backgrounds from different countries got together, respected and treated each other equally, spoke freely, sought common ground while reserving differences and made open discussions. This widened our horizon and enhanced mutual understanding of countries and nationalities with different cultural backgrounds on the issues of development, security and human rights. In a sense, this forum itself is a fruitful practice of respecting the diversity in culture, civilization and human rights development modes, also a successful dialog between different civilizations. Through discussion and dialog, not only have identified more common grounds, but we have had an understanding of each other's views and divergences and of reasons for these different views, and inspired each other. This is helpful to further study and provides a foundation for mutual understanding. Therefore, both common and different grounds are gains of the forum.

Obviously many of you have much to say. But it's impossible to say all out in a session of the forum. From my point of view, it may as well to leave some regret; anyway there will be ample time ahead. The issue of development, security and human rights is very prodigious and complex, and in some sense it is also an everlasting issue. I believe we will discuss it on a long-term basis. This human rights forum will be held in an interrupted way and I believe there will be numerous opportunities for us to discuss about the issue.

An old Chinese saying goes "As decreed by providence you have met him." More than 100 human rights senior officials and renowned experts and scholars from 32 countries of the five



continents and from international organizations, for the issue of development, security and human rights as a common concern, gathered in Beijing prior to the Olympic Games exchanging study outcomes and experience and expressing views, enhanced mutual understanding, established friendship and made friends. At this forum we got acquainted with each other, presented our wisdom, established liaison and exchanged views. This is just a “luck” by which we are brought together, also the most important and immediate achievement of the forum. For each of us present at the forum it is a rare experience in life. I hope you can bear in mind this gathering, this forum and the China Society for Human Rights Studies. I also hope we can keep such contact and friendship and use it in the way it is viewed as precious wealth.

In a word, we have held a successful forum. Through in-depth discussion and in combination with actual situations, we have achieved our goal of studying issues, exchanging ideas and enhancing understanding. Our common efforts and contributions made this forum fruitful. We all share a feeling, that is, this forum will leave a distinctive page in life experience of all.

At the closing of the conference, I’d like, on behalf of the China Society for Human Rights Studies, the organizer of the forum, to render again my hearty thanks to all participants from various countries of the world. Thank you for your active support, participation and contribution. Thank you!

(The author is vice president and secretary-general of the China Society for Human Rights Studies)



DEVELOPMENT AND HUMAN RIGHTS





HUMAN RIGHTS, RIGHT TO SELF-DETERMINATION, RIGHT TO DEVELOPMENT

Aslan Kh. Abashidze
Russia

The problem concerning Kosovo's legal status is further proof of the fact that the international community has neither conceptual nor legal basis for comprehensive and final settlement of such kind of conflicts. If nothing is done in the nearest future to find the solution to such problems within the framework of the international law, we will soon see a growing number of crisis spots around the world which might turn into uncontrollable zones. Such a situation might have really negative consequences for our world full of all kinds of weapons.

In the context of unprecedented changes taking place in the sphere of international relations, dramatic escalation of inner tensions and conflicts within states, one should not forget that any element of the present international political system - such as sovereign states, international intergovernmental organizations, primarily the United Nations, international law etc.- should be aimed at attaining the chief goal, i.e. to observe and to encourage the respect of fundamental human rights and freedoms all over the world without discrimination of any kind.

In order to overcome complexities and entanglements of the Cold War era - either in conceptions or international legal acts - an issue of autonomy and its various forms assumes a paramount significance as it serves as an important means to preserve existing international political system within which sovereign states play a decisive role; and as an important instrument helping to guarantee vital interests of all segments of the society of every state and thus contributing to maintaining and strengthening international stability. Autonomy may be also considered as an important guarantee to exercise a right to self-determination for every segment of country population, to strengthen democracy and boost development, to enforce efficient human rights implementation.

Regrettably, so far international law has not taken a definite stand on the role and significance of autonomy in solving the above mentioned problem despite the evident fact that a number of autonomous entities are successfully operating in the modern world. In our opinion, various autonomy models approved by international law could contribute to the solution of numerous acute so-called "national" problems.

Generalizing different points of view and basing on the general polemic on the issue of law and practice concerning the problem under examination, we are putting forward ten guidelines that may be considered as a basis for the status of any national autonomy model:

1. Declaration of autonomy is the integral right of the people to self-determination and it

must be performed in compliance with the constitution of the state on the territory of which the autonomy is proclaimed and in full accordance with the international law. The autonomy should be based upon expression of a free will by a population of a certain territory with regard to historic, national, ethnic and other identities of the given population.

2. Provisions forming the basis of the autonomy should clearly stipulate the nature of relations between autonomy and the state on the territory of which the autonomy is proclaimed. Such provisions must clearly determine the competence of the autonomy in the area of political, economical, social and cultural relations, and more specifically they should stipulate areas and forms of activities of autonomy structures in such a sphere as international relations, including possibly the right to conclude international treaties and specify the level of representation in international bodies.

3. All international commitments of the state, on the territory of which the autonomy is proclaimed, are obligatory to the bodies of the autonomy irrespective of whether such commitments have a conventional or traditional character.

4. In terms of sovereignty and the right of the people to self-determination, an autonomy has a right to sign treaties in such spheres as border crossing, tourism, trade, environment protection etc. without prejudice to the interests of the whole state.

5. Decisions made by the bodies of autonomy within the scope of their competence are obligatory and must be implemented by the central authorities. In case of a controversy regarding the issue of competence, such matters should be resolved by a relevant and independent body.

6. All decisions and agreements made by central authorities in respect of an autonomy, must be validated only upon consultations with the official bodies of the autonomy.

7. The competence of the autonomy authorities, their legal needs and interests should be taken into consideration in order to get necessary resources for the economic, social and cultural development of the autonomy.

8. All activities of international companies and authorities carried out on the territory of the autonomy within the scope of the autonomy's competence should be subject to preliminary agreement between the autonomy administration and central authorities.

9. Any infringement of the Regulation on autonomy status should be a subject of examination by a relevant independent body, which should also specify the liability for such an infringement.

10. The status of an autonomous territorial entity cannot be changed unilaterally and without consent of the population expressed by way of a fair referendum.

(The author is Director of the Center on Legal Research of People's Friendship University of Russia.)



DEVELOPMENT AND HUMAN RIGHTS

Herminia T. Angeles
The Philippines

“All humanity is one individual and indivisible family, and each one of us is responsible for the misdeeds of all the others. I cannot detach myself from the wickedest soul.” (Mahatma Gandhi)

Human rights are as old as the human society itself. Since the time of ancient Greece, it is associated with the rights of struggling citizens against their tyrannical rulers. Famous Greek philosophers like Socrates and Aristotle were indeed victims of human rights violation as they were both condemned for expressing their opinions contrary to the popular belief and legal institution of their times.

Down to the middle ages, man became more aware of and aggressive to stand for his rights. Thus, King John delivered the first English Constitution known as the “Magna Carta,” which not only documented but also guaranteed the personal liberties and civil rights of the people.

In 1689, the revolutionaries of England laid down the Bill of Rights to prevent arbitrary royal rule. The Bill of Rights guaranteed freedom of speech to Parliament, free election, immunity from prosecution for petitioners, freedom from cruel and unusual punishment and excessive fines, and provided protection for the protestant faith.

In 1776, the Americans revolting against the English king declared their own Bill of Rights, asserting that all men are by nature fully free and independent. They have inherent rights such as enjoyment to life and liberty, the means of acquiring and possessing properties, and obtaining happiness. They asserted freedom of speech and of the press, the right to speedy and public trial, and the freedom to express religion.

In 1789, the French revolutionaries proclaimed the Declaration of the Rights of Man against their tyrannical King. They declared that all men are born free and equal and affirmed the inalienable rights of man. This was adopted by most democratic countries in their respective constitutions, laws and statutes as the principles of the constitutional guarantees in their Bill of Rights.

The havoc created by World War II transcends human rights struggle from mere national affair to an international concern. Thus, on December 10, 1948, the Universal Declaration on Human Rights was proclaimed by the United Nations providing for the basic norms and standards of human rights. In 1966, the International Covenant on Civil and Political Rights (ICCPR) was adopted, amplifying the human rights principles in the Universal Declaration. The human rights concept was further broadened with the adoption of the International Covenant on Economic,

Social and Cultural Rights (ICESCR) in the same year. In sum, the United Nations Charter, the Universal Declaration of Human Rights with the ICCPR and ECOSOC are now known as the International Bill of Human Rights.

Among these international covenants, the Covenant on Civil and Political Rights is peculiar as it contains classical human rights of the so-called “first generation,” which made their way into the domestic constitutional law of most nation states as a result of the grand revolutions of the late 18th and 19th centuries.

The Philippines is a signatory to the ICCPR, which entered into force in the country on January 23, 1987. As a State Party, it carries with it the obligation to respect, fulfill and protect all human rights. The obligation to respect human rights refers to the duty to refrain from State intervention and applies equally to the right to life, personal integrity and privacy as well as the right to work, food health and education. The same holds true for the obligation of the State to protect human beings against human rights abuses by private persons and the obligation to fulfill human rights by means of positive legislative, administrative, judicial and practical measures necessary to ensure that the rights are implemented to the greatest extent possible.

(The author is State Counsel IV of Department of Justice of Philippine.)

HUMAN RIGHTS DEVELOPMENT IN URUGUAY

Luis Almagro
Uruguay

Ladies and gentlemen,

It is an honour for me to participate in this conference on human rights, an issue to which my country attaches great importance and that represents a leading axis of the internal and external policies of my government.

Except for brief but painful moments of its history, Uruguay has preserved a long tradition of respect for human rights and a notorious militancy for this cause at the international level.

The new Uruguayan government has wanted these principles to be part of a genuine state policy and to have expression in the daily lives of our citizens, as they are supposed to be traditionally.

We have undertaken, with adherence to the law and within the existing legal order, the difficult but necessary task of paying our dues in terms of violation of human rights that the military government who served between 1973 and 1985 had left unresolved.

But also, looking positively towards the future, we are committed to strengthening legislation and national organizations in the field of human rights, while we have promoted the spread of



international humanitarian law and the reinforcement of institutions that defend and effectively protect the observance of human rights at the international level and that prevent violation.

In this regard, and among other things, a bill for the creation of a "National Institution for Human Rights" has been presented in the National Parliament; it is equivalent to those that already exist in many countries and regions of the world. Our challenge was not to imitate models, but to create a truly national institution with a firm and strong institutional basis, which takes into account our needs and realities and which would be appropriate and effective in the observation and control of human rights in our country.

In addition, we have made new international commitments through the states accession to several regional and multilateral legal instruments in force.

For example, Uruguay signed the "*International Convention for the Protection of All Persons from Enforced Disappearance*." We did so with the conviction that this new international instrument will signify a great step forward in the progressive development of the international law of human rights, the right to truth and the fight against impunity.

Furthermore, our country collaborated actively in the negotiation of the "*Convention on the Rights of Persons with Disabilities*," adopted by consensus in December 2006, by the General Assembly of the United Nations and that came into force a few days ago.

Summarizing, Uruguay is one of the countries that have signed the broadest spectrum of conventions on human rights.

The indivisibility, interdependence and interrelatedness of human rights, as enshrined in the Vienna Declaration of 1993, are elementary principles at the time of designing national policies and it is with that comprehensive approach that my country understands and works for the promotion and protection of human rights.

However, due to time limit and the vastness of the topic I will focus on some areas that are of special importance for Uruguay:

Torture and ill-treatment

Torture and ill-treatment are aberrant practices that persist over time. The current administration makes every effort to incorporate training in human rights at all levels of the State, especially those related to the administration of justice, police and the military.

Our country is one of the State Parties to the "*Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*," and is currently in the process of shaping the National Prevention Mechanism defined there, which in our view constitutes a further progress in this area.

Racism and discrimination

Racism, racial discrimination, xenophobia, religious intolerance and all forms of discrimination, are present in all our societies, under new and contemporary manifestations of hate. At a national level, we conduct an open dialogue with all members of civil society, in order to seek ways to morally redress these deplorable violations, originated in the past but perpetuated in our society.

According to the latest census data nearly 10% of the Uruguayan population is perceived as



of African descent. The fight against discrimination and disregard of this sector of the population has given its first fruits, now we have data and information showing the living conditions of this population, and more specific figures of discrimination and racism in environments such as work, education and health.

Combating racism, xenophobia and all forms of discrimination has been declared of National Interest by the government through the promulgation of a law that creates an Honorary Commission Against Discrimination that aims to propose national policies and concrete measures to prevent these scourges, including affirmative action, which targets mainly the education of boys and girls and which will contribute to shaping a society attempting to become more egalitarian.

At regional and international levels Uruguay is committed to the tasks of the Regional Conference "Santiago + 5," which will assess the level of implementation of the important commitments made in 2000 in our region and which actively works, within the framework of the Preparatory Committee that meets in Geneva, on the preparation for the Review Conference of the Declaration and Plan of Action of Durban which will take place next year and where we have great hopes for effective measures to combat discrimination in all its forms.

Gender

The present government gives highest priority to the issue of gender equality. Not only in the cabinet of President Vazquez are there several female ministers and deputy ministers in office but also a national plan of equal opportunity and social work has been recently launched to enable gender considerations to appear across all public policies and laws of Uruguay.

Children

Likewise, childhood is another priority for this Administration. Nationally, together with NGOs and UNICEF, we make efforts to adapt all practices and national legislation to the texts of the *United Nations Convention on the Rights of the Child and its Protocols on Child Prostitution and Pornography and Children in Armed Conflicts*, which are subject to the rule of law in Uruguay.

In this regard, we have recently adopted a new *Code for Children* and submitted a country report to the United Nations Committee on the Rights of the Child.

Regionally, we will continue to give our support to the work of the Inter-American Children Institute, with headquarters in Montevideo.

And at the international level, Uruguay once again led the negotiation of the Omnibus Resolution on Children Rights in conjunction with GRULAC countries and the EU both in Geneva and in New York.

Economic, social and cultural rights (ESCR)

Let me say that the Economic, Social and Cultural Rights, including the Right to Development, are part of the top priorities of the government, in all its policies and plans of action.

Uruguay is convinced that no matter how many efforts are made in the area of Civil and Political Rights, there will be no full enjoyment of human rights if we cannot create the conditions that ensure sustainable human development, with equity and social justice.



Let me stress once again that poverty is in itself a multiple and simultaneous violation of economic and social rights, that also, in most situations is transmitted and reproduced from generation to generation.

In addition to the various measures and reforms adopted at the national level in this field, Uruguay is proud of having culminated the work of the Working Group for the adoption of an *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*. The draft protocol will finally be studied by the Human Rights Council at its meeting in July with a view to its adoption and subsequent endorsement by the General Assembly of the United Nations thus strengthening the ESCR and correcting a historical inequity between those rights and civil and political rights.

Finally, regarding said Human Rights Council, Uruguay was among the most active participants in the negotiations which led to the creation of this body and its mechanisms. And we think it is also for these reasons that the members of the international community have placed their trust in our country and made it one of its first members.

Currently, Uruguay is one of the vice presidents of the Council for Latin America and the Caribbean, and our commitment is to work to make the Council advance qualitatively and make it tangible in the protection of human rights.

The Universal Periodic Review Mechanism, which is currently in its first meeting, is one of the most innovative and most important reforms of the human rights system. It is the result, to some extent, of a demand for this Council to provide a new approach to the consideration of the human rights situation, characterized by objectivity and impartiality and to generate confidence in its operational capabilities and high quality.

In it, we visualize an effective tool that will facilitate a thorough scrutiny of the situation in each country, based on a cooperative approach and objective sources of information and taking all necessary time and resources to carry it out.

Uruguay will submit to this mechanism in May next year and will soon begin national consultations. Violations of human rights are a global phenomenon. All States have - different but equally important - challenges ahead to ensure the fullest enjoyment of all human rights of all our inhabitants.

There will never be full observance of human rights in a world at war, with the markets of rich countries closed to the products of developing countries, nor in a world impoverished and suffering from AIDS.

Uruguay believes in multilateralism, and in the actions that the international community can carry out to protect and promote human rights in all parts of the world, with emphasis on the feelings of victims, the excluded, the poor, migrants, refugees, the tortured, the victims of war, terrorism and domestic violence, of women, children, minorities and all those who suffer some form of persecution, discrimination and poverty.

Thank you!

(The author is Ambassador of Embassy of Uruguay to China.)



DEVELOPMENT AND HUMAN RIGHTS

Hesti Armiwulan
Indonesia

I. Conception and dynamics of human rights

Human rights in international context have been adopted for 40 years as from the issuance of the *Universal Declaration of Human Rights* on December 10, 1948. Human rights, in the course of its implementation, have achieved a significant growth. In human rights terminology, there are at least “three generations of human rights” as developed by Karel Vasak, a French legal expert. These include the first generation, namely civil and political rights, the second generation viz., economic, social and cultural rights and the third generation viz., solidarity rights which also include the rights for peace and development.

The historical development of these three generations of human rights has shown how the State Members of the United Nations have responded to the human rights. The civil and political rights are called as the first generation which is considered to have obviously represented the interests of Western Countries and European countries as indicated by their domination in signifying the freedom and individual rights. It is written in some literatures that the efforts to promote the civil and political rights have been greatly affected by the administrations in the U.K., the United States and France, mainly deriving from reformatory theories introduced at the beginning of the 17th and 18th centuries in connection with the revolutions emerging in these three countries. It is acknowledged that the existence of the first generation of human rights has been affected by the liberal-individualistic political philosophy and the laissez-faire economic and social doctrine. In this generation, human rights have been placed on the negative human rights terminology (“free from”), instead of the positive one (“the rights of”)¹. In other words, the civil and political rights require a limitation of the government intervention. These rights are intended to protect individuals from any abuse of power. For the fulfillment of the civil and political rights, the authorities of the government need to be limited with a view that the intervention by the government in the individual life of its people shall not exceed the specified limitation. The civil and political rights are the rights which emphasize on such individual freedoms as the recognition of the integrity principle and the basic needs of human being. These rights form an integral part of the efforts to promote a democratic life. The domination or victory of the individualism theory can be seen in the *Universal Declaration of Human Rights* which mostly provides for the civil and political rights as found in Article 2 and Article 21.

¹ Claude, Richard Pierre dan Burns H. Weston, eds. **Human Rights in the World Community, Issues and Action**. Philadelphia: University of Pennsylvania Press, 1992, page 18



In the subsequent growth, communistic and socialistic countries as supported by the underdeveloped or developing countries have demanded an equal treatment on their economical, social and cultural rights. This demand is a response to the practices which cause violations and mistreatment deriving from the development of capitalism in which the conception of individual freedom gives room to tolerance, and even to legitimacy for the exploitation of labours and the colonized community. As a result, the labours, poor people and minority group have been marginalized. The concept on the prosperous state as introduced through the revolutionary struggle and welfare-oriented movements in the 19th century indicate that the political rights have, in fact, been insufficient to create happiness. To the poor people, the civil and political rights are not so important and noteworthy for them. The fulfillment of the economical and social rights such as the rights for the working opportunity, housing, health and education are more important for their survival. In this context, significant intervention or role of the government is required in order that their economical, social and cultural rights can be fulfilled. Therefore, the government needs to do their best in exploring any potency of all natural resources and managing its economy in order that a condition which is conducive to the fulfillment of the economical, social and cultural rights can be established. The formulation of the economical, social and cultural rights as above stated have received supports from underdeveloped countries as the duty to improve the welfare of their people has become their first priority. Even, it is said that the enjoyment of the economical rights represents a guarantee for the enjoyment of the political rights.² Therefore, the economical, social and cultural rights have been called as the second generation of human rights.

In the context of the development which becomes the priority of the underdeveloped countries, it is assumed that the human rights which greatly accommodate the individual rights will cause the developing countries unable to carry out the development. As it is understood that the first and second generations of human rights represent an excessive recognition and protection of individual rights, the underdeveloped countries have therefore exerted their best endeavours in inserting such new ideas as collective rights in connection with the interests of the state, community or families into the part of the terminology of human rights. The struggle for the recognition of the collective rights can be identified in the *Covenant on Civil and Political Rights* and *Covenant on Economic, Social and Cultural Rights* in the Article 1, namely the Collective Rights to determine their own fate. It means that every nation is free to determine its political status and may freely catch up advancement in economic, social and cultural sectors.³ Due to the facts that the dynamics of the human rights which tend to promote the individual rights, the underdeveloped and developing countries demand for the recognition of the collective rights. The peak of such efforts is the launching of the third generation of human rights, namely the right to development in the 1980s. The recognition of the collective rights becomes so apparent following the adoption of the *Declaration on the Rights of People to Peace* as resolved in 1984

2 Preamble, "African (Banjul) Charter on Human and Peoples' Rights"

3 Wade, Robert, **Governing The Market** (Princeton University Press; 1991) as excerpted by the Economist, 29 June 1991 and also excerpted by Miriam Budiardjo in her books entitled *Dasar-Dasar Ilmu Politik*, Jakarta: Pt. Gramedia Pustaka Utama, 2008, page: 233.

and the *Declaration on the Right to Development* agreed in 1986. The Right to Development includes the equalization of rights to or opportunity for advancement for all people, including the right of every person who lives as an integral part of a country. In other words, the right to development comprises the right to participate in the development process and enjoy the results of the development and economic, social, and cultural growth, education, health, employment opportunity, income distribution and many others.

The strengthened position of the underdeveloped and developing countries in signifying the concept of human rights on the recognition of the collective right has become more acceptable in international relation context. It is evidenced by the *Vienna Declaration and Programme of Action* adopted in 1993 which among others recognizes the idea on the Cultural Relativism which states that all cultures shall have equal right and dignity to live and such right shall be respected. In other words, in spite that human rights are universal, the difference in respect of the history, culture, values or religion is still recognized in its implementation.

In current context, understanding human rights, especially viewed from the Western countries perspective, it is better that our minds is not to be preoccupied by the idea on the political right and excessively criticize countries which are still unable to implement it. In signifying human rights, it is necessary to consider some factors as follows:

- a. The importance of the equality of the political and economical right as also reflected in its implementation, for example, the cooperation between Western countries and non-Western countries shall be conducted on the basis of equability, instead of certain conditions.
- b. The importance of the community, in addition to the individual. It means that in addition to the individual rights, there are also collective rights such as the right to development.
- c. The importance of the right to be followed by the obligation in order that there is a balance between the individual right and obligation among the individuals and to the people in which they live.
- d. The importance of considering the uniqueness of each country will give different colours in the process of implementation of human rights, such as the implementation of the right to education in Indonesia will be different from that in the Netherlands.⁴

II. Development problems in human rights perspective

As described in the previous chapter that the right to development is a part of the human rights. Principally, every country shall freely leave any underdevelopment behind them and catch up with the advancement through development and efforts. The development is often implemented with the reason to boost the economic growth. It is in line with the definition of the development, viz. as all planned efforts to actualize the change toward a new and more valuable status.⁵ The problem is when any country is willing to carry out the development with an objective to

4 Budiardjo, Miriam, *Dasar-Dasar Ilmu Politik*, Jakarta: PT.Gramedia Pustaka Utama, 2008, page 237

5 Wignjosoebroto, Soetandyo, *Hukum: Paradigma, Metode dan Dinamika Masalahnya*, Jakarta: Lembaga Studi dan Advokasi Masyarakat (ELSAM) dengan Perkumpulan untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologi (HUMA), 2002, page 566



improve the welfare of its people, at other side, the country is also willing to assure that the development can run well, good security and stability are needed. For this reason, a country needs an established administration. It is no surprise if some underdeveloped countries are governed by authoritative regimes with dominant and strong executive in order that the country can leave the economic underdevelopment behind. The authoritative regime is also indicated by more established traditional values such as the excessive dependency on the leader. In such a condition, the development is solely oriented to and more focused on the achievement of its outputs, so the regime will take the top-down and elitism policies. If we look at some administrations at some developing countries, it is true that we find some countries with authoritative governments having successfully achieved significant market-oriented economic growth. In addition, it shall be recognized that, at certain phase, a new demand from some of its people especially of the middle or marginalized class community for a more democratic and just life for all arise. On this matter, V.W. Ruttan has the following idea:

In the beginning process of development, there is a clear relation between authoritative political organization and rapid economic growth. However, highly centralized political system will become a problem to the economic growth for the country to move forward to a middle income status.⁶

The development process which is solely signified as an economic process with economic growth will result in many weaknesses as it will ignore a fair distribution of income, thereby producing a significant gap between the poor and the rich. It is the beginning step of the calamity for a majority of poor people as they do have no access to the natural resources, education, health and other public services. Such kind of development process will gradually cause a variety of violations of human rights, not only the economical, social and cultural rights but also the civil and political rights. As regard to this matter, Lee Kuan Yew said: "If industrial advancement reaches a certain phase, and there are educated workers, urban community, managers and engineers, an adaptation is therefore needed. If the authoritative system continues, some obstacles will appear. Representative system shall be established. Then, there will be the active seeds of democracy from the grass root."⁷

III. Relation of human rights to development and human development

The adverse impacts of development which is solely based upon the economic growth have produced an idea to revise the definition of development. New idea on development has proposed the definition of development centred on the human beings. Even international community has agreed to the right to development through a declaration which expressly states that human is the centre of the development. In the perspective of human rights, the development shall be signified as "to be centred on the human, participation and concerns on the environment."⁸

6 Vernon. W. Ruttan, **"What Happened to Economic Development" in the Economic Development and Cultural Change**, Chicago: University of Chicago, 1991, page 265-292

7 Budiardjo, Miriam, **Op Cit**, hal 236

8 What is Development from a Human Rights Perspective, Rights-based Approaches, Human Rights in Development, <http://www.unhchr.ch/development/approaches-02.html>, 16 December 2005, paragraph 1

Although economic growth remains to be pursued, the process of development shall also assure fair distribution, improvement of human capabilities and be addressed to increase the number of alternatives available for them.⁹

This idea proposes a correction to the relation between human rights and development. Here, the development and human rights are inter-related, instead of being in the opposition one another. There shall be no dichotomy between the economic, social and cultural rights and the civil and political rights. Even the *Vienna Declaration and Programme of Action* affirms the relation between human rights and development, in this case, in respect of the democracy: “[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”¹⁰

The confirmation on the interrelation between human rights and development also emphasizes that there shall be no trade-off in the process of development, in which human rights are sacrificed for the development. In its course of development, the rights-based approach to development arises. In this matter, the process of development shall basically integrate the norms, standards and instruments of human rights into the plan, policy and process of development.¹¹ Human-rights-based development shall contain such fundamental elements as expressed statement on the interrelation between human rights and development, guaranteed accountability, empowering process, public participation and due attention to the specific group without any discrimination.¹² The development shall be seen as a comprehensive economic, social, cultural and political process. The object of the development is a sustainable growth for all people and individuals based upon their free, active and significant participation in the process of development. The human rights-based approach to development is therefore integrated and multi-discipline one.¹³

Further, the commitment of the international community on carrying out the human rights-based development is actualized in the *Millennium Development Goals* as launched in 2000.

Human development also regards economic, social and cultural rights and civil and political rights are equally important. The excerpt of the *Human Development Report 2000* states that “Conception on sufficient human development cannot deny the importance of the political and democratic freedoms. Therefore, these freedoms are very essential in improving the capabilities of the poor people.”¹⁴ The analysis taken from the *Human Development Report 2000* also states that these two kinds of rights are inter-related and reinforcing which can produce a synergy for the poor to enjoy their rights, improve their capabilities as well as apart them from poverty. Secondly,

⁹ *ibid.*

¹⁰ Vienna Declaration and Programme of Action, paragraph 8

¹¹ What is a Rights-Based Approach to Development, Rights-Based Approach, Human Rights in Development, <http://www.unhcr.ch/development/approaches-04.html>, 16 December 2005, paragraph 2

¹² *ibid.*, paragraph 3

¹³ *Ibid.*, paragraph 2

¹⁴ Human Development Report 2000, page 20. Lihat juga Alston, Philip, “A Human Rights Perspective on the Millennium Development Goals: Paper Prepared as a Contribution on the Work of the Millennium Project Task Force on Poverty and Economic Development”, <http://www.ohchr.org/english/issues/millennium-development/docs/alston.doc>, (16 March 2006) p. 24-25



better standard of living, good nutrition, health and economic and other social achievements are not solely the objectives of the development, but, is in essence the human rights which is an integral part of the freedom and human dignity.¹⁵

The definition of human rights to development is in line with the sustainable human development. It is a process to increase the number of alternatives available to all people which place human as the means and end of the development. The sustainable human development is aimed at eliminating the poverty, promoting the dignity and human rights, providing equal opportunity for all through good government, and therefore, the process of sustainable development shall promote the realization of human rights.¹⁶ The sustainable human development and human rights are interdependent and mutual beneficial, interconnected, complementary and multidimensional as well.¹⁷

Human rights-based development is therefore expected to be able to return the development to its essential objective which is rooted on the humanity values.

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THE RIGHT TO DEVELOPMENT: ORIGINS, CHARACTERISTICS AND LEGALITY

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Development is a process of positive and increasing transformation of every phenomenon in nature as well as in society. Socially, development can be approached from different points of view including considering it as a process of expanding the freedom right (Amartya Sen¹⁸). By this way of approaching, the measurement tool of development in a society does not only limit at the indexes in economics, social development or the progresses in science and technology but also at the capability to ensure the rights and basic freedom of each individual.

Nowadays, development is not only a demand or a policy but also it has been recognized as a right for every individual, community and nation worldwide.

Though being much discussed and having widely accepted reasoning bases, up to now many aspects of the right to development, especially the origin, legality and content, are still very much

¹⁵ Ibid, page 73. see also Alston, page 32

¹⁶ Integrating Human Rights with Sustainable Development, A UNDP Policy Document, UNDP, New York, January 1998, hal. 2

¹⁷ Ibid, hal. 2-3

¹⁸ Sen, Amartya. Development as Freedom, 1999

disputable among the researchers as well as the Governments.

Historical origin of the right to development

Historical development of the human rights reveals that human rights are an ever expanding and improving category in all contents, quantity and its own scope. Through different historical stages, human rights perception is now not only the personal demand aiming to fight against the interfering and abusing actions from the state, but also including the inquiries towards the state so that the state has to take initiative to participate positively and directly into the process of ensuring and implementing human rights.

The first Secretary General of the International Institute of Human Rights, Karel Vasak¹⁹ reckoned that human rights have gone through three development stages: civil and political rights are the rights of the first generation rights, socio-economic and cultural rights are the rights of the second generation rights then the third generation rights attaching with the demand on the mutual assisting obligations among the members in the world, which are the collective rights or solidarity rights such as rights of environment, rights to live in peace and the right to development. It is possible to consider that the third generation rights are the result of the joint-effort of the international community in order to overcome the obstacles in the implementation of the human rights in the first and the second generation rights.

Ideas on the right to development have been mentioned very early in international laws especially those on human rights. Article 55 of the UN Charter (1945) requires the member states to create conditions to improve living standard to ensure that every individual has a job and advanced conditions and development in socio-economics, solving the international problems in socio-economics, medical and other related issues as well as international cooperation in culture and education. In 1948, UN General Assembly passed the *Universal Declaration on Human Rights* which recognized: “every individual has the right to enjoy social order and international order in which the rights and freedom recognized in this Declaration can be fully implemented” (Article 28).

From the very first days of establishment, UN passed the *Universal Declaration of Human Rights* (1948). The spirit of the Declaration has been continuously implemented through following documents of the UN, some of which are important as: *International Covenant on Civil and Political Rights* (1966) and *International Covenant on Economic, Social and Cultural Rights*. The contents mentioned in the *Universal Declaration on Human Rights* and above said Covenants are basic legal bases for the development of the later *Declaration on the Right to Development*.

Since the early 1970s, the concept of the right to development has gained attention of the international community. In fact, the coming out of the right to development is closely related to the demand of the nations belonging to the third world on the establishment of a new world economic order on equality and fairness in the relationship of trade, finance and technical science. In 1977, the UN Human Rights Committee passed a Resolution calling for organizing

19 Vasak, Karel. “Human rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human rights”, *UNESCO Courier* 30:11, 1977



of a research on the international aspects of the right to development. In 1981, this Committee established a Working Group of the Governmental Experts on the right to development. In 1986, *Declaration on the Right to Development* was passed. This Declaration, though not being an international legal document, also touched quite comprehensively the basic contents of the right to development by which this right is recognized and widely used in international forum.

Through the conclusion and reports of the UN Human Rights Committee, the international forums as Conference on Environment and Development in 1992, International Conference on the Population and Development in 1994, Summit Conference on the Social Development in 1995 and the International Conference on Women in 1995 had been discussing more on the right to development. Especially, the *Declaration of the Universal Conference on Human Rights* in 1993 (*Vienna Declaration and Programme of Action*) once again determined the right to development is a universal and immutable right and a component of the basic human rights.

Basic characteristics of the right to development

The characteristics of this right have been reflected quite in details in the Declaration on the Right to Development as well as in the reports and researches of the UN and the experts in this field. Arjun Sengupta²⁰, the scholar studying the right to development, stated in his studies that the right to development is the right to a specific development stage in which “all the human rights and basic freedom rights are fully implemented.”

The right to development includes three basic issues: the importance of the participation (into the development), essential needs and social equality to eliminate hunger and poverty and distribution equality and the national policies and international cooperation in order to promote the right to development.

Based on the studies of the international scholars as well as the documents of the UN on the right to development especially the *Declaration on the Right to Development*, it is possible to determine some of the basic characteristics of the right to development as follows:

The right to development is the right that the human cannot separate or transfer but the right that every individual, every nation is entitled to participate in, contribute to and enjoy. Ensuring the right to development does not only stop at satisfying a group of rights and certain freedom but also have to be implemented in parallel with all human rights recognized by the law and international community. Also by this approach, the implementation of certain human rights must ensure that it will not violate any other rights or freedom. This is a representation of the inseparable or inalienable characteristics - common characteristics of all human rights including the right to development.

The right to development is the right to actively and freely participate into the development process. *Declaration on the Right to Development* many times emphasized on the importance of the participation. Article 2 of this document specifies “The human person is the central subject of development and should be the active participant and beneficiary of the right to development.” and hence entitled to participate in and benefit from the socio-economic, cultural and political

20 Sengupta, Arjun. The Right to Development as a Human right, 2000

development. Each individual when participating into the development process does not only play his active role but also be responsible for the common development of the community.

The right to development is both personal and collective rights. Being a personal right, the right to development is the generalized rights, directly relating with the human rights recognized in the fields of civil, politics, socio-economics and culture. Implementing the right to development of the individual is the base for implementing other human rights. Being collective rights, the right to development is closely related to the self-determined rights of the nations in the sovereignty implementation of the natural resources. As such, generally, the right to development not only mentions the responsibility of the state in the implementation of the rights for the individual, but also implies the benefits of the nations in the international relations.

Accessing the human rights towards the development issues requires each state to be responsible and obligatory in promoting, ensuring and implementing of the rights. International law on the human rights affirms that responsibility of implementing the human rights belongs to the state. On such spirit, *Declaration on the Right to Development* and *Vienna Declaration* continued to emphasize the responsibilities among the nations in the implementation of the right to development at the national and international levels at the same time considering international cooperation and assistance as national responsibility as well as an effective method to eliminate any obstacle in the process of ensuring the right to development.

At international level, international cooperation and assistance is an extremely important content of the right to development. International cooperation and assistance first and foremost, is “to ensure the development and eliminate the obstacles to development” for the nations. The emphasis of the responsibility of international cooperation and assistance is an effort to move towards the elimination of the inequality among the nations, which has long been considered as a direct obstacle of the realism of the right to development. Similarly to the national level, responsibility in international cooperation and assistance aims to establish the international development policy on which the nations, especially the developing nations have chance to integrate and participate more into the development of the entire humankind.

The legality of the right to development

Up to now the legality of the right to development is still a controversial issue. Can the right to development in particular and collective rights in general be recognized as legal rights? Is the right to development a human right? Is it personal or collective rights? Those questions though being mentioned by international scholars, however, do not really receive consensus answers yet.

Regarding the legality of the right to development, up to now there are two basic concepts: supporting/opposing the right to development as human rights. The difference originates from the desire to have equal opportunity when participating into the development process of the nations belonging to the third world and the avoidance of financial responsibilities as well as other responsibilities of the developed countries.

The opposing viewpoint on what does not consider the right to development as human rights is based on the argument that the right to development does not have moral base and is not a legal right but merely a political commitment. This affirmation prompts from some of following arguments:



Firstly, the right to development in nature is in the connotation of the self-determined rights. Therefore, if this right exists, it will only be individual rights or group rights within a nation rather than group rights or national rights among the countries. Supporting this viewpoint are the people who support the ideas that collective rights in general and the right to development in particular are the ambiguous rights and that the only group of rights that need special attention are the individual rights in the civil and political field as the right to pursue life, right to freedom, right not to be beaten, tortured. Under this viewpoint, development should be considered as a goal rather than a right.

Secondly, the right to development can be considered as a concept with protective and programmatic characteristics rather than human rights because this right does not have a clear subject. Only individual is the subject of the human rights, State and nation as mentioned in the right to development, cannot be the subject of this right.

Thirdly, rights always go with responsibilities. Once the rights are recognized, there are corresponding responsibilities to respect, ensure and implement the rights. Under international law, such responsibilities must be specified by legal framework. That means rights must be determined or recognized by a law or a covenant or at least be recognized by a court according to customary law. Therefore, the right to development may not be legal rights because it has only been recognized by a regional document, Africa Charter.

Contrary to the above arguments, the people supporting the right to development consider this as a basic right for implementing the development targets in such fields as civil, politics, economics, society and culture.

First: international law is developing and transforming in a way of supporting the recognition of the collective rights including the right to development. Under this approach, human rights do not only show the relation between individual and state, but also show the socio-economical and political relations at the international level. The right to development belongs to this scope of relations. It is the collection of the socio-economic and cultural rights of the individuals and it is considered as the economic element of the self-determined rights.

Second: supervision mechanism of the right to development implementation can still be established without necessarily waiting for a legal bound document because its implementation is normally put in an overall package of the rights which have been recognized in the international covenants. The current activities as the coming out of the Open Working Group and Independent Experts as well as the participation of the State, the Non-Governmental Organizations and Civil Society Organization can all be considered as the active contribution to implement these rights.

Both of the basic views above apparently bear the reasonable and unreasonable points. The right to development, though not recognized as a legal rights in light of traditional legality and international law on human rights, can create exceptions because the human rights themselves do not only carry the legal values but also moral, philosophical and political meaning. Under this reason, the right to development may not be the legal right but can still be a human right. Arjun Sengupta states that “human rights are based on the moral norms prompting from the virtues and as such there will be many ways to represent depending on the acceptance of the morality.” Also

he stated the right to development could become international customary law.

International law reality shows that the coding of the human rights is a process. Many international covenants on human rights before being passed were prompted from the declaration and announcement. For example, *International Declaration on the Human Right* is the prerequisite document for the two Covenants in 1966 on the socio-economic and cultural rights on the civil and political rights. *Declaration on the Elimination of Discrimination Against Women* in 1967 is the base for the *Covenant on the Elimination of the Discrimination against Women* in 1979. Therefore, we have reasons to believe that in future, *Declaration on the Right to Development* will develop into a legal document.

In today's era, respecting, ensuring and performing well the right to development in the aspect of human rights play an important role in bringing the equality and happiness for every individual, nation and country in the world especially the developing countries. The cooperation and assistance of the developed countries towards the developing countries is recognized as a political, moral and legal commitment and will be a positive contribution into the cause of hunger, poverty and inequality elimination in the society as well as the establishment, maintenance and promoting of international peace and security.

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THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN DEVELOPMENT

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Introduction

The right to development is a fundamental human rights, rooted in the provisions of *the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights*.

The Declaration on the Right to Development made the right explicit, stating that the right to development is an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development.

At a time when most countries, especially Africa are struggling to develop, and with the gradual assimilation of human rights principles, achieving development for all people in these



countries requires action and commitment from the major players in society, including the three arms of government, various state institutions and NGOs.

Directly and indirectly, NHRIs have roles to play in the promotion of sustainable human development at the domestic and international levels. This paper seeks to explore the roles played by the NHRIs and the challenges that must be removed if they are to play the roles effectively.

Towards a definition for development

The definition of development has changed over the past decades with economic, political, and social trends. But globalization has also introduced considerations about the impact of growth and socio-economic change upon the physical environment.

The rights-based definition of development in article 1 of the *Declaration on the Right to Development* sees it as a comprehensive economic, social, cultural and political process. Its object is the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the resulting benefits.

The UN has decreed that any definition of development must include a notion of sustainability, because human development is in danger of being unsustainable unless there is a redistribution of the present resources. Development therefore is not about human development or sustainable development alone, but about sustainable human development in which the distribution of resources in the present and the future is affected.

Sustainable human development, therefore, is improving the income, education and health of all segments of the population including women, ethnic and religious minorities and the poor. Sustainable human development must not only be economically viable, but also socially just, and environmentally sustainable.

In recent times, the UN system has agreed on a shared definition of a “human rights-based approach to development”. This approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.

Human rights and development: What link?

In the human rights perspective, the World Bank believes that creating the conditions for the attainment of human rights is a central and irreducible goal of development, by placing the dignity of every human being-especially the poorest-at the very foundation of its approach to development.

According to the human development report, human rights and human development share a common vision and a common purpose - to secure, for every human being, freedom, well-being and dignity. Human rights are considered as an intrinsic part of development, and development is a means of realizing human rights.

How are NHRIs implicated?

The important role that NHRIs, when truly independent and effective, can play at the national level is undeniable. For some time now, the area of NHRIs has undergone some fundamental changes. The OHCHR assigns high priority to the establishment and strengthening of NHRIs and

today, there are many of such institutions worldwide.

Given the independence that NHRIs enjoy, they are supposed to be included in the broad consultation process at the national level organised by the State, for putting in place certain institutions and adopting and implementing policies that affect the development of the state.

The NHRI in Cameroon is called the National Commission on Human Rights and Freedoms. The Law No. 2004/016 of 22 July 2004 setting up this NHRI closely follows the Paris Principles and allows it to play various roles at the domestic and international levels towards fostering sustainable human development. From the experience of the NHRI in Cameroon, it is clear that NHRIs play collective roles in regional and universal fora through advocacy and monitoring for the application of international conventions and treaties, resolutions and recommendations, norms and standards, goals and programs. At the domestic level, they work in partnership with government departments and civil society organizations for the promotion of development.

a) Occupying such privileged positions, they represent an effective link between governments and individuals. In this light, they can advise the government on the development and implementation of economic policies to ensure that the economic, social and cultural rights of people are not adversely affected by economic policies, e.g. structural adjustment programmes and other aspects of economic management.

b) They can be an integral part of a national human rights protection system, alongside an independent judiciary, a properly functioning administration of justice, parliament and a dynamic civil society. Such institutions are the foundations upon which solid national human rights and rule of law-oriented systems can be built.

c) NHRIs can have a significant impact on human rights capacity-building policies at the national level, for instance by contributing to legislative reform, whereby national laws are harmonized with international human rights instruments signed and ratified by the state.

d) NHRIs can be instrumental in the reform and strengthening of judicial and security institutions, including the police and prison administrations, and all sectors of the rule of law; ensuring that the administration of justice conforms to human rights standards.

e) NHRIs can monitor the implementation and efficiency of the normative and institutional framework for the development of states. This includes obligations and commitments at the national levels (for example commitments to improve on the country's laws, constitution).

f) NHRIs can be proactive in seeking to build up projects and seek funding for such projects that can enhance the development of citizens;

g) NHRIs could advocate the ratification of the International instruments linked to development and monitor their translation into domestic laws and subsequent implementation.

h) NHRIs should work towards facilitating public awareness of government policies relating to economic, social and cultural rights and encourage the involvement of various sectors of society in the formulation, implementation and review of relevant policies.

Challenges

Despite the wide mandate given to NHRIs, they often face challenges in their role to promote development in their states. As long as states remain the principal creators and suppliers



to NHRIs, support for NHRIs presents both opportunities and challenges for its role in improving development.

NHRIs are not strengthened enough by states i.e. granting them adequate power, authority and finance to ensure their compliance with the Paris Principles, which if met will greatly enhance development.

Broad-based consultations with these institutions are usually few, given the number of laws, policies, action plans etc. that are developed in states.

Feedback on some of the recommendations and advice is usually missing, or slow to come by.

Because of these limited resources, NHRIs may lack the skills and expertise to ensure respect for individual and collective rights.

Conclusion

The role of NHRIs in development is very eminent, especially at this time when conflicts resulting from unstable democracies destabilize many states, causing them to regress. Such conflicts are so common in Africa that most of the states have been deprived of human as well as material resources. In such a situation, development is far fetched.

If NHRIs recognise their roles and assume these roles by participating in the process of consultation; giving advice; and raising awareness, a lot could be done in the struggle for development.

Since good laws exist but poor practice prevails, it is a challenge and an obligation to NHRIs to be constructively engaged with government departments and civil society organizations in the promotion of sustainable development. They must possess the independence, information and strength to challenge the state and its institutions as well as non-state actors.

(The author is Chairman of the National Commission on Human Rights and Freedoms of Cameroon.)

CHINA'S HOUSING SECURITY SYSTEM AND HOUSING RIGHTS SECURITY FOR CITIZENS

Chang Jian and Guo Wei
China

The right to adequate housing is a kind of basic human rights. During the transition to the market economy system in China, it is a new issue for the Chinese Government to ensure everyone, particularly the families with the low-to-medium incomes, has the access to adequate housing by increasing the supply of houses. Housing is a basic right of people, and everyone in China will enjoy the adequate housing, said Wang Guangtao, the Chinese minister of construction. The Chinese Government has gradually established and improved the multilevel housing security

system according to the actual national situations, and made every effort to ensure that all the citizens have an access to the adequate housing.

1. Access to adequate housing is a kind of basic human rights

Housing is one of the most fundamental physiological needs of people, and is related to whether people can live a life with dignity. Mayra Gómez and Bret Thiele, who work at the Geneva-based Center on Housing Rights and Evictions, point out that the access to adequate housing directly influences other human rights in the article “Housing Rights are Human Rights.” “Without adequate housing, people will be difficult to secure and maintain their jobs, subject to threats to their health and restrictions on their education and more vulnerable to violent assault and disclosure of privacy, and the social relations will often become tense. The lack of affordable housings will leave people, particularly the poor population, into a dilemma, housing or food, housing or medical care, housing or clothing and so on.”²¹

The right to adequate housing is defined as one of the fundamental human rights by various international human rights documents, and is derived from the right to an adequate standard of living. The first sentence of Article 25 of the *Universal Declaration of Human Rights* expressly announces that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. The first sentence of Article 11 of the *International Covenant on Economic, Social and Cultural Rights* explicitly stipulates that the State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and that the State Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. Additionally, the United Nations passed the *Declaration on Social Progress and Development* in 1969, and the *Vancouver Declaration on Human Settlements* in 1976, both recognizing the right of everyone to adequate housing.

Miloon Kothari, the United Nations Special Rapporteur on the Right to Adequate Housing, defines the right to adequate housing as the right of every man, woman, youth and child to obtain and continuously own the secured housing and community enabling them to live with peace and dignity.”²² No. 4 general comment on the right to adequate housing passed by the Committee on Economic, Social and Cultural Rights in 1991 construed the first sentence of Article 11 of the *International Covenant on Economic, Social and Cultural Rights* in detail, and generalizes the contents of the right to adequate housing in seven aspects:

- 1) the legal security of tenure;
- 2) the availability of services, materials, facilities and infrastructure;

21 Mayra Gomez and Bret Thiele, Housing rights are human rights. <http://www.abanet.org/irr/hr/summer05/housing.html>.

22 Miloon Kothari, Adequate housing as a component of the rights to an adequate standard of living. E/Cn.4/2004/Add.1, 11 February 2004. <http://daccessdds.un.org/doc/UNDOC/GEN/G04/108/73/PDF/G0410873.pdf?OpenElement>.



- 3) the affordability;
- 4) the habitability;
- 5) the accessibility to the weak group;
- 6) the convenient location; and
- 7) the cultural adequacy.²³

Access to many human rights depends on the realization of the right to adequate housing, according to the analysis of some human rights institutions of the United Nations. These rights include the right to personal dignity, the right to non-discrimination, the right to an adequate standard of living, the right to choose residence freely, the right to freedom of speech and association, the right to personal safety, the right to no intrusion of personal privacy, family, residence and communication and so on. At the same time, the right to adequate, safe and secured housing is of significant influence on other rights of people, including the right to environmental hygiene and the right to a high standard of mental and physical health. The World Health Organization (WHO) announces that housing is the most important environmental factor associated with the conditions of disease, the high death rate and the high incidence rate.²⁴

2. New problems for housing of citizens in China

The housing issue is a global problem. About 100 million people on this planet are homeless, and roughly 1 billion people have very poor housing conditions, according to the information from the Center on Housing Rights and Evictions.²⁵ Even in America, one of the richest nations in the world, there are still 3.50 million homeless people, including 1.35 million children. Besides, the housing conditions of millions of people there are very terrible.²⁶

The shortage of housing used to be a serious problem that had worried the Chinese citizens, particularly urban citizens. In 1979 when the reform and opening up just started, the housing area per capita in China was only 3.6 square meters, or an equivalent of 7.2 square meters in building area, according to relevant statistical data. About 47.5% of urban residents were not accessible to adequate housing or houseless. In the 1980s, the steersman of the Chinese reform Deng Xiaoping proposed the reform of the urban housing system and the accelerated construction of urban houses. Afterwards, the establishment of the housing investing mechanism whereby the State, units and individuals reasonably share the housing cost stimulated the enthusiasms of units and individuals. Ever since the late 1990s, the housing conditions of Chinese residents have witnessed the substantial improvement, a result of the sale of public-owned houses to individuals, the start of the monetization reform of housing distribution as well as the establishment and continuous improvement of the housing provident fund system. The building area of the housing per capita had reached 27 square meters in terms of the registered population by 2007, marking that China

23 The right to adequate housing (Art.11(1)): 13/12/91.CESCR General comment 4, <http://www.fao.org/righttofood/kc/downloads/v1/docs/AH356.pdf>.

24 The Office of the High Commissioner of Human Rights Fact Sheet No.21, The Human Right to Adequate Housing, <http://www.unhchr.ch/html/menu6/2/fs21.htm>.

25 Homelessness and International Human rights, <http://www.gtcentre.unsw.edu.au/Resources/hlr/homelessnessAndInternationalHumanRights.asp>.

26 Mayra Gomez and Bret Thiele, Housing rights are human rights. <http://www.abanet.org/irr/hr/summer05/housing.html>.

has said goodbye to the time of insufficient housing.

However, the housing price has kept rising together with the prosperity of the real estate market. Many families with the medium-to-low incomes are unable to bear the high housing price, which has become a new social problem. About 10 million low-income families still suffered the inadequate housing conditions with the housing area per capita below 10 square meters, revealed Shen Jianzhong, head of the housing and real estate industry of the Ministry of Construction, in an interview with the media on September 18, 2007. How to guarantee the adequate housing of the families with medium-to-low incomes has become a challenge before the Chinese Government.

The Chinese Government attaches much importance to the security of the right to housing of citizens. "Housing is a basic right of people, and also a basic social security. It is impossible to solve the social fairness in the housing sector only through the market mechanism, according to the practice of the reform and exploration over the past decades," said Wang Guangtao, the Chinese Minister of Construction, at the National Construction Working Conference in January 2007. Based on the consideration of ensuring the housing right of citizens, the Chinese Government has been advancing the establishment of the housing security system at a faster pace to explore the housing security mode that is suitable for the actual situations in China.

Mr. Wang Guangtao reiterated that housing is a basic human rights and every citizen in China would have the access to adequate housing at the International Forum on Urban Development held on May 19, 2007. He pointed out that the real estate industry should focus on the development of common commodity houses for the general public, take full consideration of the residential living cost of the families with the medium-to-low incomes, and research the housing for the special staff that move from one region to another and rural workers that work in cities. The housing development should shift from the excessive pursuit of economic growth and the increase in the average housing area to the solution of social fairness and the livelihood of people. The real estate industry should focus on the development of the common commodity houses oriented at the general public. The role of the market mechanism must be adhered to while real estate industry provides the houses with a small area but intact functions, low cost but high quality, and low land use but beautiful environment by means of elaborate design and industrialized production.

3. Evolution of multilevel house security mode in China

To guarantee the housing right of the public, many nations have built the housing security system. The housing security can approximately be divided into three levels. The first level is the relief-nature security, which means that the government offers relief to the extremely impoverished group at the bottom of the society, and undertakes the part of the housing demand that fails to meet the minimum housing security standard in the society. The public house with low rent is a typical example of such security. The second level is the aid-nature security, which means that the government takes appropriate steps to enable the group with the relatively low purchasing power for housing and urgent need for housing improvement to obtain the housing in a timely manner. Interest subsidy, rent subsidy, rebate of personal income tax, mortgage guarantee, economically affordable houses, and affordable houses all fall into this category. The third level is the mutual security, which means that the government takes appropriate steps, including forcing



employers to provide subsidies for employees, reducing the personal income taxes and specifying the policy-related preferential interest, to improve the purchasing power of the middle class of the society and accordingly satisfy their reasonable housing demand in a timely manner. The housing provident fund and the housing savings bank (housing savings account) are typical of this form of security. China has learned the experience from various countries and at the same time kept exploring based on the actual situations of the nation in the process of the reform of the housing security system. The housing security system has evolved over a number of stages.

During the long-term planned economy in China, the urban housing security system was principally featured with the plan by the government and the allocation by the unit. Accompanying the transition from the planned economy to the market economy, the housing security system in China has also changed, and the allocation of houses as benefit came to an end. In 1994, the State Council first visualized the establishment of the multilevel housing provision system in the *Decisions of the State Council on Deepening the Reform of the Urban Housing System*, and set the target of the reform was to build a new housing system combining the market and security. On one hand, the system for the provision of the economically affordable houses oriented to the families with the medium-to-low incomes shall be established, and such houses are of the social security nature. On the other hand, the system for the provision of commodity houses shall be built to satisfy the housing demand of high-income families. At the same time, the housing provident fund system shall be established, the housing finance and insurance shall be developed, and the housing credit system for both policy and commercial purposes shall be constituted.

In 1998, the State Council further put forward the three-level housing provision mode in the *Circular of the State Council on Further Deepening the Urban Housing System Reform and Accelerating Housing Construction*. The three levels are as follows: The families with the lowest incomes rent the low-rent housing provided by the government or the unit, the families with the medium-to-low incomes buy the economically affordable housing, and other families with high incomes buy and rent commodity houses at the market price. The economically affordable housing plays a leading role in the housing provision under the three-level housing provision system.

In May 2006, the Ministry of Construction reviewed and researched China's housing security system together with relevant policy research institutes to overcome the shortcomings of the economically affordable housing system, and reached a final conclusion that China's housing security system needed an adjustment. The concrete operating method is to further segment the groups with the medium-to-low incomes, allow the coexistence of the low-rent housing, the economically affordable housing and the commodity housing at restricted price, and provide the housing security product at different levels for different groups.

With the adjustment of the housing security system, the construction of the low-rent housing has gradually developed into the focus of China's housing security system. In October 2006, the Chinese Government required to broaden the fund raising sources and accelerate the construction of the low-rent housing in the *Decisions by the Central Committee of the CPC on Some Major Issues in Building a Harmonious Socialist Society*. According to the Decisions, the Ministry of Construction circulated the information about the construction of the low-rent housing system in

different cities on February 13, 2007. According to the Ministry of Construction, 512, or 77.9%, of the 657 cities across the nation had established the low-rent housing system by the end of 2006. Of the 512 cities, 283, or 98.6%, of the 287 cities at the municipal level and above had built the low-rent housing system, and 229, or 61.9%, of the 370 county-level cities had set up the low-rent housing system. More than 90% of the cities in Provinces of Zhejiang, Guangdong, Hebei, Jiangxi, Gansu, Shaanxi, Jiangsu and Hubei had built the low-rent housing system. Various cities planned to offer a total of 150,000 low-rent houses, covering a combined area of 8.3756 million square meters, in the years of 2006 and 2007, such houses would be either newly built or sourced from acquired old houses. By the end of 2006, 53,000 low-rent houses have started construction or been acquired with a cumulative building area of 2.9368 million square meters. Up till the end of 2006, a total of 547,000 low-income families had benefited from the low-rent housing system and improved the housing conditions. In the meanwhile, the Ministry of Construction also pointed out that there were still some obvious problems associated with the construction of the low-rent housing system. These problems were mainly related to the further improvement of the system, funding, coverage, operating mechanism and construction progress with respect to the low-rent housing.

To solve the problems, Premier Wen Jiabao chaired the executive meeting of the State Council on August 1, 2007, and the meeting discussed the *Certain Opinions of the State Council on Solving the Housing Difficulty of Urban Low-income Families*. *The Opinions* holds that the housing conditions of urban residents have been greatly bettered due to the rapid development of the urban housing construction as of the reform. However, the construction of the urban low-rent housing system still remains backward, and part of the urban low-income families still has housing difficulty. The solution to the housing difficulty of urban low-income families shall be made an important content of the housing construction and the reform of the housing system, and as an important responsibility of the government public services. Moreover, the policy system, the core of which is the low-rent housing system, shall be established and perfected at a faster pace to solve the housing difficulty of urban low-income families with multiple channels. It is worth noticing that the basic policy framework for the low-rent housing system put forward by *the Opinions* is to distribute the rent subsidy or provide low-rent houses for the lowest-income families with housing difficulty and the low-income families that are unable to buy the economically affordable houses. The policy framework has thus expanded the stipulation that the low-rent housing is only applicable to the lowest-income families under *the Circular of the State Council on Further Deepening the Urban Housing System Reform and Accelerating Housing Construction* issued in 1998 to the low-income families with housing difficulty.

The Opinions has come up with the specific requirements for the construction and allocation of low-rent houses. First, gradually expand the coverage of the low-rent housing system. By the end of 2007, all the cities having districts shall basically provide as much security as possible for the urban low-income families with housing difficulty that reach the standard for housing difficulty and apply for rent subsidy of low-rent housing, and by the end of 2008, all the counties shall basically provide the security for all the low-income families with housing difficulty. By



the end of the Eleventh Five-year Plan period, the coverage of the low-rent housing system shall be extended from the urban lowest-income families to the low-income families with housing difficulty, and by the end of 2008, the eastern regions and other regions having the conditions shall expand the coverage to the low-income families with housing difficulty. Second, expand the source of the low-rent housing through multiple channels. The provision of the low-rent housing shall be increased by means of new construction by government, acquisition, reconstruction and encouragement of social donations. The newly built low-rent housing will mainly be built in the residential communities of economically affordable houses and common commodity houses, and may also be built in a relatively concentrated way. Actively develop the house leasing market, and encourage real estate development enterprises to develop the medium and small housing types and lease them to the society. Last, ensure the funding source for the low-rent housing. The local fiscal departments shall include the low-rent housing security fund into the annual budget; the gains from the appreciation of the housing provident fund shall be fully used for the construction of the low-rent housing after the preparation of the provisions against loan risks and management expenses; at least 10% of the net proceeds from the transfer of lands shall be used as the low-rent housing security fund; the income from the low-rent housing shall be managed independently of the funding source, and be specially used for the maintenance and management of the low-rent housing; and the financial aids will be offered to the fiscally tight central and western regions in the forms of the budgeted investment subsidy of the central government and the special subsidizing fund for the low-rent housing security from the central government. It is also required in *the Opinions* to improve the residential conditions of other groups with housing difficulty in cities, to accelerate the reconstruction of the concentrated slum areas, to actively promote the comprehensive treatment of the old residential areas, and to better the residential conditions of farmer workers through various channels.

As to the economically affordable housing, *the Opinions* requires that the economically affordable houses shall be supplied to the urban low-income families with housing difficulty, and the target users of such houses shall be linked up with the target of the low-rent housing security; the building area shall be controlled at about 60 square meters; the buyer shall only own the limited property right, and shall not directly enter the market for sale within five years after the purchase; when it is indeed necessary to transfer the house, the house shall be bought back by the government in line with the original price, the depreciation, and the general price level; and in the case of the transfer five years after the purchase, the buyer shall pay a specified proportion of the difference between the price of the common commodity housing in the same area and the price of the economically affordable housing to the government as the profit from land.

When it comes to the construction of commodity houses, *the Opinions* asks to focus on the development of common commodity houses with small and medium housing type and medium and low prices to boost the effective housing supply. As to a housing development project that is newly approved and started in a city, the area combined of the houses with an individual area of below 90 square meters shall be at least 70% of the total construction area of the development project. The annual supply of land used for the construction of the low-rent housing, the

economically affordable housing and the common commodity housing of the small and medium housing type at the medium-to-low price shall not be lower than 70% of the total supply of land for residential use.

China still remains at the stage of exploring the housing security system continuously, still has a number of problems in the construction, allocation and transfer of the economically affordable housing, the price-limited housing and the low-rent housing, and needs to keep improving the construction and actual operation of the system. However, the Chinese Government has, in general, demonstrated that it is clearly conscious about and highly responsible for the housing right of its citizens with its vigorous efforts to explore the housing security system. And the right of everyone to adequate housing, an ideal for the harmonious society, is becoming an objective for the government and the whole society to realize.

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DEVELOPMENT AND HUMAN RIGHTS

Solongo Daramjav
Mongolia

The human rights and development processes are linked to each other by multilateral relations. The development is based on concepts of human rights and freedoms of human beings; but on the other hand, the development itself being a fundamental basis promotes and protects human rights.

Application and interaction between human rights and development processes have been clearly defined in the UN *Declaration on the Rights to Development, the Human Rights and Sustainable Development* and other important documents.

In the *Declaration on the Rights to Development* the development was defined as “development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits.”

Development issues are characterized by their complexity or have multi aspects in which objectives and expected outcomes, their impacts are to be considered from each angle. Especially in recent years there is a trend to determine, implement and evaluate development policies in consideration of basic principles and norms of human rights which have become as an integral part of activities of UN, its specialized agencies, government and non government organizations as well as development programs.



Development tendency based on the rights is a concept development process of human beings suited to international standards of the human rights. That means, the definition “Development tendency based on the rights” is to include principles, norms and standards of international human rights into activity policy, planning and processes of development.

According to international legal documents on human rights state and government are obliged to respect human rights and freedoms, promote and protect human rights, as well as to provide the vulnerable and the poor who are in risk or danger with sustainable development of human rights. State should co-operate with a view to promoting, encouraging and protection the rights of minority, peaceful co-existence of nations. Meanwhile, an equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, social and cultural rights, respecting political pluralism.

Mongolia as a member of the UN has joined over 40 international treaties and makes efforts to implement provisions of relevant treaties on human rights and freedoms on the nationwide scale. In accordance with international treaties the National Human Rights Commission of Mongolia submits to UN recommendations and annual reports on human rights and freedoms in Mongolia.

In this era of informative society human rights, policy, culture and education have become a basic criterion of development. What is the dignity of human rights now? What kind of policies exists in order to implement? What are the results in private sector or in governmental level? Who are the main parties and responsibility - obligation - goals conscious? What is the public opinion, its participation? We are trying to identify and give an answer to these and many other human rights issues.

Mongolia and the human rights based development policy

How does Mongolia exercise the rights based development tendency in its policy and activity? There are several important concepts, programs and plans approved by the Mongolian state and being implemented.

Besides fundamental documents such as *Constitution of Mongolia* (1992), *Development Concept of Mongolia* (1996), *Program of Sustainable Development of Mongolian in XXI Century* (1998), *National Development Program of Mongolia* (2005), there are “Concepts of the National Security of Mongolia,” “Strategic Document on Economic Growth Promotion and Decrease of Poverty,” “Report on Millennium Development Goals of Mongolia,” “Concepts of Regional Development of Mongolia,” “Millennium Development Goals of Mongolia.” Development strategy of Mongolia is being reflected in the above documents from multi points like internal and foreign policy, economic growth, social equality, effective utilization of natural resources, development of human being and others.

In 2003 Mongolian parliament adopted “Program on Promotion of Human Rights in Mongolia.” It was defined in Art. 1.1.2.10 as an important objective “To develop standards of human rights environment to be followed by all business entities in Mongolia considering human rights environment into work place standards.”

The recent tendency of human rights despite of civil and political rights takes attention to concepts of economic, social and cultural rights. That means poverty and insufficient living

conditions are a basic violation of human rights and at the same time cause negative results. This point of view is commonly accepted.

At the beginning of a new millennium states during the UN summits adopted the historical *Millennium Declaration* that determined development goals for the next 15 years. Mongolia with great efforts in all level has been taking attention to the implementation of MDG's. In 2005 the Mongolian parliament considering the specifics of their own country adopted 9 MDG's of Mongolia towards increasing of education, health, living environment and condition, strengthening of democracy and justice, promotion of human rights and freedoms, gender equality, decrease of poverty. Besides of 8 common MDG's Mongolia adopted the 9th goal "to ensure human rights and develop democratic governance" which attracted attentions of the whole world.

Now the abovementioned MDG's are being implemented by medium term policy of Mongolian government and programs of donor countries and international organizations.

Implementation, ongoing process, conclusions and evaluations of MDG's of Mongolia are done in the first and second reports of 2003 and 2007. It was concluded that over 60% out of the adopted 22 goals has been already implemented and will all be accomplished by 2015. But there are still several challenges such as low income, tuberculosis, housing, gender political inequality, imbalance between male and female in higher education, forest planting, primary school attendance by children on which it is stated "some data goes backwards or improves slowly."

The Complex Policy of the National Development based on MDGs was developed under auspices of the President of Mongolia and adopted by the parliament. Economic and social goals underlined in this complex policy up to 2015 were closely connected to MDG's. The Complex Policy adopted by the parliament is not only an instructive policy, strategy or method, but will impact on the implementation of MDGs at suitable levels and in due time.

The Mongolian long term development priorities, policy, implementation strategies, expected outcomes between 2007-2015 and the promotion of MDG's, intensive economic development, transition to a knowledge based economy between 2016-2021 constitute the two major stages in implementing the Complex Policy. The Complex Policy has been detailed in short and medium terms development programs, plans, governmental action outlines in collaboration with international organizations and donor countries. These documents play a significant role in the promotion and protection of human rights in our country. For example, there are notable increase of participation in decision making by the civil society and obvious improvement of the status of women.

Active and free participation in any decision-making itself means the enjoying of rights based development by citizens. The level of participation by citizens is especially upgraded due to easier access to opinions of citizens in one hand and the high emphasis of the content of democracy and human rights in governance on the other. Right to expression, right to mass media and other important rights are promoted by Amnesty International, while domestic and international non-government organizations have made significant contributions to the country's further development and responding to big challenges. Citizens by their own initiative actively organize unions, associations and conferences, submit requisitions and petitions, provide information and data, initiate legal lobbying, appeal to court on wrong decisions and so on.



Another major achievement is the continuous improvement of women's status in society. Statistics show educational level of women has been increased by many times compared with a few decades before. A large number of women engage in privately owned business, management and economy, and enjoy equal medical and family welfares in work places.

Thus Mongolia, whose policy scope is in the direction of the rights based development tendency, will spare no effort in promoting human rights and related content.

(The author is Chief Commissioner of National Human Rights Commission of Mongolia.)

“RIGHTS TO DEVELOPMENT” AND SELECTION IN DEVELOPMENT MODE

Dong Zhenghua
China

Early this February, I went to Jinuo Mountain located in Jinghong County, Yunnan Province, the native place of the famous Pu'er tea. Although I was one day late for the magnificent Temaoke Festival, I did hear Zhuoba - the elder of the mountain village, beating the holy Sun Drum and see the youngsters singing and dancing under their totem pole while the seniors being carefree and content. The Jinuo people, who claim themselves to be “descendants of uncle,” just stepped out of primitive society in late 20th century. Yet their daily life is still mainly dependant on hunting and gathering. This ethnic group had only several thousand people when being identified as an independent minority ethnic group in 1979. Now the Jinuo people have their own town, town-level government and school, and own bright and spacious houses in their villages. In those tourists-receiving mountain villages with external investments, the Jinuo people even built up toilet rooms conforming to modern standards. Forming a sharp contrast with them is another group of people who recently entered the Jinuo mountain area from the other side of the border. The Jinuo people call these strangers “aboriginals” as they do not engage themselves in any agricultural work, eat raw flesh of birds and beasts and are extremely straitened materially and culturally. Some males even live in a nest-like shed high up in the branches of trees over a long period of time until some females who adore them poke them down with long poles. They will retire to trees after gormandizing and copulating. With the help of local government, Jinuo people provide food, clothes, cabins for them and get on well with them, in order to help them maintain subsistence as well as to prevent them from trampling over fields of tea or corn, or cutting down trees excessively to destroy the environment.

Watching the Jinuo people and these “aboriginals,” I could not help thinking of a debate several years ago.

The debated topic was whether the Greater Shangri-La needed modernization, towards which there were two contradicting opinions: one is that each way of living has its own standards for happiness and can produce happiness with the materials it can possess, therefore people should never draw such a conclusion that living in Shangri-La is not happy for it is not modern enough. It is a natural instinct of human beings that every individual hopes to live a comfortable and convenient life. However, if a country or a nation has no strength to resist the temptation, it only means that the country or nation no longer possesses a unique strong culture of its own. The other holds that culture shall never become the antithesis of man's natural instinct. The cultural orientation of "keeping heavenly principles while extinguishing human desires" is doomed to perish. No culture is like a pool of stagnant water. Cultures are on constant move, variation, and construction. Only under conditions of no exchange, could a tribal culture maintain its primitive style and features for thousands of years. Life styles and modes of production may spread around the world, but eventually they will merge with unique cultures of the respective countries. For instance, car is an important aspect of American culture and is being regarded in many countries as a symbol of modernization, but people of other countries will never turn into Americans simply because they drive cars like the Americans do.

My opinion seems to be eclectic: modern people have been fed up with the big cities piled up with reinforced concrete so that they are in search of pure realm, unprecedented region or a haven of peace. In this sense, Shangri-La, as well as other scenic or ethnic-group-inhabited areas that are in need of protection, is the product of modernization. Or better to say, its value is endowed by modern people. More and more people flow into the tourist attractions of primitive and natural scenery, which is a real menace that Shangri-La and Xishuangbanna are faced with. If one day these places were to be covered with life garbage, and the sky became low, clouds gray, mountains barren and water turbid, they would never be pure realms or havens of peace any longer. People talk about "Developmental Illusion," believing that living quality of hunter-gathers in the primitive society is not necessarily inferior to that of those in this modern and industrialized society, or the society of hunters and gathers is the society of abundance. Considering the increasingly tight living environment and intense living state, these views are reasonable. At the same time, I believe that if people come by airplanes and cars to enjoy the hunter-gathers of the primitive society racing with wild animals under the scorching sun, praise their slash-and-burn cultivation in the low and shabby thatched cottages and hope them to preserve the primitive life style or "culture" forever, they are cherishing their one-side wish. (For the above-mentioned debate, please refer to the signed article under the Column of "Whether Greater Shangri-La Needs Modernization," Issue No. 7, 2004 of *Chinese National Geography*)

So much for that debate. In effect, for any place, be it Shangri-La, Jinuo Mountain villages, or other regions where ancient life styles and primitive natural features are still in existence, protection and exploitation involve two fundamental issues we are going to discuss today: one is whether these places need development at all, and whether we shall acknowledge and respect the right to development of all people; the other is how to develop, i.e. what mode or path of development should they choose. The two issues are interwoven but should never be mixed up



with each other. Resolutions to both issues are of the same significance.

The purpose of development is to have overall enhancement of people's social status, welfare, political and social participation as well as of their cultural, ideological and mental outlook, not just to achieve the lifeless rigid material targets set by the national or provincial governments. Increases in GNP or GDP do not necessarily mean development. For those ethnic-group-inhibited remote areas where the economic, cultural and social formations are rather primitive, development involves, first of all, social transformation, just like the enormous changes in social structure and formation which the Jinuo people have been and are still experiencing. In modern world, "development" has become the strongest voice of this era. While in the past, development used to be a privilege for few countries and people, rather than a "development for all people" based on their equal rights. *The Universal Declaration of Human Rights* (UDHR) emphasizes at its very beginning that "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people"; and it continues to point out that "the peoples of the United Nations have in the "Charter" reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom." The *Declaration on the Right to Development* adopted by the 41st UN General Assembly makes a further exposition that "Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits," and "The right to development is an inalienable human rights by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." That is to say, the right to development is the basic content of human rights and the most important human rights. Pursuit of modern development is not only the right of all countries, but also the right of every region, every ethnic group and every individual that constitute the countries. Previous "modernization" or "modern development" is blessedness to those powerful states, people or developed areas only, the less developed states and areas being sacrifice. We shall not permit the continuation of this condition. In 2000, United Nations Millennium Summit adopted the *United Nations Millennium Declaration* in which heads of state and government promised to make the right to development a reality for everyone and to free people in extreme poverty from want and to create an environment - at the national and global levels alike - which is conducive to development and to the elimination of poverty. In today's China that aims at the common prosperity for all people, various levels of government and economically-developed regions are duty-bound to esteem the right to development for all people, satisfy the wish of "free from fear and want" of all common people, help the less developed ethnic-group-inhibited regions realize people-oriented, self-reliant development. What the improvement of Jinuo people's living conditions has demonstrated is just the process and preliminary results of such efforts.

After “the right to development” is being identified as the fundamental and universal human rights, the next issue is how to develop, i.e. how to choose an appropriate mode or path of development. And this is the real difficulty for countries and peoples exerting every effort to development. The path of industrialization, mode of modernization, or process of development of the western developed countries should not and could not be copied indiscriminately, because those were filled with conflicts and confrontations between men and men, regions and regions, nationalities and states, as well as man and nature, and because in those ways, the development of few countries and few people was obtained not only at the cost of real loss of right to development of majority people, nationalities and countries, but also at the cost of pollution and destruction of human’s living environment. The exploitation of poor and weak countries by those rich and powerful, rural areas by urban areas, and poor people by rich ones, together with predatory exploitation of natural resources, is the common characteristics of the modes of development taken by those countries. The reason why the various modernization principles, economic development theories and development model of the past are abominated and avoided so that the extreme oppositionists even go so far as to negate development itself, in the final analysis, lies in that they are based on the development path of developed countries, therefore they can never guide, nor explain the real development process of the developing countries and regions at present time. Today in this world, developing countries or regions shall never follow the old rut of western colonialism (including “interior colonialism”), nor fall in the wrong track of “development first, treatment last” in eco-environment protection. It is a kind of “Latecomer Advantage” to sum up experiences and draw lessons of the predecessors, turn spontaneous development into conscious one, and try to avoid detours and wrong roads when dealing with such unavoidable contradictions in development processes as benefit and equity, capital and labor, exploitation and protection of environmental resources, economic construction and social-political-cultural construction.

In view of relationship between human and nature, the sharp contradiction between people awaiting development and environment in need of protection does not exist only in Shangri-la and Xishuangbanna, on the contrary it is a predicament that China and all the world are faced with today. Shangri-La and Xishuangbanna are neither the Grand Canyon of Colorado where is uninhibited, nor the Forbidden City of Beijing which is now open exclusively for tourists. The right to development of local people, and their right to pursue social progress and to improve living standards need to be respected, just as the right of any group or individual to being close to nature or maintaining its own culture and tradition. Whether to exploit a place or not, and whether to forbid outside people from entering it, require an overall plan worked out by experts from the local departments concerned, with the extensive participation and supervision of local people. Forcible exploitation which would result in destruction of the environment is nothing desirable. On the other hand it is impractical to keep the places untouched at all, even if all development projects including tourism are closed down. A feasible way is to find a medium point, or a sustainable manner which can take account of both development and protection.

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PRESENTATION ON POVERTY AND HUMAN RIGHTS IN LATIN AMERICA

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1. Poverty, human rights and citizenship

Poverty is a human condition of continuous deprivation not only of material resources, but also of capabilities, security and choices, which prevents individuals from enjoying their basic rights.

Rather than being successive stages of development, the civic, political and social dimensions of citizenship continue to be simultaneous realms of action for the strengthening of human rights.

In the Latin American region, the respect for the basic civil rights and liberties is still not assured for all, while the political rights to democratic participation continues to be an arduous ideal. At the same time, ever more urgent but distant is the exercise of the social and economic rights that a welfare State is expected to provide to all citizens, in particular health and education services, social security and opportunities for employment.

In Latin America, we are compelled to understand human rights beyond its strictly legal dimension and conceive it as a social order in which individuals can effectively exercise all their entitlements and abilities and not only possess them theoretically. This leads inevitably to explore the linkages between human rights and poverty, between citizenship and inequality.

2. Global and regional engagements

Direct references to the relationship that exists between poverty and human rights can be found in the Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993. As indicated there, extreme poverty is not only a serious obstacle to the full enjoyment of all human rights; it also inhibits the full and effective enjoyment of human rights. Moreover, extreme poverty and social exclusion constitute a violation of human dignity and urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, in order to promote the human rights of the poorest and the enjoyment of the fruits of social progress.

These concepts have been reflected in several resolutions and initiatives adopted in the framework of the United Nations' Organization. We must mention, most notoriously, the Outcome Document of the 2005 World Summit and the latest Draft Guiding Principles "Extreme poverty and human rights: the rights of the poor," adopted by the Sub-commission for the Promotion and Protection of Human Rights in August 2006.

To the poor who are in a disadvantageous situation regarding globalization, economic,

social and cultural rights (ESCR) acquire a special importance. The doctrine and jurisprudence concerning human rights have taken an important step by breaking down the division between first generation rights, i.e. civil and political considered self-executing, and second generation rights, i.e. ESCR of a programmatic character. This division has been replaced by concepts of interdependence and complementarity that stress the importance of the full enjoyment of all human rights.

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is an example of the progressive engagement to secure the enjoyment of ESCR within the United Nations. This covenant seeks to recognize that the Committee, which ensures compliance with the Covenant, is empowered to receive complaints against violations of ESCR commitments.

In the American region, the link between poverty and human rights has been consistently recognized in the declarations and actions of the Organization of American States. This link is present in the OAS Charter, specifically in its Chapter VII; in the Strategic Plan of Partnership for Development; the Inter-American Democratic Charter; the Inter-American Program to Combat Poverty and Discrimination; the Declarations and conclusions of the Summit of the Americas and High level Ministerial Meetings and relevant Inter-American Committees.

In this respect, I must underline the importance of the Additional Protocol of the American Convention on Human Rights - "Protocol of San Salvador." In June 2005, the General Assembly of the OAS adopted "the Standards for the preparation of periodic reports pursuant to Article 19 of the Protocol of San Salvador." This Resolution entrusted the Permanent Council to make proposals on the composition and functioning of the Working Group established to examine the national reports in such a manner as to be able to assess the degree of fulfillment of the Protocol by the States.

In addition, the Inter-American Commission of Human Rights (ICHR) has developed draft indicators that have been submitted for consultation to the States and civil society organizations. The ICHR is currently evaluating the contributions received for their incorporation and presentation to the Permanent Council of the OAS.

We must also underline that, at present, the OAS is drafting the Social Charter of the Americas and its Plan of Action, an instrument that is meant to include principles specific goals to strengthen the fight against poverty and the protection of social, economic and cultural rights.

The OAS is not the only regional forum concerned with the link between poverty and human rights. The Ibero-american Community, in which participate Spain, Portugal and the Latin American countries, several important initiatives have been launched to foster social cohesion through education, health, water supply and employment.

3. The current crossroads in Latin America and Peru

In Latin America, according to the 2007 report on the Social Panorama of the Economic Commission for Latin America and the Caribbean (ECLAC), consistent per capita output growth during the 2003-2007 period (more than 3% per year) has allowed that, for the first time since 1990, the number of poor people in the region has dropped below the 200 million figure. During the last year, fifteen million people have come out of poverty and ten million are no longer indigents.



Although the evolution is positive, these numbers still are staggering. Poverty, especially in rural areas, is endemic. Millions of people are excluded from economic growth and from the fulfillment of their basic rights. According to 2006 figures, 36.5% of the population continues to live in poverty, and 13.4% in extreme poverty, i.e. 71 million people²⁷. Two of every five children live in extreme poverty. Even though it is not the poorest region in the world, it has the most unequal distribution of income.

Latin America finds itself in a crossroads where two courses of development are confronted in the fight against poverty. On the one hand, in a global context with high export prices, opportunity for growth, positive trade balances, competitive industrialisation and, on that basis, as well as opportunity for regional integration, national consensus building, decentralisation and social justice. On the other hand, the temptation of political confrontation, authoritarianism, demagoguery, nationalism, internal fragmentation and, subsequently, greater poverty. The region is at a crossroads that offers the opportunity to produce social transformation while avoiding a purely market-oriented logic as well as demagogic reforms that bring only short-term political benefits.

Quite clearly, the Government of Peru, headed by President Alan García, has chosen the first course of action to combat poverty. It has chosen a model of democratic governance with sound macroeconomics, free trade and investment and proactive social programs. Several years of democratic stability and 80 consecutive months of GDP growth have generated national and international trust and expectation. While in 2001 poverty reached 54.8% of the population and extreme poverty 24.4%; in 2006, the percentages dropped to 44.5% and 16.5%, respectively²⁸.

Peruvian economic figures speak for themselves: this year's GDP will exceed 100,000 million US\$, while the projections of economic growth for 2009 estimate figures over 120,000 million US\$, doubling what was produced in 2001. In 2006, Peru showed a fiscal surplus record of 1.9% of the GDP, as well as international reserves reaching 18,000 million US\$, equivalent to 18 months of imports, well over recommended international levels. The prices rate of 1.14% was inferior than the 1.5% estimated by the Central Bank.

Investment and participation of productive forces will allow maintaining this permanent growth and giving a positive and practical context to the country's economic stabilization, to ensure that growth figures depict the actual growth of the population in general, as a necessary requirement for the achievement of fairness, justice and social peace.

On this basis, the Government has decided to incorporate the promotion of the export of goods and services as a component of its development strategy and strategy to fight against poverty, aiming to incorporate all sectors of Peru's society in the benefits of globalization and growth. In this context, openness to trade and investments is essential not only in terms of the trade policy, but basically as a tool towards social fairness and taking advantage of the opportunities that globalization has to offer to the most depressed areas of our country.

Peru, as a member of the Andean Community, has an active Free Trade Zone agreed

27 ECLAC report: Social Panorama 2007

28 Information taken from ECLAC's web page, Source: INEI

with Colombia, Ecuador and Bolivia. It has signed a Free Trade Agreement with Chile and the United States, recently approved by both Peruvian and US legislatures, and the negotiations are already concluded with Canada, Singapore, Thailand, while the one's with China, Mexico, EU, the Republic of Korea and Central America are on their way. Our next objective is to begin conversations with Japan, India, Russia, Australia and New Zealand.

Therefore, it is indispensable to rely on global economic governance to tailor an adequate study, evaluation and modification of international finance, trade, indebtedness and investment patterns.

Although the expected macroeconomic indicators for the following years (inflation, public and private investment, consumption) suggest that the current level of GDP growth will persist, both government and society must act forcefully to achieve greater social justice and peace. Latin America and Peru need a focused and assertive agenda for the work ahead in the promotion of human rights and the reduction of poverty.

4. An agenda for human rights and poverty reduction

4.1 Participation and political rights

In order to allow the poor to exert their political and civic rights, it is necessary to promote greater participation of persons living in poverty, as well as vulnerable groups, in the decision-making processes of the societies where they live, including the promotion of human rights.

A political agenda for the poor also demands in every country a reform of the national State. The goal is to strengthen its capacity to intervene in order to compensate for the pernicious effects of market mechanisms and, in doing so, to fight inequality. Such a reform requires, in many countries, decentralisation, and particularly the transfer of social programmes to adequately trained local authorities. The question remains on how best to utilise decentralisation to reduce social exclusion. Also, the question is how to create a modern, professional administration on the basis of the current, often excessive and inefficient national institutions. What becomes crucial is how to introduce into these administrations the incentives and measurement policies necessary to increase public sector productivity.

Discriminatory human relations, based on ethnic hierarchies, will also prevent the construction of an authentic democratic order and will be a factor of future violence, disintegration, institutional fragility, and more generally the decay of representative democracy. Political representation of vulnerable groups is hence a central element of any cultural agenda in our region.

To prevent that scenario the Government of Peru has introduced a change in the state action based on decentralization. The strategic decentralization plan goes beyond a mere transfer of resources or the execution of public works in the interior of the country. Regions can now coordinate their development plans. This is done by distributing more than eighty percent of the national budget, gradually integrating Peru and promoting a better distribution of income. The aim is to ensure wider participation of the vast majorities in the benefits of growth, with concrete improvements in the conditions of their daily life, thus contributing to their sense of belonging to the national community, leading to full citizenship and the consolidation of the democratic system.

4.2 Economic and social rights

In Latin America, the dilemma persists between policies that stimulate growth but can be



socially insensible, on the one hand, and policies of redistribution that can hinder investment and growth, on the other.

To respond to the expansive social needs for food, health, water, housing, education, employment and justice, States need more resources and these must come, simultaneously, from higher taxes and more private investment. In order to increase tax revenues, our societies must confront the problems of informality and tax avoidance and evasion. At the same time, these problems concern civic responsibility and the action of interest groups, which often prefer maintaining their privileges to contributing to the common good.

Private investment, particularly in infrastructure and public utilities, is also a requisite for development, since the State is incapable of building by itself the roads, ports, airports, water, energy and telecommunications infrastructure necessary for the social inclusion of everyone, particularly the poor. Part of the interest of trade agreements with other regions is the expectation of attracting private investment to these sectors of public interest.

Of course, the fight against poverty also requires employment. Informal activities are still very extensive and this means that a big part of Latin-Americans are not protected by labour laws and lack social security.

The social expenditure that has probably the greatest impact on the legitimacy of democracy in our region is investment in education and health services, but only when it goes beyond the extension of coverage and deals with the quality of services provided. Unsatisfactory education and health services aggravate exclusion and inequality.

In these areas, in Peru, the Government or President Garcia has reformulated social policy to achieve productive inclusion, access to education, territorial institutional development and population support. To that end, the implementation of the National Rural Development Strategy and the National Food Security Strategy is underway.

With regard to international commitments, Peru advocates the achievement of the Millennium Development Goals and has set up as a concrete goal of reducing poverty levels by thirty percent by 2011, chronic malnutrition from twenty-five percent to sixteen percent, and to provide safe drinking water and electricity to ninety percent of the population. In addition, Peru is working to eradicate illiteracy, reduce informal employment from fifty-three percent to thirty-five percent, create one and a half million new jobs and reduce the external debt from twenty-four percent to thirteen percent of the GDP.

The most important tools designed by the Government to face the difficult threat of poverty are the social programs named CRECER (To Grow) and JUNTOS (Together). CRECER is the national strategy of articulated intervention to fight poverty and chronic child malnutrition, tackling all the aspects involved in the problem: permanent malnutrition, poor health services, low quality education, poverty and exclusion. It reaches 880 districts in 21 regions all around Peru, 811 of which are included in the first 20% sector of acute poverty. Its main goal is to reduce 9% under 5 year-old-child malnutrition in situation of nutritional vulnerability and poverty by the year 2011, under an approach of effective enjoyment of human rights, social development, inclusion and co-responsibility.

JUNTOS is the other main social program carried out by the Government, that focuses in the most vulnerable population, facing extreme poverty, risk and exclusion, promoting the effective exercise of their fundamental rights, placing an offer of services in nutrition, health, education and identity, through the granting of a conditioned monetary incentive to be used at the beneficiary's discretion, the head of family (he or she), participating in the program.

The conditionality to keep receiving the monetary incentive pursues to promote the active participation of the families in the responsible fulfillment of the commitments acquire with the program: in health (children growth control, vaccinations, pre and post natal control of pregnant mothers, institutional birth attendance); in education (children actual school enrolment and fulfillment of 85% school attendance), in identity (formal registration and possession of the National Identity Document) and in nutrition (obligation of collection of children fortified formula-food for children).

In November 2007, JUNTOS had reached 336,555 families in extreme poverty situation, in 625 rural districts of 14 regions all around the country and its positive contribution to the self-empowering of less favored families in Peru has been recognized by the UNDP and UNICEF.

5. The international agenda

Beyond the different political and economic models in place in the region, a regional convergence is evident on the principle of growth with equality and on the importance of fulfilling the social, economic and cultural rights of citizens.

In all these agendas, regional mechanisms and international co-operation have much to offer. The Latin American region needs private investment but also solidarity and adequate understanding of its problems. National macroeconomic averages generally hide enormous internal disparities. The best way to contribute to human rights and democracy in the region is to invest and assist in the diminishment of regional and social inequalities and the absorption of exclusion. This must be the guiding principle in the trade agreements with other regions, the negotiation of sustainable foreign debt programs and the provision of financial and technical co-operation for Latin America in the future.

China has much to offer in this effort bilaterally and through the United Nations system, as well as an active observer to regional institutions such as the OAS.

We are confident that through cooperation and the interchange of mutual experiences the common road to the enjoyment of all human rights by our population will be gradually reached. However, there is still a long way to go. Responsibility to attain this objective lies on the shoulders of every country, every ruler and even every public official.

Thank you very much.

(The author is Under Secretary for Multilateral Affairs of Ministry of Foreign Affairs of Peru.)



RIGHT TO DEVELOPMENT: GUARANTEEING THE REALIZATION AND DEVELOPMENT OF HUMAN RIGHTS

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China

(I)

Human rights not only belong to history, but also belong to modern times. The concept of human rights derives from historical practices and, in turn, influences the historical practices. The concepts of human rights of different stages feature time characteristics. Along with the progress of human rights thoughts and the development of human rights movement, and concurrent with the arrival of the age of economic globalization, the human rights theory has entered a new stage of development. The first-generation human rights (negative rights) came into being during the American Revolution and the French Revolution period in the 18th century, focusing on civil and political rights. The second-generation human rights (positive rights), emerging after the World War II in the mid-twenties century, emphasize the economic, social and cultural rights. The third-generation human rights, rising in the 1970s, for the first time put forward the concept of “right to development,”²⁹ which indicates that “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”³⁰

The concept of the right to development derives from people’s increasing understanding and perception of development and the development theory. After the World War II, Western scholars carried out research on the development issue, and that exploration experienced a transition from economic angle to human angle and accordingly set forth three kinds of concepts of development.

The first concept of development views development as the economic growth in the process of industrialization. After the World War II, with an awareness of their backward economy, newly-independent impoverished nations were dedicated to pursuing economic growth. And, in the face of the post-war shortage of materials, developed industrial countries were also eager to speed up economic growth. Therefore, the most fundamental meaning of development back then was

29 P.170 of the 2001 Chinese version of “Universal Human Rights in Theory and Practice” by Jack Donnelly (US), translated by Wang Pujun et al and published by China Social Sciences Press

30 Chinese version of “The Right to Development as a Human Right” by Arjun Sengupta, translated by Wang Yanyan and published on P.13 of the January 2005 issue of Comparative Economic and Social Systems

economic growth. The philosophical foundation of such an outlook on development is the cultural value based on the assumption of economic man and determinism of single economic element. The primary historical limitations of this concept of development are that as a unilateral, distorted outlook on development, it only focuses on the economic value of people but neglects the social and spiritual qualities of human beings, and that it does not reveal the mutual influences and functions between all the factors of society, nor the interactive relations between man and nature and between man and environment.

The second concept of development regards development as a reform process of the entire social structure. On the basis of a review of the outlook on development focused on economic growth, scholars put forward a new concept, considering development as integration of economic growth and social reform. The “social reform” in this sense refers to the alleviation of the cost in the process of economic growth through reform in the entire social structure. Theoretically based on the hypothesis of social man, this concept of development calls for integral progress and coordinated development of society, emphasizes the reform and development of the social form of human beings and the comprehensive development and coordinated progress of all aspects of society, and holds that developing countries should introduce modern impetus from the Western developed countries to implement reform in the traditional modes of action. However, this concept of development does not show the necessity of mutual coordination among social system, natural system, and human system, and does not take into consideration the sustainability of development.

The third concept of development regards development as a comprehensive development process oriented to human beings. In the 1970s and the 1980s, the tide of time led the Western development theory to a new stage, finding a new theme and foundation of development - the development of man or mankind. As summarized by French philosopher Francois Perroux, this concept of development is “integral,” “comprehensive,” “domestic,” and “centered on human development.”³¹ The “integral” quality of this concept requires that the mode of development should not just consider all the aspects of man and society as a whole, but also pay attention to the diversified mutual-dependence relationships among people. Being “comprehensive,” the development of different regions and different departments should progress in concerted steps for the strategic goal. To promote development, “domestic” power and resources should be fully and correctly used. The quality of “being centered on human development” determines that research should be conducted from the angle of “human beings” and that human development should be the fundamental theme, target, premise, core, and solid cornerstone of development. The nature of this concept of development: The essential of social development is people-centered comprehensive development.³²

Obviously, the above-mentioned concepts of “development” experienced an evolvement from economy to society and finally to people. With distinctive humanistic characteristics, development is a process of overall growth, a process in which people’s various rights are realized

31 P.175 of the 1987 Chinese version of “A New Concept of Development” by Francois Perroux (France), published by Huaxia Publishing Co., Ltd.

32 “Interpretation and Cause of Administrative Development” by He Ying, published on the April 2003 issue of “New View”



in phase, and a process in which the human rights are guaranteed by the power of the state and the government. The proposition of the concept “right to development” represents a transition of people’s cognition of development from simple economic growth to a people-centered overall development, implying that the third-generation concept of human rights has dominated the core of the human rights horizon.

The concept of “right to development” responds the phenomena of economic globalization and mutual dependence between different nations. Beginning in the 1960s, in order to improve people’s living standards, many developing countries have attached great importance to economy growth. But after decades of efforts, few of these countries of the Third World made a radical change, and the international political and economic order still remains in complex conflicts. Historical experiences and lessons made people finally realize the importance of mutual dependence within the international community and the necessity of international cooperation.

The proposition of the concept “right to development” eliminated the positive and negative relations. The relevant characteristics of the right to development remove the negativity of the first-generation human rights and the positivity of the second-generation human rights, more appropriately representing the relationship between human rights and the state and society in modern times. Although in character civil and political rights call for negativity of the state and government, today civil and political rights can hardly be realized without positive actions of the state and government. Yet, although the economic, social and cultural rights call for positivity of the state and government, many fields and different stage of the development of economic, social and cultural rights actually require negative of the state and government. The proposition of the concept “right to development” clearly defined the principle of overall development, and this effectively eliminates the negative and positive relations and complies with the trend of social diversity, mutual dependence and common development.

The proposition of the “right to development” for the first time in history put forward the concept of dynamic development for human rights. Whether the negative first-generation human rights or the positive second-generation human rights are all human rights of static sense, believing that existing in society are relatively universal and stable standards of civil, political, economic, social and cultural rights and that the objective of human rights movement is to by all means improve the human rights conditions to approach and reach these standards. The connotation of the right to development, however, is obviously different from the first- and second-generation human rights. Rather than a human right in parallel with the traditional civil, political, economic, social and cultural rights, the right to development focuses on an overall elevation in both quality and quantity of the human rights, as well as the protection and realization of human rights in the process of social progress.

(II)

The right to development, or the third-generation human right, as a new concept in the new stage of human rights theory, exhibits distinctive characteristics that conform to time requirements, as represented as follows:

The main body of the right to development is an integration of collective and individual rights. The third-generation human right holds that the right to development includes individual right as well as collective right, which means that the main bodies enjoying human rights are not just individual persons, but also certain human collectives, such as ethnic groups, nation, government, and other social groups (women, children, disabled persons, etc.). The right to development recognizes all the individual rights prescribed in the international human rights documents, and meanwhile it believes that some of these rights can be realized only in the form of collective rights. For example, the right of a nation's citizens to freely decide their nation's political status is represented as the sovereignty and independence of the state. Independent sovereignty is a collective human right that is not exclusive to any individual. Meanwhile, independent sovereignty is the prerequisite to realize other human rights. Another example is the right to subsistence, which is not just a right of an individual to maintain his or her life, but also a right of the people of a nationality or a nation to live on and a right of all the citizens to be free from the threat of hunger and war. The concept of human rights in development stresses both individual and collective rights, denying absolute opposition between the two. Only when the individual rights and collective rights develop concertedly can human rights be promoted effectively.

The right to development is a combination of relativity and integrity. The concept of human rights in development holds that the right to development, as a comprehensive right for all the rights to depend on each other, is inseparable. The process of realizing the right to development is also the process in which all the rights are realized simultaneously. The right to development is realized with the realization of other human rights as prerequisite. Only in such a situation that at least one right is improved without infringement upon any other right can the right to development be realized. The right to development includes civil, political, economic, social, cultural, environmental and security rights, and infringement upon any of these rights would violate the overall right to development. If there is a failure in protecting and promoting the realization of other rights in the process of realizing a certain right, the realization of this right would be impossible, and this reflects the integrity of the right to development. If one country firmly defends its civil and political rights, while another country only stresses the realization of economic, social and cultural rights, or even at the cost of civil and political rights, the right to development should effectively mediate the conflict between these two countries, so as to reflect its blending of relativity and integrity.

The right to development is an integration of development process and outcomes. Focusing on development process, the concept of human rights in development holds that "the right to development calls for both the development process and its outcomes; development is a process rather than a limited terminal; and, all the human rights, as well as the GDP growth, technological innovation and system reform, should be realized step by step in the process of development." According to this concept, the course of development must be propelled through respecting rights, and policies and actions conforming to human rights standards should be carried out by government and other development bodies through participation and non-discrimination, so as



to realize all the development outcomes fairly and reasonably.³³ The right to development is born and grows in the course of development. Throughout the development process, all kinds of rights promote and influence each other. Policies that tally with human rights requirements should be fairly instituted by the development body (government or social organizations), so as to achieve an outcome of human rights development.

(III)

The value proposed and performed by the right to development does not mean an addition of a right in parallel with the traditional human rights like civil, political, economic, social and cultural rights, but an overall elevation in both quality and quantity of the human rights, as well as the protection and realization of human rights in the process of social progress.

The right to development seeks an overall, harmonious development with human development as the core. The implementation of the right to development is a process for all the human rights to be realized in phase. People enjoy the right to obtain development, and it is in the course of development that people's civil, political, economic, social and cultural rights as well as personality development are realized. Although in the international field of human rights, the issue of development and the right to development was first put forward around states, especially developing countries, the right of a state or a people to development will finally turn to be the right of individuals to development. The right of individuals to development holds that the full realization of the right to liberty and subsistence guarantees the realization of the right to development. The thought that all the human rights are closely associated with the basic freedom is an important principle in all the international documents on human rights. The civil and political rights and the development of economic, social and cultural rights are dependent on each other. A restriction on the basic civil rights and political rights and a unilateral emphasis on the right to development in economy will finally result in a violation of human rights. The right to development calls for a people-centered overall development.

The right to development seeks equality of development opportunity. In the course of development, the inequality of the starting points is the main reason for uneven development. The cause of the social inequity is the classification and hierarchization of people and providing them accordingly with unequal development opportunities and conditions. According to the "Declaration on the Right to Development," states should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. In today's information society, in particular, to achieve full development, one must obtain an equal right to participate in the social progress, an equal right to enjoy the development achievements, and the right to obtain knowledge and information keeping pace with the social progress. The equality of development opportunity is the foundation of realizing the right to development.

33 Chinese version of "The Right to Development as a Human Right" by Arjun Sengupta, translated by Wang Yanyan and published on P.15 of the January 2005 issue of Comparative Economic and Social Systems

The right to development seeks sustainable development. New development concepts, including “mankind development” and “sustainable development,” are all related to human rights concepts. Traditional development mode ignores the cost of environment and the interaction between and the sustainability of economic and social development and environmental support. As a result of this development mode, the global environment now experiences an unprecedented pressure, and the basic requirements of quite a large number of people can not be satisfied, with their rights to subsistence and to development at risk. In view of this, “all human rights should be regulated and enjoyed in a balanced way, or to put it better, in a sustainable way ... Finally, the rapid development of environmental law, together with the closely interlinked, and dialectically inseparable, law of sustainable development, are contributing to the development of international law in general and especially human rights law.”³⁴ Sustainable development asks for attention to the environmental interests of all generations, so as to represent equity between different generations. But if the historical reasons that caused the environmental crisis are ignored, and if the actual facts to tackle the environmental issue, including population control, social justice, international cooperation and global treatment, are ignored, sustainable development can hardly be realized. Since the inter-generational equity is actually performed by people of the present generation, this requires equity within the same generation, which means the development of a group of people should not harm the interests of others. The development process and relativity of the right to development require balanced and sustainable development among various rights. The developed nations “overdrew” the global environment, with their development at the cost of the environmental interests of other nations. Therefore, they are duty bound to assist the developing countries in the realization of the right to environment.

The right to development seeks system design and assurance. The realization and development of human rights should be guaranteed by system design. The development process of the right to development requires a series of social arrangements, such as rules, system, and law, so as to well ensure and enjoy the right to development. At present, the right to development has become a legal principle for international law. According to this principle, states, as the main body of the international law, enjoy the right to development. While enjoying the right to development, states should also bear the obligation of realizing the right to development. According to the “Seoul Declaration,” development as a principle of international law merely covers efforts of States, i.e. their co-operation for the elaboration of civil, cultural, economic, political and social standards, embodied in the Charter of the United Nations and the International Bill of Human Rights, based upon a common understanding of the generally recognized human rights and the principles of public international law concerning friendly relations and co-operation among States. All the states should consider these norms when instituting and implementing their administrative and legislative policies, so as to realize the right to development in the domestic and international range. The right to development should be regarded as a right of the state to promote and protect

34 P.246-247 of the 1997 Chinese version of “Human Rights and Scientific and Technological Development” by C.G. Weeramantry, published by Beijing Knowledge Press



human rights. It is the legal and system effort and guarantee for a connection between human rights and the rights and obligations of the states.

The right to development seeks self-determination. The right to self-determination of development implies that all the states and peoples enjoy the right to independently determine their fates and choose their political, social and economic systems, and that all the nations have the right to freely use their natural resources and wealth for the sake of self-development. The principle of the right to self-determination has become a basic rule recognized in the international community. Both the “International Covenant on Economic, Social and Cultural Rights” and the “International Covenant on Civil and Political Rights” stipulate in Article 1 that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” And, in Article 25 and Article 47, respectively, it is stated that “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.”³⁵ The right of states and peoples to self-determination includes the states’ and the people’s right to “freely pursue their economic, social and cultural development.” Therefore, the right to development is not just based on the right of states and peoples to self-determination, but is also an extension of the right to self-determination. As the “Declaration on the Right to Development” states, the human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.³⁶

In conclusion, the proposition of the “right to development” for the first time in the human rights history put forward the concept of dynamic development for human rights. The concept of the right to development is an outcome of the transition of people’s cognition of development from simple economic growth to a people-centered overall development. The right to development is the foundation for the realization of the rights to liberty, property, equality, and subsistence. The implementation of the right to development is a process for all the human rights to be realized. The right to development is the pursuit and guarantee of the development body to improve the subsistence status of the state and its citizens and maintain the rights of the state and its citizens.

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35 P.421 of “International Law and Development” edited by Paul De Waart et al, published in 1989 by Martinus Nijhoff Publishers, quoted by Feng Yanli in “Interpretation of Sovereignty and Human Rights” on the March 2006 issue of “Study on Politics”

36 P.421 of “International Law and Development” edited by Paul De Waart et al, published in 1989 by Martinus Nijhoff Publishers, quoted by Feng Yanli in “Interpretation of Sovereignty and Human Rights” on the March 2006 issue of “Study on Politics”

ON MATERIALIZATION OF HUMAN RIGHTS RESEARCH AS NECESSARY CONDITION FOR THE DEVELOPMENT OF HUMAN RIGHTS

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Since its birth nearly 60 years ago, the *Universal Declaration of Human Rights* has played an essential role in promoting the human rights maintenance and development undertaking worldwide, created an outstanding immortal merit, and at the same time laid a valuable solid foundation for us to develop the human rights undertaking through the human rights research in the future. However, from another point of view, the starting point of the *Universal Declaration of Human Rights* is to safeguard the human rights of the entire humankind in the general sense, rather than the human rights status of a given nation in a particular historical period. China has arrived at a fire-new historic period of building a harmonious society, which is essentially different from the time when the *Universal Declaration of Human Rights* was born, thanks to the reform and opening up for almost 30 years. Today, it is apparent that we face the significant issue of both theoretical and realistic meanings, that is, how to develop China's own human rights undertaking by celebrating the 60th anniversary of the birth of the *Universal Declaration of Human Rights*.

Then, the problem will be how to continue the development and innovation of China's human rights undertaking today, and how to make it play an important role in building a harmonious society.

Generally speaking, the development of the human rights undertaking of a national country must be based on the realistic conditions, including the economic, political and social development. However, it is also undoubted that the development of the human rights undertaking must use the down-to-earth human rights research and the scientific conclusions derived from the research, particularly the conclusions of the human rights research that are continuously developed, innovated and scientific, as the academic foundation and theoretical guideline. Then, how can the human rights research be adapted to the reality, continuously developed and innovated? In my opinion, the only way is to materialize the human rights research, so as to make it increasingly closer to the reality, and thus achieve the continuous development and innovation of the human rights research.

This is because if we examine all the contents of the *Universal Declaration of Human Rights*, and carefully check the prevailing basic definition for human rights at present, we may clearly see that both the human rights and secured fundamental contents defined under them are



very abstract - They don't touch the concrete human rights status of various national countries with different historic and cultural traditions and varying social development stages, or highlight the responsibilities and obligations that virtually correspond to and are closely linked with human rights as a basic right. According to the prevailing basic definition, human rights are the rights of human beings in line with their natural attributes and social attributes, the core of which is to ensure the most adequate development of the humanity, dignity, spirits, moral and ability, and everyone lives in a certain society, and his rights are not abstract, but stipulated and secured by the constitution of the country.³⁷ Therefore, objectively speaking, such universal declaration of treaty nature can play its role in the most universal sense in the world. However, the declaration effectually should not or can not generalize all the aspects of the social life related to the human rights. Just for this reason, the concrete human rights statuses of different national countries deviate from such universal declaration because of varying historical and cultural traditions, the social development stages and the practical social environments.

Moreover, judging from the academic standpoint and the introspectionist and critic spirit required by the philosophic research, we can also see that any right, including human rights, is impossible to be groundless in the real life, and instead, it must be closely linked with the corresponding practical liabilities and actual obligations to form both sides of a coin. We may further reach a conclusion that any right, including human rights, is the result of particular liabilities and obligations, that is, only when a practical social individual bears certain liabilities and performs concrete obligations, can he/she have the competence and possibility to enjoy the corresponding rights. Otherwise, any discussion about rights without considering liabilities and obligations tends to fall into meaningless empty talks, but also results into very terrible realistic consequences. One of the direct reflection of such consequences is that some western countries rudely denounce the human rights status of many developing countries, including China with the excuse of safeguarding human rights. Therefore, to materialize the human rights research, it must be absolutely avoided to discuss "human rights" just simply for the sake of human rights. Rather, relevant liabilities and obligations closely related to human rights must be really included in the realm of the research by researchers, and explored and researched systematically and completely.

Then, if liabilities and obligations are introduced to the process of the human right research, will the research be materialized? Not necessarily so. This is because: A survey of the various researches on the three aspects and the interrelations between them by domestic and foreign scholars shows that the discussion combining the three aspects does lead to the materialization of the research more easily than the separate research on a single aspect, but the absolute majority of the researchers, particularly modern western scholars, tend to research the three aspects or any of them in an abstract way from concept to concept. Therefore, even if the liabilities and obligations discussed here are concerned, the absolute majority of the research processes and results we can

37 Refer to the relevant statement and discussion of the article - Show Respect for and Secure Human Rights Solidly - Fourth Discussion on Implementing the Democratic and Legal Essences of the Seventeenth National Congress of the CPC published on the Legal Daily on November 16, 2007.

see so far are still separated from the vivid practical life and various relevant significant issues, just like the research objects such as the human rights.³⁸ Therefore, our human rights researchers, on one hand, have introduced the corresponding liabilities and obligations to the territory of the human right research with a view to advancing with the times and attempting to realize the materialization of the human right research, and, on the other hand, still continue adopting the from-concept-to-concept abstract method in the discussion and research. So, such efforts are obviously difficult to achieve the original intention, that is, to attain the development and innovation of the human rights research to adapt to the time by making the human right research accord with the reality solidly.

If so, how to materialize the human right research truly, and accordingly advance the continuous development of the human rights undertaking?

In my opinion, the key to solve and answer this problem correctly is whether researchers can conduct a strict critical reflection of the researches and their conclusions made by domestic and foreign counterparts so far, and really shift their focus of attention to the practical work and various important issues in their academic researches, and demonstrate and research these aspects, instead of continuing the human rights research merely in the pure academic way from concept to concept. It is an obvious fact that as long as we face the practical life and the real world, we will clearly see that whether any right, including human rights, and the corresponding liabilities and obligations intimately linked with human rights are entirely impossible to be abstract in the practical life, but realistic and concrete. That is to say, as long as we no longer see "human" as a general and thus necessarily an abstract "kind," and start from the classical demonstration by Marx³⁹ to view human as practically existing social individuals and various social groups formed by such individuals, he/she will definitely exist in a particular historic and cultural tradition, a social development stage and a concrete practical environment, continuously form, change and develop diverse social relations by means of various social interactions, shoulder different social roles, enjoy different social identities and social statuses, and therefore enjoy the corresponding rights by assuming concrete social obligations. According to Marx, the nature of human is not an abstract matter possessed by everyone, and is the total of all the social relations in its realist nature.

It can be seen that as to the various rights of people in the practical life, including human rights, various liabilities and obligations are directly related to and closely linked with such rights, and constitute their causes and prerequisites. These liabilities and obligations are the concrete reflection of the particular social roles, social identities and social statuses, which represent the necessary results by various practical social individuals to participate in different social relations via the social interactions, and keep evolving and developing together with the continuous

38 Though we are impossible to explore and discuss this point in detail here because of the limited length of the paper, we will see the problem in this regard clearly if we simply check the research trend of "walking to the life world" that took place in the western philosophy research community since the early 20th century, and in particular examine roughly relevant researches on intersubjectivity and ethics of others that has taken place in the western academic community since the 1970s.

39 Refer to Marx: Thesis on Feuerbach, published in Collected Works of K. Marx and F. Engels, Volume 1, Beijing: People's Publishing House, 1995 Version, Page 56.



development of the social reality. The essence of the social relations is the economic relation, while the main body is the practice relation. The social relations can be expressed as a practical process both to change the objective world and change the subjective world at the same time.

So, we can clearly understand that the various rights of people in the real life, including human rights, are not only the result of the concrete liabilities and obligations assumed and performed by practical social individuals in the real life, but are determined by their social roles, social statuses and social identities as well, and that their social roles, social statuses and social identities represent the result of their participation in the social practice activities and the various practical social relations, including the economic relation, that are continuously formed. Thus, if we want to promote the sustained development and innovation of the human rights research of our nation by taking the human rights research to materialization step by step, and to have the development of the human rights play an active role in the construction of a socialist harmonious society, we should never adopt the from-concept-to-concept abstract research form, but must face the vivid social reality, and systematically explore and research the concrete living statuses, the social roles performed and the development trends of the concrete individuals with different levels, different roles, different social roles and social identities. Only in this way can the various rights, including human rights, be specifically explored and researched in combination with corresponding liabilities and obligations.

It must be stressed here that the human rights of a realistic social individual, in the final analysis, are first reflected by the right to survival and the right to development, and such rights are ultimately dependent on property, the ultimate basis for the social roles, social statuses and social identities of a social individual. So, we can safely say that property is both the materialization of the rights to survival and development, and the ultimate basis for human rights. In this way, it should be the fundamental route for us to materialize the human rights research, that is, to explore and research the property of realistic humans, as social individuals, in the social life, further research their social roles, social statuses and social identities, and accordingly materialize the human rights research in depth by exploring and researching the organic entirety consisting of liabilities, obligations and rights.

Last and the most important is that the absolute majority of the human rights researches we have seen so far have not conducted the necessary critical introspection in terms of the perceptive of the used research patterns and methodologies, and continue to use the research pattern and methodological perceptive typical of the western traditional intellectualism and Newton's classic dynamics. This obviously has problems. Because such research pattern and methodological perceptive target the matters of objects, namely the objective material objects without lives and emotions in nature and their development rules, instead of all the human matters belonging to the living world of the humankind, including human rights. The essential characteristics of such research pattern and methodological perceptive are to look at everything in an isolated, static, unilateral, mechanical and formalistic way to obtain the absolutely objective and universally effective truth once and for ever. In a word, if we don't conduct a complete criticism, introspection and sublation of such research pattern and methodological perceptive in the process of exploring

and researching human rights so as to realize the self-consciousness of the research pattern and methodological perceptive, then it will be very difficult and even impossible to realize the materialization of the human rights research really. Therefore, it will be equally an important and tough task we must complete earnestly on the way to the materialization of the human rights research to conduct such critical introspection and sublation to realize the self-consciousness and reform of the research pattern and the methodological perceptive.

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THE RIGHT TO DEVELOPMENT IN THE PROCESS OF CONSTRUCTING A HARMONIOUS WORLD

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The right to development is one of the most progressive right concepts in contemporary human society. For the goal of constructing a harmonious world, joint development and policy coordination of various countries are the best options to boost economic and social progress for human beings. All the countries should enjoy the important right of obtaining equality of development opportunity. Moreover, individual persons, who make up a country, are the main body of the right to development. Development policy should enable people to be the main participants and beneficiaries of development. However, during the increasingly fiercer and open competition in the global market, the access to the right to development for people in developing countries is not easier than the past, and poverty, backward conditions and debts, and as the result, social turbulence, ethnic conflicts and even terrorism are still the great challenges facing the human society. Hence, how to access to the right to development is an important issue facing the human society during the process of constructing a harmonious world.

I. The right to development: an unalienable human right

The right to development, widely recognized by the international community as an unalienable human right, integrates the contents of the two layers of collective right and individual right: As the collective right of a country and a nation, the right to development requires all the countries and peoples justly enjoy the economic and social benefits brought by the world economic development, urges developed countries to conduct effective international cooperation with developing countries, and provides proper measures and facilities for all-round development to developing countries; as the individual right, the right to development affirms that people are the main body of development and should be the active participants and beneficiaries of



development. The states have the rights and obligations to formulate proper development policies to consistently increase the welfare of all the people and every individual on the basis of all the people and every individual actively, freely and significantly participating in development and enjoying the benefits justly distributed by the development. In this sense, maintaining the right to live and the right to development has been the goal of developing countries and their peoples since the modern times. However, the problem is out of the common focus of the international community for a long time, and developing countries, which are marginalized or even out of the world economic structure, are unable to change the unreasonable phenomenon.

The world began to pay attention to people's rights to living and development after the World War II. For the first time, *the Charter of the United Nations*, on behalf of the world, declared "to promote social progress and better standards of life in larger freedom" and "to employ international machinery for the promotion of the economic and social advancement of all peoples." After mid-1950s, the independence of a large number of newly emerged countries and their cooperation in international affairs greatly changed the balance of force in international relations, laying foundation for the world community to pay attention to the right to development. Promoted by developing countries, the 16th General Assembly of the United Nations agreed to formulate the first international development strategy in 1961, setting the minimum annual growth rate of 5 percent of the gross national income for developing countries, so as to narrow down their gaps with developed countries in terms of per capita income. In 1969, the 24th UN General Assembly adopted *the Declaration on Social Progress and Development*, announcing "Member States shall have the responsibility to pursue internal and external policies designed to promote social development throughout the world, and in particular to assist developing countries to accelerate their economic growth." Though *the Declaration* does not mention clearly the concept of the right to development, it covers almost all the contents related to the right to development.

After the 1970s, developing countries, during the process of striving for the establishment of new international economic orders, clearly raised the concept of protecting the right to development. The Resolution 2626 adopted at the 25th UN General Assembly in October 1970 not only determined the goal of increasing GNP by 6 percent annually in developing countries within 10 years and doubling people's living standard, but also formulated concrete development strategy for industry, agriculture, trade, finance, employee, education, health care, housing and science and technology development. It required developed countries to use at least 0.7 percent of their GNP to provide official assistance to developing countries yearly. In 1970, Senegalese jurist Keba M' Baye put forward the idea of development as a human right during his speech at International Human Rights Institute in Strasbourg. In 1977, developing countries formally raised the suggestion of listing the right to development in the category of human rights at the third session of the Commission on Human Rights in 1977. With the strong appeals and active promotion of developing countries, the UN General Assembly adopted Resolution 34/46 on November 23, 1979, publicizing the *Resolution on the Right to Development* and formally announcing that the right to development is a human right, and equality of opportunity for development is a prerogative both of nations and of individuals who make up nations. On December 4, 1986, the Resolution 41/128

of the 41st UN General Assembly adopted the *Declaration on the Right to Development*, clearly announcing that “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” The document’s practice of raising the issue of development to the level of basic human rights is the important concept innovation and breakthrough of human society, reflecting the fact that greater importance had been attached to the issue of development. The right to development has become the common goal of all countries and peoples.

From the historical period from the proposal of the right to development to the time when it is universally recognized by the human society, we can see the international community is, in general, constantly raising and deepening its understanding and increasing its recognition over the issue of development, indicating the contemporary human society is making constant progress. However, the progress made in the right to development is mainly marked by the changes of concepts and increase of recognition levels. But in the real world, the problem related to the right to development has not been resolved and the right has not been realized in pragmatic manners. The goal of three “development decades” planned by the United Nations in 1960s to 1980s has not been realized. Developed countries basically fail to fulfill their commitments of assisting developing countries, leading to the result that the gap between the developing countries and developed ones is being enlarged, instead of being narrowed down. To great extent, we can say, the issue of the right to development is one of the prior difficulties left by the history to contemporary human society during the process of constructing a harmonious world.

II. Human-based interpretation of the right to development

Under the circumstance that the human society is making efforts to construct a harmonious world, the right to development exerts a substantially revolutionary impact upon nearly all the world economic concepts in the traditional world economic orders, trying to bring people’s recognition of the essence of economic development back to the human-based conclusions to ensure human beings to be the participants and beneficiaries of the construction of a harmonious world. It also enables every human person and all peoples to participate in, contribute to, and enjoy economic, social, cultural and political development. Only through the process of coordinative and all-round development can the human rights and people’s basic freedom be fully realized, and only by doing this, can the goal of a harmonious world be possible to be achieved. Thus, the maintenance and strengthening of the right to development not only play a very important part in the process and development of economic globalization, but also are of great importance in ensuring the reasonable and just direction in the development of people’s joint progress and the world order. The right to development is an inalienable human right and the concept will never change according to the changes of economic environment and conditions. Obtaining equality of opportunity of development is absolutely not bestowed as a favor to developing countries, but the basic requirements for all countries’ and peoples’ existence and progress.

Firstly, the right to development goes beyond the narrow vision of economic traditionalism, giving a humanistic sublimation and lift to the traditional outlook for development. The right to



development, as a kind of right, is substantially different from the development of pure economics. Under traditional concept, development is a state or a process independent of man's will. The improvement of a country's economic level does not necessarily mean that all the people can gain profit, and the expansion of the world market does not mean every country can enjoy the equality of the opportunity for development. The right to development falls in the category of norm and value judgment, and is the international consensus and systematic guarantee for all countries and peoples to share the fruits of domestic and the world economic development. It believes that peoples' welfare can be greatly improved through joint efforts from various countries, and on this basis, fully reflects the progressive spirits and humanitarian concerns of people's rights of participating in and enjoying the economic, social and political development.

Secondly, the right to development intensifies new human-based value concepts of cooperation, equality, equalization of opportunity and justice. Traditionally, many countries, especially those developed countries, promote the market rules of "the law of the jungle" and "survival of the fittest." Developed countries never try to provide just market conditions and equal cooperation opportunities for developing countries. While struggling to protect their own domestic market, developed countries, by using "price scissors," impose economic and market predation over developing nations. Under the vision of constructing a harmonious world, the right to development requires equal development opportunities for all countries and promotes economic development in developing nations through equal international cooperation.

Thirdly, the right to development embodies the great importance attached to individual rights. In the area of traditional economy, the claim of national rights is stressed upon, while the protection of individual rights is strictly interpreted as a country responsibility. This also leads to the phenomenon that the economic development in some countries with unjust economic systems may result in wider gaps between the rich and the poor. The right to development directly targets its right guarantee to every person, stressing that people is the main body of development and all the people should be responsible for development individually and collectively. Such responsibility itself can ensure the full and free realization of people's wishes.

Fourthly, under the concept of right with the right to development serving as the basis and core, human rights become indivisible. The right to development cannot exist independently and should be a part of the complete content of human rights together with other rights. Based on this, the *Declaration on the Right to Development* clearly states that "all human rights and fundamental freedoms are indivisible and interdependent," and in the process of protecting the right to development, "equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights."

Based on the new human-based concept, we can find out the interactive logic between constructing a harmonious world and the right to development.

First, the opinion of constructing a harmonious world injects new concepts to the right to development. The human society profoundly realizes that people in developing countries cannot realize their right to development through their own efforts. Conforming to the concept of a harmonious world, the access to the right to development has become the issue concerning

whether various countries can be co-existent in harmony. All countries should broaden their visions and consider the issue of realizing the right to development in the tide of constructing a harmonious world.

Secondly, under the view of a harmonious world, the realization of the right to development not only plays an important part in the improvement of the living standards of people in developing countries, but also directly restrains developed countries' prospect of economic development. Currently, developing countries are increasingly integrated into the world economic system, leading to the result that the prospect of developed countries' development increasingly depends on their exploration to the markets in developing countries. Meanwhile, developing countries' heavy debt crises threaten the stability of developed countries' financial order. Owing to the fact that developing countries also occupy important positions in some global economic organizations like the World Trade Organization (WTO), developed countries have to focus more attentions to the right to development since negotiations related to trade liberation and reform of global financial system cannot continue without supports from developing countries.

Thirdly, the efforts of constructing a harmonious world can also help realize the right to development. The construction of a harmonious world should be operated under strict international norms and promoted through necessary systematic arrangements. At the standardized and systematic world market, developing countries can win comparatively just and reasonable developing conditions and gain more capital and technology assistance from developed countries through legal channels. At the same time, the efforts of constructing a harmonious world can also help improve the orders of domestic economic system and market operation in developing countries and increase governments' awareness and ability of guaranteeing people's right to development.

Fourthly, the goal of realizing a harmonious world also provides an unprecedented development opportunity for the realization of the right to development, and can help bring its advantages in to full play for leap-forward development. The process of economic globalization is currently promoted, to larger extent, by hi-tech industry such as information technology, which may enable developing countries to directly enter the competition in hi-tech areas. By doing this, developing countries can seek developing opportunities on comparatively equal footings and boost the improvement of industry through IT development. Meanwhile, they can also bring their advantages into full play in human resources during the global resource allocation of multinationals.

It should be emphasized that in the current real world, the promotion of the efforts of constructing a harmonious world to the right to development is mainly a kind of value pursuance on the rational layer. Mostly, it provides opportunities and possibilities to the right to development, as well as people's ultimate value judgment of the realization of the right and reasonable expectations of neo-liberalism. The right to development still has a long way to go before it is thoroughly realized during the process of constructing a harmonious world.

III. New opportunities and challenges facing the right to development under the goal of constructing a harmonious world

The right to development is an economic issue, as well as a basic human right. In the practice of real life, it unavoidably bears thick political sense and the feature of interest conflicts, and can only



be realized gradually in coordination through complicated courses. On entering the 21st Century, the right to development also reflects some new and positive opportunities and trends, including:

Firstly, the human society is attaching greater importance to the right to development. In the past decade, the international community adopted a series of measures that can help promote the right to development. As early as September 1990, the United Nations convened the world underdeveloped countries for the second conference to discuss their problems; in 1994, former Secretary General of the United Nations Boutros Boutros-Ghali issued the *Development Program*, stressing the ultimate urgency of resolving the problems of the right to development; in 1998, the UN Commission on Human Rights proposed to establish an open intergovernmental working group to serve as the follow-up mechanism for implementing the *Declaration on the Right to Development*; in recent years, the United Nations convened the financing conferences for development and the world summit meetings for sustainable development several times, requiring its member states to review the issue of development assistance from the angle of the right to development and human rights.

Secondly, the world began to show concerns to developed countries' reduction and exemption of developing countries' debts. In 1999, the summit meeting of the seven major western economic powers formulated the Cologne Program, allocating \$100 billion to resolve the debt crises of the 40 most impoverished countries step by step; in 2000, the Summit of G8 decided to make the debt problem of developing countries their major topic, and decided to first reduce and exempt debts of \$15 billion of nine countries like Tanzania and Uganda.

Thirdly, international economic cooperation, the important factor of realizing the right to development, keeps expanding. A global cooperation organization, the United Nations is playing increasingly greater roles in development; WTO and the International Monetary Fund are playing the roles of standardization and coordination in international trade and finance areas respectively; the emergence and strengthening of some regional bilateral and multilateral cooperation organizations like the EU, North America Free Trade Area and Asia-Pacific Economic Cooperation greatly expand the international economic exchanges. These organizations bring most countries into a unified world economic system, which also returns relative benefits to the countries that participate in cooperation.

Of course, besides all these positive achievements made concerning the right to development, we can still realize that the problems of the right in the international community are far from being thoroughly resolved. In some areas, conditions still show the trend of deterioration, which includes:

Firstly, the gap between developed countries and the developing ones was enlarged, instead of being narrowed down. Viewing from the superficial statistics, we can see the economic growth rates in most developing countries after the 1990s are higher than those in developed countries. However, owing to the different statistic bases and economic scales, the growth of economic aggregate of developing countries is far less than that of developed nations. Except for a few East Asian and Southeast Asian countries, the gaps between most developing countries and developed countries in terms of per capita income and production value are still expanding.

Secondly, the development in most developing countries is not stable and in few countries,



and people's right to development even keeps retrogressing. Presently, the quality and efficiency of economic development in most developing countries are not high with their national economies still relying heavily on traditional agriculture and light industry. They mainly export primary products and raw materials with low value added. In this regard, their stamina of development is far behind that of developed countries, which, based on high and new technologies, make the tertiary industry their new economic growth points. All these factors, in addition to the instable political situations, imperfect market economic systems and frequent natural disasters, which are frequently seen in developing countries, constantly slow down or suspend their development. One of the typical examples is the financial crisis in Southeast Asia.

Thirdly, no progress was made in North-South Dialogue; developed countries fail to increase their assistances to developing nations; and South-South Cooperation retrogresses. With the deepening of economic globalization, developed countries occupy active positions in their relations with developing countries, leading to the suspension of the new global North-South Dialogue and the failure of the fulfillment of their commitments of using 0.7 percent of their GNP to assist developing countries. Traditional South-South Cooperation is also gradually replaced by various cooperation modes. Developing countries' becoming divided has become an irreversible trend.

Fourthly, the global problem of the right to development is becoming increasingly conspicuous, especially the global poverty and debt crisis, which are still continuing. Owing to the gradual reduction of developed countries' foreign assistance, some developing countries are placed in worse positions. Statistics from the World Bank show that the number of people whose daily living expenditures are less than \$1 has increased from 1.3 billion in 1993 to 1.5 billion now. Meanwhile, in the 1990s, the debts of developing countries annually increased by \$130 billion on average and in 1999, their debts combined to reach \$2.6 trillion. At the same time, owing to their debt repaying capacity, it is hopeless for the developing countries to relief their debt crises.

Fifthly, contradictions of other human rights related to the right to development sharpen to some extent. Some countries rampantly interfere into the sovereignties and internal affairs of developing countries on the issue of human rights under the name of international humanitarianism. Meanwhile, they often link up their development assistance with the situations of human rights. The Cologne Program clearly notes that only those debt-bearing countries with human rights situations and democracy conforming to the Western standards can enjoy debt reduction and exemption. This further lifts the barriers for developing countries to realize their right to development.

In the 21st Century, the human society may encounter with hopes and difficulties, as well as opportunities and challenges during its process of realizing the right to development. The international community is making unremitting efforts to resolve problems that perplex the right to development for a long time, and is making constant and outstanding achievements. However, the problems and obstacles are also conspicuous. Only through human society's joint efforts in promoting the construction of a long-lasting and peaceful harmonious society for common prosperity, respecting the rights for people in various countries to independently choose their own developing roads, helping developing countries to strengthen their capacity of independent



development, improving people's living standard and narrowing down the North-South gap can we properly resolve the problems related to the right to development.

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DEVELOPMENT AND HUMAN RIGHTS: THOUGHTS ON THE ISSUE OF POPULATION AGEING

Liu Huawen
China

Population increasingly ages with the pace of globalization. Population ageing is an issue our country has to confront in the new century and therefore should make proper preparations before it comes. The present thesis, taking into account the relationship between development and human rights, explores the ways of dealing with the issue from the human rights perspective.

1. Undertakings for the aged in China: confronting the challenge

The latest statistics of the State Statistics Bureau's sampling analysis on one percent of the national population show that there were 100.55 million people aged 65 and above in China by the end of 2005, accounting for 7.7 percent of the country's entire population. This means that population in our country is entering an increasingly ageing stage. Of course, developed countries also underwent the process of a graying population. It took them 30 to 40 years to complete the process while our country did it in just some 10 years.

Authoritative departments predict that China will have 174 million people aged 60 and above by 2010, about 12.78 percent of its total population. There will be 21.32 million people over 80 and above, accounting for 12.25 percent of the elderly people. Given this prediction, China will embrace the culmination of its population ageing by the year 2030 and it will have only 25 years to make strategic preparations for it.

Some foreign experts tend to summarize China's ageing issue as follows: 1) the working population shrinks as the ageing issue worsens. Their report predicts that the working population will reach a dividing line by 2015 and it will plummet thereafter. By the middle of the 21st century, China will lose 18-35 percent of its work force; 2) the growth rate of China's elderly population will quicken. Some 35 years ago, the proportion of children to the elderly in China was 6:1. The ratio can change into 1:2 in the 35 years to come. China's population pattern is changing dramatically. The average life expectancy of the Chinese will surpass that of Americans by the 2030s; 3) the social security system for the elderly still has room for improvement. Roughly speaking, three quarters of China's workers have no official retirement pensions at all. If China

does not implement reforms in this aspect, it will have millions and even tens of millions of old people who are short of retirement pension, medical insurance and care from the family.⁴⁰

These predictions are shocking if China's current social development trend, its current policies and mechanisms remain unchanged or changed not enough. In fact, as China's economy and society develop in an all-round way, many problems in this field can be relieved or solved if due attention is paid to the ageing issue by the government and society and effective measures are taken to this purpose.

In my opinion, the biggest challenge here is that the ageing issue is not paid due attention to or not correctly and comprehensively understood. For instance, some people look at the issue just from a perspective of economic cost while some others just pay attention to the basic old-age insurance. They cannot observe it from a perspective of comprehensive rights and interests for the aged.

Many challenges, as China, are faced in population ageing. It has, however, scored some eye-catching achievements in this aspect through long years of strenuous efforts. The achievements include: 1) A basic old-age insurance system has roughly been established in urban areas which include basic pension, medical care and minimum living guarantee; 2) China has pressed ahead with instituting of old-age policies and regulations based on the Constitution and the Law of People's Republic of China on the Protection of the Rights and Interests of Elderly People, laying a legal foundation for the undertakings for the aged; 3) It has established and perfected a network of old-age organizations. At present, our country has basically established a network of old-age organizations covering both government and non-government organs; 4) China, based on its reality, put forward a development goal of "enabling elderly people to be fed and clothed, to receive medical care, to teach, to be educated, to have a cause and to enjoy life," thus satisfying their needs and carrying out work on ageing in a comprehensive manner; 5) As the economy grows, some regions tried to make new breakthroughs by guaranteeing and strengthening rights and interests of elderly people. For instance, people aged 60 and above in Beijing who have not got the basic social insurance will receive a monthly welfare pension from January 1 of 2008. This is the first welfare old-age insurance system in China which implements the same standards for elderly people in both rural and urban areas.

Nationally speaking, China is a populous, developing country which is imbalanced in development. The level of its social security is comparatively low and its coverage incomprehensive. In such a context, China's long-cherished social and cultural tradition of respecting the aged and caring for the young is of paramount importance. It has played an important role in protecting rights and interests of elderly people.

Our government has paid much attention to the ageing issue and promulgated and implemented the Seven-Year Development Outline on Work Concerning Elderly People in China (1994-2000), Outline of the Tenth Five-Year Plan for the Development of China's Undertakings for the Aged (2001-2005) and Eleventh Five-Year Plan for the Development of China's Undertakings

40 Richard Jackson and Neil Howe, *The Graying of the Middle Kingdom*, Center for Strategic and International Studies (CSIS) and Prudential Foundation, April 19, 2004.



for the Aged. The Eleventh Five-Year Plan for the Development of China's Undertakings for the Aged, ratified by the State Council on September 21 of 2006, set out the overall goal for the work concerning the aged in the period: increasing financial input into the social security system, collecting money for the elderly people's social insurance fund through numerous channels, determining reasonably the social insurance amount and its way of distribution, progressively establishing a wide-covering, sustainable old-age insurance system which is compatible with other insurance schemes. Establishment of infrastructure should be positively promoted to facilitate life of elderly people. A network of old-age services which combines family and social care for the aged should be established and perfected.

The white paper book *The Development of China's Undertakings for the Aged*, released by the Chinese government in December 2006, summarizes our country's efforts in work concerning the elderly people, expounds comprehensively the country's relevant policies and sets out its direction of development. Its contents, falling into seven chapters, cover state mechanism of undertakings for the aged, old-age security system, health and medical care for the aged, social services for the aged, cultural education for the aged, participation in social development and safeguarding elderly people's legitimate rights and interests.

So far, Law of People's Republic of China on the Protection of the Rights and Interests of Elderly People is 11 years old. It has played a vital role in safeguarding the legitimate rights and interests of elderly people, strengthening work concerning elderly people and promoting the undertakings for the aged. The Standing Committee of the National People's Congress has passed a resolution ratifying amendment of the law so that it can be more scientific and perfected by developing with the times, absorbing good experience and practice from other places in the country and fit in with the international covenant on human rights. At present, the amendment of the law has drawn much attention from the society and triggered a heated debate on the issue.

It can be expected that work concerning the elderly people will make further progress as relevant government policies and laws are being perfected and strengthened.

2. Paying attention to human rights of elderly people: being pressed by the United Nations

Population ageing is a global issue. According to statistics of the United Nations, average life expectancy in the 20th century grew 20 more years from 1950 to 66 years and it is expected to grow 10 more years by 2050. This change of the population structure, together with birth boom in the first half of the 21st century, the world's population of elderly people aged 60 and above will grow from 600 million in the year 2000 to 2 billion by 2050. The proportion of elderly people by the world standard will increase from 10 percent in 1998 to 15 percent in 2025. The highest growth rate will occur in developing countries. It is estimated that in the 50 years to come, the population of elderly people in these countries will grow by four times. The developing countries, meanwhile, will face the problem of development and population ageing.

To confront this issue of graying population in the world, the United Nations has taken some primary actions:

The First World Assembly on Ageing held in Vienna in 1982 ratified the International Plan of Action on Ageing, which proposed actions in employment and income security, health and nutrition,

housing, education and social welfare. It also deems elderly people as a special, active group of people. The group has a number of capabilities and sometimes special medical care needs.

The United Nations' General Assembly adopted the 45/106 resolution on December 14 of 1990, designating October 1 as the International Day for Elderly People.

The United Nations' General Assembly adopted the United Nations Principles for Older Persons in 1991, which set five universal standards on the status of older persons: independence, participation, care, self-fulfillment and dignity.

In 1992 (10 years after ratifying the International Plan of Action on Ageing), the United Nations General Assembly held an international conference on ageing and adopted Declaration on Ageing. It specified the direction of further implementing the plan of action and declared 1999 as the International Year for the Aged. The conceptual framework of celebrations marking the International Year for the Aged demands research in four aspects: environment for the aged; life-long personal development; inter-generational relationship; relationship between development and population ageing. "Establishing all age-inclusive society shared by all," as the theme of the International Year for the Aged, will be continuously promoted in coming decades.

The second world assembly on ageing, held in Madrid in 2002, opened a new chapter in the work concerning elderly people in the new century. The conference initiated a new international action plan on ageing, requiring all member states to make achievements in the following three aspects: older persons and development; advancing health and well-being into old age; ensuring enabling and supportive environment. It called for the world's population ageing process to be included into a wide process of development. It was vital that the ageing issue be put on the world's agenda so that concerted efforts are made to take a fair viewpoint on policy integration. The task here was to correlate the ageing issue with other socioeconomic development and human rights frameworks.

Human rights are universally applicable. Apart from the rights and interests stipulated in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, elderly people, like ordinary people, should enjoy the special regulations set out in international covenant human rights and relevant papers, including articles 2, 22 and 25 of the Universal Declaration of Human Rights, the articles 2, 7, 10 and 17 in the International Covenant on Civil and Political Rights, as well as articles 11, 12 and 14 in the *Covenant on the Elimination of All Forms of Discrimination Against Women*.

The explanatory papers of human rights covenants elaborate extensively human rights of elderly people. For instance, the Committee on Economic, Social and Cultural Rights, as the treaty party of the International Covenant on Economic, Social and Cultural Rights, adopted its No. 6 ordinary opinion in 1995, "specially explaining the economic, social and cultural rights and interests of elderly people." In its ordinary opinion on rights of health, there are also contents on rights and interests of elderly people.

The international covenants signed and ratified by all the countries are legally binding. The relevant declarations and resolution, though not legally binding, are equally important. These international papers can reflect the latest achievements made by the international community in



dealing with the ageing issue and safeguarding rights and interests of elderly people. So they play an important regulating and guiding role in the aspect, and can lay a foundation for drafting and ratifying future legal documents at a higher level.

So, in the author's eyes, whether or not a comprehensive international covenant on safeguarding rights and interests of elderly people should be drafted and ratified when conditions are ripe and whether or not a special paper and mechanism should be established for the outstanding issue faced by developing countries are noteworthy questions. This is also a challenge and test for the international community.

3. Human rights viewed from a development perspective: thoughts on issue of population ageing

For the international community, development, security and human rights are already core issues. They are also the three pillars for the development of the United Nations. It is an undisputed fact that human rights have been a mainstream issue. The establishment of the United Nations Human Rights Council is a typical reflection of this trend. The current international organizations and departments have included human rights in their functional positioning and practical operations.

Human rights are also becoming a mainstream issue on national agenda. It is inevitable that as the domestic economy develops at a high speed and draws international attention, more attention should be paid to quality of life and citizens' participation in national and social affairs. At present, paying attention to people's lives becomes a key issue in our country's social development and a key aim of government work. What inspirations can be drawn if the ageing issue is viewed from a human rights perspective in the present context?

Economically speaking, lack of labor force and increase in pensions are symptoms of an ageing society. Now, especially in rural areas, the burden of caring for the aged falls on the shoulders of society or families. It is often said that the Chinese people cherish it as a merit and good tradition to respect the aged, care for the young and show filial obedience.

This tradition or culture as you may call it also needs strong backing from the government. Some scholars suggest that citizens who are caring for the aged should enjoy preferential treatment in income taxes. When caring for the aged becomes a burden their children can hardly sustain, the government should stand out to help. The government's support is not only a reward for elderly people's life-long contributions to society, but also a protection for its citizens.

To relieve the government's burden in pension payment and considering the fact that people live longer as a result of good medical care and health, people's retirement age limit can be postponed on a voluntary basis. This is the natural trend of social development and also a measure taken by some countries in confronting the ageing issue. However, does it really work?

It is also necessary for elderly people to progress with the times and master some knowledge and skills either for the sake of work or for the sake of life. This necessitates protection of their right for education. Some say in private that guaranteeing the right for education for children is to guarantee a future and that it may be a waste of time and energy to provide and safeguard the right for education for the aged. So the question arises whether elderly people should enjoy other rights

besides those in social insurance. It seems absurd to raise a question about the fact that elderly people are also people. But this is the very challenge we should face.

If elderly people can retire at a later age or work after their retirement, it means that they are healthy. They update their knowledge and capabilities, and feel their dignity and happiness; If they have a healthy, happy and rich childhood and middle age, their old age can also be equally rich and meaningful; If all their rights and interests are truly safeguarded, their life needs can be satisfied and their role in the ageing society can be positive. We have found out that both the United Nations and our national government do the right things when they call for the ageing issue to be viewed from every possible perspective and all the needs of the elderly people should be satisfied.

Therefore, the present author holds that the ageing issue should not be taken as one appearing solely at old age or as a sheer economic issue. The government should increase its input to not only increase social insurance level of elderly people and to widen the coverage of the scheme, but to pay more attention to their every need and safeguard all of their rights and interests.

To sum up, our development must be people-oriented. People here include both adults and the underage children. They include the young, the middle aged and the aged. Development of our economy, society and that of human rights are complementary and reinforcing. They are the three main threads that weave the fabric of a harmonious society.

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UZBEKISTAN: INDEPENDENT DEVELOPMENT AND HUMAN RIGHTS

Akmal Saidov
Uzbekistan

Introduction

Today's Uzbekistan with its 27 million population geographically and politically presents the basis of Central Asia. One of the most ancient civilizations in the world was born in this region. The Great Silk Road passed through its territory in the past. The history of my nation is deeply rooted in the centuries and counts more than 3 thousands years. From the ancient times such cities as Tashkent, Samarqand, Bukhara, Khiva and Termiz are well known in the world and their links were spread from China to Spain and from Europe to Indian Ocean.

Uzbekistan declared its state independence and entered the period of revival of its cultural,



intellectual and legal wealth, as well as democratic reforms in the economic, political and social fields.

Uzbekistan developed its own way of independent development and reforming the society and its own model of transition from authoritarian rule to democratic society and determined the concrete directions of state activity in sphere of guaranteeing and protection of human rights.

In March 1992 Uzbekistan became the member of the UN. Since that time the multilateral cooperation with different UN Human Rights bodies began.

Uzbekistan, as a Member State of the United Nations, makes every effort to promote and protect human rights and fundamental freedoms and conscientiously fulfils the obligations it has undertaken under the various international instruments in this field.

Independent and human rights

First of all, I would like to attract your attention to the three moments, which characterize the contemporary situation of human rights in Uzbekistan.

First moment, Uzbekistan is an ancient land with centuries of old civilization which is characterized by ethnic, religious, racial, cultural and multilingual tolerance. Rights and fundamental freedoms of more than 100 nations and 14 religious confessions are observed in the country. Not a single case of interethnic or interreligious conflict arose during the years of independence. Despite the difficulties of the transitional period and geopolitical characteristics of the region, Uzbekistan managed to keep political stability, interethnic harmony and sustainable development that create necessary conditions for the protection and promotion of human rights.

Second moment, legislative and institutional systems of protecting human rights were set up in a short historical period in Uzbekistan. International standards on human rights are being implemented into the national legislation. National institutions in the field of human rights such as Authorized person of the parliament for human rights (Ombudsman), National Human Rights Centre and more than 5000 nongovernmental organizations are functioning.

Third moment, Uzbekistan ratified more than 60 international human rights instruments and consequently fulfils its obligations in good faith, and maintains close cooperation with the UN Charter and treaty bodies' special procedures and mechanisms. In short, protection and promotion of human rights have become priority in domestic as well as in foreign policy.

In the years of independence Uzbekistan fulfils the following in the sphere of human rights.

The first. Legislative foundation in the sphere of human rights protection has been created for a short historical period in Uzbekistan. Parliament has adopted over four hundred laws on human rights and fundamental freedoms. During the past years, a new edition of the Law about Ombudsman to expand powers of Parliamentary Ombudsman was adopted; Laws on public funds, on elections of chairpersons of self-governance institutions of citizens, as well as on guarantees of NGO activities, on charity, on guarantees of the rights of the child have been adopted.

The second. By implementing the *Vienna Declaration and Program of Actions* the system of national institutions for human rights protection has been established. Alongside with traditional law-enforcement system, including courts, offices of prosecutors, there function such national institutions on human rights, as parliamentary Ombudsman, Constitutional court, National Centre for Human Rights, Institute for monitoring the current legislation, Special Department on human

rights under the Ministry of Justice, interdepartmental commissions and groups.

The third. Uzbekistan has created the educational system in the sphere of human rights within the framework of the United Nations decade in the field of human rights education. Special courses entitled to “Human Rights” have been introduced at all schools and universities.

The topic on human rights protection is included into the program on the improvement of professional skills of officers of law-enforcement bodies (judges, lawyers, police, offices of prosecutors). The National Program for raising the legal culture level of the society is successfully being implemented.

The fourth. Wide information - educational activity in the sphere of human rights is being conducted within the framework of the UN World Campaign on Public Information in the field of human rights. For example, more than hundred basic international legal documents on human rights have been translated into Uzbek language and published in big circulations. More than thirty juridical newspapers and magazines on human rights protection issues are being published. All mass-media pay special attention to issues of protection of human rights.

The fifth. Based on the rule of law our country has established the system of working with complaints on illegal activities of state officials, which includes institutional legal mechanism.

We know that 2008 marks the 60th Anniversary of the *Universal Declaration of Human Rights*, which has paved the way for a modern era in the development of protection of human rights and freedoms and the international cooperation in this field.

The *Universal Declaration of Human Rights* is the first international document, which Uzbekistan joined after its declaration of state independence. Thus Uzbekistan has demonstrated its adherence to ideals and values of human rights in the state policy.

The celebration of 60th Anniversary of the Declaration has already started in Uzbekistan, which will continue throughout the year with wide participation of public bodies, educational establishments, mass media and civil society institutions.

Following significant steps in the field of human rights mark the year 2008 for Uzbekistan:

Firstly, since 1 January the death penalty was completely abolished;

Secondly, the democratic institute of justice known as *habeas corpus* was introduced;

Thirdly, the constitutional law about increase of a role of political parties in democratization of society and the law on guarantees of the rights of child came into force;

Fourthly, the current year in Uzbekistan is declared as the Year of Youth and the relevant State Programme has been adopted.

Human rights education

Construction of a democratic state, where the rule-of-law would prevail, considerably depends on the organizational level of human rights education. The idea given by the United Nations that education is the basis for democracy, speaks of significant burden shared by schools, universities, as well as teachers and lecturers to carry out such task.

Human rights education is considered as one of the main fundamental rights of a human. In the light of the following, human rights education is of great importance:

Firstly, observance, protection and promotion of human rights;



- Secondly**, minimization of human rights violations;
- Thirdly**, creation of an effective mechanism for prevention and monitoring human rights violations;
- Fourthly**, formation of universal human rights culture.

Teaching the human rights is an important integral part of school education. As it is emphasized by H.E. Islam Karimov, the President of Uzbekistan, “It is important to form new values and sets in people’s minds in the context of human rights observance and thus to create a culture, directed to develop respect for human rights and their observance on national level. Person’s knowledge of his own rights and obligations should become a prerequisite for realization of constitutional guarantees of human rights.”

Modern Uzbekistan - is a country with high level of literacy and huge scientific and intellectual potential. Education is being provided in seven languages. System of continuous human rights education has been created in the country.

By realizing the Vienna Declaration and Programme of Action, as well as United Nations’ other fundamental human rights Documents, Uzbekistan pays a significant attention to human rights education. The Parliament of the country has adopted two National Programs in this direction:

The first - The National Program for Cadres Training;

The second - The National Program for Raising the Level of Society’s Legal Culture;

Thus, human rights education is a priority direction of educational policy of the Uzbek Government.

At present continuous and complex educational system concerning human rights has been created in Uzbekistan. The special “Human Rights” academic module is being taught at all the schools and universities.

Human rights are taught in Uzbekistan in three directions:

The first direction. Human rights are taught in the framework of teaching the Uzbek Constitution, during which a significant attention is paid to the constitutional rights, freedoms and obligations of citizens, as well as the system of national human rights institutions.

The second direction. Human rights are taught in the framework of the “Fundamentals of State and Law” academic module at higher levels of school education, during which a significant attention is paid to legal aspects of realization of human rights and freedoms.

The third direction. Human rights are taught in the framework of the special “Human Rights” academic module. The main purpose of this “Human Rights” course - is to research the problems of human rights and freedoms from a wide angle view.

Such wide-embracing and systematic approach to human rights education at the schools of the country is in line with obligations of the Republic of Uzbekistan before the international community that had declared the Universal Program on Human Rights Education.

The main tasks of the “Human Rights” school module are:

the first - to provide pupils with knowledge on human rights;

the second - to strengthen the pupils respect for people, their rights, pride and dignity;

the third - to develop ability and skills to protect rights and freedoms from various illicit actions independently.

Thus, the “Human Rights” academic module aims to demonstrate to pupils that human rights and freedoms - are complex and multi-angle phenomenon, result of the long legal development history of mankind and his most high social value. Human rights reflect vital needs for development of a person, frames for his freedom and responsibility. The pupils should get familiar with the interrelations between “Rights” and “Law,” “rights of a human” and “rights of a citizen,” “rights” and “obligations.”

The major aims of human rights education in Uzbekistan are to form the pupils’ human rights culture, and to bring them up to respect human rights and freedoms.

Wide academic and methodological as well as informational and educational activities are being carried out among teachers and pupils of schools in framework of teaching the “Human Rights” course. Thus, relevant textbooks and curriculums were elaborated and published for the “Human rights” course. The Universal Declaration of Human Rights, the Convention on the Rights of the Child, as well as other international human rights treaties were translated and published in Uzbek language. All the mass-media pay significant attention to issues of human rights protection, including protection of the rights of the child. There is a successfully functioning school-parliament in Uzbekistan.

We would like to stress on the need for joint elaboration with UNESCO of the International Declaration on Human Rights Education. Human rights education should become an integral part of the United Nations’ general strategy: “Education for all.”

We once again would like to note the necessity of joint elaboration with UNESCO and approval of an *International Declaration on Human Rights Education*. Human Rights Education should become an integral part of the general strategy of the United Nations: “Education for All.” Therefore, Uzbekistan supports the realization of the world programmes on human rights.

Finally, once again we would like to state our commitments to the universally recognized principles and norms of the international human rights law, consistently to implement our international obligations in this area and to deepen cooperation with all the international organizations.

Liberalization of judicial and legal system

Uzbekistan introduced a completely new concept of judicial system.

In the field of criminal procedure, the following significant measures were taken to maintain the real independence of courts:

1. specialization of courts on criminal, civil and economic cases;
2. establishment of institutes of appeal and cassation for consideration of judicial cases;
3. reducing, according to law periods of investigation and detention of people, and establishing rigid terms for legal procedures in the courts;
4. introduction of democratic legal mechanism for formation of the corpus of judges;
5. functioning of the department on execution of court judgments, and exemption of courts from functions unusual for them;



6. ensuring the principle of competitiveness, which means equality of the rights of public prosecutors and advocates.

In the field of criminal and penal legislation:

1. Classification of crimes was completely changed, with structure of criminal offences falling under the category of crimes with minor or no harmfulness to society is essentially expanded. As a result of such approach only for the last 2.5 years about five thousand persons who have committed offences not causing big social danger, was free from imprisonment and have paid material compensations of more than 11 billion som;

2. Conditions for serving the punishment in places of liberty deprivation are improved: regime and conditions of collective confinement were softened. As a result percentage of persons in penal institutions who are serving punishments of collective confinement has increased from 7% in 1990 up to 21% at present;

3. Clauses which provide a right of parole were increased. Today by average number of prisoners Uzbekistan, with about 37 thousand prisoners, holds the lowest criminal records among the CIS countries. In other words, in Uzbekistan there are on average 142 prisoners out of 100,000 people;

4. Institute of reconciliation was introduced into the legislation as a form of administration of justice. Enforcement of this institute has enabled over 26,000 people exempt of criminal liability.

The major directions for further liberalization of judicial system were presented in the statement of Islam Karimov, the Uzbek President, during the joint session of the two-chamber parliament of Uzbekistan in January 2005.

Two historical steps were taken within the framework of the liberalization of the judicial system in the beginning of August 2005. Here we speak of two Presidential Decrees.

First - strengthening judicial review of the preliminary investigation and pre-trial procedures. A Presidential Decree has been adopted on 8 August 2005, which introduces the institute of habeas corpus, i.e. transfer to courts the legal proceedings for issuing sanctions on detention, arrest, and application of other remedial compulsory measures.

Second - exclusion of death penalty from the system of punishment. First of all, it is necessary to specify that in Uzbekistan death penalty is not applied against women, minors and persons aged 60 and over. The death penalty is to be abolished in Uzbekistan, starting from 1 January 2008, not merely deferring declaration of execution.

Introduction of the habeas corpus institute

The most important task of judicial and legal reforms being carried out in Uzbekistan is to ensure the effective protection of the constitutional rights and freedoms of citizens, first of all, [their] rights to protection against groundless criminal prosecution and interference in his or her private life, and personal immunity, as well as rights to an impartial court hearing.

Considerable work has recently been done in the following areas: ensuring that the law-enforcement bodies act in line with the law; strengthening the judiciary's role as the most important guarantee of the effective protection of human rights; ensuring the true independence of courts; and boosting their role in building a democratic and law-governed state and a strong civil society.

Specialization of courts on criminal, civil and economic cases is fixed legislatively, which has provided for the increase of claims consideration quality, and has strengthened guarantees of human rights and freedoms protection. Appeal order of case consideration was introduced, and it serves as a prior guarantee of timely correction of court mistakes, non-admission of red tape in legal proceedings. Cassation instance was reformed: citizens now have opportunity to protect personally and directly their rights in case of disagreement with the court decision that came into legitimate effect. Legal mechanisms were created, ensuring equality of the rights for defense and prosecution in legal process, and realization of the adversary principle.

The terms of preliminary investigation were reduced from two years to 12 months, holding in custody - from 18 to 9 months, and in exceptional case - to 12 months. The sphere of application of this preventive punishment was limited as well. These measures on liberalization of the national legislation, law application practice have provided for the increase of efficiency and quality of pre-court investigation, jurisdiction, and expansion of procedural guarantees of observing the rights of court process participants. As an evidence of liberalization of pre-court investigation taking place in the country, usage of such preventive punishment as custody has decreased more than two times during the past four years.

The most important task of further liberalizing the judicial and legal system is to grant courts more powers in effectively protecting human rights at the stage of pre-trial investigations and, above all, to transfer the right to issue arrest warrants from the prosecution bodies to the courts. This measure will make it possible to considerably improve the effectiveness of the protection of the constitutional rights to freedom and personal immunity. At the same time, this is in full accordance with the Constitution of the Republic of Uzbekistan and universal principles and norms of international law, which stipulate that rights and freedoms of individuals are indisputable and that no-one has the right to deprive anybody of these rights or keep them outside the courts.

At the same time, the right to issue arrest warrants have been delegated to courts since 1 January 2008.

With the aim to further liberalize the judicial and legal system and ensure the gradual and systematic transfer of the right to sanction the application of measures related to restricting the constitutional rights and freedoms, and in line with Articles 19, 25 and 44 of the Constitution of the Republic of Uzbekistan, which define the citizens' rights to judicial protection, the following measures are taken:

First. The right to issue sanctions to arrest those suspected or accused of committing a crime has been delegated to the courts as from 1 January 2008.

It has been established that imprisonment is to be carried out only in exceptional cases, when the application of other measures of restriction stipulated by the law is ineffective, and that it should be carried out only under a ruling by a criminal court or military court within their powers.

Second. Ministry of Justice, Supreme Court, General Prosecutor's Office, Ministry of Internal Affairs and National Security Service of Uzbekistan made the proposals on introducing amendments and addendum to the Criminal Procedural and Criminal Executive Codes of the Republic of Uzbekistan, and to the Uzbek laws "On courts" and "On prosecutor's offices,"



(amendments and addendum) which regulate the procedure for sanctioning imprisonment and extending custody terms, and which envisage additional guarantees for the observance of the constitutional rights and freedoms of citizens and for ensuring their immunity at the pre-trial stage.

At the same time, not only laws and regulations but also the norms and normative acts envisaged by departmental legal documents are to be reconsidered in line with Clause 1 of the decree.

Abolition of death penalty

The most important objective of reforming the legal system of the Republic of Uzbekistan is a gradual stepwise liberalization of criminal, criminal procedural legislation, and the penitentiary system.

Democratic changes in penal policy and law enforcing practice have been positively impacting the social-political and the criminal situation in the country.

The most important direction of liberalization processes in legal system, and criminal punishment, undertaken in the Republic of Uzbekistan, was the gradual narrowing of the sphere of application of death penalty. For the last ten years the number of crimes for which the death penalty was envisaged has been decreased from 33 to 2. In other words, at the moment death penalty is applied only for two crimes - the premeditated murder with aggravating circumstances and acts of terrorism. Along these lines, Uzbekistan is committed to solve this matter from the very first days of independence.

What needs to be emphasized is that the application of the death penalty is banned in Uzbekistan as from 1 January 2008 according to the relevant Decree of the President of the Republic.

The current penal policy of the state in the area of the capital punishment application is fully in accordance with the world tendency and reflects the principles of humanism and justice, as declared by the Constitution of the country.

Numerous legislative, informational, educational, organizational and preparatory works aimed at absolute abolition of death penalty have been successfully accomplished in three directions.

Firstly, amendments related to abolition of death penalty and the introduction of life imprisonment or long term sentences were prepared and adopted to three Codes: the Criminal, the Criminal-Procedural and Penitentiary.

Secondly, the abolition of capital punishment required broad informational works among the population to strengthen public perception on the necessity to abolish death penalty. As annual social surveys that are carried out by the nongovernmental public opinion centre indicate the population of the country was against abolishing the death penalty.

Thirdly, Uzbekistan have undertaken entire range of organizational and preparatory works with regard to building complexes and facilities, creating necessary conditions to place the persons, whom the capital punishment has been substituted to life, or long term imprisonment, and train personnel to work at these facilities.

This is why Uzbekistan needed more than two years in order to abolish the death penalty completely. Therefore, the death penalty has been completely abolished starting from 1 January 2008.

Total abolishment of the death penalty as a type of criminal punishment is in line with the universally accepted principles and norms of international law and the provisions of the Constitution of Uzbekistan, which stipulates and enshrines the right of person to life.

Cooperation with the UN human rights bodies

Uzbekistan is a party to 6 major international human rights instruments, namely: *International Covenant on Civil and Political Rights*; *International Covenant on Economic, Social and Cultural Rights*; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; *International Convention on Elimination of All Forms of Racial Discrimination*; *Convention on Elimination of All Forms of Discrimination against Women*; *Convention on the Rights of the Child*.

Uzbekistan has submitted to the UN treaty bodies on above-mentioned instruments 19 national reports on compliance with its international obligations.

Until present the treaty bodies have already considered 18 of those reports. For example, in 2005 the Human Rights Committee considered the second national periodical report and Committee on Economic, Social and Cultural Rights examined the initial report of Uzbekistan. In 2006 there were reports of Uzbekistan considered by the CEDAW, Committee on the rights of the child and the Committee against torture.

During very recent period from February to August 2006 only the Committee on Elimination of Racial Discrimination considered the third, fourth and fifth reports; the Committee on the Rights of the Child - second periodic report; the Committee on the Elimination of All Forms of Discrimination against Women - second periodic report.

Uzbekistan has introduced an effective mechanism of implementation of concluding observations and recommendations of the international treaty bodies, namely national plans of actions (NPA). NPAs of Uzbekistan are now widely recognized by many treaty bodies as an effective tool to follow-up their recommendations in the country.

In order to fulfill its international obligations under the above instruments Uzbekistan has adopted more than 300 laws governing human rights and fundamental freedoms.

Uzbekistan is working closely with the Office of the United Nations High Commissioner for Human Rights (OHCHR). In connection with visits to Central Asia in 2002 and 2004, experts from the Office traveled to Uzbekistan, where they met with representatives of various government institutions.

Uzbekistan is also cooperating with the special procedures and mechanisms and punctually sends replies to its communications on various issues concerning Uzbek nationals and the human rights situation in the country.

Uzbekistan pays considerable attention to fulfill its obligations within the framework of *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Our efforts are carried out in accordance with the basic principles and measures developed by the Committee against Torture in its General Comments and Concluding Remarks on the results of our two reports and recommendations of Mr. Theo van Boven, the Special Rapporteur on Torture as well.



In order to fulfill its obligations on the realization of the provisions of the Convention against Torture and the recommendations of the Committee against Torture as well as that of the Special Rapporteur, the following are being accomplished gradually:

First, more than 300 laws on human rights and fundamental freedoms were adopted by parliament in a short historical period. Only during the last years in line with the Article 1 of the *Convention against Torture* an article containing the notion of “torture” was introduced into the Criminal Code, and new edition of the law on Ombudsman aiming at broadening the power of parliamentary ombudsman, law on public funds and law on the election of the representative of citizens’ self-governing bodies were adopted.

The Supreme Court of the Republic of Uzbekistan has adopted a definition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The prohibition of the use of torture, enshrined in national legislation is absolute and admits no exceptions. Persons charged with the use of torture are prosecuted in accordance with the law. To date, 15 law enforcement officers have been sentenced under article 235 (on the use of torture and other cruel, inhuman or degrading treatment) of the Criminal Code of the Republic of Uzbekistan.

Second, the third National Report on the realization of the provisions of the *Convention against Torture* was submitted to the Committee against Torture on April. More than 20 government and nongovernmental organizations actively took part in the preparation process of the National Report.

Third, on May 2004 Government of Uzbekistan adopted Program directed against the use of torture on the basis of the Convention, which includes Special Rapporteur’s all 22 recommendations. So far 20 recommendations were implemented completely.

Uzbekistan has always been demonstrating its willingness to cooperate with all instrumental human rights bodies, including Committee against Torture and Special Rapporteur on the question of torture.

Thus, significant steps have been taken and continued in order to prevent the cases of torture.

National human rights center of the Republic of Uzbekistan at glance

The National Human Rights centre of the Republic of Uzbekistan was established more than 10 years ago in accordance with the *Vienna Declaration and Program of Action*. The Centre carries out its activity in line with the Paris Principles on National Human Rights Institutions.

The center’s main purposes are - elaboration and implementation of the National Programme of Action on Human Rights.

Priority functions:

First, the Centre produces National Reports on human rights observance in the Republic of Uzbekistan and submits them to international organizations. Besides, the Centre keeps monitoring of the realization.

Till present 19 National Reports on the implementation of the 6 UN major human rights instruments have been produced and submitted to the treaty bodies. The Centre is a major partner in Uzbekistan for the UN treaty bodies.

The Center pays a great attention to information received from NGOs in producing National Reports alongside with information provided by other organizations.

Second, elaboration of National Action Plans and National Programmes on human rights.

Thus, till present the Centre has produced National Action Plans concerning the recommendations of the six UN treaty bodies and the recommendations of the Special Rapporteur Mr. Theo van Boven.

Third, preparation of recommendations for state bodies on improving their activities in the sphere of observance and protection of human rights.

Fourth, provision of consultative services to state bodies, NGOs and citizens as well regarding human rights issues.

Fifth, the Centre actively participates in legislation process.

Thus, the following laws have been drafted with the participation of the Centre:

Law on Ombudsman;

Law Court Executors;

Law on the Execution of Judicial Acts;

Law on Amendments to the Criminal, Criminal-Procedural, and Penitentiary Codes;

Law on Mass-Media;

Law on Nongovernmental Organizations;

Law on the social protection of orphans and children without parental tutelage;

Law on Public Funds;

Law on Guaranties on Childs Rights;

Sixth, the Centre carries out an enormous informational work:

Makes educational TV and radio programs;

Produces textbooks, leaflets, posters;

Organizes round-tables, seminars, conferences various human rights issues;

And publishes periodical journals.

As it was noted above, the centre publishes two popular journals: "Democratization and Human Rights" and "Public Opinion-Human Rights." Journals are published in three languages - in Uzbek, Russian and English and their main purposes are 1) dissemination of education in the field of human rights; 2) enhancement of legal culture of the employees of state bodies and population on the issues concerning human rights.

The great importance is attached to translation of international human rights instruments into the Uzbek language, as well as to their circulation. Thus, at present we have got 9 popular compilations published in Uzbek, in which over 120 international human rights instruments are included.

Hence, during the 10 years of its existence Centre has achieved considerable results that are of invaluable practical importance. Furthermore, Centre is in an active cooperation with the representatives and organizations around the globe.

Conclusion

Thus, never will be overemphasized the importance of assessing the human rights achievements of the Republic of Uzbekistan from the perspective of what has already been done to build the real democracy.



Certainly, Uzbekistan is presented with challenges of the building of democracy. These challenges are largely objective - economic difficulties, necessity of maintaining national security, peace and stability in the country.

(The author is Director of the National Human Rights Center of Uzbekistan.)

DEVELOPMENT AND HUMAN RIGHTS

Askar Shakirov
Kazakhstan

Dear ladies and gentlemen!

First of all, let me greet the participants and the organizers of today's event and to express my appreciation of such a commitment to further co-operation.

This year the international community marks the 60-th anniversary of the key human rights document of contemporary world - the Universal Declaration of Human Rights. The observance of provisions of this extremely important document serves as the keystone of security and prosperity of all humanity.

Currently our world is facing such factors as permanent modernization, integration of interests of the states and the peoples, unprecedented extension of the information space as well as the necessity of adaptation to the constantly changing living conditions.

In this situation the observance of human right of each individual for the development is an integral and extremely important component of confidence and, therefore, stability.

From the early days of its independence, Kazakhstan has acted as a responsible participant of major universal documents on human rights and reliable member of the international community. Our country attaches great importance to the Millennium Development Goals aimed at the development of human potential and achievement of progress in the field of human rights.

The right for development is the complex of human and civil rights for education, access to information, equality of men and women, freedom from any forms of violence and discrimination, protection and encouragement of rights of vulnerable groups of people: children, women, refugees, ethnic and religious minorities. It is also an elimination of such negative phenomena as poverty, hunger, wars and ecological disasters which slows down the development of the humanity.

The key contribution to the human development is the creation of favorable conditions for safe and prosperous life, especially for children, good enough for their health, their emotional state and development of their personality. In order to achieve these goals Kazakhstan is currently implementing the National Program on Childhood Protection for 2007-2011, which creates

an effective system of measures protecting the rights of all categories of children, eliminating violence against children and providing social security for them. We pay much of our attention to the practical implementation of universal conventions on protection of rights of children and to the fulfillment of final recommendations of the UN Committee on the Rights of a Child. We work closely with the international organizations including the UN specialized institutions, such as UN Children's Fund (UNICEF), UN Population Fund (UNFPA), Office of UN High Commissioner for Refugees, United Nations Educational, Scientific and Cultural Organization (UNESCO).

Our country demonstrates a strong commitment to the protection of the constitutional right of each citizen for education and adherence to the World Program for Human Rights Education. The realization of the National Human Rights Education Plan for 2006-2007 in the country is a live reflection of such a commitment. This plan is to ensure the universality and high quality of the education and the development of human personality.

Kazakhstan's Constitution proclaims the right of each individual for access to and distribution of information. The State acknowledges that the access to valuable information is an important aspect of respect of human rights and development of human personality. Therefore the administrative reform, currently being carried out in Kazakhstan, is aimed at the achievement of transparency and publicity of the activity of public authorities as well as at the creation of system providing the access for the public to whatever information that could encourage its development. The state's policy in the field of the right for information is based on the principle of openness excluding the groundless refusal for the public's access to the information.

Undoubtedly, the sexual inequality, violence against women and their discrimination limiting opportunities for the development are the negative factors for human development and human rights. Therefore, providing the equal opportunities for men and women, protecting women from violence and supporting the maternity and childhood, are among the Kazakhstan's domestic and foreign policy priorities.

Kazakhstan is implementing the Gender Equality Strategy, every section of which includes the indicators of gender equality level in all spheres of social and political life of the state and level of prevention of violence against women and children. These indicators have been developed jointly with the regional office of the UN Development Fund for Women (UNIFEM). Kazakhstan's legislation provides for the effective measures to protect women's rights which cover the labor, family, criminal, corporate and election law. We undertake efforts to ensure the social protection of women, to improve our legislation as well as to implement the international documents aimed at the protection of women's rights including the final recommendations of the UN Committee on the Elimination of the Discrimination against Women.

The civil sector is a significant factor for the development of the human potential of every citizen and contributes to raising the level of legal culture of the population. Kazakhstan has elaborated the Concept of Civil Society Development in the Republic Kazakhstan for 2006-2011 strengthening the role of non-governmental organizations in the development of a constitutional state.

Kazakhstan conducts the policy of non-acceptance of discrimination and intolerance, supports the freedom of thought, speech and conscience as well as the right of each individual



for self-improvement in the atmosphere of mutual understanding and tolerance. Kazakhstan has initiated and hosted the Congress of Leaders of World and Traditional Religions, and has the unique Assembly of People of Kazakhstan.

These and number of other initiatives aimed at the development of inter-confessional and interethnic consent, the equality of rights and opportunities, demonstrate our commitment to the creation of the favorable conditions for the human development of everybody and to the strengthening of stability and progress.

Thank you for attention!

(The author is Commissioner on Human Rights of the Republic of Kazakhstan.)

PROMOTION AND PROTECTION OF RIGHT TO DEVELOPMENT: FOCUSING ON THE *UNIVERSAL DECLARATION OF HUMAN RIGHTS* AND THE PEOPLE'S REPUBLIC OF CHINA

Yang Chengming
China

As the charter of mankind's rights, the *Universal Declaration of Human Rights: Universal Declaration of Human Rights* lists all rights and basic freedoms to be enjoyed by mankind, and encompasses the human rights objectives to be realized via the joint efforts of mankind. Thirty years after its publication, the right to development has become a new generation of human rights. Proposition of the right to development coincides with China's efforts in meditating and exploring an appropriate development path. Its determination happens at about the same time while China implements the policy of reform and open-up, and sets out on its characteristic socialist road. Its world-wide promotion and protection coincides with China's fast economic growth and all-around social progress. On the occasion when Universal Declaration of Human Rights celebrates its 60th anniversary and when China celebrates its 30th anniversary for reform and open-up, it is all the more necessary to summarize the progress made by China in promoting and protecting the right to development, and to analyze the challenges and countermeasures for further efforts, for China to improve protection on the right to development both domestically and internationally.

Section 1 *Universal Declaration of Human Rights* and the germination and protection of the right to development

Right to development stems from *Universal Declaration of Human Rights*, whose preamble announces the determination to promote social progress and better standards of life in larger freedom. In the declaration, article 2 forbids discrimination; article 21 regulates that every has



the equal right to participate in public affairs; article 25 regulates that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control, including food, clothing, housing, medical care and other necessary social services.”; article 28 rules “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” To ensure all the rights set down in the declaration, the *United Nations enacted International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights* on December 16th, 1966. The two covenants both emphasized in their preambles that the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights. In the meanwhile, both regulates in article 2 of part I that all peoples have the right of self-determination, and that by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Approval of the two international covenants on human rights shows that the international community has begun to pay attention to human rights in the real sense of the word after the Second World War, and has acknowledged that civil and political rights and economic, social and cultural rights are interrelated and interdependent, and that both are essential human rights. Meanwhile, the right of self-determination is an important precondition for realizing the above rights. However, the outburst of Cold War quickly damaged agreements reached between Western Countries on human rights. Since 1970s, the international community has been trying to bridge biases on human rights, to which the proposition and determination of right to development is an illustration.⁴¹

In 1997, the U.N. Commission on Human Rights put forward the issue of right to development during its 23rd session. The conference passed No.4 Resolution, which requests U.N. Secretary General, United Nations Education, Scientific and Cultural Organization and other relevant organizations “On the basis of international cooperation, to take the right to development as human rights, combine it with other human rights (including the right to peace) and study its international aspects. During the study, the new international economic order and mankind’s basic needs should be taken into consideration.”

On November 23rd, 1979, the 34th UN General Assembly passed No.34/46 Resolutions on the right to development, reiterating that it is a basic human right. In March 1981, UN Human Rights Commission passed No.36 Resolution on its 37th session, and decided to establish a governmental specialist panel on development right, whose specific responsibilities include deliberating the scope and content of the right to development, and the most effective means to ensure its implementation. In the same year, it began to prepare the draft of *Declaration on the*

41 Xu Xianming ed., *International Human Rights Law*, P429, Law Press, 2004



Right to Development.

On December 4th, 1986, UN General Assembly No.41/128 Resolution approved *Declaration on the Right to Development*, enunciating that the right to development is an inalienable human right. Declaration on the Right to Development is a very important document to be approved by the United Nations 38 years after the *Universal Declaration on Human Rights*.

In 1993, the World Human Rights Conference approved *Vienna Declaration and Program of Action*, further reiterating that “the right to development determined in Declaration on the Right to Development is a universal and inalienable human right, and part of essential human rights.” Therefore, promoting and protecting the right to development is an important means to further integrate civil and political rights, and economic, social and cultural rights and to push forward their realization, as well as the internal need and reincarnation of implementing Universal Declaration of Human Rights by the international community.

Section 2 Headways made by China in promoting and protecting the right to development

China has been relentless in its efforts to promote and protect the right to development both internationally and domestically. On the international level, China proactively pushes forward stipulation by UN to legalize the right to development across the globe, and to support and assist other countries to promote and protect it. On the domestic level, China establishes, improves and creates new theories on the right to development, step up with economic development and poverty elimination, and makes effort to improve its people’s livelihood and achieve comprehensive social development and progress.

2.1. Proactively facilitating germination of the right to development and its acknowledgement by the international community

Prior to 1979, China proposed the issue of ensuring right to development while commenting on universal human rights at the United Nations. In 1979, China unequivocally declared its support for defining the right to development as a human right.⁴² After the 1980s, China entered the stage of fully acknowledging and ensuring the right to development. Since 1981, China has participated in all the conferences held by the government specialist panel under the UN Human Rights Commission and was responsible for drafting *Declaration on the Right to Development*, and put forward many suggestions, until the document got approved on 41st UN General Assembly in 1986.

In addition, China actively pushes forward global negotiations on right to development hosted by the Human Rights Commission, and advocates deliberation of right to development at Human Rights Commission as an independent topic. China has always been a cosponsor of the right to development. Specifically, on the 38th session of UN Commission for Human Rights held on February 23rd, 1982, Chinese representative Gu Yijie delivered a speech titled *On the Issue of Right to Development*, voicing China’s support for series resolutions on right to development approved by the United Nations. On February 14th, 1983, Representative Ma Longde made

⁴² In the 1979 UN conference, Representative Wang Jiechen of the Chinese delegation remarked, “as for the concept of human rights, we support the positive content reflected in 32/130 resolution and the opinion that the right to development is a human right.”



a speech on the right to development at UN General Assembly, and systematically illustrated China's understanding of the importance, concepts, obstacles and implementation models of the right to development. In 1984, in the 40th conference of the UN Human Rights Commission deputy Representative Gu Yijie highlighted the issue of right to development, pointing out that efforts should be made to eliminate difference regarding the issue, and to enhance international cooperation and facilitate approval of the draft declaration on right to proposal.⁴³ Thanks to the constant appeal and sincerest cooperation from developing countries represented by China, Declaration on Right to Development was approved in 1986.

From 1990, efforts made by developing countries represented by China paid off. UN Commission on Human Rights discussed realization of right to development as an independent issue. On three consecutive UN General Assemblies from 1991 to 1993, representative from China reemphasized and reiterated China's fundamental stand and views about the right to development, elevating realization of this right in the international community to a new height. On March 25th, 1999, Ambassador Wu Jianmin, head of Chinese delegate to the 54th session of UN Commission for Human Rights, addressed the meeting, emphasizing that the human rights commission should attach importance to economic, social and cultural rights, as well as the right to development, rectify the trend of prioritizing civil and political rights and ignoring economic, social and cultural rights, and the right to development. Wu pointed out that, rebalance of the two kinds of rights is an urgent affair, when viewed against the situation that UN is trying to including human rights into the mainstream of their work. Among world population of 5.7 billion, 4.9 billion live in developing countries and what comes to their minds first is none other than realization of economic, social and cultural rights and the right to development. The primary care of the 4.9 billion people can not be left unattended, if the United Nations wants to achieve the objective of "integrating human rights into the mainstream work of the United Nations."

On United Nations Millennium Summit held in September 2000, China and other 188 UN members signed the Millennium Declaration aimed at boosting development. China is now making efforts to realize a series of specific goals within the framework of millennium development objective according to its commitment. Those specific goals include relieving poverty and hunger, popularizing basic education among its people, reducing child mortality, improving parturient health care, promoting gender equality and women's empowerment, fighting AIDS and other infectious diseases, ensuring environmental sustainability, and establishing global partnership between developed countries and developing countries (including least developed countries). Meanwhile, China has also put forward the goal of achieving full-scale well-off society by 2020.

During the 57th UN session held on March 27th, 2001, Ambassador Wang Shijie, consultant of the Chinese delegation addressed the conference on the right to development, in which he explained the standpoint of Chinese government on the right to development. Wang Shijie remarked that the right to development is an inalienable human right, and that the primary

43 Han Depei, *Theory and Practice of Human Rights*, P563, Wuhan University Press, 1995



responsibility for creating a favorable domestic and international environment lies with countries, which are thus obliged to cooperate with each other, eliminate obstacles impeding development so as to accelerate the universal realization of right to development.

In March 26th, Ambassador Sha Zukang, leader of permanent mission of the People's Republic of China to the United Nations office at Geneva, said on the 59th UN Human Rights Conference that the international community has the obligation to create favorable conditions for developing countries to realize the right to development. Sha pointed out that, the right to development is an inalienable human right, that it is the common need of developing countries to realizing right to development, and that such realization necessitates joint efforts of the international community and countries around the world. The effort by developing countries is of utmost importance, as testified by China's experience in reform and open-up over the past 20-odd years. However, this does not mean that the international community should escape its responsibility. Each party is expected to should its share of responsibility.

On June 26th, 2006, La Safan, deputy representative of the Chinese delegation pointed out during the Inaugural Session of the United Nations Human Rights Council that right to development is a cornerstone for advance in economic, social and cultural rights, and civil and political rights. La said that the international community should clearly realize its importance, as well as predicaments facing developing countries. In pushing forward the right to development, the newly established Human Rights Council should take up the responsibility. It should not only inherit the motions and resolutions regarding the right to development from the Human Rights Commission, but also specify their contents, and substantially correct the status quo of over-emphasizing civil and political rights while ignoring economic and social rights and the right to development. In the meantime, the council should strengthen its cooperation with other UN organizations, institutions, funds and programs, multi-lateral financing and development bodies, and the World Trade Organization, and facilitate substantial progress in realizing the right to development by the international community.

2.2. Supporting and assisting other countries in promoting and protecting the right to development

Since its foundation, China has been unstintingly supporting other developing countries, promoting and protecting the right to development of other countries, nationalities and individuals. Its efforts are highly lauded by the United Nations and the international community and have generated extensive positive influence among developing countries.

2.2.1. Financial assistance

As of December 2007, China has offered financial assistance to 160 countries and regional organizations in Africa, Asia, East Europe, Latin America and South Pacific region in the forms of non-reimbursable assistance, zero-interest loans and preferential loans. With its support, China has helped the receiving countries building over 2000 projects closely related to the production and livelihood of local people. The projects cover industry, agriculture, transportation, communication, culture and education, health care and other public facilities. In the following 3 years, China will provide African countries with USD 3 billion in preferential

loans and USD 2 billion in export buyer credit.⁴⁴

2.2.2. Debt relief

As of today, China waived 374 debts of 49 developing countries in Africa, Asia, the Caribbean and the South Pacific, and the total amount exceeded RMB 16 billion Yuan.

2.2.3. Man power and technical support

To help other developing countries to enhance self-development capabilities, the Chinese government has attached great importance to training programs for foreign-aid personnel, which have trained over 18 thousand managerial and technical talents. By far, almost 100 thousand foreign-nationality management and technical staff have come to China for training and researches. Since 2005, China has begun sending youth volunteers overseas. By far, over 200 youth volunteers have been dispatched to Thailand, Ethiopia, Laos, Burma, Zimbabwe, the Republic of Seychelles and other countries, to launch teaching of Chinese, Chinese medical therapy, agricultural science, physical education, computer training, international aid and other volunteer services.

2.2.4. Humanitarianism aid

China has offered humanitarianism aids to developing countries suffering from humanitarian crises. For instance, it has dispatched peacekeeping forces and medical teams to the Democratic Republic of Congo and other countries, and emergency search and rescue team to Algeria. Since 1963, about 20,000 person times of medical personnel has been sent to 65 countries and regions in Asia, Africa, Latin America and East Europe. Currently, about 48 medical teams consisting of over 1200 medical staff are working in 47 countries. In addition, China has offered prompt humanitarianism aids to countries inflicted with natural disasters. For instance, tsunami in the Indian Ocean, the devastating earthquake in Pakistan, the hurricane in Madagascar, train explosion in DPRK, earthquake in Indonesia, and typhoon in the Philippines, China offered humanitarian aid in the wake of all the above disasters.

2.3. Improving existent and creating new theories on the right to development

China has attached great importance to the right to development, and has formulated a complete and independent theory in the course of international exchanges. The theory boils down to the following aspects: (1) The right to development is an essential and primary human right; without development of the country and the nation, other human rights would be baseless. This is our fundamental opinion on human rights issues. (2) The right to development includes the right to develop economically, culturally, politically and socially, and emphasizes the interdependence and inalienability of various human rights and fundamental freedoms. (3) The right to development encompasses individual human rights and collective human rights. It is not only an individual right, but also an inalienable collective right enjoyed by countries and nations. (4) The right to development is an international human right and a domestic human right at the same time. Its realization not only relies on domestic efforts, but also necessitates the responsibility of the international community. Therefore, new international economic order

44 Li Rongmin, "China's Assistance to Other Countries Advances Global Harmony", *Study Times*, Issue 343



should be established.

China has also emphasized innovation of theories on the right to development. An important result is the Scientific Outlook on Development, which “is not only of great theoretical value in that it has enriched and improved the basic theories on human rights, but also is the fundamental guide for realizing the right to development in China, the largest developing country in the world.”⁴⁵ First, the Scientific Outlook on Development enriched the content of the right to development and gave it new connotation. It has provided a value concept for the right to development. The Scientific Outlook on Development reveals that, to realize the right to development, fundamental interests of the people should be taken as the foundation, the demands of the people should be satisfied, individual dignity respected and all-round personal development facilitated.

In the meantime, the Scientific Outlook on Development sets a value objective for the right to development. It embodies full respect for equal right to development enjoyed by all people, particularly emphasizes the urgent demand from under-developed regions and poor population for accelerated development, and ensures balanced development. Therefore, it is of significant reference value for resolving economic and social contradictions and troubles.

Secondly, the Scientific Outlook on Development expands the scope of right to development and improved its theoretical foundation. The right to development and development concept are closely related. Development concept of human society has evolved from economic development to coordinated development of individual, nature and society, and further to sustainable development. However, all those development concepts have certain limitations. However, the Scientific Outlook on Development is different. While inheriting the essentials of traditional development concepts, it discards their one-sidedness and elevates development concept to a new height. It highlights individual as the foundation, emphasizes coordinating sustainable development and lays stress on “Five Overall Planning,” thus integrating the contents and forms of the development body and process, and greatly expanding the scope of right to development.

Under the guidance of Scientific Outlook on Development, the right to development should be a universal right to be enjoyed by all the people. It should protect not only the development right of urban dwellers, but also that of the people in the countryside. It should include economic development right, and political, cultural and social development rights. Therefore, it can be said, that the right to development guided by Scientific Outlook on Development has penetrated the boundary of individualist concept on human rights, and realized the unification of individual and collective human rights during the interaction between individuals, collectives, societies and nations, and the international community and natural environment. Finally, the Scientific Outlook on Development points out the means for realizing the right to development. Its realization is not only dependent on volunteer social activities by individuals, but also on protection, coordination and facilitation from the country. Development concept points out the means for realizing the right

45 Wang Xigen, “Scientific Outlook on Development - the Fundamental Guide for Realizing the Right to Development”, *People's Daily*, June 13th, 2007, Page 009



to development.

Specifically: firstly, protection and realization the right to development for the people with Scientific Outlook on Development as the overall guidance calls for appropriate and unbiased handling of relations between current development and future development, between economic development and social development, between partial development and complete development, and between government and market. Secondly, protection and realization the right to development for the people with Scientific Outlook on Development as the overall guidance requires coordinating the value conflict between free development and orderly development, and that between efficient development and equal development. Special attention should be paid to protect interests of the poverty-stricken and disadvantaged groups, and to achieve value balance between freedom and order, and efficiency and fairness. Thirdly, protection and realization the right to development for the people with Scientific Outlook on Development as the overall guidance calls for rationalized and civilized forms of development, correct handling of the relation between economic development and social progress. Development should be people oriented. The relation between mankind and nature should be properly handled for coordinated development. Concepts of democracy and government by law should be established. Relations between cities and countries, different regions, mankind and nature, economy and society, home and abroad should be regulated according to law so that development relations can be legalized. All those will benefit complete, coordinate and sustainable development of economy, society and individuals.⁴⁶

2.4. Efforts to develop economy and shake off poverty

Fundamentally, the right to development is a right aiming at improving the living quality of mankind and facilitating the maximization of mankind's interests. With economic development at the core, the right to development further includes social and cultural rights, like the right to work, to enjoy fair and reasonable employment conditions, to enjoy higher material and mental health standards, to benefit from scientific, trade, technological and economic progresses, to use financial resources, formulate population policies and protect the environment for social and economic development. However, realization of all those essential rights, freedom and national rights must have a solid foundation consisting of economic development, without which, all efforts to realize the basic rights and freedoms stipulated in International Covenant on Human Rights would be in vain. Therefore, economic development should be the core of the right to development. China unswerving sticks to its policy of taking economic development as the central task to continuously develop social productivity, and to improve people's living standards and fundamentally push forward the promotion and protection of the right to development.

2.4.1. After continuous high-speed growth, Chinese economy has attained remarkable progress.

Since 1978, the annual growth rate of China's GDP has been kept at about 10%. Its GDP has increased from RMB 362.4 billion Yuan in 1978 to USD 2000 in 2006, its economic volume

46 Wang Xigen, "Scientific Outlook on Development - the Fundamental Guide for Realizing the Right to Development", *People's Daily*, June 13th, 2007, Page 009



skyrocketed to world No. 4, and its foreign exchange reserve reached world No.1. Its fast developing economy has become an important support and momentum for the development of world economy. According to World Bank statistics, since China joined WTO in 2001, the average contribution rate by its economic growth to world economic growth reaches 13%. Over the recent years, its export and import volume has been fast growing at the rate of over 30%. Its trade volume of 2006 reached USD 1422.12 billion, consolidating its status as the world's third power in international trade. Since implementation of reform and open-up, China has attracted an aggregate of RMB 660 billion Yuan in direct investment from overseas. By 2006, over 480 of the top 500 multinational enterprises have invested in China, which has thus become an important link in the international production chain. Currently, China is at the crux of industrialization, urbanization and accelerated modernization. With the increase in income of urban and suburban residents, and upgrade in consumption structure, the market demand is enormous. Thus the growth potential and development outlook of its economy is unbounded.

2.4.2. China has earned universal recognition from the international community for its achievement in alleviating poverty. It has become a model for developing countries in this aspect.

According to a report prepared by UN Development Program, since 1990, East Asian and Pacific Regions represented by China have reduced absolute poor population by half, and have made considerable headways in realizing other Millennium Development Goals. According to World Bank statistics, between 1990 and 1999, global (excluding China) poor population whose average daily expenses are below 1 US dollar reduced by 123 million, while the figure for China during the same period reached 151 million or 40% of its total poverty-stricken population. With China excluded, poor population around the world increased by 28 million over the past decade. During the same period, poor population whose average daily expenses are below 2 US dollars increased by 90 million, that in China reduced by 191 million or 23%. If China is excluded, the increase of poor population would be 281 million.

In 2001, the Chinese government unequivocally put forward the objective to alleviate poverty and satisfy the essential needs of poor population in the rural area, accelerate the development of poverty regions and create conditions for achieving well-off standards. With fast economic growth and proactive poverty-fighting policies, the cultural, educational and health care, and other social undertakings have attained different levels of development. In 2005, China's per capita development index ranked world No.85, up by 20 from 1990. Taking the one-dollar poverty standard, its poverty occurrence has reduced by half since 1990, achieving its millennium development objectives in advance.⁴⁷

Over the past three decades, China has made eye-catching achievements in fighting against poverty. From 1981 to 2004, its poverty rate sharply decreased from 64% to 10%, with the population lifted out of poverty accounting for 81% of that in all East Asian countries. Rural poor population has reduced from 250 million in 1978 to about 20 million, and poverty occurrence rate down from 31% to 2.5%. Statistics has it that if the same poverty standards had been adopted, the

47 See UN *Human Development Report 2005*, publicized by United Nations Development Programme

poverty occurrence rate of China in 1981 would have been 23.4% higher than the world average. By 2001, its poverty rate was already 4.5% lower than the world average.⁴⁸ Its contribution to the development of mankind and alleviation of poverty is indeed remarkable. UN Development Program pointed out that, “You can never praise China too much for its contribution to the realization of Global Millennium Goals. Without its progress, the whole world would have taken a step backward in alleviating poverty.”⁴⁹ Paul Wolfowitz, former president of World Bank, remarked during his visit to China in October 2005 that, “It is universally acknowledged that China has been the fastest growing economic entity in Asia, and it has lifted over 400 million people out of poverty according to the one-dollar standard. Since 1980, its population lifted out of poverty accounts for 75% of that world wide. This is a surprising fact. China’s achievement in alleviating poverty is truly remarkable.” Just as his predecessor James David Wolfensohn said in his speech delivered at Peking University on May 29th, 2002, China has made unrivalled accomplishment in reducing poverty, and should be proud.

2.5. Attention to the livelihood of its people and efforts to achieve integrated development and progress

The right to development is a comprehensive right, whose realization necessitates the realization of civil, political, economic, social, cultural and other rights. In the meantime, it requires equal protection for those rights and subjects entitled to those rights. The policy of reform and open-up has been implemented for 30 years, and China has not only made remarkable achievements in economic development and poverty elimination, but also made delightful headways in promoting and protecting educational, cultural, health, social security, political, environmental and fair justice rights.

2.5.1 Promotion and protection of the right to receive education

As regards protection for right to elementary education, China has exempted since the spring semester of 2007 the tuition fees and incidental expenses for students receiving compulsory education in rural areas across the country via amendment of the Compulsory Education Law. And the population coverage for regions popularizing Nine-Year-System Compulsory Education has reached 99%, and the figure for middle and western regions stands at 98%. Elementary school net enrolment rate, retention rate and promotion rate has been further elevated. According to statistics, the figures for those rates reached 99.5%, 99.4% and 99.9% respectively in 2007. As regards protection for right to intermediate education, gross enrolment rate and promotion rate for junior high school reached 98% and 79.3% respectively in 2007.⁵⁰ As regards protection for right to higher education, the gross enrolment rate for higher education reached 23% in 2007, showing that China’s higher education has evolved from meritocratic education to popular education. Currently, efforts are being made to equally allocate education resources between urban and rural

48 See *China Development Report 2007: Eliminating Poverty During Development*, compiled by China Development Research Foundation, evaluating the history and status quo of anti-poverty in China from various perspectives

49 See *UN Human Development Report 2005*, publicized by United Nations Development Programme

50 Nine-Year-System Education Popularization Covers 99% of the Population in 2007, published by www.Xinhuanet.com on February 26th, 2008, visited on March 2nd, 2008



schools, to create equal education opportunities for rural and urban students, and to tackle the issue of education for the offspring rural migrant workers.

2.5.2 Protection and promotion of cultural rights

China has attached great importance to protection the cultural rights of its citizens. Over recent years, it has made enormous effort to develop nine categories of cultural industries, covering film-making, publishing, distribution, photocopying, advertising, performing, entertainment, cultural exhibition, digital content and motion pictures. In addition, it has launched cultural construction at grass-root level, large-scale projects and constructions aimed at shaping its cultural image, cultural industry system construction, and cultural creativity construction. In the field of public culture, “cultural access initiative” has been made available to low-income and special groups via granting free access to museums and parks, ensuring the cultural rights of low-income group, rural migrant workers, senior citizens and the disabled. Over the past 5 years, China has allocated over RMB 58 billion Yuan for cultural undertakings, reflecting average annual growth of 22.5%. Investment in cultural infrastructure construction reached RMB 15.3 billion Yuan, reflecting average annual growth of 10.8%. Investment in classic stage arts, mobile stage arts, offering books to rural areas, intangible cultural heritage protection, and rescue of Chinese rare books reached about RMB 200 million Yuan, RMB 100 million Yuan, RMB 80 million Yuan, RMB 156 million Yuan, and over RMB 100 million Yuan respectively. According to statistics, aggregate traffic in public libraries in China over the past 5 years reaches 892 million person times, with aggregate book traffic amounting to 795 million, aggregate cost for books reaching RMB 1.704 billion Yuan, aggregate newly purchased books reaching 41.94 million. Annual exhibits in museums of all levels and categories reach approximately 10,000 times, attracting over 150 million person times of audience.⁵¹ Currently, coverage of radio and TV broadcast in China reaches 94% and 95% respectively.

2.5.3 Promotion and protection of Right to Social Security

Since the middle 1980s, China has launched a series of reshuffles for the social security system: further improving urban endowment insurance system, establishing rural endowment insurance system and urban unemployment insurance system, implementing birth, work injury and urban employee medical insurance reform, and setting up guarantee of subsistence allowances for urban residents. Since 2002, it has begun to establish new-type rural cooperative medical insurance system. By 2006, the social security of China had been greatly improved, with 187.66 million people included in basic urban endowment insurance, 53.74 million people in rural endowment insurance, 157.32 million in basic medical insurance, 111.87 million in unemployment insurance, 102.68 million people in work injury insurance, and 64.59 million people in birth insurance.⁵² So far, over 22 million urban residents have obtained subsistence allowances from the government.

51 Sun Jiazheng, Grand Development and Prosperity - Achievements in Cultural Construction Since the 16th NCCPC, http://www.hpwhw.com/Show_Infos.asp?Article_Id=1272, visited March 4th, 2008

52 Statistical Report on Employment and Social Security Development, see http://www.molss.gov.cn/gb/news/2007-05/18/content_178167.htm, visited March 4th, 2008



2.5.4 Promotion and protection of civil and political rights

The Constitution and laws of China have attached great importance to protecting the civil and political rights of its people. It has been constantly improving government information publicity system and proactively encouraging the development of press and publishing industries. By 2006, the number of publishing houses in China reached 573, publishing 1,938 kinds of newspapers, and the number of audio publication units reached 339, and electronic publishing units 198.⁵³ The recent years has witnessed marked development in internet industry, with netizens exceeding 210 million. China respects and guarantees religious freedom of its people. According to incomplete statistics, currently there are over 100 million disciples of various religions, 300 thousand religious personnel, and over 100 thousand premises for religious activities. It also respects and guarantees association freedom of its people. Currently, there are 289 thousand non-government organizations in China, including 153 thousand social organizations, 135 million non-government non-business organizations and about 900 foundations.⁵⁴ To ensure its citizen's right to vote and stand for election, China has gradually increased the proportion of women and peasants in the NPC deputies at various levels. In the meantime, China has established and gradually improved the systems of regional national autonomy, the congress of staff and workers and villagers' self-government.

2.5.5 Promotion and protection of environmental right

The Chinese government has always defined environmental protection as a fundamental state policy. It has adopted sustainable development as a major strategy and stuck to new-type industrial road, encouraging economic development while carrying out environment protection measures.

Especially in recent years, the Chinese government, with the scientific outlook on development as the guiding principle of environmental protection, has adhered to focusing on preventive measures, comprehensive control and overall progress with breakthroughs at some key points, and worked hard to solve conspicuous environmental problems threatening people's health. At the same time, it has continued its efforts for institutional innovation, relied on scientific and technological advances, strengthened the legal system of environmental protection, and brought into full play the initiative of people of all walks of life. The national people's congress and its standing committee have formulated 9 environment protection laws, 15 natural resource protection laws. And the State Council has formulated or revised over 50 regulations on environment ad natural resource protection.

At the same time, China is gradually establishing and improving environment protection legal systems, emphasizing control of industrial pollution and pollution reduction in key areas, implementing environment protection according to the specific conditions of cities and rural areas, attaching great importance to ecologic protection and construction, increasing investment in environment governance. It has established environment assessment systems, given priority to environment-friendly high-tech industries and encouraged public participation, and strengthened international cooperation in environment protection. Thanks to joint efforts from all parties,

53 <http://www.gapp.gov.cn/cms/website/jhcws/layout3/index.jsp?channelId=570&infoId=449966&siteId=41>

54 http://www.humanrights-china.org/cn/rqlt/rqwjrqbps/t20061011_160265.htm



although the amount of resource consumption and pollutants is increasing greatly, the trend toward aggravated environmental pollution and ecological destruction is slowing down; environmental pollution control in some river valleys has seen some positive results; the environmental quality of some cities and regions has improved; the amount of pollutant emission of industrial products has declined; and the people's awareness of the importance of environmental protection has enhanced. In the 11th Five-Year Program for Economic and Social Development (2006-2010), China has clearly set forth its main goals for environmental protection for the next five years: By 2010, Energy consumption per unit of GDP will decline by 20 percent compared with the end of the Tenth Five-Year Plan period. The total amount of major pollutants discharged will be reduced by ten percent, and forest coverage will be raised from 18.2 percent to 20 percent.⁵⁵

Section 3 Challenges facing China's effort to promote and protect the right to development

China still faces considerable challenges in promoting and protecting the right to development. Internationally, the international community has yet to enter into international covenants on promoting and protecting the right to development; developed countries have yet to legalize their share of responsibility to maintain the right to development; in addition, a few countries have deemed China's development as a "threat." In short, China is faced with complex international environment and international resources available are limited. Domestically, the prevailing laws still encompass regulations inappropriate for the right to development and the concept of sustainable development; protection of the right to development has yet to be strengthened; in addition, China lacks high-ranking human rights protection agencies.

3.1 Lack of international legal protection system

The UN and developing countries internationally have made enormous efforts to protect the right to development, and international community have formulated and approved quite a few documents. However, most of the documents are political "declaration," resolutions or "action plans." There is no international covenant with legal restraint yet. The reasons for lack of multi-lateral treaties for protection of the right to development are complex and multi-faceted. Aside from difference in understanding of the right to development because of difference between countries in economic, political, cultural and historical factors, a fundamental reason lies in that the it is difficult for the international community to shake off the old world political and economic orders. Due to lack of international laws and regulations for the right to development, China lacks a favorable international legal environment for promoting and protecting the right to development. Resources to be obtained for this cause from international community are limited.

3.2 Misunderstanding by a few countries of China's protection for the right to development

China has attached considerable importance to the right to development, committed itself to pushing forward acknowledgement of the right to development globally, taken proactive measures to safeguard the right, and made outstanding contribution to the development of China and the entire world. However, so far a few developed countries still refuse to acknowledge the right to

⁵⁵ State Council Information Office P.R.C., Environmental Protection in China, visited on March 5th, 2008, see http://www.humanrights-china.org/cn/rqlt/rqwj/rqbps/t20061011_160273.htm



development as a basic human right. Worse still, some have harbored grudge against China's rapid development momentum and taken to propaganda of "China Threat." On diplomatic occasions, they took human rights issues as excuses, ignored the actual situations of developing countries and disregarded China's situations, to wantonly criticize the human rights status quo in China with the standards of developed countries, and distorted that China has purposes in aid other countries, smearing China as "Neo-colonialism."

3.3 China has yet to determine the right to development as a constitutional right, and to establish state human rights protection institutions.

The constitution of China has yet to specifically legalize the right to development. The right to development is one of the primary human rights to be protected, and should occupy the central position in its effort to achieve government by law. However, its Constitution has but declarative stipulations on the state's respect for and guarantee of human rights. The right to development has not been determined as a constitutional right or specifically stipulated.

China has established state institutions or non-government groups for promoting and protecting human rights in certain areas. For instance, National Working Committee for Women and Children under the State Council established to promote and protect women's and children's rights, All-China Women's Federation, All-China Federation of Trade Union established to protect employees' rights, State Bureau of Religious Affairs, All-China Youth Federation established to protect youth's rights, All-China Lawyers' Association established to safeguard lawyers' rights. In additional, China has also established state agencies closely related to human rights protection undertakings, such as State Bureau for Letters and Calls, Ministry of Supervision and so on. However, it has yet to establish exclusive state institutions capable of fully organizing and coordinating human rights protection work.

3.4 The legislative tenet, content and implementation system of some of the prevailing laws in China are inappropriate for promoting and protecting the right to development.

The legislative tenets of some of the laws in effect are not suitable for protecting the right to development. The legislative tenet for currently prevailing resource and environment laws basically encompasses the objectives of unsustainable development guided by human-centered cultural and values, and is obviously contradictory to the internal requirements for protecting the right to development, and inappropriate for the latest theoretical development in the right to development - Scientific Outlook on Development.

The contents of some laws are inappropriate for protecting the right to development. Currently, the prevailing *Administrative Law*, *Civil Law*, *Criminal Law*, *Scientific and Technological Law*, *Environmental and Natural Resource Law* all include contents contradictory to protection of the right to development. In addition, China lacks necessary laws for promoting and protecting the right to development. The right to development requires realization of equal development or equality during development, but China does not have *Anti-Discrimination Law* or *Examination Law*; the right to development requires that development results benefit the people, but China does not have *Social Security Law*, *Employment Law* or *Wages Law*. The right to development requires realization of harmony between mankind and the environment or construction of environment-



friendly society, but China's substantive law on environment protection has only abstract stipulations, and stipulation of procedural law on subject of action and the accused is defective. As a result, the environment for realizing environment right during legal enforcement and right remedy is unfavorable. In environmental proceedings, the stipulated capacity to prosecute is too narrow, and has yet to entertain or define environment commonwealth civil suit.

3.5 China's protection of the right to development has yet to be improved.

China has made remarkable achievements in economic development and reduction of poor population. However, because of its vast territory, large population, short development time, historical reasons and other specific situations, China's protection of right to development has not been complete, perfect and sustainable.

In fighting against poverty, its anti-poverty strategy has created world-wide eye-catching miracles. However, in the rural area there are still about 30 million people who cannot enjoy basic food and shelter, and among urban residents, there are over 20 million people whose income is below the line of subsistence allowance. In recent years, the speed of poverty alleviation has been obviously slowing down. It is worth mentioning that anti-poverty is mostly undertaken by the government, instead of the society. The potential of market and society in fighting poverty has yet to be tapped. Compared to assistance for exploration of material sources, human resource development and redistribution is relatively under developed. Further achievements in poverty alleviation are dependent on system innovation in this aspect.

In protection of the right to receive education, "China has popularized elementary education, and is expected to achieve this millennium development objective in advance."⁵⁶ By the end of 2006, net enrolment rate of elementary education had reached 99.27%. However, because of the base of school age children is enormous, reduction of dropouts by even one percentage would be a great progress. In addition, huge regional difference exists in distribution of education sources, while centralized resources for education has also proven challenging for children from remote areas, especially mountainous areas where transportation is very inconvenient. For special groups, challenges for them to receive education are even greater: in rural areas in west China, about 3 million school-aged children are denied access to schooling, and 80% of those are girls. The preferential "Two Exempt One Remuneration" policy implemented by the Chinese government has yet to benefit offspring of rural migrant workers who are being educated privately funded schools. In national education in minority nationality regions, bi-lingual education has become systematic to some extent. However, in quite a few provinces, the lack of teaching materials, funds and teachers have proven challenging for bi-lingual education. There are 2.46 million disabled school-aged children between 6 and 14 years of age, of which only 63.19% are receiving normal education or compulsory education from special schools.⁵⁷

In protection of health right, over the past years, China has made some headway in legislating

56 Foreign Ministry of China and UN system in China, Assessment Report on Realization of Millennium Development Goals in China, 2005

57 See Global Call to Action Against Poverty (GCAP) - China: NGO Report on China's Realization of Millennium Development Goals, 2007

AIDS related areas, facing the fact of AIDS/AIDS virus spread, and preventing and controlling AIDS. The State Council has promulgated and implemented *Regulation of Prevention and Cure of AIDS and China's Action Plan for Retaining HIV/AIDS Epidemic* (2001-2005), regularly publicized the number of diagnosed AIDS patients. All those demonstrate the resolve of Chinese government to tackle AIDS issue. However, current data about AIDS lack gender analysis, posing certain difficulty for detecting the spread trend of the disease. Popularization of safe sex and AIDS knowledge has yet to be improved. The most heartrending fact is that AIDS orphans are facing living, schooling and family troubles that are even unbearable for adults.

In protection of environment right, although China has stepped up efforts in environment protection and enhancing environment sustainability in recent years, continued fast economic development calls for ever increasing demand for resources. Therefore, the increased effort can not cancel realistic changes in the macro environment. For policy makers, the complexity and challenges facing realizing millennium development objectives while ensuring environment sustainability should not be belittled. Currently, China is the second largest emitter of Carbon Dioxide, and the increasing rate of its energy consumption is much faster than that of world average. China has made considerable efforts in forestation, but simplified choice of tree species has become a serious threat to biodiversity. The drinking-water facilities in poor regions are being improved year by year, but polluted water body has become an obstacle for realizing drinking water safety. Slum is not an issue in China, but the living environment of transient population in the cities is not so optimistic.

In protection of right of equality, currently, women's conditions in education and employment, occupation of subsistence assets and health-care are obviously not so good as men. Women participation in politics is not very encouraging. The percentage of female seats in NPC deputies ranked world 50th, and the ranking has taken a downward trend. Female suicide rate is the highest in the world, posing the greatest challenge to improving women's rights.

Section 4 China's countermeasures to improve protection of the right to development

To better promote and protect the right to development, China has adopted the following countermeasures.

4.1 Promote the formulation of *International Covenant on the Right to Development*

Safety, development and human rights have become three pillars supporting the United Nations. The international community has approved a series of international covenants on safety and human rights. However, aside from the *Universal Declaration on Human Rights* approved in 1948, the *International Covenant On Economic, Social And Cultural Rights* approved in 1966, and the International Covenant on Civil and Political Rights, UN members have failed so far to reach an agreement on the right to development or to conclude a covenant that is international, universal and with legal restraint for protection of the right. As the largest developing country, China should give display to its role and influence as a big power and actively push forward the formulation and signature of a protective covenant for the right to development.

4.2 Enhance international exchange and cooperation, and facilitate the joint development of the international community

The tenor and primary objective of China's foreign policy is to safeguard world peace and



facilitate joint development. The right to development is not only a collective right, but also a compound right. Its realization calls for the joint effort of the people from all the countries, as well as the joint efforts of the international community. Therefore, China should abide by the five principles of peaceful coexistence, continue pushing forward “South-North Dialogue,” and urge developed countries to fulfill their promises of development assistance to development countries. In the meantime, it should further strengthen “South-South Cooperation,” and support developing countries with labor, material resources, finance and waive of government debts where its own capabilities allow.

4.3 Establish legal protection system with the constitution at the core for the right to development

Stipulating the right to development in the Constitution so that it can obtain protection from the fundamental law with supreme legal validity and guarantee should be the foundation and core of the legal protection system for the right to development. General conceptions for speculating the right to development in the constitution consists of the following aspects:

First, abstractly award constitutional status to the right to development in the general principles of the constitution, so as to highlight its nature of being a basic human right. At the same time, determine the legal principle of legal protection for the right to development, so that the right can become an important content of principles for guaranteeing human rights in the constitution. Second, stipulate in “Fundamental Rights and Duties of Citizens” that citizens are entitled to the right to development.

On the basis of determining the right to development in the Constitution, China should abolish and amend laws inappropriate for the requirements from the right to development, and create laws and systems accordingly. Therefore, the administrative law, civil and commercial law, environment and natural resource law and proceeding law should be improved. In improvement of administrative law, China should strengthen the role of government in protecting the right to development entitled to individuals because the government is the dominant force in social behavior of mankind. Administration by law and rational and democratic policy-making should be implemented to promote respect and protection of the right to development in government’s administration behaviors.

In improvement of civil and commercial laws, China should follow the requirements for protecting the right to development and promote the development of autonomy of private law, such as proprietary right pluralization, contract freedom innovation, and civil liability diversification. In improvement of environment laws, China should continue its efforts in promoting current reform in environmental charge system, and establish new environment laws, such as environmental taxation system, fiscal incentive system, environmental auditing system and environmental assessment system, so that they can better safeguard the order of environment laws and ensure the implementation of sustainable development.

In improvement of procedural law, China should try establishing a commonweal litigation system, whose trial implementation can be conducted in certain fields. Take the field of environmental protection for example. Currently prevailing legislation may be amended so that



all units and individuals have the right to prosecute and accuse companies and individuals that have been polluting the environment, and file suits in the people's courts. In addition, China should step up efforts to formulate new laws relevant to the right to development. For instance, it should formulate *Technological Innovation Law* according to the regulations of socialist market economy and scientific and technological development, with reference to the successful experience abroad and with an eye on the practical situations of China, so that modern technology can play its part in protecting the right to development. The right to development requires equal development or equality during development; therefore, China should enact *Anti-Discrimination Law and Examination Law*. The right to development requires that development results benefit the people; therefore, China should speed up promulgation of Social Security Law, Labor Employment Law and Wages Law.

4.4 Establish state institutions for promoting and protecting human rights

As universally acknowledged by the international community, protection of human rights covers domestic, regional and international levels. Only after proactive interaction between the three levels is realized can the human rights protection network be safe and effective. Among the three levels, domestic protection on human rights is a vital link, because the implementation of regional and international human rights legislation and promotion and protection measures can only be carried out by sovereign countries, and the major responsibility for protecting human rights can only be borne by sovereign countries. Therefore, construction of human rights institutions is of greatest importance in realization of human rights. On March 3rd, the UN Human Rights Commission approved *Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights* (abbreviated as Paris Principles) in the form as attachment to No.1992/54 Resolution. On December 20th of the following year, the document got approved at UN Assembly as No.48/134 Resolution. The *Vienna Declaration and Program of Action* passed on the World Human Rights Conference in 1993 reiterated the important and constructive roles of state institutions in promoting and protecting human rights. Since 1990s, establishment of state institutions for human rights have attracted the attention of countries around the globe. By far, over 100 countries have established special organizations to promote and protect human rights. As of December 2007, the number of state human rights institutions applying for certification at the Office of the High Commissioner of United Nations for Human Rights has reached 84.

China is the world's largest developing country. It shoulders the international responsibility and obligation to protect and promote human rights against the historical background with peace and development as the main theme of the time. To better internationally and domestically protect human rights including the right to development, it should establish special state institutions to promote and protect human rights. Once those institutions are established, China will be able to formulate and improve development planning for human right causes, speed up human right legislation and monitor legal enforcement and judicatory activities. In the meantime, international human rights dialogue, exchanges and communication should be strengthened so as to jointly push forward global human rights.

4.5 With Scientific Outlook on Development as the guide and construction of a harmonious society as the objective, improve protection on human rights in an all-round manner



Declaration on the Right to Development points out that development is the process of all-round political, economic, social and cultural development. Only in this process can all human rights and basic freedom be gradually realized. After 30 years of reform and open-up, China's economic strength has been greatly increased. Its probe in practice has boiled down to theories on Scientific Outlook on Development and Harmonious Society. An innovation of the right to development, the Scientific Outlook on Development and theory on constructing a harmonious society has rich and profound connotations. They not only involve economic and political development, but also involve social and cultural development. They not only encompass productivity and economic foundation issues, but also include production relation and higher structure issues. While paying attention to the current situation, their vision reaches into the future. Scientific Outlook on Development and Harmonious Society are not only the governance concepts and objectives of China, but also its basic principles and methods for promoting and protecting the right to development.

China has formulated the blueprint for finishing constructing well-off society by the year 2020: China will quadruple the per capita GDP of the year 2000 by 2020 through optimizing the economic structure and improving economic returns while reducing consumption of resources and protecting the environment. Citizens' participation in political affairs will expand in an orderly way. Primary-level democracy will be improved. The government will markedly enhance its capability of providing basic public services. A basic system of public cultural services will cover the whole society, the cultural industry will account for much more of the national economy and become more competitive internationally, and a more abundant supply of cultural products will be available to meet the people's needs. The modern system of national education will be further improved, a basic system for lifelong education will be in place, the educational attainment of the whole nation will rise to a much higher level, and the training of innovative personnel will be improved markedly. Employment will be further expanded. A basic system of social security will cover both urban and rural residents so that everyone is assured of basic living standards. A reasonable and orderly pattern of income distribution will be basically in place, with middle-income people making up the majority and absolute poverty basically eliminated. Everyone will have access to basic medical and health services. The system of social management will be further improved. We will have a large-scale circular economy and considerably increase the proportion of renewable energy sources in total energy consumption. The discharge of major pollutants will be brought under effective control and the ecological and environmental quality will improve notably. Awareness of conservation will be firmly established in the whole of society.

The time when construction of well-off society is completed will mark the moment of realized right to development for all the people in China. It will also be a time when all people in China will be able to enjoy their rights to education, employment, medical and old-age care, and housing.

Universal Declaration on the Right to Development has nurtured the right to development. Over the 60 years since its publication, international human rights and those of all countries have made remarkable progress. The right to development has been gradually recognized and protected since the 1970s. China is the world's largest developing country. When the right to development is initially getting determined in the international community, it is amid the effort of reform



and open-up. Domestically, China has chosen fast economic development and all-round social progress. This will undoubtedly cause China to promote the right to development into a basic human right. Over the 30 years since reform and open-up, China has contributed enormously to promotion and protection of human rights by the international community while stepping up with efforts for its own development and strengthening. Holding the Scientific Outlook on Development, China is striving to construct a harmonious society and a harmonious world, and a well-off society. Its historical course will benefit the improvement of protection on the right to development both domestically and internationally.

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ON RELATIONS BETWEEN HUMAN RIGHTS AND DEVELOPMENT

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There are innate relations between human rights and development. In the Universal Declaration of Human Rights, human rights were proclaimed as “the highest aspiration of common people,” and “whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,”⁵⁸ “while the ultimate goal of social development is to improve and enhance the quality of life of all people.”⁵⁹ Human rights and development share the same purpose. The universal attainment of the former is inseparable from the latter. The latter will be disoriented and meaningless if it does not aim to achieve the former. The former is the purpose, standard and definite contents of the latter. The significance of the former to the latter is irreplaceable. Studying the relations between them is of great theoretical and realistic significance.

I. Human rights and development are interdependent

Human rights and development represent an important topic of interest to the international community. Human rights are rights originating from human dignity. As explicitly declared in Universal Declaration of Human Rights, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁵⁸ Universal Declaration of Human Rights

⁵⁹ Quoted from the Programme of Action of the World Summit for Social Development in 1995



What is development? It means the overall development for society and for man. Just as pointed out in the 1986 UN Declaration on the Right to Development, “development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.” This definition reflected the basic consensus achieved by the international community on the concept of development.

But over a long period in the past, people equated development with economic growth. Such a growth first-oriented approach on development one-sidedly summarized development as the process of growth in material wealth while neglecting justice and the main body status of man in the process of development. Such a traditional concept and model of development brought many social problems, such as the polarization of the poor and the rich, environmental pollution and social turmoil. This prompted people to reflect on and review development, and thus to form a new, comprehensive outlook on development.

The transition from focusing on material to focusing on man in development reflects the deepening of people’s understanding about the relations between human rights and development. In the history of man, development and human rights have since followed “two separate trajectories.”⁶⁰ They were dealt with separately.

The 1945 UN Charter noted the innate relations between the two. It incorporated security, development and human rights into the three main aims of the United Nations, as Article 55 stipulated, “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

These stipulations reflected man’s insight into poverty, social polarization, sharp social contradictions and other in-depth reasons that would lead to war. They manifested the spirit of combining development with human rights, and guided concerns over, and researches of, the international community on their relations.

The 1969 UN *Declaration on Social Progress and Development* pointed out definitely, “Social progress and development shall be founded on respect for the dignity and value of the human person and shall ensure the promotion of human rights and social justice.”⁶¹ It looked at the issue of development from the angle of human rights for the first time. It suggested the aims of development and the methods to achieve it, manifesting man’s deeper and better understanding of the relations between the two.

60 A. Edgar (Norwegian): Requirements of Human Rights on Social and Economic Development, carried in Liu Hainian-edited *Studies on International Covenants on Economic/Social and Cultural Rights*, China Law Press 2000

61 *Declaration on Social Progress and Development*



The 1986 UN Declaration on the Right to Development combined development and human rights definitely for the first time and noted, “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”

“The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”⁶² The Declaration on the Right to Development enhanced the width and depth of understanding about development and established it for the first time a fundamental human right, and pushed forward its connotation and the viewpoint of its standard.

The Vienna Declaration and Program of Action adopted by the 3rd World Conference on Human Rights in 1993 defined once again the stipulations of The Declaration on the Right to Development, stressing: “Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”

The 2000 UN Millennium Development Goals explicitly defined human rights as the goals and indexes of development and further incorporated human rights into the concrete requirements of development.

These important international documents on human rights were crystals of the international community in understanding the relations between human rights and development.

Based on these, a series of new concepts have been engendered on development since the 1990s. The UN Human Development Report in 1990 raised the concept of “human development.” The 1992 UN Conference on Environment and Development clearly raised the concept of “sustainable development.” The ICPD Programme of Action adopted by the 1994 UN Conference on Population and Development further pointed out, “human beings are at the centre of concerns for sustainable development” stressing the importance of human rights standard to population and goals and indexes of development. The 1995 Programme of Action of the World Summit for Social Development, clearly raised the concept of “social development and noted that the pivotal point of social development is to ensure man.”

It was precisely the understanding of development from the angle of human rights that prompted the brand new revolutionary concept of development, which further stressed the importance of human rights in development.

The interdependent and mutually reinforcing between human rights and development are mainly manifested as follows.

Firstly, development is the means to achieve human rights while it is purported to human rights. The attainment of human rights requires the support of economic development while economic and social development provides the basis for the general attainment of human rights. Only by means of development can we fully achieve the rights to decent living standards, social security and education. Human rights cannot be fully realized without development. But development will not bring about

⁶² Declaration on Development Rights



the attainment of human rights automatically. Only by defining human rights as the fundamental goal of development can it become a process of realizing human rights.

Secondly, human rights are the definite contents of development. The point being stressed here is that only when development is based on human rights can it really become sustainable and conform to human happiness. The point being stressed here embraces the following implications: First, the human being is the central subject of development. "Development policy should therefore make the human being the main participant and beneficiary of development. Equal participation in development and sharing the fruits of social development is a fundamental human right."⁶³ Second, development based on human rights features bringing social justice into development process while on the other hand development divorced from human rights would generate an unfair phenomenon in which the rich would become richer and the poor poorer. Unjust development would eventually make havoc to mankind. Hence, development is not just the growth of material wealth, but the process of realizing and developing human rights, which in turn will make development more personalized. Third, human rights are the core of development. The UN Millennium Development Goals stipulated the main goals to be realized by 2015 would be human rights goals: A. Eradicate extreme poverty and hunger; B. Achieve universal primary education; C. Promote gender equality and empower women; D. Reduce child mortality rate, etc. These important human rights indexes constituted the core of the millennium development goals. Human rights enriched the connotation of development.

Thirdly, human rights are an important standard for development. There are various evaluation standards for development. The human rights standard differs from other standards in that it stresses the justice of development, advocating development should protect the rights of all on the basis of equality instead of merely seeking the interest of isolated individuals or the minority in violation of human rights principles. Such a gauge of evaluation is irreplaceable; it can restrain and balance other gauges. Human rights provide the development goals and also the standard of evaluation. Development divorced from human rights can hardly be just. When development is stripped of radical dynamics, we can say nothing of sustainable development.

When human rights are made the goals, contents and standards of development, they raise new demands, requiring the application of methods based on human rights to all the aspects of human development.

Beyond doubt man has achieved unprecedented results in his development now. But the world is very unbalanced in its contemporary development. Poverty, hunger and the gap between haves and have-nots have not disappeared. How to better combine human rights with development in practice, to eradicate poverty and non-equality and let development bring happiness and rights to the whole of mankind remains a common subject matter for the international community.

II. China's achievements in promoting human rights and development and the challenges it is confronted with

How to correctly understand and handle the relations between human rights and development

62 Declaration on Development Rights



for a populous developing country like China is of great importance and significance. It is the relentless combat goal for China to eradicate poverty and backwardness and let everybody enjoy full human rights.

1. China's achievements in promoting human rights and development

A legal system framework with the Constitution as the core has taken shape in China in the past five decades and more since the birth of New China, especially since the onset of reform and opening up. This is manifested in: A. It has strengthened legislation of human rights, put in place the basic civil, political, economic, social and cultural rights systems. B. It has further strengthened judicial protection of human rights. The Chinese Criminal Procedure Law newly revised in 1996 further defined the human rights principle of presumption of innocence, outlawed the system of detention for investigation, strengthened the rights for the victims, set up a sound open trial system, people's jury system, defense system, death penalty reexamination system, judicial aid system, legal aid system and lawyer system, etc. By 2006 year-end, there were over 13,000 law firms in China with over 130,000 licensed lawyers.⁶⁴

In terms of poverty eradication, China made it the main goal in its development, and adopted many effective models and measures to eliminate poverty. The Chinese poor population dwindled from 250 million in 1978 to 21.48 million. The rate of poverty fell sharply from 30.7% to 2.3%.⁶⁵ According to the latest 1990-2002 standard of USD one for consumption per day in the global poverty data set by the World Bank in 2006, the Chinese poor population decreased by 195 million while the total figure of decrease was 207 million in the whole world, thus China occupied over 90% in proportion.⁶⁶ China contributed to the global cause of poverty eradication.

In terms of development concept, China set forth the "people first" scientific outlook on development in 2003. The basic connotation of the scientific outlook on development can be summarized as follows: Development is for the people, by the people and with the people sharing in its fruits.⁶⁷

It stresses that human person is the central subject of development and the purpose of development is human rights. Human rights are the standard for development. "It is through development that we will increase the material wealth of society and constantly improve people's lives, and it is again through development that we will guarantee social equity and justice and constantly promote social harmony."⁶⁸ The new outlook on development was set forth on the basis of summarizing China's practice of development and borrowing the development experience from other countries. It was a crystallization of the Chinese government's in-depth understanding of the relations between human rights and development. The basic spirit is consistent with the stipulations and requirements set in international human rights documents. The scientific "people first" outlook of development, based as it is on human rights, is a new concept of governance in China now.

64 Quoted from Development of the Rule of Law in China

65 China Development Report 2007, by the Development Research Center, State Council

66 Quoted from the Website of Poverty Alleviation Office, State Council

67 Report to the 17th national congress of the Communist Party of China

68 Report to the 17th national congress of the Communist Party of China



The proposition of the scientific outlook on development manifested a new line of thinking in China's development. It stressed man and human rights as core of development, and the interdependence of human rights and development.

In recent years China has taken many measures to implement "people first" scientific outlook on development, including legislation and policy measures to intensify human rights protection. For example, in 2003 China outlawed the Methods of Reception and Dispatch of Urban Loafers and Beggars and introduced the Methods Aiding and Managing the Helpless Urban Loafers and Beggars. In 2004 China explicitly made it a constitutional provision that the State shall respect and protect human rights, making human rights a fundamental goal for China to pursue. In 2005 China ratified the Pact on Eradication of Discrimination in Employment and Occupations. In 2005 it revised the Law on Women's Rights Protection and clearly defined the equality between men and women as the basic state policy. In 2006 it abolished the agricultural tax, bringing an end to the two-millennium history of levying taxes on farmers. In 2007 it promulgated the laws on property rights labor contract, employment promotion and arbitration of labor dispute mediation, strengthening the legislation and enforcement in labor protection. In 2007 it set up an overall system of subsistence guarantee in the countryside. It set up an initial system covering urban-rural public health system and basic medical care system and comprehensively incorporated the rural compulsory education into financial security scope. It was precisely the development of China's human rights protection system that provided the fundamental guarantee for the practice of human rights in China.

2. Challenges facing China in promoting human rights and development

China has made great achievements in development, but it is a populous developing country at the social transition period; hence it is restrained by many factors such as imperfections in historical and development levels and institutional system, and confronted with many problems and challenges in human rights and development.

Firstly, poverty eradication is still a heavy mission over a long period to come. Poverty is the largest obstacle to human rights. China has yet a large poor and low-income population in cities and countryside confronted with challenges in survival and development rights. How to enable the whole people to enjoy the common fruits of development and promote harmonious societal development and overall progress is an important topic facing China.

Secondly, challenges in labor rights protection. Some new challenges are facing the Chinese labor rights protection during the social transition period. Some enterprises committed severe violations of worker rights in total disregard of the national laws. Accidents of all kinds inflicting casualties and occupational hazards are endangering the labor rights to life and health. It is an important task to take strong measures to punish law-violating encroachments and strengthen labor rights protection.

Thirdly, challenges in women's equality rights. After the 4th UN World Conference on Women in 1995, the Chinese government conscientiously implemented the Beijing Declaration and Platform for Action Program by proclaiming the Outline for the Development of Chinese Women(1995-2000) and (2001-2010), and taking a string of legislative, enforcement and judicial measures, thus making new achievements in promoting gender equality. But China is also facing

some unprecedented obstacles in gender equality promotion. For example, it is getting tougher to promote female employment, the gap of male and female incomes is getting wider, the rights of women to labor protection, rest, rational income are violated to varying degrees, the gap of male and female education in the countryside is getting wider,⁶⁹ the women's rights of the person and dignity are subjected to severe violations such as domestic violence and sexual harassments.

III. Thoughts on promoting China's human rights and development

Firstly, further implement "people first" approach on development and properly handle the relations between development and human rights. Fully considering the value of human rights in development today, we have to stress the sacred and supreme features of civil rights. "People first" is a rights concept. It requires the change of the old concept of development. Poverty cannot be eradicated without development, nor so the universal implementation of human rights. But economic development will not automatically bring us human rights development. The "people first" development outlook requires a proper handling of relations between efficiency and justice. While pushing economic development, governments at all levels should take social justice as the state policy and the sharing of economic development fruits as the basic economic and social rights and achieve them fully through law and policy arrangements.

Secondly, further improve human rights law system. Further promote law reforms and innovations in the spirit of constitutional protection of human rights, and re-examine and analyze the impact of related laws in practice and achieve the substantial justice required in the formal justice and subsistence and development rights in the form of stipulated justice and protection of equality of everyone before the law.

Improve social security law and set up a sound social security system. Fundamental civil rights to subsistence and development must be protected by a social security system, radically speaking. Putting in place a sound and perfect social security system is an urgent requirement of China in tackling major social issues and protecting human rights.

Strengthen the building of labor protection law. Defense of labor legal rights and interests is the prerequisite of social stability and development. A. Improve the employment guarantee system. We should formulate as soon as possible the anti-discrimination law and the minimum wage law so as to strengthen the intensity of combating against discrimination. B. Improve the labor protection system and defend the dignity and rights of laborers in work. C. Further strengthen supervisory work in law enforcement.

Strengthen the legal protection of women's human rights. Deepen the probe on the human rights problem facing women and set up a complete set of law system in protection of women's rights according to the new features of China's economic and social transition. First, Clearly define the gender discrimination in the law on women's rights protection in reference to the definition of gender discrimination in the Convention on the Elimination of All Forms of Discrimination against Women, to which China acceded in 1980. Second, clearly define the concept of domestic violence and sexual harassments and work out a law against domestic violence in reference to the 1993 UN

69 See All China-Women's Federation: *Random Survey Main Data Report on Chinese Women's Social Status Issue No. 2*



Declaration on Elimination of Violence Against Women and the experience of modern countries under the rule of law. Third, revise and improve related legislation to promote gender equality.

Thirdly, strengthen the protection of the equal rights of the disadvantaged. A key point in China's rights system is to strengthen the rights protection for the disadvantaged. The social disadvantaged are a fragile group at the fringe of society and their rights are often neglected. The human rights protection system should sensitively reflect their problems. It is especially required to change the law stipulations on equality protection into new and effective concrete mechanisms and formulate special measures in their favor. This is of vital importance to building a harmonious society.

Fourthly, set up special state human rights organs. The past decades have witnessed a new tendency of human rights development in the setting up of state human rights organs. We suggest the setting up of such organs in China.

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DRIVE OF HUMAN RIGHTS ADVANCEMENT: DEVELOPMENT

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Human rights have both obligatory and actual attributes, and also include contents in two aspects - obligatory human rights ideal and actual human rights situation. However, both obligatory human rights ideal and actual human rights situation have intrinsic relationships with development; development is the drive of human rights advancement. Such relations are mainly reflected by economic development, cognitive development, legal development and human development in respect of promoting human rights advancement.

1. Economic development and human rights advancement

The term "economy" has multiple meanings; different scholars or works may have different definitions of it. No matter how to understand economy, however, we can consider economic development as the drive of human rights advancement.

Perhaps "economy" refers, first of all, to the development status of social productivity. Social productivity is always the most vigorous and the most active factor in social development, and is also the ultimate determinant in social development. The development of productivity provides a material possibility for the development of human rights. The right to life, the right to survival, the right of freedom, the right of equality and the right to development, among others, are all closely linked to economic development. The realization of the right to life must take the maintaining of human life as the most fundamental requirement. Human life is always assured with certain

subsistence materials; without material conditions that can meet the human needs for the basic necessities of life, it will be difficult to maintain human life. Neither security nor improvement of the basic necessities of life can be divorced from the development of social productivity. Human subsistence, quality (good or bad) and condition of life are all closely related to the productivity conditions of a specific society. Freedoms of individuals or the humankind are not an illusion. Certain productivity development is the most substantial and indispensable foundation of the building of human freedoms. Human equality requires likewise necessary material assurance. Particularly, for physical assistance and relief provided to disadvantaged groups and individuals in modern societies, if there were no certain productivity and economical development as support, it would be difficult and even impossible for a country, a society or an individual to protect relevant human rights. The human right to development certainly includes the right to development, economically and in terms of productivity.

“Economy” is also frequently used to refer to the social economic base, i.e., total social relations of production. The condition of the social economic base (certain social relations of production) determines the condition of human rights too. In economic conditions, interpersonal relationships, as well as different legal regulations of these economic relations, also influence the basic condition of human rights directly. Under natural economy and market economy people have different economic relations, and in agricultural and industrial societies people have different economic relations. These form the economic base of a particular society. Overall, we can say affirmatively that human rights in the industrial society with market economy evolved from those in the agricultural society with natural economy and rose to a new level. And the requirements and conditions of human rights protection in the market economic and industrial society changed substantially, different from those in the history. Thus how to improve the level of human rights protection is just a topic of modern society.

The advancement of human society is always associated with the development of human cognition, and it is even justifiable to say that any advancement made by human beings originates from the development of human cognition. Hence human rights advancement is no exception. Without cognitive development, it is impossible for the humankind to push human rights ahead. Human cognitive development therefore is the forerunner of human rights advancement.

2. Cognitive development and human rights advancement

The advancement of human society is always associated with the development of human cognition, and it is even justifiable to say that any advancement made by human beings originates from the development of human cognition. Hence human rights advancement is no exception. Without cognitive development, it is impossible for the humankind to push human rights ahead. Human cognitive development therefore is the forerunner of human rights advancement.

Firstly, the burgeoning of human rights consciousness and the development in human rights theories were results of human cognitive development. Early in the rude times humankind had no notion of human rights, not to mention conscious human rights protection. With increase in human cognition, in particular with cognitive deepening of humankind in itself and related factors, a cognitive foundation was gradually laid for the formation of human rights consciousness. As



human self-cognition developed, humankind founded gradually that both individuals and groups should enjoy rights as human beings. Perhaps such right consciousness initially relied more on human instinct and emerged in a spontaneous way. With cognitive deepening, however, purely instinctive, spontaneous human rights consciousness evolved gradually into conscious rational cognition; even some ideological concepts were gradually formed and essential theories then established. The improvement of human rights from instinctive consciousness to rational cognition was an important result of cognitive development of humankind. Along with the development of human society and human cognition, the human rights cognition changed gradually from the initial human rights consciousness to relatively profound human rights theories. And after that, the initial spontaneous protection of human rights evolved gradually into the sound conscious protection, and human rights were even protected by people with moral, religious, legal and many other means.

Secondly, rich human rights contents are a result of cognitive development of humankind. In obligatory sense, the contents of human rights are perhaps certain, because obligatory human rights in the sense of human cognition are still uncertain and will develop with the change and deepening of human cognition. In actual sense, however, the contents of human rights are even more uncertain. The actual history of human rights development reveals once and again that the contents of human rights that people advocate and protect develop on a continual basis. In fact, in any ages, the contents of human rights that people advocate and protect must, and can only be contents being cognized by humankind. The cognition of human rights is a process of continuously enriching, replenishing and improving with social development. Early in human history, obligatory human rights certainly existed too, but the initial stage of human cognition determined the limited human cognition of the contents of human rights. Only in the process of human cognitive and social development were the contents of human rights updated continuously and enriched day by day. So far human rights have already formed a large system of rights in terms of contents being covered. The rich and varied contents of human rights make people cognize time after time and see them in a better light. Intergenerational updating and extension also occurred to the contents of human rights.

Thirdly, the condition of human rights protection is subject to the level of cognitive development of humankind in human rights. In the primitive society and in the ages of slavery system, the initial state of human cognition of human rights also made the actual protection of human rights in an extremely initial state, because at that time humankind knew nothing about what rights individuals or collectives should have and of course were unable to protect those rights not yet cognized. The condition of human rights protection was severely limited by human rights cognition in those ages. If cognition of people were abnormal, abnormality of human rights protection would be resulted in inevitably. In history and practice, gender inequality, ethnical inequality, regional inequality and inconsistency of the times are all concerned with human cognition of human rights in specific times and environments. Humankind cannot protect human rights by overstepping its cognition. In today's world, the development of human rights is unprecedented. Leaving aside its essence, at least superficially human rights have almost become



the slogan of any and all true or false human rights defenders, and almost no country or society dares to deny human rights overtly. This cannot be divorced from the shared values of humankind. The common human cognition of values and the shared human rights values of humankind themselves are part of human cognition, and are results of human cognitive development.

3. Legal development and human rights advancement

Many scholars believe that human rights can be divided into, for example, customary human rights and statutory human rights. As a matter of fact, however, customary human rights exist in customary rules without explicit and rigorous determinacy and mandatory security by the state, and this hence determines that customary human rights are far less explicit, specific and effective than statutory human rights. In the primitive ages, human rights were recognized and maintained by relying mainly on customary rules as primitive social norms. Only after the society under rule of law came, humankind began to shift gradually from relying mainly on customary rules for human rights recognition and maintenance to relying mainly on statutory rules for human rights recognition and maintenance. This process, of course, shows human advancement in human rights assurance.

Humankind didn't stop at simply using laws for human rights recognition and maintenance, but went further and promoted human rights advancement in the development course of law. Humankind developed continuously, so did law and legal protection of human rights. Whenever law gained new development, there was improvement in the level of human rights recognition and protection by law. When we look back into the human history, it is easy to find that in different ages, human rights protection by law had different forms and levels. The condition of human rights protection always went ahead in the continuous development of law. Law became one of carriers of the contents of human rights and became the most effective means for human rights protection. Thus the development of law became an important drive for human rights advancement.

Particularly when humankind moved from the rule of men towards the rule of law, law transited gradually from mainly a political ruling instrument to more a social management means and a human rights means. Today, whether or not law safeguards human rights, and whether or not it can protect human rights soundly and effectively, have already become an important mark of development in modern rule of law, as well as an important characteristic of modern law distinguishing from ancient law. In modern society, any law that can be said for the purpose of rule of law must include human rights as an object of legal protection; any country that can be said one under rule of law must use the condition of human rights protection as a reflection of its legal advancement. With modern development of humankind and law, human rights have already become an element, value and goal of the rule of law. China's progress in human rights was made in synchronization with its development, and especially after China set the goals of administrating the country according to law and building a socialist country under the rule of law, human rights protection went further and became a theme of Chinese society. Human rights progress made in western countries cannot be separated from the development of western laws, and the healthy development and significant progress in human rights protection in developing countries including



China are also significant achievements made in promoting the rule of law.

4. Human development and human rights advancement

Human development is an endless historical process; it is hard for us to learn about its start and to forecast its end. Human rights are rights of human beings, and the latter is the main body of the former. There are diverse and varied forms of existence of human beings, including, in general terms, individuals of human beings, groups of human beings, and all human beings as a whole. Therefore, human rights by nature are reflected as individual human rights, group human rights, and human rights as a whole. In the course of human development, the contents of human rights were replenished continuously, and especially with economic development, they also extended in terms of human cognition and legal recordation. Economic development, cognitive development and legal development are not only the foundation but also an integral part of human development. Between human development and human rights development is a whole-to-part relationship, also a foundation-to-development relationship.

The progressiveness of human development also determines the progressiveness of human rights advancement. In its development, humankind continued to set forth new human rights requirements and improve the condition of human rights protection, leading to an improving level of human rights protection. Human development from ignorance to civilization and from one level of civilization to a higher level determines and influences the advance of human rights from one level to a higher level. There's no doubt about the relevance of human rights advancement to human development and about its reliance on human development. Human rights are a human attribute, which decides on the significance of human development to human rights advancement and determines that the extent of human rights advancement must be appropriate to that of human development.

Human rights advancement itself is a content and reflection of human development. Human development involves extremely broad contents, while human rights advancement is a constituting, and extremely important, part of human development. Human rights belong directly to human beings, influence directly human beings, reflect directly the state of human subsistence and development, and denote the level of civilization of a country or society. Thus, we cannot say that a society or country where human rights are widely despised or infringed is a civilized society or country. We have many and varied appraisal indicators to measure the level of human development, among which, the extent of human rights advancement is no doubt one of extremely important indicators. It is therefore advocated that when evaluating social system and social reality, we should use human rights advancement as one important indicator so that we can improve the level of human rights protection of humankind and promote the development of individuals, groups and humankind as a whole.

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IMPACT OF CLIMATE CHANGE ON HUMAN RIGHTS IN DEVELOPING COUNTRIES

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As a global hot topic, the issue of climate change seems literally not to have any direct link with human rights, but it is actually not only closely related to human rights, but exerts a direct impact on them in developing countries. A United Nations official even said that global warming and extreme weather conditions may have calamitous consequences for the human rights of millions of people.⁷⁰ And human rights in developing countries will bear the brunt. At present, climate change has already greatly impeded realization of some key human rights in developing countries.

1. Right to environment

Climate change falls into the category of environment. Therefore, its impact on human rights is first realized in its impact on human rights to environment. The International Symposium on Public Calamities, held in Tokyo, Japan in March 1970, came out with a Tokyo Resolution, which first proposed the concept of right to environment and listed the right to environment as one of basic human rights. The Tokyo Resolution pointed out that the right to unpolluted environment which everybody enjoys and the right which modern human beings should pass natural resources full of natural beauty down to posterity are basic human rights. The right to environment is a gift of god, a right endowed to human being by nature. Everybody is born with the right, so it cannot be deprived of by anybody. The right to environment is also an economic right in that the owner of the right can obtain economic gains by owning or making use of some natural resources or biological environment in accordance with the law. The right to environment is not only a right for individuals, but also a right for a society. In the second sense, the right to environment takes the form of the right that a country or nation develops and manages the natural resources within its borders independently, the right that it protects its national environment and citizens from being harmed by environmental pollutions outside its borders, the right that it enjoys the internationally shared environment and common human heritages, the right to participation in international cooperation in environment protection and others.⁷¹ So, the right to environment is a right for every individual, country and nation in the world.

As for the issue of climate change, it has a global impact, influencing the right to

70 Kyung-wha Kang, the UN deputy high commissioner for human rights, quoted in "Climate Change Threatens Human Rights Of Millions - UN", Geneva, Switzerland, February 20, 2008, <http://www.planetark.org/dailynewsstory.cfm/newsid/47054/story.htm>.

71 "On the Environment Right as the Basic Human Rights" by Xia Guang. *China's Environment*, July 12, 1997



environment in both developing and developed countries. However, the risk brought about by global warming is not the same for populations on the globe. The Intergovernmental Panel on Climate Change (IPCC) has confirmed that developing countries are most at risk of climate change.⁷² The global warming and its negative effects will influence developing countries more. Some people of insight in the world have realized this. Former U.N. High Commissioner for human rights Mary Robinson pointed out clearly that it is poor countries, poor societies or poor communities who are suffering most from the effects of climate change.⁷³ This is because these people are mostly farmers who rely heavily on the natural environment and at the same time have poor ability to handle calamities and crises, poor adaptability, and not enough resources and technological skills to get themselves out of the difficult conditions caused by the worsening of their natural environment. All these poor nations and poor people belong to developing countries. Mary Robinson further asserted that climate change is a subtle form of human rights violation. There is no direct persecution or threat, but combustion of fossil fuels in industrialized nations has jeopardized the ability of certain societies to maintain their traditional practices, diminishing their cultural identity and their connection with their natural environment.⁷⁴

2. Right to subsistence

The right to subsistence is part of one's human rights, or one of the basic human rights. It is the core right stipulated by the *International Covenant on Economic, Social and Cultural Rights*. It can also be deemed as the lowest level of economic security. Such issues concerning nutrition, health, housing and living can all be seen as falling into the category of the right to subsistence.

Natural environment and the right to subsistence are closely related. Declaration on the Human Environment passed in 1972 gives a clear-cut definition of the relationship between environment and right to subsistence, "which (environment) gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself."⁷⁵ In other words, good natural environment is the fundamental guarantee for people's subsistence and the worsening of natural environment will pose as a threat to the subsistence of humans.

At present, climate change has constituted a threat to human beings' right to subsistence. To put it in more concrete way, it has threatened people's rights to obtaining food, water, health and even sustaining his/her life. The reason is that hunger, malnutrition, disease, loss of means of life all threaten people's subsistence, especially in poor rural areas where life depends heavily

72 Wolfgang Sachs, "Climate change and Human Rights", "Interactions between Global Change and Human Health" working Group, 31 Oct.-2 Nov. 2004, The Pontifical Academy of Science, Scripa Varia 106, <http://www.interpeacenet.org/peacestudies/climatechange.pdf>.

73 Mary Robinson, "Climate Change and Justice", Barbara Ward Lecture, Chatham House, London, 11 Dec., 2006, <http://www.iied.org/events/files/Barbara%20Ward%20Lecture%202006.pdf>.

74 An extract from Former UN High Commissioner for Human Rights, Mary Robinson's guest essay on climate change and human rights, <http://www.britishcouncil.org/ireland-governance-climate-change.htm>.

75 *Treaties and Covenants on Universal Human Rights*, ed. by Dong Yunhu and Liu Wuping. Sichuan People's Publishing House: 1990, p. 1403.



on weather. To those who live at the mercy of weather in unprivileged regions in developing countries, the fate of their ecological environment controls life and death over them. Their right to subsistence depends largely on what natural resources provide. Therefore, the destruction to the natural environment they live on is a direct harm to their right to subsistence. What's more, poor countries or people in these countries are likely to slip into wars over natural resources. The issue of Darfur, as a focus of international attention, stems from an ecological crisis. Some scholars have pointed out that it is global climate change that leads to the drought in Darfur. Environmental degradation and the scramble for natural resources like grass and land triggered the conflict in the region, which deteriorated into a humanitarian crisis. As determined by human nature, subsistence is the most important thing. If people's subsistence is not guaranteed, they will resort to unusual means to solve the problem and some conflicts will almost be inevitable. The conflicts, in return, will not only cause loss of many lives, but result in more serious violations of human rights. As environment experts predicted, climate change will bring about a host of side effects, one of which is aggravating scarcity of water sources. There are already conflicts over water sources in the international community (like the conflict over water among countries in the Nile basin). So, it can be expected that there will be more conflicts over scarce water sources in the future and more lives can be lost in this aspect.

3. Right of equality

The right of equality is another universally acknowledged basic human rights. The first article of the *Universal Declaration of Human Rights* stated "all human beings are born free and equal in dignity and rights."⁷⁶ So everybody should have this right, which as basic human rights cannot be deprived of.

But in dealing with the issue of climate change, the developing countries' right of equality is not guaranteed. As a matter of fact, climate change is a result of development of developed countries. The greenhouse gases, as a main cause of global warming, have mainly been accumulated by gas emissions by developed countries over the past. They underwent this process before becoming rich and developed countries. The much poorer countries, however, are suffering, most from climate change, bearing the increasing brunt of global warming caused by the greenhouse gases. It is unfair for developing countries to suffer the bitter results developed countries have sown. What is more important, most of the developing countries have found out that their equal right to the pursuit of happy life will probably be restricted, because their prospect of economic development and prosperity is becoming gloomy due to the fact that they have to limit their emission of greenhouse gases. It is already in doubt whether they can still have a chance to enjoy the convenient quality life as enjoyed by people in developed countries. Since the right of equality is a universally acknowledged human rights and everybody should have the right to pursuit of happy life, then how can the right of equality of the developing countries be ensured?

Luckily, this issue has been noted by the international community and the Earth Summit held in Rio de Janeiro in June of 1992 clearly stated that climate change is not only an ecological issue, but an

⁷⁶ Ibid. p. 961.



issue of equality as well. Some people of insight have made it clear that climate change has become an issue concerning global fairness and equity and that the most fundamental principle of fairness should be adhered to in solving this problem.⁷⁷ Some others held that in the process of solving the problem, developing countries should get compensation for their sacrifices. The human rights framework gives us the legal and normative grounds for empowering the poor to seek redress.⁷⁸

4. Right to development

The impact of climate change on developing countries' right to development is closely related to its impact on their right of equality. The right to development is an important human rights proposed in 1970s. *The Resolutions on the Right to Development* adopted at the United Nations General Assembly on 23 November of 1979 stressed that the right to development is a human rights and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations.⁷⁹ *Declaration on the Right to Development*, adopted at the United Nations General Assembly in 1986 officially confirmed this human rights, pointing out: "the right to development is an inalienable human rights and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations."⁸⁰ So every nation and every individual should have an equal chance to achieve its (his/her) development. The Declaration on Human Environment adopted in June 1972 clearly defined the relationship between environmental policies and the development of developing countries: "The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all."⁸¹

But, climate change has seriously affected the realization of developing countries' right to development. As is known to all, nations in the world are classified into developed or developing countries in accordance with their different levels of development. Developing countries refer to those nations that have relatively low productivity, an underdeveloped economy, started developing at a much late date and are still gradually developing. Most nations in the world are developing countries. As said earlier, climate change is caused by accumulation of greenhouse gases emitted by developed countries in its process of economic development. The bitter results caused by developed countries have affected the global environment and all human beings' subsistence. The avoidance of a risk often implies missed opportunities.⁸² In the case of climate change, these are usually opportunities for economic growth. For the developing countries, the problem they are facing is whether they should limit or sacrifice their opportunities for development. This is a dilemma faced by developing countries: if they stick to realization of their right to development, a gorgeous amount of greenhouse gases will be emitted and further aggravate degradation of the global environment; if they limit greenhouse gas emissions, it means

77 Wolfgang Sachs, "Climate change and Human Rights".

78 Mary Robinson, "Climate Change and Justice".

79 *World Document of Human Rights*, ed. by Dong Yunhu and Liu Wuping. Sichuan People's Publishing House: 1990, p. 1363.

80 Ibid. p. 1365.

81 Ibid. p. 1405.

82 Wolfgang Sachs, "Climate change and Human Rights".



that they will slow down and restrict their economic development and thus cannot fully realize their right to development. Since the right to development is a kind of inalienable human rights, then how can the developing countries' right to development be guaranteed? Should developing countries sacrifice their right to development for the historical responsibilities of the developed countries? This is an issue that the international community should handle and resolve appropriately.

5. Human rights of vulnerable groups

Climate change has also seriously affected the human rights of vulnerable groups and caused some new problems. Some of the problems are still uncovered by law. For example:

(1) Women's human rights

Women are a vulnerable group in society. To guarantee their rights and gender equality is still a problem facing many countries. But climate change now poses a new threat to protection of women's rights because the overall differential impact of climate change on women and men is clear. In the case of climate change, more time spent in gathering food means less time for education, personal and family life. The task of finding other means for survival is largely assumed by the woman in the family, which further lessens her ability to do things for herself. This is a major blow to the self-development of women.⁸³ Some research results have shown that women living in poverty are the most threatened by the dangers that stem from global warming. They are also key actors in ensuring their communities' ability to cope with and adapt to climate change. Therefore, defending the full range of women's human rights within the context of addressing climate change is essential.⁸⁴

(2) Human rights of environmental refugees

As stipulated by the international refugees law, refugees must meet four basic requirements:

(a) having left his/her country of origin; (b) having justifiable reasons for fear of persecution; (c) this fear should be based on one of the following causes: ethnicity, religion, membership of some social group, or political beliefs; (d) unable or reluctant to return his/her native country for fear of persecution.⁸⁵ Clearly, the definition of refugees does not cover environmental refugees. Since the international refugees law has no relevant articles on rights of environmental refugees, so their rights cannot be protected in the current international legal system. The first rather authoritative definition of environmental refugees, which appeared in 1985, was given by a research fellow with the United Nations Environment Program. It defines environmental refugees as those who are forced to leave their traditional place of residence temporarily or for good due to environmental calamities, both natural and man-made, which afflict marked destruction to their survival or their quality of life.⁸⁶ But the international status of environmental refugees is still a problem till now because it is difficult to provide protection for them in the world.

⁸³ Mary Robinson, "Climate Change and Justice".

⁸⁴ "A Women's Rights-based Approach to Climate Change", <http://www.madre.org/articles/int/climatechange.html>.

⁸⁵ Office of the United Nations High Commissioner for Refugees, *An Introduction to the International Protection of Refugees*, UNHCR Beijing, 1995, p. 21.

⁸⁶ Essam El-Hinnawi, see Diane C Bates, "Environmental refugees Classifying human migrations caused by environmental change," *Population and Environment*, May 2002.



Now, the dilemma is: rights of environmental refugees cannot be protected while the number of environmental refugees is growing with climate change. The Intergovernmental Panel on Climate Change held in 1998 pointed out that global warming would lead to a wave of environmental refugees: some suggest as many as 150 million by 2050.⁸⁷ How to deal with the problem caused by such a large number of environmental refugees is a huge challenge for the international community.

To sum up, climate change is not only an environment issue, but a human rights issue as well. It can exert most impact on the human rights of developing countries. Climate change has brought with it many problems for the international community, one of which is how to realize human rights of developing countries in the context of climate change. It is very hard to solve the problems because people cannot reach agreement due to different interests. Even law cannot do anything about it. Although there have been relevant lawsuits (such as the one filed by human rights committee of American countries against U.S. Federal Government for its activities leading to global warming, a human rights violation), legal experts say that there is little reason to believe that international human rights litigation would lead to a desirable outcome as far as climate change is concerned.⁸⁸ Then, how should the problems be solved? And what should the international community do to address them?

First, all State Parties to international covenants should carry out their assigned international obligations in both international covenants on both human rights and environment protection. The Framework Covenant on Climate Change and International Human Rights Law stipulate the relevant duties for the state parties. Almost all are parties to the Convention on the Rights of the Child, and have agreed to assist developing countries to protect children's human rights. Through their ratification of the International Covenant on Economic, Social and Cultural Rights, many of these states have also undertaken to assist developing countries in "progressively realizing" these rights "without discrimination." These legal frameworks - on climate change and on human rights - are not only mutually compatible - they powerfully reinforce each other.⁸⁹

Second, we should stick to the principle of "shared but different responsibilities." Developed countries should take the initiative to take responsibilities and if possible, limit their consumption needs and do their utmost to limit greenhouse gas emission and provide compensation and help for developing countries. This is because they are the main actors in prompting climate change.

Third, we should adhere to the "principle of fairness" and take interests of all relevant parties into account at the same time in order to achieve fairness in the whole world. In this respect, the international community should give due consideration to the interests and need for development of developing countries, enable developing countries to have a fair chance to achieve economic boost,

87 See an extract from Former UN High Commissioner for Human Rights, Mary Robinson's guest essay on climate change and human rights, <http://www.britishcouncil.org/ireland-governance-climate-change.htm>.

88 Eric A. Posner, "Climate Change and International Human Rights Litigation: A Critical Appraisal", John M. Olin Law & Economics Working Paper No. 329 (2D series); Public Law and Legal Theory Working Paper No. 148, January 2007, <http://www.law.uchicago.edu/Lawecon/index.html>; <http://www.law.uchicago.edu/academics/publiclaw/index.html>.

89 Mary Robinson, "Climate Change and Justice".



leave enough space for their carbon emission and transfer to developing countries technology in reducing carbon emission. The final aim is to ensure that citizens in every part of the world should enjoy equal rights in greenhouse gas emission. Only when interests of all parties are respected can the international community reach agreement on dealing with climate change and make concerted efforts in preserving a harmonious and sustainable environment for human subsistence.

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HUMAN RIGHTS OF THE PEOPLE WITH HANSEN'S DISEASE IN JAPAN

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In Japan, there was a long history to intern the people with Hansen's disease at the national medical institution. Once those who were diagnosed as a Hansen's disease patient, they had been put into the national Hansen's disease treatment institution. And those patients had never been allowed to discharge from the institution forever. Most of those patients had been forced to the labor in order to take care of themselves. Once a male patient decided to get married, he was forced to sterilize. In the case of a female patient, she was forced to have abortion if she got pregnant. This inhumanitarian practice has started from the beginning of the 20th century and has continued until about 11 years ago. This kind of human rights abuse was regulated under the law of the Hansen's Disease Prevention. There were 13 national Hansen's Disease Treatment Institutions and two private Hansen's Disease Treatment Clinics. About 2800 former Hansen's Disease Patients are now living in the national Hansen's disease treatment institution now. However, the average age of those patients are nearly 80 years old. Many of them are still suffering from the discrimination and prejudice by the Japanese society. In addition, those people are suffering from the social isolation and the declination of the health condition. In order to secure their human rights, the government should make an effort to provide the physical care and medical care as well.

Hansen's disease patients have organized their resident's association and they are making an effort to establish Hansen's Disease Problem Fundamental Law in order to protect their human rights and secure their social and medical security.

It is crucial to establish the Hansen's Disease Fundamental Law as soon as possible since the former Hansen's Disease Patients have been abused their human rights. This law proposes three major issues. (1) The Japanese government must admit their mistakes to violate the human rights of Hansen's Disease Patients in the past (discrimination and quarantine). (2) The Japanese



government makes sure to secure the social and medical security of the Hansen's Disease Patients.

(3) The Japanese government must open the Hansen's Disease medical facilities to the public.

I would like to make recommendations that the Japanese government should make an extra effort to protect and promote human rights of the former Hansen's Disease Patients in terms of social and medical security. In addition, the Japanese government should also make an effort to establish the anti-discrimination law for people with any kind of disability and illness as soon as possible.

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SECURITY AND HUMAN RIGHTS





THE ROLES OF INTERNATIONAL PROTECTION SYSTEM IN THE CURRENT WORLD

Larry Devoe
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The international protection system of human rights, established under the basic principles of the Universal Declaration of Human Rights adopted on December 10, 1948, should be reviewed seriously and profoundly.

The principles of inherence and inalienability of human rights mentioned in the Universal Declaration of Human Rights seem to have been forgotten during the 60 years' development of the international protection system of human rights. The structure of the protection system focuses more on so-called civil rights and political rights while ignoring people's economic, social and cultural rights.

The current situation is, when we talk about civil rights and political rights, no-one would suspect that he or she should be treated equally in this regard and there are corresponding supervision mechanisms in the international community to deal with separate complaints. However, on the issues of economic, social and cultural rights, there are some people who doubt equality and believe these rights are nothing but a beautiful future assumption.

The status quo of the regional human rights protection system on the American continent illustrates the above-mentioned situation, which is counter to the characteristics of the inherence of human rights. Actually, petitions and cases related to human rights in America are usually restricted to civil rights and political rights. Meanwhile, human rights protection movements caused by trials of human rights cases are also developing along the same road. There is not even a single record related to economic, social and cultural rights protection in the files and documents of human rights in America.

People's economic, social and cultural rights have very close relations with people's civil rights. This is not just a principle of wording or a simple theory, but an increasingly clear fact. The reality is, a rising number of people are dying of hunger and diseases that are usually preventable or curable. These cases are about much more than infringing civil rights or political rights.

Statistics from the United Nations show that 5 million people die of diseases caused by a lack of drinkable water every year, including 1.5 million children; a total of 24,000 people die of hunger every day and another 100,000 people die from reasons related to malnutrition; there are 2.6 billion people with no basic medical security, accounting for 40 percent of the global population; every day, 8,000 people succumb to AIDS or various of diseases related to AIDS. On the American continent, almost 240 million people are living in poverty and under pressure of

being squeezed out.

Facing facts, we cannot help recalling the words of Dr. Bertrand Ramcharan, UN High Commissioner of Human Rights, who said “If a family has to stay in hunger, if a person simply cannot prevent his family members from common diseases, or cannot ensure his children’s basic education, then, so-called human rights are only a remote dream.”⁹⁰

Neither the global international human rights protection system nor the regional American human rights protection system should ignore the reality facing the world and human beings. They should seriously realize that the worst violation of human rights is poverty, which affects a large proportion of our people.

The United Nations stated, “Universal extreme poverty will hinder the full and effective execution of human rights protection, and, under certain circumstances, will threaten people’s right to live. Thus, the international community will continue to give priority to alleviating and totally eliminating poverty as soon as possible.”⁹¹ Thus, the current international human rights protection system, while playing its role worldwide, should give priority to making joint efforts with all countries around the world to ensure that people can live in dignity and enjoy the basic right to live.

Recently, the struggle for inherence and inalienability of human rights has made essential achievements.

The United Nations is discussing an academic draft on a treaty of economic, social and cultural rights protection, expressing the international views that these rights should be protected.

The academic draft should not ignore the responsibility of ensuring the current economic, social and cultural rights of human beings. Of course, every country should bear blame, as they should have protected their citizens’ rights in these sectors. However, international economic organizations, international financial mechanisms and economic structures such as imbalanced foreign debt are creating obstacles and hindering the ability of countries to protect people’s rights in these sectors.

The international human rights protection system, especially the American human rights protection system, is too distant from harsh reality. The system was set up to deal with only a part of human rights protection.

Economic, social and cultural rights are also human rights, which need attention and protection from the international community. This will exert positive influence upon human beings around the world. If these rights cannot be protected, it is very difficult for us to talk about “development.”

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⁹⁰ The Office of UN High Commissioner of Human Rights. *Human Rights and Poverty Elimination*, 2004.

⁹¹ UN Assembly Resolution 61/257



THE SOCIAL CONTROL OF POLICE ACTIVITY

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Brazil

The notion of police control, particularly of external control, is usually associated with the capability to punish deviant or irregular behaviors from the members of the institution, in order to avoid their repetition. However, in truth, the concept of institutional control is much more comprehensive.

In management, control denotes an operation which comprises three stages:

- a) Collection of information about the results obtained with the fulfillment of a given activity;
- b) Comparison between obtained and expected results;
- c) Adoption, if necessary, of corrective measures to achieve the planned goal.

According to Fayol (1990), control consists in “verifying if everything occurs in accordance with the adopted plan, with the issued instructions and the established directives, in order to point out the faults and the mistakes or rectify them and to avoid their recurrence.”

Hence, the action of control has always the aim of measuring results, of preventing deviations, and, if that is the case, of pointing out measures to reach the desired aim and to assure the result initially planned. From this point, one can conclude that it is virtually impossible to exercise the control of an institution when it is unknown what was planned as the aim of its work.

Therefore, one must ask which kind of institution one is looking for before discussing how it should be controlled. Once the aims, the recommended procedures, the values to be preserved and the directives that shall guide the action of the institution are known, the organisms of control dispose of the pattern and general references to exert control activities, among them:

Detect problems of orientation and execution;

Accept claims and complaints

Map critical and problematic points

Systematize data and relevant information

Evaluate behaviors and proceedings

Check the investigations of responsibilities of agents and organizations

Compare the real performance with the desired standards

Suggest and check the necessary corrections

Propose corrective measures in time to hamper mistakes to occur again or the observed problems to get worse

When a law endows a given institution with the power of exerting external control over the



activity of another institution, it must provide, at the same time, the necessary powers and means to accomplish the task. In Brazil, for example, the Constitution of 1988 expressly determined an external control of the federal government. Hence, in order to make possible such control, the very Constitution ascribed to the National Congress the powers to evaluate and judge the public offices' bills; evaluate the legality of administrative acts; perform inspections and accounts auditing; examine bills and the employment of resources; collect data; apply sanctions; fix time frames for corrective measures; halt the execution of impugned acts and sue against irregular and abusive acts.

In a democratic State of law, the exercise of institutional power cannot and must not be subordinated to any particular or exclusive interest of the ruler. On principle, the democratic State of law must exclude any arbitrariness in the exercise of power. That is its main characteristic - the subordination of all institutions, of all organizations, of all public officers and, in sum, of the entire State, to the legal framework.

The rule of law, as the very expression conveys, means that the State is subdued to the law. A state whose power and activities are regulated and controlled by the law, and the law must be understood as the expression of the general will (Elias Diaz, 1975, p.13). That is not only a matter of blind obedience to a set of rules, regulations, codes and statutes, but also a set of values which authorities and public officers must promote and respect.

According to Messner (1967), the existence of the rule of law depends on the observation of two conditions:

1. protection and respect for the human rights;
2. protection of these rights against possible arbitrariness of public officers.

In contemporary political societies, the respect for human rights must be the axis of governance. Such a principle must inspire and guide all police activity. Therefore, the observance of this principle by the police officers must be the main concern of the institution of control.

At this point, it is convenient to remember Professor Fabio Konder Comparato's (2000) warning: "If the essence of politics is the relation of power between rulers and the ruled, the greatest problem of all constitutional organization is and will always be the limits to the exercise of power."

And power, as used to teach us by Montesquieu, "goes until it meets its limits."

The external control of social policies - including the public security - has its grounds on the principle of direct participation of the citizen in the public management, inscribed in the *Universal Declaration of Human Rights*, which claims in its XXI article that every person "has equal right of access to the public service in his/her own country."

The external control of social policies is also utterly inscribed in the 1988 Brazilian Constitution, in its first article and in many provisions related to the assurance of democratic management of public policies, such as in the social security policy, in the health care system, in the social assistance system and in the educational policy.

By the same token, in the chapter of Public Management, the Constitution determines:

1. That the entire public management, of any of the three Powers, must obey the principles of legality, impersonality, publicity and efficiency.



2. That the law:
 - a) Will discipline the forms of participation of the citizen, which concerns possible complaints related to public services in general.
 - b) Will assure:
 - the maintenance of essential services
 - periodic external and internal evaluation of the quality of services
 - open access to bureaucratic data
 - suing the State against neglect or abuse in the exercise of powers, jobs or functions.

That is the general rule for the whole public management and, logically, also for the public security system.

Police control

As well as in any other institution, when talking about police external control we should ask which particular actions must be object of control. In the case of police, control is usually understood as punishment for deviant conduct by agents as well as the adoption of preventive measures to avoid the repetition of irregular conduct. But if the objective of the control is “the activity of the police,” in a wide sense, this control should be understood in a much broader sense. It could include, for instance, the inspection of the quality of the policing service or the monitoring of the degree to which the institution is able to achieve people’s right to security. In this sense, besides investigating abuses committed by the police, the institution can also develop operational proceedings; select and train agents; evaluate the degree of satisfaction of the community with its police force, strategic priorities, budget execution, and so forth.

There are different kinds and ways of police control. We can distinguish between, for instance, formal control, practiced by organs which have this institutional attribution, and informal control, practiced spontaneously by people or groups, such as the press or citizens in general.

Another much more usual classification is the one that differentiates between internal control, practiced by members of the institution itself, and external control, practiced by people other than the police. If internal control is essential, the external one can be perceived as a more independent one and away from corporativism, and can better respond to society’s expectations.

Comparing those two types of control, Alemika (2005) indicated some advantages and disadvantages:

Internal control

Advantages:

The police authority knows better the police work and better detects eventual irregularities

Most part of the detected diversion is of a little importance and can be resolved by the immediate supervisors

Internal disciplinary mechanisms are more accepted and co-operation among police officers will be strengthened

The result of the disciplinary proceedings can influence other institutional decisions making (such as changing police formation courses or selecting agents)

Internal regulation can be more detailed and extensive, and can cover a broader range of

police conduct, not only the aberrant ones

Internal control can be more varied, subtle and precise. It can use either formal or informal mechanisms

Disadvantages:

Police corporation commanders resist divulging and punishing irregular conduct

The secret code, internal solidarity and corporativism make it difficult to put into practice effective and impartial investigations

Managerial mechanisms of control are little transparent

The applied exams can be subtle and favor the accused police

Police power can be used to intimidate and to compel the denouncers

The denouncers are not enough informed of the proceedings and the result of the investigations

Citizens tend to be dissatisfied with the result of the denunciation, due to the lack of transparency and impartiality of internal proceedings.

Besides those disadvantages mentioned by Alemika, we could add two more that appear to have a special importance to the Brazilian case:

A high importance is given to the institutional hierarchy, which practices control in a much more rigorous sense over the base than over the corporation higher levels. A police magistrate will hardly investigate independently if the accused is, for instance, the corporation chief or general commander, his hierarchical superior.

Rigid disciplinary codes, in particular at military police, which frequently do not respect the police right to defense.

External control

Advantages:

Citizens have more access to controlling organs

Proceedings are more transparent and more publicized

There is less chance of police officers intimidating denouncers

There are gains to the image of the police, since it shows itself in a disposition to expel the “rotten apples” from the corporation

Citizens tend to be more confident on control organs which do not belong to the controlled institutions

Disadvantages:

The organ of external control can undermine the commander’s authority and the subordinate’s confidence, with negative impacts to discipline

Complaints to the external organ can be used as personal vengeance against police officers

The evaluation of civilians without knowing very well how the police work cannot take into account the possibilities and risks of the police work.

There is a tendency towards more resistance from police officers to co-operate with external control mechanisms

Actually, internal and external controls should not oppose each other; they can and should be



inter-complementary. External control can strengthen the internal one in many ways, such as:

- demanding an efficient performance of the internal control as well as more investment in it
- exchanging information
- articulating simultaneous actions between the two types of organ
- threatening with the intervention of the external organs when internal controls meet resistances, then political cost for the corporation would be higher

By the other side, internal control can strengthen the external one by:

- delegating competences or tasks to the external organs, to generate credibility
- helping spread internally the objectives and results of the external control
- helping surpass internal resistances to external control

(The author is National Human Rights Ombudsman of Special Secretariat for Human Rights of Brazil.)

SECURITY AND HUMAN RIGHTS: A FRAGILE BALANCING ACT

Lovelía Cabrera Laping
The Philippines

I. Background

What is SECURITY?

It is defined as a condition of being protected against danger or loss. The concept of security is similar to safety, freedom from the occurrence or risk of injury, danger, or loss. Security is a fundamental need shared by individuals, societies, communities, businesses, and governments alike. To further categorize this concept, national security refers to the requirement to maintain the survival of the nation-state through the use of economic, military and political power and the exercise of diplomacy.

What are HUMAN RIGHTS?

Human rights refer to the basic rights and freedoms to which all humans are entitled. The Republic of the Philippines (RP) is a signatory of all the seven (7) core human rights conventions⁹² of the United Nations and also one of the original signatories and the original crafters of the

⁹² The Philippines signed the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the UN Convention on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the International Convention on the Rights of Persons with Disabilities and its Optional Protocol. RP is a party to the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Universal Declaration of Human Rights. This underscores our country's deep commitment to promoting and protecting human rights and our country's continuing commitment to working together with the United Nations Human Rights Council.

A state/government has the primary responsibility to promote and protect human rights among its people and ensure that all parties to a conflict observe applicable tenets of international humanitarian law. But intense security measures may also impinge on the basic human right of freedom of movement. It is in this area that most problems arise. However, it is imperative for states to recognize that security and respect for human rights can and should be consistent.

II. National Human Rights Institutions in the Philippines

The Commission on Human Rights of the Philippines (CHRP) is the premier monitoring body for Government compliance with obligations under international treaty organizations. Its powers and function to investigate human rights violations provide the people of the Philippines with an additional mechanism for redress and remedy.

The Philippine Human Rights Commission (PHRC) was created to act as the government's coordinative body to consolidate country-wide efforts in promoting human rights.

III. The Human Security Act of 2007

On 8 February 2007, the Philippine Senate ratified Republic Act 9372, commonly known as the Human Security Act of 2007 (HSA 2007) or the Anti-Terrorism Act. President Arroyo signed the bill into law on 06 March 2007 and it took effect on 13 July 2007.

The HSA 2007 is a law that defies and penalizes terrorism and was primarily crafted to tackle armed militants in war-torn southern Philippines which has long been plagued by bloodthirsty groups such as the Abu Sayyaf, the Jemaah Islamiya, the Rajah Solaiman and Al Qaeda.

The anti-terror law criminalizes terrorism and allows authorities to arrest terror suspects without warrants and temporarily detain them without charges. Under the law, detained terrorists are entitled to see a lawyer, a priest, a doctor, or family members. Terrorism is defined under HAS 2007 as the "commission of crimes (rebellion, murder, kidnapping, hijacking, etc.) that sow or create a condition of widespread and extraordinary fear and panic among the populace in order to coerce the government to give in to an unlawful demand."

Aside from terrorism per se, HSA 2007 also defined the new crime of "conspiracy to commit terrorism" when two or more persons come to an agreement concerning the commission of the crime of terrorism and commit the same.

Allies immediately congratulated the Philippine Government, stating that HSA 2007 will provide Philippine law enforcement and judicial authorities with the legal tools they need to confront the threats posed by international terrorism, while ensuring protection and civil liberties and human rights.

However, Manila-based human rights advocates immediately went up in arms against the Government for what they perceived to be the passing of a "recipe for martial law." They viewed the anti-terrorism law as draconian, anti-people and very dangerous. A primary aspect government critics espouse is that the Law does not cover the acts of terrorism of the State itself in the guise of counter-insurgency measures.



The anti-terror law was predicted to undermine human rights and at the same time, consolidate the president's power. The rallying cry of vocal militant groups went: "If you repress the rights of the people and keep them silent, then your power becomes stronger."

It is inevitable that anti-terror laws contain provisions that abuse or violate civil liberties. Some countries which have passed such laws even reviewed and repealed some provisions of their existing terror laws.

IV. Analysis of the Human Security Act of 2007

The most dangerous provision of HSA 2007 is found on Sections 18-19 which provide for warrantless arrests and prolonged detention of terrorism suspects without charges for up to 72 hours.

In the event of an imminent "terrorist attack," terrorism suspects can be detained beyond 72 hours. This violates the Philippine Constitutional guarantee that detained persons should be charged within 72 hours or be set free. Critics argue that this section may be rife for abuse by law enforcement officers.

The HSA has an overly broad definition of what constitutes a terrorist act. This is at variance with the principle of legality and thus incompatible with Article 15 of the International Covenant on Civil and Political Rights (ICCPR).

The strict application of a penalty of forty years' imprisonment undermines judicial discretion in individual cases and may result in a disproportionate punishment due to the broad definition of terrorist acts.

There is a further concern regarding the competence of various bodies authorized to review detention of an individual since some of these are members of the executive rather than an independent judicial body.

Thus, section 19 of the Human Security Act appears to lack the procedural guarantees provided by Article 9 of the ICCPR.

HSA provides for restrictions on movement including the imposition of house arrest where the legal basis is simply "in cases where evidence of guilt is not strong" rather than positive suspicion or a higher evidentiary threshold.

V. Conclusion

Admittedly, the Human Security Act of 2007 has a number of provisions which are not "human rights-friendly," but the Law does contain provisions which safeguard the rights of individuals against possible abuses by law enforcers.

When real threats are imminent, a state has the option to use existing laws that deal with so-called terror threats. A state also needs to seek out long-term solutions that address the social causes of terrorist threats which include poverty, injustice, corruption, etc.

Which is more important then? Which do we prioritize - the individual's human right to move freely without surveillance or fear of suppression, or the greater good of many-over-all safety for the citizens of a state?

Your answer is as good as mine.

(The author is Special Assistant to Undersecretary of Minister of Foreign Affairs of the Philippines.)



SECURITY AND HUMAN RIGHTS

- IN MEMORY OF THE 60TH ANNIVERSARY OF THE BIRTH OF THE UNITED NATIONS *UNIVERSAL DECLARATION OF HUMAN RIGHTS*

Li Shi'an
China

This year, 2008, is the 60th anniversary of the United Nations' formulation of *Universal Declaration of Human Rights*. The formulation of the Universal Declaration of Human Rights is a great epoch-marking event in human history and has far-reaching historical significance. The *Universal Declaration of Human Rights* prescribes the basic tenets and objectives of struggle for world human rights and stresses the important concept of ensuring the world security through realization of human rights. As a result, the *Universal Declaration of Human Rights* is not only a programmatic document for realizing the world human rights, but also a basis for "World Freedom, Justice and Peace" as well as a basic guarantee for "Security."⁹³

The term "security" is not a new concept. It involves a syndrome of meanings such as "human security," national security and international security, etc. The concept of "security," however, has long been a term that only involves the meaning of a realistic "national security" rather than "human security" and "international security." It is clearly stated in *International Encyclopedia of the Social Sciences* that "security is the ability of a country to protect its internal value from external threats." Therefore, before the Cold War came to an end, people only paid attention to the traditional security and "national security," but seldom cared about "human rights" and "international security." During the Cold War, the "human security" was neglected and people usually applied the term of safeguarding the "world peace" to the issue of "international security."

After the Cold War, with the collapse of polarization, the possibility of military conflicts on a large scale between the big countries has reduced. Nevertheless, various kinds of contradictions, which had been covered up by the contradictions between the United States and the Soviet Union during the Cold War period, have sprung up, resulting in various kinds of security issues and bringing about a lot of new terms such as "non-traditional security," "non-military security," "comprehensive security," "transnational security," "global security," "new security" and "sustainable security," etc. Among these terms, the term "non-traditional security" displays its utmost representative and generality and reflects the post-Cold War world security in a relatively correct way.

93 Han Depei, editor-in-chief: *The Theory and Practice of Human Rights*, Wuhan University Press, 1995, P1087



The so-called “non-traditional security” is the opposite of “traditional security,” which refers to the security issues other than such traditional ones as the national sovereignty, territorial integrity, military affairs, armament, arms control and disarmament, including such ever-increasing international issues as environmental protection, international organized crimes, terrorism, violation of human rights, smuggling, illegal immigration, trafficking in narcotics, as well as famine, disease and poverty, etc. Since “human security” cannot be safeguarded, then violence, upheavals, wars and terrorism have come into existence. Without ensuring “human security,” the national security cannot be maintained, nor can the international security. As a result, more and more attention has been paid to the issue of “human security.”⁹⁴

“Human Security” is the core of all “security.” Just as the British scholar Barry Buzan said, “If ‘human security’ relates to ‘individuals’ or ‘humankind’ as a whole, then it does not differ much from the agenda of human rights.” And “human security” is the basis for national security and for international security.⁹⁵

Barry Buzan has analyzed the post-Cold War security issues from personal, national and international perspectives. He is of the opinion that the security issues relate to international system (the biggest cluster of interactive or interdependent units), international sub-system (clusters in international system, mainly referring to regions and regional organizations), unit (composed of sub-group organizations, countries, nations and transnational companies), sub-unit (groups of organized people, such as bureaucratic apparatuses and groups in aid of foreign countries) and individual. And among them, “individual” is very important. Barry Buzan has clearly pointed out the role of individuals in world security. Only when the realization of human rights be guaranteed can the role of individuals in security be brought into play and human rights be realized; thus the society of a country be stabilized and the national security be ensured, and the stability and security of the international community be ensured.⁹⁶

Although different countries understand human rights in different ways, views of Barry Buzan have been acknowledged at large. Scholars of various countries in the world have universally agreed to “human security,” which means the realization of “human rights”: “For many, security means that they are protected from the threats of disease, famine, unemployment, crime, social conflict, political suppression and environmental deterioration,” that is, “human security” is the realization of human rights. Without “human security,” the society cannot be developed, to say nothing of national and international security. Guided by such an idea, scholars appeal: “The concept of security needs urgently to be changed in two basic aspects: firstly, a

94 Chu Shulong, Peng Chunyan: *Development of the International Security Theory after the Cold War, Modern International Relations*, 2005, 4th Issue, P31. Also see excerpts from *New Security Agenda - Global Overview* published by the Brookings Institution at the end of 1998 and edited by Paul Styles, *International Data and Information*, 3rd Issue of 2000, P14-28; See *On the Concept of Comprehensive Security* by Yang Wanming, *A Study of International Issues*, 4th Issue of 2005, P2.

95 Barry Buzan: “Human Security”: A Misleading of “Reductionism” and “Idealism” (translated by Cui Shunji and Yu Xiaofeng), *Zhejiang University Journal*, 1st Issue of 2008, P7.

96 Chu Shulong, Peng Chunyan: *Development of the International Security Theory after the Cold War, Modern International Relations*, 4th Issue of 2005, P28-30.



change from absolutely emphasizing territorial security to emphasizing human security all the better; secondly, a change from seeking security through armament to seeking security through sustainable development.”⁹⁷

American scholar Robin W. Broadway said: “The security sphere has originated from the narrow military concept of international security in Cold War and has become quite deficient in later Cold War world... Administering a country by giving priority to military affairs has restrained the country from gaining many external and internal abilities not subordinate to military security.” The former US Secretary of State Zbigniew Brezinski said that “war has become a luxury that only poor countries can afford.”⁹⁸ In 1996, the summit conference of the Organization for Security and Cooperation in Europe (OSCE) adopted *Lisbon Declaration on A Common and Comprehensive Security Model for Europe for the Twenty-first Century*, elaborating OSCE’s “outlook on comprehensive security” and putting forward such viewpoints as establishing cooperation, building up mutual trust, guarding against conflicts, seeking security and gaining “common security” with “mutual wins” and “common wins.”

The *Human Development Report* released by United Nations Development Programme in 1994, by taking “human security” as the theme, has systematically dealt with the “human”-centered new world outlook on security and has divided the threats to “human security” into seven categories: economic security, food security, health security, environmental security, human security, community security and political security. Such a statement has reflected “human security” as human rights. The *Report* has clearly pointed out that the realization of human rights should be fully ensured in order to bring about “human security.” The view has been acknowledged by some countries and has become precedence for these countries to formulate diplomatic policies.⁹⁹

After the Cold War, all countries have paid much attention to human rights and have achieved a common understanding: If human rights are not respected, then the social security will be affected, so will the national security and international security only by respecting human rights and constructing a harmonious society in the world can the “human security” be made come true, the lasting political stability of a country be safeguarded, the “national security” be realized and a safe, reliable and permanently stable international environment be built up; only by actuating “international security” can world peace, stability and development be promoted.

In realizing the “human security,” a question turns out very important to world security,

97 Chu Shulong, Peng Chunyan: *Development of the International Security Theory after the Cold War, Modern International Relations*, 4th Issue of 2005, P31. Also see excerpts from *New Security Agenda - Global Overview* published by the Brookings Institution at the end of 1998 and edited by Paul Styles, *International Information*, 3rd Issue of 2000, P14-28, *International Data and Information*, 3rd Issue of 2000, P14-28; Also see *On the Concept of Comprehensive Security* by Yang Wanming, *A Study of International Issues*, 4th Issue of 2005, P2.

98 James Dougherty and Robert L. Pfaltzgraff (USA): *Contending Theories on International Relations*, translated by Yan Xuetong and Chen Hanxi, World Affairs Press, 2004 Edition, P4.

99 James Dougherty and Robert L. Pfaltzgraff (USA): *Contending Theories on International Relations*, translated by Yan Xuetong and Chen Hanxi, World Affairs Press, 2004 Edition, P1.



that is, the “human security” in developing countries should be improved and the people of these countries should be truly endowed with the right of life, right for development and other various rights. The social security and national security of these countries should be brought to pass through realization of human rights in these countries. Once the security of these countries has been realized, then will international security.

Since the reform and opening up, China has set great store by the enhancement of human rights and, added to this, has put forward its own outlook on security. China’s outlook on security has been worked out in accordance with the reports on international and Chinese domestic situations promulgated at the 15th, 16th and 17th National Congresses of the Chinese Communist Party and on the basis of the expositions of Jiang Zemin and Hu Jintao on international and Chinese domestic situations in the new era. China’s outlook on security is aimed at “placing people above everything else,” “showing respect for human rights” and “constructing a harmonious world.” This outlook on security tallies with the United Nations’ *Human Development Report*. According to China’s outlook on security, the issue of human rights is the most important and the most fundamental strategy. In China, the concept of human rights has been expounded in the *Constitution*, and respecting human rights has become one of the major laws guiding China’s national activities. Over more than ten years, achievements made in construction of human rights in China have become the focus of worldwide attention. In external relations, China has taken vigorous action to participate in activities promoting world human rights, worked hard for improving world human rights and made new contributions to world security.

However, it is still difficult to realize the “human security,” because contradictions exist between practice and theories on human rights, and factors endangering human security exist in many countries and regions. For instance, terrorism and unrests have threatened human security. Hence, all countries should cast away the divergence of views on the issue of human rights and make joint efforts to iron out the factors causing world insecurity.

In ironing out the factors causing world insecurity, we should not only eliminate the political and cultural factors, but should also rule out economic and social factors causing insecurity as well as the sources generating these factors. We should particularly get rid of poverty, diseases, famine and wars and should bring global warming under control. It goes without saying that poverty, famine and wars undermine human rights and security, and global warming will bring about huge evil consequences. For instance, the present global warming has resulted in the surge of foodstuff prices, causing riots in some countries like Haiti. Undermining human rights has disrupted the social stability of these countries, thus causing problems to the national security. Without eliminating these factors, the world will have no peace.

To show respect for human rights, we should guarantee human rights in real earnest. On one hand, developed countries should get rid of the situation of theories concerning human rights being divorced from reality and should take forceful measures to further improve the conditions of human rights in their own countries; on the other hand, developed countries should help underdeveloped countries with their economic development, so as to ensure the right to existence, right for development and other various rights of the people in the third world. Only in this way



can we promote human rights with development and security with human rights. On the occasion of the 60th anniversary of the birth of the *Universal Declaration of Human Rights*, it is of great importance to study the relationships between human rights and security, to show full respect for human rights, to strive to improve the conditions of human rights across the globe and to bring about national and international security by virtue of “human security.”

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NATIONAL SECURITY AND HUMAN RIGHTS: TOWARDS A MORE COMPREHENSIVE NATIONAL SECURITY POLICY AND STRATEGY

Thomas Manthata
South Africa

Issues to be considered:

1. What is national security
2. Is there a conflict between national security and human rights
3. Finding an appropriate balance between human rights and national security
4. Towards a human rights based national security and challenges thereof
5. Conclusion

What is national security

National security is about protecting the sovereignty of any nation from external and internal threats that could harm the nation’s interest and its people.

For a long time and traditionally, threats to any nation and its people, both external and internal, were seen in the form of armed attacks (or militaristic in nature). In this regard national security was synonymous with the armed forces of a country; these include the army, the police and intelligence. This definition or composition of national security agencies is still seen along with these traditional perspectives/ views/ approaches to meeting security. South Africa and its 1996 constitution is a good example of this.¹⁰⁰

However with time and development since the Second World War, the way by which the Cold War was conducted besides the nuclear race, post-Cold War development and a deeper and

¹⁰⁰ Section 199(1) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that “the security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.”



better understanding of human rights, have led to a broader understanding of and approach to national security which encompasses human rights as an important factor and component of any national security approach/ policy strategy - a new human rights approach to national security that does not ignore threats of armed attacks and terrorism.

The constitution of South Africa in a way embraces this approach when it outlines the objective of national security, even though it still determines the national security agencies in the traditional way. The following principles governing national security in South Africa as per section 198 of the Constitution capsule the human rights based concept of national security:

(a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.

(b) The resolve to live in peace precludes any South African citizen to participate in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.

(c) National security must be pursued in compliance with the law, including international law.

(d) National security is subject to the authority of Parliament and the national executive.

The lack of adequate respect for human rights and entrenched democratic governance and practice in many parts of the world recently, which results in armed conflicts and other various forms of social unrest and civil strife shows that the human approach to national security is still not adequately appreciated in many nations. This also indicates that the militaristic approach still dominates the understanding of and approach to national security. The massive arms industry is a major factor that feeds and sustains this militaristic approach to national security based on the assumption that the best weapons and best-trained armies are the most important components of any national security system. In this regard Noam Chomsky on his book, *Powers and Prospects: Reflections on Human Nature and the Social Order*, wrote:

“The US faces no threats (foreign invasion), but spends almost as much on ‘defence’ as the rest of the world combined. Military expenditures are no joke, however. Apart from ensuring a particular form of ‘stability’ in the ‘permanent interest’ of those who matter, the Pentagon is needed to provide for the likes of Gingrich (the Republican Speaker of the House of Representatives) and his rich constituents, so that they can fulminate against the nanny state that is pouring their public funds into their pockets.”¹⁰¹

Gingrich’s favourite government-funded cash cow understands the scam perfectly.

Lockheed propaganda warns that it is a ‘dangerous world’ in which ‘sophisticated fighter airplanes and air defence systems are being sold’-mostly thanks to its ‘saviour’. One of the authors adds: ‘We’ve sold the F-16 all over the world; what if (a friendly or all) turns against us?’ To fend off that threat, we have to sell potential adversaries still more advanced weapons, and to transfer still more public funds to the shrinking sectors of the population that bear the burden of ‘dazzling’ profits.

Arms sales to undemocratic countries-most of the recipients-are opposed by a mere 96 per cent

101 Noam Chomsky, *Powers and Prospects: Reflections on Human Nature and the Social Order*, London: Pluto Press, 1996 at p 121.



of the population, so these programs reflect the ‘popular mandate’ as well as their companions.¹⁰²

The National Security State is a natural favourite of the advocate of private tyrannies (arms sales industry). The device facilitates the transfer of public funds to advanced industry and to wealthy sectors generally, with the public cowering in fear of foreign enemies so that planners can operate in ‘technocratic insulation’, in World Bank lingo. Furthermore, the ‘great beast’ has to be dealt with somehow, and the easiest way is to frighten them, so are internal enemies. Engendering fear and hatred is a standard method of population control, whether the devil is Jews, homosexuals, Arab terrorists, welfare queens (Black, by implication), or criminals lurking in dark corners.”¹⁰³

Recent developments in the African continent including those in 2008 highlight the need for expanded approach to national security or human rights based approach to national security.

These developments and others show the need for the national security system/ policy/ strategy of any nation/ stated country to factor in human rights and the need for national security agencies and numbers to factor in human rights in their activities, plans/ strategies etc.

At the same time most of the wars and conflicts have always been over resources and maybe the lesson going forward is to understand what causes conflict (National security threat) and how to prevent and diffuse such threat while also preparing to act decisively if conflict does occur. In this regard, Helen Yanacopulos and Joseph Hanlon in the book, *Civil War and Civil Peace*, in describing the impacts of wars wrote:

“More than 200 wars have been fought in the past half-century. Nearly all have been civil wars—wars within a single country. At the beginning of the twenty-first century, more than 30 civil wars were taking place; when fighting stopped in one place, new violence broke out somewhere else, and half of all civil wars started again.

Civil wars are angry and brutal as neighbours and former colleagues fight each other. Millions are killed and maimed; physical destruction sets development back decades, anger and distrust poisons the atmosphere. The ‘rules of interstate war do not apply; each atrocity provokes retribution and civil war takes on a horrible dynamic of its own.

The special brutality and bitterness of civil wars promotes a deep-seated mistrust of the other side. Both leaders and participants argue that the other side killed, raped and maimed and cannot be trusted; ‘they’ still want to kill ‘us’ and want to gain through peace talks and postwar building what ‘they’ could not gain during the war. ‘They’ always have a hidden agenda to do ‘us’ down.”¹⁰⁴

(The author is Commissioner of South African Human Rights Commission.)

¹⁰² Ibid, p 124.

¹⁰³ Ibid, pp124-5.

¹⁰⁴ Helen Yanacopulos and Joseph Hanlon (editors), *Civil War, Civil Peace*, Oxford, James Currey, 2006, p7.



NEW CHINA, NEW WORLD - THE RISE OF CHINA, INTERNATIONAL SECURITY AND HUMAN RIGHTS

Colum Murphy
Switzerland

“China will be, in the future, once again, a great and powerful nation. It must absolutely be included in the new United Nations, with a deserved permanent seat on the Security Council. As we create this new United Nations some of our allies do not understand this”

- American President Franklin D. Roosevelt in 1944

So said President Roosevelt in regard to the planning of the new United Nations created in 1945 after the Second World War. As everyone knows, it was also his wife, Eleanor Roosevelt, who drafted and was the architect of the *Universal Declaration of Human Rights* - one of the most important documents ever produced by the human species - adopted unanimously by the new United Nations General Assembly in 1948.

The *UN Charter of 1945*, the *Universal Declaration of 1948* - how new and recent are our two international constitutional guiding documents, the twin pillars of the international legal system! So recent, historically, that Eleanor and Franklin Roosevelt's grandson is a personal friend of mine, a houseguest in my home in Geneva just several weeks ago. His memories of his grandparents and their fight for peace and human rights are detailed and vivid.

China, by contrast, is an ancient civilization with, once again, a rising new world role. Yet the thinking of that man I admire, Franklin Roosevelt, once more applies: China must play an ever-greater and ever-more welcome role as a new leader of the international system.

Now, after decades of spectacular economic growth that has won the world's admiration, China is nearly ready for the coming-out party which will mark China's modern achievements - the Beijing Olympic Games, on which the eyes of the world will be focused in just a few months. The Olympic Games will show the world what the history, culture, talents and hard work of the Chinese people can achieve: China is back! The 21st century flies a welcome flag for the fascinating Middle Kingdom.

For decades the political centre of gravity of the world has been moving Eastwards.

The days are now gone when the West lectured the East. The days are now gone when the North lectured the South.

Yet history shows that it is precisely when new powers are rising while the powers of others decline that the greatest danger of conflict arises. It is absolutely essential that the new changes be achieved harmoniously. World peace with human rights requires that these great global changes



be managed skillfully. China needs the world and the world needs China. The North needs the South and the South needs the North. Developed and developing countries must now manage our modern dramatic global changes with infinite care - if we are to build a new world in safety, prosperity and dignity for our children.

I come from a small country - Ireland - that endured more colonial oppression than perhaps any country in the world, over some 800 years. Yet since our independence, Ireland and Britain have reached out to each other and built a modern friendship, one in which dialogue and endless patience have now also brought peace to Northern Ireland.

I am proud, therefore, of my country's reputation in the field of human rights. Ireland is a small country - of only some 4 million people - yet our voice on human rights is globally respected.

That voice will now be raised in support of China's greater world role, and more harmonious and peaceful re-alignment of security and human rights issues. That moral voice will address the new alignments and speak for peace, for international norms and for international law.

We must all work to, harmoniously, narrow the divide between rich and poor, between great and small nations and between the powerful and the powerless, on this single planet that we all share. China's indispensable help and leadership will be ever-more called upon so that our new international human rights machinery can be grown and strengthened to fit the new and exciting - but dangerous - century ahead of us.

The past 20th century - historically just yesterday - despite its inventiveness and achievements, was the most destructive century of all history. So many millions of people were tragically killed in war or related disasters. Or for simply being in the wrong place at the wrong time, the people of China suffered greatly.

Now in the new 21st century, we have no right to be complacent. History repeats itself and our international institutions are not much stronger now than they were when they were created. We can and will guarantee a safe and just future, therefore, only by working harder, and by strengthening our international institutions and international understanding. China will be called upon to play a steadily growing leadership role in the world. This growing leadership role must be welcomed, as Franklin Roosevelt pointed out, with better and better understanding between China and the rest of the world also growing apace. We need ever more frequent and deepening dialogue. China needs the world and the world needs China. The world also needs to listen more to China, and understand more, and better, China's great and ancient civilization.

The writer H.G. Wells, author of *The War of the Worlds*, said "civilization is a race between education and catastrophe." In our context it is a race between human rights education and catastrophe.

As you know, the three pillars of the United Nations, and its focus, are security, development and human rights. China is very active in the first two areas. Now the UN has revised and overhauled its human rights machinery and there too, China will be increasingly called upon to demonstrate its leadership abilities and talents. The new Human Rights Council is only now trying to find its feet. Its relationship with the Office of the High Commissioner for Human Rights will be important. The very important voice of China deserves to be heard here.



China's hour has come again. What China has to now give the world is once again of great historical importance. Let us work together then so that we can all say that "a new era of peace, development and human rights is at hand." Though we have no right to be complacent, with a dangerous century before us, the architecture for a better world is already in place - if we now seize the moment and nurture it.

There may be no better symbol of this moment than the Beijing Olympic Games. The government and people of China deserve the greatest praise for their Olympic achievement of preparation. What has been prepared for the Games - in record time - is truly extraordinary and deserving the highest praise. A very remarkable success indeed!

Let the Beijing Olympic Games, therefore, mark a newly deserved era for China. And let them mark a new departure toward a new world, with peace, security and human rights protection for all!

(The author is President of the Geneva School of Diplomacy & International Relations.)

CITIZEN SECURITY AND HUMAN RIGHTS

Nathanael De Souza E Silva
Brazil

The concept of citizen security is extremely important as far as the conciliation between fighting crime and respecting and protecting human rights is concerned. This concept underlies Brazilian policies towards fighting crime and has enjoyed unprecedented recognition in Latin America. Citizen security is breached when specific vulnerabilities are engendered by the violation of fundamental rights. It may be understood as the personal condition of being free from violence - or at least from the threat of intentional violence - or from deprivation by others. Violence denotes the use of or threat of physical or psychological force to cause damage or break someone's will, and deprivation refers to the act of violating rights. This definition paves the way for distinguishing the fields of study of citizen security and that of criminology, with which it is often confused.

Hence, it can be inferred that citizen security has to do with the effective protection of the right to life and to personal integrity-be it physical or psychological-, to inviolability of the home, to freedom of movement and to property. Realising citizen security on such basis differs radically from policies based on conceptions focused mainly on repression, which had traditionally pervaded state policies in Latin-America before democratisation and that were founded upon the conflict between the "civilised society" (the ordinary citizens) and the "internal enemy"(the political or criminal outlaws). It draws attention to the fact that safeguarding the fundamental rights of every citizen must be the ultimate objective of any security policy within the framework of the Rule of Law. This translates into the principle according to which States must address



the deep, long established causes of delinquency such as social exclusion and poor education in human rights for citizens and state agents alike.

As to the realisation of citizen security in Brazil, one could say that its main challenge remains striking a balance between fighting the vulnerability felt by most ordinary citizens and respect to everyone's human rights. Both Brazilian society and government firmly believe that the fight against all forms of crime which threaten the well-being of society must be carried out in strict respect for human rights and humanitarian law, so that any violation of the Rule of Law in the context of the fight against crime would imply an act of arbitrariness whose consequences could only be deplored. In order to dispel the citizens' feeling of vulnerability concerning their own security, Brazil has invested, in a sustainable manner, in the promotion and protection of the rights of citizens, seeking to bridge the wide socio-economic gap between Brazilians, to promote access to education, to cultural activities, to the legal system and to healthcare, all of which also translate into crime prevention.

In that context, the concept of citizen security plays a key role in the formulation of security policies, in order for the State to find the equilibrium between the public opinion's claims for a heavier hand against crime and the due respect for human rights. In order to put the concept into practice, the Brazilian Government has been organising training courses in human rights for police officers, strengthening the existing mechanisms of external control of police activity, such as the Police Ombudsman Offices, and introducing the use of non-deadly weapons by police forces, as well as the most modern techniques of legal and progressive use of force. Amongst these, the use of the Giraldi method of defensive shooting, a technique that has now won international recognition, is of particular interest. It was devised by a member of the São Paulo state police and aims at training policemen in real life situations in order to avoid cross-firing in confrontations with criminal gangs.

In addition to that, the Government launched, in 2007, the National Program of Public Security with Citizenship (Pronasci), whose basic guidelines include the articulation between security policies and social initiatives, with an emphasis on the relation between crime prevention and respect for the human rights. The main challenge of Pronasci is to fight organised crime, undermining its influence amongst inmates under custody and thus ensuring the security of citizens. The program has been created with a view to reaching the deep-rooted causes of violence without compromising the social order or crime repression. Its fundamental guidelines are: (i) training and assessment of public security professionals; (ii) re-structuring of the prison system; (iii) fighting against police corruption; and (iv) participation of community in violence prevention. Pronasci is focused primarily on the youth, trying to lead young people in situations of vulnerability to social programs.

In conclusion, it is my Government's belief that the debate over the concept of citizen security can make a positive contribution to the deliberations of this Forum, as well as provide useful insights on "Security and Human Rights" to all participating states and organisations.

(The author is Second Secretary of the Human Rights Division at the Brazilian Ministry of External Relations.)



SECURITY AND HUMAN RIGHTS: THE LIBERIA CONTEXT

Samuel Kofi Woods, II
Liberia

I. Introduction

1. Nature, character and context

Liberia was embroiled in a fratricidal civil war since 1989. The details are assumed to be well known by all of us here. My paper will therefore focus on the challenges of security and human rights within the Liberian Context reflecting on the past, present and to some extent, the future.

Liberia was founded by freed slaves from the USA. In 1847 an independent nation was proclaimed. The new nation technically reflected parallel dimensions-a settler and indigenous. This two-tier character portrayed all of the trappings of a colonial enclave. It was characterized by discrimination, subjugation, coercion, etc. Distributive justice became prevalent with the introduction of so-called modern systems of governance. History of injustices in terms of resources distribution, land, lack of access/mechanism for redress of grievances, justice for the rich/elites became abundant.

Liberia has a background like many developing countries:

1. False Start
2. Weak and incohesive state
3. Lack of legal certainty/ lack of respect of the rule of law
4. Crisis of identity, legitimacy, participation, authority, penetration- all attributes and characteristics of a colonial, two-tier, parallel state.

In 1980, a military coup took place replacing a century-old oligarchy with a military junta. The junta did not address the increasing gap between rich and poor, but embarked on programs that further deepen the divide and accelerate human rights abuses. In 1989, a military invasion led by Charles Taylor and his National Patriotic Front of Liberia (NPFL) was persecuted. It was characterized by barbarity and heinous abuses.

The character of the Liberian Civil War epitomizes what has been occurring in many parts of Africa (Liberia, Sierra Leone, etc.). These are internal conflicts characterized by loot and plunder, brute force and naked power.

They don't border on ideological dissent, religious tolerance, issues of participation, liberation, and struggle against colonialism. It is about innate greed and naked power. It is about criminal gangs who have discovered the fragility and weakness of the nation state: the state is in



cohesive, weak, lacks identity and legitimacy. They have determined that it is possible with the acquiescence of a gullible international community is possible to control the state and legitimize crime: use the stamp of governance to legitimize crime. Here I differ with those who are employing outdated models of conflict resolution to resolve our disputes.

Between 1989-2003, more than thirteen peace agreements were signed. They were all broken.

The war was brutal. It is estimated that close to 250,000 Liberians were killed and close to a million uprooted and displaced. There were wide spread rape and wanton killings.

2. Negotiated settlements and peace agreements

These peace accords could not effectively usher in the path to peace. They represented recipe for chaos and encouraged a vicious cycle of impunity because they were built on the false premise that peace could be attained if those who arrogate to themselves the monopoly of violence and crime would be given state power. This was an erroneous premise. In August 2003, a peace accord was signed, and it is the most recent peace accord signed in Accra, Ghana. It was viewed as a possible vehicle for peace-building, and conflict resolution and the restoration of the rule of law and justice. Several institutions were established. They included human rights, truth and reconciliation, elections, and interim governance, among others.

It established a fluid and fragile premise for justice, truth and reconciliation and reaffirmed the power and influence of violence, the superiority of force and legitimized perpetrators of human right abuses rewarding them with power and arrogating them authority to preside over the renaissance of a new nation. It defied and contradicted the premise upon which justice and the rule of law could be re-established and set the recipe for more violence corruption and instability in both the short and long-term.

The lack of sense of the history of the Liberian Conflict which is rooted in distributive justice was never addressed leaving the parties to control state resources to plunder. Part of the Liberian Problem has been about distributive justice and must be cured by better resource distribution and management. It has been about greed and power especially naked power. The legitimization of naked power by the international community undermines and negates the foundation for healing and justice.

The agreement also provided for the establishment of a transitional government in which all parties would participate. The transitional process was guided by the United Nations with its stabilization force to keep peace, to disarm and demobilize the factions, and to help resettle refugees.

II. The process

The peace process has not guaranteed the participation of large sectors of the Liberian Society. The agreement was signed externally with the parties but has not been able to assure the population of its effectiveness in stabilizing the country in the long-term. What is critical at this stage is to ensure consultations and dialogue with all sectors of the society to promote ownership and greater participation.

The dominance of the factions clearly defines where power resides. It resides in those who use and seek to monopolize violence. For ordinary citizens it is dehumanizing for perpetrators of abuses to assume political power. It generally relegates justice and promotes impunity. All



this has occurred with the support of the United Nations, European Union and other democratic Governments.

The transitional arrangement was supported by the UN, ECOWAS, EU and other international organizations. The very premise for the transition is now being neglected. State authority and pseudo legitimacy constitutes a pillar for the conflict in Liberia. In the case of Sierra Leone, the UN in New York and High Commissioner for human rights officially objected to amnesty provisions in the 1999 Lome Accord. This was the foundation for an international commitment to end impunity in Sierra Leone and by extension to the region.

Ordinary People are powerless and hopeless in war and require a higher authority to defend them by asserting respect for the rule of law. In the case of Liberia, reliance and faith in the morality of the international community and its capacity as the guarantor of international law and standards of justice and purveyor of objective truth has been undermined and bruised.

The peace agreement did not mention possible punitive measures or deterrent for violators. It relied on the good-faith of those who have abused ordinary people. It was fundamentally flawed in this regard.

Protection of civilians and humanitarian supplies, creation of state institutions, security sector reforms and respect for human rights, Truth and Reconciliation, etc.

1. The international actors/interlocutors

This paper will refer to international actors as the assortment of international and regional bodies as well as international non-governmental organizations. The primary actors include the United Nations, African Union, European Union, Economic Community of West African States, US Government, British Government, etc.

The secondary actors are the international non-governmental organizations that implement the policies of their respective agencies.

In our view, the International community represents an assortment of institutions and states that embodies high moral standards, upholds, guides, and reflects the ultimate interpretation, and enforcement of international laws and standards. This is certainly in theory. It is expected that State collapse, total violence and decimation of the institutions and the desecration of governance demand international response and moral leadership.

The question then is what these organizations do to respond? How do they respond? What motivates their responses? Who leads/supervises the responses? Where do resources come from? What are the limitations? How long, and how much?

2. Measures

Preliminary measures

The international community represented by the United Nations undertook several measures against the Taylor's regime. It was done primarily under suspicion that he was a pariah destabilizing the West African Region. The following was adopted between 1991-2003.

UN took sanctions against the Liberian regime, which included:

Sanctions on Liberian diamonds (referred to as blood diamonds); Arms embargo on Liberia; Travel Ban on Liberian Government officials; Later Sanctions on Liberia Timber; Freezing of



assets of Liberian Government officials.

These actions were taken while renewed crisis in Liberia commenced in 1999 with a rebel group attempting to overthrow Mr. Taylor. Taylor was elected President of Liberia in 1997.

These actions by the United Nations were attempts to impose international enforcements to restrain Taylor. It was an attempt to ensure justice and assert respect for international law. This took place after several warnings were issued to Mr. Taylor by the United Nations and other governments including the United States and Britain. The sanctions on Timber were imposed by 2003 after war broke in neighboring Ivory Coast with Taylor's support. The French and Chinese who had previously opposed sanctions on Liberia's Timber for purely economic reasons agreed to support the UN sanctions.

3. Taylor's indictment (unprecedented in Africa: indictment of a seating head of state)

When the UN discovered that Taylor was emerging as an uncomfortable nemesis, measures were taken to ensure peace for Sierra Leone while at the same time attempt was made to limit his excesses in Liberia and the entire region. Although this broad vision of regional justice was pursued, it was at best ill-conceived and could not derive a more comprehensive and effective result since it involved limited interaction with key members of civil society and did not include a real plan to limit Taylor and anticipate his eventual replacement. Taylor's role in exacerbating the conflict in neighboring Sierra Leone made him a likely candidate for the tribunal which was established then.

Taylor was finally indicted by the Special Court in Sierra Leone. He received sanctuary briefly in Nigeria. He attempted fleeing Nigeria and was arrested and turned over to the Special Court. Taylor is now in the Netherlands undergoing trial.

4. The establishment of a transitional Government to recreate/re-establish state institutions and a Truth and Reconciliation Commission.

The establishment of the transitional government is assumed to lay the foundation for the establishment of institutions to guarantee respect for the rule of law. The Truth and Reconciliation Commission will address issues of impunity, accountability and healing.

In 2005, elections were held and a democratically elected government headed by Liberia's and Africa's first female President, Ellen Johnson Sirleaf was inaugurated on January 2006.

5. Issues and problems

From the above comments, it is clear that we will have to reflect on the challenges of security and human rights in Liberia, a post-conflict society.

Post-conflict Society is concerned about 3 kinds of Governance:

(1) National security governance:

Without the minimum level of Security to its citizen, the state is unable to perform its regulatory functions:

This would mean the restructuring of criminalized state entities to respond to sensitivity of human rights abuses while at the same time protecting lives, protecting and upholding the sanctity of the state. Security sector reforms are part of the challenge.

The institutions must be rebuilt to guarantee respect and enforcement of the rule of law. The



various institutions of Justice, such as the judiciary and our courts, must be restructured. This will enhance enforcement, interpretation and law-making. It will also address the population's ability to deal with violent and deviant behaviors (violation of the law, rape, robberies, psychological pressure and obstacle after ravage)

(2) Political-administrative governance

Ending impunity TRC, restorative, retributive, distributive

Legitimacy/representation, relationship between social groups

Increasing access to basic social services and enhancing food security

Decentralization of governance to enhance national participation

(3) Socio-economic governance

Micro-economic Stability: strengthening the business and investment climate

Job creation

Reintegration of combatants, refugee, internal exiles

III. General comments and recommendations

There are critical elements to be realized when discussing security and human rights in post conflict societies especially those that experienced international intervention like Liberia.

The problems are numerous:

*The ill-conceived foundation and definition of peace and justice issues

*Lack of cooperation by member states of the United Nations

*Lack of cooperation by member states of the regional body Economic Community of West

Africa States

*Lack of political will and capacity to ensure enforcement

*Lack of punitive measures for violators of peace agreements

*Lack of emotional, national affinity to the process

*Arrogance and unwillingness to listen to dialogue and learn from ordinary citizens

*Disdain, intolerance of other views, participation and ownership

*Competition for resources, etc.

*Poor planning coordination and lack of strategic long-term vision

*Cooperation of foreign governments not guaranteed

*International community: Ad hoc and short term, donor driven project specific

*Elections as a vehicle for truth and justice (crisis of participation would be addressed and/or undermined)

*Lack of in-depth knowledge

*Competition of power, control and influence

Generally, security and human rights are erected within the framework of institutionalizing respect for the rule of law assuming that the rule of law whether domestic or international conforms to human aspiration of fairness and equality thus fulfilling our pledge to universality and inalienability. One assumes that it will flow from a mutual pact, a social contract between leaders and their subjects and/or the governors and the governed. It is this assumption that will guide me in the interaction.



The other assumption is that the United Nations, States, Intern-governmental bodies constitute the ultimate embodiments of human search for the truth and justice. If these assumptions are true which I doubt, then we might likely understand why our world find itself grappling with constant crisis and questionable quest for genuine peace and security notwithstanding the long period and the United Nations Charter whose primary existence hinges on the maintenance of international peace and security.

The nature of the state: State collapse, decimation and sometimes the criminalization of institutions of governance, institutionalization of violence as the only means of redress for grievances are reflection of lack of respect for the rule of law and doubts of state existence. Pariah states, question/crisis of state legitimacy, identity, participation authority constitutional and legal reforms, security sector reforms, excesses by institutions of government to enact, interpret and enforce laws.

The intervention of external actors tends to confirm universal morals, norms, standard and laws, defines international conscience, and rekindles hope. Along with this are expectations: that the rule of law will be different, economic pillage will reduce, greater accountability and transparency will be guaranteed.

Unfortunately, some intervention like that in Liberia can be both an asset and liability and more a liability because the primary need is to resort law and order. The institutions to sustain same are not prioritized, as massive corruption persists under the watchful eyes of the UN in spite of its mandate. Abdication of responsibility by key actors and states especially the USA, ambivalence and lack of long term commitment decrease and undermine the confidence and efforts of the local community to assert and become inspired. Old values are reinforced. The key to security and human rights is the supremacy of the rule of law built on the foundation of universality and respect for human dignity.

(The author is Minister of Labor of Liberia.)

SECURITY AND HUMAN RIGHTS IN AUSTRALIA: AUSTRALIA'S COUNTER-TERRORISM RESPONSE

John Von Doussa
Australia

Introduction

There can be no argument that terrorism is a gross violation of fundamental human rights. It violates not only the right to life, but the very way of life of the community attacked. Governments have the right, indeed the duty, to introduce measures to protect their communities that can deal



with the worst-case scenario.¹⁰⁵

In the extraordinary circumstances of a terrorist attack, protecting national security may involve restricting rights. But this can be done consistently with international human rights law. Human rights are not inflexible, esoteric principles that hamstringing government action to respond to threats to public order and security. International human rights law is forged in the wake of devastating periods of global conflict and clearly recognises the necessity of balancing the protection of individual rights against the protection of national security.

However, this balancing must occur within the human rights framework. International law allows for derogation from a range of individual rights where the gravity of the threat means that the government has no other choice than to suspend or restrict certain rights, which should be sufficient to accommodate effective counter-terrorism measures. Article 4 of the *International Covenant on Civil and Political Rights* (the ICCPR)¹⁰⁶ makes specific provision for derogation in times of public emergency which threatens the life of the nation.¹⁰⁷ Moreover, rights to freedom of expression, to freedom of assembly and to freedom of association¹⁰⁸ are expressly subject to limitation for the protection of national security and public order.

The critical condition, however, is that the derogation of an individual's human rights must be reasonable, necessary and proportionate¹⁰⁹ to the threat at hand. International law provides a workable test to determine proportionality: "Is the measure taken the least restrictive means of achieving the relevant purpose?" However, it is important that the proportionality test not turn into a broader "either or" weighing up of security on the one hand and human rights on the other.

The need to incorporate human rights principles into counter-terrorism measures has been recognised by the United Nations Security Council in Resolution 1373 which requires governments to take "such action as is necessary to prevent and prosecute terrorism" - but, only if such action complies with international human rights, humanitarian and refugee law.

Beyond the letter of international law, there are strong reasons why security measures should respect the principle of proportionality. Terrorism is ideologically and politically motivated. An essential strategy in countering the extremism that breeds terrorism is to win "the contest of ideas by rigorously defending the basic human rights and freedoms which form 'the bedrock of dignity and democracy that make our societies worth protecting'".¹¹⁰

105 The United Nations Security Council Resolution 1373 requires States to ensure that terrorists, their accomplices and supporters be brought to justice and that terrorist acts are established as serious criminal offences in domestic laws and the punishment duly reflects the seriousness of such terrorist acts: Resolution on Threats to International Peace and Security Caused by Terrorist Acts, SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (2001)

106 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

107 Non-derogate human rights recognised in article 4 of the ICCPR are referred to later in this paper.

108 Articles 19, 21 and 22 of the ICCPR

109 The UN Human Rights Committee has stated that proportionality is a fundamental test that must be met for any form of restriction on human rights under the ICCPR: See United Nations Human Rights Committee, *General Comment No. 29 - States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11, at [4]

110 Professor David Feldman, *The roles of Parliament in Protecting Human Rights: A view from the UK*, address at the Human Rights and Legislatures Conference, Melbourne University (20-22 July 2006)

Winning the contest of ideas becomes infinitely more difficult if security measures taken by a State undermine basic human rights standards. As the former United Nations Secretary General Kofi Annan observed:

Compromising human rights facilitates achievement of the terrorist's objective - by ceding to [them] the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element.¹¹¹

The revelations about the treatment of detainees in Abu Grabe and Guantanamo Bay, and about the use of torture techniques such as "water boarding" provide fertile soil for the recruitment of individuals to movements that hold out the promise of social change and advocate the use of terrorist tactics to achieve it.

For this reason, strict adherence to basic human rights standards should be seen not just as a matter of principle, but as a crucial strategy for governments in the fight against terrorism. In the same vein, the promotion of core community values of tolerance, inclusiveness and non-discrimination are important in countering extremism and radicalization in minority groups in a community.

Nevertheless, protecting the security and safety of the broader community, while preserving the human rights of those who become the subject of security measures, remains one of the most significant challenges in the post-September 11 climate.

Australia's counter-terrorism response

I now look briefly at human rights aspects of Australia's experience with counter-terrorism measures. Prior to September 11, 2001, there was no specific criminal offence of terrorism in Australia in federal legislation. Since then, the Federal Government has passed over 40 new pieces of legislation, creating a complex counter-terrorism framework. Counter-terrorism legislation in Australia has extended the law in three main areas:

1. The classification of terrorism, terrorist entities and organisations
2. Investigative and intelligence gathering powers
3. Powers of detention and control

Proposed Bills in each of these areas attracted substantial public criticism, on the grounds that the circumstances which enlivened the new measures were too vaguely defined. There were also concerns about the inadequacy of 'check and balance' mechanisms in the Bills to ensure that the exercise of the new powers in a particular case was reasonable, proportionate and respectful of human rights. In justifying the laws, the government assured the community that the new measures would be applied carefully and no further than necessary. Assurances of this kind never satisfy everyone, least of all those who already distrust the system. The very groups who need assurance do not see it in the letter of the laws. Moreover, even with goodwill it is common experience that

111 Kofi Annan, United Nations Secretary General, Address to the closing plenary of the International Summit on Democracy, Terrorism and Security, Madrid, Spain (10 March 2005). Press Release, UN Doc SG/SM/9757



law enforcement agencies make mistakes. The wrong people are sometimes identified or false evidence is unwittingly relied on.

Mechanisms to test the propriety of executive action are a necessary safeguard of human rights. While debate during the parliamentary process and open discussion in the media led to many modifications of the proposed Bills, the potential for unjustified infringement of human rights remains under the laws in their final form.

The classification of terrorism, terrorist entities and organizations

New terrorism offences were introduced in 2002 and are found in the Commonwealth Criminal Code Act. These offences criminalise a wide range of conduct; many offences falling short of the actual commission of a terrorist act, for example possessing things connected with a terrorist act, or making documents likely to facilitate terrorist acts. The definition of a terrorist act also introduced the concept of motivation - the act must be done with the intention of advancing a political, religious or ideological cause. Proof of motivation, not just intention to commit the act, is not a usual requirement in the criminal law and poses novel issues of proof.

Many of the new offences derive from “associating” in various ways with an entity that is “proscribed” as a “terrorist organization.” The notion of “associating” is a very vague one. The power to “proscribe” an entity is vested in the Attorney General, who must be satisfied on reasonable grounds that the organization is engaged in activities that foster the doing of a terrorist act, or “advocates the doing of a terrorist act.” The word “advocates” is defined in vague terms which have the potential to catch entirely innocent activity.¹¹² The law fails to provide a mechanism for reviewing the Attorney General’s decision. Even where a person is charged with an association offence there is no way of challenging the Attorney General’s decision that the organization should be proscribed.

Investigative and intelligence gathering powers

The Australian Security Intelligence Organization Legislation Amendment (Terrorism) Act 2003 gave broad ranging powers to Australia’s security organizations, including the power to obtain questioning warrants and detention warrants for the purpose of obtaining information about the planning or commission of a terrorist offence.

The Bill originally proposed allowed adults, even children above the age of 10, to be detained, strip-searched and held incommunicado for rolling two-day periods, which could be extended indefinitely. The proposed Bill denied a detained person the opportunity to inform family members or even a lawyer of their detention. The Bill provided for people to be held, not on the grounds that they were suspected of being engaged in terrorism, but because they may “substantially assist in the collection of intelligence that is important in relation to a terrorist offence.”

This legislation was the subject of three separate debates in Parliament, and extensive review by a select committee of Parliament. There was protest through the media by many persons concerned with human rights and civil liberties who argued that the proposals were out of

¹¹² The definition includes an organisation that “directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment...that the person might suffer) to engage in a terrorist act”: *Commonwealth Criminal Code* s 102.1(1A)



proportion with the risks they were intended to redress, and were a gross over-reaction.

In the result, the Bill was substantially amended before it was ultimately passed and many safeguards were introduced. In its final form, warrants require the prior consent of both the Attorney General and an “issuing authority,” usually a retired Federal Court judge. They must be satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorist offence. Under a detention warrant a person can be detained for up to seven days with only limited access to other people. A change to the original Bill now permits contact with a lawyer, but subject to visual monitoring. All questionings take place before a former judge who has close control over the treatment of the subject to ensure that the person is treated fairly and with humanity. No person under 16 can be the subject of a warrant.

Powers of detention and control

New powers were enacted under the *Counter-terrorism Act (No.2)* 2005, including the power to issue control orders and preventative detention orders. This Act was hurried through Parliament following the London bombings in July 2005.

Control orders impose a variety of prohibitions and restrictions on the subject. They may prohibit or restrict a person from being at a specific area or place, leaving Australia, communicating or associating with specified individuals, or accessing or using certain forms of technology or communication; or require them to wear a tracking device, report to a specified person, or remain at specified premises at particular times. A control order requires the approval of a court which must be satisfied, on the balance of probabilities, that the order would substantially assist in preventing a terrorist act or that the subject of the order has provided training to or received training from a proscribed terrorist organization.

Preventative detention orders allow a person to be detained to prevent an imminent terrorist attack or to preserve evidence about a recent terrorist attack. A senior member of the Federal Police may issue an initial order, which would keep a person in custody for a period of 24 hours. Following that, an issuing authority¹¹³ may continue the order for up to an additional 24 hours. Under complementary State legislation a person may then be held for up to an additional 12 days - in total, up to 14 days.¹¹⁴

The original Bill envisaged that orders of either kind would be made *ex parte*, and that the subject would not be provided with reasons why the orders were made or given access to the evidence relied on. The Bill provided no realistic mechanism to challenge an order. Again, after public debate in Parliament and the media, the Bill was modified to include mechanisms to gain access to evidence and reasons why the orders were made (except for any parts of the evidence which the Attorney-General certifies as security sensitive). However, the available processes cannot be accessed quickly, and full review of the merits is at best difficult. Significantly, at no point in the processes is an issuing or reviewing authority required to consider whether the

113 Who must be a judge, federal magistrate, ex-judge who served in a superior court for 5 years, or the President or Deputy President of the Administrative Appeals Tribunal: *Commonwealth Criminal Code* s105.2

114 See for example, *Terrorism (Police Powers) Act 2002* (NSW) s 26K



conditions of an order are the least restrictive necessary.

Conclusions from the Australian experience

The Australian experience shows, I think, that there is no need for governments to fear public debate about proposed new laws. Public discussion about the counter-terrorism Bills identified many latent problems and also identified solutions that have substantially addressed many of the human rights issues without rendering the new measures any less effective in giving protection.

The Australian Human Rights and Equal Opportunity Commission (HREOC) has had a significant presence in the public discussion about the human rights implications of Australia's counter-terrorism laws. Through its submissions to the Australian Government and Federal Parliament, HREOC has developed the following key principles of a "human rights approach" to counter-terrorism measures.

1. Do not violate non-derogate human rights

The 1st principle is that governments must not violate non-derogate human rights. International law, for example article 4 of the ICCPR, identifies some rights - the right to life, the right to be free from torture or cruel, inhuman and degrading treatment, freedom of thought, and protection against retrospective criminal charges - which cannot be derogated from in any circumstances. Legislation which violates these non-derogate rights, such as shoot to kill powers, or laws which enable confessions obtained by torture or cruel, inhuman or degrading treatment to be admitted into evidence, should not even be proposed.

States must remember that the prohibition of racial discrimination is a pre-emptory and non-derogate norm of international law - particularly in light of national and international reports warning of increasing racism and intolerance against Arab and Muslim communities.¹¹⁵

States should also recognise that while the right to a fair trial is not listed as a non-derogate right in article 4(2) of the ICCPR,¹¹⁶ the United Nations Human Rights Committee has stated that the fundamental requirements of fair trial must not be abrogated in any circumstances.¹¹⁷ The importance of the right to a fair trial in the context of counter-terrorism proceedings was reinforced in *Hamdan v Rumsfeld* where the United States Supreme Court held that right of an accused to "be present for his trial and privy to the evidence against him, absent disruptive conduct or consent" is "indisputably part of customary international law."¹¹⁸

2. Derogate rights should only be limited in accordance with human rights law

The 2nd principle is that derogate rights should only be limited in accordance with human rights law.

Article 4 of the ICCPR sets out the human rights - including the right to liberty and the right to freedom of association - that may be justifiably infringed by States "in times of public emergency which threatens the life of the nation," subject to following the notification procedure

¹¹⁵ Office of the United Nations High Commissioner for Human Rights, *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while countering terrorism*, at [8]

¹¹⁶ Pursuant to article 4(2), the non-derogable articles of the ICCPR are 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18.

¹¹⁷ United Nations Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, at [16].

¹¹⁸ *Hamdan v Rumsfeld*, 126 S.Ct 2749 (2006)



specified in article 4(3).¹¹⁹

The United Nations Human Rights Committee has recognised that terrorism may, under very specific conditions, create a state of emergency, and in 2004, the United Kingdom's House of Lords also accepted that the threat of terrorism may constitute a "public emergency."¹²⁰

There are other rights in the ICCPR that contain within them their own limitations permitting derogation,¹²¹ when that limitation is for a legitimate and defined purpose. However, the restrictions must not usurp the rules. They must meet principle of "proportionality."

3. Ensure that persons who are subject to counter-terrorism laws can challenge the validity of decisions that impact on their rights

The 3rd principle is to ensure that persons who are subject to counter-terrorism laws can challenge the validity of decisions which impact on their rights.

Counter-terrorism laws in Australia have led to an expansion of executive power to make decisions that may infringe human rights. Judicial review, to check if the decision has been made legally, and independent merits review, to check if the decision was made on the correct facts, are therefore both essential. It would also be preferable if the authorisation for the exercise of counter-terrorism powers be approved in advance by a judicial officer, unless the urgency of the situation dictates to the contrary. Without these mechanisms there are no safeguards to protect individuals from the injustice that would result from the abuse, misuse, or erroneous application of the powers.

When an individual's rights are violated as a result of the misuse or abuse of counter-terrorism powers, the individual should have access to an effective remedy which may, depending on the damage suffered, include compensation. This approach is consistent with article 2(3) of the ICCPR which provides that a person has a right to an effective remedy if his or her human rights are violated.

4. Respect the role of an independent judiciary

The 4th principle is to respect the role of an independent judiciary in overseeing the application of counter-terrorism laws.

While this principle may seem straightforward, some counter-terrorism laws unduly fetter the discretion of judges to protect the features of a fair trial, including the right of a defendant to know exactly the case against him or her. This is a trend which can subtly undermine the proper functions of an independent judiciary.

This problem is illustrated in Australia by the *National Security Information (Criminal and Civil Proceedings) Act* 2004. Under this Act the Court has the power to decide whether or not to withhold information from the defendant on national security grounds. Although the

119 In order for States to derogate from their obligations under article 4 of the ICCPR in times of public emergency, art 4(1) provides that; the public emergency must threaten the life of the nation; the public emergency must be publicly proclaimed; the measures must be strictly required by the exigencies of the situation; the measures cannot be inconsistent with other requirements of international law; and the measures must not involve discrimination solely on the grounds of race, sex, colour, language, religion or social origin.

120 *A (FC) and others (FC) v Secretary of State for the Home Department* [2004] UKHL 56

121 For example, articles 19, 21 and 22 of the ICCPR



court is required to consider whether the order would have “a substantial adverse effect” on the defendant’s right to a fair hearing, the Court must give the greatest weight to the certificate from the Attorney-General which seeks to prevent the disclosure of the information from prejudicing national security.

The United Nations High Commissioner for Human Rights has observed that an important way of preserving the right to a fair trial is to retain “effective judicial control over qualifications by the executive branch that certain information may not be disclosed in order to protect national interests.”¹²² While possible prejudice to national security ought to be given great weight, courts should retain a flexible discretion to consider the circumstances of each particular case.

5. Establish regular, independent review of counter-terrorism laws

The 5th principle is to establish regular, independent review of the operation of counter-terrorism laws.

Often counter-terrorism legislation is rushed through the Parliament as a response to a recent terrorist event without adequate consultation or chance for informed debate.

Regular, independent review of counter-terrorism legislation is vital for this reason, and because of:

- *the potential of some counter-terrorism laws to disproportionately infringe fundamental rights, such as the right to liberty and the right to a fair trial;

- *the risk that review mechanisms in relation to the exercise of counter-terrorism measures will prove to be inadequate; and

- *the limited ability - particularly in countries, like Australia, which lack a Charter of Rights - for a person to test the laws against established principles of human rights law.

It is important that counter-terrorism reviews consider how the counter-terrorism framework is working as a whole - not just focusing on one particular counter-terrorism legal law. This is because a number of counter-terrorism powers will frequently interact to impact on people’s rights.

Establishing a permanent independent review mechanism is also preferable to ad hoc committees, because it allows for expertise to be developed in a very complex area of law. A permanent independent reviewer should be given powers to gather information from a wide range of sources, including intelligence agencies; and be required to consider the human rights impacts of the laws.

6. Introduce stronger human rights protections

The 6th and overarching principle is that governments should give domestic force to international human rights law by introducing explicit statutory protections for human rights. This can be achieved through a statutory *Charter of Human Rights*, like the *United Human Rights Act* 1998. Such a Charter could give practical effect to the five principles set out above.

A 2006 review of the *Human Rights Act* 1998 (UK) found that it has had a significant, and beneficial, effect on policy formation for three reasons:

¹²² United Nations General Assembly, *Protecting human rights and fundamental freedoms while countering terrorism: Report of the Secretary General*, 24 August 2007, A/62/150, 11.



*formal procedures laid down in the Act for ensuring compatibility with human rights had improved transparency and parliamentary accountability;

*the dialogue between the judiciary and the parliament led to laws and policies which are inconsistent with human rights being changed; and

*public authorities were more likely to behave in conformity with human rights.¹²³

Under a statutory *Charter of Human Rights* Parliament can no longer overlook the human rights impact of new laws and policies. This is because under a *Charter of Rights*:

*the Minister must present a statement of human rights compatibility to Parliament on the introduction of a Bill;

*a parliamentary scrutiny committee must independently assess the compatibility of the bill with human rights; and

*perhaps most importantly, Parliament must publicly explain its actions in the event that it decides to enact or maintain legislation that is inconsistent with human rights principles.

Making human rights an integral part of the law and policymaking process helps create the framework for a “human rights approach” to counter-terrorism laws.

But to be serious about providing legal checks against the temptation for executive overreach, a Charter of Human Rights needs to give Courts the power to assess the lawfulness of the exercise of counter-terrorism powers against human rights standards. It is important to recognise that this is a judicial, not a political function. As the Lord Chancellor of the United Kingdom, Lord Falconer, observed in 2006:

Courts are not conducting the fight against terrorism. Nor are they deciding the measures to be used. The level of threat, and the extent to which exceptional measures are required, are for the executive, or the legislature. The questions the courts in the UK ask are: first, do these measures infringe any individual’s fundamental human rights; second if they do, is there a justification for the infringement; and third, is the infringement the minimum necessary to protect our democracy?¹²⁴

Giving the courts the power to ask these questions, by adopting a Charter of Human Rights, will ensure the human rights compatibility of counter-terrorism measures.

Conclusion

Strong counter-terrorism measures are necessary to prevent the gross violations of human rights that acts of terrorism inflict. However, laws that undermine rights and freedoms foster dissent and provide ammunition for the terrorist cause. Strict adherence to basic human rights standards is not, therefore, a matter of principle, but a crucial strategy for governments in the fight against terrorism.

A human rights approach to counter-terrorism laws provides a conceptual framework which is normatively based on international human rights standards and which is practically directed to

¹²³ United Kingdom Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006), at [4]. The Review also concluded that decisions of the courts under the Act had not negatively impacted on the government’s ability to achieve its objectives in relation to crime, terrorism or immigration.

¹²⁴ RT Hon Lord Falconer of Thoroton, Lord Chancellor and Secretary of State for Constitutional Affairs, *The role of judges in a modern democracy*, Magna Carta Lecture, Sydney, (13 September 2006)



promoting and protecting human rights for all. Such an approach can be used by lawmakers to achieve national security without disproportionately limiting the very rights and liberties that are fundamental for maintaining the rule of law, and ultimately, security.

(The author is President of Australian Human Rights and Equal Opportunity Commission.)

NATIONAL EMERGENCY AND HUMAN RIGHTS PROTECTION

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1. Outline

In order to cope with various crises, more than 80 countries in the world have declared emergency state since 1985. So to speak, “emergency states are a significant topic in the modern democratic constitutional politics, and a paramount emergency measure that each country adopted to deal with emergent or dangerous situation in the late half of the 20th century.”¹²⁵ But on the other hand, the implementation of emergency states in many countries have constituted serious threats over human rights, and have thus lead to some universal concerns in the international society. So, how to guarantee human rights all the better in a state of emergency has become an urgent issue to solve.

2. Emergency under international laws of human rights

Traditionally, the dangerous factors involved in emergencies are the matters that institute long-termed frequent threatens against countries, society and individuals. In the first place are the factors that endanger the existences of states themselves, that is, wars and domestic turmoil.¹²⁶ The defense against and responses to these two types of dangerous factors have existed from the very emergence of the emergency system until today, and they are an institutional manifestation of self-preservation of all any countries and governments.

The Human Rights Committee (HRC) under the *International Covenant on Civil and Political Rights* does not provide a uniform definition as for whatever constitutes a state of emergency, but meanwhile, HRC thinks that obviously not all calamities or ferments that threaten the security of a nation can constitute a state of emergency in the sense of the 4th article in the Covenant.¹²⁷ In addition, HRC has offered a list of cases that obviously can be viewed as emergency states: international or domestic armed turmoil, natural calamities, massive events

¹²⁵ Xu Gao and Mo Jihong, *Legal Systems for a State of Emergency State Foreign Countries*, Law Press, 1994, p. 768

¹²⁶ Yu An, *The Modernization of National Emergency System*, Law, 2004 (2).

¹²⁷ General Comment 5(13), UN Doc. A/36/40, 110, adopted in July 1981.



such as rebellions or industrial accidents, and so forth. But HRC does not refer to wars in its list because in a state of war, the derogation of human rights has to be considered together with the minimum standard of international humanitarian laws.

As for the present, of course, the dangerous factors threatening a nation have gone far beyond traditional wars and domestic turmoil. Due to the rapid globalization of modern society and economies and the development of sciences and technology, the security of nations has come under the threats of some new dangerous factors, whose fundamental characteristics are internationality, diversity and instability. Take economic conditions for an example. Ordinary economic fluctuations do not enable a state to declare emergency or adopt corresponding measures to derogate human rights, but if the economic instability worsens to a very serious extent and thus threatens the security of a nation, this nation is also entitled to declare emergency. In this aspect there have been corresponding state practices. One example is Ecuador in 2001, which declared a national emergency because of extremely unstable economic conditions and at the same time adopted a series of measures to overcome the negative influences of economic crises, some of which involved the derogation of human rights.¹²⁸

Therefore, a critical factor to determine whether some emergency has occurred is whether it has threatened the life of a nation. According to the relevant provision in the 4th article in the *International Covenant on Civil and Political Rights*, a nation can be declared in an emergency state only when there is some direct real threat whose influence involves the whole nation and leaves the subsistence of the organizational life of the society in an unstable state, and when the threat cannot effectively be avoided through common restrictions on rights.¹²⁹ As for how to confirm whether a kind of threat has threatened the life of a nation, The European Court of Human Rights thinks that in a democratic country the state should have the margin of appreciation for its own. A similar view is also held by the UNHRC.

There is no clear definition as with the types of threats against the security of a nation. The threats can involve citizens, territory and sovereignty, or the national institutions. In terms of ranges, such threats have to be those that overwhelm the whole nation, but some factors confined in a certain range might also endanger the security of the whole nation. For examples, Sudan declared an emergency state in 2001 just because the instability in a few areas had seriously threatened the security of the country, and Peru did so in 2002 because the unstable factors in its Arequipa Province had threatened its national security.¹³⁰ So in a summary, the most significant element to determine and confirm an emergency state is the grave consequences that a variety of threats might cause to the security of a nation, instead of its types or geographical ranges.

3. Derogation and protection of human rights in emergencies

After the state of emergency is put in practice in a country, the exercise of state power and the protection of human rights in the country will certainly defer much from those in a

¹²⁸ UN Doc. A/56/40, Vol. I, p. 33.

¹²⁹ *Textbook on International Human Rights Law*, Vol. 1, p. 616, compiled by Compiling Team of International Human Rights Law, China University of Political Science and Law Press, 2002.

¹³⁰ UN Doc. A/57/40, Vol. I, p. 32, 35.



normal state. First, from the perspective of domestic laws in a country, a state's rights have to be exercised strictly in compliance with constitution, laws and other regulations if in a normal state, but when in emergencies, the maintenance of the life of a nation come to be the paramount value for the society, so some fundamental rights that people enjoy in accordance with a constitution might be derogated to a certain extent. From the point of international laws, when in emergencies, a state can legitimately confine human rights and fundamental freedom to a certain degree. For example, in light of the relevant provision in the 4th article in the *International Covenant on Civil and Political Rights*, when some social emergency threatens the life of a nation and has been declared after confirmation, a member country of the Covenant can adopt measures to derogate its due obligations that it should have undertaken under the Covenant.¹³¹ In other words, "A government can declare a state of emergency in its country, and when the situation does requires, undertake some measures deviating from the international laws or temporarily put aside some provisions about human rights."¹³² But apparently, the abuses of such rights of decreases will do harms to the protection of human rights. Therefore, the abuses of decrease measures have to be prevented.

Firstly, in accordance with the provisions of the international human rights law, a state has to observe some certain conditions and derogates when it declares emergencies and derogate human rights. Usually it is thought that such decreases have to be strictly confined within the range that the emergencies have required, that is, it has to meet the requirement of equilibration; secondly, such decreases cannot conflict with other obligations under international laws; and lastly, such decrease measures shall not show any discrimination that is purely concerned with race, colors, genders, languages, religious faiths or social births.¹³³

Secondly, the fulfillment of a state of emergency will badly influence the status of human rights in a country, correspondingly, the clause concerning emergencies in the international conventions provide the practice of a state of emergency has to be exceptional and temporary. For example, the first item of the 27th article in *The American Convention on Human Rights* clearly stipulates that decrease measures have to be strictly confined within the period when emergent events are happening. *The International Covenant on Civil and Political Rights* and the *European Convention on Human Rights* simply stipulate that decrease measures should meet the strict requirements to cope with emergent situation. The fact that these two covenants do not mention the issues of periods does not mean they allow their member countries to continue their emergency states after the emergency states end. In fact, all the international human rights institutions think that the emergencies provided in the human rights conventions are temporary in nature. In its general comments, UNHRC thinks that the measures adopted under the 4th article of the *International Covenant on Civil and Political Rights* are just exceptional and temporary, and

131 The other international covenants that contain derogation clauses are the *European Convention on Human Rights* (Article 15), the *European Social Charter* (Article 30) and the *American Convention on Human Rights* (Article 27).

132 Guo Chunming and Guo Xingzhi, *Comparative Research of Human Rights Protection in a State of Emergency, Research of Comparative Law*, 2004 (2).

133 These three conditions are stipulated in the Article 4.1 of the *International Covenant on Civil and Political Rights*.



merely exist when the life of a nation is threatened.¹³⁴ In other words, such exercise of emergency state and decrease of human rights have to be temporary, and the decrease of human rights has to be ceased as long as the threats against the security of the nation do not exist.¹³⁵

Thirdly, relevant international conventions on human rights have clearly stipulated the human rights that should not be decreased. According to Article 4.2 in the *International Covenant on Civil and Political Rights*, the rights that shall not be derogated include the rights to life, to not being subjected to torture, to not being enslaved, to not being imprisoned due to default, to a legally prescribed punishment for specified crime, to legal personality, to the freedom of thought, conscience and religious choices, and so on. Likewise, the Article 15.2 in the *European Convention on Human Rights* and the 4th article in the No. 7 Protocol have also forbidden any decreased rights to life, to not being tortured, to not being enslaved, to legally prescribed punishment for specified crime, to no Double Jeopardy or punishment, and so forth. Article 27.2 in *The American Convention on Human Rights* stipulates more rights that shall not be decreased, including the right of legal personality, the right of life, the right of enjoying humanitarian treatment, the right of not being enslaved, the right of not being derogated by retroactive laws, the freedom of conscience and religious choices, the right of family, the right of names, the right of children, the right of nationality, and the right of involvement into government.

In 1976, a subcommittee of the International Law Association was specialized in research of how to cope with the maintenance of relationships between national survival and citizen rights protection in an emergency state. After 6 years research, this subcommittee drafted out the International Law Association's Paris Minimum Standards of Human's Right Norms in a State of Emergency. After two-year research and amendment by the Human Rights Executive Council of the International Association, the Association passed and promulgated this document in 1984. The International Law Association's Paris Minimum Standards of Human's Right Norms in a State of Emergency has set down for nations the basic conditions to enter a state of emergency and exercise the right of emergency, the fundamental principles to follow, and a variety of supervising measures, in hoping to prevent governments from abusing emergency powers and guarantee citizen rights to the minimum extent.¹³⁶ In other words, human rights can be derogated in a state of emergency, but some most fundamental human rights, such as the right of life, shall not be derogated.

Fourthly, the Article 4 in the *International Covenant on Civil and Political Rights* stipulates that a member country of the covenant has to report to UNHRC if it wants to exercise emergency.

Therefore, a state has to be controlled and supervised as it adopts emergency unusual measures in an emergency situation in case it abuse emergencies status.

4. The supervision over and human rights protection in an emergency situation

To declare an emergency is one of the paramount emergency measures for nations to cope with urgent critical situation, and it is a redeployment of a state's power and citizen rights in a

¹³⁴ Guo Chunming and Guo Xingzhi, *Comparative Research of Human Rights Protection in a State of Emergency, Research of Comparative Law*, 2004 (2).

¹³⁵ Ibid.

¹³⁶ Xu Gao and Mo Jihong, *Legal Systems for a State of Emergency in Foreign Countries*, Law Press, 1994, p. 92.



special condition, a significant topic for modern democratic constitutional politics. In face of these gusty, widespread and serious issues of national security, the essence of a nation's declaration of emergency is, in the situation that the normal order of a society is threatened, to integrate the strengths of the whole society for the solution of problems, to safeguard the overall interests of the nation and society, and to restore the rights and freedom that a citizen enjoys in a normal situation. It is an emergency power for a state to cope with emergency security status. The supervision over an emergency status is essential to monitor the emergency power of a state.

Usually, the supervision over emergency power can be classified as legislative supervision and juridical supervision. Legislative supervision is designed to, through the legislative activities of a state, specifically stipulate the contents and the conditions, ranges and procedures for the exercising of a state's right to emergency, so that a state's right to emergency can be brought onto the orbit of governance by law. The legislation to improve emergency status comes to the most significant measure to guarantee human rights. Thus, through their constitutions and laws, all states in the world have systematically stipulated the contents of legal system for emergency so as to derogate the activities of administrative institutions. Judging from the overall structure of the legal systems for emergency situations of all countries in the world, all the systems have been designed around the principle of administrative governance of law, and their pivotal intention is to enable governments exercise their right to emergency management in light of the provision of constitutions and laws, and to the maximum avoid unnecessary harms and damages that the exercise of emergency right might bring to citizen rights and constitutional orders.

Overall, the legislation in the world mainly involves the following systems:

The first is the system of emergency right. The system of emergency right is the kernel of emergency situation. In a modern society ruled by law, it is depending on the emergency right endowed by the constitution and laws that a government is engaged in emergency management. So to speak, an emergency right is the very point the legitimacy of a government's engagement in emergency management lies in.

The second is the system of confirmation of emergency status. The confirmation of emergency situation is a precondition for an emergency status. Without confirmation of emergency status through legal procedures, a government cannot exercise the emergency power endowed by constitution and laws at will, or otherwise it will violate the fundamental principle of administrative governance of law. Therefore, all the states in the world have stipulated detailed confirmation system for emergency status in their constitutions and laws.

The third is the minimum human rights standards in emergency status. When a government is engaged in emergency management, the exercise of emergency power will easily derogate citizen rights; so, to prevent governments from abusing emergency power, the constitutions and laws in many countries stipulate that even if during a period of emergency status, some citizen rights shall not be derogated because of the adoption of emergency measures, let alone being deprived. The minimum human rights standards during the period of emergency status are established to supervise the legitimacy of a government's exercise of emergency management power.



The fourth is the system of right to resistance. The system of right to resistance originates from the derogation of a government's abuses of its power. Such derogate is carried out through rights instead of any constitution or laws. In other words, when a government breaks the provisions in a constitution and laws in exercising emergency powers and no constitutional or legal measures can effectively correct or control the government's illegal exercise of emergency power, citizens can exercise their right to resistance against the government's exercise of emergency power, taking it as a guarantee for the legitimacy of emergency status.¹³⁷

More often than not, juridical supervision plays a role of hindsight supervisor, which is determined by the passiveness of juridical power. The decision for emergency status is highly political but not actionable; after the decision for emergency status, however, the emergency measures adopted by the state are totally legal activities and are actionable, and the counterparts can seek for juridical remedies. As Schmidt pointed out, such measures (emergency measures) can be tried by a judge only if they are obviously an abuse of power and go completely against its ought-be purpose. In other words, only when such measures are not for salvaging the nation from a crisis, can a judge exercise his or her power to deny the constitutionality of such measures.¹³⁸ The Civil Contingencies Bill in Britain clearly stipulates procedures and measures to examine the regulation concerning emergency status, paying sufficient attention to the terms of emergency status; at the same time, it has provided some remedy measures for legislative work when congresses are adjourned or are postponed. In Russia, the supervision over the right of emergency in The Emergency Measures Act is mainly a legislative institution's supervision over the fulfillment process of emergency state. As the 4th article of this law stipulates, after the declaration of emergency status, the president of Russian Federal shall report this situation to the Federal Council of the Federal Assembly of Russia and national Duma in no time, meanwhile, the order to implement emergency status should immediately be delivered to the Federal Council of the Federal Assembly of Russia for approval. At the same time, to ensure legislative institutions to function normally during the period of emergency status, the 9th article of this law provides that when emergency status is carried out all over the whole territory of Russia Federal, the Federal Council of the Federal Assembly of Russia and national Duma continue to work during the entire emergency status period.¹³⁹

5. Summary

To sum up, in an emergency status, a state can undertake necessary measures to restore the normal order of the nation by derogating human rights. But the derogation of human rights in the emergency status is not exercised at will, let alone randomly, it has to meet pertinent provisions in the international human rights laws. In case the state randomly violates human rights through the abuses of emergency status, national emergency status and related measures have to be regulated

137 Mo Jihong, *Improve Legislation for Emergencies and Guarantee Citizens' Constitutional and Legal Rights*, available at http://www.legalinfo.gov.cn/moj/zgsfzz/2004-07/23/content_119555.htm.

138 Quoted from Liu Haibo, *Political Science and Constitutional Polity, Constitutionalism and Modern States*, SDX Joint Publishing Company, 2003, p. 128.

139 Gu Linsheng and Liu Jingkun, *Legislative Experiences of Emergencies in Foreign Countries*, Law, 2004 (8).



and supervised, and to establish a sound legal system for emergency status becomes vital to the human rights protection in a state of emergency.

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MAINTAIN SOCIAL STABILITY AND PROTECT HUMAN RIGHTS ACCORDING TO LAW - IN COMMEMORATION OF THE 60TH ANNIVERSARY OF UNIVERSAL DECLARATION OF HUMAN RIGHTS

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This year marks the 60th anniversary of the issuing of the *Universal Declaration of Human Rights*. *Universal Declaration of Human Rights* is the first comprehensive document on human rights in modern international community, and has been of vital importance in directing the course of the history of the world's development of human rights. The purposes, principles, and essential spirit of *Universal Declaration of Human Rights*, as well as a detailed list of the main contents of specific human rights contained, still have a vital significance in guiding the development of theory and practice on both international and national human rights.

The current international situation is generally stable, and the cause of human rights is developing prosperously. However, the world is not at peace, with all the situations as disputes over race, nationality, religion, and territory being in an endless stream, the shadow of terrorism loitering around, the ecological environment deteriorating continuously, millions of people living in poverty brink of starvation. The cause of human rights is still facing many complicated contradictions and problems. Therefore, the vital tasks before us are, in view of China's specific national conditions, how to learn from international experience fully, how to maintain a harmonious and stable social environment, and how to value and protect human rights fully.

I. Maintain social stability and protect human rights in accordance with law is the choice made on the basis of history and reality

China is a unified multinational country with a five-thousand-year history and civilization, and has created a brilliant and splendid Chinese culture. However, she had ever had lots of hardships in history, and in modern times the country suffered long-time invasion by foreign powers and fighting among warlords, which drove the people to dire poverty. The people suffered untold misery and hardships, and social progress and development paid a heavy price. Led by the Communist Party of China the Chinese people overthrew the Three Big Mountains, the state



and the state power were established respectively in the form of people's democratic dictatorship and the national People's Congress, and ultimately the current unified multinational country was founded. Over the past 30 years of reform and opening up to the outside world, China's economy and comprehensive national strength have been greatly enhanced, and China's international status and international influence have seen a rapid increase. People's livelihood has achieved two historic leap-forwards, namely the leap-forward from poverty to being well fed and clad, and then to being comfortably well-off. The development of the residents' initiative and natural abilities and happiness index are constantly growing upward. These tremendous achievements show that the leadership of the Communist Party of China and the People's Congress system, and the system of CPC-led multi-party cooperation and political consultation and the regional ethnic system, as well as the autonomy system of the masses at the grassroots, are the ones best suited to China's national conditions, and have the greatest capacity to provide a harmonious and stable social environment and to ensure the improvement of people's living standards and the development of the cause of human rights protection.

Maintaining social stability has a more important significance in China today. The overall social and political situation in China is stable, and the cause of human rights is progressing forward on its track of sound development. However, as China is now in a critical stage of reform and development, with complicated contradictions and disputes existing together, the task of maintaining stability is tough and arduous. The first is that, the strategic scheme to westernize and divide our country adopted by international hostile forces has not changed. These international hostile forces, under the pretext of religion, nationality, human rights, trade and other issues, are constantly launching offensives against China's ideology and economy to defame China's international image. The tremendous achievements of the economic and social development in recent years in China have revealed the powerful charisma of the developing mode of China's socialism with Chinese characteristics, and of the political party system, as well as of the organization form of the state power, which has aroused more panics from international hostile forces. The second is that, various anti-Chinese forces are, wallowing in the mire together, ready to make troubles. They, taking advantage of Beijing Olympics to be held in 2008 in China, are waiting for an opportunity to create troubles so as to do damage to China. The "Riots on 14th of March" happened in Lhasa is the latest disruptive activities meticulously and secretly organized and planned behind the scenes by the Dalai clique. The hidden religious extremist forces, ethnic separatist forces and violent terrorist forces in Xinjiang (Uygur Autonomous Region) have been frequently creating troubles for a period of time. The third is that, the mass incidents triggered by people's internal contradictions have not been fundamentally contained. Some incidents involved many participants, which have done greater harm to the orders of society and economy and the security of citizens' lives and property. The fourth is that, the issues of people's letters and visits corresponding to lawsuits and laws are still sharp and outstanding. According to the incomplete information, of all letters and visits from people, those relating to issues of laws and lawsuits account for nearly more than half. Some are vexatious visitors, some are old visitors whose problems have not been resolved chronically, and some visiting people's actions are too drastic.



Those people who are appealing for help are on the rush all day long, which has not only wasted their own energy and money, but also has a pernicious influence on the Party's ruling image and the development of the legal system. The fifth is that, in some areas, the social security situations still need to be improved with great effort. Some serious crimes still occur from time to time, and the dark and evil forces are insufferably arrogant, against which the public still have grievances. History and reality tell us that maintaining stability is an important condition for solving all kinds of complicated domestic contradictions and safeguarding national security, and is the basic premise for the protection and realization of human rights. Fully valuing and protecting human rights can effectively mobilize the initiative and creativity of each and every force, maximize the harmony factors, and minimize disharmony factors, which will in turn promote social harmony and stability. Comrade Deng Xiaoping had repeatedly stressed that stability overrides everything. Without a stable social environment, nothing can be accomplished. Comrade Hu Jintao referred the work of safeguarding stability to the position that tops the overall work of the whole party, demanding all Party members to "Promote reform and development in the stability of society and politics and maintain social stability and the nation's long-term stability in the development and reform." In his report at the 17th Party Congress, Comrade Hu Jintao made a further statement: "Social stability is the common aspiration of the masses, and is an important prerequisite for reform and development." We believe that, the problems of current conflicts we are facing must be given greater attention, and we should uphold a dialectical perspective and take effective measures to promote the development of science, ensure social harmony and stability, and ensure continuous development of the cause of human rights.

II. Bring into full play the judicial functions, maintain social stability and protect human rights according to law

People's Court, as a judicial organ of the State, plays a unique role irreplaceable by other departments in maintaining social stability and protecting human rights in accordance with the law.

(I) Punishing criminals according to law so as to safeguard national security and social stability and protect the collective human rights of all members of society is the basic function and basic duty of the trials of people's courts. In criminal trials, people's courts maintain a strict standard to the related facts of the cases, evidence, procedures and applicable laws, so as to ensure that facts of the cases are clear, evidence is ample, convictions are accurate, punishments are appropriate, and the trial procedures are legitimate. During the five years since 2003, the Supreme People's Court has heard 4,802 criminal cases, and given supervision and instructions to local people's courts at different levels in rendering decisions of 3.385 million criminal cases of first instance, which is 19.61% higher than the previous five years. Among the criminals, those who have been sentenced to imprisonment for more than five years, or life imprisonment, or the death penalty, are 760 thousand, which accounts for 18.18% of the total number of sentenced criminals.

The local people's courts at different levels, adhering to the implementation of the policy of punishing severely serious criminals in accordance with the law, focus on conducting the trials of those crimes which have endangered national security, public security and the safety of people's life and property, so as to improve the national security situation continuously. Over the past five years,



1.2 million criminal cases, including bombings, murders, kidnappings, and robberies, have been concluded, which is comparatively 10.09% higher than the corresponding period in the past years.

In criminal trials, the local people's courts at all levels strictly enforce the criminal policy of combining severity and leniency, so as to achieve the result of "being lenient or being severe when it ought to be, combining severity and leniency, and punishing criminals properly." Those criminals whose crimes are with the circumstances that will seriously endanger the society and deserve more severe punishment should be punished resolutely according to law. Those whose crimes are with the circumstances of statutory mitigation that can be given milder punishment should be leniently dealt with according to law. Those whose crimes are with the circumstances that are within the discretion of treating with leniency should be treated leniently according to law, so as to decrease social confrontations to a bare minimum.

In the course of the trial, the people's courts actively respect and ensure the realization of defendants' rights to self-defense and the right to briefing others as defenders. At the same time, the courts, for the qualified defendants, positively designate the lawyers who have taken the commitments of Legal Aid to provide legal advocacy services. During the five years since 2003, the people's courts at all levels have designated defenders for a total of 320 thousand qualified defendants, which is 2.3-fold increase compared to the corresponding period of the previous years.

In criminal trials, the people's courts at all levels strictly abide by the principle of judging by evidence, which not only ensures that the facts of the crimes are identified accurately so as to punish crimes according to the law, but also ensures that no innocent is treated unjustly so as to avoid trumped-up cases. Over the past five years, the people's courts at all levels, in accordance with the law, have declared a total of 14 thousand criminal defendants acquitted to ensure that no innocent is held for criminal responsibility.

(II) Protect the civil rights of natural persons, legal persons and other organizations equally in accordance with the law, intensify mediation, resolve internal contradictions among the people and promote social harmony and stability. Civil cases rest in the people's internal contradictions. However, if handled improperly, they will intensify the contradictions, causing criminal cases, which will possibly cause more dangers to social security and stability. In this respect the people's courts adhere to the principle of mediation in trial to achieve the result of "Mediating if possible, adjudging if proper, and combining the two approaches of mediation and adjudgement to conclude cases." The courts, aiming at putting an end to disputes, take the conciliation proceedings through the entire process of trials to maximize the resolution of social contradictions and disputes, improve the quality of social harmony constantly, and consolidate the foundation of a harmonious society continuously. The rate of mediation and dropping charges in civil cases is 50.74%. During the five years since 2003, the Supreme People's Court has heard 3,196 civil cases and given supervision and instructions to local people's courts at different levels in rendering decisions of 22.145 million civil trials of the first instances, which is 6.25% lower than the previous five years. The Supreme People's Court attaches great importance to the legal hearing of those cases involving the people's livelihood. Within five years it has heard 5.93 million cases regarding marriage, property inheritance and some other domestic problems, which is 12.54% lower



compared to the previous five years; 2.09 million cases regarding personal injury compensation claims, which is 16.76% higher, and 600 thousand cases of labor dissention, which is 30% higher compared to the corresponding period.

(III) Bring the judicial examination system with Chinese characteristics into full play by adopting the judicial work, which not only monitors and supports the executive administration according to the law, but also protects the legitimate rights and interests of citizens, legal persons and other organizations. Over the past five years the Supreme People's Court has heard 1,242 administrative cases, 313 cases regarding state compensation, and also provided supervision and instructions to local people's courts at different levels in rendering decisions of 470 thousand administrative cases of the first instances, which is 1.5% higher compared to the previous years; of 130 thousand cases regarding state compensation, which is 17.31% higher, and the indemnity involved is 180 million yuan, which is 6.26% higher compared to the corresponding period. Through administrative proceedings, the courts have effectively enhanced the trust from litigants and the general public in the people's courts' adjudging and the government and reduced instability elements in the society.

(IV) Strengthen and improve the task of implementation, resolve the problem of "difficulty in implementation" with efforts, so as to achieve the maximum realization of the rights and interests confirmed by the judgments that have entered into force. Over the past five years the Supreme People's Court has coordinated and supervised 1,038 cross-regional civil execution cases and has supervised and guided local people's courts at different levels to intensify the work of coordination and execution, actively promoting the establishment of national implementation linkage mechanism. As a result, the rate of self-fulfillment by litigants has increased by 3.63% compared to the previous five years; the forcible execution cases are 10.8 million, which is 11.91% lower compared to the precious five years; and the target sum of execution is 1.72762 trillion yuan, which sees an increase of 28.19%.

(V) Perfect the mechanism of rehearing and reviewing complaints, strive to resolve the issues of difficult appealing to support the reasonable demands of litigants according to the law. Those who has sufficient reasons for appeal and reviewing and are wrongly judged are to be corrected by taking the procedure of adjudication and supervision in accordance with the law so as to protect the legitimate rights and interests of the litigants timely; for those who have not enough reasons for appeal and reviewing, an answer session after the judgment should be given simultaneously after their request for rehearing is rejected, so as to reduce disputes and appeals to the minimum amount. Over the past five years the Supreme People's Court has examined 9,860 cases of appeals and applications for retrial and provided supervision and instructions for local people's courts at different levels in reviewing 557 thousand complaints, among which 184 thousand cases met the requirements for rehearing and entered into the procedures, accounting for 0.71% of all the cases that came into force.

The people's courts at all levels give more attention to distinguishing legal cases from letter-and-visit petitions and guide people to express petitions in accordance with legal procedures. Over the past five years, the total of letter-and-visit petitions in the courts all over the country was on



a downward trend. Among all the courts, the Supreme People's Court has heard 719 thousand petitions, which was 11.69% higher compared to the corresponding period, while local people's courts at all levels handled 18.76 million petitions, which decreased 55.58% comparing to the corresponding period.

(VI) Promote judicial reform, and ensure the maintenance of social stability and the protection of human rights according to the law

Judicial reform is the motive of pushing forward the work of people's courts, and is an important measure to safeguard judicial justice. In recent years, the Supreme People's Court has, on the basis of China's national conditions, carried out an in-depth implementation of the scientific concept of development, actively and steadily strengthening the judicial reform to ensure due punishment of crime and the protection of human rights in accordance with the law.

According to the strategic decision made by the CPC Central Committee in 2004, the Supreme People's Court has made the full preparations in the fields of ideological concept, legal system, organizational constructions, and material equipment etc. for exerting the approval authority to exercising the death penalty. According to the decision on the amendments to the "Organizational Law of the People's Court" adopted by National People's Congress Standing Committee, the Supreme People's Court was to, from January 1, 2007, exercise the unified approval authority over the cases of death penalty, which has ended the 26-year history of delegating the approval authority to lower levels over some of the death penalty cases, and has widely received favorable reviews from all walks of life. This is the most significant reform on the most severe penalty - death penalty - in our country. It reflects the principle of valuing and protecting human rights, and is a big event with historic significance in the course of construction of China's democracy and legal system. Over the past year, the Supreme People's Court has perfected the procedures of opening a court for second-instance of death penalty cases and approval procedures for the death penalty trials, unified the standards applicable to the death penalty, and reviewed the death penalty cases strictly, carefully and justly in accordance with the law so as to ensure that all defendants are equal before the law, that the death penalty only applies to a very small number of criminals whose crimes are extremely serious, extremely bad in nature, and extremely harmful to society, and so as to ensure that the defendants' right to life according to law be strictly protected, and change the negative factors into positive ones as much as possible to reduce the community opposition and maintain social harmony and stability.

In order to protect the defendants' right to the request for an open trial, the people's courts have constantly increased the quantity of open trials. In March of 1999, the Supreme People's Court issued "Several Provisions on the Strict Implementation of Public Trial System," stipulating that the People's Court must open the trial to the public, except for those involving state secrets, personal privacy and the like that are banned for open trials by law, and meanwhile clarifying the scope of the trials that are not to be open to the public and the regulations on dealing with breaching of the rules governing public trials. In June of 2007, the Supreme People's Court also issued the "Several Views on Strengthening the Work of People's Court for Open Trials" to further promote the reform and perfection of the open trial system, including actively inviting NPC



members over to courts as visitors at trials, establishing the news release system, and making live broadcast of the major typical cases so as to put fully into practice the openness of placing cases on file, court hearing, admissible evidence, facts identification, legal basis, reasons for judgment, court verdicts, the implementation process, and so on and so forth, which has vigorously and effectively promoted judicial justice and protected the defendants' legitimate rights and interests.

The other major work in the judicial reform proceeded by the people's courts is to reinforce the protection of the rights of the victims, especially those whose personal rights have been violated. The crimes that constitute infringements on people's personal rights include homicide, intentionally causing injuries, rapes, robberies and etc. In reality, the defendants who committed such crimes are usually in poor economic conditions and come from less well-off families. After they were convicted and sentenced, the compensation to victims and their families are often difficult to be settled properly, which leads to the situation that some victims and their families have difficulties in life, or are even hard to eke out a living. Considering that, the people's courts, such as those in Shandong, Shenzhen, Zhejiang provinces and so on, have attached greater importance to this sort of work and, through various means of financing, appropriately relieve the victims, especially those from the cases whose criminals are sentenced to death, by giving them a subsidy ranging from twenty thousand to ten thousand yuan for each case to help them out. At present, the Supreme People's Court, in consultation with relevant central departments, is trying to win the state's financial support so as to systematize and standardize this work, thus to protect the legitimate rights and interests of the victims and their families effectively.

As the wheels of history roll forward, the Universal Declaration of Human Rights is shining continuously. In the new historical period, local people's courts at all levels and all judges, facing with the difficult and complex task of preserving stability and the requirements of human rights protection, are making further advances in enhancing their concept of conducting trials according to the law, their awareness of the overall situation, their sense of responsibility and awareness of human rights, and promoting their operational capacity and professional level in conducting trials, so as to make a more positive contribution for promoting social harmony and stability and protecting human rights in accordance with the law.

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CULTURAL DIVERSITY AND HUMAN RIGHTS





PENG-CHUN CHANG: A MAN WHO INTEGRATED THE ORIENTAL CONFUCIAN THOUGHT WITH THE *UNIVERSAL DECLARATION OF HUMAN RIGHTS*

Cui Guoliang and Li Rong
China

I. About Peng-chun Chang

Peng-chun Chang (1892-1957), born in Tianjin, had at least six years of old-style private education and had learned Confucian classical works thoroughly in his heart before he entered a private middle school (the predecessor of Nankai Middle School) in 1904. In 1910, Peng-chun Chang went to the United States to study and was awarded the doctor's degree in 1922, becoming China's first doctorate holder of education. After that, he came back to China and established and participated in establishing two world famous universities: Nankai University¹⁴⁰ and Tsinghua University¹⁴¹.

Influenced by his family, Peng-chun Chang loved dramas very much. While studying in the United States, he also learned western dramas in 1913-1915, starting the mode of Chinese people directly learning the concepts and composing methods of western drama. Meanwhile, he spread Chinese traditional culture to the west. In 1919, he went to the United States again for doctor degree. During the period, he cooperated with U.S. poet and reviewer J.E. Spingarn in translating with the *Shibian* (poet debate) and *Shifa* (poetry) sections and related historical literary quotations of Canglang Poetry Talks, the great work in Chinese history of poem, which were published in *The Dial*¹⁴²; in 1921, he and Hong Shen wrote and directed the drama *Mu Lan* on the basis of Chinese long poem of the sixth century. The drama was so successful when it was put on stage in the Cort Theater in Broadway that the theater was crowded with audiences in every single performance¹⁴³. He introduced Chinese classical poems and its theory to the West.

Peng-chun Chang initiated the introduction of Chinese traditional dramas to the West and

140 Peng-chun Chang: *Proposal of Changing the Special Department of Nankai School into a University* (Tiyi Jiang Nankai Xuexiao Zhuanmenbu Gaiban Daxue), *Selected Works of Zhang Bolin's Education Theory - Appendix 2: Selected Works of Peng-chun Chang's education theory in Nankai* (Zhang Bolin Jiaoyu Lunzhu Xuan - Fulu Er Zhang Pengchun Zai Naikai Qijian Jiaoyu Lunzhu Xuan); Cui Guoliang: *Foreword for Selected Works of Zhang Bolin's Education Theory* (Zhang Bolin Jiaoyu Lunzhu Xuan Qianyan).

141 Peng-chun Chang: *General Program of the Report of Tsinghua Curriculum Commission (I)* (Qinghua Xuexiao Kecheng Weiyuanhui Baogao (yi) Zonggang); *Peng-chun Chang's Theory on Education and Drama Art* (Zhang Pengchun Lun Jiaoyu Yu Xiju Yishu), compiled by Cui Guoliang and Cui Hong, and published by the Publishing House of Nankai University, October 2003.

142 *The Dial*, a U.S. magazine, was initiated in 1840 mainly for articles of literature, philosophy and religion.

143 See *The New York Times Drama Commentary (Volume 1)* of February 25, 1921

played outstanding roles in helping the U.S. audiences understand Chinese culture. When Chinese great Peking Opera performer Mei Lanfang led his troupe to make his debut with the *Qingwen Tearing the Fan* (a section of *A Dream of Red Mansion*) in the United States, the audiences did not understand the story, leading to a great failure to the performance. Under the circumstance, Mr. Mei asked Peng-chun Chang, who not only mastered Chinese and Western dramas, but also knew clearly U.S. audiences' appreciation psychology, to select a new list of operas. Knowing foreigners would like to watch easy operas of martial art with traditional Chinese costumes, Peng-chun Chang proposed to stage *Slaying the Tiger*. According to him, the play was easy to understand even without language so long as the movements were well arranged. He suggested cutting unnecessary plots of the opera to reduce the time length, and adding new plays gradually into later performances. Peng-chun Chang personally directed rehearsals and the graceful and lifelike Chinese traditional operas received warm welcome in the United States. Two universities in the United States awarded Mr. Mei doctor's degree of Literature. At the awarding ceremony, Mr. Mei read out the thank-you message written by Peng-chun Chang:

"We are here to exert what little strength we have to promote peace, which are eagerly hoped by civilized people. History shows that real peace cannot be obtained through force; People hope to obtain peace, but not quietness after turbulence. The real peace should promote people's development and growth mentally, rationally and materially. To maintain the world's real peace, people need to know each other, understand and show sympathy to each other, and help each other, instead of fighting against each other. The peace in the hearts of the two great peoples, the Chinese and American, is in line with the norms of international credit and sincerity. To reach the goal, everyone should conduct concrete researches in art and science fields, understand each other's ways of living, historical backgrounds and problems and difficulties."¹⁴⁴

The paragraph fully expressed Chinese people's best of intentions, eager pursuance to real peace and respects to other peoples in a centralized manner, and, through his sagacious thinking, put forward the ways and methods of achieving the lofty goals.

Peng-chun Chang directed the writing and performance of Mei Lanfang Troupe for half a year as the chief director and chief consultant. Thanks to his efforts, Mei Lanfang Troupe achieved great success in the United States in 1930. In 1935, Mei Lanfang Troupe went to former U.S.S.R. at invitation. The two trips promoted Peking Opera to the West successfully. Mr. Mei's art of performance is thus regarded as one of the world top three performance systems.¹⁴⁵

Peng-chun Chang devoted himself to the work of promoting Chinese culture to the world community. In 1931, he taught Chinese philosophy and Chinese literature and art at the University of Chicago, Art Institute of Chicago and Columbia University in the City of New York. In 1933, he was dispatched to Canada for visit and, after that, taught Chinese literature and art for one year at the University of Hawaii in Honolulu. During the period of time, he wrote a book *China:*

144 Li Lingling: *Biography of Mei Lanfang* (Mei Lanfang Quanzhuan), China Youth Publishing House, June 2002

145 Mei Shaowu: *My Father Mei Lanfang* (Wo De Fuqin Mei Lanfang), Baihua Literature and Art Publishing House, 1984.

What Course to Follow? for local middle school students and published the book in a publishing house in Honolulu.¹⁴⁶ In 1936, he was dispatched to teach in Britain. He delivered speeches like *The Changes of Chinese Culture* at 10 universities in London, Oxford and Cambridge. In the same year, he published his English work *China at the Crossroads* in London.¹⁴⁷

The book was finished on the basis of expanding and revising his previous book *China: What Course to Follow?* and combining his speeches in Britain. In the foreword of the book, Professor Eileen Power wrote, “A common people may be confused by what is happening in China and he needs a guide to led him out of the labyrinth. The guide is nobody but Dr. Peng-chun Chang. He enjoys the high reputations of a scholar, a dramatist and an educator in his own country and is very familiar to European and U.S. civilization. He is well aware what we are going to learn about China, what concepts may present obstacles to out understandings to China, and what need to be explained to Western readers. Actually, he knows both parties, and because of his knowledge, he completed the uniquely instructive book.”¹⁴⁸

In Section 2 of Chapter 1 of the book, Peng-chun Chang briefed on Confucius’ political and education thought. “When asked ‘Is there one word which may serve as a rule of practice for all one’s life?’ The Master said, ‘Is not RECIPROCITY such a word? What you do not want done to yourself, do not do to others.’” (Chapter 15, *Confucian Analects*)¹⁴⁹. This is the philosophic basis of human’s emotions Peng-chun Chang specially stressed. “What you do not want done to yourself, do not do to others” is the rule of practice for Confucius for all his life.

At the early stage of China’s campaign against anti-Japanese military aggression, he was assigned to Britain and the United States to disseminate China’s idea of anti-Japanese aggression. At the national protest rally in Royal Albert Hall, Peng-chun Chang delivered a speech entitled *Japan’s War against the Civilian*; in the United States, he initiated and organized the American Committee for Non-Participation in Japanese Aggression to arouse sympathy of the United States and European countries to China, and further to win their supports for China’s campaign of anti-Japanese aggression.

From 1940 to late 1944, Peng-chun Chang was appointed to be minister plenipotentiary to Turkey and Chile. During his term in Turkey, he signed friendly treaty with Iraq on behalf of Chinese Government and delivered two famous speeches to the imperial family and university students in Iraq in March 1942. During his speech, he introduced Chinese culture, especially the Confucian thought. Talking about the sentence Confucius used to describe his own life experiences “At forty I came to be free from doubts,” Peng-chun Chang said, “When a person is ‘free from doubts,’ he has actually discovered the reasons for all affairs through exploration and has mastered the pith of wisdom¹⁵⁰.” At the time, the 42-year old Peng-chun Chang had actually

146 Zhang Xinyue and Zheng Shizhuo: *Peng-chun Chang’s Life and his Works* (Zhang Pengchun Shengping Ji Zhuzuo), internal edition of 1995.

147 *China at the Crossroads*, Montague Publishing House, London, June 1936.

148 *China at the Crossroads*, Montague Publishing House, London, June 1936.

149 *Peng-chun Chang’s Theory on Education and Drama Art* (Zhang Pengchun Lun Jiaoyu Yu Xiju Yishu), compiled by Cui Guoliang and Cui Hong, and published by the Publishing House of Nankai University, October 2003.

150 Peng-chun Chang: *Speech to Students in Baghdad University, Peng-chun Chang’s Theory on Education and Drama Art*.



mastered the pith of Confucian thought.

Peng-chun Chang was a versatile and intelligent scholar being well versed in both Chinese and Western learning. Thus, it was no surprise to see the great intelligence he demonstrated in formulating the *Universal Declaration of Human Rights* while he worked for the United Nations. At the first session of UN Economic and Social Council, Peng-chun Chang proposed to convene an international health conference - He proposed “to submit a declaration of war to eliminate the bacterium that can cause diseases and plagues across the world,” and hoped that “we can increase international cooperation through declaring a war against the bacterium.” Under the backdrop, the World Health Conference was convened, which led to the establishment of the World Health Organization, a practice that “really blesses the human race” until today and even in the future. He also appealed at the second session of UN Economic and Social Council that attentions should be paid to economically undeveloped regions, which should be properly treated¹⁵¹.”

II. Peng-chun Chang and the Universal Declaration of Human Rights

As the Chinese idiom goes, “preparedness ensures success, and unpreparedness spells failure¹⁵².” Peng-chun Chang put forward his motion at the beginning of his work at the Commission on Human Rights. He was well prepared. When some participants such as Malik and Eleanor insisted that an individual should exist prior to the society and countries, and an individual’s rights and freedom were the basic connotation of human rights, Peng-chun Chang noted that the concepts of human rights should not be interpreted only from the angle of Western individualism and other angles should also be taken into consideration. From the angle of Confucian thought, an individual should not be separated from the society. In this sense, we can see the rich meanings of the sentence from *The Confucius Analects* “What you do not want done to yourself, do not do to others,” which Peng-chun Chang advertised repeatedly. Thus, Confucian thought on individual was also added to the Declaration.

“Dr. Zhang is a pluralist. He movingly interpreted his opinion: the final truth is more than one,” said Mrs. Roosevelt in her memoirist, being convinced. While discussing the issue of the origins of the human rights, the United States and Britain insisted the theory of natural rights; some countries noted that the human rights were “endowed by the God”; while Arab countries argued that the human rights were blessed by Allah. During the discussion, no party could persuade the other. Peng-chun Chang adopted the golden mean of the Confucian school, namely, a compromise proposal. He asked each party to put aside their respective insistences and put forward a “general principle” acceptable to all parties. His mediation finally solved the problem and the final wording was “All human beings are born free.”

However, the Declaration should avoid covering only Western concepts, and should also reflect some oriental ideas to form a complete and perfect structure. Only by doing this could the *Declaration* draw on the wisdom of the whole world and become an ideal document of the people of the globe. Only those who mastered Western and Eastern cultures could undertake the task of

151 Peng-chun Chang: *The Third Speech at the UN Economic and Social Council, Peng-chun Chang's Theory on Education and Drama Art*.

152 *The Doctrine of the Mean*, in *The Book of Rites*.



reviewing and commenting on the *Universal Declaration of Human Rights* in all-round manners and find out its shortcomings; and to overcome these shortcomings, only those who understood Western culture and had a good command of oriental culture could abstract the quintessence of the Confucian thought and apply it to the *Universal Declaration of Human Rights*. Peng-chun Chang was the only qualified member in the declaration formulation committee.

After reading the draft version in the first discussion of the Commission on Human Rights, Peng-chun Chang proposed that the document must cover ideas beyond those of Western countries. He stressed that Chinese philosophy and Confucianism had long been admired by European philosophers. Though European people embarked on the road of narrow nationalism and treated themselves as the center of the world in the 19th Century, after the World War II, the human race should watch the international affairs with wider vision, and thus, the *Universal Declaration of Human Rights* should have Chinese Confucian idea and school. At a conference, Peng-chun Chang suggested that the secretariat that was responsible for document drafting spend several months to study the main ideas of Chinese Confucianism. John Humphrey, convener of the drafting group, indicated that according to Peng-chun Chang's suggestion, every member of the Commission on Human Rights should have lived in China for more than one year to study Confucianism. Hearing this, Peng-chun Chang immediately replied: "So, this proves the Declaration not only needs Western content, but also oriental ideas¹⁵³." After deliberation, Peng-chun Chang proposed to add the term "conscience" into the Declaration and was finally approved. Recalling Peng-chun Chang, Eleanor spoke highly of him, regarding him as a "master of mediation art." "He is humorous. From the angle of philosophy, he can respond to any occasion resourcefully with Chinese sayings¹⁵⁴."

The term "conscience" is from *The Mencius-The Kao Tzu* (part one): "In the case of people, how could they lack the mind of Humaneness and Rightness? But the daily damaging of the conscience is just like the lumberjacks on the mountain. Being chopped down day after day, how can it manifest its natural beauty? One may breathe in fresh air day and night, but if you allow the enjoyment of evil doings with people to close in on you, the air gets thin, and your daytime activities stifle you. Because of this stifling, the fresh air is insufficient." Here, the term "conscience" includes "the mind of humaneness and rightness, as well as the kindness of "What you do not want done to yourself, do not do to others." Only conscience can make everything so beautiful.

The *Universal Declaration of Human Rights* also included the term "conscience" in its Preamble and Article one, making "reason and conscience" the fountainhead and philosophic basis of the concept of human rights. This enriched the document, making it covering ideas from both the West and the East and enabling it to be an international document of the world significance.

From then on, the Confucianism began to benefit people around the world and it also gained the world significance:

153 Cui Guoliang: *Peng-chun Chang and the Universal Declaration of Human Rights*, Supplement of Jinwan Bao, December 17, 1998.

154 *The Universal Declaration of Human Rights: a Common Standard of Achievement*, compiled by (Swede) Gudmundur Alfredsson, and translated by China Society for Human Rights Studies, Sichuan People's Publishing House, June 1999.



Firstly, though without legal effect, the *Universal Declaration of Human Rights*, covering Western and oriental ideas, has become a document of the whole world, and its demonstration and guidance roles are far beyond people's expectation. On the basis of the *Universal Declaration of Human Rights*, the United Nations formulated the International Covenant on Civil and Political Rights, which has legal effect. The International Covenant on Economic Social and Cultural Rights was also formulated and was ratified by a large number of countries. Relative content of the *Universal Declaration of Human Rights* were used for reference by many countries while formulating their constitutions and other legal documents related to human rights. All these indicate the immeasurable value of the Declaration.

Secondly, the domino effect caused by the large-scale discussion upon Confucianism in the area of the world human rights on the world stage of the Commission on Human Rights 60 years ago can never be underestimated. It was Peng-chun Chang who discovered the great treasure-house of China's Confucianism. He picked up a big glorious diamond and set it on the crown of the *Universal Declaration of Human Rights*. Mireille Delmas Marty from France noted that Peng-chun Chang was the rejuvenator of Chinese culture.

Chinese scholar Liu Hainian, while attending a symposium, said in his speech *Some Issues on China-Western Countries Connections and Cultural Innovation - Speech at the International Symposium of China-Western Countries Connections and Cultural Innovation in Macao*, "The *Quotations of Confucius* distributed at the symposium include a sentence from the *Declaration of the Paris Rally of the World Nobel Prize Winners*: 'To survive in the 21st Century, the mankind needs to seek wisdom from Confucius 2,500 years ago.' Nobel Prize winners are from different countries worldwide and they are the most outstanding scientists in their fields. Their consensus in this regard well illustrates the importance of the Confucianism. Meanwhile, on a big stone at the Hall of the International Red Cross in Geneva, Switzerland carved eight Chinese characters "What you do not want done to yourself, do not do to others," a sentence regarded by Western scholars as a golden rule. The sentence classically reflects the philosophical basis of modern human rights movements and is the spiritual road sign of modern international human rights movements." Actually, all these have some connections with the practice of integrating Confucianism into the *Universal Declaration of Human Rights*.

In this sense, Peng-chun Chang had made great contribution to the world.

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DIVERSITY - ITS DIMENSIONS AND HUMAN RIGHTS

Anil Kumar Garg
India

Thousands of years ago, the Indian philosophers gave a message of eternal relevance. The message was Vasudhev Kutumbakam. It means that the entire universe is a family. Even though there are striking differences in ideologies, political systems and levels of development of different nations and societies, all of them share certain basic values like protection from arbitrary rule, prohibition of inhuman treatment and access to equitable share of the national assets. What matters is not the diversity of ideologies, political systems and levels of development but the universal nature of human values.

India is an ancient country of diverse cultures. It is a mosaic of different religions, different social customs, different castes and tribes, different styles of living and different languages. Historical reasons have contributed to this diversity. In ancient India, people were classified into four categories according to the professions they took up in pursuit of life. Some people took to learning, defence or trade and they occupied high positions in the society. Some people took up menial jobs to earn their living and they were condemned to inferior positions. This categorization on the basis of occupations culminated into caste system. Those belonging to higher castes enjoyed privileges and power. The lower castes were reduced to a state of deprivation and indignity. The resultant inequality generated discontent in the society. With the advent of Mughals, Islam came to India with the message of equality and many deprived people converted to Islam. During the time of British rule, the Christian religion also spread its influence to India. The process of interaction of religions was an enriching experience but at the same time it created distortions and conflicts in the society. After gaining independence we made efforts to build a harmonious society based on secularism, justice, liberty and equality. Part III of the Constitution of India guaranteed fundamental rights including the prohibition of discrimination, the freedom of speech, the protection of life and liberty, the right against exploitation and right to freedom of religion. Part IV of the Constitution embodied some Directive principles of State policy in an endeavour to build a welfare State. Several laws were enacted for uplift of the deprived classes and to do away with social injustice. Democracy was ushered in to empower people and the result is that a Scheduled Caste woman is the Chief Minister of the most populous State of the country and she wields the levers of power in that State.

The caste system in India gave rise to vexed issues of discrimination and inequality in the Indian society as they exist all over the world for different reasons. Mahatma Gandhi, the father of the Indian nation inspired the people to rise above considerations of caste and religion



and made a very important observation, “It has always been a mystery to me how men can feel themselves honoured by the humiliation of their fellow beings.” The Indian people demonstrated an irrepressible will to effect fundamental, social, economic and political change through the process of democracy. Article 15 of the *Constitution of India* expressly prohibits discrimination against any citizen on grounds of religion, race, caste, sex and place of birth. Article 18 of the Constitution abolished untouchability and forbids its practice in any form. The mandate of the Constitution was carried out by enactment of the *Protection of Civil Rights Act*, 1955 and *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act*, 1989. The Government of India also initiated measures to eliminate manual scavenging, Devdasi system, Boded Labour System and introduced land reforms. Article 16 of the *Constitution of India* provides for equality of opportunity in matters of public employment and this mandate of the Constitution was given effect to by ensuring important positions in governance to Scheduled Castes and Scheduled Tribes. This was done through reservation in recruitment of jobs, seats in legislatures and Panchayati Raj institutions. Reservation was also provided for them in entry to various educational institutions and professional courses to enable them to compete for other positions in society. Reservations no doubt helped a small section of scheduled casts and scheduled tribes to disengage from traditional demeaning occupations and give them a sense of freedom and confidence. Much, however, remained to be done and it was necessary to empower them economically. Therefore, the National Scheduled Castes Development and Financial Corporation was set up. Loans were given to the down-trodden to enable them to engage in business activity and such loans were subsidised. The National Human Rights Commission, on its part received and redressed numerous individual complaints that it received from Members of scheduled casts and scheduled tribes alleging discrimination or atrocities against them or high handedness by the other castes and public servants. A Dalit Cell was set up in the Commission and placed under the independent charge of a Member. The Commission also appointed a Committee under Shri K.B. Saxena, a retired IAS officer to undertake a study and submit a comprehensive report about the progress made in the implementations of various legal provisions and other schemes undertaken for amelioration of the conditions of the deprived castes and to make appropriate recommendations. The Committee has submitted its report and has made recommendations to tackle the problem of apathy and passivity by activating the Government machinery and also the civil society. It has suggested review of instructions, intensive training, regular monitoring with participation of scheduled casts and scheduled tribes at various levels within the Government and setting up of an alternative arrangement for exerting pressure on the Government with the help of NGOs. The Commission is actively pursuing the recommendations.

As stated above, the interaction of religions created some problems. There are fundamental differences between the philosophic views of various religions. Some of the practices observed by members of one religion may appear to be excessive and even violative of human rights to members of another religion. Within the same religion there may be divergent reasons to deny or accept particular human rights. For example, Muslim law permits polygamy. To check the misuse, many Islamic countries have codified the personal law wherein the practice of polygamy



has been either totally prohibited or severely restricted. In India, however, the personal law of Muslims permits them to have as many as four wives. On the other hand monogamy is the law for Hindus. This divergence between personal laws relating to marriage enticed some errant Hindu husbands to embrace Islam to circumvent the provisions of Hindu law and to escape from penal consequences leaving the Hindu wife in the lurch to fend for herself. The Supreme Court of India stepped in to resolve the anomaly and save Hindu wife from ignominy and penury by holding in the case of Sarla Mudgal that a second marriage of a Hindu husband after conversion to Islam without having his first marriage dissolved under the law would be invalid.

Many conflicts arise out of intolerance of ethnic, communal, regional and other natural differences. Then there are tensions between fundamentalists and pluralists. Some Hindus traveling in a train were burnt alive at a railway station in the State of Gujarat on 27th February, 2002. The incident triggered a communal backlash in which many persons of the minority community lost their lives and many families were uprooted from their home and hearth. The National Human Rights Commission of India took suo-motu cognizance of news reports of the communal flare up and alleged inaction of the police and other state functionaries. It issued notice to the Chief Secretary and Director General of Police of the State and called for their reports about the measures being taken to prevent any further escalation. The Chairman of the Commission paid a visit to the State of Gujarat to study the situation and to ensure accountability and efficiency of the administration. The visit of the Chairman served to build confidence amongst different sections of the plural society. The Commission also recommended several measures for relief and rehabilitation of the victims. Not only this, when the persons accused of involvement in multiple murders of Muslims were acquitted by a City court, the Commission filed a writ petition in the Supreme Court to ensure fair trial and justice to the victims. The Supreme Court directed retrial of the case outside the State of Gujarat and ultimately the offenders were brought to justice and suitably punished. A heartening feature of the whole episode was that many Hindus and NGOs took up the cause of the minority community and demonstrated their commitment to the philosophy of pluralism.

Religious freedom, the basic foundation of secularism, was guaranteed by Article 25 to 28 of the *Constitution of India*. The framers of the Constitution at the same time felt that it was desirable to reconcile the divergence in personal law. They thought that a common civil code will help the cause of national integration by removing disparate loyalties to laws having conflicting ideologies. Article 44 was therefore enacted in Part IV of the Constitution which lays down that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The minorities, being anxious to preserve their identity, see a uniform civil code as an interference with their personal law. They apprehend that the enactment of a uniform code may be a step to efface their identity. The majority communities have shown consideration for this apprehension of the minority. They appreciate that a social climate will have to be properly built up. They are prepared to wait for the minority community to take a lead in the matter of reform of their personal law. The regard shown by the communities for the sentiments and fears of each other has helped us to preserve unity in diversity.



The importance of respecting cultural differences in an increasingly globalised world is a goal we must all cherish. Nobel laureate Amartya Sen says “The robbing of our plural identities not only reduces us, it impoverishes the world.” In the World Parliament of Religions at Chicago in 1893, Swami Vivekanand described the diversity of religions as the same light coming through different colours.”

The idea of respecting cultural diversity and maintaining national identity may, however, seem to be inconsistent with the concept of universality of human rights. How can cultural diversity and human right both be protected? How can universal human rights exist in a culturally diverse world? The local cultural traditions determine the existence and scope of civil and political rights enjoyed by the persons living in a society. Substantive human rights standards vary among different cultures. What may be regarded as a human rights violation in one society, may be considered lawful in another. How then does universal human rights standard be practical?

The protagonists of cultural relativism would argue that human rights should be interpreted differently in different cultural, ethnic and religious traditions. According to them, human rights are culturally relative rather than universal.

According to United Nations Charter, all member states have a legal obligation to promote and protect human rights, regardless of individual cultural perspective. Cultural relativism creates a defence to this legal obligation cast on the states by UN Charter. This theory would enable the individual state to invoke or interpret local traditions in such a way as to justify any violation of human right.

The argument raised by the proponents of cultural relativism is certainly not tenable. Firstly, it cannot be said that the international human rights laws lack a substantive core. There are legitimate limitations on even well entrenched traditions. For example, no culture can today legitimately claim a right to practice slavery. Secondly, there is nothing in Human Rights conventions to suggest that the respect for human rights depends upon or can be modified by local cultural traditions. The only exception is Article 63(3) of the *European Convention* which provides that the provisions of the *Convention* shall be applied in colonial territories can not justify the theory of cultural relativism because in Tyrer’s case, the European Court of Human Rights, while dealing with a case of corporal punishment, interpreted the word ‘requirement’ to convey an idea of necessity. Where the local practice or tradition is not necessary to maintain law and order, the provisions of the *Convention* will prevail.

Every society is entitled to develop its cultural identity and practices. Cultural rights are not however unlimited. They cannot go beyond a point where they infringe on the rights of another.

Moreover, human rights are a substantive part of International law, not only as a matter of treaty but as a part of customary law. The universal nature of human rights is evident in the preamble of *Universal Declaration of Human Rights*. Universal human rights are further established by two international covenants namely *International Covenant on Civil & Political Rights* and *International Covenant on Economic, Social and Cultural Rights* and other instruments. The *Vienna Declaration* of 1993 reiterated the universality of human rights by stating “All human rights are universal, indivisible, interdependent and inter-related.” The issue was



settled once and for all when the Vienna Declaration stated that the universal nature of all human rights and fundamental freedoms is beyond question.

Universal human rights represent the consensus of international community. Certain minimum standards are necessary to lend flexibility to human rights so as to make them relevant to diverse cultures. Chinese President Hu Jintao, in his address to UN General Assembly in September 2002, emphasized that the production of international standards of human rights should be democratic and its implementation should adhere to the principles of equality and dialogue. He said that respect for human rights will help to build a harmonious world but did not miss to point that the implementation of human rights is possible in a harmonious world alone.

If the diversity of religions, languages, cultures, traditions and nationalities is to be transformed into a harmonious world where human right is not a mere rhetoric but a pious obligation, the virtue of tolerance shall have to be nurtured. Intolerance hinders dialogue and obstructs conciliation. It makes us blind to reason and deaf to dissenting voice. Intolerance is the anti thesis of plurality. When plurality is endangered, fundamentalism starts. Fundamentalism of any kind is the greatest violator of human rights. Therefore, it is imperative that plurality is sustained by tolerance so that human rights may prosper.

In the present mindset of cynicism and intolerance, the universal implementation of human rights may appear to be a half realised dream now but that need not deter us from pursuing our path. Dreams are like stars. We may not reach them but we can certainly chart our course by them.

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CULTURAL DIVERSITY IN ASIA AND ITS HUMAN RIGHTS DEVELOPMENT

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Asia, while teeming with both vitality and conflicts in today's world, also "takes pride in its abundant culture, religion, and diversity"¹⁵⁵. Its changing situation of human rights attracts increasing attention from politicians and scholars around the globe. More than just an economic, cultural and geological concept, Asia has become a regional community holding sway in the process of world human rights improvement. In the 21st century featuring both challenges and hopes, people want to see the continent as not only boasting economic prosperity, but also on the

¹⁵⁵ *International Social Science Journal* by the United Nations Educational, Scientific and Cultural Organization (UNESCO), September edition in 1999 (16-4), published by the Social Sciences in China Press.



way to growing humanism and constitutional value.

1. Cultural diversity and legal tradition in Asia

Asia appears on the world arena as a community. Seen from its historical development, cultural tradition and geological environment, the continent provides a uniform social environment to its people. Its legal system is one sought and improved creatively during long-term social practice, hence is a natural result of social development. The history, social function and unique cultural attraction of it offer an opportunity for transformation of Asian societies from traditional to modern ones, which thus surge as most eye-catching and dynamic economic engines in the world.

On the course of constitution development, traditional culture played a significant role. No matter in the eastern part, the southern or the western, a sense of a cultural community laid a legal foundation for Asia to develop as a whole. Some scholars believe that traditional cultures in East Asia, including Confucianism, are an indispensable stage and link in the cultural development of the area, whose production works as historical basis and impetus propelling the society towards modernization.¹⁵⁶ The traditional cultures in East Asia embody precious experiences throughout history and reflect special lifestyle of the people. Amid the conflicts and inosculation between eastern and western cultures, the East Asian people compared different values sensibly and objectively, absorbing the western elements applicable to the actual situation of their own countries while preserving the traditional parts helpful to social development, and therefore coordinated rationally values in both areas' cultures.

Constitutional culture is a rather diversified concept that mirrors people's understandings and feelings about constitutional values under specific cultural background, especially those fostered in the traditional culture of a nation. A key reason for the academic ardor in legal culture research ignited after World War II in western countries is that scholars found in their studies of eastern legal systems that digging into the eastern legal culture had been a necessary path towards understanding of eastern legal system and spirit. It was hard for them to see an integrated system of Asian legal culture if their research, skipping the cultural values, lingered solely on surface of the systems. Then, "if you want to really understand the legal systems in eastern countries, you must study their traditional legal cultures. Comparison of laws is not enough - it should be accompanied with comparison of legal culture."¹⁵⁷

Judging from the development of constitutional cultures in all Asian countries, Asian constitutional culture has a multiplex structure seeking natural harmony and integration through conflicts of various legal cultures. For example, the legal cultures in eastern Asia as a community normally comprise of the following parts: traditional Chinese legal culture, western legal culture, original legal culture of the country and the newly formed. Chinese traditional culture has important influence during the formation of traditional eastern Asian legal culture, which is seen as a basis for the latter to take shape. Surely the influence is limited, and it couldn't substitute other traditional elements once existed in ancient cultural systems.

¹⁵⁶ *Traditional Culture and Societies in East Asia*, by Zhang Liwen, published by the Press of Renmin University of China in 1999, page 47.

¹⁵⁷ *History on Law and Culture*, by He Qinhua, published by the Law Press of China in 1998, page 234.



2. Tradition of Asian legal culture and value of human rights

(1) Cultural diversity and the concept of human rights

The concept of human rights in western countries is production of their cultures reflecting historical development. It has left impacts on human rights practices in other cultures, but is neither the only such system nor a “common pattern” applicable everywhere. Each culture system, in theories and practices of human rights, has its value for existence and deserves equal recognition. Western culture, Asian culture and African culture gave birth to their own conception of human rights with distinctive cultural features. Constitutionalism as a principle to safeguard human rights shows their values in different cultures and respective ensuing characteristics.

Talking from the cultural aspect, human rights in eastern and western cultures bear dissimilar definitions. The practices under western production pattern also differ from those in Asia. Research on human rights theories shows that western concept of human rights lacks world’s universality. British scholar A.J.M.Milne noted in his book *Human Rights and Human Diversity* that although “human rights” is a popular political catchphrase in the west and also a criterion evaluating political systems, its definition is not clear and explicit. He gave three reasons. Firstly, judging from the economic, political and cultural situation, western human rights have little impact on most human beings in the world, who haven’t and never had the western-style freedom. Secondly, in aspects of culture and cultural tradition, western human rights are fruit of western culture and cultural tradition, which, however, were just a kind among all traditions of mankind. Thirdly, seen from the sociality of human beings, nobody could live outside a society and everyone is a social member by growing up in a specific society, learning its language and following its lifestyle.¹⁵⁸ The explanation of Professor Milne on the concept of human rights is quite enlightening in our analysis of Asian-styled human rights.

(2) Cultural diversity and practical foundation of human rights

It is generally believed by developing countries that the concept of human rights should reflect cultural diversity. Its content as a whole, all kinds of rights are inter-dependant and inseparable, and individual responsibility to the society is underscored. The World Conference on Human Rights passed at the Bangkok Declaration at its regional preparatory meeting in Asia in April 1993 pointed out that economic, social, cultural, civil and political rights were inter-dependant, and all types of human rights deserved equal attention. It was especially stressed that despite the universality, human rights carry different features in various regions with varying historical, cultural and religious background, which should be judged through repeated amendments of international principles and avoid double-standard in implementation.¹⁵⁹ Another declaration passed by the regional preparatory meeting in

¹⁵⁸ *Human Rights and Human Diversity*, by A.J.M.Milne. Quoted from the Origin of Human Rights Concept by Xia Yong, published by the Press of the China University of Political Sciences and Law in 1992, page 242 to 243. Macmillan USA commented on the book that lives of human beings are not identical with different cultures and civilizations. Not every country should borrow western system and value.

¹⁵⁹ Bangkok Declaration passed by the regional preparatory meeting in Asia in April of World Conference on Human Rights. The then Thai foreign minister hailed it “a basis for Asian countries to achieve human rights” at his closing speech.



Latin America and Caribbean in January 1993 also acknowledged that interdependence of civil, economic, social and cultural rights and their inseparability are basic to addressing human rights problems. These rights mustn't and shouldn't be deprived under the excuse of absence of some others. The regional preparatory meeting in Africa also proposed that the principle of human rights inseparability would never change; civil rights and political rights are inalienable from economic, social and cultural rights; all the rights are equal. The Tunis Declaration passed at the conference highlighted opposition to imposing uniform human rights mode upon all countries in the world.

Throughout the development of human rights, Asian countries, based on their respective actual situation, adopted different forms of security systems. For instance, concerning protection pattern of constitution, China, South Korea, and Japan adopted different systems as power organ guarantee system, constitutional court system and judicial review systems. Among the countries which have set up human rights committees, diversity also exists in specific organizing forms and procedures due to cultural differences. Obviously, in international practices of human rights, different conceptions of human rights are allowed in different cultural traditions, and the notion of human rights in Asian societies has become an independent one both in theory and in practice, reflecting common value of human rights development as well as Asian historical and cultural tradition.

(3) Cultural diversity and humanistic foundation of human rights

Conception and practice of human rights in Asian societies bear historical characteristics of social development in the area, which have good influence on international human rights practices. Asian-style human rights, like those in other developing countries, emphasize the influence of traditional culture and value of human rights.

Seen from the practice of human rights, cultural tradition in Asia knows no conflict with value of the human rights. Each traditional culture carries its special function and measure reflecting and protecting human rights. Although Asian traditional culture is no generator to modern human rights concept, the limit lies with characteristics along development process and the culture itself takes no blame. Traditional cultures in different countries, to varying extents, mirror civilization of the mankind, while there is no completely different value system in effect. For example, affected by traditional culture, Asian human rights stress individual liability to the society and human rights are first manifested as a value system with collectivism considered the core. Economic rights and the right of existence are paramount in the human rights system.¹⁶⁰ Regarding this point, it is hard to grade various kinds of human rights. The western ideological system featuring individualism just reflects western social structure and hence not applicable to Asian societies. In fact, human rights vary in the maturity of practices rather than superiority in values. For a long time, hegemonism of westerners in psychology and attitude deviates from

¹⁶⁰ The white paper titled *China's Efforts and Achievements in Promoting the Rule of Law* published in March 2008, which noted that "China's basic stand on the development of human rights is: placing top priority on people's rights to subsistence and development, making development the principal task, and promoting citizens' political, economic, social and cultural rights to achieve their all-round development".



the spirits of equality, harmony and rationality involved in human rights value in essence. In 1991, Martin Bernal published a book named *Black Athena - the Afroasiatic Roots of Classical Civilization*, which made a review and reflection of European tradition in humanistic studies since the 18th century. The author revealed a long-neglected fact after argumentation with vast historical data that the phylogeny of western culture recognized as bible by many was in fact a centralism fiction made up by European scholars in the 18th century. The hegemonism in western culture has become a target for criticism from post- colonialism theories in literature circles of Europeans and Americans since the 1970s, when Edward W. Said published his book *Orientalism*. It is proven by facts that many unfair phenomena arising in international human rights practices are connected with western hegemonism. Therefore it is an important aspect to combat cultural hegemonism in realization of human rights values.

(4) Cultural diversity and the path of human rights development

In a nation, the degree of development and demand rests with requirement of daily life. It has been determined by the economic structure and developing level in Asia that human rights be exerted widely in economic and social fields, with the right of existence, social and economic rights, as well as developing right the main features. This, however, doesn't mean an exclusion of political rights and freedom from Asian human rights. On the contrary, the latter part accounts for a large proportion according to constitutions of Asian countries. In regard to the human rights issue, disputes between western and Asian counties lie in the lineup of different elements in the human rights system and difference in practicing ways instead of whether they respect human rights or not. For instance, equality is valued more than freedom in practice of human rights in Asia, and the right of existence outweighs political right. A bill passed by the U.N. Commission on Human Rights in March 1993 reiterated the principle written in the *Declaration on the Right to Development* by a conference of the United Nations in 1986, that "the right of development is an inalienable human right," and both the right of existence and the right of development are among the most basic and significant human rights. Without the two rights, other human rights are castle in the air. To the third-world countries, national independence and development are precondition to enjoying human rights.

3. National constitutions in Asia and protection of human rights

(1) Human rights in Asian constitutional cultures

"Human rights" is a historical concept influenced by different cultures, traditions even geological environments. Asian scholars generally believe that human rights originated from ethnical rights, the basic meaning of which is qualification and freedom enjoyed by human beings. Human rights are supranational and super-legislative. In other words, they exist as a power bestowed by social ethnics, not just in the process of litigation.

The function and conception of human rights since 1945 has seen drastic changes, giving rise to a new tendency of their socialization. The third generation of human rights with constitutionalization and development of environmental rights the major characteristic further boosted improvement of social civilization. According to domestic scholars, human rights should be defined from the following three aspects: first, it is an ethnic right enjoyed as mankind;



second, human rights in essence are national lawful rights; third, it is concrete.¹⁶¹ In the world theories, human rights are an integrated concept falling into three levels based on its universality and cultural relativism view point: civil and political rights including the right of life, personal freedom, freedom in moving and speech, etc.; educational, healthy and working rights which are categorized as social rights; self-determinative rights, rights for peace, development, and common legacy entitled to all human beings.¹⁶² Different as the expressions are in constitutions of Asian countries in terms of human rights, the basic connotation and goal are generally the same.

(2) Constitutional expression on human rights

Generally speaking, human rights are expressed in different versions of all countries' constitutions: first, human rights are defined in the text of constitution; second, the words of "human rights" don't appear in the text of constitution, which, however, carries explanation of human rights as basic rights; third, concept of human rights was expounded in the text of constitution and key content of human rights is written in forms of basic right; fourth, human rights appear together with and basic rights and their expressions, and are expounded in the constitution in practice.

In Asia, human rights are stipulated in the following forms: first, the tradition of British legislature excluded human rights from texts of laws; second, constitutions in nations like Malaysia and Singapore stipulate only freedom of individuals, speech, press, religion, etc., rather than social rights, giving the reason that issues related to the latter are hard to tackle through judicial procedures, which need intervention of the nation and its society; third, human rights, comprise of basic rights and guiding principle of national policies, are prescribed in various form and endowed with different effectiveness (the rights of freedom were listed as basic rights with constitutional remedies while guiding principles of national policies are not entitled to judicial solution. The constitution in India is a good example of this form, drafted after which the constitutions in Pakistan, Bangladesh, Sri Lanka, though with slight differences, all cover the contents of social rights); fourth, the constitution doesn't distinguish the rights of freedom from social rights, and that in South Korea, DPR Korea, Vietnam, Indonesia and China are in this category. During the emergence and development of constitutionalism, Asian countries, while drawing on experiences from western human rights progress, created new types of concepts by combining the experiences with historical and cultural characteristics in the continent.

Provisions on human rights, basic rights and their explanations are frequently seen in the texts of Asian constitutions, but experts have noticed their borderlines. For example, topic of the third chapter of the Japanese constitution is civilians' rights and obligations. The term "basic human rights" appeared in the 11th clause and explained as "permanent unfringeable rights endowed to civilians now and in the future." In the 50th clause of the Vietnamese constitution, human rights are defined like this: any human rights in politics, civil affairs, economy, cultural and social affairs must be respected and stipulated in legislation in Vietnam." The Bangladeshi constitution used the terms "basic human rights" and freedom, while the constitution prologue

¹⁶¹ *Jurisprudence* by Shen Zongling, published by the Higher Education Press in 1994, page 190 to 191.

¹⁶² *Human Rights and Development* by U. O. Umozurike, which was carried by the *International Social Science Journal* (the November edition in 1999, 16-4), page 74.



in Tajikistan noted that “freedom and rights of people should be acknowledged.” Prologue of the constitution in Uzbekistan reads that “human rights and national sovereignty must be respected” and the third part further elaborated on people’s basic rights, freedom and obligations. By comparing texts of different constitutions, we could see that western countries draw a clear line between human rights and basic rights, with connotation of the former strictly limited, while in Asia, the value of human rights is generally acknowledged as basic principle in the prologue or texts of constitutions, and explained in various ways to expand the applicable scope of constitutional value.

4. Criterion of human rights in Asian constitutions and protection of unlisted rights

Modern constitutions in Asian countries didn’t attach enough importance to the protection of unlisted rights. Such protection only appears in several constitutions, like South Korea and Turkmenistan, as regulations with different explaining theories and techniques. For example, the 16th item of the constitution in Turkmenistan stipulates that human rights are unfringeable and indeprivable. The rights and freedoms listed in the constitutions and other laws are not allowed to deny or derogate other rights and freedoms. In South Korea, scholars analyze the constitution’s structure under the theory of standardization and coordination, and established a mechanism to protect the unlisted rights. The dignity and value of human beings are shown by specific regulations from the 11th clause to the 36th, but now all scenarios are included. For the unlisted but necessary rights, the constitution should extend protection. On the whole, the basic rights listed in the constitutions are but part of human rights most important to an overall growth of human beings but definitely not all of them. Protection of people’s dignity largely relies on the “items for unlisted rights.”

The Chinese constitution has a list of basic rights and there is no such prescription as how to protect the unlisted basic rights. Questions on the unlisted rights including whether they exist and how to protect them has yet not become a concern in social life. After the amendment of constitution in 2004, national respect and protection of human rights became a basic value of the country and “human rights” finally become a term in the text of constitution. Setting up of this principle is good for further enhancement of human rights awareness, adjustment of the relation between governments and people, and promotion of human rights as an undertaking by the nation.

After the appearance of human rights in items of the constitution, it became a focus in the academia whether the items could function as the in the ninth amendment of American constitution, and cases involving right remedies based on such items crop up. In countries where protection of unlisted basic rights is formally written in the constitution, I believe that those items not only suggest political morality and political principle, but have independent value and function to limit public power. As a source of rights, they provide a foundation and type to meet the need of the main body in the society. Those countries whose constitutions lack such items ought to seek a way to protect their reasonable needs of rights as well in practice.

Regarding the conception of value, items of human rights bear the same values as those without list of rights, but they divide in forms and effectiveness. Items of the unlisted rights contain unique regulatory value whereas those on human rights stress more of significance constitutional



principles. The unlisted rights or basic rights are a source to produce new rights while human rights are a dubious definition shown as an integrated value pattern, which is hard to become foundation of new rights. Although human rights are listed in constitutions, it takes a long time for them to be exchangeable with the value of basic rights and a constitutionalizing mechanism on human rights should be established both in theory and in practice. Ruled by a constitutional government, China sees different natures and functions of items on human rights from the items to protect unlisted rights in other nations' constitutions. The comparison is meaningless.

In reality of our country, human rights clauses protected the basic rights, listed and unlisted alike, to varying degrees. They can be explained as general regulation on protection of basic rights to offer a more direct and extensive value basis to realization of the latter. Similarly, these items are only supplement to protection of unlisted rights: to expand the scope of protection of basic rights, new types of rights, hidden behind current items, could be abstracted based on the items on human rights; to provide concrete salvation in case that basic rights are prescribed but specific legal regulations are missing; to provide a reason value basis and standard while making constitutional explanation on items of basic rights; to arrive in necessary judgment abiding by items on human rights at the requirement of new rights absent from constitution and laws, etc. The human rights clauses are less than evidence for discovery and abstraction of new rights. Rather, they offer a rule or principle for explanation. Distances exist between human rights standard, principle and specific rights. With an eye on the changes of reality and actual needs, we should gradually accelerate constitutionization of human rights to grant human rights and basic rights respective value systems and domains.

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HUMAN RIGHTS IN THE ISLAMIC WORLD VIEWED FROM THE PERSPECTIVE OF CULTURAL DIVERSITY

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Human rights have been a hot topic in the international community. To the Islamic world with around one billion population, issues on human rights are growing to be a concern both in and outside Muslim countries. In the present paper, we attempt to give a preliminary analysis and summary of Islamic concepts and thoughts on human rights.

The emergence of Islamic thought on human rights

Human rights, as a historical category, are the due outcome developed in a certain phase in history. "Human rights, namely the rights enjoyed by people, are the total rights that should be and



are enjoyed in reality by a person (or the combination of persons), and that are acknowledged by society.”¹⁶³ Human rights, a legal prescript in nature, should be protected by individuals, nations and states. The content and form of human rights are ultimately determined through joint effect and mutual restriction of material conditions in reality, social and historical conditions as well as traditional values.

In the Islamic world, Muslim tradition plays a key role in the formation of the Islamic concept of human rights. In the 7th century, led by the Prophet Muhammad, Muslim people established in Medina the “Ummah” that integrated politics with religion. Hence, Koran and Hadith turned to be the legal guarantee for state administration. The word “right” in Arabic means the combination of “Allah,” “truth” and “reality,” and also includes the meanings of “justice,” “responsibility,” “obligation” as well as “equality.” On the level of religion, the word is a reflection of Allah, and from the perspective of law, it represents the grant, the enjoyment and the protection of rights. According to Muslimism, people are not born to be entitled to human rights and freedom, which, in accordance with Islam, are godsend from Allah. God creates man, and at the same time confers on each individual equal rights to life and dignity. As the rights are given directly by Allah, human being must follow the way of God, and implement the obligations to God. Otherwise, he or she is not qualified to enjoy the rights granted by Lord. It is from this very point that Islam diverges from the western concept of human rights characterized by “natural rights.”

Since the 7th century, the Muslim world began to present such conceptions as rights to life and equality and the balance between rights and obligations, laying the foundation for human rights in the Islamic world. In 1990 *Cairo Declaration on Human Rights* in Islam was passed by the General Assembly of the Organization of the Islamic Conference. In the Declaration, it was highlighted that in the Muslim world, the fundamental rights and freedoms as recorded in Koran are conveyed to all mankind by the Prophet Muhammad, and safeguarding rights and freedoms is a devout practice. Meanwhile, “none of the rights and freedoms can violate Islamic law.”¹⁶⁴

Ideological foundation for Islamic human rights and rule of law

Islamic concept of human rights is established on the basis of “Allah alone.” It proclaims that all are created by God, who enjoys absolute and ultimate power, grants all human beings rights and protection of their rights. According to Islam, Islamic law is the source of all individual rights and freedoms. In order to sustain the operation of the complex social system that consists of individuals, groups, institutions and the relationships between, Allah gives His instruction through the Prophets that Islamic law, taking Koran and Hadith as the core, should be used to help with coordinating social relationships and the prescription of rights and obligations in the Muslim world, and the law should have its procedures. Therefore, Allah is the sole law-giver, and the Islamic law, as prescriptions given by God about the rights and obligations of individual and society, should be practiced by each person and society.

Islamic law, as institutional safeguard for human rights in the Muslim world, reveals that

163 Luo Yuzhong, Wan Qigang, *Human Rights and Rule of Law*, Peking University Press, 2001, P11

164 Fan Guoxiang (translator), *Declaration and Decisions of Islamic Human Rights*, Human Rights, Vol.5, 2002, P51



Islam is much socially engaged. It covers the whole process of life from birth to death, and concerns each aspect of material and spiritual life. In the law, human rights, involving the content and the fulfillment of the rights, are protected. Regarding the content, Islamic law divides human rights into different categories. According to the law, human rights must satisfy the living necessity of each person for the essence of individual human rights is personal interests. The protection of human rights is in reality the safeguard of interests. Fundamental interests include the rights to religion, life, reason, consanguinity and property. Islamic law makes these five interests as the primary objectives in legislation, trying to protect the existence of any individual person. Other interests, including freedoms of thought, speech, work, reputation and education, are applied to ensure easy and comfortable living, and help with solving the difficulties of human being. Interests on the third level refer to the right to virtue, which is personal pursuit and perfection of life, moral character and belief. With respect to the fulfillment, Islamic law sets up its procedural protections, which are mainly reflected by the legal system called Qadi system, that is, a Qadi or a Mufti is established to handle the civil, commercial, and criminal litigations of Muslim people. Qadi system is used to protect legal rights and interests, stop illegal practices, conquer dictatorship, and maintain social justice and order. Protections from the perspectives of the content and procedure of the law are corresponding to and dependent on each other. Protection of the right content determines the legal protection of procedures, and the latter is also the approach to the self-fulfillment of the former.

The relationship of individual rights and social rights in Islamic law

Exploration of the issue on human rights will always concern the relationship between individual rights and social rights. Islamic law, for the purpose of integrating personal rights with social rights, enables close relationship between the two in society. Islam regards that the establishment of a society is based on one belief and moral system. It is against the social system that is bonded by clan, blood and class, and demands that the relation between social members be founded on brotherhood and mutual respect.

Islamic law is always trying to seek balance between personal and social rights by affirming and encouraging some of the rights such as rights to life, honor, by providing favorable conditions to some of the rights such as rights of children and the right to work, and by prohibiting some of the rights such as the right to be held in slavery or servitude. When contradictions arise between personal and social rights, Islamic law will orient towards public social rights, ensuring that social rights be higher than personal rights, and will require personal rights be included in the scope of social rights at the same time. In the view point of Muslims, the exertion of personal right should not infringe upon others' rights, or harm the interest of the community. "If one does not fulfill his obligations to Allah, it is possible that he will be forgiven, but if he does not fulfill his obligations to others, he will not be forgiven."¹⁶⁵ Individual freedom is integrated with social restriction. "Unrestricted personal freedom cannot but curtail others' freedom."¹⁶⁶ In the Muslim community of brotherhood, all are interdependent on and complement each other, and each individual bears

165 Sheikh Showkat Hussain, *Islam and Human Rights*, Budaya Ilmu Sdn Bhd, 1991, P10.

166 Sheikh Showkat Hussain, *Islam and Human Rights*, Budaya Ilmu Sdn Bhd, 1991, P45.



inevitable responsibilities to others and society. He must fulfill his obligations in a mutually beneficial way to reflect the spirit that “All Muslims are brothers,” and ultimately achieve the implementation of Islamic law.

Human rights from the perspective of cultural diversity

In modern history, it was Dante Alighieri, the great poet and thinker of Italy, who first presented the concept of human rights. According to him, the purpose of the whole mankind is to establish a universal world government to realize the happiness of all-under-heaven, and the foundation for his world empire is human rights.¹⁶⁷ More than three hundred years ago, Hugo Grotius and Thomas Hobbes began to view human rights as philosophical concepts. And it has been more than two hundred years since human rights were written into the US *Declaration of Independence* and the French *Declaration of the Rights of Man and of the Citizen*. As time goes by, human rights evolve from theoretical terms to ethical principles observed all around the world, from an ideology of an individual nation to an international consensus, and then to an enormous system of rights.

Modern views on human rights came into being after four revolutions. First, in the bourgeois revolution against monarchy and hierarchy, the emerging stage of human rights, are engendered the concepts of political right and freedom, which turned to be the foundation for contemporary philosophies on human rights. Next, during the proletarian revolution against bourgeois the contents of individual freedom and political rights were enriched, and the economic, social and cultural rights that can be enjoyed by working man were also added. The third reform mainly involves such collective human rights as the rights to development and communication, which were newly added during the struggle of the Third World against colonialism and imperialism. The fourth revolution reflects concerns about resources, environment and culture in the era of globalization. The evolvement of human rights concepts demonstrates the battle and compromise between Western-oriented perspectives of human rights and human rights from the angle of cultural diversity.

Islamic views on human rights, based on religious beliefs, have special characteristics, and also demonstrate the diversity of human rights all around the world. According to Islamic human rights, Allah, the source of human society, is the Creator, Possessor, and Protector of mankind. Allah creates mankind, confers rights on human beings and selects his subjects. Therefore, human rights belong to God, and are given by God. Only under guidance from his Lord will a Muslim be able to implement and enjoy his rights to the greatest extent. Accordingly, the practice of human rights is the expression and demonstration of belief in Islam, is the obedience and observance of the law prescribed by Allah, and is more of the benevolence and virtue of realizing the value of the self. Islamic human rights, safeguarding no violation to individual rights, highlights that self-values agree with social values, giving a profound revelation of the philosophy of equality and justice. The relationship between Allah and mankind establishes unshirkable obligations of human being to God, and also the obligatory relationship between people.

Since the moment of his birth, or his conversion into Islam, a Muslim is subject to

¹⁶⁷ Dante, *On World Government*, Translated by Zhu Hong, Beijing: Commercial Press, p. 76



obligations. Concepts such as “obligations must stand prior to rights, and rights should be enjoyed by all” are deep-rooted in the life and minds of the people, which have been the great contribution to the development of human rights concepts of mankind by the Islamic community. Although “commercial economy in the capitalist society lays the economic foundation for the generation of modern human rights, and capitalist democracy supplies the political basis for the generation of human rights, and the Bourgeois Revolution in the 18th century serves as the midwife of modern human rights,”¹⁶⁸ the *Universal Declaration of Human Rights* adopted in 1948 by the UN General Assembly and the later *United Nations Human Rights Treaty* began to extend human rights as a western concept to a general goal pursued by all the nations in the world. During the course of the world’s working people’s dedicating themselves to the pursuit of self interests and rights, and during the course of non-western countries’, including the Muslim world, striving for national liberation, political independence, economic development, civilization renaissance and blending into the international community, they have been doing their best in observing their present human rights conceptions, amending and improving human rights concepts and the system related.

Not being an abstract and changeless concept, human rights has developed and varied and will develop and vary with time and space. In this process, we must advance respect and tolerance for each different culture, admit equality between cultures, and try to absorb and borrow special human rights concepts from each culture. Dialogue and communication between cultures should be oriented towards the principle of “harmony with diversity” so as to reach consensus. Only in this way can we build our world into a big harmonious family, promoting the popularization of human rights concepts and improving human rights conditions at the same time.

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DIVERSITY OF CIVILIZATIONS AND HUMAN RIGHTS DEVELOPMENT

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Introduction

Ladies and gentlemen:

I will like to start by acknowledging the Herculean task of presenting in 10 minutes a paper as philosophical, as vast and at the same time as interesting as the one for which I stand here before you. One would have thought that to make a scholarly impact on the subject of my

168 Li Buyun, *The Way to the Rule of Law*, Changsha: Hunan People’s Publishing House, p. 419



presentation, which is “Diversity of Civilizations and Human Rights Development,” and I would have been allowed at least a full hour. In the circumstance however, I would proceed to give a summary of my thoughts on this rich subject matter. I will not forget however to thank the China Society for Human Rights Studies for inviting me to take part in this stimulating forum as a resource person. I am indeed delighted to be here.

My understanding of this paper is that I am required to discuss how diversity of civilizations can affect the development of human rights. If this is correct, it is imperative to discuss my understanding of diversity, civilization and human rights and then marry them together by running a line that bonds them in a way that discharges the obligation with which the paper saddles me.

Diversity

For our purpose, diversity can be taken to mean all the ways in which people differ, and that includes the innate and acquired characteristics that differentiate people. By innate characteristics we mean such things as gender, age, race, ethnic orientation, sexual orientation as well as mental and physical abilities and disabilities et cetera. By acquired characteristics we mean such things as geographic location of each individual and each country, income levels and disparities, religious belongingness, levels and quality of education, work experience, language skills and so on. Diversity is thus a commitment to recognizing and appreciating the variety of characteristics that make individuals, communities, nations and civilizations unique; it is about learning to include different perspectives and processes in order to avoid narrow treatment of issues that impact on a wider group of people in an organization, a community, a country and in our world. Diversity of civilizations would thus mean differences in civilizations which impact on human development and, for our purpose, the development of human rights. Diversity of civilizations underscores the existence of many civilizations in our world and not just one. Thus, in order to develop the content of world human rights, the diversity of civilizations in our world must be consulted and integrated.

Civilization

It can no longer be argued that there is no definition of civilization that binds all cultures because a civilization is a culture and since cultures differ, even within cultures, agreement on what constitutes the criteria by which a universal idea of civilization might be defined is impossible. Consequently a universal definition of the subject is presently elusive. A major mistake, however, has been the tendency to saturate our thoughts with Western dominated view of civilization as a complex urban culture with the associated industrialization, modern architectures as well as a directional refinement in certain ways of behavior that altogether emphasize Western lifestyle. This mistake goes further to entrench the perception of societal behavioral patterns that deviate from Western ways of doing things, defined by the U.S and Britain, as barbaric thus creating the impression that certain civilization is superior to the other.

The word “civilization” has been explained by some dictionaries as simple meaning: to come out of a state of barbarism by refinement and polishing of behavior. But civilization is more than that. Will Durant sees it as a social order promoting cultural creation. Durant also identified four elements that constitute civilization as: economic provision, political organization, moral traditions and the pursuit of knowledge and the arts. He went further to note that civilization begins where



chaos and insecurity end because when fear is overcome, curiosity and constructiveness are free, and man passes by natural impulse towards the understanding and embellishment of life.

Durant's notion of civilization, if accepted, gravely indicts the West of uncivilized behaviors and by implication violation of the rights of people even in far away lands. If it is true that civilization starts where chaos and insecurity end, what can we say of the West that have awed the world with the insecurity of war and the ever present trepidation, chaos, humanitarian disasters and the depreciation of the worth of man associated with this insecurity? The reality that has become evident from the modern day behavior of the U.S and Great Britain is that a nation may be civilized in its own way and perception but considered uncivilized by another. This fact is buttressed by Richard Bulliet who notes that "one of the irreducible barriers to taking Western thinking about civilization as a benchmark is that the thinkers always classify themselves and their compatriots as civilized but carry the burden of proving that they are truly civilized." There are probably as many civilizations in the world as there are nations, and even within nations some unique civilizations exist and each of them may have evolved patterns of dealing with issues that must be respected. And since civilization is an expression of culture in diverse forms (see Sadashivan Nair), no culture can be said to be superior to another, hence no civilization is superior to the other. It thus follows that diversity of world civilizations/cultures should be considered, and if possible, reflected in the pursuit and development of universal human rights agenda.

Human rights

Human rights refer to "the basic rights and freedoms to which all humans are entitled." These include civil and political rights, such as the right to life and liberty, freedom of expression, and equality before the law; and social, cultural and economic rights, including the right to work, and the right to freedom. Article 1 of the United Nations Universal Declaration of Human Rights anchors the backbone of human rights on the fact that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The basic foundations of the religions of man also anchor human rights on the religious injunction that we should do to others as we would be done by. These translate to the requirements that we should treat our neighbors, strangers and one another well; we should not kill or harm another person; we should allow the hungry the right to meet their need for food by eating from us; the oppressed the right to an unencumbered life; the slave the right to freedom, et cetera. However, notwithstanding the overriding importance of human rights in the maintenance of qualitative life and sustenance of our achievements and genes on this planet, most people, especially some of those in government remember the values of human rights development and necessity for its preachment as a universal code of behavior only when they suffer a deprivation of such rights. The truth thus remains that it is the righteous duty of every man and woman, no matter which side of the divide you may be today, to strive and contribute to the development of the content and practice of national and universal human rights.

How diversity of civilizations can shape human rights development

Human rights are not only about protecting the right of citizens of the world by their governments and/or the right of one individual by another; they are also about preserving our



genes by creating an orderly and respectful society. Unfortunately, the idea of human rights enunciated and practiced by the West has tended to recreate our world into a time bomb in which no one may be safe in time to come. This specie of human rights has tended to make children too bold against their parents; rogues too strong against their communities; arms dealers too wicked to society by selling arms to the two sides of a conflict; and society so helpless against lawbreakers and evildoers who go scot-free and become role models in the same society. We have seen children slap, bully, insult, bruise, curse, and ruin their parents all because we have a Western-style human rights system that considers some culturally approved actions to raise morally upright children a violation of their rights. But I am yet to see from the same Western style human rights reasonable efforts to protect parents from abuse of their rights and emotions by their own children.

African civilization embodies a system of raising a moral society. Spare the rod and spoil the child is an accepted part of this civilization. Unfortunately, the encroachment of the American and British style civilization weakened our civilization to the extent that if one tries to instill some discipline in his child by use of the cane, he is accused of child abuse and human rights violation. The consequence is that teachers are even today taken to court by parents who accuse such teachers of child abuse and violation of human rights. Then what do we have in our society today: increase in cases of drug addiction, armed robbery, rape, examination fraud, the get-rich-quick syndrome and severe behavioral misalignments that are increasingly dislocating our social, economic, political and religious order and predicting the unlikelihood that our society will not self-destruct. How do we survive? The respect for human rights should therefore consider differences in national cultures or other civilizations. History will be harsh on us if we bequeath to the future a society that is incapable of reinventing itself and sustaining our gene, morality and the continuity of life on this planet, all because we abandoned the values that sustained our society and embraced invading cultures. The structures of discipline and love to which family socialization is accustomed in most civilizations must be reinvented to come to our rescue in raising children that care for the right of others. It is these children that will repopulate our world with their minds open and susceptible to developing higher human rights ideals. This also translates to the fact that there must be consultation among civilizations.

No one can again refute the fact that the hope and future of our world lies in the development, growth, preservation and pursuit of well-articulated and purposeful culture of human rights. But I don't subscribe to multiplying evils in society through those whose inability to discipline themselves has made them cling to the mantra of human rights to avoid sanctions. I subscribe to allowing civilizations to use their unique method of preserving their genes to correct what is wrong in their society. Consequently, in the development of universal human rights agenda, practice and law there is a need to consider the unique values of other civilizations through which the sanity of society has been maintained through the ages and the dignity of man preserved. Terrorism has today dealt devastating blows on humanity mainly because of the inability of Western civilization to consult other civilizations in the framing of solutions to issues confronting the world. The apparent anger that arises from having to be dictated to has brought about a thickening of plots against the West and has made life on our planet more insecure than ever before. The flagrant abuse of human rights



that have become widespread from terrorist attacks, torture chambers, rapes, abductions and so many other crimes remain evidences of what can happen when different civilizations are forced to see only through the pigeonhole of Western Civilization. In a way therefore, Western behavior has encouraged the gross violation of the very human rights they preach. The end to these abuses can essentially come about with dialogues among and between civilizations; and through tolerance and patience, cooperation, education and communication.

By borrowing from the diverse civilizations of the world rather than forcing the world to adopt only the Western-style philosophy of human rights, we may be heading for better ways of developing the content of world human rights and preserving our world and its morality. What we have today is a practice whereby we can no longer pinpoint where what some call human rights stops and a morally sensible and workable society begins. Therefore, as the world appears to set to approach the apocalypse through the behavior of its members, let us prevent its complete destruction by being diverse in the enrichment of the content of universal human rights principles and practices through convocation of civilizations to make workable input to it.

Thank you for listening.

(The author is Former Deputy President of the Senate of the Federal Republic of Nigeria.)

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ON THE RELATIONSHIP BETWEEN CULTURAL RIGHTS AND A HARMONIOUS SOCIETY

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At the 60th anniversary of the promulgation of the Universal Declaration of Human Rights, we may see that in spite of some differences in the understanding of the philosophical basis and criterion of human rights between the countries in the East and the West, every country has



actively specified and protected human rights according to its actual economy, politics and culture. However, as compared with citizens' political, economic and social rights, cultural rights have been universally left out in the cold; hence a scholar once pointed out: "It seems that it was an unnecessary category."¹⁶⁹ In accordance with Article 1 (5) of the Vienna Declaration and Program of Action: "All human rights are universal, indivisible, interdependent and interrelated," and the role of cultural rights, an important human right, in the social development is not inferior to any other human rights. This thesis will introduce the important significance of cultural rights to the social development through an analysis of the concept and dimensionality of cultural rights, and the relationship between cultural rights and a harmonious society.

I. Nature of cultural rights

1. Culture

The study of cultural rights cannot be separated from the answer of a question: "What is culture?" The scholars who are engaged in the research on cultural rights often have different understanding of the definition of culture, and express great differences on the concept of cultural rights. The definition of culture is very complicated. According to the summary by Professor R. Stavenhagen, culture contains three basic meanings: (1) culture as capital, i.e., taking culture as all the material heritages of whole mankind or specific groups; (2) culture as creativity, i.e., taking culture as the course of artistic and scientific creation; and (3) culture as the whole life style, i.e., taking culture as a total of all material and spiritual activities of a social group which differentiates from other types of groups.¹⁷⁰

As this thesis focuses on the study of the relationship between cultural rights and social development and the building of a socialist harmonious society, it adopts the cultural concept expounded by the UNESCO Universal Declaration on Cultural Diversity in 2001, i.e., "Culture is the summation of different characteristics of a society or a social group in spirit and materials, intelligence and feeling; and except for literature and art, culture also contains the life style, the mode of coexistence, the system of values, and traditions and beliefs." This concept basically contains the meanings of culture in the three above-mentioned aspects, which are conducive to the comprehensive research on the nature and contents of cultural rights.

2. Cultural characteristics and rights of human beings

Culture is one of the human social characteristics. "We are the creators of culture, and we are also created by culture because of the reaction of culture."¹⁷¹ The human cultural characteristics mainly reflect that individuals and groups must exist in culture, and obtain their cultural status and

169 "Cultural Rights as the Individual Human Right" written by A. Edwin, which is included in *A Course in the Economy, Society and Cultural Rights* with A. Edwin [Norway] as chief editor (the second revised edition), translated by the China Society for Human Rights, published by the Sichuan People's Press of the Sichuan Publishing Group, 2004 edition, p. 235.

170 Please refer to "Cultural Rights: Visual Angle of Social Science," which is included in *A Course on the Economy, Society and Cultural Rights* with A. Edwin [Norway] as chief editor (the second revised edition), translated by the China Society for Human Rights, published by the Sichuan People's Press of the Sichuan Publishing Group, 2004 edition, pp. 71-73.

171 *Philosophical Anthropology* written by M. Landmann [Germany], translated by Yan Jia, and published by the Guizhou People's Press, 2006 edition, p. 206.



identity. This human cultural characteristic is the fundamental difference between human beings and other living things, between individuals and others, and between groups. "Every human individual who wants to be a human individual must become a participant of a super-individual cultural intermediate."¹⁷²

Hence, no matter human beings are regarded as individuals or groups, their cultural characteristics have decided that human beings must have the human qualification in the cultural significance, and should enjoy the basic interests in the cultural aspect. In view of history, one important aspect of the comprehensive development of human beings is to realize the development of the human cultural characteristics, and form an interactive relationship between the cultural development and the economic, social and political development. Of course, in the modern society, this human cultural characteristic should truly refer to the human dignity and value. Accordingly, promoting the comprehensive development of the cultural characteristics must conform to the principle of fairness and justice, and to the basic moral requirements. The cultural characteristics of human beings involve the basic interests of the individual development, identity of groups and recognition of society; and the government has the obligations to respect, protect and realize these basic interests.

Therefore, this thesis maintains that cultural rights refer to the cultural characteristics of the groups maintained and developed by human beings, to which they belong, the upright interest requirements in morality and law, and the fundamental way for the protection of the cultural diversity. Under the background of the modern society, protecting the human and social development is of special important significance.

3. Cultural rights in the international documents on human rights

As a basic component part of human rights, cultural rights have been mentioned in various international documents on human rights. In view of the current situation, the international legal documents with legitimate effects do not sum up all the contents of cultural rights.

(1) Definition of the basic contents of cultural rights

Article 22 of the *Universal Declaration of Human Rights* specifies: "Everyone is entitled to the realization of the economic, social and cultural rights," which affirms that cultural rights are one of human rights enjoyed by individuals. Article 27 refers to the concrete contents of cultural rights: "(1) Everyone has the right freely to participate in cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

The provisions prescribed in Article 25 of the *International Covenant on Economic, Social and Cultural Rights* promulgated in 1966, which are basically similar to the provisions prescribed in Article 27 of the *Universal Declaration of Human Rights*, clarifies through the legal binding force to all the signatory states to the covenant for the first time that except for the right to

¹⁷² *Philosophical Anthropology* written by M. Landmann [Germany], translated by Yan Jia, and published by the Guizhou People's Press, 2006 edition, p. 208.



education,¹⁷³ cultural rights also include the right to the participation in the cultural life, and the welfare right to the scientific and technological progress; and that creators shall enjoy the right to the moral and material interests resulting from production. These have also provided fairly clear standards and basis for the basic contents of cultural rights to be enjoyed by special groups in the future, such as women, children, old people and the disabled.

(2) Expansion of cultural rights

Various cultural rights as prescribed in the *International Covenant on Economic, Social and Cultural Rights*, and the *Universal Declaration of Human Rights* are individual cultural rights, which focus on the individual participation in the cultural life, acquisition of cultural interests and relevant aspects. But as an interest requirement for human cultural characteristics, cultural rights must be a human-right form integrating individuality and collectivity. As a matter of fact, this tendency appeared in the *International Covenant on Civil and Political Rights* promulgated in 1966. In spite that the main aim of this covenant does not specify the cultural rights, Article 27 points out clearly: “In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” Hence, it specifies collective cultural rights in terms of the international human covenants for the first time.

When the “three generations of human rights” - “development, peace and environment rights” - raised by the development countries in accordance with the needs of the countries and people have been constantly recognized by the international community, and combined with the rights to “subsistence, self-determination and a small number of people” with the collective characteristics,¹⁷⁴ which have formed a huge impact on the human-right viewpoint on the basis of individualism and western civilization from socialism, collectivism, independence of national sovereignty and other aspects, the significance of the cultural rights collectivity to the guarantee of the cultural characteristics and to the individual progress is attracting more and more attention.¹⁷⁵

173 The right to education is commonly regarded as an important component part of cultural rights, but this thesis will not discuss the issue concerning the right to education. Please refer to “The Right to Education” written by M. Novak, translated by Li Xiaojun. This article is included in *A Course on the Economy, Society and Cultural Rights*, with A. Edwin [Norway] as chief editor (the second revised edition), translated by the China Society for Human Rights, published by the Sichuan People’s Press of the Sichuan Publishing Group, 2004, pp. 199-220.

174 The “collective right” is not the synonym of the “three generations of human rights.” Please refer to the “Development Right” written by A. Rosas, and translated by Gu Shengkai for the relationship between these two terms. This article is included in *A Course on the Economy, Society and Cultural Rights*, with A. Edwin [Norway] as chief editor (the second revised edition), translated by the China Society for Human Rights, and published by the Sichuan People’s Press of the Sichuan Publishing Group, 2004, pp. 71-73.

175 The international documents related to the development of cultural rights are mainly declarations, rather than the covenants, pacts and treaties with the legal binding force, such as the Declaration on the Right to Development (approved at the UN General Assembly in 1986), the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted at the UN General Assembly in 1992), and the Universal Declaration on Cultural Diversity (approved by the UNESCO in 2001).



II. Dimensionalities of cultural rights

In accordance with the nature that cultural rights are the basic right to the safeguard of human cultural characteristics, and the reality that the international documents on human rights have kept expanding cultural rights, this thesis maintains that cultural rights are the needs adapting to the human cultural nature, i.e., the basic rights to the needs of individual development, group identity and social acknowledgement. Therefore, cultural rights should include the three dimensionalities that contact with and differentiate from each other.

1. Involving the right to cultural development

This right is mainly embodied by the right of the individual subject (including the collective subject under certain conditions) to conduct cultural creation and obtain cultural development benefits through participating in cultural life. It is the basis for bringing into full play the cultural rights; because the core of culture is the full play of the human creativity. So long as everyone enjoys the right to participate in the cultural life, conduct cultural creation and obtain cultural benefits, and throws oneself into the constant circulation of cultural production and reproduction, the human cultural development as a whole will be possible. It is concretely embodied by the individual rights to participate in cultural life, conduct cultural creation, obtain cultural benefits, get cultural development income, enjoy cultural heritages, and so on.

2. Involving the right to cultural identity

It is a cultural status formed by an individual in a group or a collective because of influence of the specific culture, and the right to mutual identity with other members in a group or a collective. Cultural identity is not only individual identity, but also group identity. It is an important right reflecting the collective dimensionality of human cultural characteristics. This right is of especially important significance to a small number of groups and original inhabitants, mainly embodied by the right to cultural identity of individuals and groups.

3. Involving the right to cultural recognition

This right is mainly the mutual recognition between individuals and groups with certain cultural statuses, and between ethnic groups and even between countries in the modern society, with the right to develop culture with their own characteristics. This right involves the construction of the multiple civil societies in the contemporary era. In the world today, there are few countries with single culture. The issue involving the recognition of group rights with cultural characteristics between countries, and cultural cooperation between them exists. It is mainly embodied by the right to cultural recognition of groups and countries, and the right to cultural cooperation between groups and countries. It is mainly the cultural rights linked with the self-determination right, development right and peace right, and the right that appeared fairly late in cultural rights.

In the above-mentioned three dimensionalities of the cultural rights, the *International Covenant on Economic, Social and Cultural Rights* mainly specifies the right to cultural development; and the other two rights are included in the *International Covenant on Civil and Political Rights*, and other legal documents, various declarations and resolutions on human rights, and some contents are in the state of moral rights at present.



4. Cultural rights and a socialist harmonious society

On October 27, 1997, China signed the *International Covenant on Economic, Social and Cultural Rights*, which was approved by the Standing Committee of the Ninth National People's Congress on February 28, 2001. The Chinese Government submitted the Performance Report of this Covenant to the United Nations for the first time on June 27, 2003. Now the protection of cultural rights has entered a new stage in China. But the above analysis shows that cultural rights are embodied not only by the provisions as prescribed in the *International Covenant on Economic, Social and Cultural Rights*, but also includes three-dimensionality rights. This thesis maintains that the three-dimensionality rights is of great importance to the building of a socialist harmonious society in China, and the harmonious society has laid a solid foundation for the realization of cultural rights in an all-round way.

5. Cultural rights have promoted the founding of a socialist harmonious society

Today when human beings have entered the globalization, safeguarding the cultural rights of citizens and defending a country's cultural sovereignty in front of the powerful expansion and corrosion of the western culture and civilization is not only an important task of a country, but also requires the common efforts of the whole world. During the building of a socialist harmonious society in China, protecting the cultural rights is of great importance.

On the one hand, the full realization of the individual cultural development can greatly stimulate the people's cultural creation vitality, resulting in the creation of more spiritual and cultural wealth for the socialist society, and the better acceleration of the vigorous prosperity and development of the socialist culture. Meanwhile, if we fully safeguard the cultural identity and recognition of individuals, groups and nations, continue to develop and perfect the ethnic regional autonomy system, carry forward the excellent cultural traditions of the Chinese nation, protect the excellent cultural heritages of China, and steadily establish the harmonious relationship between individuals with different cultural characteristics, groups and ethnic groups with different cultural characteristics, the country will maintain a harmonious, tolerant, stable and favorable internal environment.

On the other hand, if all the countries admit people's cultural rights, the cultural sovereignty of countries and the diversity of the world culture according to the principles of the ordinary international laws, the principle of human rights and the relevant regulations on cultural rights, the international community can truly conduct cultural exchanges and make civilized dialogues, which will be conducive for the countries to get along equally, and gradually reach the world harmony. It will undoubtedly create a favorable outside environment for the founding of a socialist harmonious society in China.

6. The socialist harmonious society has guaranteed the realization of cultural rights

(1) The building of harmonious culture and the realization of cultural rights

The most important requirement for realizing cultural rights is the containment and reference of various excellent cultures and their achievements. The socialist harmonious culture stresses the intergrowth and harmony among human beings, society and nature, contains the concepts for coordinated development and balanced progress, and reflects the profound understanding of the



mutual mergence and intergrowth in a concentrated way while various kinds of cultures maintain their own characteristics. Therefore, the building of harmonious culture can help people realize that the diverse culture under the guidance of the socialist core value system is the relationship between mutual competition and promotion, and different cultural right subjects have the same important position and role in the development of diverse culture, then laying a favorable ideological basis for the full realization of cultural rights.

(2) Encouraging the realization of cultural innovations and cultural rights

An important condition for the people to enjoy cultural rights is to constantly make cultural innovations, keep guiding cultural producers to create a great amount of excellent cultural and artistic products that conform to the needs of the social development, and reflect the national spirit, the spirit of the era and the requirements for the diversity of culture. The Report to the 17th National Congress of the Communist Party of China makes a special explanation: “To promote cultural innovations and strengthen the vitality for the cultural development,” and then “bring into full play the people’s main role in the cultural construction, and mobilize the enthusiasm of the broad masses of cultural workers for the cultural construction.” In this way, we can constantly promote the vigorous development and prosperity of the cultural industry, and widen the larger space for the people to realize cultural rights.

(3) The building of cultural infrastructure facilities and the realization of cultural rights

During the formation of a harmonious society, the construction of cultural infrastructural facilities has been constantly strengthened; the network of the public cultural facilities has been perfected step by step; the public cultural service ability has been upgraded in an all-round way; and the cultural life in cities has continually made progress while that in urban areas is becoming prosperous with each passing day.¹⁷⁶ These cultural construction measures have provided favorable conditions for the people to enjoy the rights to the participation in cultural life, and to the full enjoyment of cultural rights.

(4) Promoting the realization of cultural legislation and cultural rights

The important content of building a harmonious society in China is to spare no effort to conduct cultural legislation, so as to guarantee the people’s cultural rights and promote the cultural development of China. At present, Article 47 of the Constitution of the People’s Republic of China includes the clear provisions on cultural rights: “Citizens of the People’s Republic of China have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The state encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work.” In addition, in the relevant legal system on the ethnic regional autonomy, there are regulations on the development of the ethnic autonomous regions and the protection of their

¹⁷⁶ Please refer to the article “Vigorous Development and Prosperity Are the Unremitting Pursuit-the Cultural Construction Achievements Since the 16th National Congress of the Communist Party of China” by Sun Jiazheng, which was published on the 18th issue of *Qiushi* magazine in 2007.



cultures.¹⁷⁷ But these are far from enough for the realization of cultural rights and the promotion of cultural development, and they do not match the *International Covenant on Economic, Social and Cultural Rights* China is performing. During the construction of a harmonious society in China, China should work out laws and regulations on various issues, such as cultural heritages, system, industry, market and environment, and public cultural service, in addition to various policies on the cultural development to be promulgated by the Chinese government.

Now, cultural rights as a human right that reflects human cultural characteristics have attracted universal attention by all the countries in the world. In spite that China has made some achievements in safeguarding the people's cultural rights, how to make people further realize the people's cultural rights and how to further promote cultural cooperation between all the countries in the world during the building of a socialist harmonious society are important issues that require long-term attention in theory and in practice as well; because it involves not only the people's cultural rights, but also the cultural sovereignty of a country.

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CULTURAL DIVERSITY AND DEVELOPMENT OF HUMAN RIGHTS

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Historical introduction

Human Rights were manifested in line with various human civilizations and as an objective outcome of Justice-seeking movements. At various historical eras, intellectuals, scholars' prophets and rulers had extremely effective role in institutionalization of human rights concepts. Historically, there seemed to be the defense of rights of human from three thousand years ago, based on the exalted teachings of Justice-seeking movements. The Analects of Confucius in the Eastern Asia, and the epigraph (inscription) of Great Cyrus in Iran and western Asia during the conquest of Babel, and the Asian values at various eras in the Indian subcontinent, could be considered as the memorials of human rights history. From a historic perspective, what was found in these writings is considered as the precious heir of human society which is linked with and

¹⁷⁷ The regulations on the protection of the ethnic minority culture in China are: The Regulation on the Protection of the Ethnic and Folk Traditional Culture in Yunnan Province, the Regulations on the Protection of the Ethnic and Folk Traditional Culture in Fujian Province, and the Regulations on the Protection of the Ethnic and Folk Traditional Culture in Guizhou Province, which are far from satisfying the requirements for the protection of China's multi-ethnic traditional culture.



depended on other parts.

Undoubtedly, these huge thoughtful and historic achievements belong to all human beings and their use could help a better understanding of human rights concepts.

In other words, this precious heritage has international values for two reasons.

First and with regard to human rights concepts, the values posed in this viewpoint have very deep, wide reliable dimensions. Second, these ideas at their special time and place setting have been geographically dominant in various parts of the world. In fact, these concepts were not only considered as a theory, but also have been practiced in societies. Therefore through a new approach, it could be concluded that intellectuals, rulers and prophets had the seeking of justice and protecting of the rights and dignity of human beings on the top of their activities. Confucius states: "Whenever the highest reality triumphs the life of human society, the Earth belongs to the fabric of society. The people choose among themselves the most knowledgeable diligent men to establish peace, unity, welfare and solidarity in the society. Then all individuals treat each other honestly and amicably like family members and give a helping hand to each other. This is the real human society."¹⁷⁸

These were stated several centuries ago (B.C.) but we find the fundamentals of human rights in those words of Confucius. On the other part, many of the historians and intellectuals believe that the first world declaration on human rights was issued by Cyrus the Great. He toppled down the Mad's dynasty and established a government based on the human principles. According to Aristotle, "Cyrus has released his country from servitude."¹⁷⁹

It is interesting to know that according to the documents and evidences, Holy Koran refers to Cyrus as *zulharnein*. He was a man of monotheism and a king of justice who was kind to inferiors. His manner was based on kindness, benevolence, and tolerance while he was a man of politics towards the tyrants and enemies.¹⁸⁰ Cyrus has always defeated enemy tribes, and forgiven the offenders. He has always paid tribute to the high figures of every tribe and treated their inferiors with compassion and has politically taken measures for the disloyal and corrupt persons. In 538 B.C, when the news of the tyranny of Babel king became worldwide, Cyrus commanded a military group to Babel. When he conquered Babel, he issued an order by which forty thousand people were released from servitude and were returned to their homelands. With regard to the exalted rights of human, the epigraph of Cyrus is of paramount importance and is considered as the first charter of freedom and human rights in the legal forums. In a part of his historical epigraph, Cyrus states: "Every day I pray the Almighty Allah. My numerous armies moved in Babel city without any nuisance. I did not let any one to make Babel land frightened. I considered their needs and their chapels and made efforts to improve their lives. I took away the undesirable yoke of Babel civilians. I renovated their destructed homes and put an end to their

178 The original analects: saying of Confucius and his successors, Colombia university press 1998 - Simon Leys the Analects of Confucius

179 Politics by Aristotle

180 Great. Scholar. Tabatabaie Almizan, Volume 26 (Persian version Translation of Koran)



grieves...” These were two examples of the great history of human civilization based on the sense of justice and protection of human rights that were referred to. Meanwhile, these fundamentals have been influential at their special time and place and should be pondered about with respect to geographical expansion.¹⁸¹

A critic on cultural relativity and international human rights

A western intellectual in the field of cultural relativity and international human rights, Jack Donnly, has dealt with a kind of understanding of these two subjects and considered the classification of weak and strong, cultural relativity, extremist and non-extremist globalization as an approach to get rid of the challenge.

However, there is a primary discussion: First, the elements of time and place have significant effects on acculturating and globalizing human rights. For example globalization of human rights is based on the Universal Declaration of Human Rights and the relevant covenants. However, a question has not yet been posed that the issuance of the Declaration was principally established on the disputes of the West camp and the disputes were prompted by the main problems that hindered the establishment of peace and security in the West.

As a final point, Donnly believes that human rights in our age is worldly in essence and should only be adjusted to some relatively common levels, based on the cultural diversity.¹⁸²

In the book, based on the effectiveness of time factor, another point is stated that we should comply with in our classification: “Development as freedom,” under the title of Islamic tolerance: “Among the strong commentators and defenders of pluralism negligence in India, King Akbar should be mentioned; the great Emperor of Mogul, (whose reign was between 1556-1605). We face a powerful king who certified various forms of social religious behavior and human rights, including the freedom of worship and religious practice that was impossible in many parts of Europe at his concurrent era. For example, an interesting event happened in 1591 in divergent Delhi which resembles what had happened in early third millennium. King Akbar issued quite a few different orders at that historical era which were based on religious negligence.

The description of negligence is as follows: No one shall interfere in others’ religion and every body is authorized to convert into another religion as he/she wishes. Of course this negligence was not strong in other social fields, but at one level negligence and equality were combined with non-negligence and inequality at other level. However the area of public negligence on issues such as faith, belief, and religious practice is utterly remarkable. It should be borne in mind that these viewpoints were proposed by King Akbar at a time that faith inspection blossomed fully in Europe. Therefore it could be realized how the theory of relativity and cultural diversity, which is based on the principles of time and place, is steering in its developmental path.¹⁸³

181 This is belong to Great Cyrus historical epigraph which is know, the original one, keeping in British Museum also in Islamic thought, the Great Cyrus is a man who in the Holy Koran notice as a just, truthfulness, reformer person - Abulkalam Azad: Great Cyrus

182 Jack Donnly: Universal Human Rights in Theory and practice

183 Akbar, the Great Mogul (Oxford, Claredon Press) translation from vincent. A. Smith



Justice as the highest tool of applying human rights

The concept of justice is specially respected by all human tribes. In a way, globalization of justice concept is acceptable by all people, although the concept may be misinterpreted. Justice shall be applied at various grounds, at any rate. However, in the western culture more attention is paid to justice in terms of politics rather than other factors. One of the most famous intellectuals of the West, John Rawls, has introduced new interpretations of this concept which is, to a great extent, near to reality. The motive behind his interpretations lies in the fact that he considers depovertization as the utmost result of justice. With regard to class distinction of the public, he even justifies it as acceptable if the wealth distinction is at the disposal of the poorest layers of society.¹⁸⁴ Consequently, today a large gap exists between the profit-oriented theories and the social and commercial arrangements. Furthermore, in many large countries of the world, the most significant concern over human rights is to fight against poverty and prevent its development in various social, natural, and cultural fields. The topic of trade and human rights shows the consideration of human rights principles in these arrangements.

One thing should be noted: what is more important than the very concept of justice is its management in society, especially in political and economical fields as well as judicial issues, to hinder the development of corruption, injustice and oppression.

Having in mind the justice and equality criteria, we should consider that different countries and various nations have diverse cultures, religions and traditions. Without considering the priorities and norms, diversity and relativity of these concepts would make the application a problematic one.

In many insurances, these sacred concepts would turn into pressure and an invasion tool. This shows the importance of the concept of diversity and relativity. Meanwhile, what prompts us in the current world to be sensitive towards the human rights issues and human dignity is the real degree of protecting these rights by those countries that consider themselves as the defenders and protectors of these rights. It is of vital importance to mention that the formulation of the Universal Declaration of Human Rights and the relevant covenants happened after break out of the World War II and the destructive fighting of the western countries. In fact, the new legacy of human rights was born through the battle of western countries and was a plaster on the old wounds of human beings, while these concepts could draw the attentions of other nations and states due to its prevalence, we should be convinced that these achievements are not the last ones and more than any other time the human society is thirsty for justice, peace, and security, and it needs the human rights concepts to institutionalize the intrinsic dignity of humans and justice and to progress remarkably in fighting against poverty.

We reach to a conclusion that in the existing turbulent world the root of resolving all problems is not war or occupation. We may consider that during the past fifty years, after the Second World War, the signs and effects of previous world wars provocations are evident in all regional wars and clashes. Unfortunately, many of these struggles, wars and bleedings have

¹⁸⁴ John Rawls, *Justice as fairness*, and John Rawls, *Theory of Justice*



occurred in the name of human rights, democracy and freedom. The violation of human rights and deprivation of Middle Eastern people, in particular the Iraqis and the Palestinians, from their primary rights, and the development of poverty and insecurity with the slogan of human rights, democracy and freedom is a catastrophic overshadowing of the Universal Declaration of Human Rights. The unconditional defense of western power for these disasters and development of insecurity and pandemonium has paved the way for upgrading the viewpoint of cultural diversity and rights based on the real needs and desire of people.

At the international arrangements

The important points of the draft of establishing resolution of the United Nations Human Rights Council demonstrate the significance and general sensitivity to the issue of human rights. Some points of the draft that would serve to a better understanding of the subject are as follows:

The significance of the concept of cultural diversity and comprehensiveness of the human rights

The third paragraph of the introduction of human rights concept refers to “all human rights.” This refers to the comprehensiveness of human rights as a consistent, indivisible and worldly concept. “All human rights” means human rights in all economic, political, civil, social and cultural aspects that should be complied with on the basis of justice and fairness.

In paragraph four of the introduction, even the significance and acceptance of national, regional, historical, cultural and religious characteristics of tribes and nations are emphasized and the states are obliged to protect all human rights and fundamental freedoms of human beings, regardless of their political, economic and cultural systems.

The concepts of development, peace, and human rights are considered as inseparable elements.

Paragraph eight of introduction refers to an important point that is the interrelationship of the concepts of peace, security, development and human rights that are considered as the infrastructure of the system of the United Nations and collective security.

In paragraph twelve of the introduction, the right of development is considered as a new human rights concept in the third millennium among other factors¹⁸⁵.

Preventing the application of dual standards and the politicization of the concept of human rights

Paragraph nine is about the elimination of double standard in human rights and prevention of the politicization of human rights concepts.

There are two more differences between the new Human Rights Council and the previous Commission:

The Human Rights Council has suspended the rights derived from membership due to its wide remarkable violation.

The creation of supervision system is one of the very important factors of the Human Rights Council.

According to this mechanism (Universal Periodic Review), the Council shall be obliged

185 United Nation's Human Rights Council Declaration



to submit the report of the human rights situation in all Member States of the United Nations. The new mechanism shows that the quest of Asian and Islamic civilization views to upgrade the concepts of human rights is through dialog and cooperation rather than division of values to western and nonwestern more than ever before.

Non-Aligned Movement, cultural diversity and development of human rights

Last year the NAM in Tehran had an important meeting about human rights and cultural diversity. This session succeeded in some fields. The first one was the level of participants and the second one was issuing a strong declaration, completed by an action plan which follows:

Cultural Diversity and Human Rights Declaration. This concept was based upon reality and the purposes of United Nations charter, inter alia the right of the people for their self-determination. Logical tolerance is also a fundamental value in the international affairs which should promote the culture of peace and dialogue. The resolution of the General Assembly emphasizes on cultural diversity as a source of mutual enrichment for cultural human life.

Mutual interactions in different cultures should be considered as a human life heritage. This interaction should be based upon antiracism and be used as a way for development and prosperity of all nations.

Fundamental elements in cultural diversity should be used as protector and promoter of social justice and tolerance in the society and all appropriate measures should be taken against the racism and apartheid.

In the concept of cultural diversity, the whole human rights are considered as a live organism, which interacts with international society, based upon justice and equality, and the regional and national specifications. Consequently it is a governmental duty to achieve these purposes on the basis of impartiality.

Explanation of the topics of adopted program of action

1. International commitment to respect for cultural diversity
2. Dialogue for essential cooperation for enrichment of the universality of human rights
3. Upgrading and understanding the results of cultural diversity
4. Role of cultural institutes, media and academics
5. Role of the United Nations and other international organizations

All effective elements on the international scene contribute to building an international order, based upon principle of justice, equality, equity, human dignity and mutual understanding, promoting and protecting the development of cultural diversity.

Universal human rights may consider regional and national interest through a constructive cooperation which is based upon considering cultural, religious and historic backgrounds.

With respect for the cultural values of other nations, the concept of cultural diversity extends the participation of people and enhances a wider exchange of knowledge. In this way, the international community should avoid discrimination or preferential treatment towards other nations and cultures. Development of their concepts is coming through respecting other nations. On the contrary, the domination of values, lifestyle, beliefs from industrial countries to the south and developing countries, with the purpose of destroying their basic values and core



principles of their societies to the detriment and even loss of cultural identities creates a new kind of colonization and unilateralism. Some industrial countries in regional conflict take inhuman measures, like restrictions of the people activities, border problems, immigrant, and destruction of home and vital infrastructure including destroying their cultural heritage. This is the case in the Middle East especially in Palestine, Iraq and Afghanistan.

To develop human rights, international communities should take appropriate measures to bring an end to this tragic and intolerable situation through cooperation and dialogue among and between cultures and civilization, and they could facilitate the protection of tolerance in different cultures.

The best way to foster respect to cultural diversity is education, increasing awareness of different civilizations, especially the concept of human rights. We should prepare and encourage the incorporation to study various cultures and civilizations in educational institutes, to exchange knowledge by measures including learning different languages, history and sociopolitical and economic thought of the countries.

International communities like Human Rights Council of the United Nations should take appropriate measures to protect and promote the concept of cultural diversity and develop human rights.

The enhancement of solidarity between the nations with exact obligation and framework of how to administer justice and equalities upgrades the values of human rights through the nations¹⁸⁶.

Conclusion

There is a special tendency in the international community by which human rights in contemporary world is associated with the concepts of peace, security and development. Fundamental freedoms maintain political stimulant for economic security and create special priorities and values.

We may not enrich the main value of cultural diversity in Asia without considering all components of these concepts¹⁸⁷.

We should authentically correct the present view that "Human Rights" is a totally western idea and cultural diversity and Asian values are based upon central authority and dominance. On the contrary, the western liberal values get the opposite position. Otherwise, in contemporary world the acceptance of diversity and relativity within the civilization and different cultures are extremely considerable¹⁸⁸. We should really avoid the inclination to absolutes and general ideas about the culture and civilization of Africa, Asia and even Western values. Simplistic and superficial reading of cultures and civilizations creates difference, division, corruption and atrocity in society.

The fact is that people encourage new talks, negotiation and education about other cultures that are based upon mutual understanding and respect. If we believe in existence and settlement in a harmonious planet, we cannot ignore moral principles and other values.

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186 NAM Declaration "Human Rights and cultural Diversity", Tehran Summit.

187 Chris Patten *East and West* (London Macmillan, 1998)

188 Stephan Shate Susan Harfy eds "On Human Rights: the Oxford Amnesty Lectures" (1993)



THE DIVERSITY OF CULTURES, CIVILIZATIONS AND THE DEVELOPMENT OF HUMAN RIGHTS

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The diversity of cultures and civilizations is the reality of today's world.

There have been hundreds of definitions for culture as well as different conceptions of civilization. There have been many distinct civilizations and many that have existed for thousands of years.

In the Enlightenment, French philosophers such as Montesquieu, Rousseau, and Voltaire considered civilized societies to be a progressive social regime which was based on law and justice, on the contrary to the barbaric situation in Medieval Times. Their flag of freedom, equality, and humanity in fact promoted bourgeois democratic revolutions, setting up capitalist civilization. For bourgeois scholars, the civilization was the highest development of the human being's history and was eternal and immutable. The bourgeois class, in the name of civilization, used commodity barter and battleships to "civilize" many Asian and African peoples, making them colonies and semi-colonies. French and British utopia socialists made great contributions to the conception of "civilization." They condemned barbarism and the shortcomings of the bourgeois civilization while foreseeing its collapse as well as the establishment of a new civilization, the socialist civilization. Marxism, on grounds of dialectical materialism, and pointed out the nature and rules of the human civilization's development. It interpreted the development of the human civilization into steps which are associated with socio-economic forms. The Marxists argued that the bourgeois civilization obtained peak achievements in the living standards and quality, in the economic, social, spiritual, and cultural development, and in social advance, though, it would obviously perish and be replaced by the communist civilization- a new civilization with a true democracy and humanity that fully liberates humans as "meter for everything" and a self-purpose of history. The ideology of civilization forms dominated the academic circles for nearly 3 centuries. It clarified the historical aspects and the common orientation of the human being's history as well as the linear extent of social advance.

With Europe as the point of departure, the ideology is in a close link with the viewpoint considering "European centralism," or "Western centralism" and considering it as the most progressive and model civilization for everywhere in the world. According to this theory of European centralism, countries outside Europe were barbaric and had only to learn and follow the path of Europe. Great ideologists in late 19th century and in the 20th century in the East acquired the values of Western civilization, encouraging the modernization of their countries according



to the model while partly disregarding the characteristics of the Eastern culture and civilization. However, the haughtiness of the European centralism, high rationalism and extreme individualism unveiled a wide range of the European civilization's shortcomings and weaknesses as well as exhaustion of potentials in the 20th century, thus, losing its pioneering role and attractiveness to other civilizations. Many European distinguish scholars in the 20th century such as Spengler, E. Fromm, Einstein, P. Kennedy, J.P Sartre, and E.Morin and Pope J. Paul II foresaw the crisis and erosion of the existing Western civilization, opposing the recognition of its role as a lighthouse for the whole world. Seeing no way to continue Western civilization, human beings has been struggled to developed new model of modernization on the basic of integration, inheritance and development of noble progressive human values accumulated from the world's civilizations.

The human being's civilization not only develops alongside the direction of the history of forms but also expands, particularly in the existence and development of different civilizations-regional civilizations. Every civilization is the result of the erudite development of peoples over a long period in the cultural-spiritual field and contains sustainable values that contribute to the humankind's advance. The world is always a multi-national and multi-cultural community. The difference between cultures and civilization with regard to cultural-religious traditions, and ethic and spiritual values is an obvious and undeniable fact. According to many Eastern and Western scholars, our world is one with different civilizations: European (North American and Latin American Catholicism), Eastern, Latin-America, Slav Orthodox religion, as well as the civilizations of Muslim, Buddhism, Confucianism, etc. Peoples that belong to different civilizations have different conceptions of the relation between the God and human, between individual and community, between citizen and State, between rights and duties, between freedom and power, and between equality and castes. Differences in culture and civilizations that root in the history over many centuries are deeper than those of ideologies and political regimes. In the current context of globalization, poverty threats billions of people; wealth gap widens; economic development separates from social advance; ethic and spiritual values deteriorate; crimes rise and environment is polluted. These issues, on one hand, cause sharp contradictions between civilizations and can lead to a global conflict. On the other hand, the diversity of cultures and civilizations is also a common heritage of the humankind, and a favorable foundation for seeking to learn from each other, to supplement and to develop vividly and perfectly measures to settle common problems of the human civilization and of each civilization. Therefore, one of the most important issues in this world is to promote dialogue among civilizations - a major means to prevent conflicts among countries and civilizations, thus ensuring peace, cooperation and development between countries in the world. This is shared and supported by the UN and politicians of many countries. The Hanoi ASEAM 5 Declaration in 2004 of leaders of 38 Asian and European countries, the UN Submit in 2005 stressed that the diversity of culture is the common heritage of the humankind, an encouraging creativity and an important momentum of economic development and social advance of the human society. The diversity of culture is a big opportunity to build a more peaceful and stable world because the cultural diversity does not exclude but include a spirit of tolerance, dialogue and cooperation. The meetings appealed for a dialogue among cultures and



civilizations on the basis of equality and mutual respect. The dialogue will not only contribute to preventing potential conflicts, promote the common development and bring humanity into the globalization process, thus benefiting all. Moreover, this dialogue plays an important role in protecting the principles and purposes of the *UN Charter*, including heightening fundamental human rights clarified in the *Universal Declaration on Human Rights*, international conventions on political, civil, economic, social and cultural rights.

Cultures, civilizations and human rights

There have been views to considered human rights as a merely Western product. However, it is recently recognized that the idea of human rights have also existed in Eastern culture. Human rights values can be found since very early in Hammurabi of the ancient Babylon, the prayer book of Muslim, Buddhism, and Confucianism. The Buddhism thoughts that valuing a life of humanity, mercifulness, tolerance and the Confucianism thoughts that esteeming the idea of goodness, the rule of virtue, people are the master, appraising family, community, right and responsibility, the harmony have played a critical role in the treasure of human ideology on human rights. The respect for and observance of human rights are a critical values that also existing in other cultures and civilizations. Human rights are common values of human culture; they are not property of any individual or region. Human rights are a component of social progress and human civilization. They are also ideal and torch in the struggle of the labor force against all kind of pressure and exploitation for dignity, honor, freedom, equality and social progress.

When the question of human rights and the diversity of culture and civilization come into view, there may be two contradictory perceptions. One is to consider the universality as the only character of human rights and request to apply one common standard for everyone in all states, regions in the world regardless of cultural differences or event to consider such differences may deny the universality of human rights. The other consider that for the sake of existing and development, the culture of each country should adapt and modify itself to protect the dignity of human being without recognizing the universality of human rights. However, it is more reasonable to recognize the universality of human rights as well as the particularity of each state, region based on cultural, religious differences and level of economic, social development of each state and region in the respecting and protection of human rights. No country or region in the world can be prided as an embodiment of universal human rights and consider itself as the perfect model of human rights. Each culture contains itself with human rights values and patterns or practices that deny human rights. However, all cultures are the cradle for the promotion and development of human rights ideology and their implementation in each country.

Human rights are universal and the universality of human rights has been recognized by everyone in all cultures. They includes standards and principles that can apply for all human beings without any kind of discrimination based on race, color, sex, religion, language, political opinions. However, it does not mean that all human rights can be applied and implemented at the same level, content, manner, order and framework. Since human beings are not abstract but specific, all universal human rights must be realized in accordance with economical, political and social situation of each region and in specific time. Human rights, therefore, are particular and



specific in term of implementing. Previously, many people deny this reality. It was until 1993; Vienna Declaration of the world conference on human rights proclaimed that while recognizing the universality of human rights, the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind. Experiences from many countries have showed that the universality of human rights can only be implemented effectively when the particularity of human rights is considered. Originating from the universality of human rights, different cultures may integrate, at the minimum, the best notions and values to settle their own human rights issues. The universality of human rights exists together with the particularity in a diverse way from the interpretation to insurance in each countries and region. The universality of human rights is connected with standards and principles recognized in international human rights instruments. The particularity of human rights is reflected in regional human rights instruments and national laws. States and regions can start from economic, social and cultural conditions to directly or indirectly incorporate international human rights provisions and develop policy, mechanism, and measures to ensure human rights. Each country or region can have its own way to realize human rights. Some countries may take peaceful initiative, whereas, other may need a revolution. Some countries may make their own effort to realize human rights, whereas, other may need international cooperation. Some countries may ratify more conventions and have better protection of human rights than the others. Each country can also give priority for the implementing of certain rights in accordance with the urgent need of practice, leaving other rights to implement later. Obviously, the ensuring of human rights in different countries happens in difference modes, methods, scales and level. The particularity of human rights is developed by different factors, however, the traditional cultures of the nation, level of awareness, level of education and culture, morality, customs and practice of the people are among the most influenced. The implication of cultural environment, national tradition in the interpreting and enforcement of human rights are strong and undeniable. Cultural diversity including the ideas of human rights has made the perception of human rights universality developed in a diverse and vital way, making human rights become more practical and essential.

In long-standing cultures such as China, India, Vietnam, many precious human rights heritage has been accumulated. The tradition of humanity, valuing human dignity in Eastern cultures has created favorable cultural condition to transfer, develop, reinforce and apply authentic human rights standards. They are foundation for the international human rights standards and principles to be relevant with the specific condition in each country, making contribution to the social progress, reinforcing state and maintaining spiritual values and national identity. By having cultural exchange, sharing and learning experiences, countries will have more opportunities to overcome their difficulty, to better protect human rights, to ensure peace and to develop human civilizations. Cultural dialogue and cooperation are the first step and foundation for all kind of cooperation.

Human rights dialogue among cultures and civilizations

Together with the dialogue among civilizations, countries should also develop human rights dialogue and international cooperation. The differences in history, culture, and economic condition, legal and political system have created the differences in the interpretation of the



concept of human rights and its implementation mechanism. For some people such differences may cause certain misperceptions, debates or criticism. One of the reasons for the differences and debate at the international level is the lacking of mutual understanding and wrongfulness in the one way approach to human rights. In a reality world with the exiting of difference social system, level of development, diverse cultural and history, it is understandable to exist differences in the implementing of human rights. In such differences and diversity, dialogues and cooperation among countries to promote and protect human rights are essential and objective need. Dialogue not confrontation is the favorable condition for the exchange of views, the promotion of mutual understandings and for the eliminating of conflicts. Dialogue shall provide support to widen the consensus, strengthen cooperation and promote human rights. Confrontation shall only bring contradiction and harm when dealing with human rights issues.

The conducting of human rights dialogue and exchange is essential and critical. Vietnam support the strengthening of international dialogue and cooperation in the field of human rights while underlying the principle of equality, constructive, mutual understanding, respecting traditional culture and the independence of all countries pursuing a common objective of better promotion and protection of human rights nationally and internationally.

Countries should organize dialogue, seminars, and workshops and cooperate with others in the area of human rights. It is from such constructive and sincere dialogues and cooperation in human rights, different countries and civilizations will understand each other better. They will have less preconceived approach to human rights, more opportunity to learn and share experiences to propose more effective solutions for a better promotion and insurance of human rights. Human rights and cultural dialogue and cooperation are actually a civilized and effective way for counties and civilizations to overcome the divergence, confrontation, standstill and conflict. They are foundation for the setting of believes, the strengthening of consensus, contributing for developing of cooperation, ensuring peace and security in all countries and after all for the better ensuring of human rights.

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HUMAN RIGHTS AND CULTURAL DIVERSITY

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Cuba

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat different categories of human rights globally in a fair and equal manner, on the same footing and with the same emphasis.



The universality of human rights and fundamental freedoms were achieved with the recognition of the significance of national and regional particularities and various historical, cultural and religious backgrounds as well as the diversity of political, economic and cultural systems adopted by States.

The purposes and principles enshrined in *the Charter of the United Nations*, underscore the priority of the development of friendly relations among nations based on equal rights; the right of all peoples to self-determination, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development; the will of achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character; and the respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

The Universal Declaration of Human Rights in its Article 27 and *the International Covenant on Economic, Social and Cultural Rights* in its Article 15 established the foundational framework for the promotion and protection of cultural rights in the progressive development of international cooperation in the field of human rights. It was affirmed that everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

The vital objective of ensuring respect to cultural diversity while promoting and protecting human rights has been, and continues to be a key element in the strategy and action of all of those committed to peace, development and the strengthening of multilateralism and international security.

The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, contains important provisions directed to the reinforcing of international cooperation for the realization of the cultural rights of everyone and the respect of cultural diversity.

It is important to recognise relevant achievements accomplished by States, intergovernmental and non-governmental organisations in the promotion and protection of cultural rights and cultural diversity in the framework of the United Nations Educational, Scientific and Cultural Organization (UNESCO).

However, in this paper the analysis will focus primarily on the work done in this field at the United Nations human rights mechanisms, particularly at the Commission on Human Rights, and the ongoing developments at the Human Rights Council. A priority will be also devoted to recent contributions made by the Non-Aligned Movement to the issue.

The Non-Aligned Movement Ministerial Meeting on Human Rights and Cultural Diversity

An important contribution to the reaffirmation of the solid linkages and interdependence between human rights and the respect of cultural rights and different cultural identities was made by *the Tehran Declaration and Programme of Action on Human Rights and Cultural Diversity*, adopted at the Non-Aligned Movement Ministerial Meeting on Human Rights and Cultural Diversity, held in Tehran, Islamic Republic of Iran, on 3 and 4 September 2007.

The representatives of Member States of the Non-Aligned Movement (NAM) renewed in Tehran their commitment to the right to preserve cultural identity which is a defining characteristic



of humanity and forms a common heritage of humanity. They reaffirmed that cultural diversity and the pursuit of cultural development by all peoples and nations are a source of mutual enrichment for the cultural life of humankind, as well as that cultural diversity is a cherished asset for the advancement and welfare of humanity at large. Therefore, cultural rights and cultural diversity should be valued, enjoyed, genuinely accepted and embraced as a permanent feature which enriches our societies.

In that sense, it was considered by NAM Member States that tolerance and respect for cultural, ethnic, and religious and linguistic diversities, as well as equitable and mutually respectful dialogue among and within civilizations, are essential for peace, understanding and friendship among individuals and people of different cultures and nations of the world. Manifestations of cultural prejudice, intolerance and xenophobia towards different cultures and religions should be rejected as sources of generation of hatred and violence among peoples and nations throughout the world.

It was vital the reaffirmation made that tolerance is not only a moral duty but also a political and legal requirement that makes peace possible through the respect, acceptance and appreciation of the rich diversity of our world's culture and our forms of expression and ways of being human.

A particular attention was paid to the consideration of the impact of globalization in the enjoyment of cultural rights by everyone and the respect of cultural diversity. It was underlined that the process of globalization constitutes a powerful and dynamic force which should be harnessed for the benefit, development and prosperity of all countries, without exclusion.

The NAM's Member States deplored in Tehran attempts or efforts to use economic might as an instrument to impose cultural domination on others and reaffirmed the conviction that cultural diversity in a globalizing world needs to be used as a vehicle for creativity, dynamism and promoting social justice, tolerance and understanding as well as international peace and security, and not as a rationale for a new ideological and political confrontation.

NAM resolved to take all measures to secure a democratic and equitable international order based on dialogue, cooperation, intercultural exchange and prevention of cultural homogenization and domination. The Movement denounced attempts to identify any culture with terrorism, violence and human rights violations.

Key elements on NAM's position on human rights and cultural diversity

Culture as a prerequisite of sovereignty. All peoples and nations should hold, develop and preserve their cultural heritage in a national and international atmosphere of peace, tolerance and mutual respect.

Enhanced multilateralism as the main tool. International cooperation based on solidarity and respect of diversity should be promoted. The UN human rights mechanism should increase its role in promoting international cultural cooperation and the respect of cultural diversity, while preserving the activities and work of UNESCO in this area.

Particular attention should be given to *the Declaration of the Principles of International Cultural Cooperation* and *the Universal Declaration on Cultural Diversity*, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization in



1966 and 2001 respectively.

It should also be recalled *the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, adopted on 14 November, 1970 by the General Conference of UNESCO and *the Convention on Stolen or Illegally Exported Cultural Objects*, adopted on 24 June, 1995 by the International Institute for the Unification of Private Law.

While appreciating the numerous efforts within the United Nations system in general and the United Nations Educational, Scientific and Cultural Organization (UNESCO), in particular, in promoting respect for cultural diversity and human rights, NAM's Member States urge the UN system to enhance initiatives directed to the full realisation of cultural rights and ensuring respect to cultural diversity.

Diversity as an asset to be preserved and respected. The world today is composed of States with diverse political, social and cultural systems and religions determined by their history, traditions, values and cultural diversity, whose stability can be guaranteed by the universal recognition of their right to freely determine their own approach towards progressive development.

A peaceful and prosperous world and a just and equitable world order as requirements of an enhanced international cultural cooperation. All actors on the international scene should contribute to the building of an international order based on inclusion, justice, equality and equity, human dignity, mutual understanding and promotion of, and respect for cultural diversity. The respect for cultural diversity and the cultural rights of all contributes to a wider exchange of knowledge and understanding of cultural background, advancing of the application and enjoyment of universally accepted human rights throughout the world and fostering of stable and friendly relations among peoples and nations worldwide.

Globalization process as a challenge. The international community must strive to respond to the challenges and opportunities posed by globalization in a manner that ensures respect for the cultural diversity of all. The international community must maximize the benefits of globalization through inter alia, the strengthening and enhancement of international cooperation and global communications for the promotion of understanding and respect for cultural diversity. Only through broad and sustained efforts to create a shared future based upon common humanity and all its diversity, can globalization be made fully inclusive and equitable.

Cultural homogenization as a weapon of imperial domination. Cultural homogenization as well as uniculturalism in the context of globalization should be prevented and mitigated through increased intercultural dialogue and exchange guided by enhancing respect for and observance of cultural diversity. We must face the growing attempts to create a new form of colonialism and uniculturalism, which surreptitiously permeate people, destroying the basic values and core principles of their own societies. Some industrialized countries seek to impose their values, opinions and lifestyles on developing countries, to the detriment, and even the loss, of cultural identities.

Non-discrimination of any kind: a principle to be respected and a goal to be fulfilled. All members of international community must avoid discriminatory or preferential treatments



toward other nations and cultures, as they are detrimental to the principles of equity. Acts of prejudice, discrimination, stereotyping, and racial, religious and sectarian profiling are affronts to human dignity, equality and justice, and should not be condoned.

Individual and collective enjoyment of cultural development. All members of international community should guarantee the right of all, individuals and peoples, to have access to a culture of their own and to develop it creatively, as well as their right and duty to know and respect other cultures.

Migration as a mean of promoting intercultural cooperation. All States should develop and implement policies and action plans, and reinforce and implement preventive measures, in order to foster greater harmony and tolerance between migrants and host societies. All members of the international community should implement specific measures involving the host community and migrants in order to encourage respect for cultural diversity, to promote the fair treatment of migrants and to develop programmes, where appropriate, to facilitate their integration into social, cultural, political and economic life without undermining the right to return to motherland.

Durban's World Conference: a milestone in strengthening respect to cultural diversity. The Movement welcomes the decisions of the General Assembly and the Human Rights Council to convene the Durban Review Conference in 2009 and calls upon the Durban Review Conference and its Preparatory process to encourage debates on promotion of respect for cultural diversity among all nations, in the context of global fight against racism, racial discrimination, xenophobia and related intolerance.

Foreign occupation is incompatible with all human rights, particularly with the enjoyment of cultural rights. Foreign occupation hinders the enjoyment of basic human rights and fundamental freedoms. The Movement condemns the inhumane measures imposed by the occupying power on the Palestinian people, including border closures, severe restrictions on the movement of people, destruction of homes and vital infrastructure, including religious, educational, cultural and historical sites; as well as all the actions designed to change the legal status, geographical nature and demographic composition of the occupied Palestinian Territory and the occupied Syrian Golan, and destroy their cultural heritage. NAM calls upon the international community to take all appropriate measures to bring an end to this tragic and intolerable situation.

Dialogue and cooperation are essentials for enriching the universality of human rights. Equitable and mutually respectful dialogue among and between cultures and civilizations including in the field of human rights, would facilitate the promotion of a culture of tolerance and respect for diversity and contribute greatly to the enhancement of international cooperation in this field. Encouragement and development of international contacts and cooperation in the cultural fields and intercultural dialogue enriches the common understanding of human rights and prevents cultural imposition on nations. All states, relevant international organizations and non-governmental organizations should provide support to and embark on intercultural initiatives on human rights in order to promote the common understanding of the human rights standards, thus enriching the universality of human rights.

Education: best tool to raise understanding of cultural differences and to foster respect



to cultural diversity. All countries should design and implement policies whereby educational systems proclaim the principles of tolerance, respect for others and cultural diversity. All members of international community shall promote, through education, an awareness of the positive value of cultural diversity and improve to this end both curriculum design and teacher education. It must be encouraged the incorporation of programmes to study various cultures and civilizations in educational curricula, including the teaching of languages, history and socio-political thoughts of various civilizations, as well as the exchange of knowledge, information and scholarship among academia.

Governments have the primary role on raising awareness and ensuring the enjoyment of cultural rights and respect to cultural diversity. The Governments should promote, including through education, as well as the development of progressive curricula and textbooks, understanding, tolerance and friendship among human beings in all their diversity of religion, belief, culture and language, which will address the cultural, social, economic, political and religious sources of intolerance, and apply a gender perspective while doing so, in order to promote understanding, tolerance, peace and friendly relations among nations and all racial and religious groups, recognizing that education at all levels is one of the principal means to build a culture of peace.

Market forces alone cannot guarantee the preservation and promotion of cultural diversity, which is the key to sustainable human development and from this perspective the Movement recognizes that the preeminence of public policy, in partnership with the private sector and civil society, must be reaffirmed.

Media: a key actor for promoting respect of cultural diversity. The media should act as a mechanism to universalize ideas on tolerance, respect for cultural diversity and the right to cultural development, and to spread human values rather than serve as a tool to accentuate the disparities and imbalances prevailing in the fields of information and communication. The media should develop a better understanding among all religions, beliefs, cultures and peoples to facilitate a dialogue among societies, as well as to create an environment conducive to the exchange of human experience and promoting intercultural understanding and cooperation for peace, development and human dignity.

A new international information and communication order is needed to fulfil the goal of cultural development based on respect to diversity. It should be rejected attempts by some developed countries of exerting intellectual and cultural domination on other countries inter alia, overcoming the prevailing trend of monopolizing flows of information that gradually restricts freedoms and imposes cultural hegemony. In the face of current imbalances in flows and exchanges of cultural goods and services at the global level, it is necessary to reinforce international cooperation and solidarity aimed at enabling all countries, especially developing countries, to establish cultural industries that are viable and competitive at national and international levels.

The international community should exert all its efforts to bridge the digital gap between developed and developing countries.

Governmental and non-governmental cultural entities should support the activities at



national and international levels. Relevant governmental and non-governmental organizations and institutions must promote the principles of tolerance and respect for cultural diversity through organizing appropriate cultural initiatives and activities with due respect to their capacities. The academia preserves its important role in promoting awareness of the positive value of different cultures and respect for cultural diversity. The academia should engage further in enriching intercultural dialogue on human rights, contributing to a wider exchange of knowledge and common understanding of cultural backgrounds. Civil society, including non-governmental organizations, must recognize and promote respect for cultural diversity for the purpose of advancing peace, development and universal human rights.

The Human Rights Council and the Office of High Commissioner for Human Rights have a role to play in the fulfillment of the goal of cultural development and respect to cultural diversity. HRC and OHCHR should support the initiatives of different actors to promote intercultural dialogue on human rights and to mainstream the question of human rights and cultural diversity within the United Nations human rights mechanisms and machinery.

The Ministerial Meeting decided to establish a “NAM Center for Human Rights and Cultural Diversity” in Tehran. The Center will serve as a focal point to enhance cooperation and dialogue among Non-Aligned Movement Member States as well as between these States and other United Nations member states with the purpose of inter alia, the realization of the goals and objectives contained in the *Declaration and Programme of Action* adopted on 4 September 2007.

In the former Commission on Human Rights and in the Sixth session of the Human Rights Council, Cuba sponsored resolutions entitled “Promotion of the enjoyment of the cultural rights of everyone and respect for different cultural identities.”

Those resolutions highlighted the importance for the main UN body specialized on human rights of enhancing the visibility and understanding of cultural rights and the respect for cultural diversity, and confirmed support for the concept that the creation of a thematic procedure on this issue could contribute to the achievement of the purposes and principles enshrined in *NAM's Tehran Declaration and Programme of Action on Human Rights and Cultural Diversity*.

Cuba reaffirms that the objective of the establishment of a thematic procedure on the promotion of the enjoyment of the cultural rights of everyone and respect for different cultural identities is not to develop a new monitoring mechanism, but to appoint an independent expert who could elaborate concrete proposals and recommendations on the issue, taking into account the work already done in this field by other bodies, organs and organizations of the United Nations system.

The HRC Resolution 6/6, of 28 September 2007, acknowledged that the process of review, rationalization and improvement of mandates represents a momentum towards the establishment of an independent expert in the field of cultural rights, and to this end requested the United Nations High Commissioner for Human Rights to consult States, intergovernmental and non-governmental organizations on the content and scope of the mandate of the independent expert in the field of cultural rights, the basis of which would be the comprehensive implementation of this resolution, and to report on the results of those consultations to the Council in accordance with its annual programme of work.



Cuba is committed to the establishment of the mandate of the Independent Expert on the enjoyment of the cultural rights of everyone and respect for different cultural identities at a forthcoming session of the Council.

We are convinced that further developments on the issue of cultural rights and respect to cultural diversity at Human Rights Council could represent a significant contribution for ensuring legitimacy to the universality of human rights.

(The author is Director of the Division of Multilateral Affairs Ministry of Foreign Affairs of the Republic of Cuba.)

CULTURAL DIVERSITY AND HUMAN RIGHTS

Ahmed Saadi
Algeria

First of all, I would like to express my gratitude to the leaders of the People's Republic of China, and, especially, to the forum held by the China Society for Human Rights Studies. Here, I want to thank you for your warm reception.

Under the current international situation, the important topic of Human Rights and Diversified Cultures reminds me of words from The Koran, which also reflect the spirit of the forum, its individuality and universality. The Koran says, "O men! Verily, we have created you of a male and a female; and we have divided you into peoples and tribes that ye might have knowledge one of another." The understandings of each other on the basis of cultures and civilizations of various peoples involves the whole human race, and has nothing to do with religion, ethnic group or other factors.

It is totally possible to construct a diversified world where people of different ethnic groups can learn about the diversification of each other's cultures. However, such a world cannot be constructed by unifying and standardizing the habits, behaviors, ways of thinking and value concepts of different ethnic groups. This is also determined by our understanding other peoples and ability to accept their diversified cultures. Removing obstacles to understanding is the responsibility of the whole world and will add impetus to human progress.

Currently, human rights undoubtedly bear universality. Though long established, this universality cannot cover the particularities of all cultures and civilizations, which mainly include indivisibility, mutual dependence and the mutual complementarities of economy, society, culture and political power.

A declaration published at the World Conference on Human Rights in Vienna in June 1993 clearly pointed out that while promoting and protecting human rights, "the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind."



In this sense, human rights have become the common heritage of all human beings and are not exclusive to particular civilizations, religions or regions. The entire human race should make diversified contributions to the development of human rights and learn more from each other in various national and international affairs calmly, objectively and actively.

In reality, extreme politics, selectivity and subjectivity still exist in most-favored treatment clauses of civil laws and political laws. These practices severely damage other areas of human rights law, especially the right to development.

Some people in Africa, Asia and Central and South America are still in hunger, and lack basic education, drinkable water and even basic medical assistance. AIDS, malaria and other grave diseases could claim their lives at any time. All these constantly remind the international community that the right to live is a basic right. In order to defend the basic right to live, it is very important to develop political and material conditions through international cooperation. The universality of human rights is prominent in this aspect.

As one of the developing countries, we worry that the universalities of human rights law that stem from westernized concepts are not only protected by globalization, but are also influenced by gaps in the development of science and technology, and fail to take account of cultural sensitivities. They may be becoming part of an outdated colonial era.

The reconsideration to diversification of the culture, history, geography, religion and politics is a necessary condition for developing universality of human rights. While initiating the United Nations' role of developing human rights in all range of activities, including international affairs, we cannot ignore necessary principles in international law, especially the principles of equal sovereignty, non-interference in internal affairs, mutual respect for political, economic and social regimes and the right of self-determination.

We hail the establishment of the United Nations Human Rights Council and the operation of its organs, including the Universal Periodic Review (UPR), which looks into the objectivity, non-selectivity, transparency and responsibility of human rights situations worldwide. Extreme politics and selectivity paralyzed the former United Nations Commission on Human Rights. We hope the Human Rights Council can conquer these difficulties in the future.

We object to the practice of using human rights policy as an instrument for one country to impose its ideas on another. Before any national court every citizen is equal. They have the right to criticize for the purpose of promoting human rights development as well as to protect people from physical or mental harm. This is our primary right.

All non-governmental organizations should play extensive roles in promoting the development of the diversified culture of every ethnic group and keeping away from standardization and unification in our society. By developing and promoting dialogue among different cultures and civilizations, these organizations will win honor and respect.

In 1990s terrorist groups raided my country. Thanks to the supports of all the Algerian people, we have been able to continue with our original system, a republic political regime. In order to maintain stability and peace among various parties in Algeria, our president boldly promulgated the Charter for Peace and National Reconciliation. The Charter gives all Algerian



citizens the right to vote, clearly indicating the president's determination of overcoming the national tragedy and reconstructing our homeland.

The implementation of the Charter for Peace and National Reconciliation has changed Algerian culture from atonement to peace and self-restraint.

Algeria has established a democratic election system. Free elections determine changes of government. This is an unchangeable political practice.

During the process of national reconciliation, the government also launched many reforms in various industries, aiming at improving the Algerian people's living standards and developing their rights in civil, political, economic, social and cultural sectors.

Hence, the main goal of judicial reform is to realize the independence of the justices, optimization of judicial administration, controlling of judicial weapons and improvement of the quality of human resources. The measures adopted in the judicial reform embody the basic rights and freedoms in the Algerian Constitution.

The revised Family Code of 2005 also conformed to the Algerian Constitution, giving men and women equal rights and obligations. Our national laws do not include any content involving inequality of men and women. The current Family Code targets domestic changes in society, economy and culture in Algeria, while not totally denying our commonness and the value of religious culture. The duality between human rights and cultural diversification is a typical example.

Meanwhile, we have also established the National Commission for Promoting and Protecting Human Rights. This is an independent mechanism with the primary task of directly supervising the national chief justices. The commission consists of famous personages of human rights protection who are comparatively independent, who embody probity and equity of a high quality.

In international affairs, Algeria has signed some major international conventions related to human rights and implemented the obligations stipulated by these conventions. We also regularly submit reports to the commissions affiliated to these conventions and maintain dialogues with unconventional organizations of the United Nations.

In November 2007, Algeria submitted its third report on civil and political rights. On April 14, 2008, we also submitted a report from the UPR to the UN Human Rights Council.

In regional affairs, I believe everyone here is very clear that in June 2006, Algeria signed the New Partnership for Africa's Development (NEPAD) in Accra, receiving assessment from related departments of the organization.

Algeria's full cooperation with the organization has been applauded by the vast majority of its African compatriots, who also extended congratulations to Algeria for its progress made after the assessment. Our African compatriots put forward objective and constructive suggestions to improve our management. These suggestions need our special attention.

The form of negotiation is based on the basis of Africa's value concept. It mainly includes those countries that want to join in voluntarily, and these countries should also accept other countries' assessments in democratic governance, economic management and sustainable development. This is a reform worthy of support and effort. We also hope the dialogue mechanisms can highlight Africa's advantages and prompt the UN Human Rights Council to establish new mechanisms.



Some regional human rights organizations represented by the African Commission on Human and Peoples' Rights know better about our diversified cultures and features of history, religion, geography and civilization.

In my speech, I would like to discuss the problem of crankiness, which exists in the media of many so-called "democratic" countries. Faith and belief are the important ingredients of our human race, but these media do not respect them.

Some media constantly use the image of Mohammed to defend so-called freedom of speech. They are committing unpardonable mistakes and they do not know how to respect diversified cultures, arousing great resentment and enlarging the cultural gap.

In April 2005, our President Abdelaziz Bouteflika delivered a speech at a conference entitled "Dialogue Among Civilization, the Motors of Peace and Progress for the Human Race," held by the United Nations Educational, Scientific and Cultural Organization in Paris. I think I can use a paragraph from his speech to conclude my speech. He said, "It is totally possible to establish a diversified world in which various ethnic groups co-exist in peace and seek common ground while reserving differences. In the world, all the people learn from each other with their diversified cultures. The world is progressing and is developing better. However, such a world cannot be constructed by unifying and standardizing the habits, behaviors, ways of thinking and value concepts of different ethnic groups."

"In such a world, our dream is also determined by our capacity to understand other peoples and accept their diversified cultures. Removing obstacles to understanding is the responsibility of the whole world and will add impetus to human progress."

Thank you.

(The author is the Deputy Director of the Department of Multilateral Affairs of the Ministry of Foreign Affairs of Algeria.)

DIALOGUES ON HUMAN RIGHTS IN THE CROSS-CULTURAL CONTEXT

Ai Silin and Wang Guixian
China

Human rights, as a category being widely used in both theoretical and practical circles, are the "new ideal that has triumphed on the world stage."¹⁸⁹ However, human rights tend to be the excuse of some nations for intervention in the human rights issues of other countries, and then for interference in the internal affairs of other countries. In addition, the understanding

189 Costas Douzinas, *The End of Human Rights*, Translated by Guo Chunfa, Jiangsu People's Publishing House, 2002, P1.



of human rights in different ethical backgrounds is also taken as the excuse for rejecting the criticism from international communities and organizations for violations of human rights. The complex situation of international relations reveals that highly flexible concepts of human rights would result in arbitrary understanding and implementing of human rights. Human rights are the oppressed nationalities' demand for political liberation and independence, but also the excuse of some hegemony countries for interference in other nations' internal affairs. They can be seen as the concept of absolutism, and can be also understood specifically by placing it in particular cultural backgrounds. They are the battle cry for liberalism, and at the same time the viewpoints of communitarianism. Such characteristic of human rights has the advantage in that it allows different interpretations of human rights by different nationalities, but the diversity of human rights tends to be ignored in the pursuit of universal concepts of human rights. With the enhancing of communications between different nations and regions, in order to avoid interference in other countries' internal affairs through observing "dual criteria" in the implementation of human rights, it is necessary for us to tease apart the concepts of human rights to identify their characteristics, which is the basic requirement for the promotion of human rights dialogue and human development based on the respect for cultural differences.

I

Human rights have extended from a national and regional category to a global one. In this extension, people tend to believe that "human rights are the equivalent to civil rights and liberties and social welfare rights in modern society. The particular value and institution as revealed from these rights are rooted in the traditions of Western culture and civilization."¹⁹⁰ The highlight on universal human rights causes the spreading of the human rights in the context of Western culture to the whole world, which then leads to competition and even antagonism between different views on human rights in different cultural contexts.

Such competition and antagonism reveal the diversity but not the universality of contemporary concepts of human rights. Generally, human rights, as the outcome of modern society, are regarded as maintaining no ethical connotation since the very beginning and being merely a special form of modern subjective rights, that is, a special form of legal rights, and thus possess to a great extent a strong characteristic of universalism. However, the moral and political practices demonstrate that the human rights concepts of universalism are not universally agreed. People are growing to realize the difference between different human rights concepts. In the second half of the 20th century, the rapid uprising of Eastern Asian economy enabled people in this region to identify the human rights of Eastern Asian characteristics. For example, the Bangkok Declaration on Human Rights issued in 1993 proclaimed that "while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."

190 A. J. M. Milne, *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights* (Chinese version), The Eastern Publishing Co., Ltd, 1991, P6.



The diversity and differences as revealed from the theory and practice of contemporary human rights are the inevitable outcome of history. After Enlightenment, the integrated worldview in pre-modern society, i.e., the religious and metaphysical values, was broken down in Europe. Religion and metaphysics then lost their authority completely, and human rights thus lost their religious and metaphysical foundation at the same time. In order to seek for another time the valid foundation for human rights, it is necessary to change the orientation of the justification for human rights. Therefore, many scholars begin to defend human rights from the perspective of cultural traditions. For example, Islamic, Confucian and Buddhist traditions can all provide theoretical justifications for human rights. Therefore, in the world wide, human rights theories in reality must be particular, that is, they can be rationally defended, and modern society of heterogeneity must be able to contain each set of comprehensive doctrines of human rights.

Besides the social and cultural factors mentioned above, the causes for the diversity and difference of human rights also involve political and historical ones. With respect to the political factor, some countries tend to emphasize that state affairs should be handled according to their levels of importance and urgency. They hold that when the national economy is not able to fully satisfy the material demands of people, the government should give priority to how to improve citizens' living situation, but not equality of rights and freedom of opinion. Such argumentation, emphasizing the strategy and function of human rights, would deepen and enlarge the differences between human rights. Regarding the historical factor, the degree of the importance and the content of human rights also vary with different courses of history. For example, Continental Europe stresses active rights more, while U.S. and Britain attach more importance to passive rights.

The above analysis of human rights concepts from social, political, historical and cultural perspectives can demonstrate that the diversity and difference of human rights is a normal state of society, and is the realistic foundation for human rights dialogue in the context of economic globalization. Moreover, only by acknowledging differences and promoting understanding and tolerance will the course of human rights be advanced, as "the foundation for human rights also lies in listening to all the voices."¹⁹¹

II

For the sake of advancing the free and all-around development of human beings, most democratic countries in the world have carried out active dialogues on human rights, and have made and signed a series of international agreements on human rights protection. However, with the deepening of economic globalization and the growing of communications between different cultures, nations and states with particular values will have more different understandings of human rights. During the construction of a new global political order, what constitutes the necessity and possibility for starting human rights dialogues?

In the contemporary world political and economic order, which takes "peace and development" as two major themes, most disputes including issues related to human rights are

191 Jürgen Habermas, *Die postnationale Konstellation*, Translated by Cao Weidong, Shanghai People's Publishing House, 2002, P140.



addressed through dialogue. The precondition for human rights dialogue is the diversity of the rights, but differences in values would prevent agreements on human rights by dialogue. The following differences in values demonstrate the necessity for human rights dialogues.

First is the different understanding of individual rights and collective rights. Western society in general sees human rights as the rights of individuals, i.e., “subjective rights.” In modern views on human rights, the concept of subjective rights plays a key role. Eastern countries on the other hand stress collective rights. Therefore, Eastern human rights concept is in general “communitarian,” highlighting that community should be prior to individual, that obligation be prior to rights, that basic social and cultural rights be prior to political rights, and also the legal order of communitarianism be prior to the maintenance of the unity of the community. However, which should be the first, individual or collective rights, is a question that could be answered in specific contexts. Coordinating the relationship between individual and collective rights in a proper way can help with effective participation in the international dialogue on human rights, and thus accelerate human development.

Second is the competition between the universality and particularity of human rights. Heidegger with rational critique, and Schmitt with rights critique, stress the European characteristic of human rights concepts and deny any requirements for universal effectiveness of human rights. According to them, the veiled particularities of human rights should be prior to their universalities at the very beginning, and the so-called universal standards can only be applied effectively on local regions in reality. All the traditions, worldviews and cultures must have their own criteria, which are not compatible with each other. And behind the demand for universal rights is generally buried the particular will of a specific community. However, Western liberalists tend to highlight the universality of human rights. In their eye, behind the particularity of human rights are also hidden some political intentions that are against human rights. Views on the particularity and the universality of human rights will collide with each other frequently; continuous dialogues are thus needed to solve the disputes therein propped up.

Finally, valid justification of human rights can also indicate the necessity of dialogues on human rights. According to Habermas, the validation for the right to religion could possess the exclusive nature of the community, and will cause others not being able to be equally tolerated. “According to Islam, Christianity and Fundamentalism, the absolute nature of the important truth means that the very truth is worth being implemented via violence when it is necessary.”¹⁹² In Europe, when the religious worldview lost its authority, and the religious sects were separated and thus caused serious political consequences, the question how to find a common foundation for a just political community arose. It is under this circumstance that politics broke away from the sacred authority, and human rights began to possess secular characteristics and European concepts of human rights thus came into being. However, modern European concepts relating to human rights were established on the basis of “natural rights,” which takes “natural law” as the foundation. “Natural rights” is a metaphysical

¹⁹² Jürgen Habermas, *Die Einbeziehung des Anderen*, Frankfurt am Main, 1999, 188-189.



expression of this view on human rights. The theory of “natural rights” in fact assumes that individuals are prior to society, as individuals, having already existed before any form of society, are born to be entitled to rights. The valid justification for human rights, from the perspective of religion or metaphysics, can not address the issues regarding valid justification of human rights under post-metaphysical conditions. However, dialogue on human rights pioneers a new orientation for the justification.

Sophisticated conditions of international community determine the necessity for human rights dialogue. Although we think that differences and other voices of human rights should be tolerated, yet the universality of human rights, which pays attention to justice in legal procedure, but not material contents, means that it is possible to start dialogues on human rights.

First, an overview of history development would find that human rights were presented to act as the response to the challenges in the process of modernization. “Human rights thought is not originated from the particular background of Western culture, but from an attempt, that is, the attempt to ‘give a response to the challenges met in the modernization that has been expanded in the world wide.’”¹⁹³ Now even in Asian countries, economic and social modernizations have been growing. However, in these countries, the economic and social modernization does not synchronize with legal form modernization. Every sophisticated society with a high level of democracy must solve the issue of integration. To solve these issues, we must establish an abstract form of citizen unity. The success is determined by if the basic rights of individuals can be implemented. “Legalization of politics through democratic process will help us to overcome the tension and clashes arising in the accelerating of modernization.”¹⁹⁴

Second, modern legal orders differ from traditional ones. Modern legal order mainly consists of subjective rights, which can provide legal action space for artificial legal persons, and enable them to act as they like. Therefore, other types of moral restraint that a personality with rights should undertake are lifted artfully. In this way, law and morality are separated completely. As human rights are in nature legal but not moral rights, procedures of law can ensure the justice of human rights dialogue.

Third, Habermas’ democratic proceduralism is able to safeguard personal autonomy and public autonomy, and opens up a new path for shaking off the plight of the justification for whether human rights should be particular or diverse. The rights system of proceduralism identifies with the intersubjectivity of the undertaker of the subjective right. Therefore, it will not be indifferent to the unequal living conditions, nor ignore the cultural differences. Thus, the equal existence of different races as well as their cultural lives is not needed to be safeguarded by the quality of collective rights. Habermas believes that his right theories of proceduralism can explain explicitly the problem of collective rights, and there is no need to introduce the concept

193 Jürgen Habermas, *Die postnationale Konstellation*, Frankfurt am Main, 1998, 181.

194 Jürgen Habermas, *Die postnationale Konstellation*, Translated by Cao Weidong, Shanghai People’s Publishing House, 2002, P146.



of collective rights on the basis of human rights (subjective rights). He even holds that although these collective rights can be acknowledged in democratic countries, these rights are not necessary at all, and will be troublesome from the perspective of standardization, because protecting the identified living styles and traditions is after all to acknowledge their members.¹⁹⁵

Habermas stresses the inherent relationship between human rights concepts and social and economic development. He holds that it is the challenges on both social and economic levels, but not on cultural levels, that determine the universality of human rights. Democratic concept of proceduralism discusses the universality of human rights mainly from the perspective of procedural system. However, it also clearly sees that the advocators of the relativity of human rights highlight the inner relationship between the universality and the particularity of human rights, and especially the inner relationship between social and economic modernization and the human rights concepts as well as the legal system of individualism.

III

Setting human rights in particular cultural contexts enables us to understand and tolerate the differences between Eastern and Western views on human rights, and thus lays foundation for dialogues on human rights. Only after identifying the truth of traditional Chinese culture can we get a full understanding of the specific contents of the human rights in the context of Chinese culture, and the contribution to human rights dialogue by Chinese culture.

Objectively speaking, the feudality system of more than two thousand years in China places an obstacle for us to understand the nature of traditional Chinese culture. It is easy for us to mix institutional matters with issues on the level of culture, and thus regard the feudal system as the main content of traditional Chinese culture. This misunderstanding would cause errors in the interpretation of this culture, and then identify traditional Chinese culture as a culture of absolutism lacking democracy and ignoring the people's livelihood. In fact, even according to contemporary Western thoughts on human rights, traditional Chinese culture can not be evaluated as a culture of absolutism. Many thoughts in traditional Chinese culture can provide abundant theoretical resources for contemporary thoughts on human rights.

First, traditional Chinese culture contains rich thoughts on democracy. It pays attention to equality between people. Both the thought of "universal love" advocated by Mozi in the Spring and Autumn period and the "conscience" theories in Confucianism include the democratic thoughts on equality and enlightenment. For example, Mozi said:

"Let him who is strong be ready to help others, who is rich to share his wealth with others, and who possesses the Dao (the way of nature and life) to teach others persuasively." (Exaltation of the Virtuous III, Mozi)

According to Mohism, those who are "strong," "rich" and "virtuous" are expected to behave morally to achieve the goal of "universal love," that is, social equality. And the Confucian thought that "each thing belongs to itself" aims at setting everything in its proper place, which, according

¹⁹⁵ Jürgen Habermas, *Die Einbeziehung des Anderen*, Frankfurt am Main, 1999, 259.



to Mou Zongsan, the representative scholar of Neo-confucianism, reveals the thought of liberal democracy.¹⁹⁶ Traditional Chinese culture (e.g., Confucianism and Mohism) possesses obvious characteristics of absolutism, which, however, is not the cause for authoritarianism. Kant's moral philosophy also carries strong traits of ethical absolutism, but is usually seen by the West as the base of the justification for liberalism. In the study of "ruling others and cultivating himself," Confucianism expected much from the ruling through peaceful transfer with demise of the previous kings in the mythical and semi-mythical age, which was also the value of the mainstream scholars.

Secondly, Chinese traditional culture attaches great importance to the rights to subsistence and development. Although it seems that "cherish natural laws, and deny human desires" had become the substitute for Confucianism, and "virtue and morality" had turned to be cannibalistic ethics since Song and Ming dynasties (such criticism is reasonable to some extent), the mainstream thoughts of Confucianism will not exclude "interests" for the sake of "righteousness." On the contrary, it highlights man's rights to subsistence and development. For example, The Analects of Confucius noted: When the Master went to Wei, Ran You acted as the driver of his carriage. The Master observed, "How many people there are!" Ran You said, "Since they are so many of them, what more shall be done for them?" "Enrich them," was the reply. "And when they have been enriched, what more shall be done?" The Master said, "Teach them." (Zi Lu VIII, the Analects of Confucius)

As can be seen from the above, Confucian thought of "making people rich first and then educating them" reveals that Confucianism pays great attention to the right of subsistence. Social stability and progress as well as custom civilization depend on if people can lead a good life. Promoting human development on the basis of a better-off life of people, that is, "letting careful attention be paid to education in schools, and inculcating in it especially the filial and fraternal duties," then, "this condition, in which people raise their children and bury their dead without regrets, is the first step towards royal government." ("Lianghuiwang I," The Works of Mencius) It is clear that Confucianism holds that human's development should be based on people's right to subsistence.

Only through dialogue will countries all around the world reach consensus on human rights. The dialogue should take into consideration not only the most basic universal human rights, but also the particular rights in the context of a specific culture. Although traditional Chinese culture does not have a specific analysis of the concepts of human rights, yet its "human-oriented" thoughts can enrich the content of human rights concepts.

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196 Mou Zongsan, *Nineteen Lectures on Chinese Philosophy*, Shanghai Ancient Classics Press, 1993, P162. Note: Mozi is quoted from *History of Chinese Philosophy* by Department of Philosophy, Peking University (2001, P40), and *The Cheng Brothers Collection* is from *Nineteen Lectures on Chinese Philosophy*, P166.



HUMAN RIGHTS STANDARD, CIVILIZATION DIVERSITY AND HUMANITY HARMONY

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In recent years, the discussion on the issue of human rights in various countries worldwide is deepening. The Communist Party of China (CPC) and Chinese Government's proposals of adhering to human-oriented approach and making efforts to construct harmonious society inside China, and initiating and promoting construction of a harmonious world in the international stage have provided new impetus for the world human rights development and supplied new angle for academic discussions on the issue of human rights. In this article, I would like to talk about the relations between human rights protection and respects to civilization diversity and promotion of a harmonious human society.

I

Respecting and protecting human rights are the pre-conditions and basis for diversified development of civilizations. Based on the current historical and social conditions, and going beyond these conditions, human rights can be divided into right to live and right to development in general, as well as economic rights, cultural rights, social rights, political rights and so on. As a whole, the ideal state of the concept of human rights includes being respected spiritually and physically and avoiding being injured for no fault (including the rights of the special groups like children, women, the disabled and the old), choosing to participate in social material and spiritual production activities and getting reward so as to get their material and spiritual necessities for a living through exchanges, improving their living conditions through being educated and trained, accumulating and possessing properties through methods like working, receiving endowment and getting inheritance, choosing their living places and styles (including migration, marriage and giving birth), choosing and disseminating their religions, choosing social and political management modes, expressing their ideas on areas and issues related to their own or other people's rights, etc.

Logically, the word "human" falls in the category of non-collective concept and an individual human is a cell of the human race. Individual human exists during his/her coexistence with other people, and thus, the essence of a human lies in his/her existence in the society. The rights of an individual human can exist and be realized only through his/her existence with other people. In this sense, the stipulation of human right should be subject to its existence in the society. Human rights, because of their social nature, can only exist and be developed in specific time frames and spaces, and thus bear the natures of history and reality. They also have universality and



particularity. The human rights' natures of history and reality indicate the processes of human rights consciousness, theory and practice developed out of nothing, from parts to the whole and from specificity to general, and they are still in the process of development and perfection up to date. Linking up the nature of history with that of reality, we can see the human rights are unavoidably bearing universality and particularity. Universality refers to every person's conformability as a cell of all human race and the essence of the rights of every person should be the same to each other. Particularity means every person has his/her unique geo-space, time and social environment, which are necessary to human rights' detailed contents and realization. Just because of human rights' natures of history, reality, universality and particularity, they have the unified attribute of diversity.

During the development process of human society, social material and spiritual production activities in certain time frame and geo-space always form certain civilizations. To promote the human rights, we should fully respect the particularity of various civilizations, trying to find out effective methods to promote human rights progress under the existing historical, cultural and traditional conditions. Measures should be taken to avoid following and transplanting blindly other modes, or setting a unified standard for different civilizations. Disrespecting civilization diversity may lead to civilization conflicts, instead of civilization dialogues and exchanges, and finally, human rights violation in large scope. On the other hand, human rights protection should be the necessary approach of realizing progress and development of various civilizations. In this sense, promoting human rights progress is an important channel to boost civilization development and progress. Without human rights progress in modern time, traditional civilization, even though glorious in the past, is very difficult to radiate new vigor under the new historical conditions.

II

After clarifying the relations between human rights protection and civilization diversity, we need to deepen our discussion on the following three questions. The first one is, whether or not the practice of stressing civilization diversity and paying attentions to detailed traditional civilization in human rights protection means there is no general or common human rights standard, or we can deny such standard. Should such general or common human rights standard be formulated according to or beyond the conditions such as specific regions, countries and traditional civilizations? Logically, when the common or general human rights standard can be universally accepted, such standard can be qualified by most regions and countries through efforts. In other words, such standard should be the lowest standard. The lower the general or common standard is, the higher acceptance level it will have. Someone may say, given the lowest human rights standard is adopted, such standard may lose the value of existence, and human rights course itself will also lost its potential and developing orientations. Actually, it is not the case. Even though an overwhelming majority of regions and countries have reached the lowest standard, it is still of positive significance to establish such standard, which at least can avoid infringement to the lowest human rights standard and prevent human rights course retrogression. Furthermore, given the general or common standard is formulated according to the human rights concepts and practices of a few regions and countries which are much higher than the level reached by most



regions, countries and traditional civilizations, such standard is impossible to be widely accepted and their value of practice will be reduced. This will lead to power politics in human rights field. Thus, it is very difficult to find out or formulate a unified standard that can satisfy every party, and is impossible to be implemented in real practice. However, it is worth careful thinking and discussing academically to work out a lowest standard and a highest or ideal standard according to civilization diversity and keeping the usefulness of human rights standard in the minds.

The second question is, should human rights standard be rigid? In general, the effectiveness of any standard without rigidity is limited. Nothing can be accomplished without a norm or standard. Similarly, nothing can be accomplished when the norm or standard lose its rigidity. However, the rigidity should also be linked up with the standard itself. Given the highest human rights standard is adopted and implemented rigidly, large scale sharp contradictions and fierce conflicts and even serious confrontations may emerge constantly between the minority and the majority in human rights area. Inside specific regions and countries, the situation may sometimes become fierce social contradictions, conflicts and large-scale turbulences. In the area of international relations, it may lead to tense international relations and regional situations. Given the lowest standard is applied rigidly, it also may lead to sharp contradictions and conflicts, but in smaller scale, mostly in the forms of most human rights protecting forces restraining, pressing and punishing those infringers. This practice may be more practicable and experiences can be followed in the history of human rights development. In this sense, the promotion of human rights course development needs to explore and establish some certain general and common standard, ideally, a lowest standard and a highest standard. Human rights standard also need rigidity. The best option is, the lowest standard should be implemented rigidly and the highest standard needs some flexibility, serving as the guiding standard for the development of human rights course and encouraging related parties to develop towards the goal.

The third question is related to the responsibility of human rights protection and punishment when human rights are infringed. Like I have mentioned above, individual human rights protection can only be realized in certain region, country and traditional civilization. The responsibility of protecting human rights should be shouldered by all the members of the society, and any individual who violates human rights seriously should be punished correspondingly and should bear corresponding legal liability. In certain political and social entities, administrative and legal bodies should shoulder the prime responsibility of protecting human rights in their own areas. The responsibility includes providing effective economic, political and legal guarantees for human rights improvements through launching systematic reforms in political, judicial, economic and other areas and carrying out various measures to promote development. The investigation to the responsibility of problems in human rights protection in certain regions should be discriminated according to different situations and we cannot simply mix up individual activities with government's organizational activities. In general, some certain standard is needed to promote the development of human rights course and such standard should be established in accordance with the differences of regions, countries and traditional civilizations. These standards should be implemented rigidly and flexibly according to different situations. This can not only help promote



the development of human rights course, but also help maintain the development of civilization diversity. Measures should be taken to avoid stressing on human rights indiscriminately because this will lead to sharp contradictions and conflicts, civilization conflicts, large scale human rights infringements and retrogression of human rights course.

III

Promoting human rights protection and civilization diversity is the basic guarantee of constructing a harmonious society and promoting the establishment of a harmonious world.

Viewing from the angle of specific regions and countries, we can see a society that seriously disrespects and even infringes human rights is impossible to be a harmonious society. Similarly, a society that disrespects and harms civilization diversity is also impossible to be a harmonious society. It is especially true in a multinational country. Hence, Chinese Government first stressed on human-oriented approach while putting forward the strategic goal of constructing a harmonious society to accelerate the construction of a well-off society in all round manners. After the term of respecting human rights was included in the CPC Constitution, the CPC further put forward its people-oriented ruling concept in light of the important thought of “Three Represents,” indicating the CPC substantially raises its understandings to the issue of human rights. It closely connects its long-pursuing aim of serving the people wholeheartedly with the promotion the development of the world human rights course, indicating a new leap forward in CPC’s governing concept. At the same time, during the course of constructing a harmonious society, Chinese Government also specially emphasizes that great efforts should be made to promote harmonious culture construction and boost national unity and religious harmony. All these have close connections with the promotion of human rights protection and encouraging culture diversity development. On the other hand, protecting human rights and respecting culture diversify are important to guarantee the construction of a harmonious society; the concept of constructing a harmonious world has a larger scope, and have higher standards than that protections of human rights and culture diversity. The harmonious society includes democracy, rule by law, equality and justice, sincerity and friendliness, vigorous development, stability and harmonious coexistence of human beings and the nature. It is actually a further development of human rights protection concept, trying to respect and promote culture diversity on higher level. It is expectable that with the continuous advancement of the process of harmonious society construction, China will achieve new progresses in human rights protection and culture diversity promotion.

Viewing from the angle of international or global level, we can conclude that a world without human rights protection is impossible to be a harmonious world, and a world that disrespect and even harm culture diversity is impossible to become a harmonious world. In this regard, Chinese Government attaches importance to human rights protection, insists that the differences in regions, countries and traditional history civilizations should be taken into consideration during the process of protecting human rights, and objects establishing one-sided standard in human right area for power politics. The term “harmony” actually means the coexistence of the various differences. Diversity is the major charm of the nature and the human society, and logically, implies recognizing the differences, and on this basis, seeking harmony and promoting the harmony



and charm of a diversified world. Human rights progress is an important content of civilization progress. Human rights cannot be protected without the promotion of civilization diversity, and the course of human rights development cannot be effectively promoted without respect to civilization diversity. The two are the necessary conditions, but not the necessary and sufficient conditions. In other words, insisting on establishment of a harmonious world does not mean to focus the attentions only on promotion of human rights protection and respect to civilization diversity. The concept also include various countries and nationalities' mutually respecting each other's sovereignty and integration of territory, peaceful coexistence, equal negotiation, mutual benefit economically for joint development, cultural exchanges to promote each other and so on. Promotion of establishing a harmonious world will provide solidier, more reliable and long-lasting basis and guarantee for human rights development and civilization diversity development worldwide in large scope.

Finally, I would like to note that the greatest advantage of establishing the lowest and the highest standards and combining rigidity and flexibility while applying them is to promote the course of human rights protection worldwide and promote to establish a harmonious world under the condition of restraining hegemonism and power politics.

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THE DIVERSITY OF CIVILIZATIONS AND THE DEVELOPMENT OF HUMAN RIGHTS

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1. The diversity of civilization is a rule of the development of world history

Since the very beginning of human race, diverse civilizations characterized with different layers and distinctiveness have been formed on the basis of villages, regions, clans, religious communities, and so forth. On the one hand, each culture is a system that fits into its environment, a crystal of people's experiences in life for thousands of years, and a human heritage of historical and artistic values. Therefore, it has always maintained its unique form of civilization. On the other hand, various forms of communications and exchanges have been performed between different civilizations through daily association and economic activities as some ties. And with the formation of a world capitalist market, the local and national self-sufficiency and door-closed policy have been replaced with the intercourses and mutual dependence in all aspects between each nation. The spiritual products of each nation have some common wealth, which makes national unilateralism and limitedness increasingly impossible. As the development of world



history shows, it is the opposition and unity as well as integration and exchanges between different civilizations that have enabled the development of civilizations and the progress of society.

2. A harmonious world needs cultural diversity

Far back into the ancient times, people began to look forward to the unity and harmony of the world, where “people do not only support their own parents with filial piety, nor do they merely parent their own children; the spouseless, the widowed, the parentless, the childless, the ill, and the disabled all have their livelihood” . Cultural diversity is the very footstone to construct a harmonious world. Likewise, the course of world historical development has also shown that if there is only one single culture or if one single culture dominates in the world, there would not be democracy or freedom, let alone harmony. Just as a British scholar E. Renan has pointed out, the existences of multiple nations and multiple cultures can guarantee freedom, if there were only one set of laws and one ruler, such freedom might get lost.

Just in this sense, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* passed by the UNESCO on October 21, 2005 in Paris proposed in its first lines that the identification of cultural diversity is a fundamental character of human race, and clearly pointed out that the significance of a diverse culture is that it has “created a colorful world, offering more choices for human beings to improve their own abilities and values, and thus forming a main driver for the sustainable development of communities, nations and countries.” As the rule of development of the world history has proven, if some people attempt to subjectively discriminate civilizations as the so-called “superior” and “inferior,” or even arrogantly substitute one civilization for another, then wars would break out between countries, nations or regions.

With a history of civilization for several thousand years, the Chinese nation made its excellent contributions to the accumulation of the world civilization. But we have always respected the civilization of other countries, and called for harmony in the world. In 2005, President Hu Jintao delivered a significant speech in a UN meeting of chiefs from all countries, pointing out that “we will maintain the diversity of human civilizations, and in light of the principle of equality and democracy, boost the peaceful co-existence, mutual complementation with each other’s strong points, and simultaneous development of all civilizations, so that the world becomes more wonderful,” that “we respect the rights for each nation to choose its social institution and path of development for its own, and urge each nation to realize its prosperity and development in accordance with its own reality; we should embrace the spirit of equality and opening to maintain the diversity of civilization, strengthen dialogues and exchanges between different civilizations, and make concerted efforts to construct a harmonious world that accepts various civilizations,” and that we should “hold on the spirit of inclusion and co-operate to construct a harmonious world.” That is a clear generalization and summary for the consistent standpoint of the Chinese people.

So, we should work together to maintain the diversified world civilizations if we respect the rule of development of the world history.

3. The diversity of civilizations and the development of human rights concept

In the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*,



UN has clearly clarified the relationships between the diversity of civilizations and the concept of human rights: “Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed.” Cultural diversity is a footstone for the equality between nations and the guarantee of human rights. In other words, one has to respect and protect human rights if he wants to secure the diversity of civilizations.

But as for what are human rights and how to respect human rights, the current academia both at home and abroad are holding different opinions.

Among the Western concepts of human rights, one typical view holds that human rights are “ecumenical,” which stresses the aspect of political rights. To their thinking, the standards of human rights in a country simply rest in whether there exists a multi-party system, whether separation of powers has been practices, and whether there are the freedom of speech, news and association, the right of general election and so on that meet the requirements of their own.

Now that human rights are considered as “the rights that human beings own,” there would be some common standards that have been generalized, of course, one of which is the right of inborn equality.

But the concept of human rights is a category of superstructure, and also a category of civilizations. Now that civilizations are diverse, human rights certainly have their own diversity, relativity and particularity.

First, the development of each nation or country varies, and the status of human rights in each country or region mainly depends on whether people are in line with the social, political, economic and natural environment where they are living, in other words, one should take people’s status of social existences as a major index to judge the criteria of human rights in a society, but not on the contrary as some Westerners do, who dogmatically take some certain concepts as standards, regardless the aspect of human beings as social existence. They are just acting in a Procrustean way or putting the cart before the horse.

Secondly, the essence and contents of human rights are being enriched and improved together with development and changes of times. There has never been any unchangeable concept of human rights.

The concept of human rights originated from Europe, and it did lay more emphasis on the political aspect in its early days. But with the development of economies, the independence of nations, the improvement of education and living conditions and so forth, many developing countries are increasingly realizing that, as for the rights of their own, national rights, development rights, survival rights and so on, have also represented the contents of human rights, and to a certain extent the state’s rights is much more important than human rights; as with individuals and collectivity, the rights of individuals are not necessarily superior to those of collectivity. So, many countries have proposed the inclusion of these rights to judge “human rights,” instead of merely the human rights criteria put forward by the Western countries.

So, the concept of human rights is a unity of universality and particularity.

For the Western concepts of human rights, a common essential character is its abstract



universality beyond classes, times and history, which dissects the dialectic uniform relationships between the universality and particularity of human rights, and denies and erases their particularity. Some Western countries even put forward the proposition that “human rights are superior to sovereignty,” which are actually seek for hegemony in the name of human rights to realize their own national benefits.

People can make concerted efforts to boost the constant development of human rights as a part of civilization in the world only when the distinctive factors of human rights in each country interact to seek common points while reserving differences for a simultaneous development.

4. The socialism with Chinese characteristics is the only way for the development of human rights in China

It has been a persistent pursuit for CPC to strive for, maintain and constantly develop human rights for the Chinese people. After 1840, due to the invasions by the Western powers, China degraded into a semi-colony and semi-feudal society step by step, and the Chinese people suffered from dual oppressions by imperialists and feudalists. The national and social crises were unprecedentedly critical. Starting with the Opium War, and going through the Taiping Rebellion, the 1898 Reform, and the Boxer Rebellion, the Chinese people had fought persistently and dauntlessly, and numberless people with lofty ideals had made bitter efforts to explore a path to salvage the nation and help the people. All these struggles and trials had failed one by one although they had really driven the advancement of China in some certain historical conditions. The 1911 Revolution led by Dr. Sun Yat-sen overthrown the monarchal autocratic system that had ruled China for thousands of years, and very significant to the social progress of China at that time, but it also failed to change the essence of China as a semi-colonist and semi-feudalist society and the miserable fate of the Chinese people. Still they were suffering as if in an extreme misery, without any human rights at all.

The founding of the Communist Party of China in 1921 has been epochal in the history of Chinese people's struggle for human rights. The construction of socialism with Chinese characteristics that CPC had proposed just meant to strive for democracy and freedom, and guarantee and develop human rights for the Chinese people by building up a really democratic republic. In such a republic, both workers and peasants, regardless of their genders, would enjoy unlimited suffrage and eligibility in congresses of all levels, as well as absolute freedom of speech, press, assembly, association and strikes; laws and regulations concerning workers, peasants and women would be constituted (including the improvement of treatment for workers, the abolishment of contracted lives of workers, an 8-hour workday system, the availability of workers' hospitals and other sanitations and health care facilities in factories, labor insurances in factories, the protection of women workers and children workers, and the insurances for unemployed workers, and so forth); the weaker gender would enjoy equal rights in terms of political, economic, social and educational aspects; the educational system would be improved and the educational services would be popularized, and so on. All these objectives had presented the propositions of CPC in its early days for human rights, pointing out a revolutionary path for the Chinese people.



The founding of New China in 1949 brought a brand-new look to the Chinese nation and society, initiating a new era for the development of human rights in China. In the Chinese People's Political Consultative Conference held in 1949, the Common Creed for the Chinese People's Political Consultative Conference was passed, which was somewhat a temporary constitution. The Common Creed clearly stipulated that the power of the state belonged to people; that people had by law the rights of suffrage, the right of eligibility, and the freedom of thoughts, speech, press, assembly, association, person, dwelling, migration, religious faiths, procession, and demonstration; that all the laws, statutes and juridical systems of reactionary Kuomintang government that opposed people had been annulled, that the laws and statutes to protect people would be instituted, and that a people's juridical system would be established. In February 1953, the Law of Election of the People's Republic of China was promulgated, and in December the same year, a general election was carried throughout China. It was the first national general election in the history of China, which had realized people's rights of democracy to participate in the administration of state affairs. In September 1954, the 1st session of the 1st National People's Congress was held in Beijing, which passed the Constitution of the People's Republic of China. The Constitution stipulated the nature of the state and the function of state institutions, as well as the rights and obligations of citizens. Laying a stage for the construction of democracy and legal system in China, it offered a fundamental political guarantee for people to govern the country.

The 3rd Plenary Session of the 11th Central Committee of CPC in 1978 decided to adopt the policy of reform and opening to the outside world. In 1982, for the first time the 12th Central Committee of CPC brought forward the brand-new slogan to "construct socialism with Chinese characteristics." Over 30 years, China has come to find a proper way to develop socialism with Chinese characteristics.

The socialism with Chinese characteristics is something involving the construction of economy, politics, culture and society, doubtlessly the achievement in all these aspects under the flag of socialism with Chinese characteristics have facilitated the cause of human rights in China; meanwhile, the development of socialism with Chinese characteristics has been a holistic development including that of human rights. During the recent 30 years, the socialism with Chinese characteristics has achieved a great success, and the economy in China has maintained its rapid development for nearly 30 years; the Chinese people, who account for 1/5 of the whole world population, have solved their livelihood problems, largely living a better-off life, and the Chinese society has made an all-around progress. As early as when New China was to be founded, some Western politicians asserted that no government in China could afford to offer enough food to people. But the socialist China has solved this historical problem on its own. Now, China has only 7% of the farmland in the world, with a per capita amount 1.3 mu, much less than 12.16 mu in the USA and 4.52 mu all over the world, but it has supported 22% of the whole population in this planet. This comes first as people talk about human rights in China. In the 2nd session of the 10th National People's Congress in March 2004, an amendment of the Constitution was passed, which for the first time introduced the concept of "human rights" into the Constitution, and stipulated that "the state respects and guarantees human rights." For China, it was both a great



occasion in the construction of constitutional politics and political civilization, and a significant milestone for the development of human rights. As it has been proven in practices, the socialism with Chinese characteristics is a proper way to boost the development of human rights in China.

We are going to persist in a socialist road with Chinese characteristics, and a road of human rights development full of Chinese features. The world is actually diverse; each nation is unique compared with others. It is not only unnecessary but also impossible to reject our own way of civilization in blindly imitating the pattern of human rights development in the Western developed countries. As for human rights, the Chinese people have taken their own way to develop human rights, which has been proven suitable to the Chinese nation. Such a way has been distinct at least the following aspects: 1. It emphasizes that the diversity of civilizations and that of the ways of human rights development should be respected; 2. It emphasizes that human rights are a result of history, and its full realization means a gradual process connected with the economic and cultural levels of each nation; 3. It emphasizes that the rights of life and development should be placed at the first place, and that human rights should be boosted from all aspects in the conditions of reform, development and stability; 4. It emphasizes that the development of human rights should take productive development and simultaneous affluence as their substantial cornerstone; 5. It emphasizes that human rights are a part of sovereignty which should mainly be dealt with domestically, and it opposes any intervention over the sovereignty of other nations in the excuse of human rights; 6. It emphasizes that the benefits of collectivity and a state are superior to the interests of any individuals; 7. It emphasizes to govern the country by law, and protect and guarantee human rights by law. All these aspects are not only a significant part of the socialist human rights theory with Chinese characteristics, but also an important principle that should be adhered to in the development of human rights in China. Now, the human rights of the Chinese people have developed greatly, and the point is that we stick to our own way, persistently exploring the way of human rights development with our own characteristics.

With the constant superiority of the socialist system in China, and with the constant development of the socialist cause characterized with Chinese features, the enterprise of human rights will certainly keep progressing. As early as back in his days, Deng Xiaoping had expected the Chinese nation would develop on the basis of socialism and make greater contribution to the human race. The cause of human rights in China will certainly generate increasingly greater and more profound worldwide influence, being a part of contributions that the Chinese people make to the human race.

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AMALGAMATE DIFFERENT CULTURES TO BUILD A HARMONIOUS WORLD

- IN COMMEMORATION OF THE 60TH ANNIVERSARY OF THE *UNIVERSAL DECLARATION OF HUMAN RIGHTS*

Liu Hainian
China

A saying from the ancient book *The Book of Changes* reads, “the sage is able to discover the amalgamation of things by watching the movement of Mother Nature, and use his experience in setting up pertinent codes”¹⁹⁷ - in other words, a respectable man of high moral integrity is able to follow the trend of the world and amalgamate different cultures and ideas, so as to formulate codes and regulations suitable for all common people, propelling social development. This philosophical conception, penetrative and instructive, can be used either to review history, observe reality or to look forward to the future.

Part I

Sixty years ago, in December 1948, the UN Assembly drew up and ratified the historic document of the *Universal Declaration of Human Rights (UDHR)* by amalgamating opinions of delegates from different cultural backgrounds. Before this document came into being, mankind had just endured two world wars in the first half of the 20th century. The Second World War, in particular, had brought the world unprecedented atrocities, with the German fascists and Japanese militarists brutally slaughtering tens of millions of people in the West and East, as well as destroying human civilization. And at that time, hundreds of millions of people in Asia, Africa and Latin America were in extreme misery, struggling under the exploitation and oppression by colonialism. After experiencing fierce wars and long struggles against colonialism, people of the world came to realize the significance of independence, freedom and human rights. Under the circumstances, and according to the human rights principles of the *UN Charter*, the UDHR was drafted under the direction of Mme. Eleanor Roosevelt and deliberated and ratified by the UN General Assembly. The UDHR clearly and solemnly states in its very beginning that:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall

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enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.¹⁹⁸

In Article 2, it is emphasized that, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁹⁹

The UDHR is crystallized by amalgamating numerous ideas from delegates of different nations around the world. The drafting process of the UDHR has shown the convergence and accommodation of different cultures. Professor John Peters Humphrey, late President Emeritus of the Canadian Human Rights Foundation who had participated in the drafting of the UDHR, once told that, the argument over certain issues by the delegates came to a stalemate during the drafting process. At that time, it was the Chinese delegate P. C. Chang that made a suggestion to Mme Eleanor Roosevelt that all delegates stop their negotiation and study the Confucian ideas of tolerance and moderation. The Confucian ideas cooled down the atmosphere so that the drafting process could be carried on. Chang’s suggestion was appreciated by Mme Roosevelt and the delegates from other nations.

The UDHR has amalgamated different cultures and reflected requirements of different nations - that is why it is endorsed by people all over the world. To make the UDHR principles effective and legally binding in various fields, the UN has formulated and promulgated a series

¹⁹⁸ Universal Declaration of Human Rights

¹⁹⁹ Ibid.



of documents on human rights, including: *Convention Relating to the Status of Stateless Persons*, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, *International Convention on the Elimination of All Forms of Racial Discrimination*, *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Right to Organise and Collective Bargaining Convention*(by International Labor Organization), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *Basic Principles on the Independence of the Judiciary*, *Standard Minimum Rules for the Treatment of Prisoners* Protocol relating to the Status of Refugees. Among all, the *International Covenant on Economic, Social and Cultural Rights* and *International Covenant on Civil and Political Rights* enacted by the UN General Assembly in December 1966 are the most important ones, as these two, together with the UDHR, are the basic documents of the *International Bill of Rights*. Encouraged by the UDHR, people of all nations in the world have made tremendous endeavors together for over half a century and have attained remarkable achievements: human civilization has recovered from the destruction by the German fascists and Japanese militarists; fascist/militarist perniciousness has basically been eliminated; former colonial and semi-colonial countries and peoples have won their due independence and freedom (one of the most important historic event is the founding of the People's Republic of China in 1949, which ended the semi-feudal/semi-colonial rule in China and liberated a quarter of the world's population); the brutal policy of racial segregation has been discarded; gender discrimination and inequality have been much corrected; rights of the minority and the disadvantaged have drawn broad attention and been protected in most countries; freedoms of ideas, conscience and religious beliefs and freedoms in other forms as stated in the UDHR have been or are being realized; it has become the trend of the times to strengthen democracy and rule by law and to safeguard personal, property and other due rights of individuals; violation of human rights is not only opposed domestically but also condemned internationally, for people's awareness to rights protection has been greatly improved; the UN has established the Human Rights Council and reinforced supervision of human rights conditions in all of its members. Human rights, international security and peace, and economic and social development have become the three supporting pillars of the UN. It has been proved in the past 60 years that, as the keynote programme of the *International Bill of Rights*, the UDHR is the single important historic document in the field of international human rights. That's why we gather here and people of different countries are holding conferences everywhere commemorating it today.

Part II

Thirty years ago, in December 1978, the Communist Party of China amalgamated all sorts of opinions from within and outside the Party, determined to "emancipate the mind and seek truth from facts," and adopted the Reform and Opening-up Policy. Chinese people, starting from their specific domestic conditions and absorbing nutrition from other cultures, overthrew the last feudal empire in 1911 and won a great victory of the New-democratic Revolution in 1949. For some reasons, however, China was cut off from the outside world for quite a period of time.



As a result, China's national and social improvement was badly affected. But the Reform and Opening-up Policy brought an end to the closed conditions. In this new policy, "Reform" means to eradicate the old system or mechanism inadapted to new developments of the socialism; "Opening-up" means to change the conditions of being cut off from the outside world, voluntarily open the country to the world, import from and export to foreign countries, boldly use all meaningful achievements of human development and learn from all valuable experience so as to improve China's socialist construction. It is by starting from its specific domestic conditions and amalgamating different cultures that China has found out its path of building socialism with Chinese characteristics and furthermore improved China's human rights greatly.

For another 30 years since then, China has made unremitting efforts to improve on what has been achieved in socialist construction during the precious years. Now China's human rights legal system is perfecting day by day. The viewpoints of "exercising the rule by law, and turning China into a socialist country with an adequate legal system" and of respecting and safeguarding human rights have become important constitutional principles. The constitution and relevant laws all provide that Chinese citizens enjoy a broad range of rights and freedoms:

- Political rights. The electoral system that reflects people's managing affairs of their own country has been perfected. This system lays emphasis on improving grass-root democracy, broadens the application of differential voting mechanism, and promotes consultative democracy within and outside state organs. To safeguard people's right to know and to reinforce supervision over state organs and their staff members, Chinese government has improved the transparency of operation in government agencies, designating a spokesperson in each county-level or above government agency. Government agencies and officials should administer strictly according to law. Should any citizen or legal person find his/her rights have been violated, he/she might submit an application of administrative reconsideration to a government agency of an upper level, or might lodge an administrative proceeding to the court.

- Personal rights. The constitution and relevant laws provide that, a citizen's personal freedom is free from any aggression, and a citizen is not to be arrested unless the action of arrest has been approved by a competent People's Procuratorate or ordered by a competent People's Court and is being executed by a public security organ. The *Criminal Law* and *Criminal Procedure Law* recognize the principle of a legally prescribed punishment for a specified crime and presumption of innocence. The People's Procuratorate exercises its procuratorial authority independently while the People's Court exercises its judicial power independently. The hearing of a case by the People's Court is to be open unless otherwise provided by law in special occasions. The accused has the right to defense. The newly amended *Law on Lawyers* has further improved China's system of advocacy. A citizen has the right to obtain due compensation according to law, if his/her civil right has suffered a loss owing to aggression by a state organ or its staff members.

- Rights of the minority and the disadvantaged. China has enacted *Law on Regional National Autonomy*, *Law on the Protection of Rights and Interests of Women*, *Law on the Protection of Minors*, *Law on the Protection of Disabled Persons*, etc. China has also formulated appropriate policies in regards to national economic construction, western development drive,



culture, education and employment. The GDP growth rate and improvement speed of living standards in many ethnic-minority-inhabited regions are higher than those of most middle parts of the country. The employment rates of women, the disabled and other disadvantaged groups are also greatly increased.

- Religious rights and freedom of speech, publication, rally and association. All of these rights and freedoms are fairly safeguarded. Buddhist temples, Taoist abbeys, Islamic mosques and Christian churches are renovated. Different religious groups are living harmoniously together with each other and with non-religious groups. The quantity of all sorts of publications is tremendously boosting. NGOs emerge in large numbers. All the above have contributed to a prosperous social life in China.

- Economic, social and cultural rights. The constitution and relevant laws confirm that, during the primary stage of socialism, China will adhere to the basic economic system that takes public-owned economy as the core while concurrently accommodating development of all types of economy, to the distribution system that takes “distribution on the basis of labor” as the core while recognizing the existence of all forms of distribution. Lawful private property of a citizen should not be offended against, for the state provides legal protection to its citizen’s property rights and rights to succession. Since the establishment of socialist market economy, China’s industry, agriculture, science and technology, and culture have been developing rapidly, with a stable GDP growth rate of more than 9% per year. China’s economy grew by 11.4% in 2007, making the country the third largest economy in the world - that means China is not only feeding 20% of the world population with only 7% of the world’s arable land, but also continuously enhancing the living standards of its rural or urban population. This is a great achievement by China. It is also a great contribution to the world.

It has been proved in the past thirty years that, the Reform and Opening-up policy, formulated under the guidance of “emancipating the mind and seeking truth from facts,” is the key to China’s sustained development, because it is based on China’s specific domestic conditions and has absorbed nutrition from the achievements of other nations’ civilization. In recent years, China’s top decision-making body has, on the basis of development in all fields, put forward the Scientific Outlook on Development which stresses the need to “put people first,” aimed at building a moderately prosperous society in all respects and building a harmonious socialist society - this is the outcome of amalgamating Chinese and foreign cultures in the background of the emerging new conditions. A careful study of President Hu Jintao’s report to the 17th National Congress of the Communist Party of China leads to the conclusion that the report is as good as a pledge of human rights with Chinese characteristics, and that realization of the goals it set up will surely bring China’s human rights standards to a higher level.

Part III

Taking a careful look at the world of today, we will find historic changes have taken place in human rights and social development both in China and other countries, for people of all countries have been working together, making cultural exchanges and learning from each other. Peace and development have become the mainstream of the world. However, we have to realize



that there are still many problems remaining to be solved. For example, the shortage and damage of resources have hindered economic and social development, which has in turn affected the realization of rights to development; pollution of land, water and air has shown negative effects on food safety, and natural disasters triggered by greenhouse effect are menacing human subsistence; conflicts between different races, nations and religious sects are still going on in many areas; random killing of innocent people by terrorists and religious extremists is running rampant; the war against and occupation of the sovereign country of Iraq, in the name of destroying weapons of mass destruction, is yet to be ended; the North and the South are experiencing very imbalanced development, with hundreds of millions of people still living below poverty line and their right to subsistence hindered by poverty; the farmer-workers in Chinese cities and overseas labors in Europe and North America have made great contributions to the economies there, yet the rights they can enjoy are utterly unbecoming; governments need to find effective ways to strengthen supervision over enterprises' fulfillment of their legal obligations and social responsibilities, averting life threatening and health damaging incidents in particular; in the field of law-enforcement and judiciary, the goal to maintain equity and justice by protecting the rights of both the aggrieved and the suspect is yet to be achieved and so on.

Modern technology has sharply shortened the distance between people. Things that could only be completed and contacts to be achieved after months or years of efforts in the past take only a single day, several hours or even a few minutes at present. The globe is just like a village, where all villagers share common interests and face common challenges, and no individual can expect to be immune from his surroundings. In these circumstances, world elites should enable themselves to "discover the amalgamation of things by watching the movement of Mother Nature," pool the wisdom of different nations and cultures to establish the "*social and international order in which the rights and freedoms set forth in this Declaration can be fully realized,*" as appealed in the UDHR. China, on the ground of its national realities, follows the fundamental principles of the UN Charter and the UDHR, and maintains that "people of all countries should join hands and strive to build a harmonious world of lasting peace and common prosperity" - this is an important enrichment and development of the UDHR aspiration. The basics of the Chinese standpoint are peace and security, development and prosperity, and enjoyment of human rights.

1. International peace and security are prerequisites for building a harmonious world. Without peace and security, there will be no harmony in this world, and people will have to live in terror and chaos where no guarantee of life and property is available. Amalgamation of different cultures is conducive to international peace and security. As stated in the UN Charter, in order "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind," we must "practice tolerance and live together in peace with one another as good neighbors." To achieve peace and security has been the ardent aspiration of Chinese people for a long time. In ancient times, Chinese people believed that peace and harmony are "the fundamentals of governance and essentials of all things on earth." The time-honored faith that "peace and harmony are the priceless" has been passed on from generation to generation in China. Shortly after the People's Republic was founded, China initiated, together



with India and some other countries, the “five principles of peaceful co-existence,” which has become guidelines for development of relations between nations. For over half a century, following these principles, China formulated foreign policies of never seeking hegemony, building mutual trust, mutual benefit, equality and cooperation, developing friendship and partnership with neighboring countries, establishing a new international order and promoting diversified international relations. The concept of building a harmonious world is the most recent development of China’s foreign policy, which appears at a time when the country is more and more integrated into the international community. Considering the obvious reality that there are countries of different cultural backgrounds and social systems of different features, China holds that any attempt to impose certain value or social system onto others should be avoided, otherwise intensified contradictions will arise, leading to conflicts or even wars. At present, the unscrupulous killing and destruction of public facilities by terrorists and religious extremists have become an international issue, menacing peace and security around the world. To resolve this issue, we need to make sober, careful, objective analysis of the underlying causes, and apply what the Chinese call “comprehensive measures” instead of simple violent tit-for-tat actions. Even for the purpose of “prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,” countries need to “take effective collective measures” “in conformity with the principles of justice and international law”²⁰⁰, and go through appropriate procedures in the UN Security Council. Arbitrary unilateral action can only cause harm to life and property in a broader spectrum. Confucius, the great Chinese sage who lived 2500 years ago, introduced the concept of “being harmonious yet different” as an effective way to deal with personal relations. Confucius said that “a noble man can be harmonious yet different, but a mean man can only be identical yet inharmonious”²⁰¹ - in other words, a reasonable man, recognizing the existence of contradictions, pursues harmony and concertedness but doesn’t impose identicalness; while an unreasonable man, not paying enough attention to the objective existence of contradictions, seeks unrealistic identicalness but doesn’t know how to concert differences. Therefore he will never achieve harmony. This philosophical conception, when applied in international relations, means that countries need to be tolerant, friendly, respectful, equal and consultative to one another, need to use peaceful means in settling international disputes, and should not adopt “beggar-thy-neighbor” policies or oppress other countries by force.

2. Development and prosperity are fundamental to building a harmonious world. Development is a comprehensive process that involves economy, society, culture and politics. It is proved that, the amalgamation of different economies, political systems, societies and cultures can facilitate development. In view of the significance of development, the UN Charter provides that, countries shall strive to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character. To attach more emphasis on the significance of development to mankind, the UN General Assembly pointed out that, the right to development

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is an inalienable human right, and that, the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development. The Declaration on the Right to Development laid stress on the obligations of countries and the international community in the realization of development, declaring that, States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development, have the duty to co-operate with each other in ensuring development and eliminating obstacles to development, and have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development²⁰². The *Declaration on the Right to Development* has set up guidelines for countries and the international community in social development and in solving problems in the process of development, and thus played a positive role in promoting development.

China has always attached importance to the realization of both a nation's right and an individual's right to development. As an ancient Chinese saying goes, "getting ample food is the primary want of the masses." The Chinese people have always been striving to realize their development, to live a better life, and to vitalize the nation. But it is only in the recent 30 years that Chinese people came to realize that "development is the iron law," and began to eliminate obstacles and grope for the right way to develop. "Poverty is not what Socialism is for," and the only way to get rid of poverty is to develop the national economy. Thirty years of economic development has lifted 250 million people out of poverty and sent the 1.3 billion Chinese on the way toward a fairly comfortable life. Development, of course, means far more than economic achievements, as indicated in the UN Charter. While endeavoring to lay a sound economic foundation for material development, China has been aware of the inner link between developments of different fields and laid equal emphasis on ethical, political and social developments to attain the goal of building a moderately prosperous society in all respects. Realizing, from their own experiences, how significant development can be for people's subsistence, Chinese people regard the rights to development and subsistence as the prime human rights for the current period of time and a long period to come. To safeguard healthier development, China puts forward the scientific outlook on development which endorses the need to "put people first" and pursues comprehensive, balanced and sustainable development. With the comprehensive application of the Scientific Outlook on Development, China will surely usher in a period of sound and rapid development, making solid progress in all respects.

In the modern age of rapid technological development and economic globalization, resources for development and markets for products are in closer ties than ever. Any economic problem ensuing in one country may have immediate repercussions in countries nearby or faraway, or even the whole world. Apparent recent examples are the financial turmoil occurring years ago

202 International Documentations and Institutions of Human Rights. Ed. Chinese Academy of Social Science. P483-484.



in South-East Asia and the ongoing subprime mortgage crisis in the USA. The development of global economy has been captured by production and consumption of the world's prime energy, petroleum oil. To stabilize and sustain the development of world economy, countries need to be cooperative, seek balanced, complementary and mutually-beneficiary growth of their economies, and endeavor to create a win-win situation. Developed countries have the obligation to provide more financial and technological support to developing countries, and bear more responsibilities in promoting development and in removing certain undesirable consequences of development. As imbalance exists in economic growth, frictions among countries are almost unavoidable. In case of any friction, the parties concerned should resolve to have consultations on the basis of equality or seek conciliation or arbitration through WTO dispute settlement mechanism, avoiding trade wars that will eventually hurt both sides or even affect other countries.

3. Safeguard of human rights is the noble goal of building a harmonious world. Harmony is desirable and the endeavors to build a harmonious world are lofty - such a eulogy is well justified in that these endeavors are for enabling all people to enjoy full human rights. This is also the underlying reason for the masses to support the scientific outlook on development which endorses the need to "put people first" and pursues comprehensive, balanced and sustainable development, enhancement of social construction and further improvement of social welfare. We can assume that, if harmony were only for the interests of any single country, nation, religion or gender, it would entirely lose its halo. Always bearing in mind that human rights are the aim of building a harmonious world, we can highlight man's dominant position in the building process, and accordingly all people will be attracted into this process, and share its achievements without jeopardizing the rights of other people and the public by one's own rights. Always bearing this conception in mind, we can understand and respect the universality of human rights and the interdependence of various rights, and can facilitate comprehensive development of economy, society, culture and politics, and can guarantee all individuals' rights as well as the collective rights of women, children, the aged and the disabled. Always bearing this conception in mind, we can pay enough attention to the particularity as well as the universality of human rights, so that every country can, in the light of its specific culture and development level, establish appropriate human rights safeguarding system and determine its phased targets in the process. Human rights laws and systems are a kind of culture. And in the area of human rights, different countries in the world have different mentalities and distinctive systems. No matter what unavoidable contradictions there exist, all countries need to conduct exchanges and dialogues so as to accomplish the goal of common progress.

The world is diversified and complex, with differences existing in historical process, national culture, religious belief, social system and level of economic development, as well as in people's mode of thought. In an environment where science and technology are developing rapidly and weapons of mass destruction are constantly emerging and unavoidably reachable to more and more countries and people, any unilateral intervention aimed at seeking private interests for a single ethnic group or country will never establish an order recognized by international community. If someone with a teenager's "naivety" attempts to apply a certain system as a model to the world,



claiming his own value to be universal, he will definitely run into brick walls wherever he goes. Faced with this situation, if we want to keep the global village peaceful and secure, we have no other choice than to live harmoniously with one another. Arduous as the mission to build a harmonious world may seem and long as its way may be, we have to set up our objectives and start our undertakings. As long as we arouse the fervor of the masses, pool the wisdom and cultural achievements of all the nationalities, we can accumulate immense strength and achieve our desired goal.

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THOUGHTS AND SUGGESTIONS ABOUT THE RESEARCH EXCHANGES OF CHINESE AND WESTERN HUMAN RIGHTS

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I. Increasing the common understanding of the dialogue about Chinese and western human rights

At the beginning of the 1990s, the dialogue about Chinese and Western human rights emerged at the end of the Cold War. After the disintegration of the Soviet Union and Eastern Europe, China began to meet more and more “human rights offensives” from the western countries. The research of Chinese human rights was to cope with the diplomatic pressure from the human rights at the beginning. The main divergences are from the relationship of human rights and sovereignty, the relation of the personal rights and the collective rights and the relationship of political rights and economic and social rights.

With the review of more than ten years dialogue history of Chinese and Western human rights, from the academic aspect, the differences come from the historic, cultural and economic developments of two sides, rather than from those politics and ideologies. Furthermore, the enormous improvements in China’s economy and Chinese living standard have further explained the human rights dialogue.

The scholars of two sides, especial historians and economists, should be involved in the dialogue which should not be limited in the political and diplomatic fields. Without historical cases and real data, those, living under the western economy and social welfare system, feel difficult to understand the reason why the sovereignty, the right to subsistence and the right of development are not empty conceptions in China. A common person does hardly understand Chinese concept of human rights, if he has never been a colonial slave and never faced the threat



of national doom and racial extinction, if he has never suffered from cold and hungry and if he has never been too poor to be educated in school and cured in hospital. Many Chinese are still seeking to live comfortably in his own moderate apartment and live gracefully on his own labor.

Although in the present world, the issue of human rights has become one of the most concerned problems, and all the governments give more and more support to the International Covenant on Human Rights, the security of human rights is still far from globalization. In fact, human rights still show as the rights of citizens in every country which mainly are protected by the sovereign countries. The western governments apparently show more responsibilities and duties to their own citizens than to other countries'. America refused to accept the Jew when they were expelled by the Nazi in the last century. Even nowadays, the western countries have measures to resist illegal immigration, and under the economic trouble they resist and discriminate the legal immigration. The immigration will not be discussed here. This just means that all the governments give more priorities to their own citizens than to other countries'.

But Chinese concept of human rights is extremely changed, while the revolution and opening and the foreign exchanges get deeper development and Chinese economy continues booming. Chinese social development has experienced three phrases: in the first phrase, the political rules are taken as the main line, which means the only measure is to divide the bourgeois nature and socialist nature; in the second, the economy is simply measured by the simple increase of GDP; in the third, the "human-centered" theory of development is supported. In 2004, "the nation respects and safeguards human rights" was charted in Chinese Constitution, which is an epoch-meaning event. That shows the expansion of the common understanding of Chinese and foreign research of human rights.

II. Human rights: common values not mean common road of development

In the histories of China and foreign countries, it has been proved that human rights are necessary in modern social development. A society without human rights is an autocratic and immoral society in which politics and economy cannot develop steadily. So it has its objectivity that human rights have become the common ideal values of all humanity, especially in the present globalization.

So the prerequisite of the present dialogue is not about the necessity of human rights, but about the way to develop the rights of citizens. The different ways of all countries are dependent on the historic and cultural traditions and the national qualities. And the social, economic and cultural rights of citizens also are influenced by the economic level.

The western development of human rights has several characteristics: The first is self-rising, which means that the concept and system of human rights stem from the real needs of the social inside, not from the external pressure and influence of the foreign countries; the second is from the grass-roots, for example, from the Middle Ages the autonomy has begun in towns, villages, guilds, churches and schools, etc; the third is gradual, which means that rights are developed gradually, for example, the rich and the man owned rights earlier than the poor and the woman, and the process is still continuing nowadays; the fourth is the divergent, the western countries choose different ways to develop human rights.



In the West, the concepts of geography, culture and politics are vague. I held a research project in which a book named *The Development of the Human Rights of Western Citizens* will be released recently by the Jiangxi People Press. During the research, we took the UK, the US, French and Germany as representatives, although they are different from other Northern and Southern European countries in many aspects. The first three represent the common qualities, while Germany shows the specialties. Actually, the four countries have their own characteristics. Generally, in UK and US the rights of citizens are especially important, while the government power is limited. In Germany, the government is the premise and basis for personal rights, and the national and social interests are unswervingly higher than the rights of citizens. And the French mode combines the two kinds.

In China, the development of citizens' rights has three characteristics: First, that does not spontaneously develop from bottom to top. In Chinese traditional culture, there are some factors of civil rights which generally are not enough to form modern democracy. Especially the traditional civil rights are different from the modern individual or citizens' rights. Second, that is unbalanced, just like the local economies. In an undeveloped region, the sense and safeguarding of rights are correspondingly backward. Third, that is gradual. All nationals are not due to own same rights, even after the Constitution has been issued and amended.

Gradual development, as the common characteristics of Chinese and Western citizens' rights, should be concerned. That approves the historical development of human rights. In another word, the development is limited by many social factors, and exploring theory and issuing declaration cannot resolve everything. In 1789, the concept in French *Declaration of the Rights of Man and the Citizen* was advanced, but one and half of a century later French women owned the right of vote in 1944. And even French men owned the universal suffrage in 1848, nearly one hundred years earlier than French women. The American *Declaration of Independence* issued the human rights earlier than the French, but the black owned the equal rights later till the middle age of 1960s. The reasons of time differences cannot be the theory of "natural rights," but the histories and cultures of the two countries.

We can also learn from the variety of western human rights development. Northern Europe chooses the democratic socialism and their women own the best rights to participate politics. The English and American choose the new liberalism, but they have different emphases. The American prefer personal rights and freedom. Different from the American emphasis on personal rights, the German and Dutch prefer the social values and make many concepts with "social" as the prefix, such as social partner, social dialogue and social market economy, etc. If there are various forms in western development of human rights, is it strange that China with a cultural tradition of more than 5000 years chooses its own way?

Under the globalization, the developments of all countries, which are not isolated and fixed, are being continuously compared, competed and chosen again with the practice and time as criteria. For example, under the policy of reform and opening up, Chinese farmers spontaneously chose the democratic self-ruling and directly elected the villagers' committee to meet the practical needs, which is epoch-marking in Chinese history. On February, 1980, 85 peasants of Hezhai



village, Yizhou city, Guangxi province, directly elected by ballot the first villagers' committee in Chinese history. It is unexpected that this autonomous committee was accepted and supported in the countryside, just like the experience of fixed output quotas for individual households created by the farmers of Xiaogang village, Fengyang county, Anhui province. Till the end of 2007, 620,000 villagers' committees have been constructed, covering almost all rural areas in China. At present, "the autonomous system of the grass roots" is listed with "the multi-party cooperation system," "the political consultation system" and "the system of regional autonomy for ethnic minorities" as main lines of the socialist political system and reform with Chinese characteristics. Doesn't this spontaneous, internal, fundamental or grass-roots form of democratic autocracy deserve the full concern of the human rights researchers?

III. Suggestion: research of human rights to meet three needs

In the 21st century, human rights should be a channel and bridge for the international exchanges. Some constructive work should be carried out. For example, the exchange and cooperative research of the experiences of Chinese and western democratic constructions can help the two sides mutually understand and compare for mutual learning.

The exchange and research of Chinese and foreign human rights should further combine the theory and practice, and meet the needs of social basic level, particular problems and the common people. If the human rights and the rights of citizens are not closely related to the living of the common people, not combined with the particular problems concerned by them, and not from the grass-roots units, those rights will lose social foundation and vitality. The grass-roots organizations are similar to the social cells. If the grass-roots level has no democracy and self-ruling, neither does the whole society. Furthermore, there is another research project to combine the grass-roots democracy from below and the representative democracy from up.

About how to meet the three needs, there are many issues to explore. In China, there are the grass-roots democracy and self-ruling in countryside, the self-ruling in urban communities, the safeguarding the rights of urban employees by the trade union, the women's rights, and the rural children's rights to be educated. In China, the "human-centered" concept is held to resolve the practical conflicts and problems.

In Chinese academic circle, there are more theoretical discussions about the western human rights and democracy, and better understanding of the forms of the upper democracy, such as the parliamentary system, party system and separation of powers, compared with the understanding of the grass-roots democracy and self-ruling of the western society which are the foundation of the western democracy and human rights. It seems that people only see the upper part of ice-berg over the water surface. That is one of the reasons why some persons blindly worship the western democracy and depend simply on legislature and the system from top. In one word, the emphasis of the research of the western human rights should also be moved down.

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PROTECTION AND DEVELOPMENT OF HUMAN RIGHTS IN CHINA





HISTORICAL IMPROVEMENT ACHIEVED BY CHINA IN THE CAUSE OF HUMAN RIGHTS

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While commemorating the 60th anniversary of the Universal Declaration of Human Rights, we are glad to see that China has achieved historical achievement in the cause of human rights and gained special successful experience with Chinese characteristics. Standing at a new historical starting point and led by the CPC Central Committee with Hu Jintao as the General Secretary, China is now already upholding higher the banner of people's democracy and entering a new development stage for the cause of human rights.

I. It is the task and characteristics of China's democracy to respect and safeguard human rights

This year is the 60th anniversary of the Universal Declaration of Human Rights. Within the past 60 years, China has achieved historical improvement in the cause of human rights. At the 17th CPC national congress held last year, stress was laid again on that "we must respect and safeguard human rights, and ensure the equal right to participation and development for all members of society in accordance with the law." while "Unswervingly Developing Socialist Democracy" being expounded. It can be concluded that to respect and safeguard human rights has become the primary task while developing the socialist democracy with Chinese characteristics. In the meantime, we should notice that China has its own outstanding features in the cause of human rights.

For a thorough understanding, we must make a meticulous study and illumination in the light of Chinese history and reality in China.

First, we must recognize that human rights of Chinese citizens are realized gradually in the course of safeguarding the nation's collective human rights.

As China had experienced a lengthy fierce and dauntless fight against the control of imperialism and feudalism before it obtained the basic conditions for human rights, the individual human rights in China are inevitably combined with nation's collective human rights for the sake of respecting and safeguarding human rights. It is widely known that China was a semi-feudalist and semi-colonial country for over 100 years when almost all the capitalist powers had invaded and bullied China. In those years when "power is the truth," where could thousands of millions of Chinese find their human rights? Chinese individual human rights can be achieved only after the whole nation is independent and liberated and after the whole country gains its due rights in the world. This truth is learned from China's distressful history of over 100 years. As Deng Xiaoping said, "people support human rights, while we cannot forget about the national rights."



National rights are the national collective human rights. 60 years ago, the Universal Declaration of Human Rights was proclaimed “whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and “whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people” , of which we have a particularly profound understanding as China waged an arduous war and made great sacrifice for “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family” and against “barbarous acts” that smeared China’s human rights. Now China is developing rapidly in a peaceful way. However some take China’s development as a so-called “threat” to them and try to restrict the right of equal development we should enjoy in the world. The national development and strength is the prerequisite to realize and safeguard each citizen’s human rights in China.

In fact, one feature China has in respecting and safeguarding human rights while developing socialist democracy lies in to “ensure the equal right to participation and development for all members of society in accordance with the law” while at the same time safeguarding China’s sovereignty.

Secondly, we must recognize that human rights of Chinese citizens are realized gradually, with a correct leadership by hardworking CPC.

History tells us that Chinese people have faced two major historical tasks since modern China. One is the national independence and people’s liberation and the other is national prosperity and power and people’s common prosperity. Taking this into consideration, in order to fulfill the task to respect and safeguard human rights in China, we need to work on the collective human rights for the whole nation and people, and to provide a social environment and social system where democracy and legal system is implemented to safeguard citizens’ human rights. Not any individual can alone achieve this difficult task. Instead, this historical task poses a test for all classes, parties and their leaders in China. Landlords represented by Lin Zexu, Wei yuan, Gong Zizhen took this test. Peasants represented by Hong Xiuquan took it. The bourgeoisie reformists represented by Kang Youwei and Liang Qichao took this test. The bourgeoisie revolutionists represented by Dr. Sun Yet-sen took this test. Actually, Dr. Sun Yet-sen made great contribution to China’s human rights as he led the 1911 Revolution though which the absolute monarchy in China was overthrown. However, China’s nature as a semi-colonial and semi-feudalist country was not changed yet and no solution was provided for the fundamental human right issues in China. It was CPC who achieved a great score in this test, the test deciding the future of China.

CPC, which was founded then to realize democracy (human rights) and science in China, has put great efforts in effectively promoting democracy and safeguarding human rights in China. CPC’s core task in the Democratic Revolution Period was to fight for democracy and human rights, politically fighting against imperialism and feudalism, economically striving for peasants’ land right, worker’s right of association, and other basic welfare and benefits. In particular, on



the Chinese People's Political Consultative Conference held in 1949 by CPC, CPPCC Common Program was formulated reflecting and safeguarding the basic human rights for Chinese. P.R.C was founded and people became the master of the country. It was the first time emancipation of human rights in Chinese history that China. The year of 1949 reminds every Chinese of the proud sound "Chinese people who accounted for 1/4 of the world population stand up since now." From then on, laws and rules like *Marriage Law of P.R.C*, *Workers Union Law of P.R.C*, *Land Reform Law of P.R.C*, *Labor Insurance Stipulation of P.R.C* have been enacted. Peculiarly, under the leadership of CPC, Constitution was formulated, general election was held, NPC system was set up, equality and unity for all nationalities was advocated, and nationality region autonomy system was established. All these provided systems to ensure the realization of human rights. Since P.R.C was founded, China's human rights have come true into the real life, step by step from the written requirements in the program. It is the truth in history. At the same time, we don't deny the fact of the tortuous road and the mistakes we had on the way to realizing human rights in China, esp. like the Cultural Revolution when human rights were violated at a large scale. However, on the other hand, we must point out that not only the people, but also the CPC members and cadres suffered from these mistakes. And it was us ourselves that corrected these mistakes. In 1978, the reform and opening up policy was adopted. The family contract responsibility system was implemented in the rural area and 4 special zones including Shenzhen were set up. Since then, reforms in the field of economic, technological, education, cultural, and political systems have been carried out. Harmonious society and democracy within CPC have been promoted. All these have promoted China's human rights. Since the reform and opening up policy was adopted, the past 30 years witnessed the realization of the second time emancipation of human rights in Chinese history. As we underwent the painful tortuous road in developing human rights in China, we surely cherish more what we have achieved, and moreover the human rights that every Chinese should and is enjoying in the social progress in China. In 1997, "respect and safeguard human rights" was included in the 15th CPC national congress report. In 2004, the second plenary session of 10th NPC listed "respect and safeguard human rights" in Constitution of P.R.C. All these show that CPC has taken "to respect and safeguard human rights" as the fundamental governing philosophy and primary task.

Looking at the history of the human rights development in China, it not only shows that CPC has made great contribution in respecting and safeguarding human rights in China, but also proves that the realization of human rights of Chinese citizens is inseparable with the correct leadership of CPC. We can say that "ensure the equal right to participation and development for all members of society in accordance with the law" under the leadership of CPC is the second feature that China has in respecting and safeguarding human rights while developing socialist democracy.

Thirdly, we must recognize that human rights of Chinese citizens are realized gradually with the overall economic and social development.

What we get from the history is a developing country with the biggest population in the world. Big population, many human rights issues. In a developing country, the human rights are developing too. All these basic national conditions pose a tremendous challenge to the cause



of China's human rights, which you will never see in other countries. It is noticeable that when P.R.C was founded in 1949, we put it clearly that "All power in the country belongs to the people. The organs through which the people exercise state power are the local people's government established through general election; people have the right to vote and stand for election and enjoy freedom of ideology, of speech, of assembly, of the press, of association, of communications, of person, of migrating, of religious belief, and of demonstration, according to the law." However, it is not easy to realize all these human rights as it involves not only the governing party's efforts, but also the maturity of the society. Since reform and opening up in 1978, as we changed the strategy from "class struggle as the central task" to "economic development as the center," it became clear and important to us that human rights are respected and safeguarded when "class struggle as the central task" being dismissed, and they are much more when "economic development as the center" being adhered to. All that we have achieved in human rights development in contemporary China result from this change of strategies for working priorities, initiated and led by Deng Xiaoping 30 years ago. Now, we put forward furthermore that focus should be put onto building a harmonious socialist society while boosting development and onto taking improvement in people's life as the priority while promoting social construction. Human rights of Chinese people are further respected, realized and safeguarded. We learn from experiences that citizens' rights of survival and development in China are the primary basic human rights among all.

The Article 3 of the *Universal Declaration of Human Rights* says "Everyone has the right to life, liberty and security of person." In a poor developing country like China, Citizens' rights of survival and development must be put as the primary basic human rights so as to fulfill the above-mentioned rights. This is learned from the 150-year arduous struggle Chinese people had, from CPC's conclusion of about-60-year development in China since PRC was founded, esp., the recent 30 years of reform. It is also learned after observing and thinking about the experiences gained by many developing countries who have tried to change the underdevelopment status. Therefore, it has general applicability. We can say it is a great contribution China makes to the cause of human rights in the world, and it is also a progress China makes to develop human rights theories in the world.

Taking realization of citizen's right of survival and development as the basis for other human rights in the course of economic and social development and ensuring the equal right to participation and development for all members of society in accordance with the law is the third feature that China has in respecting and safeguarding human rights in the course of the China's development of socialist democracy.

In the course of development of Chinese democracy, these features not only reflect most the successful experience accumulated in human rights development, but also provide a good foundation for us to start from a new historical starting point to further promote political system reform and promote in-party democracy and people's democracy.

II. The achievement in cause of human rights by China cannot be obliterated by Cold War thinking by any means

Within 60 years since the *Universal Declaration of Human Rights* was proclaimed, China has achieved such great improvement in the cause of human rights and CPC has made such great



contribution to promoting human rights of Chinese. However, human rights issues have become a hot topic we keep encountering in recent years in the international exchange and communication. And it has become a primary field that we have to face in the international struggle. Then, why does it happen? It deserves a thorough study and reflection.

We never deny any mistake China had in the cause of human rights development which hurt democracy and human rights, e.g. expansion of anti-rightist struggle and the Cultural Revolution. However, we corrected these mistakes ourselves. Not any country in the world, including the industrialized countries, has never made any mistake in the cause of human rights development. It is groundless that endless harping and blame is poured on China's human rights just because of the mistakes we had in the course of human rights development. It only shows some people's extreme bigotry toward China.

We also notice that human rights and democracy are extraneous to Chinese society and Chinese people. Besides, these new ideas, like human rights and democracy, were brought out in the course of fighting for national independence, a different background from the western renaissance movement, and different priorities from western too. However, Chinese people do gain the true human rights they have never had. It is necessary to hold seminars as there are different understandings of basic issues like how to interpret human rights and how to achieve them. However, it is not in accordance with the principle of human rights if one wants to impose his understanding onto others, which cannot but show his bigotry.

Why do some hold such strong bigotry? It deserves a careful research.

The underlying source is the Cold War after WWII and confrontation and antagonism between ideologies arising in this period. The Cold War pattern that lasted for half a century came to an end finally since the dramatic upheaval in Soviet Union and East Europe. Chinese people, who had suffered considerably from the Cold War, abandoned resolutely the Cold War thinking and started a peaceful path for development from Deng Xiaoping period. And now China puts forward the idea to promote to build a harmonious world together with people from all over the world. However, some politicians and strategists in western countries, complacent over the victory in the Cold War, have not shaken off the outdated Cold War thinking. Instead, they continue to comment the cause of human rights in China with the out-of-date Cold War thinking, including the bigotry toward socialism and the habit to smear communists.

Looking at the history of human rights' initiation and development, the human rights, right from the western renaissance movement, have been standing mostly against the power and autocracy. Human rights (later changed to democracy) and science in China were initiated in the May 4th New Culture Movement to fight against power and autocracy. However it was different from the renaissance movement in that it stood against the power and autocracy not only of the native feudalism, but also of the foreign imperialism. Those who had experienced the Cultural Revolution craved for human rights and democracy as they suffered from the power and autocracy in the name of "big democracy" and "mass autocracy." However, we encounter a new thing while we are developing China's human rights, i.e. the cause of China's human rights being uglified and destroyed by Cold War thinking. We must face a fact: in the course of realizing and safeguarding



the human rights of Chinese people, we have to fight against both power and autocracy, and Cold War thinking.

Then what is the Cold War thinking? What is its attribution? The Cold War, opposite to the hot war (i.e. the traditional war), originated from the Iron Curtain Speech by former British PM Sir. Winston Churchill in 1946 and a speech by Bernard Baruch at Columbia, South Carolina on April 16, 1947. Putting it into the simplest words, it means the political and diplomatic confrontation between members of NATO (the western group led by US) and WTO (the East Europe group led by SU) after the WWII. The Cold War thinking, formed in the Cold War, possesses two conspicuous attributions, namely mechanical classification by ideology, and extreme confrontation on ideology, which rigidifies thinking and makes people bigoted and conceited. Now with the Cold War being over, the Cold War thinking became out of date and unpopular. Having experienced the winter of the Cold War, we have a better understanding of the harm the Cold War thinking brought. For instance, influenced by the Cold War thinking, we used to refuse to talk about human rights and just criticize the bourgeoisie idea about human rights, only to unwittingly make the human rights as others' privilege. Therefore, since the reform, we do not make mechanical classification by ideology or extreme confrontation on ideology any more. At the same time, we protect our national interests and keep our belief firmly. However, we noticed that the backward Cold War thinking is not over yet though the Cold War was over. Some people ignore the truth, potshot and launch the hostile attack on the cause of China's human rights. We are hence reminded again and again that it will take lengthy great efforts for human beings to say farewell to Cold War thinking.

The history of the development of China's human rights is already complicated itself. Moreover, there is the bigotry caused by Cold War thinking. All these make the human rights not only an issue, but also a complicated one. We must recognize and think about it when we study and discuss about human rights. We believe that the bigoted voice of Cold War thinking cannot stand the test in reality. The Cold War thinking cannot obliterate the historical achievement and improvement in the cause of China's human rights. However, the Cold War thinking must be abandoned and the choice by people in each country must be respected. This is human rights' requirement. The Cold War thinking must be fought against for the sake of respecting and safeguarding human rights.

III. It is the primary task to improve governance awareness in order to respect and safeguard human rights

We talk about respecting and safeguarding human rights again and again nowadays, not because of the external pressure we encountered, but out of our self-reflection and self-awareness. In order to fulfill the tasks to respect and safeguard human rights brought at the 15th, 16th and 17th CPC national congresses, we must improve the party's governance awareness and enhance CPC's governance ability.

As the human rights of Chinese citizens are linked closely to the national collective human rights, the human rights of Chinese citizens can be realized gradually only starting from realizing the citizens' rights of survival and development under the leadership of CPC with the overall economic,



cultural and social development. Moreover, it decides that whether the cause of human rights in China can have a sound development lies closely in whether CPC has correct governance awareness.

It is learned from the profound reflection on Cultural Revolution and the thorough summary of the experiences in reform and opening-up. After the Cultural Revolution launched by Mao Zedong, we reflected a lot and were enlightenment in many ways. One of them: the Party as well as the national political organs would be in disorder and the people would suffer, if we tried to solve the problems within the party through uprising and power take-over by people who were asked to expose the negative sides from the bottom to upper, when CPC gained governance all over China. Therefore in the course of setting things to rights, Deng Xiaoping raised a profound question to the whole CPC members: what kind of the party should be a governing party? What qualification should be there for members of the governing party? How can the Party be good at leading? Meanwhile, he put forward that CPC should be a Marxist party that leads in socialist material civilization and spiritual civilization. Through this question, we came to realize that CPC's historical role had changed fundamentally. We used to think and deal with affairs from the point of the view of a party who led people to strife for political power. Now we must adjust ourselves to thinking and dealing with affairs from the point of view of a governing party. In the formation of the "Three Representatives" Idea, Jiang Zemin, taking over Deng Xiaoping's political philosophy, brought forward explicitly in December 1989 that "we must strengthen the governance awareness and enhance governance ability."

In some people's eyes, governance awareness is the one to grasp power tightly. It is not only one-sided, but also wrong. When they exercise the power, this wrong idea is the nest for creeping bureaucracy, formalism, corruption and is the source for those cases that human rights are not well respected and safeguarded, even are violated.

Then what is the correct governance awareness? The governance awareness is the one to provide good governance and exercise power well for the sake of people. CPC's governance awareness is very inclusive and comprehensive in its nature. Whatever in Mao Zedong Thought, Deng Xiaoping Theory, "Three Representatives' Idea or scientific outlook on development, CPC's governance awareness is repeated in all CPC' basic theories. Party members are required to remember not only that it is not easy to gain and further consolidate the political power, but also that we are entrusted by the people to exercise powers only for their interests. We must reinforce the class foundation for governance, and at the same time expand the mass basis, rearrange the social forces and mobilize widely all positive elements to its fullest. We not only need courage to expose the existing problems in governing and to accept the supervision from all sides, but also must be good at solving conflicts and lead a harmonious development in the society. We must carry out socialist democracy and complete the socialist legal system as well, to ensure the stable and orderly healthy social development.

We cannot but only hold this governance awareness to promote CPC's overall self-construction with an innovative mind and to reform the CPC's governance modes. We must integrate the leadership of the Party, the position of the people as masters of the country, and the rule of law, esp. expanding people's democracy and developing primary-level democracy. We



must speed up the building of a socialist country under the rule of law, build a service-oriented government, improve the mechanism of restraint and oversight, and ensure that power entrusted by the people is always exercised in their interests. Only with these, we can better respect and safeguard human rights.

We are glad to see that historically, CPC made great contribution to the cause of human rights of Chinese people. Nowadays, standing at a new historical starting point and being self-reflecting and self-aware, CPC is upholding higher the banner of people's democracy. The cause of human rights in China is now seeing a brighter and splendid future.

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PROGRESS AND REFLECTION: CHINA'S HUMAN RIGHTS IN THE PAST 30 YEARS

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This year marks the 30th anniversary of China's reform and opening up. Tremendous changes have taken place in Chinese society over the past three decades. With the economic and social development, China has made great progress in its human rights cause, which is closely linked to the nation's fate as human rights will progress as long as a country prospers. In the past 30 years, the achievements in the economic and social fields that China has accomplished in this period are obvious to all. The economic, social and cultural rights of Chinese citizens have been better protected and realized. However, people should see there are still many weak points in China's practice to protect human rights. There are still many difficulties and obstacles on the road of future human rights development. At such a critical period linking past and future, it is important to review history, summarize experience and lessons. This article reviews the development of China's human rights in the past 30 years from the four aspects: the thought, theory, system and practice of human rights.

I. The establishment of human rights protection thought

1. The establishment of rights first concept

The founding and development of human rights protection thought began with rights protection thought. Only when the concept of rights first was established, the thought of safeguarding human rights could be developed.

(1) From duty first to right first

In the past nearly 30 years, the most prominent achievement of China's legal circle in legal



theoretical thinking mode is the change from a duty first outlook to the right first one. Rights and duties are the core content of all laws, regulations, law enforcement departments and the whole legal system. By stipulating a behavior mode with rights and duties, law directs the behavior of people (including natural persons, legal persons and other organizations), puts people's behavior into a unified order to adjust social relations. All legal affairs boil down to rights and duties. Right and duty are a pair of dialectic and contradictory concepts. They are closely interrelated and inseparable. "No rights without duties, no duties without rights."²⁰³ Traditional Chinese culture stressed duty first, that is, the concept of people's obedience and fulfillment of duties. There were more provisions of bans than those of rights. People only had the idea of abiding by law, but did not know law still had the function of endowing people with rights and protecting them. Due to historical reasons, the traditional concept lasted until the early period of reform and opening up. With the deepening of reform and opening up, economic and social development, people's minds began to be emancipated. Elite groups such as intellectuals first realized each individual must have a strong subject and rights consciousness if the minds of the masses were to be fully emancipated and a market economic order to be established. Therefore, they strongly advocated the concept and thought of rights first. A hot discussion on which should be first, rights or duties, emerged among the circles of law, philosophy, sociology, politics and economics. Finally, the concept of rights first was established. The concept of duties first was discarded. The modernization of China's rule of law requires the rights first value. Only the people's awareness of subject and of the obligations of a citizen is aroused, the rights first concept is established. The process of China's social progress is the process of citizens' rights to be fully realized.

(2) Power first to right first

The establishment of right first outlook is also marked by the change from the power first outlook to right first outlook. Consistent with the emphasis on duties first in traditional Chinese culture, the design of traditional Chinese state system and social mode was also power-oriented. The emperor has the supreme power. Thus traditional Chinese political theory holds that "All lands under Heaven belong to the Emperor, all people under Heaven are subjects of the Emperor." The power of an emperor and state constitutes the root for the construction of a country and society. Each member of a society was nothing but the emperor's property, which the emperor could kill and cut as he liked. People's basic life right could not be guaranteed. This traditional thinking mode lasted until prior to the reform and opening up. Although the Communist Party of China (CPC) has the good tradition of "serving the people," such thought as official rank first or power first still existed for long among officials at all levels of government. The design and establishment of modern political, legal and social systems or modes are also based on rights protection. In the relationship between rights and power in modern society, rights are dominative and the fountainhead of power. Power originates in rights. Without rights, there will be no power. Rights are superior to power. Power has a state cohesive nature itself, but rights do not. Power is easily to be abused and rights are difficult to be protected. Power is often infringes on rights.

203 *Marx-Engels Collected Works*, V. 16, pp. 14-16



Power must be restricted to protect rights. Right first is a conspicuous feature of a modern country under the rule of law as it presents the idea of “putting rights first” and opposes that of power first marked by the absolute domination of high over low. Thus, all social strata, especially government officials, must have the thinking mode of put rights first. Currently, the change from power first thinking to rights first is still under way among all social strata. It should become an important roll booster for the building of a socialist country under the rule of law.

2. The establishment of human rights protection concept

The establishment of the concept of rights first lays the foundation and clears obstacles for the establishment of human rights protection idea. The combination of rights protection thought and individual's subject status concept leads to the concept of human rights protection. When human rights were put forward as a concentration concept, it can link all types of rights in legal systems together and form a unified and coordinated human rights system.

The establishment of human rights thought of China in the past 30 years has been along with the clarification process of the human rights concept. Generally speaking, human rights are the social acceptance of man's value, and the conceptual, moral, political and legal standards that distinguish human beings from animals. It includes such layers of meaning as “rights of humans,” “rights of humans as humans,” “rights for humans to become humans” and “rights for humans to become dignified humans.” The human in “human rights” can be explained as natural persons, the people, citizens, nationalities, races, and the collectives and legal persons. It concerns the subject. Rights can refer to rights of natural persons, citizens, nationals, and the civilian rights, basic rights and rights in the Constitution. It concerns the status of human rights in all rights.²⁰⁴ China's human rights legal circle has reached a consensus in the classification of human rights, namely, the deserved, legitimate and practical rights. The real condition of human rights of a country is just the proportion among the three types. If the deserved becomes the legitimate and the latter becomes the practical, the proportion of the three is one, meaning the ideal reality of human rights. In contrast, there is a big gap in the proportion, the country's human rights situation are not good. The human rights situation of a country should not be judged by only one type. If we regard the legitimate human rights as the practical ones, the protection of human rights will only stay at the legal level. Such judgment is not conducive to human rights practice.

As the academic field's research on basic human rights issues such as its concept and classification deepened, the political circle's attitude toward human rights changed dramatically. The year 2007 marked the 10th anniversary of China's implementation of the strategy of governance according to law and also the 10th anniversary of the official enshrining of “the respect for and protection of human rights” in the CPC's congress report. In 1997, the 15th CPC National Congress report enshrined “‘the respect for and protection of human rights’ into the Party's action guidelines as the basic aim for the rule of the Party. In 2002, the 16th CPC National Congress had the same phrasing. On March 14, 2004, the 2nd session of the 10th National People's Congress, China's top legislature, adopted the amendments to the Constitution, which

204 *Jurisprudence*, pp 226, edited by Xu Xianming, CUPIL Publishing House, 2007



included for the first time “The state respects and safeguards human rights.” In March 2006, the fourth session of the 10th NPC approved the 11th five-year plan for national economy and social development, in which “to respect and safeguard human rights and promote the overall development of human rights cause” was clearly stated, the first time for human rights cause to be included into the country’s development plan as a key part of the modernization drive. In 2007, the 17th CPC National Congress report had the phrasing of “to respect and safeguard human rights, to ensure the right to equal participation and development for all members of society according to law,” when elaborating on implementing the basic strategy of ruling the country by law and speeding up the construction of a socialist country under the rule of law. Also at this congress, “to respect and safeguard human rights” was written into the Party constitution, making it officially become an important thought and value for Party rule and nation’s prosperity. From the phrasings, the 15th and 16th CPC national congresses both mentioned “to respect and safeguard human rights” in the part of improving democratic system. The emphasis was on the relationship between human rights and democracy. Thus, human rights were still a political concept. Different from the two, after “to respect and safeguard human rights” was included into the Constitution, the 17th CPC congress mentioned “to respect and safeguard human rights” in the part of “speeding up the building of a socialist country under the rule of law.” The relationship between human rights and rule by law was stressed. The human rights mentioned in the 17th CPC congress were a legal concept. Human rights became a kind of legal right, thus the country’s respect for and protection of human rights became a legal duty. It should be pointed out that in the past, the Party did a lot of work in human rights, but said little. Or what had not been done was never said, or what had been done was mentioned in other ways. Currently, we have the concept in the Constitution and CPC congress reports. This indicates what must be done. It also showed the establishment of the concept of human rights in the core political leadership.

With deepened research and knowledge about human rights among academic and political circles, and social, economic and cultural development and people’s knowledge of the importance of human rights issue, the concept of human rights protection has been gradually established. The protection of human rights has become a basic principle and core value for the construction of a complete, systematic legal system and of a socialist country under the rule of law.

II The form of human rights theoretical system

Over the past 30 years, China has had its own theory of human rights. And the human rights studies have become a hot area from the previous taboo area in the academic field. Currently, China has set up its human rights theoretical system with Chinese characteristics. The formulation of the system mainly includes the following two respects:

1. The extension of human rights subject

Since the existence of the concept of human rights, the human rights subject theory has been continuously enriched and developed. The extension of the subject scope of human rights is the most obvious. The 30 years of development of China’s human rights subject theory is represented by two marked changes, namely, “from limited subject to general subject” and “from general subject to special subject.”



In Western human rights history, human rights subject had long been limited to white and propertied men in Europe. The United Nations adopted the the Universal Declaration of Human Rights (UDHR) on December 10, 1948 in Paris. It clearly declared to the whole world that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The UN General Assembly announced the UDHR was the aim that all people and all nations strive for. The declaration specifically replaced “all men” with “all people” in diction. The declaration marked the general subject of human rights was finally set in theory²⁰⁵. In China, the understanding of the extension of human rights subject scope experienced the same flexural development as the world history of human rights. The CPC’s outlook on human rights subject has long been closely related to its outlook on the people. In history, only the people enjoy rights. Since the founding of New China, the Party has been continuously updating the scope of the people to keep pace with time. The 1982 Constitution referred the people to “all socialist laborers, patriots supporting socialism and the unification of the motherland.” The Fourth Constitution Amendment added socialist builders to the people’s scope. However, the scope of human rights subject still did not include everyone. The 17th CPC congress made a breakthrough by pointing out that “to respect and safeguard human rights, ensure the right to equal participation and development for all members of society.” The human rights subject was stated as “all social members.” The concept of “everyone” was directly used four times in the report. This showed the human rights scope in China realized the extension “from limited subject to general subject.”

The other remarkable development of human rights subject theory is reflected in the change of “general subject into special subject.” The subject should enjoy all human rights. As a general right, all natural persons enjoy human rights. But for some human rights, the only enjoying cannot meet the demand of their subject, who needs to exercise the right if he wants to gain the interests contained in the right. In recent years, with the economic and social development, the policy of letting some people become rich first has also brought worsening problems in social fairness, widening gap between rich and poor and livelihoods represented by housing, health, education and employment. The tough problems are becoming big obstacles to social progress. To handle those problems, the human rights subject theory develops concepts of special and underprivileged groups. The human rights of the underprivileged are actually a special kind of individual’s human rights, but they are not privileges in general sense. “Privilege is the right superior to others as enjoyed by people who have an advantaged social status. The rights of special groups of people are the ones that the most vulnerable people in society should enjoy to keep their basic dignity as human beings. The special protection of the rights of these people does not mean the inequality in rights among people. Rather, it marks the completeness of human rights protection and the respect for personal dignity of all people.”²⁰⁶“The increased part looks like to be privilege of the

205 “View of Human Rights Subject,” by Xu Xianming, Qu Xiangfei, China Jurisprudence, 2nd Issue, 2002

206 *Ideals, Paradox, Reality of Human Rights*, by Chang Jian, pp 104, Sichuan People’s Publishing House, 1992

weak. In fact, it is after the supplementing of the ‘increased part’ that the weak can enjoy ‘equal rights’.²⁰⁷ The principle of considering more for the weak is an important content in human rights subject theory.” The quasi-human rights can be regarded as human rights to guarantee general human rights. Women, children(minors), the old and handicapped(physically and mentally), become the biggest number of weak groups in human rights. Refugees, non-nationalities, overseas foreigners, POW, the wartime injured and civilians, and so on, are the weak human rights subject in international human rights laws. The arrested, defendants and people serving sentences become weak subjects of human rights because they are restricted from enjoying human rights due to special legal relations. Due to the cause of religion, language, race and color, the minority in a country becomes weak human rights subject in modern society.

2. The improvement of human rights content

According to the contents of the rights in human rights, modern human rights theories generally classify human rights into three generations. The first is the freedom-centered civil and political rights. The second is subsistence-centered economic, social and cultural rights. The third is the collective or group human rights focusing on development. The concept of the rights to subsistence and development is an important theoretical contribution that China makes to the world’s human rights cause. The three generations have no tier relations. That is, none of the rights is more important than the other. None of the former can replace the latter. All human rights are equally important. Each item of human rights is irreplaceable. But this does not hinder the government or individuals from making priority choices and strategic arrangements in human rights development.²⁰⁸

Since the reform and opening up, China has consistently made the right to subsistence as the top human right in its construction of human rights system. To a country and a people, man’s subsistence right comes first. Without subsistence right, there will be no other human rights at all. The UDHR says “Everyone has the right to life, liberty and security of person.” In China today, to maintain its own independence and sovereignty, the subsistence right of all member of society and to improve their living conditions, are still top priorities.

When stressing subsistence right, China also attaches more and more importance to development right. The 17th CPC congress report described the object of rights as “the equal right to participation and development for all members of society” when it said “we must respect and safeguard human rights.” The phrasing, together with the foreign policy statement in the report that “we respect the right of the people of all countries to independently choose their own development road” when deliberating that China will unswervingly follow the path of peace development, both clearly show human rights are first defined as the development right - focused third generation concept. People are the core subject of development. The right to development mainly means the right of all members of society to share all kinds of fruits brought by the overall

207 Few Theoretical Problems on Human Rights Subject Debate, by Xu Xianming, China Jurisprudence, 5th Issue, 1992

208 Three Wishes in Human Rights Construction, Human Rights Studies, Vol. II, by Xu Xianming, Shandong People’s Publishing House, 2002



social progress and development. This is reflected in the report's emphasis of "all the people building and sharing" and of that "development is for the people, by the people and with people sharing its fruits."

Therefore, over the past 30 years, China has basically set up the human rights theoretical system with Chinese characteristics, which regards everyone (all members of society) as its subject and the rights to subsistence and development as core contents.

III The improvement of human rights safeguarding system

Human rights, democracy and rule by law are the three major elements of the political civilization of mankind and three pillars for the building of a modern civilized society. For mankind, the purpose of discarding rule by man and carrying out rule by law is to get closer to democracy and further away from monopoly, and to gain human rights. Thus, among the three elements, human rights are the soul, democracy and rule by law are both means.²⁰⁹ The improvement of human rights safeguarding system must be closely linked to the realization of rule by law. The thought and theory of human rights must be implemented via human rights safeguarding system which depends on the establishment of society under the rule of law. So to build a legal system with rights protection as its core value has become the major road to improve human rights safeguarding system.

Over the past 30 years of reform and opening up, China has made remarkable achievements in the legislation area. To realize the grand goal of having a socialist legal system with Chinese characteristics by 2010, the National People's Congress and its standing committee have been strengthening law promulgation and improving quality of legislation. As of now, China has a total of 229 laws in operation, covering seven law divisions including the Constitution and its related laws, civil and commercial laws, administrative, economic, social, criminal and civil procedure laws. Currently, there are nearly 600 administrative decrees and more than 7,000 local laws and regulations in operation. The socialist legal system with Chinese characteristics has basically been established. The system, consisting of seven law divisions and three tiers of laws and regulations, has the Constitution as its core, the laws as its main body and includes regulatory documents such as administrative and local regulations. The laws have covered the country's economic, political, cultural and social life, providing a strong legal backing for rule by law, the building of a socialist country under the rule of law and safeguard of all human rights.

In China's legislation progress, several marked events most closely related to human rights deserve special attention. First, what deserves most attention and pride is the "inclusion of human rights concept into the Constitution" in 2004. Among the fourteen articles of amendments, except for two concerning the state president's post and national anthem which have no direct connection with human rights, all the other 12 are in connection with human rights. Among the 14 articles, "The state respects and protects human rights" is a general article. It indicates the human rights spirit and principle were written into the Constitution. The amendment involves modifications in five aspects. The first is the modification on the outlook on subject of human rights, which changes the

²⁰⁹ *Human Rights and Rule by Law*, Qi Yanping, pp. 13, Shandong People's Publishing House, 2003



formerly used citizen subject into the adjusted subject of “everyone” or “all people.” The change challenges the differentiation outlook of subject and legislation and the dual structure of rights. The second is the change from closedness to openness of the established human rights system. The third is about the human rights standard and value. China has joined the 21-member UN human rights conventions. The international human rights standards, are also the country’s domestic ones except for declared reservations. The human rights modifications unite domestic and international standards. The fourth is the adjustment of governance idea. “Governance for the people” should be transformed into legal judgment to safeguard human rights. The “for the people” in governance should become “for the people’s rights” in law. The fifth is the modification on law enforcement idea. The state respects and safeguards human rights, indicating law enforcement departments should regard this as their own duties.

Second, the promulgation and enforcement of the Law on Property Rights. Private property right was written into the 2004 Constitution amendment, which greatly prompted the birth of the law. The law took 13 years of widespread discussion and created a record high of the number of deliberation times for a single draft law in the legislative history of China. The core value of the law is to protect the private property rights of individuals, laying a systematic property rights foundation for market economy. The law is a basic law that defines, confirms and protects property rights in the socialist market economy. It links property and economic relations and safeguards the basic economic rights of citizens and coordinates interest relations of different subjects. It is also an extension of the articles concerning the protection of citizens and state’s property in the Constitution. The law solves the problems yet to be handled in the Constitution and reflects new property relations in the social transformation and economic development. The value of the law lies in providing a foundation for equal protection of rights of all subjects of society. With such an equal and clear property rights awareness and protection foundation, the masses can have micro-stimulations for production investment and business development.

In addition, on the basis of the promulgation of the *Law on Property Rights*, some other laws mainly for protection of rights of disadvantaged groups were also adopted. For example, the NPC Standing Committee has amended the law on individual income tax three times to reduce the tax burden for middle and low-income people and raise tax for high-income groups. To safeguard farmers’ rights, the agricultural tax decree was abolished, ending more than 2000 years of farmers paying tax for planting. This is also a big step for a unified tax system for urban and rural areas. The promulgation of farmers’ professional cooperatives law is significant to improving the organization of farmers and promotion of industrialized management of agriculture.

Finally, to realize the equal right to development and improve people’s livelihood and build a harmonious society, the legislation in social rights protection has become a new focus in China. To perfect legal system in labor and social security concerns the interests of laborers and social harmony and stability and becomes a key part in the legislation. In 2007 alone, the NPC Standing Committee passed the *Labor Contract Law*, *Employment Promotion Law*, *Law on Mediation and Arbitration of Labor Disputes* and deliberated on draft Social Insurance Law. All these help protect the labor rights of individual citizens. To ensure the education rights, the



Law on Compulsory Education was amended. The fund mechanism for compulsory education was established. To carry out quality education was written into the law. The goal of balanced development of compulsory education was also set. To safeguard women's rights, the *Law on Women Rights Protection* was amended. The realization of equality of men and women was set as a basic state policy in law. To protect children's rights, the *Law on Protection of Minors* was revised to stress the protection responsibilities of families, schools, society and government and the education reception rights of minors.

IV. Progress in human rights safeguarding practice

The final realization of human rights depends on the enforcement of human rights safeguarding system. Legislation is only the first step for human rights protection. Only through the two fulfillment procedures of administrative protection and judicial aid can human rights protection be finally realized. In the past 30 years, China has made significant progress in its human rights protection undertakings with the human rights situation becoming much better.

1. Rights to subsistence and development

Over the past 30 years, the Chinese government has made it a priority to solve the problems of the people's subsistence and development rights, by sticking to the central task of economic construction and striving to develop social productivity. The country has seen rapid economic and social development, the conspicuous strengthening of overall national strength, improvements of people's living standard and realization of two historical strides - from poverty to enough food and clothing to well-off life. The gross domestic product saw an average annual growth of 9.67 percent between 1978 and 2006, far higher the world average of 3.3 percent in the same period. After years of development, China's overall national strength has been greatly enhanced. It has a higher international status. The country's economic volume has become the fourth largest in the world. From 2004, China has been the world's third largest trader. The state finance has also been much improved. The per-capita disposable income of urban residents increased from 343 yuan in 1978 to 11759 yuan in 2006. The per-capita net income of farmers was raised from 134 yuan to 3587 yuan. The whole country financial revenue was only 113.2 billion yuan in 1978. In 2006, it reached 3.93 trillion yuan. From 1978 to 2006, the rural population in absolute poverty fell to 21.48 million from 250 million. The occurrence rate of absolute poverty fell from 30 percent to 2.3 percent. The sanitation conditions also improved a lot and so did the people's health. Currently, the average life expectancy of Chinese has risen to 71.4 years from 35 years prior to the founding of New China. The death rate of pregnant women fell to 43.2 per 100,000 in 2002 from 1500 per 100,000 in the mid-1950s. The death rate of babies fell to 2.84 percent from 20 percent. The death and infection rate of infectious diseases, parasite-caused diseases and local diseases fell dramatically. The Chinese rights to subsistence and development have been greatly improved with its economic and social development.

2. Civil rights and political rights

Over the past 30 years, great progress has been made in China's democratic and legal system construction. The citizens' rights and political rights of the people of all ethnic groups of the country have been protected. The following serves as examples.



Right to vote and stand for election. The Constitution and the Electoral Law stipulate “All citizens of the People’s Republic of China who have reached the age of 18 have the right to vote and stand for election, regardless of nationality, race, sex, occupation, family background, religious belief, education, property status, or length of residence, except persons deprived of political rights according to law.” In China, the right to vote and stand for election includes the right to elect deputies to the state power organs according to one’s own will, the right to be nominated as candidates for deputies and elected to be deputies and to dismiss unqualified deputies that citizens themselves elected according to law. The election funds are disbursed by the State Treasury, providing material insurance for citizens to fulfill their right to vote.

Citizens of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration, as stipulated in the Constitution. China promulgates relevant laws and regulations to provide all kinds of measures to ensure citizens exercise the rights according to law. The state ensures social groups carry out activities in line with laws, regulations and their charters. No organization or individual is allowed to interfere illegally with such activities. By the end of September 2004, the number of non-government organizations registered in the Ministry of Civil Affairs reached 289,000. Employees enjoy the right to join and organize trade unions. By September 2004, the grass-roots trade unions in the whole country totaled 1.02 million, with 137 million members. As to the freedom of demonstration and procession, the *Law on Assemblies, Processions and Demonstrations* stipulates: “The citizens’ exercise of their right to assembly, procession and demonstration shall be safeguarded by the people’s governments at all levels in accordance with the provisions of the Law.”

Freedom of religious belief. In November 2004, the State Council promulgated the first comprehensive religious administrative decree - the *Regulations on Religious Affairs*. It stipulates the rights of religious groups and citizen believers to carry out religious activities and open religious schools. Incomplete statistics show China had more than 100 million religious believers and 100,000 sites for religious activities, 76 religious schools and around 300,000 religious staff.

Furthermore, different places across China actively explore the grassroots democracy system in recent years. Grassroots democracy is an important channel to ensure citizens directly exercise their democratic rights. People in rural areas directly elect villager committee members and decide the key affairs through democratic deliberations. They fully exercise the democratic rights in election, decision-making, administration and supervision. Since 1988, rural areas across the country have carried out three to four elections of villager committees and most villager committees have established mechanisms of villager meeting, villager representative meeting and publicity of village affairs. After the promulgation of the new *Organization Law of Villager Committee* in 1998, nearly half of the provinces, municipalities and autonomous regions have enacted local regulations on villager committee election. The election of villager committee is more standardized via such procedures as respect for villagers’ nominee right, pre-election, equal competition among official candidates, margin election, delivery of speeches, secret balloting and public counting of votes and announcement of results. Statistics show the election participation rate of farmers in provinces who completed villager committee elections in 1999 was more than



90 percent with the lowest of above 85 percent.

3. Economic, social and cultural rights

China is now implementing a scientific outlook on development which puts people first. The country is striving for a coordinated urban-rural, regional, social and economic development, in order for all the people to equally participate in development and share the fruits of development. The people's rights to enjoy economic, social and cultural rights have been improved.

The promulgation of the *Labor Contract Law* shows the importance of safeguarding laborers' rights and the degree of importance that the Chinese government attaches to the protection of labor rights. Statistics show by the end of 2005, the number of the employed population in rural and urban areas reached 760 million, including 270 million in towns and cities, an increase of 100 million compared with the end of 1990. The urban registered unemployment rate has been controlled below 4.3 percent. In the 10th five-year period, towns and cities saw the employed population increase by 42 million. Some 40 million surplus rural laborers went to cities. By 2010, the total number of laborers will reach 830 million with a supply shortage gap of about 10 million. In reality, labor is in an absolutely weak position compared with capital and lacks necessary say. The organizations to safeguard legal rights and interests such as trade unions are nominal, which worsens the inequality between labor and capital. In the face of the minimum salary standard set by the government department, some illegal enterprises just follow it superficially but reduce the salary level of employees in a different way. Thus, in many places, the minimum salary standard can not be implemented and becomes an oral and documentary safeguard. To safeguard laborers' rights still needs the channel of rights. For example, the collective consultation system of salary is now carried out in many cities. It is necessary to take this opportunity and build a fair distribution system and push forward the implementation of all regulations to safeguard the rights of laborers.

The Chinese government established unemployment insurance system in the 1980s. With the establishment of the socialist market economic system in the 1990s, the social security system was much improved. The minimum living allowance system was set up for laid-off workers and so was the on-time payment of pensions system for retired people. The policies for old age, unemployment and medical care insurance system were further promoted. This marked the final establishment of China's socialist security system. With the establishment of the combination of "social raising and personal accounts" in the mid-1990s, the social security system went on a good development road. This is reflected in the following four aspects. First, "the combination" system guarantees the basic old age pensions are paid in full and on time for retired workers of enterprises. In 2007, the expenditure of the national financial revenue on employment and social security, was 539.6 billion yuan, 2.05 times that of 2002. Seventeen provinces, municipalities and autonomous regions have paid off historical arrears. Second, the social security coverage is continuously extended. More and more urban and rural residents are included into the social security coverage. For example, new rural cooperative medical care system has been going on smoothly since its launch in 2003. By September 2007, 726 million farmers have joined the system, making it a social security system with the widest coverage. Third, social security levels are enhanced gradually. From 2003 to 2007, the basic pensions for retired workers of enterprises were raised five times. The national average old



age pension level had increased from 7728 yuan in 2003 to 11500 yuan in 2007. Fourthly, the fund raising channels for social security services have been widened.

The country has exerted great efforts to develop education, science, culture, health and sports undertakings with an overall promotion of safeguarding citizens' education and cultural life rights. In 1977, the national college entrance applicants were 5.7 million. 270,000 of them were admitted - an admission proportion of 29:1. In 2007, the recruitment of colleges and universities was 5.67 million. The admission proportion was 2:1. The recruitment expansion of colleges and universities, which began in 1999, has made the college education realize historically remarkable development and enter the period of the generalization of high education. In 2006, the country's colleges and universities recruited 5.4 million students. The total number of students in colleges and universities exceeded 23 million. The gross entry rate hit 21 percent. Meanwhile, the profession education also develops rapidly and the all-life education system is built. A "cross bridge" to train talents has been set up.

4. Judicial safeguard of human rights

The judicial safeguard (aid) is the final line of defense for the human rights safeguarding system and thus is critical to the safeguard of human rights.

In recent years, to strengthen human rights protection in judicial procedures, people's courts have carried out deep reforms on the forms of trials by promoting open trials according to law, strengthening the supervision of society and public opinion on trials to ensure judicial fairness. The first trials of cases are all open except for those required to be closed according to law. The opening rate of courts for second trials also rises. The cases of open or closed trials all have public sentencing. To raise the rate of announcing of judgment at the count, the showing of evidence, questioning of witnesses, corroboration of evidence and debating, are also carried out at the courts of trials. From 2003 to 2007, the Supreme People's Court heard 20,451 cases of all kinds, an increase of 0.78 percent from the previous five years; to punish criminals according to law and maintain the state security and social stability, the Supreme People's Court heard 4,802 criminal cases in the five years. It also supervised and directed local people courts at all levels to finish 3.38 million first trial criminal cases, an increase of 19.61 percent from the previous five years. Among the cases, 760,000 people were sentenced to death, life imprisonment or jails of five years or more, accounting for 18.18 percent of the sentenced criminals. Furthermore, reform and improvement for death sentence approval system was carried out in an active way. On Jan. 1, 2007, the Supreme People's Court retrieved the right to review all death penalty decisions made by lower courts, ending its 24-year absence in approving China's execution verdicts, according to the NPC Standing Committee's decision to amend the country's organic law on the people's courts. In the past one year, the transition work went on steadily and trials of cases were normal. The retrieval of the right to review death penalties is undoubtedly of great importance to implement the Constitution regulations on safeguarding human rights. China guarantees the prudence and fairness in death sentencing by using institutional system.

The other area highlighting human rights protection is the reform of reeducation-through-labor system. In China, reeducation-through-labor is a kind of administrative punishment. It applies



to minor illegal acts which are not serious enough to get criminal punishment. But in practice, reeducation-through - labor is sometimes more strict than criminal punishment. Meanwhile, some regulations in the reeducation-through - labor system are blurry, which leaves room for abuse of power and violation of human rights for public security departments. Seen from the general social background of governance by law, the system must be modified. The objects of reeducation should include two kinds - Those who seriously violate the law but they have not committed crimes, and those who have committed minor crimes but their personal freedom is not restricted. It is said the rectification law for illegal acts had been included into the promulgation plan of the 10th NPC Standing Committee. The law will give specific regulations targeting the above problems.

Furthermore, the pilot community rectification program has become a shining point in judicial safeguard of human rights. If the reform of the death penalty review system and reeducation-through - labor system safeguards human rights by restricting rights, the community rectification reform is to enlarge the living space of prisoners with minor crimes and try to ensure punishment will not have a disavowance effect on them, thus realizing a smooth return of criminals to normal social life and showing the humanitarian spirit in law. The community rectification is applied to criminals who are put under surveillance, on parole, on probation or serving a sentence outside jail and released but still deprived of political rights. In 2003, the Ministry of Justice selected six provinces or municipalities as pilot places for the program. In 2005, the program was extended to 12 other provinces. Since 2006, these pilot provinces have been standardizing community rectification and establishing relevant regulations to lay foundation for the legislation on community rectification. To punish according to law and deter offenders are the integral parts of law, but the deep humanitarian care to offenders is a more rational representation of rule-by-law civilization.

Summary

The 30 years of reform and opening up is also a period of China's all-round economic, social and cultural development and of the flourish of its human rights undertakings, which have experienced a fundamental change from being a minefield to being a hot issue. In the 30 years, China's human rights thought was established, its human rights theoretical system formed, human rights safeguarding system improved and human rights safeguarding practice promoted. The report of the 17th CPC National Congress said "we must respect and safeguard human rights" in the part of speeding up the building of a socialist country governed by law. It puts more emphasis on the relationship between human rights and rule of law. Human rights are changed from a political concept to a legal one. Human rights become legal rights, which make it a legal duty for the state to respect and safeguard human rights. This not only points out the direction for the development of China's human rights undertakings, is also the action principle and guidance for us to push forward human rights work and strengthen the construction of human rights thought and theory. It is believed China's human rights undertakings will achieve greater progress with the deepening of political system reform and sustained economic and social development.

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REFORM AND DEVELOPMENT OF THE PRISON WORK AND THE GUARANTEE OF CRIMINALS' HUMAN RIGHTS

Li Yuqian
China

The issue of human rights has become an important issue that attracts the universal attention of whole society today; and the guarantee of the human rights of criminals is an issue that attracts more attention from the people, as well as an important work to which the prisons in China have always attached great importance. Since the founding of New China, the prisons in China have taken the Marxist theories on human rights as guidance, followed the socialist humanitarianism principle for criminals, and strictly guaranteed the rights of criminals. China has achieved tremendous achievements in the guarantee of criminals' human rights. Especially since the 16th National Congress of the Communist Party of China (CPC), the prison setup has adhered to reform and development. As a result, the human rights conditions in the prisons have been greatly improved, and a human rights guarantee system for the prisons with the Chinese characteristics has taken shape. The prisons are on the frontier of the international human rights struggle, and the guarantee of human rights in the prisons, which is a special field for the guarantee of human rights, has made active contributions to China's human rights field in the international struggle, and has won extensive attention and recognition of the international community.

I. Strengthening the guarantee of the human rights of criminals is of great significance

The human rights of criminals refer to the restrictive special rights enjoyed by the criminals in detention who are sentenced to fixed-term imprisonment, life imprisonment and death penalty with suspension of execution. The guarantee of the human rights of criminals refers to the systems and measures of the state or other entities that shall, through legislation, judicature and other activities, guarantee that the criminals' human rights that have not been deprived and restricted according to law shall not be infringed upon or be realized. The guarantee of human rights in prisons often becomes a focus that attracts worldwide attention because of the special main body and guaranteed objects, and a window that can best reflect the degree of civilization and legal system construction of a country. Therefore, under the new historical conditions, guaranteeing the human rights of criminals is of great realistic significance.

1. The guarantee of human rights in prisons is an important component of the guarantee of human rights of whole society.

The prison is an organ of the state for executing criminal punishments, and a window of social civilization as well. The guarantee of human rights in prisons has always been one of the core and sensitive parts of the human-right guarantee; hence the international community has



always paid great attention to the protection of the criminals' rights in prisons. In 1950, the United Nations General Assembly adopted a resolution, deciding that the United Nations Congress on the Prevention of Crime and the Treatment of Offenders be held once every five years. Now, 11 such congresses have been convened. The United Nations and other relevant organizations have worked out a series of international documents on the treatment and rights of offenders, such as Standard Minimum Rules for the Treatment of Prisons, Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and United Nations Minimum Rules for the Administration of Juvenile Justice, etc. The promulgation and implementation of these international documents are of extremely important significance not only to the protection of the human rights of criminals, but also to the deep-going development of the human rights campaign of the whole international community. In 1992, the Chinese Government promulgated the white paper "Criminal Reform in China," which introduced China's basic principle of reforming criminals, and the rights enjoyed by criminals; resolved some misunderstandings and misinformation of the international community to China and helped the people of other countries to understand the real conditions of China's prison work; and denounced the slanders and attacks launched by the Western hostile forces against the human-rights situation in the Chinese prisons with hard facts. The human rights of criminals are an important component of the whole human-rights undertaking, and the guarantee of the human rights of criminals is related to the whole situation of the human-rights guarantee work of China.

2. Intensifying the guarantee of the human rights of criminals will help guarantee the safety and stability of prisons and the construction of a harmonious society.

To guarantee the safety and stability of prisons is an urgent need for China to implement the viewpoint of scientific development in a comprehensive way, and meet the urgent need of the construction of the socialist harmonious society. Through the fair law enforcement, the civilized management, and the true respect for and protection of the human rights of criminals during the course of executing punishments by the people's policemen in prisons, we shall create a favorable environment for criminals to be reformed through labor, eliminate the criminals' hostile consciousness, stabilize their emotion, encourage them to receive reform in ease, replace "being required to be reformed" with "voluntarily asking for reform," eliminate hidden perils of safety from origin, and safeguard the safety and stability of prisons. Meanwhile, under the stable and orderly supervision, control and reform environment, we may better implement the basic principle for the prison work - "combining punishments with transformation, and taking the transformation of persons as the aim," correct various unhealthy thoughts and behaviors of criminals, and help criminals cultivate good moral characters and habits of respecting others, respecting society, showing concern about the collective, abiding by the law and discipline, paying attention to civilization and observing good manners, so as to eliminate unharmonious factors for the construction of the socialist harmonious society.

3. Safeguarding the human rights of criminals is a requirement for upholding the management of prisons according to law, and building modernized and civilized prisons.

Managing prisons according to law is the premise for guaranteeing the human rights of



criminals, and the internal need for guaranteeing the human rights of criminals. The construction of modernized and civilized prisons must put into effect the management of prisons according to law, promote the transparency of prison affairs, and safeguard the rights of criminals in a down to earth way. During the whole course of execution from the detention of criminals to their release, the prison administration, education and reform of criminals must be fair and transparent; and we shall act strictly according to law, respect and safeguard the due rights of criminals, and require prisons to perform their obligations. Meanwhile, we shall, through the establishment and betterment of the guarantee system for criminals' rights, abolish some old viewpoints on the prison work, clarify the criminals' legal positions, further improve the law-enforcing level of the people's police in prisons, and further promote the adoption of scientific, civilized and normalized management of prisons, which will play an active role. The above-mentioned contents are important contents of the construction of the modernized and civilized prisons, and the realization of these objectives will speed up the construction of the modernized and civilized prisons.

4. Strengthening the guarantee of the human rights of criminals will help to better mobilize their enthusiasm for accepting transformation.

Strengthening the guarantee of the human rights of criminals, specifying their legal positions, safeguarding their legitimate rights and interests, and giving them humanitarian treatment can make criminals feel the government and society's concern for them and efforts to rescue them, and enable criminals to be filled with hopes for their self-transformation. These measures will have active accelerating role in mobilizing the criminals' enthusiasm for transformation, and improving the quality of transformation. Through the effective measures, the prisons will truly respect and protect the rights of criminals, make them to be protected and restricted by law, and enable them to feel the dignity and power of law. It will play an active promoting role in helping criminals to set up the legal consciousness, cultivate the behavior habit of abiding by law and discipline, perform their legal obligations conscientiously, accept education and reform, and make up their mind to start their lives afresh.

II. The human rights of criminals are safeguarded in an all-round way in China

The prison in China is an organ of the state for executing criminal punishments. In recent years, China has attached more importance to the protection of the rights of criminals, to the education of criminals and to their transformation while giving them necessary punishments according to law. We have always upheld an important guiding ideology that people can be transformed, and it is also true to criminal offenders. We have always maintained that criminals should be transformed with hopes; and that we shall spare no effort to transform criminals into citizens who abide by laws and regulations, so as to turn negative factors into positive factors, turn destructive factors into constructive factors, and make new and active contributions to the construction of a socialist harmonious society.

1. The scientific and civilized control of criminal offenders according to law is practiced.

China has always persisted in ruling prisons according to law, strictly prohibited beating, cursing and corporally punishing criminals, and strictly forbidden the use of various kinds of tortures or tortures in disguised form. If tortures are found in a prison, the cases will be resolutely



investigated and dealt with, and the relevant personnel will be subject to punishments according to law. We have embodied the prison civilization during the strict enforcement of law, rectified the criminals' bad habits and promoted the cultivation of criminals' normal behaviors through scientific control. China has joined the UN Convention Against Torture. On the basis of advocating humanitarianism, China adopts the scientific and civilized control of criminals according to law. A prison shall practice separate custody and separate control with respect to male adult criminals, female adult criminals, juvenile delinquents and criminals with foreign nationalities. In addition, according to the types of crimes, the categories of punishments, the terms of imprisonment and the performance of criminals, prisons in China practice the separate custody of criminals and adopt different control methods. Special requirements are raised for the administrative personnel and control methods of foreign criminals, female and juvenile prisoners. In the actual work, the rights of the foreign criminals, national minority Chinese criminals, female criminals and juvenile prisoners are under special protection; and considerations are given to their special culture, traditions, customs, habits, lifestyles and physiological and psychological characteristics. The prisons in China also attach great importance to the spiritual life of criminals. Almost all the prisons in China have libraries, reading rooms, wallboards, blackboard newspapers, singing groups and theatrical performance teams; various kinds of sports matches are held regularly in the prisons; and great efforts have been made to strengthen the cultural construction in the prisons, so as to create a healthy and active atmosphere for all the criminal offenders. Since 1994, the prisons in China have started an activity of founding modern civilized prisons, and adopted the modern, civilized and scientific methods and means to transform criminals, so as to improve the prisons' management level and the quality of transformation. Up to now, over 90 modern civilized prisons at the ministry level have come forth throughout the country.

2. Attaching great importance to safeguarding the development right of criminal offenders.

The prisons in China follow the principle of "combining punishments with transformation, and taking the transformation of persons as the aim"; and transforming criminals into law-abiding citizens and laborers who can earn their own living is the aim of all the prison work. Since the 1980s, China has launched an activity of running special schools on a large scale in prisons, and remarkable achievements have been made. The cultural education in prisons takes primary education and junior secondary education as the major part, and the criminals with a good cultural basis may receive higher education. The prisons in China make comprehensive arrangement for vocational education according to the transformation of criminals through labor and the employment after they are released upon completion of sentences. Those who pass the examinations will receive certificate for various levels of technical proficiency issued by the local labor or education departments. The prisons throughout the country have run various kinds of cultural classes and technical training classes. Over the past decade or so, millions of criminals have obtained certificates or diplomas of various levels, and various technical certificates. According to incomplete statistics, in the past few years, the criminals have won 507 invention patents in total; completed 13,713 technical innovations; finished 1,186 inventions; and won 1,191 awards at the scientific and technological competitions organized by the governments at or above



the prefecture (city) level. Many criminals are turning their terms of imprisonment into semesters in the prison to learn skills and techniques. In this way, the persons released after serving their sentence may stand on their own feet in society. Many of them have achieved great successes, and realized their own life value. As a result, their individual rights have been totally restored. In addition, some prisons have invited the “labor market” to the prisons, and introduced the criminals to be released after serving their sentences to the employing units, an action which has been well received by criminals and employing units. They have created conditions for urging criminals to return to society, and become law-abiding citizens who can earn their own living.

3. Making efforts to perfect the guarantee of the human rights of criminals during education and transformation.

During the service of the criminals’ sentences, we have strengthened the education and transformation of criminals, and urged them to start their life afresh, repent and turn over a new leaf, and return to society smoothly. It is the best and most fundamental guarantee of the human rights of criminals. In 2001, the Ministry of Justice put forward that the work of prisons should take the improvement of the transformation quality of criminals as the center, and the legalized, scientific and socialized construction of the prison work as the measure for improving the transformation quality of criminals. All these measures have been extensively popularized and deepened in all the prisons around the country, and the guarantee of the human rights of prisons has constantly been improved, enriched and perfected. Along with the constantly deepening reform of the prison control system, the broad masses of the people’s police have been extricated themselves from the heavy economic pressure, and now the limited police forces can focus on educating and transforming criminals, make efforts to improve the quality of education and transformation, and reinforce the protection of the human rights of criminals from various aspects. Meanwhile, many new transformation means and methods involving the psychological consultation for criminals and the appraisal of the quality of transformation have been applied. At present, most prisons in China have started psychological consultation, correction and treatment, and remarkable results have been achieved. The objective, effective and scientific level of the transformation and education of criminals has been raised.

4. Constantly reinforcing the guarantee of the basic life of criminals.

Along with the gradual fulfillment of the readjustment of the layout of prisons and the comprehensive construction of prisons, the living and material conditions for criminals have been greatly improved, and the materials for criminals’ daily life are unifiedly rationed and provided by the prison. The Prison Law specifies clearly that the meals in prison shall follow the standard set by the state. The prison not only has the ordinary dining hall, but also provides special food to the ethnic minority criminals according to their cooking habits, and consideration is given to the special habits and customs of criminals of ethnic minority groups. In addition, more consideration is given to sick criminals in terms of life and food. The food provided by the prison features the rational nourishment needs, safety, sanitation and guaranteed quantity and quality. As the prices of non-staple foods have kept going up rapidly, the prison has actively made coordinating work, trying every way to digest the influence brought forth by the price rise, guarantee the quantity of



food supplied to criminals strictly according to the standard, constantly make efforts to improve criminals' life, and safeguard their rights of securing the basic life in prison.

5. Attaching great importance to the life and health of criminals.

To safeguard the health of criminals, the Prison Law specifies that a prison shall set up medical organs and living and sanitary facilities, and institute regulations on the life and sanitation of prisons. China has formed the three-level medical and epidemic prevention system for prisons - the central hospital of the Bureau of Prisons at the provincial level, the prison hospital (health center), and the clinic in the area where the prison is located, which can give sick criminals timely and free prevention and treatment. The Prison Law specifies that medical and health care of criminals shall be put into the public health and epidemic prevention program of the area in which the prison is located. Some prisons cooperate with local hospital to provide medical services, raising the prisons' medical guarantee level. It fully reflects that the Chinese Government attaches great importance to the life and health right of criminals and the effective guarantee ability of the prisons' medical and epidemic prevention system.

III. Actively promoting the reform and development of the prison work for the guarantee of the human rights of criminals

In recent years, the prison administration has adopted a series of effective reform measures to strengthen the implementation of the Criminal Law and improve the transformation quality of criminals, thus further promoting the new development of the human-right guarantee in prisons. The main reform measures adopted by the prisons are: Persisting in taking the socialist legal concept as the guidance, making efforts to promote the control of prisons according to law, and accelerating the legalization, scientization and socialization of the prison work; steadily promoting the experimental reform of the prison system by the Ministry of Justice with approval of the State Council; constantly perfecting the enforcing system of punishments; implementing the readjustment of the layout of the prison; sparing no effort to promote the IT building in prisons; putting into practice the criminal policy of combining punishment with leniency; promoting the transparency of prison affairs in an all-round way; launching the special rectification and reform activity focused on "standardizing the law-enforcing acts, and promoting fairness in law-enforcing process"; adopting the scientific and civilized management according to law; founding the legal-ideology warning education base in prisons according to law; starting the psychological correction for criminals; launching the cultural construction in the prison area and the correction activity for cases; and intensifying the vocational and technical education for criminals. In addition, China has actively started the research on the human rights in prisons, conducted exchanges with foreign countries, and adopted the supervision measures for the law-enforcing process. All these measures have played an active stimulating role in strengthening and ameliorating the prison work, improving the transformation quality of criminals, and promoting the human-right guarantee in prisons.

1. Starting the legalized, scientific and socialized construction of the prison work and creating a favorable environment and atmosphere for guaranteeing the rights of criminals.

Improving the transformation quality of criminals, and transforming criminals into law-abiding citizens are the best guarantee for the human rights of criminals. In December 2002,



the Ministry of Justice put forward the requirements for “promoting the legalized, scientific and socialized construction of the prison work, and working hard to improve the education and transformation quality of criminals.” The legalization of the prison work is the dynamic process that the prisons execute punishments, control prisons and manage various types of prison affairs according to law in line with the state’s laws and regulations, and the rules and regulations of the relevant departments; scientization refers to the dynamic process that prisons make use of new ideologies, way of thinking, methods and resources to form the theories, systems and mechanisms in conformation to the development of the situation, and the basic rule of the prison work; and socialization refers to the open activities that prisons, during the control work, adhere to combining specialized organs with the mass line, mobilize all active factors inside and outside of prisons, and participate in the transformation and correction of criminals by using diverse main bodies. Through the common efforts of the workers and staff members of the prison setup, the construction of the legalization, scientization and socialization of the prison work has made remarkable progress; the control of prisons according to law has been further implemented; the fair and civilized law-enforcing level has been constantly raised; the scientific level of the prison work has been remarkable strengthened; the means of transforming criminals have been more scientific; the modern information technologies have been extensively used in prisons; the control level of prisons has been constantly improved; the efforts to integrate and utilize social resources have been constantly strengthened; the effect of society’s participation in the transformation of criminals has been tentatively shown; and the transformation quality of criminals has been greatly improved.

2. Steadily carrying out the reform of the prison system, and offering the system-related support to the human-right guarantee of criminals.

With approval of the State Council, the Ministry of Justice has conducted the experimental reform of the prison system in 14 provinces (autonomous regions and municipalities), which were divided into two groups, focusing on the reform objectives of the “guarantee of full amount, separation of prisons from enterprises, separation of revenues from expenditures, and standardized operation,” so as to intensify the functions of prisons. At present, the main tasks of the experimental reform have been basically fulfilled; the objectives of the reform of the prison system have been basically realized; and the new prison system and operation mechanisms have taken shape. After the adoption of separating prisons from enterprises, a new prison control system has been basically formed; due to the adoption of separating revenues from expenditures, the prison funds are unhooked from the enterprises run by prisons; China has actively promoted the separation of prisons from society, and gradually solved the problem that society was run by prisons; China has actively ascertained the guarantee of funds, and basically established the guarantee system of the total funds for prisons; and prisons in China have gradually put into effect the supporting policy, and promoted the constant deepening of the reform. In general, the reform of the prison system has powerfully promoted the advance in the prison work; the responsibility of the prison as the punishment-enforcing organ has been better performed; the prison’s safety and stability has been better guaranteed; the education of criminals has been intensified; and the fair, uncorrupted, civilized and high-efficiency punishment-enforcing system has been perfected in a constant way; and the



functions of prisons have been reinforced. On the basis of experiments, the national prison setup will, with approval of the State Council, reform the system in an all-round way in 2008. Along with the gradual establishment of a new system, the prison work in China will, within the framework of the new system, release more vitality, and advance with new and bigger steps.

3. Implementing the readjustment project of the layout of the prison and constantly improving the law-enforcing environment in the prison.

In the early days of New China, according to the needs of preparing for war, and the principle of “not contending for profit with the people,” the prisons in China were basically built in the remote areas far away from the cities. Along with the social development and progress, the contradiction of the prison’s unreasonable layout has come into prominence. Many prisons in the remote regions and far away from the cities had the bad geographical conditions; the distribution of prisons was unbalanced; and the unevenly distributed prisons had insufficient abilities to put criminals in custody. Accordingly, the prisons could not bring into full play their functions. To help criminals with their transformation and return to society, guarantee the safety of prisons, and reduce the penalty execution cost, the prisons throughout the country, since 2001, have acted according to the requirements for a reasonable layout, an appropriate scale, scientific classification, perfect functions, a rational investment structure and IT control; worked out the plans in great earnest according to the Standards for the Construction of a Prison; and greatly promoted the readjustment of the layout of the prison. At present, the readjustment work of the prison’s layout has been going smoothly; and the central and local governments have invested a great amount of capital in over 300 projects for readjusting the layout. The layout readjustment has brought forth the deep and omni-directional changes in the prison work: Fundamental changes have taken place in the appearance of the prison and in the law-enforcing environment as well; the hardware facilities for the labor, study, rest and recreation of criminals have been remarkably improved; it is more convenient for the family members of criminals to pay visits and for society to start the assistance and education activities; and the basic human rights of criminals have been guaranteed in a more comprehensive, more substantial and more effective way.

4. Speeding up the paces for the IT construction in the prison, and improving the control of the prison.

In 2006, the prisons in China formally initiated the IT construction: The National Plan for the IT Construction in Prisons was worked out, raising the definite requirements for the guiding ideology, objectives, tasks and main measures of the IT construction in prisons. China has started the building of the information bank of criminals; and the National Criterion for the Information Codes of Criminals, and the National Exchange Standard for the Information and Data of Criminals passed the examination and appraisal by experts, and were issued to the prisons throughout the country for implementation. In May 2007, the Ministry of Justice held the national work meeting on the IT construction of prisons in Nanjing, further making clear the new objectives, tasks and demands for the IT construction, and speeding up the paces for the IT construction in prisons. After the IT construction is completed according to the plan, an IT system with perfect applying functions will be formed, which will cover all the prisons, link all the prison-



related networks, share all resources, and adopt the unified standards, thus further improving the efficiency and level of the control in prisons. At present, many prison administrations at the provincial level have set up the LANs and the electronic supervision and control system, and the computer information process has been extensively applied, which have played a good role and brought forth good results.

5. Carrying out the criminal policy of combining punishment with leniency and truly safeguarding the human rights of criminals.

The essential of the criminal policy of combining punishment with leniency means to make a distinction between criminal acts, punish the criminals who should be severely punished, and show leniency to those who should be dealt with leniently, realize the unification of the legal effects and social effects, and reach the objective of punishing crimes and preventing from crimes. During the prison execution, “leniency” refers to pointing a way out. We believe that most of the criminals can be transformed and return to society smoothly, which will be conducive to bringing into play the functions of safeguarding the human rights in punishment. “Punishment” reflects the essential characteristic of the prison, and reflects the important mission of protecting society. During the punishment execution, we have upheld the implementation of the policies and systems on the prison work under the legal framework. As for commutation of punishment and release on parole, we have had a good command of applicable criminals and conditions, made clear that commutation of punishment and release on parole do not mean indulgence, but for the better realization of the punishment value. As for those criminals who have committed crimes and resisted transformation, we have punished them according to law, cracking down on their criminal activities. As for those with light subjective evil tendency who have always abided by the prison’s regulations, actively received transformation and reform, shown good behaviors, and whose fatalness to society has been constantly reduced, we have offered them encouragement and rewards - some received the commutation of punishment, and the others were released on parole. Meanwhile, we have worked out the work mechanisms and systems according to the punishment policy of combining punishment with leniency, and specified the standards for punishment and leniency, so as to guarantee the implementation of the policy of combining punishment with leniency. We have persisted in putting the people first, implemented and embodied the punishment spirit and guaranteed the human rights of criminals. We have dealt with juvenile delinquents in light of adult criminals, and more consideration has been given to them in various aspects, making them fully feel the tolerance and warmth of society, and promoting them to correct their errors and make a fresh start, and return to society for self development.

6. Promoting the prison affairs openness in an all-round way and guaranteeing the fair and civilized law enforcement in the prison.

The control level and state of the prisons adapt to the social formation in which the prisons are located and to the civilized progress of society as well. To further popularize and implement the Party’s policy on the prison work - “combining punishment with transformation and taking the transformation of criminals as the aim” - and establish and perfect the supervision and restriction mechanisms, the prisons in China have made public the relevant regulations on the punishment



execution, and the administration, education, labor, life and sanitation of prisons to which the people from all walks of life, criminals and criminals' family members show great concern, as well as the work disciplines of the people's police in the prisons, and the rewarding and punishing measures, such as commutation of punishment, release on parole, and execution outside prison, through the announcements of the telephone numbers for reporting offences and consultation, the establishment of the warden's mail box, and the director and warden's reception days and the employment of law-enforcing supervisors. All these have been notified to all criminals, the family members of criminals and society through newspaper, TV, broadcasting, networks and promotion booklets; and the prisons in China have accepted complaints and reports on offences, and voluntarily received the supervision of the Party committees, governments, people's congresses, Chinese people's political consultative conferences and procurators at various levels, news media and the people from all walks of life, so as to promote fairness with openness and safeguard the legitimate rights and interests of criminals. During the practice, the Ministry of Justice issued the Regulations on Implementing "Two Types of Openness and One Supervision" during the Punishment Execution in Prisons (for trial implementation) in 1999; and the Ministry of Justice promulgated the Opinions on Implementing the Prison Affairs Open in the Prison Setup in 2001. The new measure known as the "Sunshine Project" has placed the law-enforcing activities in prisons under the extensive social supervision, strengthened the transparency of the law enforcement in prisons, promoted the rise of the law-enforcing level of the people's police in prisons, eliminated the mystery of the prison work, reinforced the connection between prisons and society, effectively prevented from and restrained judicial corruption, mobilized the criminals' enthusiasm for transformation, stabilized the transformation order in prisons, facilitated the improvement of the prisons' control level, created the fair, open and just law-enforcing environment, propelled the fair and civilized law enforcement in prisons, and more effectively safeguarded the rights of criminals.

Along with the constant development and progress of the prison work, the human-right guarantee in the prisons of China has been improved and developed. But we have consciously realized that the work on the human-right guarantee in prisons is confronting many new conditions and problems, and many aspects need to be further improved and perfected. Accordingly, we should not only constantly carry forward the successful experiences and methods, but also keep pace with the times, constantly make innovations, deepen researches on the specialities of the human rights of criminals from a higher and more scientific level in terms of the contents, realization modes and guarantee mechanisms, correctly handle the relationship between the criminals' human rights and obligations, and the relationship between the rights of criminals and the rights of victims and the functions and powers of the people's police in prisons, put into practice the policy of combining punishment with leniency, secure the unification of the human-right guarantee of criminals and the transformation work in prisons, constantly promote the healthy development of the human-right guarantee work in prisons, and make due contributions to the development of China's human-right cause.

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A DISCUSSION ON PRISONERS' RIGHT TO MARRIAGE UNDER THE VISION OF HUMAN RIGHTS PROTECTION

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In order to build a harmonious society, the basic human rights of citizens must be fully ensured. In the field of human rights protection, China has got considerable achievements. With continuous development in China's prison system reform, the issue of prisoner's rights protection has received more and more attention and concern from all walks of life. The statutes of prisoner's application for marriage registration were, for the first time, stipulated as bylaws in the Views on Several Issues Relating to Implementation of Marriage Registration Regulations issued by the Ministry of Civil Affairs (Hereinafter referred to as Views) in 2004. It says, "Prisoners who apply for marriage registration should go to the marriage registration offices personally and provide valid identity documents. Those who are unable to provide their identity cards can be proved by the related materials issued by prison administration department. Prisoners may choose one of the marriage registration offices which are either in the one of the two applicant's permanent residences or in the local place of prison."

This paper attempts to, from the perspective of protecting human rights, make a discussion and analysis on prisoners' right to marriage.

I. The right to marriage is one of a prisoner's human rights

On the issue about the essence of the rights, there have been many arguments in the legal theorist's circles, such as the arguments advocating interests, qualifications, possibility, legal force, standardization, selectivity, and freedom. However, most of the abovementioned arguments tend to generalize the essence of rights only at the level of their content. Considering the complexity and profundity of the content of rights, a growing number of scholars tend to explain the essence of rights in terms of the elements contained in the concept of "rights" such as interests, freedom, proposition, empowerment and willpower. Some scholars point out clearly, "Although we can make a variety of analysis to the elements of rights for the purpose of research or argumentation from different perspectives, we insist on that the basic elements in rights, including moral-based rights, custom-based rights and legal rights, are actually two, namely, one is interests, the other legitimacy and deservingness."²¹⁰ This statement is well grounded. Therefore, viewed from this perspective, it is obviously correct to consider the right to marriage as a basic right of an ordinary citizen. The reason for saying the right to marriage is a right a prisoner should have is

210 Bei Yue, *Ideas on the Obligations and Rights* [J]. Law, 1994 (8).



that it also contains the natures of interests, legitimacy and deservingness.

1. The nature of interests of prisoner's right to marriage

Getting married is a legal action taken by people to pursue their physical and mental interests. "Appetite and sexual desire are the natures of human beings!" The ancients two thousand years ago had recognized that eating and getting married are the essential attributes of human beings - the concept of human beings mentioned here is explained biologically. In the process of human evolution, eating guarantees survival, and marriage ensures proliferation. The significant value of the marriage for a person is that it is not only the means to continue his family but also his spiritual sustenance. This is the content of the natures of interests represented by the right to marriage.

The natures of prisoners as human beings, explained biologically, have not changed. In the early stage of the development of human society, offenders had ever been deemed as "others." However, it cannot be denied that the criminals were still humans in their nature. Also with the progress of human society, such ideas of penalties have been eliminated. The mankind has reached to a new height in the process of recognizing ourselves. Therefore, prisoners, like other ordinary citizens, have the inherent requirements of enjoying the interests of the right to marriage. This forms the basis for that prisoners should have the right to marriage.

2. The nature of legitimacy and deserving of the right to marriage

(1) Prisoners have not lost their citizenship

It is clearly stipulated in Article 33 of Constitution of the PRC that all those who have the nationality of the People's Republic of China are the citizens of the People's Republic of China. That is to say, the nationality is the sole criterion for judging whether one has the citizenship or not. Although prisoners have been punished and accepted their penalties for their criminal behaviors, they did not lose their citizenship since there is no penalty in China to say that prisoners' nationalities are to be deprived of because of their criminal offences. Viewed from this perspective, prisoners should have what other ordinary citizens have, except for those rights that have been deprived of clearly by the court decisions. Since an ordinary citizen has the right to marriage, it is certain that a prisoner also has the right to marriage, which reflects the nature of legitimacy and deservingness of the right to marriage.

(2) Prisoners' right to marriage is not prohibited by laws.

It is explicitly stipulated by Article 49 of Constitution of the PRC that marriages and families are protected by the State. The right to marriage that a citizen has is a constitutional right, which has the natures of universality and inherency. Therefore, this right will not be deprived of unless it is clearly stipulated by laws. For example, the restrictions to the right to marriage for some citizens are stipulated explicitly in Article 7 of the Marriage Law of the PRC, which include the following situations, such as for those who are lineal consanguinities or collateral relatives by blood within three generations, or patients with the diseases that are considered medically not to be married. However, the status of being in prison is not included in the restrictions stipulated in Marriage Law, and also there is not any other law stipulating explicitly that prisoners' right to marriage should be deprived of. It is also stipulated in Article 7 of the Prison Law that "those rights which are not denied or restricted in accordance with laws are not to be violated." As



prisoners' right to marriage is not explicitly deprived of by the constitutions and laws, prisoners should have the right to marriage. It shows the nature of legitimacy and deservingness of the right to marriage.

(3) The imperfection of prisoners' right to marriage

Though prisoners' right to marriage is consistent with the essential nature of rights, its imperfection is obvious. Some scholars believe that the right to marriage is actually one of the civil rights, while the key element of exercising the civil rights is freedom. To exercise the civil rights freely is the specific content of the personal freedom.²¹¹ Since prisoners have lost their liberty, and can neither enjoy the marital interests, nor discharge the marital obligations, and the relationship of such kind of marriages which exist only in their forms never meet the objective requirements of marriage stimulated by the laws.²¹²

The author of the paper believes that this viewpoint is open to question. The availability of the rights is a matter of fact, not the matter of the value judgment. Just as what Kant said, the right is that each person must be, in accordance with his own willingness, allowed to make his own decisions on his actions that never disturb others and are suit for the general rules and principles. That is to say, all that one can make his decisions according to his own willingness, and is not expressly prohibited by laws, are all the rights one should have. Therefore, the existence of the right itself cannot be denied only because it is unable to be realized. The imperfection of the right is of quality evaluation of the right, while having no right is of existence evaluation of it. They are on two different levels and cannot be lumped together. If we deny the right itself only because of its flaws, the judgment will be subjective. Indeed, prisoners, having lost their rights to freedom, are unable to have normal marriage and family lives as ordinary citizens, but their rights to marriage as statutory rights are indisputable.

In view of the practice in some foreign countries, many of them have reached consensus for the right to marriage. Prisoners should have all the other rights except those that have been stipulated explicitly to be deprived of by laws or those that have been spontaneously deprived of because of the penalties prisoners have received²¹³. It is certain that the right to marriage is also included in the rights.

II. The value of protecting prisoners' right to marriage

1. The right to marriage and the human rights

Human rights have become one of the common ideals pursued by the whole mankind. With the progress of society and the deepening of cognitive process, human rights have been changed from slogans to thoughts, then from thoughts to reality, and ultimately settled down in the forms of laws. The issuing of the Universal Declaration of Human Rights has been a milestone in the history of the development of human rights.

211 Wu Lina. "On Prisoners' Right to Marriage" [J]. *Journal of Guangxi College for Young Cadres*, 2006 (4).

212 Li Ming. "The Conflict between Protecting Prisoners' Human Rights and the Penalty for Reformation and Its Solution - On Prisons' Execution Civilization under New Situations" [J]. *China Prison Journal*, 2004 (4).

213 Ma Zhiyi. "The Management System of Prisons in Developed Countries" [M]. Current Affairs Press, 2001. 181.



As an old saying goes, if one wants to know the degree of civilization of the country, he can look into how its prison system is, which can help to make a judgement.²¹⁴ Viewed in some senses, the degree of realization of prisoners' rights may reflect the country's progress levels. Because prisoners are usually in a weak position as nationals of the country, the protection of their human rights is easily to be ignored when that of the other ordinary citizens' human rights has been enhanced with the development of the national economy. Furthermore, it is more difficult for prisoners to voice for their rights because of the limitation of their personal freedom. Therefore, it is of important value to show great solicitude for prisoners' right to marriage whether from the perspective of protecting prisoners' human rights or from that of improving the standards of the citizens' human rights.

2. The right to marriage and the purpose of penalty

Jhering, a Germany penal jurist, believes that penalty is a double-edged sword. Practicing it properly will benefit both the country and prisoners, otherwise both will be afflicted. With the continuing development of the thoughts of the criminal policies, there emerged two different viewpoints in the schools of the modern criminal jurisprudence, namely penalty for retribution and penalty for purpose. Penalty for retribution holds the opinion that the essence of penalties is for the criminal retribution. While penalty for purpose, also known as penalty for education, states its fundamental view that Penalties are the means which are completely targeted for the future to defense criminals in society.²¹⁵ After that, with the theory of society defense and the new theory of society defense being on the rise, the principles of the penalty for retribution and the penalty for threatening have been replaced by the ideas of humanitarianism and socialization of execution. Humanitarianism is the theory that insists that human is the center and purpose. It cares for such issues as humanity, human dignity and value, human real life and happiness, and human liberation.²¹⁶ While the socialization of execution is that, as the places to implement the penalty for freedom, how will prisons do, through the approaches of expanding the contacts and links with criminals and the communities, or changing prison execution environment²¹⁷, in the course of the enforcement of the sentence, to make prisoners abide by laws and not to commit crimes again to endanger society after they are released. To guarantee prisoners right to marriage is just the representation of the humanitarianism and the socialization of execution.

Viewed from criminal psychology, the reasons why one commits crime are various, such as psychological needs, personality disorders, moral declination and so on. Among which, an important reason is that they lack social acceptability and love and care from their families. People are social animals, and the interaction with a society is a significant feature. Families, schools, work units and community groups are important links between individuals and communities. For prisoners, families are always the only links between them and the society since their crimes

214 Sun Xiong, *Penology* [M]. Commercial Press, 1936, 6.

215 Ma Kechang, *Principles of Comparative Criminal Laws* [M]. Wuhan University Press, 2002 (1). 47.

216 Chen Xingliang, *The Value Composition of the Criminal Laws* [M]. Renmin University of China Press, 1998. 431.

217 Zhang Quanren & Zhang Ou, "Comparative Study of Socialization of Prison Execution" [J]. *China Prison Journal*, 2004 (3).



have led to the termination of their studies and loss of their work. Therefore, the great value in ensuring prisoners' right to having families, namely protecting prisoners' right to marriage, is self-evident. The existence of the families will inspire prisoners with hope to reform themselves, and love and care from their families can bring psychological comforts to prisoners, which will make them weaken and ease the sense of inferiority caused by being abandoned by the society and their animosity against the society. It is of great significance for prisoners to reform themselves with full efforts and return to society earlier. It has been proved by practice that those who have got love and care from their families always get the better remolding results, while divorces will result in prisoners' emotional fluctuations and then their producing negative thoughts.

III. The realization of prisoners' right to marriage

The right to marriage should have belonged to the scope of the rights to privacy. However, it is more difficult for prisoners whose personal freedom has been restricted to realize their rights to marriage because of their special status. Therefore, more measures are needed to guarantee them their right.

1. The conceptions need to be changed to realize prisoners' right to marriage

Since prisons are the direct administrative organs to prisoners, the degree of whose concern about prisoners' right to marriage will have a direct impact on its realization. In order to practice their rights to marriage, prisoners need the guidance of the supervisors of prisons and also some help from them when running on some specific operations. Therefore, prisoners' right to marriage is only castles in the air without the cooperation from the administrative personnel of prisons. However, some of the executives of prisons hold such opinions as to ask "aren't the police officers and constables' rights more important than the prisoners'?" They think it will cause disorder in prisons to stress prisoners' rights. These opinions are obviously incorrect.²¹⁸ Although prisoners have been deprived of their personal freedom, they have never been deprived of their right as human beings. Since the right to marriage is not subsidiary to the right to personal freedom, prisoners should have this right under the circumstances of the rights without being explicitly prohibited by laws, which is the selection of the legal process of the society. It will not lead to the disorder in prisons to ensure prisoners' right to marriage because the protection of prisoners' right to marriage need to be pushed forward legally and cooperated with the long-term mechanism of prisons' security. Viewed from the functions of prisons, the punishment is not the purpose, and reform is fundamental. Therefore, such actions as the protection of the right to marriage, which will benefit the reformation of prisoners, should not be hindered, but should be supported actively and vigorously.

In addition, the publicity work on the protection of the rights should be strengthened in the whole society. The degree of the realization and the protection of the citizens' rights has become an important criterion for measuring the level of the country's development. The idea of defending the rights should be rooted in the hearts of each and every citizen as a golden rule in the modern

²¹⁸ *Protection of Human Rights in Prisons in China*, ed. China Prison Institution & Human Rights Institute of China [C]. Law Press, 93-94.



legal society. The existence and implementation of the rights should be stipulated and protected by laws. Any slight negligence in one's rights should not be overlooked only because of one's specific status, as is required by humanitarianism as well as by laws. In some developed countries, more and more people are beginning to realize that humanitarianism, as the basis of criminal policies, is not an idealistic matter practiced by some compassionate individuals, but the matter of the responsibility taken by the whole society towards crime. To show concern for the offenders is not a grace and mercy, but the mandatory obligation any welfare state should have.²¹⁹

2. A perfect corresponding system is needed to realize prisoners' right to marriage

(1) Perfect the examination and approval system regarding prisoners' right to marriage

The specialty of prisons' functions and the importance of prisons' responsibilities decide that no affairs within prisons can be carried out prior to the examination and approval process. That is to say, only after the strict examinations and approvals by prison authorities and other relevant organs have been made can some actions of prisoners be decided whether to be done or not to be done. Therefore, in order to guarantee prisoners' right to marriage, the corresponding examination and approval system must be perfected.

Firstly, prisons should be the authorities to conduct the examinations and make decisions. The reasons for this are as follows. First, prisons know the situation of prisoners best, so they can use the examination and approval standards most accurately; second, on the principle of "No relief, no right," the examination and approval of prisoners' applications for marriage need to be supervised. The judicial administrative organs, as higher authorities of prisons, can exercise supervisory functions. Prisoners will get the relief by appealing to the judicial administrative organs when their applications for marriage are rejected with no reasonable explanation.

Secondly, the deadline of the process of examination and approval should be identified. According to the relevant provisions in Code of Criminal Procedure and the Administrative Law of the People's Republic of China, the deadline for the process is suggested to be a month. It may be appropriately extended under the special circumstances, but should not exceed over two months.

Finally, the process of examination and approval should be defined. After prisoners' applications for marriage is submitted, prisons should make proper investigations and discussions in view of this issue, and make decisions in accordance with the principle of democratic centralism, and then give opinions of approval or disapproval in the form of a written reply. If not approved, there should be the reasons set out in a written reply. If prisoners believe that the explanations given by prisons are unreasonable, they may appeal to the judicial and administrative departments through prisons within 15 days after they receive the written reply. Prisons should not detain the complaints, but need to transfer them to the judicial administrative organs within 15 days. If prisoners' applications for marriage have been approved, prisons should make arrangements for the applicants to go through marriage registrations within three months.

219 Liu Qiang, "The Status Quo and Thoughts on the Corrections of Legal Norms of Community Abroad" [J]. *China Prison Journal*, 2004 (1).



(2) Perfect the marriage registration regulations for prisoners

It is stipulated in Views on Several Issues Relating to Implementation of Marriage Registration Regulations that Prisoners who apply for marriage registration should go to the marriage registration offices personally and provide valid identity documents. There are actually some difficulties for prisoners to go to the registration offices personally. Considering this, some modifications to the provisions can be made legally. For instance, the related staff members may be assigned to prisons, and help prisoners go over the marriage registrations, which will not only bring convenience to prisoners, but also remove prisons from twists and turns. It is a necessary approach to realize prisoners' right to marriage.

(3) Perfect the system of prisoners' personal safety and security

The permission for prisoners to contact their spouses in private will bear some security risks. The first is that prisoners' spouses are likely to carry some dangerous goods. Secondly, prisoners' spouses can be a source of transmission of infectious diseases. The two risks mentioned above are extremely dangerous to both prisoners who have spouses, and those who live with other prisoners. Therefore, it is necessary to make body searches and physical examinations on prisoners' spouses. Another problem will arise therefrom. Since prisoners' spouses are free citizens, do prisons have the authority to make the mandatory physical examinations on them? Will these inspections infringe the right to privacy of the free citizens? We believe that prisons have such authorities. Since prisons have the obligations to protect prisoners' safety, the actions taken by them are just the embodiment in fulfilling their obligations. Furthermore, each citizen also has the obligation not to endanger the others' health.

In order to realize prisoners' right to marriage, there is still a follow-up issue in reality which has to be taken into consideration, namely the issue of prisoners' right to reproduction. For male prisoners, the indulgence of their rights to reproduction may bring some problems of their children's education as well as the aggravation of social burden. For this, the supervisory staff of prisons can, through ideological education, make prisoners know the drawbacks of giving births to children in their prison terms. It should be said that most of the parents will temporarily give up their rights to reproduction when considering the children. This approach is not a limitation to their rights to reproduction, but a guide to criminal policies on the basis of full consideration. For female prisoners, there is another problem. It is stipulated by Article 214 in China's Criminal Procedure Law and Article 17 in Prison Law that those who are pregnant or breast-feeding their own infants may serve their sentences outside prisons temporarily. In this case, will female prisoners manage to achieve the purpose of avoiding legal punishment by becoming pregnant after they get married? Such a possibility does exist in practice. Therefore, how to prevent such matters from taking place so as to safeguard the justice of laws has become the issue that prisons have to take into consideration. The author of the paper believes that the solution to this problem also needs the doctors' involvement and recommendations.

To sum up, it is of great value to protect prisoners' right to marriage both for the realization of the penalty purpose and for the reformation of prisoners. Though some problems might crop up along with the realization of the rights, the benefits the realization of the right brings will be in the



dominant position when weighing the pros and cons. Also the disadvantages will be shaken off in the practice of the prison reform. It is believed that prisoners' right to marriage, alongside the advances of the reform of China's prison system, will get fully guaranteed and developed.

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ON PROTECTION OF HUMAN RIGHTS BY CHINA'S ADMINISTRATIVE PROCEDURAL SYSTEM

Zhan Zhongle
China

I. Administrative procedural system in modern history

In China's modern history, administrative proceedings made its existence for only a short period of time. When the judicial reform was introduced at the end of the Qing Dynasty, it was proposed to establish "Court of Administrative Justice" as Japan did special for administrative proceedings, and drew up the Draft for Court System of Administrative Justice. Before promulgation thereof, the Qing Dynasty collapsed and the administrative procedural system was aborted. In 1912, the Republic of China was founded. Pursuant to Article 10 of the Provisional Constitution of the Republic of China, "the people shall have the right to file a complaint before Administration Justice (Pingzheng Department) regarding any violation by any government official of law or right." According to Article 49 thereof, "the court shall adjudicate civil and administrative cases according to law. Notwithstanding above, laws shall be otherwise enacted for administrative and other special proceedings." Under the tense situation domestically and internationally, the Nanjing Provisional Government had no time to consider formulation of a special administrative procedural law.

In 1914 after its founding, the Beiyang Government (the Northern Warlord government) promulgated the Constitution of the Republic of China, affirming the assumption of "Administration Justice" in the Provisional Constitution, Article 8 of which provides that "peoples shall have the right to appeal to administrative departments and state before Administration Justice." In May 1914, the Beiyang Government formulated the Administrative Procedural Ordinances, which in July of the same year was revised as the Administrative Procedural Law. In November 1932 after its founding, the Nanjing Kuomin (National) Government promulgated the Organic Law of the Administrative Court and the Administrative Procedural Law. In 1933, the administrative court was established and commenced acceptance of administrative actions. The administrative court, affiliate to the Judicial Department, was not subject to control of



any administrative department. With regard to any administrative matter, parties might file a lawsuit to the administrative court and might claim for collateral damages. Theoretically, the Administrative Procedural Law in 1932 was relatively mature due to its borrowing and studying of successful experiences from France, Germany and Japan. However, under the then historical circumstance when the Chinese citizen's life could not be ensured, it is natural that the administrative procedural system played nothing but virtually a rather limited role. Under the rule of the Beiyang Government, the number of disputes accepted by Administration Justice did not amount to ten, which was mocked as "Pin Zheng Court" (a court suffers from poverty) due to lack of administrative cases. When the Nanjing Kuomin Government was in power, the administrative court accepted only a hundred cases approximately.²²⁰

II. Administrative procedural system after founding of new China

Since the founding of new China, Kuomintang's "the Complete Literatures on Six Laws" were totally abolished. At the initial period after founding of new China, emphasis was given on the administrative organic law in administrative legal system as there was lack of profound understanding on the rule of law. As the CPC in power did not make a proper distinction between party and state in political system, official's instructions and orders were dominant and the country was ruled by man, to much extent. Regardless of people's right of complaint and appeal provided in May 4 Constitution, establishment of a standardized administrative procedural system was absent. Supervision on the administrative departments was manifested mainly by the administrative supervision and disciplinary sanctions on administrative staff. After 1957 when "Anti-Rightists" struggle became expanded, "the Supremacy of Law" was severely criticized and law nihilism spread, let alone establishment of administrative procedural system.

Formal establishment of administrative procedural system commenced at the outset of the 1980s. Article 3.2 of the Civil Procedural Law of the People's Republic of China (trial), promulgated in 1982, set out that "administrative cases subject to trial by the people's court according to law shall apply to this law." At that time, only a few laws provided the right of citizens to institute an administrative lawsuit. For instance, pursuant to Article 15 of the Income Tax Law on Sino-foreign Equity Joint Ventures (1980), any equity joint venture objecting to any administrative decision rendered by competent taxation authorities may file a suit to court after reconsideration. In accordance with Article 39 of the Ordinance for Security Administration Penalties (1986), anyone objecting to any public security penalty may file a suit to court after appeal. Initially, administrative cases were tried by economic tribunals as such cases occurred more often in business management area. After security administrative cases were accepted by courts, establishment of a special administrative tribunal was attempted from place to place. In November 1986, the first administrative tribunal was established in Hunan's Minluo County People's Court in China. By 1988 as many as 1,400 people's courts have the establishment of

220 Yuesheng Weng: on Modernization of Administrative Procedural System, as from the Administrative Law and Country by Modern Role of Law (9th version), authored by Yuesheng Weng, 1990, published by National Taiwan University, Compiling Committee of Law Book Series. p.390



respective administrative tribunals in China.²²¹ Notwithstanding the above, universally applicable administrative procedural system did not take shape.

In 1989, the Administrative Procedural Law was enacted by the National People's Congress which affirmed the administrative procedural law via statute. The number of administrative cases in docket was soaring. Between 1987 and 1988, the Chinese courts accepted totally 14,153 administrative cases, only 7,256 cases annually on an average. In contrast, the Chinese courts accepted 460,308 administrative cases from 1989 to 1999, 46,031 cases annually on an average.

²²² Up to date, 17 years have passed by since implementation of the Administrative Procedural Law. At present, nearly 100,000 administrative procedural cases and administrative claims are accepted at trial of first instance in China every year, and tried in favor of 30-40% of plaintiffs. In some places, even over 60% of administrative plaintiffs win.²²³

At the time administrative cases increase, the type of cases has become diverse. In the first several years since implementation of Administrative Procedural Law, cases were mainly related to administrative penalties, labor reformation and detention for investigation. Since promulgation of Legal Interpretation on Certain Matters concerning Implementation of Administrative Procedural Law by the Supreme People's Court in 2000, administrative proceedings have expanded from acts related to personal right and property right to acts related to such other rights as from legal acts to quasi-legal acts and de facto acts, from unilateral acts to bilateral acts, and from acts of administrative departments to those of some non-administrative departments. From the perspective of judicial practice, lawsuits concerning the right of education, abstract administrative acts, and omission have emerged.²²⁴ For example, two of cases released on the Gazette of the Supreme People's Court (1999-2005) are related to the right of education. Yong TIAN vs. Peking University of Science and Technology on refusal to grant graduation and academic degree certificate in 1999 and Baoxi YANG vs. Tianjin Garments Technical School on refusal to grant graduation certificate in 2005. Other new cases related to administrative omissions, administrative permits, and administrative certificates have sprung up. e.g. Chenyan YIN vs. Public Security Bureau of Lushi County on police omission upon report by 110 call, Zhifang LI objecting to liability for traffic accident applying for reaffirmation, 35 residents of Block 28, 3rd Niansi Village vs. Yangzhou Municipal Planning Bureau on administrative permit, Ruigeng LU vs. Donggang Public Security Bureau on reward-offering advertisement, and so forth. Statistics indicate that types of administrative cases have expanded to over 50 types, and almost cover the entire field of administrative management.²²⁵ It can be said that unprecedented improvement has

221 The Studies of Administrative Procedural Law, editor-in-chief by Jiansheng Zhang, Higher Education Press, 2006, p.53.

222 Mingan Jiang, Administrative Proceedings and Environment for Rule of Law, Research of Administrative Studies, No. 4, 1999, pp.9-12

223 http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=1088

224 Jianmiao Hu, Evolution and Trend of Scope of Chinese Administrative Procedures: Division, Limitation, Recovery and Expansion, Political and Law Tribune (Journal of China University of Political Science and Law), Sept. 2005, No 5, Vol. 23, P3-9

225 Mingan Jiang, Administrative Proceedings and Environment for Rule of Law, Research of Administrative Studies, No. 4, 1999, pp.9-12



achieved in the scope and depth of Human rights protection with effective implementation of administrative procedural system.

III. Achievements of administrative procedural system in Human rights protection

1. Protection of personal right

Personal right constitutes the most basic factor in human right, including right of life, right of health, right of name, right of portrait, right of fame, right of privacy, and parental right. In the absence of protection on personal safety and freedom, any other entitlement would be groundless. Prior to promulgation of the Administrative Procedural Law, the right of police was not effectively curbed to such extent that it was not rare for public security departments to set restriction on personal freedom of parties at will via labor reformation, detention for investigation, and administrative detention, even to execute law by force. Article 11.1 and Article 11.2 of Administrative Procedural Law provides that anyone objecting to such administrative penalties as detention and objecting to such compulsory measures as limitation of personal freedom at will may file an administrative lawsuit. The Official Opinion regarding Certain Matters on Implementation of Administrative Procedural Law (trial) released by the Supreme People's Court in 1999 lists decisions on labor reformation and detention for investigation in the scope of acceptance in administrative proceedings.

The Administrative Penalty Law enacted by the National People's Congress in 1996 specifies that the administrative penalty of limiting personal freedom may only be created by law. The Legislation Law enacted in 2000 further specifies that the State Council may not be vested the right to enact administrative regulations regarding compulsory measures and penalties for personal freedom limitation. In 2005, the Ordinances for Security Management and Penalties was introduced, stipulating that public security departments, prior to any decision made for detention, must comply with statutory procedures for investigation to listen to statement, argument and excuse and explain facts and reasons for said decisions. Positive change of police power, from being subject to no restriction to being subject to overall restriction in procedural rules, though incomplete in contribution to administration procedures, reflects the unparalleled feat of administrative procedural system. It is because administrative departments are constantly sued that compels them to deal cautiously with the lawful rights of citizens to enable the entire society to realize the necessity and urgency to control administrative power. Since implementation of the Administrative Procedural Law, which has boosted powerfully the fundamental change in legislation and administration, from concept to action, the achievements in the protection of citizen's rights simply can not be ignored.

2. Protection of property right and other rights

In modern society, the object of property has become broader, which correspondingly results in more likelihood of being infringed upon. In particular administrative departments impose more intervention in private properties after transformation of government function to overall regulation on economy and society. Acquisition of one property right may depend on registration, certification or licensing with competent administrative departments. The earliest administrative dispute in China took place in economic field. After implementation of Administrative Procedural



Law, quite a few acts that impose major impact upon the property right of citizens are subject to review and examination of people's court. Unlike past, administrative departments may not adopt "take doctrine" by taking advantage of administrative superiority. Protection of administrative procedures on property right is embodied by the following:

i. Citizen's property right may not be infringed upon at will should undue deprivation of property interest of administrative counterparts by administrative department, e.g. fine, revocation of permit or license, charge of suspension and shutout be revoked, modified or determined as violation of law by court. Provision that citizen's lawful private property shall not be trespassed at will was adopted in 2004 in the 5th amended Constitution, fundamental law of China, which serves as affirmation of citizen's property right secured by administrative proceedings.

ii. Granting by administrative department of a certain interest to administrative counterparts shall be subject to review by law, procedurally and substantially. In modern society, as administrative departments adopt considerably "welfare administration" and "service administration," the parties in many cases rely on administrative department to obtain certain interest. Protection on reasonable anticipation and expectation of parties serves as an important part of human rights protection.

iii. If and whenever any administrative act causes damages to the party, the party may file collateral administrative damages at the time of filing administrative suit, claiming for compensation responsibility to be borne by the department causing injury to obtain remedy in property.

In addition to property right, the recent practice in administrative actions spreads to other rights of administrative parties, e.g. right of education (please refer to Yong TIAN vs. Peking University of Science and Technology), adjacent right (please refer to 35 resident of Block 28 from 3rd Village of Niansi vs. Yangzhou Municipal Planning Bureau regarding administrative permit), right of employment (please refer to "the First Case of Hepatitis B Discrimination")²²⁶. The above shows that administrative proceedings have become increasingly mature. If and when a citizen's right is infringed upon, he or she will basically resort to remedy of administrative proceedings.

Despite many achievements obtained by administrative procedural system in human rights protection, it has been 18 years and, compared with the proceeding history in other countries, administrative procedural system, young and infant, remains in the stage of accumulation and exploration, lack of backup by traditional culture. So far as the function of human rights protection is concerned, quite a few problems are pending for reflection.

IV. Prospect of administrative procedural system

Human rights protection is always deemed the scheme of administrative proceedings. Article 1 of Administrative Procedural Law makes clear the purpose of administrative procedural law is in the first place to "protect lawful rights and interests of citizens, legal persons and other organizations," then to "maintain and supervise lawful exercise by administrative departments

226 <http://www.southcn.com/news/community/shzt/yg/>



of administrative functions” Human rights protection is the primary and ultimate goal in and for administrative proceedings. As society progresses, human rights are described in a more and constantly expanded manner, which powerfully boosts the development of administrative procedural system and enables administrative proceedings to be transformed and perfected unceasingly. Sound operation of administrative procedural system calls for right awareness and passion for maintenance of rights, and new types of human rights are conceived and born in the practice of proceedings. Human rights theory and administrative proceedings are achieving side-by-side development in mutual impetus.

The administrative procedural system in China has newly started, which is in explorative stage, and a good many tough problems are on the way, both in theory and practice. Meanwhile, the leading human rights theory flood in from overseas. China has acceded to a number of world human rights conventions, which means China’s administrative procedural system is in dilemma in Human rights protection. On the one hand, its design and operation is far from perfect, unable to provide all-round protection on traditional human rights; on the other hand, the existing administrative procedural system was introduced in transformation period at the outset of the 1990, so the scope of acceptance is narrow and lacks open provisions, unable to be adapted to the trend of development, and the newly born claim of rights can not be brought onto the track of administrative proceedings. On the path of Human rights protection, there is still a long way to go for administrative procedural system. In general, administrative procedural system may be reconstructed from the following to give better play in Human rights protection.

1. To broaden the scope of acceptance for administrative proceedings. China’s Administrative Procedural Law lists the scope of acceptance, Article 11 and Article 12 of which list categorized acceptable and unacceptable cases, which, compared with single statute in force prior to enactment of this law, are broadened but in practice turns narrow in scope. There is no way to complain in case citizen’s right should be infringed upon by public right. From fundamental purpose of solving social disputes and maintaining citizen’s basic rights, any and all administrative disputes shall be in-principle settled ultimately in court. To accurately define the scope of administrative proceedings and avoid being far from complete, it is appropriate to adopt a “generalized provision” technology for the scope of acceptance. Any special administrative act that is inappropriate for court to accept may be excluded explicitly by listing. To be specific, scope of acceptance shall be expanded from the following. The first is to establish public right proceedings. Other social organizations exercise public right in addition to administrative departments. For example, China Football Association, China Bar Association, China Association for Certified Public Accountants and other industrial associations penalize their members; the villager committee exercises autonomous power in accordance with Organic Law of Villager Committee and village regulations; public institutions of higher learning exercise management on respective students in admission, student status management, academic degree issuance, and disciplinary penalty. There are provisions in Administrative Procedural Law for specific administrative act by “organization empowered and authorized in law and regulations,” which are not clear however, resulting in sharp difference in practice from place to place. Such acts of public right shall be brought to the scope



of acceptance for administrative proceedings from solving social disputes and protecting party's right of action and on the basis of essence of administrative proceedings. The Second is to include as soon as possible abstract administrative acts in the category of administrative proceedings. Administrative Procedural Law limits actionable administrative acts to specific administrative acts, exclusive of any action filed against abstract administrative act in general. Proceedings on any abstract administrative act may only be reviewed collaterally to decide whether to apply after a specific administrative act is made by competent administrative department on the foregoing basis, when victims file proceedings respectively and when competent court reviews legality of said specific administrative act. This goes against timely remedy by the parties, does not comply with the principle of litigation economy, and more prevents wrong abstract administrative act from being timely corrected. Therefore, "mature principle" shall be established. Where any administrative act should constitute material impact on the interest of any citizen, legal person or any other economic entity, the latter may file an administrative suit. The third is to set forth suit standard for "legal interest" and establish bona fide suit system. According to Administrative Procedural Law, the scope of actionable cases limits basically to "personal right and property right infringed upon." With regard to other rights than personal right and property right, including political right, labor right, right of education, right of religious belief which are illegally infringed upon by any administrative departments, citizens are unable to file a lawsuit in accordance with the law, unless otherwise provided, but rather solicit any other remedy. To secure sufficiently citizen's right of action, it shall be provided that any citizen, legal person or other organization that has legal interest in any administrative act should object to such administrative act may file an administrative suit. As supplement of the above standards, it may be taken into account that in some fields lacking special interested parties such as construction of public utilities (engineering) and environment protection, citizens are vested the right to file a suit with the capacity as a tax payer or procuratorates are vested the right to file a suit for and on behalf of public interest. In this way, administrative acts not detrimental to the interest of specific parties, but to social public order will be covered in administrative proceedings. The forth is to establish the principle of "justice as last resort or last judgment." At present, for most specific administrative acts, parties are permitted to file a suit after reconsideration, or immediately file a suit, except for several specific administrative acts that are provided for by law as administrative final. In recent years, China has revised provisions concerning patent-related and trademark-related administrative acts as final administrative ruling, as requested by WTO rules, while certain types of final administrative rulings remain unchanged. In the future, efforts shall be exerted to abolish rules inconsistent with WTO rules and administrative remedy principle and to allow parties to file a suit to court after exhaustion of administrative remedy against any and all administrative acts. Regarding such internal administrative acts as incentives and rewards, appointment and removal, treatment in and by administrative departments, Administrative Procedural Law excludes court acceptance. In the past, some countries deemed such acts as "special power relationship," which may not be accepted by court. After Second World War however, countries changed one after another so that the so-called "extralegal space" was eliminated. The Civil Servant Law newly introduced in China



fails to provide that civil servants objecting to any administrative penalty may seek a path of administrative proceeding, which theoretically does not exclude prohibition of seeking the path for judicial review. It is my viewpoint to seek for impartial and timely solution to disputes and borrow foreign experiences, consideration may be given to allow parties to file administrative proceedings and reinforce review by introducing the constitution and legal principles after exhaustion of administrative remedies against any such administrative acts as refusal for enrollment and dismissal involving basic identity and major interest of civil servants, to ensure impartiality of review results.

2. To establish different review standard on the basis of different types of administrative acts, in particular to regulate and control administrative discretion to free citizen's right from being infringed upon by arbitrary, presumptive and reckless discretion. For example, the standard of "obvious law violation" may be adopted in judgment of extremely professional and individualized matters, by which competent court observes professional judgment of administrative departments. "Reasonable review standard" and "complete review standard" may be adopted in other fields²²⁷. In other words, review on acts may not be limited to legality review only, but rather reasonable analysis shall be conducted by employing proportion principle, trust protection principle to measure public interests and individual interests in specific cases and provide citizen rights with true and reliable protection.

3. To extend time limit of administrative proceedings. According to Administrative Procedural Law, general time limit is three (3) months. This time limit is too short and leads to loss by many citizens of the opportunity to sue; therefore, the infringed right of citizens can not be effectively remedied. From the respect of protecting plaintiff's right of action, extended time limit shall be provided. In addition, there shall be clear provision whether interruption of time limit applies to administrative proceedings. Where defendant argues that the time limit for claim of plaintiff lapses, such argument shall be made during defense; defendant failing to object to time limit in trial of first instance may not defend in trial of second instance with lapse of time limit as an excuse. In case any dispute arises on whether time limit for plaintiff to file a suit lapses, the burden of proof shall be on the defendant.

4. To establish a principle for enforcement suspension during administrative proceedings. Under the existing regulations, in principle, specific administrative acts will not suspend during court proceedings. In practice, to make it an accomplished fact, some administrative departments take advantage of their functions and powers to grab off for enforcement in court proceedings which consequently results in irredeemable damages to plaintiffs and turns proceedings passive. For the purpose of protecting lawful rights and interests of plaintiffs and ensuring administrative proceedings on the right track, enforcement suspension shall be taken as a principle. Under special circumstances, administrative department may file an application to court for enforcement to prevent public interest from being seriously damaged.

²²⁷ Administrative Law and Administrative Procedural Law, version 2, editor-in-chief by Mingan Jiang, Peking University Press and Higher Education Press, 2005, P460-461



5. To perfect evidence system in and for administrative proceedings. The evidence system for administrative proceedings is intricate and complicated, and the existing provisions are too simple for courts to adjudicate cases. There is lack of specific provisions on time limit for evidence providing by parties and adoptability of evidence. As required by law, plaintiff shall submit an answer within ten (10) days from the date of receiving the counterpart's claims and shall produce evidence and bases for initial specific administrative act. However, there are no provisions for legal responsibility of any defendant refusing to produce or producing evidence after lapse of time limit without due cause. In practice, some administrative departments refuse to provide evidence and bases, or refuse to respond to actions and refuse to appear in court to confront court trial. So, provisions shall be added that where defendant refuses to produce or produces after lapsed time limit without reasonable cause, it shall be held that the specific administrative act lacks evidence and basis and the specific administrative act shall be repealed. Where defendant fails to provide evidence in trial of first instance but provides the same in trial of second instance, it shall not be deemed as the reason to repeal or modify judgment or ruling in trial of first instance. It shall be specified that no evidence without being cross-examined may be deemed as the evidence for deciding a case, and that evidence gathered in serious violation of statutory procedures may not be taken as the base for lawful specific administrative acts. Consideration may be taken to cover evidence-related judicial interpretations by the Supreme People's Court in recent years.

6. To perfect judgment and ruling in and for administrative proceedings. Article 50 of Administrative Procedural Law provides that where people's court tries an administrative case, mediation shall not apply. Such provision reflects the initial worry that administrative departments may suppress a plaintiff by mediation or trade with public interest. In practice, a large number of cases are settled through "coordination" under court acquiesce, even court mobilization. Mediation prohibition exists in name only. For the purpose of settling disputes, "coordination" shall be allowed if its course and result are not in contravention with law. Therefore, it seems necessary to cancel the aforementioned provisions and allow mediation. Where court holds after review that mediation does not contravene with the will of the parties and statutory provisions, an instrument of mediation shall be prepared and take effect upon service thereof. As the case may be, such judgments as dismissal of plaintiff's claim, determination of any administrative act as violation of law, prohibition of implementing any act by administrative department in question shall be added. Regarding lawful administrative acts, it shall be deemed necessary to apply dismissal of plaintiff's claim in lieu of the original judgment sustained. In addition, the scope of right of judicial modification shall be expanded properly to allow courts to render decisions in lieu of administrative departments under special circumstances.

7. To enhance enforcement. It remains a serious phenomenon that court judgment can not be enforced. Administrative departments tend to refuse enforcement of any judgment against them (in particular judgment on duty performance). Some government officials worry that administrative judgments adversely affect local economy or administrative efficiency, even overtly stop court judgment from being enforced. The existing clauses for enforcement are not severe enough and measures therefor are too simple. Responsibility may be carried out by individuals, in particular



the responsibilities by chief executive.

Naturally, it must be pointed out that improvement shall be achieved in quality and awareness of citizens in China, inclusive of quality of judges, awareness of administrative departments to exercise administrative power in accordance with law and citizen's awareness of right, because implementation of a system relies upon man power. Reality proves that the function of Human rights protection in China's administrative procedural system is constrained by quality of man. Standardization of qualification for judges will, to some extent, relax the situation. The cases of civilians suing government officials have been carried on newspapers from time to time. The general public show great tolerance to the illegal act of administrative departments under traditional influence of "weary of litigation," and feel fearful to civilians suing officials. "Rome is not built in a day." It is not the matter of changing a concept within a single day, and it is indispensable to carry out legal publicity which shall not only target at general civilians to fill them with courage and confidence to maintain rights, but also to administrative departments to urge them to exercise cautiously the power in hand. Administrative procedural system, with Human rights protection as its mission, will be unable to give full play unless such ideas as democracy, rule of law and responsible government are deeply imbedded in our citizens.

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PUBLIC INTEREST LITIGATION AND THE DEVELOPMENT OF HUMAN RIGHTS

Zhang Wanhong and Ding Peng
China

I. Public interest litigation: a conceptual discussion

1. Public interest litigation and related concepts

It is generally believed that public interest litigation, from the etymon perspective, can be traced back to the Roman Empire. According to the formula procedure of Roman law, private litigations, or *actiones privatae*, were aimed at protecting individual rights and could only be submitted by certain individuals, whereas public interest litigations, or *actiones publicae populares*, were litigations seeking to safeguard public interests of the society and could be submitted by any citizen unless stipulated otherwise by law.

Public interest litigations in the modern sense originated in the United States in the 1960s, when, amid challenges to many social systems in the wake of drastic social changes such as the Civil Rights Movement and the Vietnam War, many public interest groups were formed, which, represented by lawyers and jurisconsults avid for social reforms, worked to protect the



environment and safeguard rights of consumers, women, the colored people and minors, as well as many other public interests, and called for new and fairer social systems. The litigations submitted for these objectives were called public interest litigations.

In addition, the United States has a so-called “private attorney general” system, under which the US Congress has passed laws authorizing an individual or group to bring a lawsuit that is in the public interest, and to sue lawbreaking or non-performing officials.²²⁸

The main characteristics of the Roman and US public interest litigation systems lie in: 1. a wide variety of suits; 2. diverse background of litigants, who can be taxpayers, consumers, environment consumers, environmental protection organizations and groups, alongside minister of justice and chief procurator; 3. litigation can be filed against an action that has already caused damages or one with potential harm; 4. the litigation, when it proves legal and wins support, can be awarded; 5. the role of public interest litigation is to supplement, rather than replace, law enforcement of state organs.

Japan also has a civil action system, which refers to litigations, submitted by any electoral or any party that is not seeking personal interest, that bring to justice the lawbreaking government bodies or local government organizations.

Similarly, the ultra vires litigation of France is means of relief to the plaintiff whose rights and interests have been harmed by the administrative organizations’ decisions and who pleads for a court’s review to check the legality of such decisions and nullify unlawful decisions.

After a research into prevalent theories in China and relevant systems in other countries, it can be assumed that public interest litigation is filed, by designated government organizations, citizens, juristic person or any other party, to the court of law for the protection of “public interest,” regardless of the relations between the party that files the litigation and the administrative or civil behavior under litigation. Public interest litigation includes administrative public interest litigation and civil public interest litigation.

Other concepts related to public interest litigation include impact litigation and structural legal aid, among others.

Impact litigation is also an imported concept, though the idea is more often known in China to have originated from the 2005 nomination of the country’s 10 most influential litigations, an event co-hosted by Legal Daily and All China Lawyers’ Association.

These litigations have had a far-reaching social influence in China. They are widely known or have caused widespread attention among the public and, under the concerted efforts of the legal practitioners, directly or indirectly promoted legal system reforms and triggered or shaped the citizens’ faith in the rule of law.

228 Xu Hui: *Theoretical Discussions on Public Interest Litigation*, published in *Gazette of the Chinese Academy of Social Sciences*; Su Wenqing: *Litigation Law: New Trends of Development - A Bird’s Eye View of Public Interest Litigation Systems in China and Abroad*, published in *Exploration Magazine*, 5th issue of 2003; Wang Mingyang: *Worldwide Administrative Litigation Systems*, People’s Court Press 1991; Yan Yunqiu: *Public Interest Litigation, A Conceptual Study*, China Procuratorate Press, 2002.



Among the 10 most influential litigations were the penal action against She Xianglin, who was wrongly jailed for “killing” his wife, and the apparent public interest litigation filed by Hao Jinsong, a legal practitioner who sued railway authorities for not providing invoices.

“Structural legal aid,” prevalent in some Southeast Asian countries, refers to the legal aid sponsored by non-governmental organizations or individuals to bring about structural changes to remedy injustice through the hearing or judgment of one typical case and subsequently eliminate or prevent similar unfair phenomena arising out of such injustice.²²⁹

2. Public interest and the litigation system

Further definition of the general concept of public interest litigation involves the definitions of public interest and litigation rights.

Public interest refers to the well-being of unspecified groups in a given society. The well-being of the unspecific majority is often ensured through a democratic legislation process, whereas common and more important personal interests - those involving life, health and property - are guaranteed only through penal law and often excluded from the range of public interest litigation. What's most prone to violation, however, is the well-being of the unspecific minority or disadvantaged social groups.

The concrete forms of public interest include interest in case of consumers' rights, environment protection, public services and administrative incompetence. Preservation of public interest should fall under the category of public interest litigation, whether or not the litigants' own interest is included in the “public interest” and has been violated. The litigation therefore includes litigation for private interest and that for others' interest. Under China's current circumstances, however, the former is more likely to be filed at courts, taking into consideration the qualification of litigants.

Besides the qualifications of litigants, several other issues of the litigation system need to be considered: 1. As the target of the dispute concerns public interest, the plaintiff's request should be mainly litigation for affirmation and litigation for formation, rather than litigation for payment. The plaintiff should also be restricted on substantial problems of the dispute, such as seeking reconciliation or withdrawal of lawsuit; 2. Risk of losing the suit should be set to balance the situation and prevent misuse of litigation and waste of social resources, whereas litigation fees should be partially exempted and a proportion of awards should be set for winners of lawsuits; 3. To ensure better effects of public interest litigation, citizens and social bodies should be called for to promote the scope and depth of judicial review.²³⁰

II. Public interest litigation ensures human rights: a practical analysis

Public interest litigation, in its practice in China and abroad, has proven significant in safeguarding human rights.

229 For further discussions on this concept, please refer to Nasution & Lubis in HM. Scoble and LS Wiseberg (eds) *Access to Justice: The Struggle for Human Rights in South East Asia* (London: Zed Books, 1985).

230 Lin Lihong: *Basis for Dialogue and Discussion - On the Understanding of Public Interest Litigation*, published on *Theory and Practice of Litigation Law*, 2006 volume



1. Abroad

The Brown versus Board of Education of Topeka, Kansas, 1954, was a landmark lawsuit that, with the strong support from the National Association for the Advancement of Colored People (NAACP), overthrew the “separate but equal” doctrine of Plessy for public education with the Supreme Court’s ruling and made the Constitutional rights real. More importantly, it ensured equal rights for the colored people with judicial authority. Though the anti-discrimination “affirmative action” was frustrated in the subsequent social movement, with the right-wing party in power, the Warren Court’s elaborations on equal rights remain inspiring and encourage people to continue fighting for their rights.

In South Africa’s Minister of Health and others versus Treatment Action Campaign and others, 2002, the Treatment Action Campaign, having teamed up with other NGOs such as legal resource center, children’s rights center, the Community Law Centre, the Institute for Democracy in South Africa and Cotlands baby sanctuary, protected the rights and interests of AIDS patients and susceptible groups by transporting low-cost AIDS drugs, opposing pharmaceutical association’s attempt to stop legislation supporting affordable AIDS drugs and demanding the government to make the drug nevirapine available at all medical facilities to prevent mother-to-child HIV transmission.

One of the most exciting developments, however, is the Constitutional Court, through this suit, realized the justiciability of economic, social and cultural rights, and stressed the state were liable to take rational actions to achieve anticipated effects. “If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”²³¹

NGOs played a vital role in the above-mentioned cases. Because the appeals for rights by the disadvantaged groups of society, such as the black or AIDS patients, are often marginalized by law, it would be hard to ensure equal protection of their right without the publicity work, advocacy, calls and actions from NGOs and their alliances. Besides, the roles of “barefoot lawyers” and “basic level legal workers” were also exerted.

2. Domestic situation

In 2002 two teachers of China’s Southeast University, Shi Jianhui and Gu Dasong, sued the Nanjing Urban Planning Bureau for the illegal construction of an observation platform by Nanjing Purple Mountain Observatory. The lawsuit, though filed as an “administrative litigation” and was rejected by the court, had all the elements of a public interest litigation in others’ interest and, with the help of the media, brought environment rights and planning of public interest affairs into the spotlight.

In May 2006, Xu Jianguo sued a police station of the Wuhan Railway Public Security Bureau for its illegal checking of citizens’ IDs. This is a public interest litigation for private interest and against illegal administrative procedure. The plaintiff, after filing the suit, applied for legal assistance at Wuhan University Center for Protection of the Rights of Disadvantaged Citizens,

231 Vinodh Jaichand: Public Interest Litigation Strategies for Advancing Human Rights in Domestic Systems of Law, <http://www.lunwontianxia.com/prodct.free.9562593.aspx>. Visited March 29th 2008



which he entrusted as his attorney. The case was eventually withdrawn, when the defendant offered to apologize to the plaintiff, pay the litigation costs and all other expenses and compensate the plaintiff for his losses. Yet NGOs have thereby demonstrated their power in providing legal assistance, arousing social attention and advocating social justice.

III. Safeguarding public interests, protecting human rights in action

1. Facing challenges: international and domestic

Article 28 of the Universal Declaration of Human Rights says that everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

China has ratified several international human rights conventions including International Covenant on Economic, Social and Cultural Rights and their definitions of labor rights, equal rights and judicial justice are binding to the Chinese government. Though we are not instantly liable for the full realization of all these rights, we will still undoubtedly face up to diverse pressures in international cooperation in these rights protection.

The international standard in human rights protection therefore demands a distinctive government obligation: on one hand, human rights standards should be transformed into explicit government obligations within the current capacity of the government and through domestic laws, so as to ensure corresponding judicial relief for human rights, e.g. environment information exposure, hearing procedures for administrative decision-making, etc; on the other hand, as a goal not altogether unbinding, the international standard setting of human rights also need public interest litigation in the civil rights movement sense to prompt its realization. For example, to make strategic choices in ensuring environment rights and invite democratic participation under the principle of sustainable development. Likewise, while development rights should be kept, social forces should also be allowed to ensure, through judicial means, that the government shoulders due responsibility in legal aid and social insurance sectors. These moves are significant in ensuring equal opportunities, preventing the yawning gap between rich and poor and easing social conflicts with a procedural expression of rights.

2. Argument beyond theory: from thinking to action

Sixty years have passed since the Universal Declaration of Human Rights was endorsed, and mankind has for long made great achievements in the international and domestic practice of rights protection. In fact, since the concept of human rights came into being, the phrase of “human rights,” its inherent moral sense and legal obligation, have never been as widely recognized and accepted by people of different cultural backgrounds. We therefore have every reason to feel optimistic of the prospects of such efforts as we discuss today how public interest litigation will promote the development of human rights.

The international standard in human rights protection can be called a “minimal standard.” Correspondingly, we advocate a “minimal theory” in public interest litigation. Though those with metaphysical pursuit are doomed to never abandon the “ethical” debate of human rights, the human rights theories we are exploring and concerned about in practice today should focus more on the effective organization of and guidance to our actions, including actions of the government,



NGOs and individuals. Based on the general description of human rights standards given by the international human rights system, the incisive point of public interest litigation is that it protects and promotes the “minimal standard” of rights for specific groups through general judicial cases and expands the “minimal theory” in the process of discovering and solving human rights problems. This is used as a common basis for dialogue and cooperation, and a solution to the endless and ever changing legal problems in a transformational society.

China does not have the case law or the private attorney general system of the Anglo-American legal system, or a clear-cut public interest litigation system as precisely stipulated as in continental law. But trees of life are permanently green whereas theories and systems are always gray. Based on the “minimal theory” of public interest litigation, our thinking would point to a probably pragmatic strategic proposal. Dedicated to public interest litigation, we will spare no efforts in urging the government to live up to its obligations in human rights training and legal aid; we will exert our utmost to support NGOs and university legal clinics to carry out human rights training and legal aid, protect the rights and interests of the disadvantaged people such as farmers and migrant workers, in order to help define the general content of human rights training and develop standards of legal aids, help more social forces to get involved, so as to arouse the public awareness and achieve publicity and education of the rule of law so that the public will be concerned of, and voluntarily work for, public welfare.

The debate over the theoretical corroboration of human rights’ universality is therefore not so important. What is noteworthy is that we have witnessed the plight of our compatriots and the pinch of the disadvantaged groups, of which we feel awfully sorry. We will witness the profound connotation of human rights in our public interest litigation. Meanwhile, the road to human rights protection is long and zigzagging, but every small single step forward will witness our meaningful contribution.

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PROTECTION OF FREEDOM OF EXPRESSION BY THE CHINESE LAW

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Article 35 of the Constitution of China specifies: Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration. Articles 19, 21 and 22 of the *International Covenant on Civil and Political Rights* include the identical provisions. In the Report to the 17th National Congress of the Communist Party of China (CPC), General Secretary Hu Jintao of the CPC Central Committee clearly



pointed out that we should truly safeguard the people's right to freedom of expression. The right to freedom of expression includes the commonly known freedom of speech, of the press and of news, as well as the right to the behaviors of expressing one's own political viewpoints and opinions through posters and slogans.

This thesis introduces how the Constitution of China recognizes and protects freedom of expression, as well as the relevant provisions of the department laws on freedom of expression. The last part of this thesis gives a brief account of the human-rights standards for freedom of expression.

I. The constitutional position of freedom of expression

Article 2 of the Constitution of China specifies: All power in the People's Republic of China belongs to the people. It indicates that in China, the people are owners and executors of the state power; and the people have the right to singly or collectively administer the state affairs, the economic and cultural undertakings, and other public affairs through various forms and channels according to law. Practicing the political rights and freedom of speech and the press is one of the rights. According to Article 35 of the Constitution of China, citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.

Freedom of speech, of the press, of assembly, of association, of procession and of demonstration as prescribed in Article 35 of the Constitution of China jointly form the political rights and freedom enjoyed by citizens of China, i.e., citizens enjoy the freedom to state clearly their attitude toward and express opinions and viewpoints on the state and social public affairs. It includes the freedom to exercise these rights in the individual way, as well as the collective way. Citizens can express their viewpoints and opinions through publishing works, or give voice to their own political views through the improvisational and short assembly, procession and demonstration.

Though Article 35 of the Constitution does not include the term "freedom of expression," it contains various rights and freedom involving the normal operation of the modern democratic society; hence we can regard this group of rights and freedom as the right to freedom of expression, and name Article 35 of the Constitution as the article on freedom of expression. This term can not only avoid inconvenience in understanding brought forth by different terminologies because of different connotations and extensions, but also discuss various rights and freedom recognized and protected by Article 35 of the Constitution according to the same criterion. In addition, Defining a group of rights and freedom prescribed in Article 35 of the Constitution as freedom of expression is in accordance with the *Universal Declaration of Human Rights*, and the provisions prescribed in Article 19 of the *International Covenant on Civil and Political Rights*.

Of all the articles in the Constitution of China, Article 41 also includes the relevant contents related to freedom of expression, which specifies that citizens have the right to criticize and make suggestions regarding any state organ or functionary, make to relevant state organs complaints or charges against, or exposures of, any state organ or functionary for violation of the law or dereliction of duty. Article 47 specifies that citizens have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The rights of the former type are



called the right of appeal enjoyed by citizens, which means that citizens have the right to express their opinions and wishes, and expose any state organ or functionary for violation of the law or dereliction of duty. It is citizens' right to indirectly participate in the state affairs and administer the state affairs.

In theory, state organs and functionaries are the people's public servants in China, who undertake the important task of administering society entrusted by the people. Whether state organs and functionaries can truly handle affairs strictly according to law involves not only whether the state organs can operate normally, but also the people's immediate interests. Therefore, citizens should have the right to guarantee state organs and functionaries to correctly perform their responsibilities through criticizing state organs and functionaries, and making suggestions, complaints, charges against and exposures to them, so as to truly safeguard the social or public interests.

The rights prescribed by Article 47 of the Constitution may be called cultural rights, in which freedom or rights can be classified into the freedom enjoyed by citizens to engage in scientific research, literary and artistic creation and other cultural pursuits. All the freedom is an important channel or way for citizens' self-realization. Article 35 of the Constitution that lists this type of rights and freedom after expressing the items of freedom does not mean that this type of rights and freedom and a series of political rights and freedom prescribed in Article 35 are completely different rights and freedom in nature. In fact, cultural rights and the enjoyment and exercise of cultural rights and freedom have close relationship with politics, in addition that they can enrich the people's cultural life. The people can also express their political wishes through literary and artistic works, and the government can also publicize the Party and state's principles and policies through various types of artistic works and theatrical items. Therefore, cultural rights and freedom are an important component part of the right to freedom of expression.

Articles 36 and 41 of the Constitution of China also specify the rights closely related to freedom of expression, i.e., citizens enjoy the right to freedom and privacy of correspondence. "Though correspondence is not direct expression, but expression contents can be transmitted through correspondence," hence "protecting freedom and privacy of correspondence is of great importance to citizens for the exercise of the right to expression."²³² The Constitution specifies that citizens enjoy the right to freedom and privacy of correspondence. It means that no organization or individual may, on any ground, infringe upon citizens' freedom and privacy of correspondence, except in cases where, to meet the needs of state security or of criminal investigation, public security or procurator organs are permitted to censor correspondence in accordance with procedures prescribed by law.

It needs pointing out that in the correspondence service provided by the Internet, many correspondences are privacy, such as E-mail. This provision is also applied to the correspondence through the Internet.

²³² *A Course on the News Media Law* [M] written by Wei Yongzheng, and published by the Press of the Renmin University of China, Beijing, 2002.



II. Department law and relevant regulations on freedom of expression

To put into practice the rights and freedom listed in Article 35 of the Constitution, many other laws and regulations include the contents prescribed in Article 35 of the Constitution: Some are ordinary laws and regulations which include the relevant articles; some are specific laws and regulations; and the others are the rules, regulations and notices issued by the relevant departments.

The substantive laws and regulations, such as Criminal Law and Civil Law, specify the boundary of the exercise of the right to freedom of expression; and the procedure laws, such as Criminal Procedure Law and Civil Procedure Law, also specify what kinds of cases should be subject to public trial, and what kinds of cases do not allow journalists to enter the trial venue. In addition, the judicial explanations with the legal effects issued by the Supreme People's Court also include many provisions on the concrete rights and freedom mentioned in Article 35. In view of these regulations, China has primarily established a fairly perfect legal system for the recognition and protection of freedom of expression, and for the prevention from the misuse of the right.

The provisions on freedom of expression prescribed in the Constitution are principled. To make these principled provisions to come into effect in the actual life, we must have the laws and regulations under the Constitution, the regulations and rules of departments, and even the notices promulgated by the relevant state organs. Hence, we maintain: Freedom of expression is actually the freedom or right confirmed and protected by a huge legal system. The exercise of this right or freedom and the realization in reality are subject to the legal protection, and must be under a complete logic framework established by the Chinese legal system. At present, we have not established a fairly complete examination system for the acts in violation of the Constitution; and the people cannot bring a constitutional lawsuit directly to the people's court when their right to freedom of expression is infringed. Under this condition, it is of great significance to let citizens enjoy their right to freedom of expression through the provisions of the lower-level law and the implementation of these provisions in the actual life. It means that if only the lower-level law under the Constitution and its implementation focus on the protection of freedom of expression, can the principle of protecting freedom of expression prescribed by the Constitution become the "law on paper."

In terms of the existing legal system in China, the relevant regulations on freedom of expression, except the provisions included in the Constitution, have the following characteristics: First, such provisions are included in the laws worked out by the National People's Congress (NPC) and the NPC Standing Committee, such as the *Criminal Law*, *General Principles of the Civil Law*, *Civil Procedure Law* and *Criminal Procedure Law*, as well as the specific laws, regulations and the rules of departments, such as the *Criminal Law*, which includes the punishments on the crimes of seditious libel and the spread of obscene publication; the *General Principles of the Civil Law*, which includes the provisions on the protection of the right of fame and copyright; the *Law on Assemblies, Processions and Demonstrations* adopted at the Standing Committee of the Seventh National People's Congress on October 31, 1980; and the *Regulations on Publication Administration* promulgated by the State Council in 2001. Second, the Constitution



is the norms of authorized legislation, and the provisions on freedom of expression included in other laws and regulations mainly specify the restrictions on exercising the right to freedom, so as to satisfy other interests which are of same importance to the interests of freedom of expression on the one hand, and to avoid the abuse of the right to freedom of expression on the other hand. Third, according to the principle that promotion and protection of freedom of expression should be taken as the rule and restriction of it as the exception, when the lower-level law involves the restriction and reduction of freedom of expression, we should avoid some problems, such as too large scope of attack and unclear meaning of words, and avoid authorizing too many authorities to administrative organs. However, at present, all the administrative regulations, department rules and notices have the above-mentioned problems at different extents. Therefore, revising and readjusting the relevant provisions that conflict with the principle of freedom of expression or obviously form inappropriate restrictions on freedom of expression in the existing laws and regulations will become one of the important problems China needs to solve in the coming period. Fourth, in recent years, mass media of China has made great progress, and the laws, regulations and department rules on readjusting mass media have been promulgated one after another. We may say that China has formed a legal system (including the Constitution) for readjusting these mass media. How to maintain the unification and coordination between numerous regulations concerning freedom of expression will be an immediate task in the coming legislation and judicial work.

The Constitution is a fundamental law of China, which has the supreme legal effects. Freedom of expression recognized and established by the Constitution should become the basis for China to work out laws, administrative regulations and department rules, the basis for legislation and law enforcement, and especially the basis for legislation and law enforcement of the relevant administration organs of various mass media. In accordance with the principle that the lower-level law should not conflict with the higher-level law (Constitution) and we should rule the country and administer the state according to law, the government organs of various levels should not formulate the laws, administrative regulations, department rules and notices in violation of freedom of speech and freedom of the press prescribed in the Constitution; and should neither adopt the administrative measures in violation of the basic principle of the Constitution to restrict and deprive the people's right to freedom of expression, nor set up inappropriate obstacles and restrictions for the free flow of information during the exercise of powers and functions.

In terms of the system, freedom of expression also means that citizens or various mass media can obtain relief through the judicial channel when this right is infringed or when one believes this right is infringed. Only in this way, the right to freedom of expression can become the right and freedom of actual significance. Establishing the enforcing mechanisms of the Constitution with Chinese characteristics, such as the judicial examination system, is of important significance to truly guarantee the people's freedom of expression granted by the Constitution.

III. The human-rights standard for freedom of expression

Many articles in the international and regional treaties on human rights involve freedom of expression, but the articles that directly recognize and protect freedom of expression are mainly included in the *Universal Declaration of Human Rights*, Article 19 of the *International Covenant*



on Civil and Political Rights, and Article 14 of the *Convention on the Rights of the Child*. Of the regional covenants on human rights, Article 10 of the *European Convention on Human Rights*, Article 13 of the *American Convention on Human Rights* and Article 9 of the *African Charter on Human and Peoples' Rights* direct recognize and protect freedom of expression. Europe also founded fairly effective regional mechanisms for the protection of human rights, and established the specific human rights courts, i.e., the Court of Human Rights with the headquarters in Strasbourg. Of a great number of cases handled by the court, a quite large number of them involve the basic human right of freedom of expression. The principles of solving the issue of freedom of expression established by the Court of Human Rights in the judgment have become not only the basis for the parties related to the cases in solving the expression problems, but also an important basis for the member states to formulate domestic policies and laws.

Before the initiation of reform and opening up to the outside world, the Chinese Government was not active toward the human-rights protection mechanisms established under the guidance of the western countries, and toward the standards for human rights prescribed by a series of international treaties on human rights after the World War II; and few scholars of China made research achievements in this aspect. After the adoption of the policy of reform and opening up to the outside world, great changes have taken place in this field. Since the 1990s, the Chinese Government has thrown itself into the international affairs related to human rights with a more positive attitude. China has conducted various types of dialogues on human rights with the governments and human rights organizations of the Western countries, such as the European Union, the United States and Australia, and has joined many international conventions on human rights with approval and become a member state of many international conventions on human rights. During legislation, the Chinese Government has attached great importance to the standards included in the international conventions on human rights, and taken these standards and the research achievements by scholars as the main propelling force for the improvement of the domestic legislation and justice.

Including human rights in the Constitution is of extraordinary significance, but it is far from enough. We need to include the spirits advocated by the Constitution in various laws and regulations, and implement the provision of the Constitution in the concrete governing process and judicial process. It is a due attitude a large country should take on the international political stage, as well as the inner requirements for solving domestic problems and building a harmonious society.

As compared with the domestic law of China, the international standards for human rights have superiority in value, priority in norms and universality in the scope of effectiveness. The so-called superiority in value refers to the standards for human rights, including the realization of the basic human-right standards, such as freedom of expression, which are the common objective the people of the whole world are pursuing, and the highest criterion for the domestic legislation and justice of all the member states. The priority in the norms mainly refers to that once a country becomes a member state of a convention, it should give priority to the standards for human rights in terms of the legislation and justice, especially when the domestic legislation is not identical with the international standards for human rights. The universality in the scope of effectiveness refers to that



the international standards for human rights apply to all the member states, and the number of the member states joining the international treaties and conventions on human rights is increasing.

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THE PRINCIPLES OF OPTIMIZING THE INTERNET ENVIRONMENT

Gao Gang
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The two earthquakes that shook the South China Sea on December 26, 2006 were a huge shock to my colleagues and me. Although we didn't physically experience the tremors at our homes in Beijing, thousands of miles from the epicenter, its magnitude was evident from the instant disruption it caused to major Internet services. Serious damage to undersea cable networks, among them the US-China Cable Network, Apstar1, Apstar2, FLAG, FINAL and SMW3, as a result of the earthquakes prevented the transmission of much international and regional information. The temporary loss of the MSN service, a main channel of communication for China's netizens, was devastating. I generally use MSN for instant online conversations with colleagues and students, as well as my son, who is studying in the US. Life during the one-week loss of this tool of rapid communication seemed staid and colorless. It brought home to me just how indispensable the Internet has become within the basic infrastructure of human civilization.

Achievements in Internet communication over the past decade or so, in the fields of computer, telecommunications and network technology, demonstrate the enormous development potential of modern information technology, and the revolutionary changes to information dissemination the Internet has brought to humankind.

Development of the Internet integrates countries of the world, breaking regional, ideological and time boundaries. It is human civilization's commonly constructed, known and shared digital information space. Continuously developing Internet technology clearly demonstrates that network information dissemination is a mode of communication that embraces all regions, fields and social groups, and that multi-media capabilities energize network services. Databases constitute basic support for many information services, while information receivers actively participate in the creation and dissemination of information. The information industry is expanding and the mode of information production is undergoing reform. Large amounts of social data emerge daily, and new, hitherto undreamt methods of information distribution abound. Communication barriers are gradually breaking down, allowing exploration of the means to a better life and stimulation of an



ever-higher intelligence potential.

No one today is in any doubt that the Internet constitutes a virtual society. Internet information technology has created a digital civilization in cyber space with all the features and functions of human civilization. It exists according to its own rules of operation, at the same time progressing in tandem with actual society. Reality and virtual space now function on the basis of symbiotic energy exchange.

Digital virtual space, in common with actual life, thrives on multiple forms of nurture, in the forms of input, a secure environment and order.

We have already witnessed and benefited from the many conveniences and services rendered by the Internet. Along with the miracle it has created in our lives, however, it also brings danger, troubles, worries and conundrums. The Internet is a source of crime and harmful information that pollutes the innocent and injures lives.

Since the Internet integrated the entire world into one big body, the network information dissemination system has become a main component of continued human existence and security. As various countries each have their own culture, legislature, value systems and language, upholding an equitable network environment is a major challenge.

Maintaining a safe digital network environment is the responsibility of Internet technology and content providers.

I believe that a discipline, based on safeguarding the Internet environment through formulation of an ecological network, is imminent.

The Internet belongs to all humankind. The Internet information environment issue, therefore, is one that encompasses the construction and protection of the entire global environment. We must, therefore, focus our attention on international cooperation in this regard.

There is much work to do in promoting international cooperation within the Internet environment. In my opinion, it starts on the premise of common recognition of the goals and responsibilities of global Internet information dissemination.

The Internet has become an accepted infrastructure facility within human society. As such, the following principles of Internet information dissemination should be internationally acknowledged.

The Principle of Maintaining Safe Internet Operation: As a basic feature of human civilization infrastructure, the Internet must guarantee international safety. The Internet is a facility for information communication and exchange that faces similar artificial and actual threats as other, more tangible infrastructure facilities. The purpose of both is to maintain human existence and social order. The international community, therefore, must set up a unified coordination system in order to maintain Internet safety.

The Principle of Respecting Diverse Cultures: We must respect the right of various countries and ethnic groups to describe, and express opinions on their living environment; also their freedom to promote specific ideals and pursuits. All countries, ethnicities and cultures have the right to exist and develop within the world of Internet information. It acts as a platform for different cultures to learn about, communicate with and understand one another, in order to live



in harmony.

The Principle of Protecting the Young: The Internet is a world of information. It performs the same educative function as schools and libraries. The Internet provides the information that enables young people to increase their knowledge of science and culture, train their life skills and achieve their ideals and dreams. We must, therefore, construct a healthy information environment for minors.

The Principle of Providing Useful Information: Internet content providers are under an obligation to provide information that helps us better understand our living environment, optimize our living conditions and attain life skills. Information of this caliber heightens standards of human civilization and contributes to human progress.

The Principle of Restraining Harmful Information: We must seek every means and adopt all methods necessary to reject and eliminate information that is detrimental to the principle of human virtue, the spirit of human civilization and the common pursuits of humankind. Information that poisons and destroys our living environment must be dispelled.

The Principle of Promoting Shared Information: Unbalanced economic development among various countries and ethnicities of the world is a main cause of international instability. Similar imbalances exist as regards the Internet, in its capacity of a new form of resources and civilization. Such inequalities are defined as the “digital gap.” International society must pay attention to the dangers arising during the construction of an information environment. It must summon greater efforts towards providing better conditions for Internet infrastructure construction, information dissemination, and service development. An information base aimed at the common development of all nations in the Internet information era will enable us to share more effectively our material achievements as well as our heightened spiritual civilization. This will, in turn, achieve better understanding and closer cooperation among different communities.

The diverse cultures, legislatures, value systems and languages of the world’s nations often act as barriers to international Internet cooperation. I nonetheless believe that as the Internet is the common wealth of humankind, international society is under a serious obligation to cooperate in safeguarding it.

We are all gratified at the extent of current international cyber cooperation.

In February 2004, the CNCERT/CC signed a cooperation agreement with the JPCERT. Prior to this, China confirmed its cooperation with the ROK. China is a member of FIRST, an organization with more than 200 member countries and regions. It is also a founding member of the APCERT.

On December 15, 2006, the China National Copyright Administration, the Motion Picture Association of America, the Business Software Alliance, the Association of American Publishers and Britain’s Publishers’ Association jointly signed a Memorandum of Understanding on the Establishment of a Coordination Mechanism for Online Copyright Protection in Beijing. Its aim is to strengthen international concord, as regards online copyright protection, and to combat the availability of pirated films, software, audio and video products and word documents on the Internet.



In Beijing on June 16, 2007, Internet information centers in China, Germany, the UK, the US, the ROK, Japan and Singapore jointly signed the *Beijing Declaration*. All expressed willingness to enhance exchanges and communication, and reached unanimous agreement on domain name administration.

In September of 2007, the Seventh International Conference on Cyber Crime organized by the International Criminal Police Organization was held in New Delhi. Its theme was the upcoming capacity of cyber-police to prevent and combat Internet crime.

We believe that deeper international understanding and accord on Internet information dissemination will act as a guarantee of common action to ensure a safer Internet environment.

China and the US are two nations prominent in the cyber world. The US is a major force in Internet infrastructure facility research and development, while China is a main force in Internet technology applications. Our two countries shoulder important responsibilities in construction of the cyber communications environment. Our respective Internet information dissemination practices have shown us the many wonders of the Internet, and at the same time its problems and conundrums. The experience we have had and the lessons we have learned, shared by countless Internet surfers, have contributed to our immense growth in the field.

The Internet is rapidly changing the world we live in. Less than 10 media organizations participated in the First Internet Media Seminar held in China in 1997. At that time, no more than 10 media websites operated under independent domain names. Today, almost all Chinese media have established their own platforms of Internet information dissemination and operation. In October this year, the School of Journalism of Renmin University of China, China Central Television and Cisco jointly constructed a TV broadcasting center at the Renmin University with Internet technology as its core infrastructure facility. China Central Television produced *Us*, a large-scale talk show, in this hall. It used Cisco Telepresence technology to interview people in various parts of the world, and asked their opinions on current topics related to China's development. Students from the School of Journalism participated in the production of this program, learning in the process about TV program production as supported by Internet information technology.

Cisco President John Chambers recorded the first show in the series on October 1. His topic was the influence of the Internet environment on young people.

It is an inspiring subject that embraces the news media, science and technology enterprises, education organizations, Chinese and American people, media communication, technology applications and education processes. These formerly discrete, independent entities with no overlap today blend on one platform - the Internet. This indicates to us how the Internet enables all human beings to get to know, understand and work with each other, and to realize the common but diverse goals of the humankind.

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PUBLIC PARTICIPATION AND HUMAN RIGHTS GUARANTEE

Xiong Lei
China

A few years ago, after a vehement round of inner city renewal, I suddenly found many sidewalks in the city proper of Beijing became so narrow that pedestrians often had to compete with bikes and even automobiles for a space to walk. The place where we used to enjoy strolling were given way either to bike lanes or to thoroughfares, or taken for the parking of automobiles that are ever increasing in the city.

Some sidewalks left to pedestrians can only accommodate one foot. You really have to master the skill of walking on the rope or on tiptoe to walk on such a narrow path. Along with the shrinkage of sidewalks are widened roads for traffic, mainly for cars. The streets become so wide in Beijing and many other cities that pedestrians find it a real challenge to cross them. Indeed you often have to struggle to cross a street, either racing against the time lest the traffic lights change before you manage to cross, or climbing up or down a bridge or tunnel to cross the street - for that you have to take extra walk to find the facility.

While many of us might be unconscious of it, in the narrowed or vanished sidewalks and in the excessively widened streets is the encroachment upon our rights - our rights to space and to public facilities.

If these rights look too trivial to be taken so seriously as rights of the person, then we do witness other cases in which people's living was jeopardized. Some people were forced to move out of their houses in the inner city so that shopping malls, new high-grade residential housings and other profitable real estate projects could take the site. The compensation could not afford the uprooted residents to remain living inside the city and they might have to leave the convenience of commuting to and from work to move into the "sleeping towns" in the suburbs, often far away from their workplace. And even for the housing there they might have to pay out of their years' savings in addition to the compensation. As many of the uprooted residents belong to low-income groups, the added living cost may further reduces their family revenue and marginalizes them.

More people, mostly rural dwellers, were displaced by big projects like hydropower conservancies. The dams had their farmland and homes inundated, compelling them to resettle in a totally strange environment or struggle to start a new career. Many became impoverished after such displacement, as the compensation could not sustain them for long. Some projects could introduce pollution and incur health problems to local people before they realize it.



Development vs. subsistence

All these are encroachments upon people's right to subsistence, which is a basic human right. And all these violations happened in the name of development, and the right to development is also a basic human right.

This could be puzzling: How could it happen that one basic human right is in contradiction with another basic human right and even jeopardize it?

One simple reply is that the rapid development of modern society has brought about unprecedented diversity, which would certainly result in diversified interest pursuits. While development is people's common desire, different interests of different groups could clash in the pursuit of development.

For instance, almost everyone wishes to have his or her own car and the car population in Beijing is increasing by about 10,000 daily. Of course the car owners want greater space for them to move faster, while the city authorities assume wider streets could help alleviate the traffic congestions. Yet not every citizen in Beijing with a population of over 15 million drives a car everyday. The city planning tilted too much in favor of the car-driving group is likely to neglect or even hurt the interests of the people who don't drive.

In the case of a real estate development project, there also may be different interest groups involved: the real estate developer who aims at profits in the transformation of the area from a habitat of low-income groups into a community of high-income people; those who expect to move in after the project is completed and enjoy all the convenience living in a high-brow quarter; those who have to move out to distant suburbs but might enlarge their living space, though at extra cost; those who used to have business in the area and may have to increase their input to come back and continue their operation after the renovation or could no longer afford the increased charges; and government officials in charge of the area who are eager to add the project to their political achievement. It is possible that some officials could have gains through the deal with the developer. All these groups have different interest pursuits. As Jeffrey Soule, director of the American Planning Association's outreach and international programs, observes in an article about China's city planning: "(Trendy) and selfish architects are often manipulative. Many of the academics, whose advice is sought after, are now making money by either acting as commercial contractors, or joining foreign firms to get design project. This makes them unqualified to give advice in an official capacity because there is a conflict of interest."²³³

Due to these complicacies, failure to balance these differing interests could give rise to violation of certain group's rights and incur their resentments or even social instability.

Aside from diversified interest pursuits, the issue of development itself could be complicated in a modern society and may not always benefit the fundamental interests of the majority of the people. If the development is not sustainable, it could be destructive rather than constructive.

A survey conducted by the State Environmental Protection Administration shows that among the 7,555 chemical or petroleum projects in China, 81 percent are located in environment sensitive

233 Jeffrey Soule: *Beijing's urban form should reflect its history*, *China Daily*, July 30, 2005



areas, such as water networks or densely populated habitats. While these projects have contributed economic profits to the national gross product (GDP), they also created pollution that seriously affected people's life. For instance, at the 500 sections of China's nine major river systems that are monitored for water quality, only 28 percent have water suitable for drinking, while 31 percent have water quality with limited or no functional use.

Pollution has aggravated shortage of water supply in the water scarce north and incurred water famines in the water affluent south. According to the State

Environmental Protection Administration, China now faces intensive outbreaks of water pollution incidents as a consequence of negligence of environmental protection over the past decades, with reports of a water pollution incident every two or three days on average since the end of 2005. In the Pearl River Delta in Guangdong, where the volume of freshwater resources averages at 330 billion cubic meters a year, rapid economic growth since the 1980s has coupled with pollution to nearly every river course in the urban areas. The pollution has resulted in a water shortage affecting 16 million people of the province. Nationwide, more than 300 million people's drinking water security is not guaranteed.

Such destructive development certainly would hold human rights at stake.

Necessity of public participation

It is obvious that while both subsistence and development are our basic human rights, they may clash with one another if the interest of various groups of stakeholders is not well balanced, with more gains going to certain groups but others on the losing side.

A case at hand is a planned hydropower project on the Nujiang River in Southwest China's Yunnan Province. The compensation program for the peasants to be displaced includes payment of 200 yuan for every mango tree to be inundated. However, from each mango tree the peasant originally could earn 400 to 500 yuan a year. Such compensation could hardly sustain the displaced peasants' current living standard, which is barely up to the national average.

Here comes the necessity of public participation.

If we look into the miscalculated city renewal projects and those polluting enterprises which now make people suffer, we could see they share one thing in common: Public participation was missing in the process of decision-making on all these projects. In the absence of public participation, decision makers who were preoccupied with the solutions to some pressing problems are likely to neglect many people's long-term interest. Then the result could benefit some people at the expense of others' welfare, as in the case of narrowed sidewalks for pedestrians to give more space to automobiles.

Suppose the decision makers are influenced by selfish advisers who have personal interest involved in the projects, the result could be worse.

Therefore the public should have a say in decisions about actions that affect their lives. Through the process of interactive and constructive dialogue, different stakeholders - officials, designers, citizens, scholars, young and old, rich and poor, could sit together and communicate their interest. Although the final decision may not satisfy everyone's expectation, it should be a compromise acceptable to all, since it would address to all the concerns.



In fact, public participation is not just a procedure to democratize the decision-making process but an essential means to honor and guarantee our human rights. Article 21 of the Universal Declaration on Human Rights adopted by the United Nations 60 years ago provides that “everyone has the right to take part in the government of his country;” “everyone has the right to equal access to public service in his country;” and “the will of the people shall be the basis of the authority of government.” This lays the principled ground for public participation as a human right.

Our own experiences, positive and negative, have proven the necessity of involving the public in policy or decision-making on issues concerning their own life. This guarantee of their rights is also for the sake of social justice and equity.

To date China has ratified five of the seven major international human rights treaties. All of them require the public consultation in the preparation of periodic reports on their implementation to the related UN bodies.

Forms of participation

While the Universal Declaration gives an emphatic provision of election and suffrage for the public to take part in the government, public participation is not confined to electing chief public servants. In modern society featuring complicated interest pursuits, no single person, however democratically elected to a leading position, can represent all the interest groups on all issues at all time. Although the system of people’s congress - the legislature in China - embodies the public will in many aspects and is a very important form and channel for the public to participate in politics, it is only one of the many forms of public participation.

Another form is the Chinese People’s Political Consultative Conference, which as an advisory body with extensive representation of various social strata has played a positive role in democratizing the decision-making process. However, both the people’s congress and the CPPCC function more in the mapping of major national or local policies. It is impossible for them to address every specific issue involving clashes of interests of different stakeholders.

In the past few decades, governments at various levels have invited scholars in various fields to be their advisors, and would consult them before an important decision is made in the hope to guarantee the rationality of the decision. This marks a progress in democratization of decision-making process. But in reality, the “dissidents” among the experts are often excluded from the consultation. And the advice from an exclusively expert panel may not be representative enough of all stakeholders’ rights.

In this context, another form of public participation has emerged, which is the public hearing on issues concerning the public benefits. Up to the end of 2005 more than 2,000 hearings had been held across China on matters ranging from bus ticket or cooking gas pricing, income tax threshold, ban on fireworks, to renovation projects of public properties. It has become a platform for ordinary Chinese to present their voices on issues they are concerned about, and help make the final decisions more scientific. And the public policy will be more popular if ordinary people have contributed in its making process.

Public participation is also necessary in the supervision of the implementation of public policies and law enforcement. Many government departments in recent years have designated



people of different occupations as supervisors of their work, to monitor commodity prices, performance of government officials, and so on. This kind of public participation proves effective to improve the government work and guarantee people's rights.

Obstacles to be overcome

Despite the progress China has made in expanding the public participation to democratize the decision and policy-making process, there are still obstacles to more adequate public participation.

A foremost obstacle is the inadequate legislation. It is encouraging that state leaders have urged government officials at various levels to promote public participation, and several laws have incorporated public participation as essential in policy or decision making, including the *Law on the Environmental Impact Assessment*, the *Law on the Administrative Punishment*, the *Law on Administrative Licensing* and the *Law on Pricing*. Yet the move is rather sporadically written in some specific laws, and the public participation is mostly witnessed in hearings on pricing, legislation and some administrative moves, but is absent in many projects immediately affecting people's life, like land leasing, neighborhood renovation and city renewal projects.

And the selection of representatives to hearings may not be scientific and democratic enough so that every group of stakeholders can have their voice heard. In some cases, the representatives are randomly designated by the sponsor at their own will, whose independence is questionable.

Another obstacle comes from some officials' resistance to the process for fear of possible inefficiency it may incur. For a long time there is the misconception that efficiency should be given priority while equity should be secondary to it in the drive to accelerate China's modernization. Actually, however, the efficiency is not what the decision making process should pursue - numerous decisions made rashly have led to disasters and even human rights violations in reality. A desirable decision making process is fair and just, with opinions of different stakeholder groups fully aired before an agreement or compromise is reached to reflect interests of all the groups. This process might be prolonged, but the result is more likely to bring about efficiency.

The lack of necessary information is also an obstacle to the public participation. This problem involves another human right - the people's right to know. The effective and genuine public participation must be informed participation. Or it may be reduced into simply a showcase. Then the people have the right to know what their representatives have presented at the public participation sessions, which means minutes and memorandums of such meetings should be made public.

On their part, the public should be made more conscious of their rights to participation and become capable to do so. A problem in China is that there are not many interest groups capable to present a different voice, and there is the tendency that those whose voices are louder may receive greater attention while the rights of the silent majority can be neglected.

By all means, the public participation is not so alien to us. Decades ago, the Chinese leader Mao Zedong put forth the mass line of "from among the people and to the people," which mobilized and motivated millions of Chinese to pool their wisdom and strength to win the liberation and independence of the Chinese nation. Only in recent years that some in the leading position forget this fine tradition of ours and turn a deaf ear to the broad masses at grassroots. If we are going to pursue comprehensive, coordinated and sustainable development that features mutual



improvement and common development of material, political and spiritual civilizations; balanced growth between urban and rural areas, different regions, economic and social undertakings; and that fosters a harmony between man and nature, we must do an earnest job to observe the people's rights to participate in decision making on matters concerning their welfare.

(The author is Former Executive Editor of China Features, Xinhua News Agency.)

HUMANITY: COMMUNITY PURSUIT OF LIBERTY

Han Zhen
China

This article tries to probe the dispute that runs through the entire history of humanity, i.e., the polemic of which is the primary factor, individual liberty or social interest? Observation of the generative causes of the major viewpoints of Liberalism and Communitarianism leads to this conclusion: in addition to the root cause of the interests of the social strata, there is rather a difference in epistemology. In ontology, humanity might be the being of the social pursuit of liberty and the social being is generated continuously in the course of liberty pursuit. Should Communitarianism take the generative root of the existence and ideal goal of humanity as the goal itself, and then Liberalism may be considered to turn the goal at the same time into a starting prior root. In order to deepen our understanding and seek solution, we should attribute the foundation to the root cause and the goal to the ideal and try to understand man and its social generation in the tension between the root cause and the ideal.

I

Communitarianism is today a powerful challenge to the liberal tradition in the politico-philosophical polemics of the Western world. Those two ideological trends in the sense of tradition have actually been a polemic that has been going on intermittently on the issue of what should be the fundamental goal of the individual and society. Both of those two politico-philosophical thinkings have certain foundations as H. Mark Roelofs has observed that our politics and culture are confronted with contradictory demands, the demand for both the social democracy of equality and communal love in the pursuit of the broad goal of social justice and simultaneously under the powerful support of the social elite, the demand for individual interest, individual liberty and democracy.²³⁴ When we look back at history in its full length, we find that the debate on which should be more fundamental between the two different political pursuits for individual liberty and

234 H. Mark Roelofs, *The Poverty of American Politics: A Theoretical Interpretation*. Philadelphia: Temple Univ. Press, 1992, p.1



public interest has become a lasting theoretical polemic.

Why the difference of the two in their political understanding exists? Should they represent different interests? No common understanding has been reached in the academic circles of China or the Western world on the social class nature of the polemics. The origins of the polemics between Liberalism and Communitarianism definitely have their different practical foundations that stem from the different interests of the social groups. Nevertheless, there are left and right wings within both the Liberalists and Communitarians. For instance, the liberalist theories of John Rawls and Ronald Dworkin obviously differ from those of Feng Hayek, Robert Nozick and Milton Friedman. Likewise, Alasdair MacIntyre's Communitarianist tenet is different from Michael Walzer's Communitarianism, and Michael Sandel's Communitarian concept vastly differs from that of Charles Taylor's. Obviously people cannot explain the theoretical differences among the liberalist theories and those among the Communitarian theories on the light of their social classes and strata. It is necessary to take into account different epistemological basis in the study of those tenets.

In human social practice, there are political activities in pursuit of individual autonomy as well as acts of dedication to certain definite beliefs of certain communities. Modern liberalists uphold the supremacy of individual interests, believing that it is intolerable to suppress individual liberty in the name of protecting public interests. The prerequisite of such a theory boils down to that humanity is individualistic by nature and justice should be built on the basis of individual liberty. But such a tenet can in no way explain why so many people in history have even laid down their lives for their nations, religions, common beliefs or collective interests. For example, the terrorists who forced airliners to destroy the twin towers of the New York World Trade Center in the "9/11" incident were definitely not seeking their personal liberty and happiness. And so were the numerous suicidal bombings that have taken place in Israel, Iraq and other places. They gave up their lives for certain collective beliefs. Obviously those acts cannot be interpreted by the liberalist theories. On the other hand, people organize themselves in tribes, villages, urban communities, city-states, political parties, nations and states precisely for the purpose of safeguarding the individual interests within the communities, because people can live much better by relying on the cooperation of the collective rather than by individuals each fighting in isolation. People can better combat wild animals, natural calamities and foreign invaders by collective efforts. And the political struggles of modern time are just aiming to ensuring the members of their own organizations, strata or nations to have better opportunities, rights, or dignity. Communitarianism, however, cannot provide a truly reasonable interpretation as to the question of what is the aim of communal cooperation and organization.

On account of the uniqueness of different cognitive angles, people tend to proceed from different starting points in the study of the issue of political justice. Actually, the debate between Liberalism and Communitarianism also encompasses their differences in cognitive thinking. The Liberalists see the ideal values of humankind in pursuit of individual liberty, and in order to justify such an ideal with an objective basis, they deem such pursuit as inborn or congenital so as to give individual liberty a solid metaphysical basis. The Communitarians on the other hand seeing the root cause of the generation and lives of humankind are aware of the fact that the human being



cannot live in isolation from society and they come to believe the social relations and communal character of man to be the special values of the existence of humankind. So, besides the basis of social interests, the polemic between Liberalism and Communitarianism is also one between different ways of thinking.

In a sense, the social root causes of theories are obvious and easy to recognize. The cognitive thinking of ontology is relatively complex and may be overlooked easily. In order to truly grasp Liberalism and Communitarianism theoretically, we must have a profound understanding of the different cognitive thinkings that generate the two tenets.

II

Liberalism arises from this thinking: Should the pursuit of individual right and liberty be the primary goal, it must be something of origin by nature instead of some particular experience formed by history and culture. Should liberty and right be the product of some particular experiences, it cannot be of an absolute nature. In order to prove that individual liberty is not only important but also necessary, the thinkers of enlightenment put forth the concept of “inborn human right,” such as Kant resorting to the “prior reason” of the nature of liberty and Rawls resorting to the ideological experiment of the “initial state.” By relying on innate human right, enlightenment thinkers established natural duty, treating liberty as something of necessity. By relying on prior reason, Kant furnishes liberty its metaphysical basis and turns it into the keystone of ethical concepts. Through ideological experiments, Rawls gives liberty and right its logical strength and turns it into a supreme rule that defies any differentiation. Obviously, they all attempt to discover or establish general rules that transcend particular historical experiences and try to enhance the absolute authority of individual liberty and right.

Yet, the cognitive thinking of the Liberalist tenet is weak. Firstly, when being viewed from the historical angle, Liberalism turns human ideals and yearnings into something original and the result of the human social activities as the prerequisite of such activities. Here the social liabilities originally defined by particular circumstances are elevated to inborn and prior natural responsibilities. Individual liberty is indeed valuable and worth seeking. But such liberty is nurtured in the cultural history of past thousands of years and the process of its growth has undergone the ordeal of numerous trials. All of the pursuit of Liberalism cannot be something like instant coffee which may achieve all aroma and taste in an instant. The ideal of liberty can be dawned upon only through the cruel ordeals of history.

Secondly, from the angle of theoretical terminology, Liberalism deems the situation and the terminology used in a definite linguistic environment as something that transcends the particular situation and linguistic environment and takes the category in connection with the society as something that transcends experience. Man is not born the independent existence of reason and liberty and equality, but grows in the extremely complex social relationships of history. Different social relationships not only carry different customs and habits and cultural traditions, but also present themselves in forms that constantly change with the passage of times. It is precisely because the social relationships of history have provided humanity the framework of existence, rules of conduct and goal of living as well as the significance of lives. In this sense, the need, special



fondness, right and ideal are products of social relationships. Liberty, therefore, has never been divorced from the social circumstances and the linguistic environment of social communications. But Liberalists in thinking have overlooked such a situation and linguistic environment.

Only on such a more solid foundation can we understand why people need liberty. The choice by the individual requires a public space or place. Suppose a man lives on a secluded island and maintains no relations whatsoever with others in any social relationships, there is no need to talk about liberty, because he is free from any restriction from anybody else. And the liberty of every citizen requires the protection provided by certain limitations enforced by the State. Should a person refuse to accept any restriction, it can only be an incredible illusion. Jean Bethke Elshtain sums up such a concept when he writes to the effect that in Robinson Crusoes's world, things are of no essential connection to one another and any restriction to the individual liberty is considered a burden and mostly unacceptable.²³⁵ As a matter of fact, a man must meet with all sorts of restrictions so long as he lives in a society. What is even more important is that without society, he ceases to be a social being, or in other words, he cannot become a human being.

Furthermore, when observed from the angle of practical political activities, pursuit of individual liberty requires united action to make it the "common goal." Supporting the valuable way of life of the individual is not a matter of the individual, but the communal matter of the whole society. For example, the endeavor for liberty is a social undertaking. In order to win personal liberty, people are united by class, national, community or sex ties so as to gather effective force. Workers must unite in the form of the proletariat in order to win freedom. People under the oppression of alien foes trying to win freedom must forge national unity for national emancipation. In face of the social life characterized and defined by male domination, women in the last decades launched conscientious feminist movements in their fight to win freedom and rights for women and free themselves from the social way of life under the male domination and control. Women in order to win the equal rights with men need to be united to fight for women's rights. Obviously, it may become the joint aspiration and pursuit of a whole social stratum, class, a nation or even humanity as a whole in the fight for the liberty of the individual, thus endowing the progress of human society the character of common goals. No doubt, such common goals are characterized by different phases or stages, not ultimate, for otherwise, there may arise social oppression under the pretext of abstract social goals. We will further discuss this point later.

Obviously, Liberalism cannot explain the modern social life in a comprehensive way, which means its lack of a fundamental theory, hence its defect. Even S. Williams admits that contemporary Liberalism is facing the difficulty of being able only to achieve partial rebuilding to tide over the difficulty and that to survive, Liberalism must be aware of its limitations, rest on a firmer basis and seek new ways of manifesting its concepts.²³⁶ The "firmer basis" can only be the social and historical basis for the formation of the ideal of Liberalism.

235 Jean Bethke Elshtain, "The Communitarian Individual", in Amitai Etzioni (ed.) *New Communitarian Thinking: Persons, Virtues, Institutions, & Communities* (Charlottesville, Va.: Univ. Press of Virginia, 1995), p.104.

236 Leonard Williams, *American Liberalism & Ideological Change*. DeKalb, Illinois: Northern Illinois Univ. Press, 1997, p.6.



III

Communitarianism understands correctly the socio-historical basis for the formation of the human nature and knows that without that basis, it is impossible to explain not only the natural rights of man, but also the human being self. Yet the Communitarian theory still has its one-sidedness for its lack of a broad vision for greater ideals.

First, unlike Liberalism, Communitarianism takes into consideration the historical root of the pursuit of liberty, but it tends to deem the basic matter as the ultimate goal of humanity, thus turning the starting point and process into the ultimate target. For example, Communitarians deem the common interest of mankind as the starting point and ultimate ideal of social justice, thinking that an ideal society shall be the “common goal” that functions as the tie in human relationships.

In reality, however, the common interests of society should be the grand total of the individual interests put together instead of their substitution. In other words, besides all types of the individual interests, the public interest seeks no self-interest; besides the ideal and interests of the individual, society does not have its own goal. Philosopher McTaggart in his *The Value of Individualism* writes that individuality is the goal and society is just a means.²³⁷ All social organizations including the State, he points out, it is of value only because it is a means. People organize themselves into society for the interests of all individuals, not for the society itself. Man is not the tool of society (the State, classes, organizations), but the social forms are tools in the lives of humanity. In a sense, we may criticize Liberalism for its neglect of the public goal. But in view of the ultimate goal, we must admit that man originally is not the goal or born the goal, but Man should be the goal; Man is often looked upon as the means and often exists as the means, but in view of the progress of civilization, Man should not be deemed merely as the means and his role as the means should decrease gradually.

Secondly, Communitarians are worried about the dissolution of social relationships because of Liberalism. But besides their worry, they have not provided us with a more convincing solution as an effective substitute. The argument of the Communitarian critics boils down to the fact that the Liberalists advocate a distance of individuals from other people in society resulting in their self-ostracism because they overlook to a degree the dependence of individuals’ understanding of themselves and kindness upon their society. The harmful effect of such ostracism is often dubbed as Ostracist individualism or ostracism. Ostracism is the core of the Communitarian worry about Liberalism. Charles Taylor tells us that the opponents of the Atomists argue that the genuine Atomist organization is devoid of citizen spirit.²³⁸ Society shall have no cohesion without citizen spirit and shall not form into a living community. Without the cultural framework of such a community of living, life will be devoid of its significant root.

Obviously, Communitarians allege that the Liberalists are real Atomists. In their eyes, Liberalists advocate that everybody works for self-interest and society is looked upon as voluntary

237 Steven Lukes: *Individualism*, Chinese edition translated by Yan Kewen, Jiangsu People’s Publishing House, 2001, p.48

238 Charles Taylor, *Philosophy & the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985), p.110



relationships and “the members of a society of people of self-actualization are increasingly deemed capable of revoking their membership identity, which cannot maintain a powerful identification with the political community needed for by public liberty.”²³⁹ The so-called ostracism of Liberalism hampers citizen spirit and public liberty. The Liberalist individuals do not have unchangeable ties, which is considered a lack of public acknowledgement, feeling unrelated with their neighbors. MacIntyre holds that Liberalism tends to dissolve the traditional ties of humanity, leading to the withering of social and cultural relationships.²⁴⁰ Obviously Communitarians have the worry that when the individuals lack public spirit and care for only personal liberty, which will weaken the social relationships; and once the social relationships collapse, Man ceases to generate into a social being.

But from the viewpoint of Liberalism, the worry of Communitarians is groundless, for the Liberalists deny that they have severed ties with other people and the individual has no connection whatsoever with other people. They say in principle their ties with others may be modified. The Liberalists argue that in the system of ideal Liberalism, the individual relations with others are far from being weak, but such ties should attain greater values. The Liberalists promise to have profound understanding of emotional relationships ethically and such ties should attain further profundity when on the basis of voluntary choice. They give particular importance to their relations with others, because such relations may be quit but they have been retained. Such relations are not merely inborn, but are deemed valuable for the ties with the individuals.²⁴¹

Then where is the problem? My view is that the critique of Liberalism by Communitarianism is off mark. Liberalism does not deny social relationships but forgets the fact that such social relationships are the basis and precondition for the formation of people’s pursuit of liberty and individuality. On the other hand, since Communitarianism fails to give people the ideal pursuit of liberty and rather is willing to let people obey the cultural tradition and prevailing common community interests. So with the passage of time, people will lose their zeal because of the absence of the prospects and targets of development. Instead, the desire to free from the old fetters and fight for the realization of liberty will unite people together. The outbreak of the French Revolution serves as an outstanding example. In that revolution, people converged into a powerful collective force for the sake of Liberty.

Essentially, even Charles Taylor seems to have come to realize that people should not attack Liberalism too much. He points out that we should take this culture as partially reflecting the ethical aspiration and sincere ideal, but that ideal itself cannot approve itself as a self-centering mode.²⁴² He seems to have discovered an ideal angle of Liberalist epistemology and as an ideal, the linguistic form of Liberalism is “should.” Yet, he erroneously believes that it is wrong to

239 Charles Taylor, *Sources of Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989), p.508.

240 Giovanna Borradori, *The American Philosopher: Conversation with Quine, Davidson, Putnam, Nozick, Danto, Rorty, Cavell, MacIntyre, & Kuhn* (Chicago: University of Chicago Press, 1994), p.143.

241 Andrew J. Cohen, “Liberalism, Communitarianism, & Socialism”, *the Journal of Value Inquiry* 34(2000): 250.

242 Charles Taylor, *The Ethics of Authenticity* Cambridge, Mass.: Harvard University Press, 1991, p.55.



take the pursuit as the nucleus of ideal. This author however believes that everybody's pursuit of liberty may be the central task but it cannot become the basis and precondition for social being. Humanity tends to take what is not available at present as the goal of pursuit, thus making those goals and targets become central issues in a certain period of time. Should they be things already accomplished in reality, they are no longer the ideal to be pursued and they cease to be issues.

Furthermore, Communitarians also worry about the doubtful subjectivism of Liberalism. Alasdair MacIntyre observes that in order to avoid harmful subjectivism, we must accept the authority of given standards, i.e., the common ethical customs and cultural tradition that have been upheld publicly over thousands of years. Yet Liberalism encourages the harmful neutrality of the State toward benevolence because any authoritative guarantee for individual convictions would encourage subjectivism. On the contrary, he believes that acceptance of community authority requires a certain degree of trust and coordination. "Certain forms of cooperation, recognition of authority and success, certain respect for norms and certain risks, all those features of participation in practice demand a fair judgment of self and others, merciless truthfulness (no fairness without truthfulness), and the willing trust in the judgment of those who have won authority from success in practice, presuming that such judgments were fair and truthful while constantly taking risks voluntarily, risks that even threaten success."²⁴³ Should Liberalism ignore the law, ethics and cultural tradition and act at will, then those Communitarians were correct in their appraisal of the former. But Liberalism does not advocate random actions but deem the law and rules authoritative. However in history the demand for liberty would unite people together, i.e., the demand of people for liberty arouses a sense of community and we-ness. In that case, people would treat the fight for liberty the common ideal.

Besides, in the eyes of Communitarians, because there are public goals shared by a community, they constitute the basis of political legitimacy of the fight for public interests. The actual strength and possibility of the fight for individual liberty originate in the common goals shared by many. For that goal attracts people together to form effective strength for social struggle. Should people go no further than identifying themselves with that basis only, they may lose the enthusiasm for pursuing personal liberty, hence loss of the initiative and creativeness in life.

IV

Both Liberalism and Communitarianism study the relations between Man and society, but each chooses to focus one-sidedly on some aspects of such relationships. Andrew J. Cohen points out: Communitarians pay greater attention to the standardizations of society than the Liberalists. They believe in themselves being invariably related to other people and society is responsible for their livelihood. On the contrary, Liberal individualists attach greater importance to the standardizations of the individuals and believe that the State has plans which the individual thinks valuable for his own pursuit. The Liberalists think the individuals can control their own lives to a great degree and can take the responsibility.²⁴⁴ In reality, however, the actual social and individual

²⁴³ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (London: Duckworth, 1981), p.193.

²⁴⁴ Andrew J. Cohen, "Liberalism, Communitarianism, & Socialism", *the Journal of Value Inquiry* 34(2000): 257.



aspects are inter-molding. For example, those countries with Liberalism as the mainstream ideology work also for the common goal, common values and national identity, and those countries with Communitarianism as guiding thinking also strive to provide as many opportunities as possible for citizen participation in the interest of citizen loyalty and social identity, making national identity as the source of dignity and significance of all individuals among the “people.”

Liberalism, if unbridled, tends to cause social disintegration. In an in-depth view, if people pay attention only to the future by pinning their eyes only on the distance, that will lead to a divorce from the foundation; whereas in a broad view, if everybody concerns only with personal interests without forming a common understanding in personal liberty with others, the society tends to go to pieces or become “atomized.” People in their actual life should maintain creativeness and development by pursuing ideal liberty so as to maintain the continuation of history by keeping in mind the foundation. Without an ideal, a man cannot fly his kite of hope into the sky; without the tie of tradition, a man will be like a kite with the line snapped. Both Man and society should develop in an orderly, stable and sustainable way.

If too much freedom may lead to a severance of history, servilely respecting the tradition of community may seem too conservative. As Cohen points out, when they talk about tradition and community authority, the Communitarians are definitely conservative. They worry about the too fast change of society impacts the individual understanding of their status every day. In their romantic past, people were said to know their own being and role because such role rarely changed. The fact is that those statuses and roles seldom changed in people’s entire lives. The divorce rate was low. Children respected their parents and were willing to take care of them. The communities were relatively stable and social records were relatively authoritative because there was not much movement of population. Today, however, population movement is very fast and people often leave their communities geographically and in other senses.²⁴⁵ Society may become stagnant if it does not give an individual new taste of liberty.

It is reasonable for Liberalists to deem individual liberty as their social ideal. This is because the development of the individual is a driving force to social development. Without the pursuit of liberty, man may become the captive of tradition and society may stagnate. And the Communitarians are right when they say that without the restriction by tradition, people tend to indulge in seeking novelty, society may develop too fast and the line of history may snap. Besides, self-realization and self-confirmation all depend on the joint endeavors in a community.

Marxism is not an integration of Liberalism and Communitarianism, but it has overcome the errors of both in two different directions in the ways of theoretical epistemology. In the Marxist view, the comprehensive development of the individual presupposes that of others. Marxists hold that Man is a social being generated in the course of social practice, not born innate. The individual is not a simple copy of the social relationships because he deals in practice with its social relationships. That is to say that Marxism does not deny individual liberty, and deems it a driving force to social development, because man’s creativeness and initiative constitute the most

245 Andrew J. Cohen, “Liberalism, Communitarianism, & Socialism”, *the Journal of Value Inquiry* 34(2000): 252-253.



dynamic force in the productive force.

According to Marxists' understanding, in order for the full realization of Man, we must unite and remold the social structure instead of taking as the target of our pursuit the available social structure and form. Even the Canadian political philosopher Will Kimlicka too points out: Marxists believe that a commonwealth can be achieved only through a social revolution by overthrowing capitalism and building socialism. But the newly emerged Communitarians, however, believe that a commonwealth has always existed in the social customs and habits, cultural traditions and social common understanding. There is no need to build a commonwealth anew, on the contrary, it deserves respect and protection.²⁴⁶ Obviously, when the Communitarians deem the community as a fine social goal, Marxists try to remodel society to make it meet people's needs.

Pursuit of liberty can be realized only by relying on the community strength and the foundation of a community can be consolidated only through the pursuit of liberty. People cannot but communally pursue the decision making rights on the autonomy and liberty of the individuals, families, tribes, communities, nations and countries. The purpose and reason of the existence of the community is no other than that of giving its members still greater liberty, although that is to be realized gradually in history whereas greater liberty given to the individual may tend to help them identify themselves with the community. Meanwhile, a community of any size can help civilization advance continuously only when it creates room for the individual's free creative activities. Rousseau once said that Man is born free but is always in fetters. Yet in my view, Man is born in fetters (in nature and in society), but never ceases pursuing liberty.

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CONTRIBUTION OF DEVELOPMENT OF CHINA'S HIGHER EDUCATION TO HUMAN RIGHTS UNDERTAKING

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Human rights are the rights and freedoms of humans in their nature, and represent the basic conditions for the free and complete development of the humankind. The educational development level is an important mark of the level of realization of human rights. China's higher education realized the historic development in the 1998-2007 period, and the number of the enrolled students at common colleges and universities across the nation had exploded from 3.4 million to 18.85

246 Will Kimlicka: *Contemporary Political Philosophy*, (Chinese Translation), Shanghai Sanlian Press, 2004, P377



million, the number one in the world. This has laid a solid foundation for China to develop into a powerful nation of human resources from a large-population nation. The domestic and foreign comments are mixed on the vigorous efforts by the Chinese Government to develop the higher education when the economic and financial conditions are still very limited. However, in the perceptive of the security of human rights, the historic development of China's higher education is definitely of positive and significant strategic importance to the development of China's human rights undertaking.

1. Ten-year historic development of China's higher education

China's higher education has witnessed the swift development over the past decade. The gross enrolment rate of China's higher education jumped from 9.8% in 1998 to 15% in 2002, and further to 23% in 2007. At the same time, the expenditure on the higher education has also grown considerably, a result of the expenditure diversified investing mechanism for the higher education. The national higher education expenditure only totaled at CNY 54.9 billion in 1998, including the fiscal education expenditure of CNY 35.7 billion. By 2005, the total higher education expenditure jumped by 460%, or an average annual growth of 24.5%, to CNY 255 billion, while the fiscal education expenditure for common colleges and universities soared 310%, or an average growth of 17.3%, to CNY 109.1 billion. During the period between 1998 and 2006, the land area of the common colleges and universities throughout the country grew 260%, the educational and administrative buildings increased by 370%, the value of the educational equipment and devices rose 470%, and the fixed assets raised 640%. All of these have ensured the continuous improvement of the educational conditions.

Take Nankai University for instance. The number of the enrolled undergraduates and postgraduates doubled from 10,659 in 1998 to 21,905 in 2006. The educational undertaking expenditure swelled 345% to CNY 850 million in 2006 from nearly CNY 247 million in 1998. At the same time, China has also mobilized various social forces to engage in the higher education. At present, there are a total of almost 300 private common colleges across the nation, and 300-strong independent schools under universities.

2. Strategic significance of development of higher education to realization of basic rights of citizens

In the perceptive of the overall national development strategy, the development of China's higher education has, first of all, exerted the far-reaching influence on the future economic development. It has considerably enhanced the scientific temperament of the population of China, and created a solid foundation for the country to grow into a powerful nation of human resources from the world's most populous nation. In the perceptive of the personal development of citizens and security of rights, it has the positive significance as well.

First, it has satisfied the appetite of citizens for a higher educational level, and provided a more complete security for the right of citizens to education. The right to education is one of the basic human rights, and refers to the right of citizens to receive cultural education and the material aid for the realization thereof. The first sentence of Article 26 of the *Universal Declaration of Human Rights* expressly announces that everyone has the right to education.



Article 46 of the Chinese Constitution clearly stipulates that citizens of the People's Republic of China have the duty as well as the right to receive education. China has a long-standing cultural tradition of paying importance to education, and considers education itself as a fundamental requirement of the life. For education, Chinese can give up many other opportunities and leisure in life, and to realize the dream of a child to go to university, a whole family can work industriously and make sacrifice. The founding of the People's Republic of China has brought the higher education to a fire-new stage, and at the same time created the reliable talent security for a modernized China. After the reform and opening up, the demand of people for the higher education has increasingly risen to a new level amid the swift economic growth and rapid increase in the personal incomes. At the same time, China faces growing fierce international competition amid the expanding opening up to the outside world, as well as the long-term pressure from the economic and technological edges of developed countries. Just in this context, the Chinese Government has firmly implemented the strategy of revitalizing the nation with science and education, and made great efforts to develop the higher education even when the financial resources are still very tight, thereby providing the more adequate practical conditions for the right of Chinese citizens to education.

Secondly, the historic development of the higher education has provided more favorable conditions for the improvement of the income level of citizens and the realization of the basic rights of citizens. To receive the higher education can enhance the knowledge and skill level of citizens, improve the working opportunities and efficiency of citizens and accordingly increase their income level. To this effect, the higher vocational education has played an extremely important role. To satisfy the demand of the citizens for the higher vocational education, the Chinese Government has spared no effort to develop the higher vocational education in recent years. In 2007, the number of the higher vocational schools in China was more than 1,000, a sharp rise over the less than 100 ones in 2000. Almost every municipal city in China has set up at least one college or university, and the higher vocational education has taken up half of the higher education. At the same time, the population having received the higher education has exceeded 70 million, which enables China to come at the world's second place in terms of the labor force with the degree of the higher education.

Thirdly, the historic development of the higher education has provided a larger space for citizens to seek the personal development, and created the more adequate security for the realization of the right of citizens to development. The *Declaration on the Right to Development* passed by the General Assembly of the United Nations in 1986 stresses that the right to development is a human right that cannot be deprived of. The first sentence of Article 26 of the *Universal Declaration of Human Rights* explicitly states that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. With the fast-growing standard of living of the Chinese people, the fundamental living demands of people have generally been satisfied more completely. In this context, the desire of people for further personal development is getting increasingly strong, and the target has kept rising. To develop the higher education with great efforts will create the



opportunities for citizens to receive a higher and more extensive education, definitely provide a more enormous space for the free development of citizens and offer more adequate conditions for the realization of the right of citizens to development.

Last, the historic development of the higher education has provided the practical foundation for the realization of the political rights of citizens. With the steady progress of the reform of the political system in China, the wishes of citizens to more participate in the decision-making on public affairs have become increasingly strong. One of the important conditions for expanding the participation of the general public is that citizens have received good education, particularly the higher education, so that they have broader understanding of public affairs and have the appropriate ability to analyze, compare and judge the problems and various solutions associated with the public affairs. All of these require the development of the higher education so that more citizens will receive the trainings needed. In this sense, the historic development of the higher education will build an important foundation for the development of the democratic politics in China and the ordered political participation by citizens.

The above analysis indicates that the historic development of China's higher education has made significant contribution to the human rights undertaking, reflects that the Chinese Government pays much importance to and actively advances the human rights undertaking, and will definitely provide a more enormous space for the development of China's human right undertaking.

3. The right to education of population with different incomes shall be equally secured

Education is the cornerstone for the revitalization of the people, and the educational fairness represents an important base for the social fairness. The first sentence of Article 26 of the *Universal Declaration of Human Rights* clearly states that the higher education shall be equally accessible to all on the basis of merit. However, due to the unbalanced economic development in China, there exists income difference between the groups in the rural areas and in the urban areas, the groups between different regions, and the groups in the same region. Such income difference constitutes an obstacle to the equal access of citizens to the higher education to some extent.

The Chinese Government pays much importance to the influence of the income gap on the equal access to the right to education, and has taken a series of active steps to solve this problem.

In the field of the free education, in 2006, the Chinese Government exempted the tuitions and surcharges on 52 million students in the rural free education stage in the western regions and part of the central regions, provided textbooks free of charge for 37.30 million students from impoverished families, and offered subsidies for living use to 7.80 million boarders. In 2007, China exempted all the tuitions and surcharges on the rural free education. In 2007, the Chinese Government earmarked a total rural free education budget of CNY 223.5 million, a rise of CNY 39.5 billion year on year. The Central Government has injected a total of CNY 9 billion into the construction projects of rural boarding schools, from which totally 7,651 schools have benefited. A total of CNY 8 billion has been invested in the remote education project for rural elementary and middle schools, and the project has covered more than 80% of the rural elementary and middle schools in the central and western regions, and enabled more than 100 million students to share



the quality educational resources.

In the field of the higher education, the State has established the aid policy system to ensure the students from financially tight families can afford to go to college or receive the vocational education. The pillars of the aid policy system are the national scholarships and aids, supplemented by part-time jobs, special aids for difficulty and exemption and reduction of tuitions.

Scholarships and aids will be discussed first. In 2007, the Ministry of Education and the Ministry of Finance jointly promulgated the *Opinions on Perfecting the Aids to Common University Students from Financially Difficult Families*. The National Scholarship has been set up in line with this document, and is used to award the extremely excellent full-time undergraduates at common colleges and universities as well as higher vocational schools. Each year, 50,000 students are awarded with the standard of CNY 8,000 per student annually, and the fund needed is covered by the central government. The National Encouraging Scholarship has been set up for the first time, and is used to award the full-time students with excellent moral and academic records but low family incomes at common colleges and universities and higher vocational schools. The National Encouraging Scholarship covers 3% of the enrolled students at the colleges and universities across the nation, and adopts the standard of CNY 5,000 for each student per year. The central government and the local governments jointly set up the national student aids which are used to aid the enrolled full-time students from low-income families at common colleges and universities and higher vocational schools, and all of the enrolled full-time rural students and students from urban low-income families at the medium vocational schools. The national student aid covers 20% of all the enrolled students at the standard of CNY 2,000 per student each year. At present, the central government and local governments earmark roughly CNY 30.8 billion, and about 4 million college students have the access to the scholarships and aids, and take more than 20% of the total enrolled students at colleges and universities.

Secondly, the educational loans. Since China started to implement the educational loan policy in 1999, the banks across the country had examined and approved the loan applications from 2.405 million students, and extended a total loan of CNY 20.14 billion.

Additionally, colleges and universities have also taken measures to help financially difficult students, including the delayed payment of tuitions, part-time jobs and difficulty aids.

Take Nankai University for example. Nankai University has established a sound student aid system to prevent any student from falling behind because of financial difficulty. The system principally consists of scholarships, educational aids, the national student loans and part-time jobs, supplemented by the temporary difficulty aid and the exemption and reduction of tuitions. Nearly 8,000 undergraduates, 53% of the total enrolled students, obtain various scholarships and aids valued more than CNY 9 million. As to the children of martyrs, orphans, single-parent children, children of the social lowest-income families, children of laid-off workers with financial difficulty, the aid object of the Western Development Student Aid Project, and the financially difficult students from the remote and poor regions, Nankai University has taken the following measures:

1) Delayed payment of tuitions. The students unable to hand over the tuitions because of financial difficulty can apply for the delayed payment of tuitions with the certificate of financial



difficulty issued by the local town government, the civil affairs department, or the unit of parents;

2) National student loan. Each year up to 1,000 students obtain the national student loans, and the maximum amount of the loan is CNY 6,000 per student each year. 50% of the interest on the loans is covered by the fiscal department of the State, and the borrowing students bear the remaining 50%. The repayment period of the loans is in general no longer than four years after graduation of undergraduates, and the loans should be repaid every quarter of each year. If the borrowing students continue to study at Nankai University for further education after graduation, they can apply for the extension of the loans, and the repayment period can be extended to graduation of graduates.

3) Part-time jobs. Nankai University sets up 1,100 fixed part-time positions, including the office assistants within the campus, the floor head of student dormitory buildings, assistant library keepers, and information clerks. Each student taking a part-time job can obtain an aid of CNY 200 each month. In addition, Nankai University strives to develop social jobs (including private teachers), and seeks the enterprises and non-profit institutions with good social reputation to establish the cooperation so that they can provide part-time jobs for students.

4) Scholarships and student aids. Scholarships and student aids not only comprise the national scholarships, but include the university scholarships set up by the University as well. 40% of the students receive these scholarships and student aids. At the same time, the big names from all circles of the society and enterprises and non-profit institutions have created various special scholarships, such as Tsang Hin Chi Excellent Student Scholarship, Panasonic Scholarship, Cuncaojikun Aid Scholarship, Xiaolong Excellent Poor University Student Scholarship, Hong Kong Fuhui Special Scholarship, Chou Enlai Memorial Scholarship, Zhang Shunyao and Friends of Hong Kong Aid Scholarship, Yu Xintun Aid Scholarship, Macao Liao Xiyun and Luo Xue'er Couple Scholarship, Wang Kechang Scholarship, Shang Lin and Mei Ling Scholarship, Wang Wentian and Li Shuhua Scholarship, Baogang Scholarship, Toyota Scholarship, Samsung Scholarship, and so on.

5) Exemption and reduction of tuitions. Nankai University offers the preferential treatment to the aid object of the National Western Student Aid Project to the students that are unable to afford the tuitions because of financial difficulty and the students from Tianjin whose parents enjoy the lowest-income security policy with financial difficulty.

6) Difficulty aid. In addition to the aforesaid aid measures, Nankai University also offers various one-time difficulty aids to the financially difficult students free of charge according to the concrete situations. For example, the University grants the one-time temporary difficulty aids to the students whose family economic sources have unexpected changes, whose hometowns suffer serious disasters or who go to hospital for treatment.

The above measures effectively ensure that the students from low-income families can go to university equally just like other students, and will not interrupt the learning because of economic difficulty, thereby ensuring all the students can equally enjoy the right to higher education.

Finally, I want to stress that the human rights undertaking is the common undertaking of the entire humankind, and calls for the active efforts by every nation for realization. As a university



educational staff, I am convinced that China's higher education will contribute more to the undertaking under the guidance of the view of scientific development.

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MORE TALK ON THE GUARANTEE OF HUMAN RIGHTS IN TIBET

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According to *The Oxford Companion to Law*, human rights (or known as Fundamental Freedom) are the rights which require to be maintained or sometimes to be set forth that should be recognized and protected from the perspective of law, so that every individual achieves his or her fullest and freest development in terms of individuality, spirituality, morality and independence in other aspects. As some rights, they are considered the results of inborn individual reason and free will, instead of what are merely endowed by essential laws and thus can be deprived of or annulled.²⁴⁷ This definition describes the relationship between human rights and laws, that is, laws should serve to recognize and guarantee human rights. In words, laws are the solidified and explicitly manifested requirements of human beings for their intrinsic dignity and rights of equality.

Based on this very definition, this essay researches the issues of human rights in Tibet, with a focus on the relationship between laws and human rights guarantee.

I. Corpus juris in old Tibet and its characteristics

Characteristics of human rights protection in the local laws in old Tibet

Following the Buddhist principles of the *Ten Meritorious Acts*, the local reign headed by Byang-chub rgyal-mtshan during the Yuan Dynasty constituted the *Fifteen-article Code*. This code had been observed until the reign of Phang-mo gru-pa. Then, the *Sixteen-article Code* was set down at the early 17th century, the late Ming Dynasty. It was instituted under the sponsorship of Karma bsTan-skyong dbang-po after he took the local power in Tibet, which involved military, criminal, civil, financial, productive and living affairs of the Tibetan Minority. In the early Qing Dynasty, the 5th Dalai Lama presided to adjust and amend the *Sixteen-article Code*, finalizing it as the *Thirteen-article Code* which came to function during the reigns of all generations of Dalai Lamas from then on.

These codes in the old Tibet were characterized as the following:

247 Quoted from *The Oxford Companion to Law* (Chinese version), Guangming Daily Press, p. 426, 1988.

1. It defied the fundamental dignity of mass Tibetan people as human beings.

“Until the first half 20th century, Tibet was still a feudal serfhood-slavery society which mixed both politics and religions together, which was even darker and more backwards than the mid-age Europe. Both monastic and mundane serf-slave owners- less than 5% of the whole population- controlled the personal freedom of serfs and slaves of more than 95% of populace.”²⁴⁸ Neither the serfs nor the slaves in enormous amounts in Tibet had any independent personalities; merely as the appendix of their owners, they had no dignities. In legal provisions, they were treated as horses in terms of their status and values. For example, the Rule of Corporal Punishment for Felonies in the Article 6 of the *Sixteen-article Code* explicitly provided that “Those who kill people or loot horses at any time shall be sentenced to a corporal punishment”.²⁴⁹ Similarly, the Rule of Corporal Punishment for Felonies in the Article 4 of the *Thirteen-article Code* also articulated that those who “kill people or steal horses” should be sentenced to a corporal punishment.²⁵⁰ Meanwhile, both the *Thirteen-article Code* and the *Sixteen-article Code* recognized the provision in the *Fifteen-article Code* that the life of a vagrant beggar, a blacksmith, a butcher, a woman or someone like this who was incidentally killed could be compensated with one single piece of grass rope. In this case, how could one have his dignity?

2. It flagrantly maintained privilege and inequality among people.

First, it explicitly stipulated inequality among people. The *Sixteen-article Code* specified a strict hierarchy instead of the equality among human beings called for by the modern human rights theories. “People are labeled as the classes of the superior, the middle and the inferior, and each class is further divided in the same way.”²⁵¹ The superior among the superiors were “btsan-po (kings),” which points to the kings of Tibet; the middle among the superiors were chieftains who had more than 300 servants, governmental chiefs at forts, monastic masters and so forth, the inferior among the superiors were sprul-sku (reincarnated Buddhas) at a seminary level, ordinary monks, would-be governmental official of noble birth, and officials who had more than 100 servants. The superior among the middle were safeguards at the service of a governmental official of noble birth, chamberlain monks at a monistic seminary, disciplinarian monks and so on, the middle among the middle were those who transported supplies, forages and weapons as well as monks in a small monastery; the inferior among the middle were mundane people of noble birth. The superior among the inferiors were single free persons, logistic workers at the government and butchers; the middle among the inferior were blacksmiths or beggars who had their own domains, and the inferior among the inferiors were vagrant blacksmiths, butchers and beggars.²⁵² In particular, the *Thirteen-article Code* unambiguously ranged women into the inferior among

248 *National Region Autonomy in Tibet* (white book), the State Council Information Office of the People’s Republic of China, May 2004.

249 *Selected Ancient Tibetan Codes*, translated and commented by Zhou Runnian and Sherab Nyima, proofread by Suolang Banjue, Press of The Central University for Nationalities, p. 28, 1994.

250 *Ibid.*, p. 91.

251 *Ibid.*, p. 39.

252 *Ibid.*, p. 39.



the inferiors, together with vagrant beggars, blacksmiths and butchers.²⁵³ The 3rd article in the *Thirteen-article Code* went even further in prescribing to “arrest those who argue against people of higher statuses.”

Secondly, people of various ranks received protection accordingly, i.e., people of a higher rank enjoyed better legal protection. Both the injured and the injurers would be treated differently where people of different ranks were wounded. As it was prescribed in the 10th article of the *Sixteen-article Code*, namely, the *Rule of Punishment for Wounds*, “The old code in the ancient times also recorded that ‘The bleeding of the superior is much more worthier than that of the inferior.’ So, injuries committed by the superior and the inferior are dealt with in various ways because the values are different. Where an ordinary person wounds an official, the limbs of the injurer shall be broken in light of the condition of the injury. Between a master and his servant, however, the master would be free of any other obligation except the cure of the wound provided he injures the servant by mistake, and the master will bear no obligations at all if the wounds are caused by his intentional beats.”²⁵⁴

As for the killing or murdering of people at different ranks, the financial compensations for victims’ lives were different, too. Both the 9th article in the *Sixteen-article Code* and the 7th article in the *Thirteen-article Code* involved contents of the same essence, that is, the compensations for killed lives decreased rank by rank from the superior among the superior to the inferior to the inferior. For a king, who was the most valued, the price of his life accounted for the value of all creatures and properties; when a Yaz king was killed by Huoer people, the price would be the same amount of gold as the weight of his body; when a king from lower Gesar was killed by a believer of Danma cult, the price of his life would be too valuable to compensate; the life of the middle among the superior was priced as 300 to 400 liang (1/20 kilograms) gold; that of the inferior among the superior 200 liang gold, the superior among the middle 140-150 liang gold, the middle among the middle 50, 60 or 70 liang gold, the inferior among the middle 30-40 liang gold, the superior among the inferior 30 liang gold, the middle among the inferior 20 liang, and the inferior among the inferiors 10-15 liang gold.²⁵⁵

In addition, where properties of people of different ranks were stolen, the standards of punishment for thieves also varied in accordance with the ranks of victims.

3. The penal system was extremely brutal.

Here we quote the clear provision of the 6th article in the *Sixteen-article Code*, which said, “Corporal punishments such as the gouging out of eyes, the cutting off of knees, tongues, or limbs, being thrown down cliffs, slaughter, and so forth, should be exercised for those who have committed five deadly sins, those who have robbed a Buddhist master of higher rank, monks or Tibetan kings of their property, those who have severely damaged the reputation of the government, those who have poisoned others, those who have played one off against another,

253 Ibid, p. 96.

254 Ibid, p. 45.

255 Ibid, pp. 35-49.



those who have killed people or looted horses at any time; or in a peaceful time, those who have plundered, those who have carried weapons to commit violence, those who have framed up any civil rebellions; or those who have broken the laws anyhow. All the violators should severely be punished in accordance with the extent of their crimes in case anyone else follows their examples. Where many people rebels, the principal should be drowned in water.”²⁵⁶ This provision has not only clearly shown how cruel the penal system was at that time, but also that these penal punishments were mainly applied on serfs and slaves who were supposed to have done harms towards the benefits of the serf-slave owners.

“Simply from the perspective of cruelty of the penal provision in the *Sixteen-article Code*, we can find no other comparable laws both in the history and the present all over the world. The *Sixteen-article Code* involved many extremely brutal punishments which damaged people’s five sense organs and limbs. These punishments had not only caused unbearable sufferings in the processes of execution. Once having been rendered such punishments, the receivers would thus lose their abilities to work and live, suffering desperately all life. The cruelty of the *Sixteen-article Code* depended on its class attributes as well as such several aspects: 1. The feudal serfhood-slavery institution, which embraced a tradition that a severe penal system should be applied for a society out of disorder and thus tried to maintain and solidify its dominance with cruel punishment; 2. The influence of backwards juridical practices in the tradition of Tibetan people, some of which originated from equal revenges; 3. The extreme defiance over human rights, i.e., a perspective that saw both serfs and slaves as some private property or speaking animals which could be slaughtered at will.”²⁵⁷

4. It coerced religious faith.

The Article 3 in the *Sixteen-article Code* started as such, “Any local official dispatched under the decree from a king should reject the vice of selfishness and pursue the practices of public affairs, going all out with devotions to the cause initiated by the chief ministers of the government or the ruling lamas of generations. He shall be committed to serving and embracing Buddhism, without converting to other religions or sects.”²⁵⁸ The “Rule of Kings as a Mirror” of the 1st Article in the *Thirteen-article Code* contained a similar provision, “Anyone who holds a public office should go out to devote himself to the causes of the local chiefs and ruling lamas of all generations to practice Buddhism, without conversion to any other sects or paganism.”²⁵⁹ In other words, the freedom of religious faith, a concept of human right for the modern people, was not adopted by the local laws in the ancient Tibet, and the Tibetan Buddhism was the only religion that should be embraced and practiced, and no other types of religions should be worshiped or believed in.

To summarize, Tibet took a feudal serfhood-slavery system before the founding of the

²⁵⁶ Ibid, p. 28.

²⁵⁷ *The Changes of Laws in Tibet*, authored by Lou Yunsheng, Tibet People’s Publishing House, pp. 50-51, 2000.

²⁵⁸ *Selected Ancient Tibetan Codes*, p. 26.

²⁵⁹ Ibid, p. 89.



People's Republic of China, and naturally its legal institution did not get rid of the corresponding generality in terms of human rights protection. Due to the absent fundamental right of personality, the mass serfs and slaves had no right to survive, let alone any political rights or any other ones.

II. Initiation and features of legislation for guaranteeing human rights in Tibet in the early PRC

This period began from 1951 when the People's Army of China entered Tibet peacefully and ended in 1958 when the democratic reform initiated in Tibet. From the perceptive of human rights protection, the legislation during this period was mainly characterized as the following.

1. It left the previous political and legal systems untouched in Tibet, not changing a lot in terms of human rights guarantee

After a negotiation, the Central People's Government and the plenipotentiary representative from the contemporary local Tibetan government came to *The Agreement on the Peaceful Liberation of Tibet between the Central People's Government and the Tibetan Local Government*. In particular, the 4th, 5th, 6th, 7th and 10th articles provided that the central government did not change the existing political system in Tibet; that the central government maintained the previous status, functions and rights of Dalai Lama and Panchen Erdini; that the central government protected lamaseries and did not alter monastic incomes; and that the central government did not coerce various reform items in Tibet, while the Tibetan local government should exercise reforms for its own. As any reforms are required by the mass, the relevant issues should be solved in negotiation with Tibetan leaders.²⁶⁰

2. A principal framework for regional minority autonomy in Tibet

The 3rd article in the Seventeen-point Agreement prescribed, "In light of the ethical minority policy under the common creed of the Chinese People's Political Consultative Conference, Tibetan people are entitled to perform regional minority autonomy with the uniform leadership by the Central People's Government."²⁶¹ In accordance with *The Resolution of the State Council on Setting up a Preparatory Committee for the Tibet Autonomous Region* in 1955, a Preparatory Committee for the Tibet Autonomous Region was set up, which was an "institution resembling a regime, under the leadership of the State Council" during the transitional period before the founding of the Tibet Autonomous Region.²⁶² This committee carried out its work accordingly in reference to its functions and responsibility.

3. A prescript to improve the status quo of Tibetan human rights was made in terms of economy, society and culture.

The 9th and 10th articles in the Seventeen-point Agreement dictated to, in light of the reality in Tibet, developing the language, letters and schooling of the Tibetan Minority step by step and developing the agriculture, stock raising, industry, commercial business progressively so as to

260 *Selected Reference Literatures for the Research of Human Rights in Tibet*, compiled by the Task Force for the Research of Human Rights in Tibet at the China Academy of Social Sciences, China Tibetology Publishing House, pp. 12-13, 2004.

261 *Ibid.*, p. 12.

262 *Ibid.*, pp. 15-16.



improve the standards of people's living.²⁶³

Based on this, some specific provisions were further made in *A Decision of the State Council on the Matters to Help Tibetan Local Authority with Constructions*, with funds allocated and technical personnel dispatched by the central government to help construction in Tibet.²⁶⁴

The Resolution by the Standing Committee of the Preparatory Committee for the Tibet Autonomous Region to Vigorously Train Cadres of Tibetan Minority articulated the source of cadres of Tibetan Minority: except being selected and elevated from the various existing institutions such as the cabinets of Dalai Lamas, the cabinets of Panchen Erdini, the authorities at Changdu and other sides, as well as officials of noble birth and young intellectuals, it also involved "civilians, workers, peasants, herdsmen and so on."²⁶⁵

In addition, there had been more regulatory documents concerning the improvement of the existing human rights conditions in Tibet such as *The Solution of the Standing Committee of the Preparatory Committee for the Tibet Autonomous Region to Exempt Tibetan Staff Workers Involved in Public Institutional Work (Including Logistic Works, the Same Below) and Students (Including Students from Colleges, Middle Schools and Primary Schools, the Same Below) from Substitute Taxes for Personal Labor*.²⁶⁶

III. The holistic development period and characterized legislation for guaranteeing human rights in Tibet after the founding of PRC

This period refers to the time from 1959 when Tibet began its democratic reform to 1984 when the Law of the Peoples Republic of China on Regional Minority Autonomy was enacted. The legislation during this period was distinctive in terms of human rights protection in the following aspects.

1. The rights to personal freedom of previous serfs and slaves were recognized

Several legal documents in 1959 such as *The Resolution of the Preparatory Committee for the Tibet Autonomous Region on Democratic Reform* stressed to "totally abolish the feudal slavery," "annual personal attachment and liberate serfs and slaves," "abrogate all the feudal privileges of slave owners and their agents," "revoke all the feudal privileges of monastic authorities (including appointing officials, administrating municipal affairs, setting up private courts, prisons, penal punishment, the confiscation of properties, the exile of people, the privately keeping of weapons, the intervention both over civil and penal suit, the intervention over freedom of marriage, the intervention of cultural and educational causes, the sabotage of production, and so forth), feudal possession, feudal exploitation, personal enslavement, the coercing of mundane masses into lama monks or nuns."²⁶⁷

2. Tibetan people have acquired their fundamental rights of survival

In *The Resolution of the Preparatory Committee for the Tibet Autonomous Region to Annul*

²⁶³ Ibid, p. 13.

²⁶⁴ Ibid, pp. 19-20.

²⁶⁵ Ibid, p. 28.

²⁶⁶ Ibid, pp. 32-33.

²⁶⁷ Ibid, pp. 41-43, 48, 53-61.

the Feudal Land Ownership of Serf-slave Owners and Exercise Land Ownership of Peasants passed on September 21, 1959 in the 3rd plenary session of the Preparatory Committee for the Tibet Autonomous Region, it articulated that before the democratic reform in Tibet, “serfs, who accounted for 90% of the whole Tibetan population, had no ownership of lands and were personally attached to the serf-slave owners; and slaves, 5% of the population, were totally possessed by serf-slave owners and their agents both in terms of their physical bodies and their labor achievements. Relying on their feudal privileges and land possession, the serf-slave owners and their agents exploited serfs and slaves brutally, living an extremely extravagant life; in contrast, however, the mass serfs and slaves toiled through years, staying in a poorer living condition even than hard-working horses or oxen.”²⁶⁸ And one important mission of the democratic reform in Tibet was simply to “annul the land ownership of feudal serf-slave owners (in particular, feudal government, nobles and monastic authorities), and exercise the land ownership of peasants.”²⁶⁹ In *The Resolution of the Preparatory Committee for the Tibet Autonomous Region on How to Reform Land Ownership System in Tibet*, the 4th and 11th articles prescribed that “Policies to redeem and confiscate are respectively carried out for the land and other productive materials possessed by the serf-slave owners and their agents in the Tibetan area,” and that “Township peasant associations take over all the redeemed or confiscated lands and other productive materials except those that are possessed by the state in light of this document, and under the principle to satisfy the requirement of serfs and slaves most in need to the utmost extent and properly take care of the interests of serfs at a medium level (including better-off serfs), the distribution should be performed in a just and legitimate way. An equal share of land shall be endowed to each serf-slave owner or his agent.”²⁷⁰ Such system of land distribution is not only the most fundamental and important measure to guarantee the human rights of all the Tibetan people, but also brings the universality of guaranteed subjects to the highest extent in the concept of modern human rights.

3. The mass Tibetan people have gained their fundamental political rights

The 7th Article in the *Rules of Election for the People's Representative Conferences at Levels in the Tibet Autonomous Region* (draft) in 1962 stipulated that “Any citizen of the PRC at or above 18 years civilian who live within the autonomous region, regardless ethical or racial status, genders, occupations, social sources, religious faiths, the levels of education, property conditions, terms of dwelling, shall be entitled with suffrage or eligibility.”²⁷¹ The election results publicized in the *Decision of the Election Council for the Tibet Autonomous Region on the List of Representatives for the 1st People's Representative Congress of Tibet Autonomous Region* in 1965 was as such: “301 representatives have been elected for the 1st Autonomous Region People's Congress in total, among whom are 226 people of Tibetan Minority, 59 of Han ethnic group, 5 of Menba Minority, 4 of Hui Minority, 3 of Luoba Minority, one of Naxi Minority,

268 Ibid, p. 51.

269 Ibid, p. 53.

270 Ibid, pp. 54-55.

271 Ibid, p. 78.

one of Nu Minority, and two representatives from other sides; in particular, there are 44 women representatives.”²⁷² “This from-bottom-to-top election has completely changed the class basis and organizational structure for the political dominance in the Tibetan society, enabling the mass to participate in and discuss political affairs both actively and with awareness of a citizen, bringing an opportunity for enormous numbers of poor serfs and slaves to be involved in public affairs.”²⁷³ At the same time, it indicated that right to political involvement has become democratic in Tibet.

4. The other fundamental rights and freedom of a citizen have been established for the Tibetan people

In *The Resolution of the Preparatory Committee for the Tibet Autonomous Region on How to Reform Land Ownership System in Tibet* promulgated in 1959, the 3rd article stipulated to “annul all the feudal privileges of the serf-slave owners and their agents. And the fundamental rights of a citizen shall be protected in light of the Constitution of PRC.”²⁷⁴

Apart from the right to personal freedom, the right to equality, the right to suffrage and eligibility and the right of association, the other fundamental rights of a citizen stipulated in the subsequent Constitution of PRC respectively promulgated and implemented in 1975, 1978 and 1982 include the freedom of speech, press, assembly, processions and demonstrations, the freedom of religious faiths, the right that the dignity of personality are not infringed, the right that private residences are not encroached, the freedom of communications, the rights of privacy in communications, the right of criticism, advices, appeal, complaints and impeachment, the right of work, the right of recreation, the right of social security, the right of acquiring material aids, the right of receiving education, and the right of culture. In addition, people of ethical minority have also enjoyed the freedom to maintain or abandon their own customs and practices, to make use of and develop their own languages and letters, and so forth.

5. The right of autonomy in minority areas has been established and constantly developed

As early as in *The Resolution of the 2nd National People's Congress of PRC on Tibetan Issues* on April 28, 1959, it has been pointed out that “At the local level in Tibet, regional minority autonomy will be exercised under the uniform leadership of the Central People's Government and with the sponsorship of the mass and patriots of all circles. A prosperous new socialist Tibet will be built up in reliance on the brotherly unity and mutual help between the working people of various ethical groups. This is an unalterable guideline for the People's Republic of China.”²⁷⁵ In September 1965, the Tibet Autonomous Region was formally founded.

On May 31, 1984, the *Law of the People's Republic of China on Regional Minority Autonomy* was promulgated, and it has been the first time to employ national laws to affirm the autonomy in each minority autonomous region (including Tibet Autonomous Region) in such a concentrated and holistic way. Specifically, these rights of autonomy include the autonomy of

²⁷² Ibid, p. 122.

²⁷³ *Research of Human Rights in Tibet*, authored by Shi Jinbo, et al, China Tibetology Publishing House and the China Academy of Social Sciences Press, p. 31, 1999.

²⁷⁴ *Selected Reference Literatures for the Research of Human Rights in Tibet*, p. 54.

²⁷⁵ Ibid, p. 40.



legislation, the autonomy of languages and letters, the autonomy of personnel administration, the autonomy of establishment of public security forces, the autonomy of economic and trade management, the autonomy of resources and environment management, the autonomy of finance and tax administration, the autonomy of education, science, culture, sanitation and health care administration. The promulgation of this law also marks the formal establishment of legal status of minority autonomous regions, and it has been a milestone for the legislation of human rights guarantee for the ethnic minorities in China.

IV. The legislation for guaranteeing human rights in Tibet since 1976 has entered a new period of holism and systemization.

After the reform and opening to the outside world (1976), especially since 1985, the legislation for guaranteeing human rights in Tibet has come into a new period of holism and systemization. Such holism and systemization are mainly manifested as the following.

1. The local legislation in Tibet has been accelerated, and the lawmaking for guaranteeing human rights in Tibet has further been enriched and specifically oriented.

The *Constitution of PRC*, the *Legislation Law of PRC* and the *Law of Minority Autonomous Region of PRC* have all endowed the right of legislation to the minority autonomous regions, including Tibet. In 1985, the *Procedure for Constituting Local Laws and Regulations in the Tibet Autonomous Regions* was approved and implemented by the Standing Committee of the 4th People's Congress in 1985 and amended by the same institution in 1990. According to this procedure, the Tibetan legislative institutions have promulgated a series of local laws and regulations that both fit into the reality in Tibet and match up with the relevant national laws and rules.

Merely within its 5-year term, the Standing Committee of the 7th People's Congress of the Tibet Autonomous Region examined and deliberated 57 pieces of laws, regulations and resolutions related to legal issues, which have not only boosted the economic and social development in Tibet, but also contributed to the progress of human rights right there. For example, it proposed the 4th plenary session of the 7th People's Congress to examine, discuss and pass the *Statutes for Legislation in Tibet Autonomous Region*, promulgated the *Ways to Implement the Law of Representatives* and some other regulations, and amended the *Rules of Procedure in Representative Conferences*, the *Ways for the Election of Rural Villagers Committees*, and so forth; in reference to the strategy of development in West China and the new situation that China has joined the WTO, it advised the 5th session of the 7th People's Congress of the Tibet Autonomous Region to make a decision on the amendment of the *Several Regulations for Learning, Using and Developing Tibetan Language in the Tibetan Autonomous Region* (Trial), and so on.

2. The amendment of the *Law of Minority Regional Autonomy* in 2001 has further improved the unique system of minority regional autonomy in China that guarantees the rights of minorities from all aspects, so as to better regulate and guarantee the various rights of the minorities and the regions where they live.

3. The 4th amendment of the 1982 *PRC Constitution* in 2004 marked that the line "the state respect and guarantee human rights" was written into the fundamental law of the state. By then, to guarantee human rights has become a principal basis for a variety of laws, administrative statutes,



local statutes, regulations, legislative interpretation and juridical interpretation.

So to speak, the systemization of legislation for guaranteeing human rights in Tibet has mainly been manifested through the affirmation of the fundamental law, the further improvement of basic laws, the diversification of legislative forms, and the universality of legislative contents.

Summary

All in all, we can easily draw the following conclusions from the development in the history: first, the legislation for guaranteeing human rights after the founding of PRC has witnessed a radical progress in comparison with that before the establishment of PRC; secondly, the legislation for guaranteeing human rights in Tibet after the founding of PRC has primarily been systemized; thirdly, the construction of the basic legislative system for guaranteeing human rights in Tibet after the founding of PRC has been very fast and efficient; and fourthly, the legislative contents for guaranteeing human rights in Tibet after the founding of PRC have not only implied the specific situation in China, but matched up with international standards. And they are not anything groundless.

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THE QUESTION OF TIBET: A REALITY CHECK

- REFLECTIONS ON DEVELOPMENT, HUMAN RIGHTS, STABILITY, AND THE EMERGING FUTURE IN CHINA'S TIBET AUTONOMOUS REGION

Ram Narasimhan
India

I. Deifying the riots: through a distorted lens

If you go by western media reports, you will find that the propaganda of the so-called "Tibetan government-in-exile" in Dharamsala and the votaries of the "Free Tibet" cause, or by the fulminations of Nancy Pelosi and the Hollywood glitterati, some of the more fanciful news stories, images, and opinion pieces on the "democratic" potential have been put out by leading international news agencies, western newspapers, and television networks. Unsurprisingly, these demonstrably false, manipulated reports have drawn condemnation and sharp criticism from tens of thousands of Chinese "netizens."

The websites of several western television organisations and newspapers, including The Washington Post, BBC News, Fox News, and CNN, have not been above fielding photographs



such as those of baton-wielding Nepalese policemen clashing with Tibetan agitators in Kathmandu, with the captions claiming the baton-wielders were Chinese policemen; an ambulance bearing a Red Cross symbol, with the caption claiming “there is a heavy military presence in Lhasa”; Indian police dragging a man away, with the caption saying “Chinese troops parading handcuffed Tibetan prisoners in trucks”; and seemingly menacing Chinese military trucks, with the part showing rioters hurling rocks at the trucks cropped out.

But this is not all. Following an allegation put out by the Dalai Lama’s headquarters that Chinese People’s Armed Policemen dressed up as Tibetan monks and rioted in Lhasa on March 14, 2008, a sensational photograph began to circulate on the Internet. It showed several People’s Armed Police servicemen wearing summer uniforms and holding in their hands folded robes of Tibetan monks. The problem for the credibility of the image was this. By the end of December 2007, there were some 210 million Chinese Internet users (32 per cent of whom were young men and women in the age group 18-24; 72 per cent of whom used search engines; and 66 per cent of whom were accustomed to posting or uploading content on the Internet): the data source for these numbers is the 21st Statistical Survey Report on Internet Development in China published online by CNNIC, the China Internet Network Information Center.

Some of these netizens did some rapid appraisal and research and found inconsistencies in what the captions claimed in relation to the images. The first problem was the summer uniforms worn by the policemen in the picture, something out of the question for March 14 in the Lhasa cold. The second problem was the absence of shoulder badges, worn by all CPAP servicemen since 2005. Further online discovery gave the lie to what the photograph was supposed to be: it had been originally uploaded on a website linked to the Dalai Lama’s “government-in-exile,” with the caption reading: “This photo was apparently taken when monks refused to act in a movie, so soldiers were ordered to put on the robes.”

A notable feature of recent western media coverage of Tibet is the way journalism feeds off the disinformation campaign unleashed by the Dalai Lama’s headquarters and the votaries of Tibetan “independence,” without any attempt at independent reporting. One favoured method, under the guise of responsible news reporting, is to rationalise publication of the most exaggerated and fanciful accounts by pleading lack of onsite access. BBC did this on its website on April 4, 2008 with reference to the riot in Garze in Sichuan Province by offering the caveat that “foreign media organisations cannot report freely from Tibetan areas, so it is difficult to confirm facts from the area.” This is news-speak for “anything goes” for journalists on the other side of the ideological-political fence; they are freed from all rules of responsible and transparent sourcing and verification prescribed by codes of good journalistic practice and innumerable books on journalistic ethics.

In particular, such stratagems have enabled various western newspapers, news websites, news agencies, and television stations to deify the riots and disturbances by Tibetan discontents, including monks, under the banner of “human rights” and “freedom.” They equate Chinese official accounts of the toll taken by the recent Tibetan riots with vaguely sourced claims made by “Tibetan exile groups.” This observation applies especially to the death toll, which is necessarily a function



of body counts in any law-abiding society. In various subtle and not-so-subtle ways, readers are invited to give credence to claims by unnamed Tibetan exile sources that up to a hundred, if not hundreds of, people died in the March-April 2008 riots; and that Chinese security forces cracked down on or brutalised unarmed protesters or “opened fire on crowds of civilians, killing” whatever number the “Tibetan exile groups” are pleased to put out on the incident.

The mainstream western news media have also failed to report on, and analyse the significance of, the crucial fact that police investigation has revealed that the “confirmed list of 40 individuals killed” released by the Dalai Lama’s “government-in-exile” on March 26 was wholly fabricated. The investigation has found that five people on the list of dead are alive or never existed; and that the other 35, whose birthplaces or residences have been given as “Lhasa, Tibet,” “Aba, Sichuan Province,” and so on, were impossible to locate. A supposedly dead monk, Lobsang Tsepel of Sera Monastery, and a supposedly dead nun, Lobsang Doma, have been found to be very much alive; and a “dead” monk, Ngawang Thekchen of Taklung Drak Monastery, has been found to be non-existent. The Dalai Lama establishment’s fabricated list of 40 Tibetan “martyrs” is strikingly reminiscent of the list of 59 Hindu “martyrs” put out by India’s ultra-rightist organisation, Vishwa Hindu Parishad, in 1991; journalistic field investigation exposed the falsity of the VHP’s communally venomous body count hoax.

This kind of journalism turns on its head C.P. Scott’s celebrated maxim, “Comment is free, but facts are sacred.” But even the opinions have been riddled with contradictions. In an editorial, “China Terrorizes Tibet,” published four days after the Lhasa riot, *The New York Times* was quick to judgment. It charged Beijing with a “crackdown on Tibet” and described the savagery unleashed by the rioters as a “clash” between Chinese security forces and “hundreds of Buddhist monks and other ethnic Tibetans.” Subsequently, this newspaper was obliged to publish news items that acknowledged, in minimalist fashion, the lynching of Han Chinese by the rioters. In its editorial, “A spluttering flame,” published on April 5, 2008, *The Guardian* went a step further, even after the nature of the Lhasa riots became clear to the whole world. This editorial criticised Britain for being “in close embrace with a government cracking down on human rights.” Citing “exiled Tibetan sources” as claiming that the death toll was 140 (against the official figure of 18 civilians), it surmised, “the final death toll could well be much higher.” The liberal British newspaper charged China with “preparing for the (Olympic) games by re-establishing control” and accused Chinese security forces of “behaving in a manner not unlike Burma’s junta.”

The reality is that the riot that broke out in Lhasa on March 14, 2008 and claimed a confirmed toll of 18 innocent civilian lives was the handiwork of violent, thuggish, ransacking mobs. They included 300 militant monks from the Drepung Monastery, who marched in tandem with a foiled “March to Tibet” by groups of monks across the border in India. In Lhasa, the rioters committed murder, arson, and other acts of savagery against innocent civilians and caused huge damage to public and private property. The atrocities included dousing one man with petrol and setting him alight, beating a patrol policeman and carving out a fist-size piece of his flesh, and torching a school with 800 terrorised pupils cowering inside. The riot caused enormous damage to public and private property, including the destruction of about 900 shops. Tourism, “the backbone



of Tibet's economy," was set back seriously, with a sharp decline in the number of tourists and consequently hotel occupancy, and a blow to the catering business.

Visual images and independent eyewitness accounts attest to this ugly reality, which even compelled the Dalai Lama to put out threats to resign. There was violence also in Tibetan ethnic areas in the adjacent provinces of Gansu and Sichuan, which, according to official estimates, took an injury toll of more than 700.

By way of analysis, western pundits have linked these incidents to the March 10 anniversary of the failed 1959 Tibetan rebellion; non-progress in the talks between the Dalai Lama's emissaries and Beijing; China's "human rights record"; the Beijing Olympic Games, which will of course be held as scheduled from August 8 to 24 (notwithstanding some attempts to disrupt the ceremonial relay of the Olympic Flame or torch from Olympia in Greece to the Olympic venue in Beijing); and what not.

Recent western media accounts express unease and sadness over the swift containment of the Tibetan troubles, the "large-scale," if belated and politically slow, response by Beijing, and the "brutal ease" with which the protests have been "smothered." The surrender, by March 19, of more than a hundred people who admitted involvement in the Lhasa riots, and the formal arrest, by April 9, of 403, including 13 of the 93 "most wanted," were either ignored or reported in mournful tones. In another context, say Pakistan under Pervez Musharraf, such a response from the state would have been characterised as exemplary restraint.

The announcement by a spokesman for the Chinese Ministry of Public Security that weapons, including 178 guns, vast quantities of ammunition, 359 swords, 3,504 kg of dynamite, 19,350 detonators, and two hand grenades, had been recovered from the rooms of lamas in Tibetan temples introduces a new dimension altogether. According to a Ministry statement, the authorities, who have the ring-leaders in custody, are investigating a conspiracy, approved by "senior officials of the Dalai clique," to develop out of the March 14 riots an armed "Tibetan People's Uprising Movement" and to use the favourable opportunity before the Olympics to stage "sabotage activities in the Tibetan-inhabited areas in China." Such Chinese official revelations tend to be treated with scepticism, if not derision, by the western media.

However, as the evidence on the nature of the riots has piled up, the realisation has dawned that it was too much to expect any legitimate government of a major country to turn the other cheek to such savagery and such a breakdown of public order. So there has been a strategic shift in the demand made on China: it must "initiate" a "sincere" dialogue with the Dalai Lama to find a "just" and "sustainable" political solution in Tibet.

But this is precisely what China has done for three decades. The framework of the political solution - genuine regional autonomy within one China with its socialist market economy and political system led by the Communist Party - is there for all to see.

So what was the provocation for such violence in Lhasa and some Tibetan ethnic areas outside TAR? What is the cause for which these pro-Dalai Lama agitators are fighting?

It cannot be economic because the economy of the Tibet Autonomous Region, as we shall see in this paper, is on a roll. Nobody in their right mind has accused the Chinese government -



with its sights set firmly on economic development, political stability, and a “harmonious society” and just ahead of the August Beijing Olympics - of any new set of suppressive measures, political, economic, social, or cultural, against the 2.6 million ethnic Tibetans who constitute more than 92 per cent of the 2.8 million population of the Tibet Autonomous Region or against the 3.9 million Tibetans who live in other Chinese provinces and regions outside TAR. According to officially compiled data, in 2008 more than 80 per cent of the deputies elected to people’s congresses at the regional, prefectural, and city levels, and 90 per cent of those elected at the county and village levels were Tibetans or people from other ethnic minorities.

The Dalai Lama has charged China with committing “cultural genocide” but this is contradicted by the existence of 1,700 monasteries and other Tibetan Buddhist religious sites with their 460,000 monks and nuns (17.69 per cent of the Tibetan population of TAR); four mosques for 3,000 Muslims, and a Catholic church for 700 Christians; the protection and showcasing of the Potola Palace and other priceless heritage sites; the flourishing of the Tibetan language; the renaissance of traditional Tibetan medicine, which is enjoying a cult status internationally; and the strength and vitality of age-old tradition observable in the daily lives of the Tibetan people.

Some terrible things, including cultural vandalism, happened in TAR and other Tibetan ethnic areas during the “Cultural Revolution” but even worse things happened elsewhere in China. In any case, very much for ideological reasons, the Dalai Lama and the “Free Tibet” campaign have chosen to underestimate the damage done during the “Cultural Revolution,” tending to depict the normal years as the worst period for Tibet and Tibetans.

Overall, over a period of nearly six decades following the Chinese Revolution, Tibet has developed, with some setbacks and interruptions, as an inalienable and autonomous part of the People’s Republic of China. This holds true socio-economically, politically, culturally, and above all in transforming the lives of the people. There have been shortcomings and deficits of course in rising to the historic challenges of development and socio-economic transformation in TAR and in Tibetan ethnic areas in other provinces but which country does not have such shortcomings and deficits? A fair, objective, and balanced assessment makes it absolutely clear that many developing and developed nations have done far worse by their ethnic minorities than China has done by its 6.5 million citizens of Tibetan ethnic stock.

II. Challenges of development: gazing at the future

One way of examining the issue of human rights is from the point of view of the *entitlements* or *capability* approach to well being and the quality of life, as set out by the Nobel Laureate Amartya Sen. This is now a rich theoretical field with far-reaching policy implications. *Development*, in Sen’s analysis, is a process of expanding the “real freedom” of people; and *real freedom* resides in an individual’s “capability to achieve valuable human functionings.” The crucial question of the freedom of members of a society to achieve basic and more advanced *human functionings* depends obviously on the socio-political system, government policies, opportunities available to all the constituent sections of society, and *stability* and *harmony* in society. “Measuring real freedom,” a commentator on Sen’s work points out, “in terms of indicators such as life expectancy, literacy and educational attainments, levels of nutrition, access



to health care, employment, social respect and political participation are central to assessing how individuals and societies are faring.”

It follows that the primary goal of development must be to enable all members of a society to achieve these and more advanced human functionings on a secure and stable path. Deprivation, chronic as well as contingent (as in a drought, famine, or flood), is the opposite of development and the freedom and opportunity to develop the capability to achieve valuable human functionings. The expansion of freedom in this sense should be the foundation of *human rights* - a field that is valuable in itself but is unfortunately used from time to time as an ideological-political weapon to injure, besmirch, and pressure perceived adversaries. Those who use human rights as such a weapon are clearly open to the charge of upholding double standards.

We can approach Tibetan developments usefully from this perspective.

Ten years from now, a visitor to Tibet is likely to find it transformed into a region of reasonable development. It is likely to have decent living standards for all its people; a robust industrial base; modern agriculture and modernising animal husbandry; a well-educated, relatively young population; a high cultural level; a strong infrastructural spine and network supporting the development of a vast region; and active linkages and contacts with the rest of the world. It is more than likely that the autonomous region will enjoy political and social stability. It is certain not just that Tibet will be a still autonomous but much better integrated part of China but also that rising China will be very much in charge of Tibet's future. A significant part of “Tibet in Exile” could be back home, participating in shaping this future. Tibet is thus poised to achieve the status of a moderately developed region by the middle of the 21st century, possibly earlier.

These predictions can be confidently made on the strength of two visits I have made to the Tibet Autonomous Region over the past seven years.

The first visit, over five days in July 2000, gave me an opportunity to attempt some reality testing of Dharamsala's main campaign themes. In psychology and psychoanalysis, reality testing is defined as the technique of objective evaluation of an emotion or thought against real life, as a faculty present in normal individuals but defective in some psychotics. The technique is increasingly used in other contexts, for example in conflict resolution where the objective is to “adjust” conflicting perceptions that do not “conform to the realities of the situation.” In the case of China's Tibet, the reality testing was against the defining themes of the Dalai Lama-led “independence for Tibet” campaign.

The opportunity for another reality check came during a weeklong visit in June 2007 to the Tibet Autonomous Region and, for comparative reference, some Tibetan autonomous areas in the neighbouring provinces of Qinghai and Yunnan. The process and effects of change were there for everyone to see and there were hundreds of visitors, from various parts of China and abroad.

Five defining factors

Five factors stand out about contemporary Tibet.

The first is the rapid development of its economy, which in 2007 grew by 13.8 per cent compared with 11.4 per cent for China as a whole. The second is the readily observable fact that the arrival of material prosperity, steady population growth, rises in living standards, education



and skills training, and in general the process of modernisation are transforming life, work, and mindsets, especially of the young who make up the bulk of the Tibetan population. The third factor is a hard-won improvement in the Tibet Autonomous Region's internal and external political climate. The fourth is the dramatic leap in connectivity with the mainland that has come with the Qinghai-Tibet railway - a 1,956-km engineering marvel that now links Xining, the capital of Qinghai Province, with Lhasa. The fifth factor is a widening credibility gap - between the make-believe world of the "independence for Tibet" movement and on-the-ground Tibetan realities, which are reflected in the Dalai Lama's scaled-down political demands for an "autonomous" solution within a sovereign and one China.

Starting from age-old isolation from the mainstream, a chequered history, a low economic base, and a unique plateau environment averaging higher than 4,000 metres in altitude, Tibet has been growing at an annual compound rate of 12 per cent over the past seven years. The living standards, education, and skills training of Tibetans have improved visibly. In 2007, TAR's gross domestic product was US\$4.88 billion (34.2 billion yuan); and the per capita income was about US\$1,714 (12,000 yuan), which was double the 2002 figure. The per capita net income of farmers and herders - the really underdeveloped sector of the region's economy - experienced double digit annual growth over the past five years. For 2007, it was estimated to be US\$391 (2,788 yuan), a 14.5 per cent improvement on the 2006 figure. This compared with a national per capita income of US\$487 (3,587 yuan) for farmers. In 2007, TAR experienced the highest growth in retail sales of all provinces and regions in China. The effects of the economic transformation are conspicuous on Lhasa roads and streets, with their fast-moving vehicular traffic and rising modern buildings and commercial complexes. They can be witnessed on Barkor Street, known locally as "the Saint Road," and in the crowded bazaar around Jokhang Temple; in the vicinity of the Dalai Lama's past vacant Potala Palace; in the fast-developing transportation, telecommunications, and energy infrastructure; and at another high altitude wonder, the 6.2 square kilometre Lhalu Wetland in the capital's suburbs, which is known as Lhasa's "oxygen bar."

However, the real test is in the countryside, where four-fifths of Tibet's 2.8 million people live. There is visible evidence of economic development in the villages we were able to visit, especially in the households of farmers who have prospered thanks to their hard work and thrift, the large number of working hands in the family, central government subsidies, and new opportunities offered by the construction boom. The positive effects are also visible in the schools, kindergartens, and medical centres dispensing Tibetan medicine. They are on view in the bustling, grain producing and industrialising Xigaze prefecture located in TAR's mid-south.

World's highest railway

The most dramatic change since 2000 has come with the Qinghai-Tibet railway system, which will be marking its second anniversary on July 1, 2008. The section between Golmud, a city of the Haixi Mongol and Tibetan Autonomous prefecture in Qinghai Province, and the Tibetan capital took five years and 33 billion yuan to build. The world's highest railway, Nima Tsiren, a Tibetan who is vice-chairman of the autonomous region, exulted, "has ushered in a new millennium for Tibet. It is the realisation of a dream of two generations, of great importance to



the Tibetan people. It has greatly reduced the cost of transportation. We have taken one more step towards the modernisation of Tibet and the deeper integration of the regional economy with the Chinese economy.”

It is a big step indeed. A point made regularly in the Chinese media is that the Qinghai-Tibet railway is a refutation of Paul Theroux’s 1988 prophecy: “The Kunlun Range is a guarantee that the railway will never get to Lhasa.” For good measure, the aficionado added: “That is probably a good thing. I thought I liked railways until I saw Tibet, and then I realised that I like wilderness much more.” Theroux’s failed prophecy typifies the romantic, change-nothing view of Tibet, which prefers it to be frozen in its remoteness, its inaccessibility, its mysterious wildness, its “unchanging” culture and traditions. Taking the cue from “independence for Tibet” propaganda, the romantics see the railway as the ultimate destabiliser of Tibet’s culture, religion, demography, and environment.

Enchanting Tibet

The journey from Xining takes about 26 hours. As the train climbs into Tibet, often touching 100 kilometres an hour, you are offered breathtaking snapshots of snow-clad mountains, plateaus, frozen earth, bare rock, desert, valleys, lakes, azure clouds, yaks, antelopes, and the rare human being. Nothing you have read or seen in photographs prepares you for the vastness, the remoteness, the unnatural “Shangri-la” beauty, the flat-versus-mountainous, dry-versus-riverine, snowy-versus-grey-green-blue, fertile-versus-barren singularity of this once-great-sea that has avatared into this “roof of the world.” An additional treat is that you can measure the changing altitude with a simple measuring device that can be purchased in the dining car.

Tibet has less oxygen, more sunlight, longer hours of daylight, lower temperatures, less precipitation, more changeable weather, more great mountains and rivers, a larger collection of lakes and nature reserves, and a lower density of population than most people are used to. The electronic display in the vestibule of our railway compartment is educative and the train is pressurised to assure passenger comfort and well being. But over two visits in this decade, I have observed that, at least from the standpoint of Indian visitors (excluding of course those with major cardiac or respiratory ailments), the warnings - of breathing difficulty, nose bleeds, altitude sickness, and against any kind of physical exertion and even taking a bath upon arrival in Lhasa - are somewhat exaggerated.

In a historical essay published in *The New-York Daily Tribune* in 1853, Karl Marx analysed the potential of the railway to end India’s “village isolation this self-sufficient inertia with a given scale of low conveniences without the desires and efforts indispensable to social advance.” He famously predicted “the railway system will become, in India, truly the forerunner of modern industry.” The time and place were different, the circumstances colonial and exploitative. Further, Marxist and other Indian historians have challenged the historicity of Marx’s “unchanging” self-sufficient village community. But the analysis of the difference the railway can make is relevant to Tibet today.

Transforming effects

During the first ten months of the operation of the Qinghai-Tibet railway, TAR saw its



foreign trade rise by 75 per cent - to \$322 million (\$100 million of imports and \$222 million of exports). The trains immediately brought an influx of tourists, more than 2.5 million domestic and foreign tourists in 2006, which represented an increase of 35 per cent over 2005. In 2007, the number rose to four million, bringing in US\$684 million (4.8 billion yuan) of tourism revenue. The structure of tourism in Tibet has changed. With the Qinghai-Tibet railway finally doing away with the age-old “bottleneck of communication,” taking the train to Lhasa has become something of a national aspiration across fast-developing China.

Investment is likely to follow tourism and trade. Chinese officials project that by 2010 the Qinghai-Tibet railway will transport 75 per cent of the autonomous region’s inbound cargo, tremendously lower transportation costs, and double the tourist revenue. As they see it, the railway symbolises “the right of Tibetans to seek development,” catch up with the rest of rising China, and open themselves more to the outside world.

Over the next decade, the railway will be extended to three more lines in Tibet: one connecting Lhasa with Nyingchi to the east, another with Xigaze in the west, and the third linking Xigaze with Yadong on the China-India border. Beginning September 1, 2008, a five-star luxury train, “the most luxurious in the world,” will transport well-heeled tourists from Beijing to Lhasa over five days.

Railway and environment

Apprehensions about the railway’s adverse effects on the environment and wildlife have proved exaggerated, if not entirely baseless. An unprecedented 1.5 billion yuan package of environment protection measures, including systems to store garbage and wastewater and treat them in designated stations, and 33 special passageways for antelopes and other wildlife, has been put in place. Technologies of heat preservation, slope protection, and roadbed ventilation have reportedly come to the aid of the plateau’s frozen tundra. Scientists have set up a long-term monitoring system for water, air, noise, and ecology. Further, greening the 700-km Tibet section of the railway - planting 26,000 hectares of trees over the next five years - is under way.

The real threat to Tibet’s environment comes not from the railway but from global warming. A leading climate change scientist, Dong Guangrong of the Chinese Academy of Sciences, has been quoted in the Chinese media as estimating that the “roof of the world” glacier, which constitutes 47 per cent of China’s total glacier coverage, is shrinking at the rate of 7 per cent a year. He and other scientists have warned that the melting glacier will trigger droughts, expand desertification, and worsen sandstorms. Aside from the railway, the development of a new kind of physical infrastructure - highways, paved roads, bridges, power lines, telecommunications, irrigation channels, modern housing, and so forth is there for all to see. The plan is to build, by 2010, “high-class highways” to connect 100 per cent of Tibet’s townships and 80 per cent of its administrative villages; and to convert 80 per cent of the roads into blacktops. Expressways, however, are considered unsuitable for a region that has only 2.3 persons per square km.

As you speed along the highway from Lhasa to Xigaze for five hours or more, you are offered rapid frame alternations of the new and the old, the modern and the traditional, in a heady mixture of sensory experiences. A surprise is how easily you can connect to the outside world: the



GPRS on your mobile phone (or PDA) works along much of the Lhasa-Xigaze highway. While browsing the internet for news of the outside world or answering your email, you can catch a glimpse of how the bulk of Tibetans live: in mud and stone houses; cultivating small plots and tending livestock; prayer flags fluttering; primitive farming and nomadic practices; basic living conditions; colourful long skirts, striped aprons, beads, and incongruous cowboy hats; people squatting road-side; and children in school uniform on their way home.

Transforming the conditions of life and work of these simple folk is the basic challenge before the central and regional governments.

Outlook on education

The Chinese socialist system highlights the “fast, coordinated, and healthy development of education” in TAR as a solid achievement of liberation and especially the post-1978 programme of reform and opening to the world. According to vice-chairman Tsiren, there are 540,000 students enrolled in the autonomous region’s educational institutions, comprising six universities, 118 high schools, seven intermediate vocational schools, and 880 elementary schools. He adds that school enrolment covers 96.5 per cent of children of the relevant age group and the programme of nine years compulsory and free education has been completed in 46 of the region’s 73 counties.

In addition, central government preferential policies have enabled about 14,000 Tibetan students to study in scores of key high schools and higher educational institutions in 20 of China’s provinces and municipalities. It has been estimated that up to January 2007, the fraternal funding of Tibetan education by these provinces and municipalities aggregated \$74 million, in addition to the 2,000 teachers and educational officials they sent to Tibet. There is clearly a lesson in this for India, and especially the Hindi-speaking States.

The literacy rate among the Tibetan population in TAR is more difficult to estimate. Some Chinese education officials and literacy researchers have expressed concern over a stagnant if not worsening situation across the country between 2000 and 2005, because of factors like large-scale migration for work and the rising cost of rural education. Official sources estimated that the adult illiteracy rate in TAR was below 30 per cent at the end of 2003. It is not clear what it is in 2008 but it appears that it is not worse than the situation in India’s Hindi-speaking region.

Monasteries and monks

The monasteries are distinctly traditional area but there are plenty of signs of modernisation here too. Whether you go to the 16th century Kumbum monastery in the vicinity of Xining or to 15th century Sera near Lhasa or to 17th century Songzanlin in Diqing prefecture in Yunnan, the monks wear their traditional robes and debate the sutras in the stylised and gesticulating style of Tibetan Buddhism. But they also carry mobiles, drive vehicles, collect fees for allowing photography inside the most hallowed chambers, follow satellite television, and perform for tourists.

In the northwestern suburbs of Xigaze city, a hub of Tibet’s modernisation, we visited the imposing Tashihungpo monastery, the seat of successive Panchen Lamas. Founded in the 15th century by Gandain Zhuba, a disciple of Master Tsongkapa and the (posthumously recognised) first Dalai Lama, it is one of the six major monasteries of the dominant Gelug sect. I duly paid 125 yuan for the privilege of using my camera, a Nikon D70, inside the magnificent memorial



hall where the 10th Panchen Lama - who, unlike the 14th Dalai Lama, decided to stay in Tibet and work constructively with the Chinese government - is entombed. A vigilant teenage monk sprang up from nowhere to make the point that I could not use a second camera, a pocket-sized Leica D-Lux 3, without paying an additional 125 yuan. In a Tibetan autonomous area in Yunnan Province, we even visited a novitiate monk of middling rank from a famous monastery in his rural home, where he is allowed to spend part of the year.

Town-country gap

The development gap between town and country is certainly a matter for concern in Tibet - as in the rest of China - but a high level of central government subsidies and organised social sector assistance from China's more developed provinces and municipalities are targeted at narrowing the gap. China has adopted a strategy of westward development to overcome the historical backwardness of this vast part of the country. A recent comprehensive study of socio-economic development in rural western China, by Professor Zheng Changde of the Southwest University of Nationalities, has come up with some surprises. The per capita income of TAR's 2.3 million herders and farmers is actually higher than the per capita incomes of the rural population in the western Chinese provinces of Shaanxi, Gansu, Yunnan, and Guizhou. This reflects the sustained investment by the Central and regional governments in the development of agriculture and animal husbandry; the opening of the Qinghai-Tibet railway; and the development of the service industry in TAR.

A major aspect of the propaganda campaign by the Dalai Lama, the remnants of his theocratic establishment, and his supporters abroad is the supposed contrast between China's "authoritarian" political system and the "democratic" character of "Tibet in exile." This is a bit rich coming from the spiritual and temporal head of a feudal serfdom, which Tibet indisputably was before 1951 - when the nascent People's Republic liberated and took control of a region that was greedily eyed, infiltrated, and manipulated by imperialist powers, originally Britain and Czarist Russia, and subsequently Britain and the United States.

The old order

During the theocratic rule of the Dalai Lama, lands as well as most means of production were in the hands of three categories of estate-owners - government officials, nobles, and upper class Lamas - who made up merely five per cent of the population. The mass of the Tibetan population, serfs and slaves numbering a million in 1951, lived in extreme poverty, as appendages to estates owned by masters, lacking education, health care, personal freedom, and any kind of entitlement. They were obliged to perform unpaid labour services or ulag, corvee, and parasitical land rent.

Agriculture was largely of the slash-and-burn kind. Modern industry was virtually non-existent. Transportation was predominantly on animal or human back. Life in general was brutish and short, with diseases rampant, the population stagnant, and life expectancy at birth hovering around 36. It has been estimated that in old Tibet monks and nuns accounted for 10 per cent of the population. At the top of this oppressive feudal and theocratic system sat the institution and person of the Dalai Lama.

Pre-1951 Tibet had no schools worth speaking about. Monastic education, going back a thousand years and focusing on the Buddhist scriptures and to some extent the Tibetan language,



was the leading form of education. There were some schools outside the monastic system meant for the training of lay and monk officials and for imparting a modicum of basic education - reading, writing, and arithmetic besides the recitation of Buddhist scriptures. These schools had a student body of less than 1,000. Not surprisingly, the illiteracy rate was higher than 90 per cent.

Twists, turns, and progress

From such an abysmal socio-economic base, it would be hard not to make substantial progress. With the 1959 Democratic Reform, which was brought forward by the flight of the Dalai Lama, serfdom and landlordism were abolished and the socialist system was introduced in stages into Tibet. There have been twists and turns and “ultra-left” attempts to force the pace of change - with the “Cultural Revolution” of 1966-1976 inflicting extensive and grievous damage on life, the economy, education, religion, and cultural heritage in Tibet, as in the rest of China.

While many Tibetans regard the period 1961-1965 as a “golden age” in their material lives, it is the post-1978 programme of economic reform and opening to the world and recent developments in political policy that have transformed life and work in Tibet most profoundly. Top Chinese leaders have freely admitted that much more could have been done for the country’s “western development,” and specifically for the development of TAR. Deng Xiaoping it was who inaugurated, in 1978, a new development-oriented policy approach towards the region. Hu Yaobang made an important inspection tour of Tibet in May 1980, after which Tibetan development was given higher priority; and Jiang Zemin followed up during a fact-finding visit a decade later. Hu Jintao himself worked for more than a decade as a Communist Party of China organiser in Gansu Province, which adjoins Tibet, and subsequently served as secretary of the CPC Tibet Autonomous Regional Committee.

Mao Zedong and Dalai Lama

It is Mao Zedong’s portrait that you will find in a large number of ordinary Tibetan homes - because he continues to be seen as the liberator of a million serfs from the old feudal regime of landowning aristocrats and monks. During my 2007 visit, I noticed that a growing number of Tibetan families also appeared to see no contradiction in displaying pictures of the 14th Dalai Lama, typically besides smaller portraits of the 10th and 11th Panchen Lamas, inside their homes. These moderate demonstrations of reverence for the Dalai Lama as a religious leader, which I did not witness during my 2000 visit to Tibet, seemed to reflect a more relaxed socio-political situation in TAR as well as in more developed Tibetan autonomous areas outside the region. But the riots and disturbances of March-April 2008 have obviously brought about a change in this situation.

In Hilton’s Shangri-la

The Tibetan communities outside TAR are conspicuous beneficiaries of China’s economic boom. Xining, a city where ultra-modern buildings and commercial complexes co-exist in harmony with the traditional and the old, bears testimony to this. In the southwest Yunnan Province, the Diqing Tibetan Autonomous Prefecture, dominated by the magnificent Meili Snow Mountain, is going through a remarkable makeover. In 2001 Zhongdian, the major town in the area, officially renamed itself Shangri-la, after the legendary place made famous by James Hilton in his 1933 novel, *Lost Horizon*. The county also calls itself Shangri-la, a winning brand that



attracts droves of tourists, Chinese and foreign, here.

In Zhongdian, An Weng Ning Bu, the head of the local government, told me that between 1997 and 2007 Shangri-la's economy grew at an annual average rate of 12 per cent; and over the last half-decade at no less than 20 per cent. In Zhongdian and elsewhere, we met several young Tibetans who grew up in refugee settlements in India and returned to make their fortune in the great Chinese economic boom. Three of them had come together to run a thriving business, the Khampa Caravan Adventure Travel Company Ltd., and a trendy ethnic restaurant, and were looking to invest in other profitable lines, including luxury hotels.

The Communist Party of China's present focus on the creation of a "harmonious society" and the concept of China's "peaceful rise" have been welcomed even by the Dalai Lama, to judge from a speech made in November 2006 by his special envoy, Lodi Gyaltsen Gyari.

With a speeding up of the development of industry, the service sector, and education; with the modernisation of agriculture and livestock practices; with adequate job creation; with an all-out poverty eradication effort; with an enlightened programme of environmental protection; and with scrupulous respect for the language, culture, religious beliefs and constitutionally mandated autonomy of the Tibetan people, rising China is eminently capable of achieving the all-round development of this autonomous region. Seldom does a giant country get such an opportunity to concentrate its burgeoning resources, internal and external, to improve the lives of 2.80 million of its citizens, accounting for 0.21 per cent of the national population, dotted across 1.22 million square kilometres, actually one eighth of China's land area.

III. The future of "Tibet in Exile"

What about the future of the "independence for Tibet" movement?

The term "Tibet in Exile" is used by the Dharamsala-based "Tibetan Government-in-Exile" to denote up to 150,000 people of Tibetan ethnicity spread across India and several other countries who are supposed to be votaries of the Dalai Lama. This "Living Buddha," who will turn 73 on July 6, 2008, has suffered some health setbacks over the past few years. He has himself fuelled uncertainty about the future by making a profusion of statements about his own mortality. At times, he has indicated that he might choose to be the last Dalai Lama; and even proposed "democratic" modalities for ending the institution. But he has also said: "If I die in exile, and if the Tibetan people wish to continue the institution of the Dalai Lama, my reincarnation will not be born under Chinese control. That reincarnation will be outside, in the free world. This I can say with absolute certainty." These remarks make it clear that while the Tibetan Buddhist doctrine of reincarnation belongs to the mystical-religious realm and asks a lot from 21st century believers, the Dalai Lama's approach even to rebirth is decidedly ideological-political.

As religious leaders go, the Dalai Lama is certainly one of the world's most-recognised faces. In this respect, he is comparable to Pope John Paul II and Ayatollah Khomeini, except that he has been on the world stage for much longer than either of them was. Centuries of history bear down on him. For he is the 14th in an "incarnate" series launched in the 16th century when a Mongol chieftain, who owed allegiance to China's Ming Emperor, conferred the honorific "Dalai" ("Ocean") on a "Living Buddha" of the Gelug sect who became the 3rd Dalai Lama.



(Two predecessors were posthumously recognised.)

Historical records show that the institution of the Dalai Lama as an “incarnate” politico-religious supremo - recognised and empowered by the Chinese central government - began in the middle of the 17th century, when the Great Fifth received a formal title, a golden certificate of appointment, and a golden seal of authority from the Qing Emperor whom he visited, and paid homage to, in Beijing. The 13th Dalai Lama was a wily and unreliable political actor who played between Chinese central governments and interventionist colonial Britain, often aligning with the latter. Interestingly, on February 22, 1940, Tenzin Gyatso was enthroned as the 14th Dalai Lama at the Potala Palace after receiving the necessary certificates and seals of approval from the Chinese Nationalist government of Chiang Kai-shek, which in fact allocated 400,000 silver dollars to cover the expenses of the enthronement ceremony.

Tibetan paradox

The shy and diffident religious leader who was prevailed upon to flee Tibet during the 1959 and has, since 1960, been based with his entourage in Dharamsala - India’s “Little Lhasa” - has developed into a consummate public figure and world traveller. Winner of the 1989 Nobel Peace Prize, the 14th Dalai Lama has been primarily responsible for keeping the Tibet question active internationally, within China, and in the arena of India-China bilateral relations.

Politically, Tibet presents a paradox.

On the one side, there is not a single country and government in the world that disputes the status of Tibet; that does not recognise it as a part of China; that is willing to accord any kind of legal recognition to the Dalai Lama’s “government-in-exile” based in Dharamsala. This situation presents a contrast to the lack of an international consensus on the legal status of Kashmir.

With respect to Tibet, India, which started out in the late 1940s with a policy of ambivalence shaped by the British Raj, has come a long way. In the *Declaration on Principles for Relations and Comprehensive Cooperation Between the Republic of India and the People’s Republic of China* issued at the end of Prime Minister Atal Bihari Vajpayee’s official visit to China in June 2003, India firmly reiterated its “one China policy” and recognised that “the Tibet Autonomous Region is part of the territory of the People’s Republic of China.” It added that it did not allow Tibetans “to engage in anti-China political activities in India.” The Manmohan Singh government reiterated this official Indian position in the Joint Statement issued at the end of Prime Minister Wen Jiabao’s state visit to India in April 2005, and again during Dr Singh’s successful visit to China in January 2008. In the aftermath of the March-April 2008 riots and disturbances, External Affairs Minister Pranab Mukherjee has reiterated India’s position on the status of Tibet as part of one China, and also on not allowing the Dalai Lama and the Tibetan refugees to engage in anti-Chinese political activities in India; and the Chinese government has expressed its satisfaction over, and appreciation of, this stand.

The Tibet political question continues to cause concern to the political leadership and people of China; and that it serves to confuse and divide public opinion abroad and, to an extent, at home.

This problematical side expresses the interplay of a host of subjective and objective factors, which I identified in a 2000 cover story for *Frontline* magazine as the following: the Dalai Lama’s



religious charisma combined with the iconic international status of Tibetan Buddhism; his long-lastingness and tenacity; his alignment with western powers and anti-Chinese interests and the ideological-political purposes he has served over half a century; his considerable wealth and global investments, and resources mobilised from the Tibetan diaspora in various countries; the cultural and human damage done in Tibet, as in the rest of China, during the decade of the “Cultural Revolution” (1966-1976); the nature of the “independence for Tibet” movement that follows anything but the Buddhist “Middle Way”; the links and synergies the Dalai Lama has established with Hollywood, the media, legislators, and other influential constituencies in the west; and, most troubling from a progressive Indian standpoint, the reality of a continuing Indian base of operations for the “Tibetan government-in-exile.”

Anti-China political figure

The long-term assessment of China’s political leadership has been that the Dalai Lama cannot be treated merely, or even primarily, as a religious leader. If he were just a pre-eminent religious leader, there would be no problem in accommodating him within the constitutional framework that guarantees religious freedom to all citizens and regional autonomy to ethnic minorities in extensive parts of a giant country. In fact, the 14th Dalai Lama is a consummate politician leading a movement that seeks to take “Greater Tibet” away from the motherland - an anti-communist and separatist political figure, with external links.

The Dalai Lama’s track record certainly bears out this assessment. He started out by accepting China’s peaceful liberation of Tibet in 1951. He acquiesced in, and supported, the May 1951 “Agreement of the Central People’s Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet.” The key features of this 17-article agreement were unambiguous recognition of the status of Tibet as part of one China; cooperation by the local government of Tibet with the People’s Liberation Army; continuation of the existing political system and the status, functions, and powers of the Dalai and Panchen Lamas; and a crucial and remarkably liberal provision that the local government “should carry out reforms of its own accord” and there would be “no compulsion on the part of the central authorities.”

Secessionist actions

However, after his flight to India, the Dalai Lama showed his, and his Keshag’s, secessionist colours. He declared Tibet to be “an independent state.” In September 1959, acting against Prime Minister Jawaharlal Nehru’s advice, he sought unsuccessfully to get the United Nations to intervene in Tibet. In 1960, he ordered the reorganisation of the “Religious Garrisons of Four Rivers and Six Ranges” in Nepal and thus became complicit in military activities against the Chinese state. His “Tibetan government-in-exile,” with its “Draft Constitution for Future Tibet” and its front organisations, functions in flagrant disregard of legality as well as India’s long-declared official policy of not allowing Tibetans “to engage in anti-China political activities in India.”

Over the past three decades, following a high-level political decision, the Dalai Lama has travelled extensively abroad to rally support for the internationalisation of the Tibet question and presented various “realistic” proposals for its “satisfactory and just solution.” These have included a Five Point Peace Plan unfurled in a September 1987 address to members of the U.S.



Congress; the elaboration of these five points in the so-called Strasbourg Proposal of June 1988; the withdrawal, in March 1991, of his “personal commitment” to the ideas expressed in the Strasbourg Proposal on the basis of the allegation that the Chinese leadership had a “closed and negative” attitude to the problem; and an abrasive and propagandistic open letter written to Deng Xiaoping in September 1992. His March 10 speeches have varied in content and tone, in sync with his perception of the international situation and China’s place in the sun.

In his major pronouncements, the Dalai Lama has taken the stand that Tibet has been an independent nation from ancient times; that it has been a strategic “buffer state” in the heart of Asia guaranteeing the region’s stability; that it has never “conceded” its “sovereignty” to China or any other foreign power; that China’s control over Tibet is in the nature of “occupation” by a “colonial” power; and that “the Tibetan people have never accepted the loss of national sovereignty.”

For “Greater Tibet”

Equally important, he has repeatedly spoken of “six million Tibetans.” He has falsely accused China of rendering Tibetans, through a state-sponsored policy of population transfer and Hanisation, into a “minority” in their own land. The plain truth, borne out by official censuses and easily verifiable by foreign observers and experts, is that Tibetans constitute more than 92 per cent of the population of the Tibet Autonomous Region. The Dalai Lama has even accused the Chinese socialist state of unleashing a “holocaust” and exterminating more than a million Tibetans.

He has put forward the demand for the reconstitution of a “Greater Tibet” known as “Cholka-Sum” and comprising the areas of “U-Tsang, Kham, and Amdo.” This is a revival, in another form, of the infamous British attempt in the early 20th century to constitute two zones, “Outer Tibet” and “Inner Tibet” (the latter comprising extensive ethnic Tibetan areas in several Chinese provinces); weaken China’s sovereignty over both zones; require Chinese “non-interference” in the affairs of Outer Tibet; and give the Lhasa-based Tibetan administration the right to control most monasteries and even appoint local chiefs in Inner Tibet.

He has demanded that “Chinese forces,” the People’s Liberation Army, should pull out of Greater Tibet and that “a regional peace conference should be convened to guarantee demilitarisation in Tibet.” If the 14th Dalai Lama has his way, a single “de-Hanised” administrative unit, which will be formed by breaking up four Chinese provinces, will appropriate one-fourth of China’s territory - instead of the one-eighth covered by TAR.

He has even sought to implicate India in his political project, observing on one occasion, at a seminar, that “it is more reasonable for India to own sovereignty over Tibet than China.” Fortunately, no one of consequence in India pursued this hint.

In an appeal issued on March 28, 2008, the Dalai Lama declared that he wanted to assure the ethnic Han people who constitute the overwhelming majority of China’s population that he had “no intention to split Tibet from the country or cause a rift between the Han and Tibetan peoples.” He claimed that he had “occasionally pursued a solution to the Tibet issue on the basis of lasting and mutual benefit between the Han and Tibetan groups” and complained that “no matter how hard” he worked to “avoid separation of Tibetans from the one big family,” he was unjustly censured by



“some Chinese leaders.” But there was a mischievous new note in this appeal. The Dalai Lama expressed confidence that “a lot of important issues including those related with Tibet, Xinjiang, and Inner Mongolia can be resolved.” This remark has been interpreted by some Chinese commentators as expressing “a new trend in the Dalai Lama’s activities,” of uniting with other ethnic separatist forces and even terrorist organisations to split China.

The 11th Panchen Lama

There have been other political provocations under the guise of exercising traditional religious authority. On May 14, 1995, in a pre-emptive bid, the Dalai Lama in exile in India “recognised” the boy Gendhun Choekyi Nyima, sight unseen of course, as the 11th Panchen Lama. However, in December 1995, the Chinese central government, going by centuries-old custom and tradition that empower it to recognise and appoint both the Dalai and the Panchen Lama, approved the enthronement of Gyaltzen Norbu as the 11th Panchen Erdeni.

Deng’s policy shift

Over the past three decades, the Chinese leadership has fashioned and finessed its strategy of dealing politically with the Dalai Lama and his followers. In December 1978 Deng Xiaoping announced that “the Dalai Lama may return, but only as a Chinese citizen” and that “we have but one demand - patriotism. And we say that anyone is welcome, whether he embraces patriotism early or late.” In May 1991, Prime Minister Li Peng clarified that “we have only one fundamental principle, namely, Tibet is an inalienable part of China. On this fundamental issue, there is no room for haggling...All matters except ‘Tibetan independence’ can be discussed.”

However, after several rounds of informal talks and contacts with the Dalai Lama’s emissaries and fact-finding delegations between 1979 and 1992, and after watching his performance on the international stage, the Chinese government came to a provisional conclusion by the time it held the Third National Conference on Work in Tibet in 1994. The conclusion was that the “Dalai clique” was demonstrably insincere; that it was working overtime to separate Tibet from China and destabilise the situation in TAR in concert with “China’s international enemies”; and that its real demands were tantamount to “independence... semi-independence... (or) independence-in-disguise.”

Six rounds of talks

However, that was by no means the end of the story. In an era of China’s unprecedented economic growth, inclusive and nuanced socio-political and cultural policies, commitment to a peaceful rise and a harmonious society, when serious international political support for “Tibetan independence” is non-existent, the Dalai Lama has been obliged to back-pedal on the key issues. In turn, the Chinese central government and the Communist Party of China have shown exceptional patience. This has meant that since 2002 six rounds of discussion have taken place between the representatives of the Dalai Lama and the Chinese government.

Before the sixth round of discussion took place (June 29-July 5, 2007) in Shanghai and Nanjing, Lodi Gyaltzen Gyari, styling himself the “lead individual” designated by the Dalai Lama to “reach out to the Chinese leadership,” made a revealing speech at the Brookings Institution in Washington D.C. According to his remarks made on November 14, 2006, five rounds of talks deepened mutual understanding, “brought the dialogue to a new level,” and went “a long



way towards establishing a climate of openness that is essential to reaching mutually agreeable decisions regarding the future of the Tibetan and the Chinese people.”

“Climate of openness”?

For a start, the Dalai Lama’s representatives declared themselves to be “encouraged by the new focus within China’s leadership on the creation of a “harmonious society.”..(and) by the concept of China’s “peaceful rise,” whereby it will develop as a “modern socialist country that is prosperous, democratic, and culturally advanced.” They also stated that the Dalai Lama’s current approach was to “look to the future as opposed to Tibet’s history to resolve its status with China” because “revisiting history will not serve any useful purpose.” Further, they clarified, the crux of the Dalai Lama’s “Middle Way” approach was to “recognise today’s reality that Tibet is part of the People’s Republic of China...and not raise the issue of separation from China in working on a mutually acceptable solution for Tibet.” His commitment was to “a resolution that has Tibet as a part of the People’s Republic of China, the need to unify all Tibetan people into one administrative entity, and the importance of granting genuine autonomy to the Tibetan people within the framework of the Chinese Constitution.”

But within a year, the tune changed. Addressing the European Parliament Conference on Tibet in Brussels on November 8, 2007, the Dalai Lama’s envoy, Kelsang Gyaltzen, assumed an apparently pessimistic but more belligerent tone: “After six rounds of discussion, unfortunately, I have to report to you that the overall picture of our dialogue process is rather sobering and disillusioning. Since the resumption of this dialogue in 2002 the Chinese side has been adopting a position of no recognition, no reciprocity, no commitment and no concession. Although they profess interest in continuing the dialogue, so far they have been pursuing a strategy of avoiding any progress, decision and commitment in the dialogue process. It has now become clear that the Chinese leadership is clearly lacking the political will to address the issue of Tibet in all earnestness.”

Kelsang Gyaltzen went on to “appeal to the international community for help,” even making the paranoid claim that “the Tibetan people - an ancient nation with its distinct and rich cultural and spiritual civilisation, language and identity - is disappearing fast from the face of the earth.” He asked “members of the international community” to play an important role “in encouraging, promoting and facilitating earnest dialogue and negotiations” between the Dalai Lama and the Chinese government. As a “first priority,” he declared, it was of “vital importance to make China accountable for her repressive policies in Tibet at appropriate national and international forums and in your bilateral relations.” The Dalai Lama’s envoy wanted the Chinese leadership to be “made to realize that the issue of Tibet cannot be suppressed and silenced unless it is properly addressed and resolved.” Noting that “the emerging world power China” was “also vulnerable,” he called for “a strong and unified message with regard to the issue of Tibet.”

Daunting gap

Here lies a big gap - which cannot be narrowed unless the Dalai Lama and his establishment radically modify their stand on two core issues.

First, the concept of “high-level” or “maximum” autonomy in line with the “one country, two systems” principle (which Beijing holds to be applicable only to Hong Kong, Macao, and Taiwan)



is very different from what Chinese constitutional framework and the law on national regional autonomy stipulate. The law, it has been pointed out, defines national regional autonomy as the basic political system of the Communist Party of China to solve the country's ethnic issues using Marxism-Leninism. The content of autonomy, which in the Chinese constitutional and political context essentially means self-administering opportunities and subsidies and preferential policies from the state to help the autonomous region overcome historical backwardness, can certainly be improved.

However, the kind of autonomy that the Dalai Lama demanded in November 2005 - "the Central Government should take care of defence and foreign affairs, because the Tibetans have no experience in this regard, but the Tibetans should have full responsibility for education, economic development, environmental protection, and religion" - cannot possibly be accommodated within the Chinese Constitution. Further, his demand that "a Tibetan government should be set up in Lhasa and should have an elected administrative chief and possess a bicameral legislative organ and an independent judicial system" is ruled out of court. Beijing's 2004 white paper, "National Regional Autonomy in Tibet," is emphatic that, in contrast to Hong Kong and Macao that follow the capitalist system, Tibet does not face the possibility of introducing another social system.

Secondly, it bears reiteration that the 2.6 million Tibetans in TAR - a number that has grown steadily and is more than twice the Tibetan population in the region when the Dalai Lama went into exile - form only 40 per cent of the total population of Tibetans in China. In responding to the demand for "one administrative entity" for all ethnic Tibetans, the Chinese government makes the perfectly reasonable point that TAR parallels the area under the former Tibetan regime. Acceptance of the demand for "Greater Tibet" means breaking up the provinces of Qinghai, Gansu, Sichuan, and Yunnan, where there are a large number of Tibetan autonomous counties and prefectures; doing ethnic re-engineering, if not "cleansing"; and causing enormous destabilisation and damage to China's state, society, political system, development, and human rights.

The talks will continue, as they should. Civility, open-mindedness, flexibility, and a positive attitude to resolving the Tibet question will certainly help, on both sides. During our visit to Tibet in June 2007, vice-chairman Nima Tsiren responded to a question on the Dalai Lama by citing an observation made by Prime Minister Wen Jiabao at a Beijing press conference on March 16, 2007: "We will not only hear what he has to say; more importantly, we will watch what he does. We hope that the Dalai Lama will do something useful for China's unity and the development of Tibet."

Democratic India will hope so too.

It is significant that Prime Minister Wen Jiabao has now made it clear that although "there are ample facts and plenty of evidence that the recent riot in Lhasa was organised, premeditated, masterminded, and incited by the Dalai Lama clique," the channels for dialogue between the Chinese government and the Dalai Lama remain "open" if he can truly renounce "Tibetan independence" and recognise Tibet and Taiwan as inalienable parts of the Chinese territory. Premier Wen added the significant caveat: "We mean what we say. We need to watch what the Dalai Lama does. It is up to his actions."

For those who espouse "independence for Tibet" - organisations like the "Tibetan Youth



Congress,” the “National Democratic Party of Tibet,” and the “International Tibet Support Network” - the future looks bleak indeed. Since the Dalai Lama has been eloquent on the subject of his own mortality and has even speculated on the thereafter, they will be worrying over the big question: after the 14th, what? One thing is clear: as much as the future of Goa and Sikkim belongs to India, the future of the Tibet Autonomous Region and the extensive Tibetan autonomous areas that form part of four major provinces will reside - in their differentiated and distinctive ways - within one China.

(The author is Editor-in-chief of The Hindu Newspaper Group.)

PROTECT WOMEN’S HUMAN RIGHTS, PROMOTE FULL DEVELOPMENT OF WOMEN

- IN COMMEMORATION OF THE 60TH ANNIVERSARY OF
THE *UNIVERSAL DECLARATION OF HUMAN RIGHTS*

Zou Xiaoqiao
China

This year marks the 60th anniversary of the *Universal Declaration of Human Rights* (UDHR). As its 60th birthday is approaching, the UN Secretary-General Ban Ki-moon officially launched, on December 10, 2007, a year-long celebration with the theme of “Dignity and justice for everyone.” Today, we are holding here in Beijing a forum on human rights, to probe into some issues around “Development, Safety and Human Rights,” which is of vital significance to propel further development of China’s human rights and forge a more harmonious human society.

UDHR, issued 60 years ago, is the first specialized document on human rights by the UN, and has played a positive role in guiding the development of theory and practice on international human rights, and in propelling the advancement of human rights in the world. The historic contribution of UDHR lies in that it has evoked people’s pursuit of inalienable human rights. Sixty years having elapsed, human rights conditions have changed a lot on this globe. Human rights issue, including human rights of women, has aroused general concern in the international community. The UN organizations have adopted a great number of conventions, protocols, declarations and resolutions on international human rights, likewise all the continents have passed many regional documents on human rights, and the constitutions or relevant laws of most countries around the world have included contents on valuing and protecting human rights. During this process, we are glad to see that the concept of human rights has been greatly developed. Aside from civil, political, economic, social and cultural rights which have been generally recognized



and cherished, the international community has started to devote much attention to the human rights of women, to accelerate the elimination of all forms of discrimination against women on all levels and in all spheres, to promote equality between men and women and to guarantee all the rights women are entitled to. Since 1970s, the UN has convened four world conferences on women, which have put forward the strategic aim of and operational plans for raising status and protecting human rights of women. The *Platform for Action* adopted on the Fourth World Conference on Women held in Beijing 1995 identified the significant realm of “Women and Human Rights,” and fully and closely examined the human rights conditions of women and called for a positive and distinctive strategy which would reflect gender perspective into all policies and programs. Meanwhile, a series of conferences convened by the UN such as the UN Conference on Environment and Development 1992, World Conference on Human Rights 1993, International Conference on Population and Development 1994, World Summit for Social Development 1995 and the Millennium Summit 2000, all emphasized the significance of equality between men and women and women’s human rights, and regarded women’s equality and empowerment as a key method in achieving various development objectives, so as to create and cultivate a better environment for women to enjoy full human rights. The UN has also stipulated and adopted a number of international human rights documents, declarations and resolutions in relation to women’s human rights. The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), adopted in 1979 by the UN General Assembly and now ratified or acceded by 185 states, is the most important international legal document the UN has ever stipulated in regards to maintaining women’s rights, and is often described as an international bill of rights for women. The basic ideas of CEDAW are to follow the non-discrimination principle, abolish all laws, customs, regulations and practices discriminating women, and advocate women’s participation in a country’s political, economic and cultural life on the basis of equality with men. All the above-mentioned efforts have contributed positively to the advancement of women’s human rights cause as well as the improvement of women’s human rights conditions in various fields.

Enjoyment of full human rights and realization of both *de jure* and *de facto* equality between men and women is the lofty goal pursued for a long time by the international community, especially by women. It has been proved that, human future is a future for full development of politics, economy, culture and individuality, and no development can be achieved without the extensive participation of women who account for half of the world population. The fulfillment of women’s human rights requires a guarantee for women’s capability to acquire self-reliance, self-improvement and self-determination, and an empowerment for them to participate in political, economic, social and cultural development. Only by achieving these can their interests and requirements be integrated into the mainstream of the development process. The important basis for women to be equal partners in the development process is that they enjoy equal dignity and value with men. This is also a principle set by UDHR.

Today, when we commemorate the 60th anniversary of UDHR, we have not only seen the development of international women’s human rights, but also witnessed the great improvement of Chinese women’s human rights and the great efforts that Chinese government has exerted for



the advancement of women's human rights. Ever since the founding of the People's Republic of China, realization of gender equality and safeguard of women's human rights have been set, by the Communist Party of China and Chinese government, as a basic goal in its socialist construction, and have been guaranteed by legal, systematic and administrative means. Since late 1970s when China adopted the Reform and Opening-up policy, and especially after the Fourth World Conference on Women held in Beijing 1995, Chinese government has been earnestly fulfilling its solemn commitment to the international society, actively implementing the basic state policy of gender equality, ensuring equality (incl. gender equality) and justice to be an important aspect in forging a harmonious society in the new century, and taking effective measures to propel the advancement of Chinese women's human rights.

China is one of the earliest signatory states of CEDAW. To oppose and eliminate discrimination against women in the whole society and to promote a full scale development of women's human rights, Chinese government has, according to China's specific national conditions and with reference to the principles of CEDAW and other international laws and regulations, ceaselessly enacted and perfected laws and regulations to protect women's rights, and has promulgated *The Program for the Development of Chinese Women*, which is in line with the national development plan. The *Law of the People's Republic of China on the Protection of Rights and Interests of Women*, enacted and decreed in 1992, acknowledges women's full rights and interests in politics, culture, education, labor, property, person, marriage and family, and hence a basic law safeguarding women's rights and interests comprehensively and systematically. It is not only a basic law guaranteeing women's human rights, but also a significant component of China's human rights legal system. After this law, China has enacted or amended a series of laws related to women's rights and interests, including: *Labor Law*, *Law on Maternal and Infant Health Care*, *Population and Family Planning Law*, *Marriage Law*, *Law on Land Contract in Rural Areas*, *Law on the Protection of Women's Rights and Interests*, *Real Right Law*, *Employment Promotion Law*, etc. These laws, based on the principle of equality between men and women, have reinforced protection of women's rights in various aspects. So far, China has established a comprehensive women's human rights legal system to protect women's rights and interests and promote development of women, taking the Constitution as the basis and the *Law on the Protection of Women's Rights and Interests* as the core, and encompassing various specific state laws and regulations, as well as administrative decrees and regulations enacted by various government departments, and local legislation.

With the continuous improvement of women's human rights legal system and the special attention and unremitting promotion from Chinese government, Chinese women's enjoyment of equal rights in politics, economy, culture, society and family has been carried further, and Chinese women are playing even greater roles in different aspects of social life after having made proud achievements in the development of their human rights.

Chinese government attaches great importance to women's participation in political and public affairs, and has formulated concrete policies to enhance women's capacity to participate by setting clear objectives and introducing strategic measures. As a result, a great number of outstanding



women have entered organs of power at various levels. At the recently concluded first Session of the 11th National People's Congress (NPC) and the 11th Chinese People's Political Consultative Conference (CPPCC), the proportions of female members in both NPC and CPPCC are 21.33% and 17.7%, and has increased respectively by 1.13% and 1% from that of last year. National-wide, females claim 38% of the total number of cadres. In the Supreme Court, Supreme Procuratorate and component departments of the State Council, there are 27 female ministers/vice-ministers and 241 minister-level leaders, with a 2% increase during the past 3 years.

Meanwhile, women's occupation structure is also improving, with continuous widening of their employment scope. In 2005, employed women amounted to 45% of the entire workforce in both urban and rural China. In urban areas, the 6 major industries, namely computer, communications, finance, education, health care and social security employed sixteen million four hundred and fifty-one thousand females, 6.8% more than that of 2003. In order to protect women from employment discrimination due to marriage or child-bearing, the Employment Promotion Law stipulates that no employer should put into the employment contract any content that restricts women's marriage or child-bearing rights. The government also seeks to guarantee women's employment rights by taking such active measures as strengthening law-enforcement supervision and perfecting child-bearing insurance system. To help women set up their own business or seek re-employment, All-China Women's Federation, the biggest national women's organization in China works to provide services such as technical training, employment advising and job placement to laid-off women. In 2005 only, All-China Women's Federation trained one million three hundred and thirty thousand laid-off women and helped eight hundred and fourteen thousand set up their own businesses or get re-employed.

In recent years, Chinese government increased the national financial education funds. Consequently, women's educational level has been raised by a large margin, with a steady increase of the percentage of females in various educational institutions and a notable decrease of the gap between male and female educational levels. In 2006, 46.4% of all China's post-graduates and 33.9% of doctorates were female, with respective increases of 12.3% and 12.4% over 2000. Female adult literacy rate and female youth literacy rate have also reached 83.85% and 94.7% respectively. The male-female discrepancy in average years of education has dropped from 1.3 years in 2000 to 1 year in 2004.

Women's health conditions and life quality have been remarkably improved. Women can enjoy lifelong health care service. Chinese government keeps increasing financial input into maternity and childcare, gradually improving service networks in this regard. The national financial funds for maternity and childcare was RMB 1.88 billion yuan in 2004. Up to the end of 2005, 3021 maternity and childcare institutions have been established. So far, the hospitalized delivery rate in rural China, very low before, has reached above 81%; hospitalized delivery rate of women with high-risk pregnancy reached 98.35%; maternal mortality rate is 47.7 per hundred thousand; average life expectancy of female is 74.1 years.

To reinforce the mechanism for safeguarding women's rights and interests, China established a trans-departmental National Coordination Panel in 2001, which greatly enhanced the association



and coordination of different government departments and effectively strengthened the nation's efforts in safeguarding women's rights and interests. So far, 23 provinces (autonomous regions and municipalities) have formulated local regulations or administrative documents prohibiting domestic violence. During the 10th Five-year Plan period (2001-2005), some 260 thousand women enjoyed legal assistance from the 3,100 legal assistance institutions in different parts of China. In 2007, nine governmental departments jointly released the document of *Suggestions on Preventing and Curbing Domestic Violence*. The same year also witnessed China stipulated the *Plan of Action for Counter Abducting and Trafficking of Women and Children (2008-2012)*. All these have helped to foster a mechanism to facilitate and assist women in their pursuit of rights and interests or to afford adequate adjustment.

The government has pushed for the development of Chinese women's human rights with a visible hand, which has in turn brought Chinese women with visible equality and humanistic care. It is quite obvious that Chinese women have achieved historic improvements in enjoying equality with men. These improvements are an important part of international women's progress, as well as of improvement of China's human rights. However, we have to remain sober-minded and realize that, due to restrictions by the level of socio-economic development and influence of cultural tradition, there are still many serious challenges with regard to the conditions of Chinese women's subsistence, development and safeguarding of their rights and interests. For example, there are conspicuous incidents that women's labor rights are harmed; there still exists gender discrimination against women in employment; women's educational level is comparatively low, esp. in rural areas; violations of women, including violence and illegal/criminal actions against women's personal rights still constitute a problem despite continued efforts to curb them. It takes quite a long process for *de jure* equality to be transformed into *de facto* equality. There is a lot more for us to do. I personally believe that, the cultural and social environment in which women live can be better improved, women's equal rights to subsistence and development can be better safeguarded, and Chinese women's human rights will be further enhanced, so long as the whole society executes the national policy of equality between men and women seriously, integrating the conception of gender equality into the mainstream decision-making process of economic development, and continuously improving the legal system, law enforcement system and judicial system to safeguard women's human rights.

During the past 60 years, the international community, governments and civil societies have made vigorous efforts to eliminate discrimination against women and to promote full development of women's human rights, and have acquired significant achievements and valuable experience. Yet, due to the differences between social systems, historical backgrounds, cultural environments and stages of socio-economic development, there still exists imbalance in the development of women's human rights among countries. With all countries facing different levels of challenges and obstacles, there is a long way to go to fully realize women's human rights.

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THE PROGRESS AND ANALYSIS OF WOMEN'S HUMAN RIGHTS PROTECTION IN THE LEGISLATION 2007 IN CHINA

Li Mingshun
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The year 2007 witnessed “the new progress in the construction of democracy and legal system, the reliable development of administration by law, and the strengthened guarantee of people’s rights and interests as well as the safeguard of social equity and justice”²⁷⁶ in China. In this year, both the National People’s Congress and its Standing Committee as well as local People’s Congresses at all levels and their Standing committees were active in performing their duties, constituting and promulgating a series of laws and regulations. These laws and regulations have directly or indirectly concerned the rights and interests of women. This article is going to briefly sum up and analyze the provisions in the pertinent legislation in China in 2007 that directly involve the rights and interests of women, so that we can see more clearly the new progress of the Chinese legislation concerning the guarantee of women’s rights and interests, and enable these regulations to play a better role in guaranteeing women’s rights and interests.

1. The progress and analysis of guarantee of women’s human rights in national legislation

Among the laws passed by the National People’s Congress and its Standing Committee in 2007, four are most directly connected with women’s rights and interests, namely, they are the Real Right Law of the People’s Republic of China passed by the 5th session of the 10th National People’s Congress on March 16, 2007, the Labor Contract Law of the People’s Republic of China passed by the 28th session of the Standing Committee of the 10th National People’s Congress on June 29, 2007, the Employment Promotion Law of the People’s Republic of China passed by the 29th session of the Standing Committee of the 10th National People’s Congress on August 30, 2007, and the Law of the People’s Republic of China on Mediation and Arbitration of Labor Disputes passed by the 31st session of the Standing Committee of the 10th National People’s Congress on December 29, 2007. This article is focused on the new protection of women’s rights and interests concerned in the Real Right Law, the Labor Contract Law, and the Employment Promotion Law for the following analysis.

A. The progress and analysis of the guarantee of women’s rights and interests in the real right law

As a law to adjust the civil legal relations between equal subjects, and to identify and protect

²⁷⁶ See the government work report made by Premier Wen Jiabao at the 1st meeting of the 11th National People’s Congress on March 5, 2008.

real rights, the real right law does not only represent the objectives of values such as order, freedom, justice and efficiency as other laws do, but also it functions specially in identifying the rights of property, protecting the rights of things, maintaining basic economic systems, safeguarding economic orders and giving a full play to every objects. Due to the special functions of a real right law, its promulgation is significant in a broad sense: from the traditional perspective of juristic thinking, the law of real rights is the most important part of civil codes, an important part of the legal system for the market economy in China, so the institution of the real right law is an important step to improve the legal system for the socialist economic market. If viewing from the perspective of human rights beyond the traditional juristic thinking, still the real right law is an important law to guarantee human rights in China because “to protect legitimate rights of property just means to guarantee the fundamental human rights of citizens.”²⁷⁷ From the point of view of genders, the real right law is an important part of the legal system to guarantee women’s rights and interests and boost equality between men and women.

As a law to adjust civil relationships arising due to the ownership and utilization of things impresses people as if it is merely related to objects, at most deals with the relationships between human beings and objects; it seems that it does not matter whoever owns or utilizes them, and it has nothing to do with genders. Actually, that is an illusion. The real right law is related to objects, indeed, but what it adjusts are the civil relationships arising due to the ownership and utilization of objects, and therefore are the relationships between human beings, a category of social ones. As the most fundamental and most general social relationships, the relationships of genders cannot keep far away from civil relationships, let alone far away from the relationships of real rights, so the issues of genders do not only exist in the relationships of real rights, but are profoundly influential. As one important element for people to subsist and develop, properties are vital in social lives; the deprivation of women’s properties means a vital threaten to their own subsistence, and women’s rights and interests of properties, including real rights, can be viewed as the extension of women’s rights of life in a certain sense. Thus, the double attributes as economic and political rights make real rights a precondition for women to gain freedom and equality, and a cornerstone to realize equality between men and women and to safeguard social justice. Therefore, the promulgation and implementation of the real right law in China is very significant to guarantee women’s rights and interests of properties.

As for the provisions concerning women’s rights and interests of properties in the real rights law, one of the important breakthroughs is that it has delivered special protection for rural women’s rights and interests of properties. “For long, the issues to discriminate women and infringe women’s rights and interests exist to various extents in the land-contracting activities in some places. Among them, some appear as the meetings of representatives for rural villagers, resolutions of rural villager conferences, the decisions of rural village commission or rural non-governmental agreements in depriving women of their rights to contract lands or share the benefits of collective economic organizations; some take young women’s ‘expected marriages’

277 Wang Liming, Yi Fei and Cheng Xiao, *Textbook on China Real Right Law* (M), People’s Court Press, Foreword, 2007.



as an excuse to refuse land shares to unmarried females or distribute fewer shares to them; in some places, the registered permanent residences of women who are married off or widowed are coercively transferred out, and their contracted lands are compulsorily taken back, and their other economic interests related to contracted lands are also damaged. These issues come out of many reasons, some of which are that due to the influence of backwards values, people discriminate women and thus neglect their rights; that policies and regulations are defective, and the implementation of them is weak; and that both the attention to and the measures for maintaining women's legitimate rights and interests are insufficient and weak. These unsolved issues have not only decreased the enthusiasm of the massive rural women to participate in the construction of socialist modernization, but tarnished the profiles of CPC, governments and related basic rural organizations.²⁷⁸ In this case, the real right law spends relatively more length to define in details rural collective ownership,²⁷⁹ elaborating the right to contract and operate lands is an important usufruct in rem²⁸⁰, and upgrading the access of premises residence grounds to be a kind of real right with Chinese characteristics.²⁸¹ It has also specified its protection for the requisitioned interests of peasants which have widely attracted attention²⁸², requiring that when the lands owned by collectivity, expenditures such as land compensations, settlement subsidies, and compensations for attachments on the grounds and growing crops should be disbursed, and that the social insurance fees for the peasants whose lands have been expropriated should be arranged. In particular, the Article 63.2 stipulates clearly, "Where any decisions made by a collective economic organization or a rural villager commission or their functionaries infringe any legitimate rights and interests of any member of the collectivity, the infringed collectivity member can request a people's court to annul such decisions." This stipulation is very important in protecting rural women's rights and interests, and it has offered some corresponding juridical remedies when the rights and interests of the mass rural women are infringed by the provisions of any non-government village agreements. No doubt the above-mentioned real right law has laid a sounder legal basis for developing the Chinese rural economies and society and protecting the rights and interests of peasants, including the rights and interests of rural women.

Naturally, when viewing the real right law from the perspective of social genders, one can find enormous limitations still exist in the afore-mentioned provisions in the real right law. The insufficiencies in protecting rural women's equal rights and interests of properties are as the following: 1. As for the subject of rights, more often than not the real right law has employed phrases such as "a holder of the right of land contract and management," "a holder of the usufruct of residence grounds" and "a member of collectivity." Simply viewed from a juristic point, such appellations are exactly correct and give no cause for criticism. But systematically

278 See the Notice of Faithfully Guaranteeing Rural Women's Rights and Interests of Contracted Lands by the General Office of the CPC Central Committee and the General Office of the State Council on May 8, 2001.

279 See the Real Right Law of the People's Republic of China, 58-63 articles.

280 Ibid, 124-134 articles.

281 Ibid, pp. 152-155 articles.

282 Ibid, 42-44 articles.



and realistically, one can find it would generate unfavorable influences against women. For, in accordance with the provisions in the law of rural land contracts, the contractor of a family-based contract for lands shall be the farming household of the same collective economic organization.²⁸³ Again in accordance with the law of land administration, rural villagers take a household as a unit as they own any residence grounds.²⁸⁴ Such legislative mode that take “household” or “family” as a subject of real rights may not only leave the operational rights of lands of women as individual submerged in a “household,” but also cause some divorced or widowed women to be deprived of their real rights, for “in rural areas, women settle down in men’s household in general after they get married, almost all the holders of the rights in rem concerning the usufruct of residence grounds and the contracting rights of lands are the husbands in the households, and the greenhouses that a married woman takes care of are also contracted in the name of her husband. In this case, once the married women are divorced or widowed, it is very common the village authorities on the husbands’ sides will take back the lands that these women are operating.”²⁸⁵

2. It is true that the real right law has clearly stipulated to equally protect the legitimate rights and interests of the members in a rural collective economic organization, but this law fails to specify a criterion for the qualification of a member of the rural collective economic organizations. Thus in practices, the rural women, especially the married, divorced or widowed women would probably be excluded out of the collective economic organization, and it would be difficult to find any ways and evidences for remedies once their rights and interests are infringed. So, as early as when discussing the draft of the real right law, some people have suggested adding the line that “the rights of land contract and operation are not affected by the marital status of a contractor” to the item concerning the rights of land contract and operation, and the line that “the right of use of residence grounds is not influenced by the alteration of marital status of a usufruct holder.”²⁸⁶ These suggestions are really very correct, and it is undeniable a regret that the real right law does not include these contents. In addition, from the point of view of social genders, much attention should also be paid to the absences of the rights of dwelling in the real right law and the gender trap in the registration system of real estates.

B. The progress and analysis of the guarantee of women’s rights and interests of labor in the Labor Contract Law and the Employment Promotion Law

Responding to the requirement in the construction of a harmonious socialist society, legislative work has been intensified with a focus on the social aspect. The improvement of the legal system concerning labor and social insurances is closely related to the personal benefits of laborers and the harmony and stability of society, and is thus a kernel point in the legislation work for social issues. In 2007, the Standing Committee of the National People’s Congress successively

283 See the Law of the People’s Republic of China on Land Contract in Rural Areas, Article 15.

284 See the Land Administration Law of the People’s Republic of China, Article 62.

285 Jin Yong, How the Real Right Law Should Protect Women’s Rights and Interests (N), *China Women Newspaper*, March 8, 2007.

286 Ibid.



passed the Labor Contract Law, the Employment Promotion Law and the Law on Mediation and Arbitration of Labor Disputes. In these laws, what directly concern and especially protect women's rights and interests of labor is the protection for women during special physiological periods and the provisions about specific collective contracts in the Labor Contract Law, and the provision to guarantee women's equal employment in the Employment Promotion Law.

Both the Law of Labor and the Law of the Protection of Women's Rights and Interests have specified special protection for women in terms of labor contracts. Based on this, the Labor Contract Law goes further to iterate that any unit as an employer shall not resort to the provisions in the articles 40 and 41 in the Labor Contract Law to rescind its labor contracts with a woman worker as she is within a pregnant, delivery and lactation period. As for collective contracts, it requires "the labor party in an enterprise may sign with the employing unit some specific collective contracts concerning labor security and sanitation, protection for women workers' rights and interests, adjustment mechanism for wages, and so forth."

To guarantee women's equal rights of employment, the Employment Promotion Law has made three special provisions. In particular, Article 3 in the law stipulates, "Labors enjoy by law the right of equal employment and independent employment choices. The employment of labors shall not be discriminative due to ethical attribution, races, genders and religious faiths." Article 27 claims, "The state guarantees that women enjoy the rights of labor equal with men. Except the types of work or the occupations that the state has provided as unsuitable to women, an employer unit shall not take genders as an excuse so as to refuse the employment of women or increase its recruit standards for women. As an employer unit recruits a woman worker, it shall not regulate any contents that constrain woman workers' marriage or bearing in its labor contract." And Article 62 provides, "Where the provisions within this law are violated and any discrimination over employment occurs, labor may make a suit to a people's court."

The so-called sex discrimination in employment involves any differentiation, exclusion or favors based on genders, consequent it cancels or goes against women's equal opportunities or equal treatment in employment or careers. From the perspective of human rights, it is a behavior infringing women's human rights. Labor is the source of wealth, and employment means livelihood. In a modern view of human rights, the right of labor and employment is a fundamental human right. For a normal healthy adult, his or her rights of life and development can be guaranteed only if his or her right of labor and employment is properly protected. From the point of view of economics, the gender discrimination in employment is an unreasonable and prejudiced activity of resource deployment. It will not only do serious harms to women laborers' job opportunities and employment rights, but also cause enormous waste of human resources to the society. From the perspective of sociology, the gender discrimination in employment will further trap female groups, and thus spawn instability in the society. From the angle of laws, the gender discrimination in employment is an illegitimate behavior, which badly infringes women's right of equality and dignity. So, it is extremely significant that the Employment Promotion Law pays special attention to the gender discrimination in employment.



2. The progress and analysis of the guarantee of women's human rights in local legislation

As for the guarantee of women's human rights, local laws and regulations have also played an increasingly important role. In 2007, the provinces, municipalities directly under the leadership of the Central Government and autonomous regions such as Zhejiang, Heilongjiang, Gansu, Shaanxi, Guizhou, Anhui, Ningxia, Tianjin, Jilin, Guangdong and Shanghai have successively promulgated the Ways for the Implementation of the Law of the Peoples Republic of China on the Protection of Rights and Interests of Women (the Ways for the Implementation for short hereafter), and the new progress in guaranteeing women's various rights and interests are as the following:

A. The institutions and their functions to guarantee women's rights and interests have been subdivided

A law does not work on its own. The specification of a law-enforcement subject and its clearly designed functions are vital to the implementation of a law. In the Law of the Protection of Women's Rights and Interests amended in 2005, the "General Rules" has specified the status of people's governments at levels as subjects in guaranteeing women's rights and interests, thus it appears very important how to properly regulate the functions and responsibilities of people's governments and their functional departments. The Ways for the Implementation by Shanghai, Shaanxi, Heilongjiang, Guizhou and Ningxia have done a good work in this aspect, subdividing and deepening the four fundamental functions and responsibilities of institutions for women and children at and above county levels, namely organizations, coordination, guide, and supervision and urge. Having involved some essentiality to a certain extent, these documents make the work more authoritative and more operable.

Unfortunately, these documents still contain some insufficiency, however. For examples, many Ways for the Implementation have not subdivided or deepened the supervision and urge functions of women and children's service institutions, and have not stipulated to monitor and assess whether the regulations and policies promulgated by related governmental departments contain any provisions discriminating women or going against the realization of women's rights and interests. In addition, in the Ways for the Implementation in some places, some unnecessary constrains have been laid upon the functions of women and children's service institutions. For examples, the Article 6.2 in the Ways for the Implementation by Shanghai stipulates to "participate in the institution of statues, regulations and public policies concerning the significant issues involved in the guarantee of women's rights and interests"; the Article 4 in the Ways for the Implementation by Jiangxi Province provides to "determine the significant matters involved in the guarantee of women's legitimate rights and interests, and supervise and urge related departments to investigate and deal with by law the significant case involved the infringement against women's rights and interests." Here the word "significant" is simply restrictive and ambiguous. Actually, the women and children's service institutions are entitled to participate in any matters concerning women's rights and interests, let alone that there is no definite criterion at all for whether an issue or case is significant or not.

B. The outlays for the guarantee of women's rights and interests have specifically been



guaranteed in some of the Ways for the Implementation

The Ways for the Implementation in some provinces such as Jiangxi, Shaanxi, Guizhou and Anhui have stipulated to include the outlays for the work on women's rights and interests into governments' financial budgets. What is worthy of specially mentioning is that the Ways for the Implementation in Jiangxi Province stipulates to "guarantee the necessary working outlays for the women and children work, and include them into financial budgets."

The Ways for the Implementation in other places does not deal with the issue of outlays. As with this, some people explained in a national seminar that due to the fear of its conflict with the Law of Budgets, the Ways for the Implementation did not include the outlays needed in the work for women and children into the financial budgets of local governments. The author thinks it a misunderstanding, for the Statute for the Implementation of the Law of Budgets promulgated by State Council has clearly stated that first warrant for the local governments to work out annual budget drafts is local laws and regulations, while the Ways for the Implementation is nothing more than a local statute. Once the Ways for the Implementation makes some clear stipulations, will it not become a legitimate warrant for the local governments to include the funds needed in the work for women and children into their financial budgets?

C. The Ways for the Implementation in most places has stressed the rate of women among candidates for local people's congresses

First, they have emphasized to recommend and promote women representatives; second, they have stipulated the rate of women among candidates for the local people's congresses. For example, the provinces such as Shaanxi, Heilongjiang, Guizhou and Anhui have stipulated women should account for more than 30% among candidates.

But unfortunately and insufficiently, almost all the Ways for the Implementation merely stipulate the rate of candidates, instead of that of representatives. Only in Jiangxi Province the Ways for the Implementation has provided that women shall account not less than 20% of the representatives in the local people representatives at levels.

In some other places, Shanghai, for example, the Ways for the Implementation does not stipulate the rate of women representatives. The reasons might be complicated. Some might fear that such stipulations are just no use because the conditions are still unready; some might think the numbers of local women representatives have been larger than a national average, so it is unnecessary to stress it anymore, and some might be afraid of its conflict with the law of election. But in the author's opinion, none of these excuses should become an encumbrance in increasing the rate of women representatives. Those that fail to reach a certain rate should set down an unalterable quota for their women representatives.

D. Some provinces have defined the rate of women representatives in Corporate Employee Representative Conferences

For example, the 9th article in the Ways for the Implementation in Anhui Province stipulates that "governmental institutions, social groups, corporate organizations and non-governmental public institutions should be staffed with women leaders in accordance with related provisions. Within a villager commission or an urban neighborhood committee, there should be a certain



quota for women. The quota of women in a corporate staff representative conference should be in line with the rate of women workers in the enterprise. Where there are more than 10 female members in a corporate labor union, a women worker commission should be set up under the labor union; and if less than 10 female members, a women worker commissioner should be established.”

E. The Ways for the Implementation in some places has stipulated women’s offices as chiefs in governmental departments and institutions

For example, the 10th article of the Ways for the Implementation in Shaanxi stipulates, “In people’s governments at or above townships (towns) level, or in the component departments and institutions directly under people’s governments at or above county level, there should be a certain amount of women taking the office of chiefs.”

In a real life, due to different range of functions, responsibilities and power, a chief and a deputy play distinct roles. The stipulation about women’s offices as chiefs in governmental departments or institutions will be a sound guarantee for women to really participate in essential decision-making, and conducive to changing the situation that in the governmental departments of present China, women take more deputy offices than chief ones, and more nominal offices than essential ones.

F. Some special protection has recently been stipulated for women during special periods

The 18th article of the Ways for the Implementation in Guangdong Province stipulates, “An employer unit shall not, due to marriage, pregnancy, maternity leave, lactation and other cases, decrease the wages or other welfares of a woman worker, or unilaterally cancel its labor (employment) contract with the woman worker, and when alter the occupation of a woman worker, it should ask for the agreement of the woman worker *ex ante*.”

Where a woman worker’s labor (employment) contract expires during her pregnancy, maternity or lactation periods, except the cases provided by laws or regulations, the employer unit shall terminate the labor (employment) contract, and the term of the labor (employment) contract should automatically extends until the end of the lactation period.”

The second item of this article is especially significant in the reality because currently many employer units sign short-termed contracts with their staff members or employees, and the shortest lasts for mere one single year. Many women workers meet the expiration of their contracts when they are still during their three periods (pregnancy, maternity and lactation periods), and the employer units will probably sign no more contracts with them. Obviously that departs from the concept of human-centeredness, and also it goes against the protection for women’s rights and interests. As for this, the Maternity Protection Convention passed by the International Labor Organization in 2000 as well as the related laws in Europe and the USA has made a clear provision: in this case, the term of a labor contract automatically extends until the end of lactation. But before this, no laws or regulations in China have made such explicit prescription, and there is no legal means to prevent an employer unit from doing so. Many women at their child-bearing ages repeatedly postpone their pregnancies because they fear that their employers will not renew their contracts, so that they let slip their best conceiving ages. From a long-term perspective, it is



adverse to the development of the nation.

G. More stipulations have been made about insurance systems for bearing and relieves for women in need

It is one of the significant provisions in the Law of the Protection of Women's Rights and Interests to guarantee women to enjoy the rights and interests of social insurance, social relieves, social welfares and health care; and the Ways for the Implementation in each province has also taken some positive measures. In this aspect, the deeds in Shaanxi Province deserve some praises. Its Ways for the Implementation has not only stressed to fulfill the bearing systems for workers in cities and towns, but also demanded that "people's governments at and above county level should include the bearing fees for the rural women during their pregnancy, maternity and lactation periods into the reimbursed range of rural cooperative medical systems, and reimburse the expenditures in accordance with provided criteria."

In the Ways for the Implementation in Shanghai, the 24th article stipulates, "Each unit should arrange the diagnosis and examination of gynecologic diseases and breast diseases for its own women workers once every two years. Those which are well conditioned can add the times of diagnosis and examination and items.

People's governments at city and district (county) levels should arrange the diagnosis and examination of gynecologic diseases and breast diseases for retired women and those in poverty at least once every two years.

Social communities, corporate organizations and non-governmental public institutions units are encouraged to help the diagnosis and examination of gynecologic diseases and breast diseases for women in poverty.

The 25th article in the same document stipulates, "In Shanghai, a bearing insurance system is carried out by law, and a healthy guarantee system concerning women's bearing matters is established.

People's governments and related departments at levels should follow the pertinent provisions to deliver necessary bearing relieves to women in need; and social communities, corporate organizations and non-governmental public institutions units are encouraged to offer aids to the bearing activities of women in need."

According the statistics and budgets by related sides in Shanghai, this measure will do favor to two million women who are retired or in need. Calculated as 60 RMB plus for one-person examination, the total financial expenditures for all the examinations for once are more than 100 million RMB. No doubt it is a huge amount to the governments. The Shanghai People's Congress and other governmental departments convened 6 symposiums, finally coming to a principle for the expenditures of gynecologic diseases examinations, that is, the employer units pay the most, the governments defray the rest, and medical institutions give away some profits. This principle has been represented in the existing provisions.

In Jiangxi, the Ways for the Implementation has made relatively more concrete and detailed stipulations for the social aids towards women in poverty. For example, its 28th article stipulates, "An employer unit should offer a free gynecologic health care examination for its women workers



every one or two years. The administrative departments concerning medical matters should undertake effective measures to carry out general examinations of gynecologic diseases for rural women, deliver necessary medical and health care conditions to women in old revolutionary bases, rural minority-concentrated villages, remote mountainous areas and depressed areas, and prevent and cure common diseases, frequently-occurring diseases and infectious diseases.”

H. The protection for rural women’s rights and interests has been intensified

Because the Law of the Protection of Women’s Rights and Interests has stipulated relatively detailed protection for rural women’s rights and interests of properties, most provinces have largely copied the provisions in the Law in question. Jiangxi Province is the only one whose stipulation about community properties and rural women’s rights and interests deserves a mention. In the Way for the Implementation in Jiangxi, Article 29 prescribes that a pair of spouses may sign jointly for their community properties that need to be registered, and pertinent departments should offer their support. The 30th article stipulates that as they constitute village autonomous rules and unofficial villager rules or covenants or decide matters such as the rights and interests concerning lands, no villager commissions, villager meetings, villagers’ representative meetings or villager groups shall take women’s being unmarried, married, divorced or widowed as an excuse to infringe women’s rights or interests that they should have equally enjoyed by law as men do, in terms of the contracting and operating of lands, the sharing of collective economic organizations’ incomes, the sharing and using of compensated funds for the confiscated or requisitioned lands, and the using of residence grounds, and so forth.

I. The issue of sexual harassment has further been defined

The stipulation about sexual harassment in the Law of the Protection of Women’s Rights and Interests is a legislative breakthrough, and also a historical step forward. The law in question is still insufficient in terms of detailed provisions, but it has offered some direct explicit legal warrant for cracking down on sexual harassment by law anyhow.

Most of the Ways for the Implementation have adopted some experiences both abroad and in Hong Kong, China to further define sexual harassment. For example, the Ways for the Implementation in Guangdong Province has offered a relatively detailed description about the forms of sexual harassment: “The sexual harassment in any forms such as behaviors, speeches, letters, pictures, images and electronic information, which goes against the will of a woman and contains sexual contents or involves sex, shall be forbidden.

The employer unit and the management unit in a public site should undertake measures such as creating a proper environment or setting up a necessary investigation and complaint system to prevent and hold out the sexual harassments against women.

A woman annoyed by sexual harassment is entitled to complain to related organizations.”

The clear definition of sexual harassment enables people to know what sexual harassment is and what legal liability sexual harassment might bring. With strong pertinence, warnings and deterrent work better than punishment. In addition, most of the Ways for the Implementation have stipulated legal responsibilities for employer units to prevent sexual harassment. “An employer unit should take effective (necessary) measures to prevent and hold out sexual harassment.”



J. The issue of family violence has received due attention

After its 2001 amendment of the Law of Marriage, the Law of the Protection of Women's Rights and Interests went further to prohibit family violence. The opposition to family violence has been all over China for long, and many research achievements and practical experiences have been accumulated in each place, so the newly amended Ways for the Implementation is relatively more sufficient and specific in describing the issue of family violence and related remedy measures and administrative ones. For example, its description about the concept of family violence primarily adopts the content in the Rules on the Prevention and Interdiction of Family Violence of Hebei Province: "the behaviors causing physical and/or spiritual injuries to other family members through beating, binding and cruelly injuring them, or coercively constraining their personal freedom, or any other means." In terms of remedies, the Article 38.2 in the Ways for the Implementation in Anhui Province prescribes, "When dealing with family violence, public security institutions should collect and preserve by law the evidences related to the family violence." And the 39th article in the same document stipulates, "On a request by woman victim of family violence, the urban or rural basic non-governmental organizations or related units that deliver relieves should offer the evidences concerning the related events; and the medical institutions that have treated the victims should offer the records of diagnosis and treatment." Such provisions are very practical.

But unfortunately, in some places, the judicial interpretation by the Supreme Court about how to deal with family violence has completely been included into the Ways for the Implementation. That may be more exercisable, but certainly will reduce the range of family violence, for the family violence coped with judicial approaches is usually that which has caused serious injuries, while the family violence that the Ways for the Implementation is designed to prohibit is much broader than that in the juridical definition because it involves the purpose of prevention. At the same time, the expressions in some of the Ways for the Implementation are somewhat improper. For examples, in the Ways for the Implementation in Shaanxi, the 39th article stipulates that "For the women victims who are temporarily not able to return to their home because of family violence, women's non-governmental organizations should coordinate the related departments and institutions such as those of civil administration to deliver necessary relieves." This provision is designed for the good of women, but these organizations by women are merely some non-governmental ones, and have not power or responsibilities to coordinate governmental departments. It is the governmental institutions for women and children instead of women's non-governmental organizations that should be responsible for this job.

K. The legal liability of infringing women's rights and interests has further been specified

As with legal liability, the Ways for the Implementation have further embodied some administrative measures and relief approaches. For example, Heilongjiang Province employs the form of regulations to finalize some concrete sanctions such as penalties, offering some actual legal basis for dealing with the infringement of women's rights and interests. At the same time, many provinces have also stipulated the responsibilities of pertinent personnel in their Ways for the Implementation. For instance, the Ways for the Implementation in Shanghai stipulates,



“The pertinent departments should fulfill by law a notice of supervising and urging execution within 15 workdays from on the day they receive the notice of supervising and urging execution. Where neither reply is made nor the case is dealt with within the limit of the term, a women and children’s service commission may suggest the people’s government at the same level demanding the pertinent departments to rectify their defaults, and may advise the pertinent departments to condemn the executives and other staff members who are directly responsible with administrative punishment.”

To sum up, the year 2007 has witnessed both a great progress of the legal guarantee for women’s human rights, and new development of related legislation. It will cast a great positive influence towards the guarantee of women’s human rights, the improvement of equality between men and women, and the boost of a harmonious society.

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ANALYSIS FRAMEWORK OF GIRL CHILD ISSUE: RIGHTS AS A CHILD AND AS A WOMAN

Bu Wei
China

Girl child, should enjoy the rights as a child and as a woman. Therefore, analysis framework should be the right of the child and right of woman.

1. Rights of girl child as a child

On November 20th, 1959, the United Nations General Assembly passed *Declaration of the Rights of the Child*, proposed each fundamental right that children of every country should enjoy. Based on this declaration, in 1978 the United Nations General Assembly 33rd session passed a decision on establishing a draft work team of *Convention on the Rights of the Child*. It took ten years from 1979 to 1989 to complete the draft work. On November 20, 1989, the United Nations General Assembly 44th session adopted the 44/25th Resolution unanimously, and made it open for signature, ratification and accession by all states. Up to now, the UN’s *Convention on the Rights of the Child* has already been ratified by 192 countries. In 1989 on the 44th session of United Nations General Assembly, China became one of the cosponsor countries for this convention draft. On August 29th, 1990, China officially signed the United Nations *Convention on the Rights of the Child*. In 1991, the Standing Committee of the National People’s Congress authorized the *Convention*. On April 1st, 1992, *Convention* became officially effective in China. Our government started to undertake and to fulfill every duty on protection of the child’s fundamental human rights which the *Convention* stipulated. In the same year, China promulgated Law on the Protection of



Minors and also formulated the original programme for the *Convention on the Rights of the Child*, namely *90's National Programme of Action for Child Development in China*.

According to the United Nations *Convention on the Rights of the Child*, the child is referred to any person under 18-year old. *Law of the People's Republic of China on the Protection of Minors* (hereafter referred to as *Law on the Protection of Minors*) announced in 1991, stipulated that citizens under 18years old should be called as the minor. The minor defined by Chinese laws, is the child defined by the UN's *Convention on the Rights of the Child*. The UN *Convention on the Rights of the Child* is designed to protect and promote a wide range of child rights, including the right to be alive, the right to a name, the right to a nationality (to belong to a country), the right to an identity (a name), the right to live with parents, the right to give opinions, the right to entertainment and leisure, the right to privacy, the right to education, the right to the best health care possible and so on. We can categorize the rights into four groups- survival, development, protection, and participation.

Survival Rights - These cover the right to life and the right to the highest standards of health and medical care attainable.

Development Rights - These include all kinds of education (formal (in-school) and non-formal (out-of-school)) and the right to a standard of living which is adequate for the child's physical, mental, spiritual, moral and social development.

Protection Rights - These include protection from discrimination, abuse and neglect, protection for children without families and protection for refugee children.

Participation Rights - These cover the right of a child to participate in family, cultural and social life and the right to express her/his views in all matters affecting that child. That's one good reason for your being here at the Forum!

We have to explain that the classification of the rights of the child is not absolute. For example, giving the child in crisis situation essential protection, is the child's right to survival, but also may be regarded as the child's right to protection; The girl child dropping out of school, is the issue of the right to protection "without discrimination," also is the issue of the child's right to development; the child's right to expression, not only belongs to the category of the right to development, but simultaneously is also regarded as the right to participation.

Regarding each right above, in the *Convention* article 2 explains that "State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." This article clearly indicated that regardless of gender all children should enjoy the right to survival, the right to development, the right to protection and the right to participation. With respect to the *Convention on the Rights of the Child*, the term "discrimination" should be understood to imply any

- Distinction
- Exclusion
- Restriction or



- Preference (Edwin Judd, 2000: 6)

The government has the responsibility to fight against any kind of discrimination and to guarantee that the girl child could enjoy the same rights as the boy child.

2. Rights of girl child as a woman

Girl child as a child, is at the disadvantageous position in the majority societies and countries, and her rights could be harmed; moreover, girl child as a woman could suffer discrimination, exclusion, restriction and harm based on her gender. Therefore, we should not only guarantee that girl child could enjoy the rights of the child, but also should pay attention to her rights as a woman.

On December 18th, 1979, 34th session of United Nations General Assembly adopted the *Convention on the Elimination of All Forms of Discrimination against Women*, an international legal document which clarified every fundamental human right for women. On July 17th, 1980, Chinese government signed *Convention on the Elimination of All Forms of Discrimination against Women*. On November 4th, 1980, China authorized to join the Convention. On September 3rd, 1981, the *Convention* became effective in China. The *Convention* indicated that “extensive discrimination against women continues to exist,” this kind of discrimination “violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.” The term “discrimination against women” shall mean “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” (Article 1)

According to the *Convention*, State Parties are responsible for pursuing a policy of eliminating discrimination against women (Article 2). They shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men (Article 3). The girl child is an underage woman, and should enjoy the rights on what *Convention on the Elimination of All Forms of Discrimination against Women* elaborated.

In addition, some articles of the *Convention* are directly related to girl child. For instance, State Parties shall take all appropriate measures “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (Article 5); State Parties shall take all appropriate measures “to ensure to them equal rights with men in the field of education” including providing the same opportunities for access to school, access to the same curricula, the same opportunities to benefit from scholarship, the same opportunities to participate actively in sports and access to specific educational information to help to ensure the health and well-being of



families, including information and advice on family planning, and reducing female student drop-out rates. They shall take all appropriate measures “to eliminate any stereotyped concept of the roles of men and women at all levels and in all forms of education by the revision of textbooks and school programmes and the adaptation of teaching methods.” (Article 10)

3. *Beijing Platform for Action* and child's life-cycle framework

UNICEF has already developed a life-cycle framework to evaluate girl child's development, so as to promote governments and UNICEF to consider the girl child's all kinds of needs and rights at different growth stages (Wickramasinghe, Lakshman, 1999: 20). This point was also reflected in *Beijing Platform for Action* article 38 and article 39, the official documentation of 1995 UN Fourth World Conference on Women: “In a number of countries, the practice of prenatal sex selection, higher rates of mortality among very young girls and lower rates of school enrolment for girls as compared with boys suggest that son preference is curtailing the access of girl children to food, education and health care and even life itself. Discrimination against women begins at the earliest stages of life and must therefore be addressed from then onwards; the girl child of today is the woman of tomorrow. The skills, ideas and energy of the girl child are vital for full attainment of the goals of equality, development and peace. If women are to be equal partners with men, in every aspect of life and development, now it is the time to recognize the human dignity and worth of the girl child and to ensure the full enjoyment of her human rights and fundamental freedoms.” Otherwise, “Discrimination and neglect in childhood can initiate a lifelong downward spiral of deprivation and exclusion from the social mainstream.” (260)

Beijing Platform for Action has listed “girl child” as one of 12 critical areas. Besides the “girl child” section, girl child issue was reaffirmed in two other sections Education and Training of Women and Women and Health. This report put girl child's life cycle (from birth to 18-year old adolescence) and girl child issue of *Beijing Platform for Action* together, developing a crossover sheet, table 1 as following.

Table 1 Gender Issues in Girl Child's Life Cycle

Life cycle stages	Main obstacles of girl child development in Beijing Platform for Action	Violated girl child's rights
Before birth	Prenatal sex selection (38, 259)	right to survival
Infant and baby	Higher rates of female infant mortality (38) Female infanticide (39, 259) Discrimination against the girl child in her access to nutrition and physical and mental health services (93, 259, 266)	right to survival
childhood	Sexual and economic exploitation (39, 259), Child marriage (39, 259) Female genital mutilation (39, 259) Lower rates of school enrolment for girls as	



compared with boys (38)

Girls without access to primary schooling (70, 263)

Discrimination in girls' access to education (71)

Girls undertake heavy domestic work at a very early age and result in early drop-out from the educational system (71, 263)

Curricula and teaching materials remain gender-biased to a large degree, and are rarely sensitive to the specific needs of girls and women. This reinforces traditional gender roles (74)

Lack of gender awareness by educators at all levels strengthens discriminatory tendencies and undermines girls' self-esteem. (74)

Gender-biased educational processes, including curricula, educational materials and practices, teachers' attitudes and classroom interaction, reinforce existing gender inequalities. (261)

Science curricula in particular are gender-biased. Science textbooks do not relate to women's and girls' daily experience and fail to give recognition to women scientists (75)

Girls are often deprived of basic education in mathematics and science and technical training, which reduce their employment opportunities (75, 264)

Resources allocated to education, particularly for girls and women are inadequate (78)

Girls and adolescents may receive traditional messages on their gender roles from their parents, teachers, peers and the media (262)

The shortage of women teachers (263)

The safety and education of the girl child with disabilities, homeless, displaced and street children (270, 271)

Adolescence

All the discrimination concerning education mentioned above

Economic exploitation (39)

The lack of sexual and reproductive health education has a negative impact on women and men; girls without access to nutrition and health-care services; counselling and access

to sexual and reproductive health information and services for adolescents are still inadequate or lacking completely (74, 93, 267)

Early marriage, pregnancy and child-bearing (Unsafe abortions endanger their current and future health and well-being) (39, 93, 268)

Sexual and gender-based violence, including physical and psychological abuse, trafficking in women and girls, and other forms of abuse and sexual exploitation which place girls and women at high risk of physical and mental trauma (39, 93, 99)

Girls' unprotected and premature sexual practices result in HIV/AIDS and other sexually transmitted diseases. (98, 269)

Girls are less encouraged than boys to participate in and learn about the social, economic and political functioning of society, with the result that they are not offered the same opportunities as boys to take part in decision-making processes. (265)

In order to safeguard the girl child's human rights, *Beijing platform for Action* proposed nine strategic objectives in its "the Girl Child" session, as following: L. 1 Eliminate all forms of discrimination against the girl child; L. 2 Eliminate negative cultural attitudes and practices against girls; L. 3 Promote and protect the rights of the girl child and increase awareness of her needs and potential; L. 4 Eliminate discrimination against girls in education, skills development and training; L. 5 Eliminate discrimination against girls in health and nutrition; L. 6 Eliminate the economic exploitation of child labor and protect young girls at work; L. 7 Eradicate violence against the girl child; L. 8 Promote the girl child's awareness of and participation in social, economic and political life; L. 9 Strengthen the role of the family (based on the definition in article 29) in improving the status of the girl child.

In addition, in the area of Women and Health, *Beijing Declaration* proposed detailed objectives as following: eliminate harmful attitudes and practices including selective abortion (107); take specific measures for closing the gender gaps in morbidity and mortality between girls and boys (106); ensure that girls have continuing access to necessary health and nutrition information and services from childhood to adulthood (42); promote breast-feeding (106); eliminate female genital mutilation and other harmful attitudes and practices (107); and provide girls with education and information on sexual and reproductive health issues (107). The detailed objectives of Education and Training of Women area are: close the gender gap in primary and secondary school education; create a gender-sensitive educational system; encourage girls to receive education by allocating appropriate budgetary resources; make available non-



discriminatory and gender-sensitive professional school counselling and career education programmes to encourage girls to pursue academic and technical curricula in order to widen their future career opportunities (80); provide non-formal educational opportunities for girls (82); develop gender-sensitive training programmes and materials for teachers, with a view to providing them with effective strategies for gender-sensitive teaching; take actions to ensure that female teachers and professors have the same opportunities as and equal status with male teachers and professors (83); provide funding for special programmes, such as programmes in mathematics, science and computer technology, to advance opportunities for girls (85).

According to the investigation and study projects and intervention projects concerning girl child and women development in the past decade, all the other girl child issues have already appeared in China, except the large-scale female genital mutilation under the influence of traditional attitudes and practices. However before 1995 World Conference of Women, China's girl child issue concentrated on girl child education, exactly to say, the issue of equal opportunity of school enrolment for girl child. But we could see from international analysis framework of girl child, girl child issue is not merely the issue of equal opportunity of school enrolment. The girl child issues are so extensive that we have to look deeply and carefully when discussing it into what obstacles and challenges are actually faced by girl child development and what kind of effort we have to make to eliminate these obstacles to create a world fit for girl child to grow up in China.

4. Most outstanding challenge: "The girl child has been left out"

In 1999, the United Nations Children's Fund and the All-China Women's Federation held "The National Symposium on the Girl Child."

"Why do we want to pay attention to the girl child?" At this Symposium, United Nations Children's Fund official Wickramasinghe, lakshman explained that, "*Convention on the Rights of the Child* article 2 affirms that children should not be discriminated against due to sex or other reasons, and gives force to the principle that girls have equal rights to boys. In addition to protecting their rights as people, there are two strong reasons why UNICEF focuses on girls.

The first is that in most countries, programmes for children are gender-neutral. That is they do not differentiate service provision by sex. Unfortunately, in the majority of cases this approach has not produced gender-balanced results, so girls do not receive equal benefit from the services. The second reason is that many of the problems faced by women is to rooted in discrimination against girls, so one sure way of working to reduce discrimination against women is to prevent discrimination against girls. Therefore, we hope that the girl child's needs should be considered in all child programmes." (Wickramasinghe, Lakshman, 1999: 20) At this symposium, United Nations Children's Fund's gender consultant Croll talked that the positive catchphrase of supporting girl child is "The Girls of Today Are the Woman of Tomorrow"; this is an excellent catchphrase, but we have to alert about the idea that because the girl child is the woman of tomorrow, she does not have the gender issue today. (Croll, Elisabeth, 1999)

In the Keynote Address: The Current Situation and Main Issues of the Girl Child in Asia and China by Elisabeth Croll, she pointed out that, "girls are probably the most under-studied of all social groups in most societies. There has been much interest and activity around the issues



of women and gender but very rarely is this extended routinely to include girls,” and “there has been a great deal of attention to and progress in programmes to do with children, but very rarely are children either divided into boys and girls or seen to have different needs and interests in the family, community and society. It is presumed that work with children, like work with women, will benefit girls automatically. Yet the statistics show that there are vulnerable points in girls’ lives different from those of boys or older women.” Therefore, the girl has been left out (Croll, 1999: 9), namely the extension of girl child issue has not obtained the value which it should have.

The United Nations Children’s Fund from the following two aspects elaborated the necessity of putting a value on girl child issues:

First, woman’s rights and girl’s rights are interdependent. Only in the society that woman enjoy the right of equality, girl child can attain the same kind of right. At the same time, girl child’s rights to survival, development, protection and participation, their realization level or violation level in her process of growing up, would decide her future living conditions as a woman.

Second, no girl child’s rights, no children’s rights. No discrimination against any child, is the fundamental principle of children’s rights. Girl child takes up half of the child population, and if her right of equality cannot be guaranteed, we will never achieve the goal of realization of child’s rights (United Nations Children’s Fund, 2000: 94).

Therefore, the equality between women and men is not only adult’s issues, also is child’s issues. If we want to reduce discrimination against women, we must prevent discrimination against girls.

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CHINA’S FOREIGN AIDS AND HUMAN RIGHTS CONCERNS

- THOUGHTS PROVOKED BY DARFUR HUMANITARIAN CRISIS

Zhou Qi
China

The humanitarian crisis in Darfur, Sudan, raised China a brand-new subject in the field of international relations: what attitudes and manners should China adopt in treating human rights issues in its major recipient countries when it is trying to establish an international image of a responsible nation and meanwhile maintain the increase of its aid to the third world, which is meant to be mutual beneficial in the form of joint venture and cooperation.

The year of 1995 was a turning point of China’s overall reform in its foreign aid framework. The target was, based on the “grand strategies of economy and trade” put forward by Minister



of Foreign Trade and Economic Cooperation Wu Yi in 1994, to integrate foreign trade, capital flow and international economic cooperation and boost China's economic growth by making use of the internal and foreign funds, resources and markets. As a tool of China's participation in the international economic cooperation, foreign trade programs should implement the strategic ideas raised by the "grand strategies." To achieve this goal, China needed to pursue fund and the diversification of the foreign aid forms while considering the benefits of both the recipient countries and itself. After that, preferential loans provided by financial organs became the main forms of China's foreign aid and joint-venture and cooperative programs were given more heeds and encouragement.

The oil exploration project in Sudan is a successful model of China's mutual benefit cooperative programs. The exploration of Zone Six of the Sudanese oil field by China National Oil and Gas Exploration and Development Corporation was China's first example of exploring overseas oilfield with preferential loans after the country changed its foreign development and aid strategies in 1995. The corporation started, as early as 1994, to seek overseas oil resources to resolve China's oil resource shortage. Learning that the Sudanese government was seeking foreign investment for its internal oil exploration, the corporation performed a preliminary program evaluation and sent technical staff to Sudan for a field survey. After the negotiation with the relevant department of the Sudanese government, both sides decided to cooperate in exploring the oil resource following international norms, i.e. to distribute the oil output according to a certain ratio. At the same time, the program was submitted to China's Ministry of Foreign Trade and Economic Cooperation for approval and it was the time when the Chinese government launched its reform on the foreign aid policies. The program soon gained supports from the ministry and the Export-Import Bank of China. In September 1995, the Chinese government signed with Sudan to provide it with a 150 million RMB preferential loan (the interest of the preferential loan is lower than normal, the margin is subsidized by the government foreign aid fund). After three months, the Export-Import Bank of China reached a loan agreement with China National Oil and Gas Exploration and Development Corporation. The drilling started in January 1997, in the Zone Six of the oil field. Thanks to good performances and credibility of Chinese companies, the corporation then acquired the exploration rights of oil-rich Zone One, Two and Four and also 40 percent of the stock and the management rights of the oilfields, claiming the triumph over the competition with other nine transnational corporations. These again brought about a large sum of oilfield construction contracts.

Sine 1997, China has become the largest foreign investor in Sudan. China's corporations are very active in Sudan's energy-related sectors including oil pipe construction, power and water conservancy. China is also the biggest participant of Sudan's petroleum industry, playing an important role in exploring and prospecting for the oil. China National Petroleum Corporation is the largest stockholder of the Greater Nile Petroleum Operating Company. China is also the largest trade partner of Sudan. Sudan's export to China accounts for 71 percent of its gross export turnover and Sudan's import from China accounts for 21 percent of its total. Sudan is China's third largest trade partner in Africa and its trade with China accounts for 13 percent of China's entire



trade with Africa. In 2006, thanks to the development of petroleum industry and oil export, the economic growth rate of Sudan reached 13 percent, the first place in Africa. Petroleum outputs accounted for 70 percent of Sudan's export turnover, reaching 5.25 billion US dollars in 2006. It is commonly recognized that Sudan's economic growth should attribute to PetroDar Operating Company (PDOC in short, which is an international consortium jointly established by China National Petroleum Corporation, Petronas, the Greater Nile Petroleum Operating Company, China Petrochemical Corporation and Al Thani Corporation from United Arab Emirates.)

Yet the deterioration of Sudanese political situation was receiving more and more concerns from the international community. In February, two tribal anti-government armed forces - Sudanese Liberation Army and the Sudanese Justice and Equality Movement - were successively founded in Darfur. They opposed with force the Arabic Sudanese government, accusing it of implementing discriminatory policies toward them during the past decades and condemned Sudanese President Omar Al-Bashir to use an Arabian militia organization, called Janjaweed, to perform retaliation toward them in Darfur. According to the UN estimation, assaults of Arabian militia since 2003 left over 200,000 people killed and 2.5 million others homeless.

The Sudanese government reached a ceasefire agreement with Darfur anti-government armed forces in April 2004, and an African Union troop consisting of more than 7,000 men then garrisoned into Darfur to carry out peacekeeping tasks. Nevertheless, limited by its own capabilities and funds, the AU failed to completely resolve the stability crisis in Darfur. The AU felt it would be difficult for it to continue the peacekeeping task by the end of March when the authorization expired, so it suggested transferring the peacekeeping task to the United Nations. The United Nations thereafter denoted to be willing to take this task. The United Nations Security Council passed its No. 1706 Resolution on August 31, 2006, deciding to dispatch a 17,300-man peacekeeping troop to Darfur if agreed by the Sudanese government. But the Sudanese government set itself against this resolution. The UN Secretary General Kofi A. Annan put forward a three-stage project in November 2006, proposing to deploy a mixed AU-UN peacekeeping troop in Darfur so as to resolve the conflicts.

The confrontation in Darfur was regarded as a human rights issue by the international community, as it violated the human rights of the local non-Arabian races who believe in Christianity. The Sudanese government was also condemned by many UN resolutions. On the other hand, China's intimate relationship with Sudan, including the bilateral economic, political and military relations was regarded as levers influencing Sudan. Nonetheless, although China actively provided aid to Sudan, China stuck to a non-exclusive economic cooperation policy based on equality, mutual benefits and transparency while adhering to its principle not to interfere in other country's internal affairs. From the very beginning, China did not pay special attention to Sudan's human rights situation. China firmly believed that its aid and investment toward Sudan would make great contributions to Sudan's economic and social development. Moreover, China unswervingly believed that its economic cooperation with Sudan would create favorable conditions to resolve the Darfur issue, because the fundamental causes of the confrontation were poverty and undeveloped economy. In China's views, the population surge and overgrazing in



the 1960s and 1970s caused land desertification, forcing some Arabian inhabitants to seek water sources southward and then caused scramble of resources with the local black people tribes.

China implement policies which do not interfere in Sudan's internal affairs and claimed two principles based on which the Sudanese problems can be resolved: respect the sovereignty and territorial integration of Sudan; seek to solve the issue through dialogues and equal consultation. The Chinese government also denotes to support the constructive roles of the AU and the UN.

China continued providing important financial aid to Sudan. During President Hu Jintao's visit to Sudan, China agreed to exempt Sudan from its 80 million US dollar debt and provided a 13 million interest-free loan in the infrastructure construction program. China also promised to provide 5.2 million US dollar humanitarian aid to Sudan. Furthermore, China also provided 30 million US dollar in Darfur's dam project. China's humanitarian aid included providing movable houses for at least 120 schools, transportation vehicles, power stations, water pumps and other facilities to restore production and development.

China Assistant Foreign Minister Zhai Jun paid a visit to Darfur and three refugee camps in April 2007. During the press conference, Zhai on one hand pointed out people who wanted to boycott the Olympic Games were either out of ignorance or with ulterior motives; on the other hand, he supplemented that China suggested Sudan showing its flexibility and accepting the UN peacekeeping troop. Thereafter, the Chinese government started to intermediate the standpoints of all parties based on Annan's three-stage plan. In May 2007, the Chinese government decided to appoint Liu Guijin, China's former ambassador to Zimbabwe and South Africa, as the envoy of African affairs, whose main duty was to resolve the Darfur issue. Foreign Ministry spokesman also testified that China would dispatch 275 sappers to join the United Nations' peacekeeping actions. The Foreign Ministry spokesman refuted the denouncement against China, while pointing out that China's non-antagonizing methods had already proved effective and denoted "China and the United States shared the same goal on Darfur issue. We hope to resolve the issue in political ways, therefore we prepared to make attempts together with the international community, including the United States."

Liu Guijin's tasks were to liaison and exchange ideas with the Sudanese government and other countries on Darfur issue, discuss solutions of the issue and make the world understand China's basic standpoints and viewpoints on this issue. The Chinese government tries to intermediate, contact and exchange viewpoints among Sudan, the African Unions, the League of Arab States and the United Nations. Liu told Financial Times that "China is using its own way, through all methods and channels, to try to persuade the Sudanese government to adopt a more flexible standpoint. On some problems, for example whether to accept Annan's plan, China has even used very direct words when talking with them."

The United Nations Security Council passed its No. 1796 Resolution on July 31, 2007, deciding to dispatch a 26,000-man AU-UN mixed peacekeeping troop to Darfur on December 3, 2007. Though the resolution authorized to dispatch the peacekeeping troop, it strengthened the Darfur issue could not be resolved merely through the military way. Wang Guangya, Chinese Ambassador to the United Nations, said after the UNSC vote, that the peacekeeping move was



only one aspect of solving the problem while the other aspect was the political process. As a result, the resolving methods ought to be double-tracked and the second track that promoted negotiation between the Sudanese government and the local rebelled organizations should not be abandoned but accelerated. The draft of the resolution was in fact proposed on July 11, 2006, which gained widespread supports from the international community but was strongly opposed by the Sudanese government and UNSC's three nonpermanent members in Africa. Chinese Ambassador to the United Nations Wang Guangya and other members of the Chinese delegation to the United Nations made their biggest efforts to make consultation on this resolution with other delegations, trying to weaken some parts of the resolution which could not be accepted by the Sudanese government. Sudan's discontent was concentrated on the authorization toward the UN peacekeeping troop, fearing that it would uncontrollably interfere in Sudan's internal affairs. China showed its understandings toward this and therefore suggested that the AU-UN mixed troop should not be deployed until granted by Sudan and China opposed the resolution on multilateral economic and diplomatic sanctions against Sudan. After the amendment of the resolution by stipulating the peacekeeping troop will resort to forces only for protecting itself, providing humanitarian aids and protecting the civilians from attacks, the Sudanese government finally dissolved suspicions and accepted the No. 1769 Resolution. China has played a pivotal role during the negotiation. The Sudanese government's acceptance of the resolution meant the ending of the first stage and the beginning of the second. Though Sudan still reserved its opinions on the third stage, however, it consented to have a discussion with all parties related.

On the second stage of political resolve, the Sudanese government said it was willing to negotiate with the enemy forces, boosting them to join in the Darfur peaceful agreement. Under this circumstance, China believes that further sanctions against Sudan will only leave the situation more complicated but by no means help reach the agreement. International organizations, including the United Nations and the African Union, and other nations have made great efforts to alleviate the tense situation in Darfur. A peaceful agreement including disarming the anti-government organizations was eventually signed after several rounds of negotiations between the Sudanese government and the two rebelled organizations. The Sudanese government insisted that the AU-UN mixed troop should be under command of a man from an African country. After the consultation between Sudan and the African Union, it was decided that the troop would be under the command of a Nigerian.

China started to deploy 135 advance peacekeeping sappers on November 24, whose tasks included drilling wells, building bridges and mending roads, a good preparation for the third stage. China has also sent out medical teams. The total number of the Chinese troop will eventually rise to 315. The Chinese corporations in Sudan will provide Sudan with more aids, for instance, Huawei and CITIC Group have already donated long-range education facilities and 16 computers and are preparing to provide more educational donation. Sinopec and some other companies plan to raise two-million-US-dollar humanitarian aid. Moreover, the Chinese government has dispatched agronomists to Sudan, designing agricultural technological centers and providing more aids to the agricultural development. To improve the humanitarian situation in Darfur, China has



already provided it with five sums of aid, totaling 80 million RMB, or 11 million US dollars. Meanwhile, China has provided 18 million US dollars to the League of Arab States and 500,000 US dollar donation to the United Nations to resolve the Darfur issue.

China has taken an attitude to actively cooperate with the United Nations, the African Union and the League of Arab States on the Sudanese humanitarian crisis. As a matter of fact, China is playing a pivotal role in dispatching peacekeeping staff, providing humanitarian aid, promoting Sudan to accept Annan's three-stage plan and boosting all forces in Sudan to reach a peaceful agreement through political resolution. Nevertheless, China's attempts did not prevent Steven Spielberg, under great pressures, quitting his job, nor stopped the mouths of the US congressmen (The US Congress passed a resolution on March 6 this year, opposing President Bush and the congressmen to show their faces in the Beijing Olympics with the reason that China did not try its best on the Darfur issue). There are not only lessons China should draw, but also problems of some westerners who conceive prejudice and even hostility against China.

The lessons China should learn from the Darfur issue are: the century-long humiliation that China underwent in the modern history made the western imperialists' deeds including invasion and intervention remain fresh in the country's memory, as a result, it pays more heeds to the diplomatic principles of respecting sovereignty. But if China wants to show the world it is a responsible nation, it must well balance the principle that persevere not to interfere in others' internal affairs and the will to boost resolve the humanitarian crises in the international community. The practice of neglecting humanitarian problems and sticking to nonintervention will not be recognized by the international community in the globalization age after the cold war. Although China quickly changed its practices after realizing this, yet the already-existing influences did not make China's efforts fully acknowledged by some countries and international nongovernmental organizations. In other words, China got half the result with twice the effort. If China had taken some proactive actions from the very beginning, the effects would have been much better. In view of this, China should become more sensitive in this sort of human rights issues in the future, especially in those who receive important aid from and have close relations with China, turning the passive situation to an active one. Of course, the intervention can be dialogues and consultations under the premises of fully respecting the country's sovereignty and territorial integration and on an equal basis, just like what China has already done.

On the other hand, it is unreasonable for some western nations to ask China to give up its oilfield exploration in Sudan or to take the main responsibilities for the Sudanese human rights plight. First of all, China's oil exploration in Sudan belongs to normal international economic cooperation, which has remarkably boosted Sudan's economic growth. Sudan's GDP growth rate ranks among the best in Africa, which is, to a large extent, thanks to China's economic aid and cooperation. China's withdrawal from Sudan will only bring about an economic regradation of the latter. However, just as what the Chinese government pointed out, the root of the crisis is poverty. Then imagine how can the more poverty-stricken nation resolve this crisis in a better way? The answer is definitely negative. Secondly, facts show that political approaches can be effective in resolving crises, better than diplomatic measures and economic sanctions. Thirdly, when China



exerted its biggest efforts in promoting to resolve the humanitarian crises, have those who call for more pressures on China ever self-examined whether or not their nations have done better in the countries bearing intimate relations with them than what China did in Sudan; whether or not their nations have well taken all the international duties that they should according to international treaties in all the countries with human rights plights?

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PROTECTION AND DEVELOPMENT OF HUMAN RIGHTS IN THE WORLD





STATE RIGHTS, SOVEREIGNTY AND HUMAN RIGHTS: WHOSE RIGHTS AND WHOSE RESPONSIBILITY TO PROTECT?

Jeremy Paltiel
Canada

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This year marks the 75th anniversary of Adolf Hitler's rise to power. The international human rights regime in place today is in large measure a response to his murderous regime whose unrestrained aggression launched a genocidal holocaust in Europe. That is why the promotion of human rights is enshrined in the preamble of the Charter and in Article one placed as one of the purposes of the United Nations.²⁸⁷ The idea of human rights finds its source in the European Enlightenment, and *Declaration of the Rights of Man* embraced by the French Revolution in 1789. Of course, throughout the world, many religious thinkers and philosophers had long proclaimed principles of humanity and humane governance. Humane government is neither a monopoly of Western Civilization, nor as the example of Hitlerite crimes amply demonstrates, has Western culture always been its highest exponent. However, the culture of human rights is strictly an invention of the West. This does not in any way mean that it is restricted to, or privileged by its association with Western culture. For example, food is an important expression of culture. Yet wheat was domesticated in the Middle East cultivated in North China and turned into noodles, which were then brought back to the Mediterranean basin, combined with tomatoes which were domesticated in South America and turned into pasta, a staple of Italian cooking. The failure of a potato crop, which was a staple introduced from Peru only in the 16th Century led to the emigration of the Irish to the New World. Cultures change, adapt, and take on new characteristics, and human rights can no more be associated only with Europe than potatoes restricted to Peru or corn to Central America. They are a common heritage of humankind.

We cannot, at the same time, neglect the basic purpose of human rights as expressed in the Declaration of the Rights of Man. It is to ensure that the purpose of government is to protect the interests of people. People are the end of government and not the other way around. Of course, this idea was already present in the thought of Confucius and Mencius 2,500 years ago who argued the people are the root of government. But the language of rights was so specific to the West that there was no exact translation of the term until the second half of the 19th Century when the translation of Wheaton's Principles Of International Law by the American Missionary W.A.P.

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Martin was commissioned by the Zongli Yamen of the Qing Court.²⁸⁸ Most of the basic elements that undergird a rights based culture were well understood in Chinese culture - Reciprocity, Law, and obligation. But they were not used in the Western form. The basic idea of rights is a call to the specific obligations entered into by mutual consent. Human rights are the obligations owed to us on the common basis of our humanity. They can no more culturally relative than is the minimum caloric standard needed to sustain healthy life. However, rights cannot be claims unless there is someone against whom to make these claims. There must be some person or body who can enforce the claim and perform the obligation that one is calling upon. That is why rights cannot be separated from government and the power of the state. We can make a simple statement. No states, no rights. However, not all states are respecters of rights. Therefore the existence of a coherent state is necessary condition for rights to exist, but not a sufficient one. Unlike the people of the European Enlightenment we do not require the fantasy of the "State of Nature" to anchor human rights discourse. We can accept that people are the end of government without simultaneously imagining the condition of human beings outside government. In fact we are only too aware of the frightful circumstances of living without law or government. We all know that the first order of government is to provide security for the life of its inhabitants. Without security there is no life. The most vexing problem of the contemporary world is the problem of providing security where none exists. The worst abuses of human rights do not occur under sovereign states. They occur where sovereign states do not exist or where the state is too weak to provide security. Moreover since 9/11 the problem of security and its relationship to human rights has become salient even in well-established sovereign states. The existence and promotion of human rights requires the sovereign state as its context.

Nevertheless, we cannot claim on this basis, that sovereignty is somehow prior to human rights or that it supersedes it. This is true both on moral and practical grounds. The fact of the matter is, that where governments are incapable of providing security, conflict often spills over the border, sending refugees and insurgents into neighbouring countries. That no government can provide consistent security or stability without the broad consent of the population is a principle recognized in China as much as elsewhere. The only question, then, is whom governments are accountable to, and how, where a government fails to respond to the human rights claims of its own citizens and inhabitants it should be held accountable by anyone else.

Former Secretary General of the United Nations Kofi Anan has stated that sovereignty is a responsibility:

State sovereignty, in its most basic sense is being redefined - not least by the forces of globalization and international cooperation. States are now widely understood to be instruments at the service of their peoples, not vice-versa. At the same time individual sovereignty - by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties - has been enhanced by a renewed and spreading consciousness

288 For a genealogy of rights and sovereignty in china see the author's *The Empire's New Clothes: Cultural Particularism and Universal Value in China's Quest for Global Status* (New York: Palgrave 2007) esp. pp. 56-68.



of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.²⁸⁹

Most recently he has applied this as part of his mediation efforts in Kenya on behalf of the United Nations. Cultures may vary but humanity is indivisible. The structure of the United Nations not only protects sovereignty as the outer shell of lawful governance it also unites states in the pursuit of human rights. Rights do not exist in the absence of accountability. We live in a world where the principles of reciprocity have been universalized. Reciprocity is also not strictly a Western concept. It is deeply imbedded in Confucian thought as Shu and Buddhist thought as Bao.

We must distinguish between accountability, censure, and sanction. The question of accountability does not require placing any one person or body in the seat of judgment. It simply requires that the body or person called to account has the obligation to answer. Confucian thought makes it plain that pointing out fault is not simply a privilege it is an obligation in itself.

The Master replied, "What words are these! What words are these! Anciently, if the Son of Heaven had seven ministers who would remonstrate with him, although he had not right methods of government, he would not lose his possession of the kingdom. If the prince of a state had five such ministers, though his measures might be equally wrong, he would not lose his state. If a great officer had three, he would not, in a similar case, lose (the headship of) his clan. If an inferior officer had a friend who would remonstrate with him, a good name would not cease to be connected with his character. And the father who had a son that would remonstrate with him would not sink into the gulf of unrighteous deeds. Therefore when a case of unrighteous conduct is concerned, a son must by no means keep from remonstrating with his father, nor a minister from remonstrating with his ruler. Hence, since remonstrance is required in the case of unrighteous conduct, how can (simple) obedience to the orders of a father be accounted filial piety?"²⁹⁰

Clearly, while Confucian thought is not rights based, does not condone silence or impunity in the face of misdeeds. The entire fabric of international relations today is permeated by the facts of interdependence. The political situation at the time of the Treaty of Westphalia in 1648 that established the principles of sovereignty and non-interference are not applicable to the circumstances of the twenty-first century. This does not excuse or permit a blanket license to intervention. However, whereas the most important aspects of sovereignty and the rule of law back in the 17th Century may have had to do with mutual respect of borders, and tolerance of religious difference in the a mutual atmosphere of each state having its own regulations concerning the established religion, international relations in the twenty-first century are mainly bound up with the movement of goods, persons, capital and ideas across state boundaries. The rule of law is invoked to facilitate, encourage and regulate an increasing volume of trans-border flows. In this context, it is inevitable that states will be called upon to harmonize standards and

289 Kofi Annan, "Two Concepts of Sovereignty", *The Economist*, September 18, 1999, pp. 49-50.

290 Xiaojing - The Classic of Filial Piety, XV Filial Piety in Relation to Reproof and Remonstrance, www.chinapage.com/confucius/xiaojing-be.html



to establish mutual trust by bringing codes of law in line with one another. These movements involve the seamless passage of persons and goods from one regulatory authority to the next. These circumstances demand transparency and fairness and these are written into the charter of the World Trade Organization. Property rights and “national treatment” cannot be respected in the absence of the rule of law and by implication, human rights. At the same time in the twenty-first century it is unacceptable and inconceivable that we should privilege property owners as bearers of rights before all other persons. Clearly if property owners are deserving of rights it is first and foremost because they are deserving of rights by virtue of being human beings.

The actual volume of trans-border flows has grown exponentially over the past few centuries whether it is measured in trade, investment, migration or tourism. The modern passport dates only to the days of the First World War, and became general after the passage of the British Nationality act of 1914.²⁹¹ For the US, for example, the number of passports issued rose from less than 2.5 million 1974 to 12 million in 2006.²⁹² The numbers for China would show even more spectacular rises. Thus as trans-border movement becomes ever more normal it would seem to be anachronistic to claim that each state contains a single homogenous culture and that each state should treat its inhabitants in ways that can be incommensurable with the treatment that human beings can receive elsewhere. While refugee numbers decline from 1997 to 2005, 2006 saw a sharp rise, and the total populations of displaced persons of concern to the UNHCR reached 32.5 million. What this shows is that in the current global situation persons who are unable to receive security and protection at home will move. Domestic issues of human rights inevitable became the problem of neighbouring state regardless of any intent to intervene in the internal affairs. States simply do not have the luxury of indifference. However, the structure and purpose of the UN together with the Universal Declaration of Human rights already provides basic standards of accountability. Moreover international human rights law already recognizes that all states have obligations to one another in the area of human rights irrespective of their adherence to the UN Human Rights Covenants.²⁹³ We do not need further talk of the cultural relativity of human rights. We have a common standard. While it may be, that certain countries may promote some rights more strongly than others, the question when it comes to rights is whether the country in question is responsive to the rights demands of its own people. I and every other human rights advocate that I know of, agree that human rights should be the responsibility of the government in which you reside. The only question that might divide us is what to do about human rights claims that go without response, or worse, are actively repressed. Still less should governments be allowed to wage war with impunity against innocent civilians within their own borders as has been reported, for instance in Darfur Sudan.²⁹⁴

I absolutely agree that it is almost impossible for rights claims to be enforced across borders.

291 <http://www.ips.gov.uk/passport/about-history.asp>

292 http://travel.state.gov/passports/services/stats/stats_890.html

293 This was established by the ICJ in the *Barcelona Traction* case (1970) as well as in *Nicaragua vs. the United States*, (1986)

294 See the New York Times “Scorched-Earth Strategy Returns to Darfur” Sunday March 2. p. A 1 The Genocide Convention provides a universal obligation on all states to act to prevent genocide.



Not only that, I wholeheartedly agree that in many instances the attempt to do so may cause more harm than good. However, that is not the same as saying that where human rights claims go unanswered, it is appropriate for one country to direct the attention of another government to those rights claims. The role of the United Nations Human Rights Council in these cases is to ensure that there is the fullest possible forum to debate these claims and a common atmosphere of respect in which remedies can be discussed.

So I agree, in general terms with the position espoused by the Chinese representative on the UN Human Rights Council:

“We are living in a world of great diversity, with differing national circumstances, varying levels of development, diverse religious and cultural traditions and uneven progress in the field of human rights.” “We should adopt a more inclusive approach by acknowledging such differences and treating them with respect. We also need to strive for harmony as a means to secure development for all.”²⁹⁵

When we speak of respect for difference, we cannot do so in a way that effectively silences rights claimants. China’s late leader, Deng Xiaoping famously asserted that State Rights (*guoquan*) be considered in the same priority as human rights.²⁹⁶ “People who value human rights should not forget the rights of the state.”²⁹⁷ However, to take this at face value suggests that states have value beyond their role in advancing the welfare of human beings. Clearly that cannot be. States must be respected by other states because that is the only way to preserve international peace and is the only way to build international trust for the purposes of organizing an international society and community based on shared values. But if those values are not underlain by the inherent value of the human beings, then there is no other possible basis for international society. The durability of the sovereignty principle is founded on its realism: the principle of effective control over territory and population makes possible the social compact among states that entails peaceful coexistence and mutual recognition. Human rights are an ideal. But they also contain an element of realism. They advance the prospect of a harmonious political community by ensuring that the dignity of every person within that community is respected. This is no different in principle than the proposition that underlies peaceful coexistence in the international community. In a very real sense, recognized as far back as Emmerich de Vattel but also even further back by Mencius in China, these are parallel and mutually supporting propositions. A government that has the support of its people is strong domestically and respected internationally. By contrast, a government that fails its populace becomes a problem internationally.

The question in light of the need for realism is what to do about it. When we look at the

295 “China calls for dialog, co-op in managing human rights”, Source: Xinhua News | Updated: 03-06-2008, <http://www.wsichina.org/morningchina/archive/20080307.html>.

296 See, Deng Xiaoping, “We Must Adhere To Socialism And Prevent Peaceful Evolution Towards Capitalism” (November 23, 1989), *Selected Works* Vol. 3, available online at <http://english.peopledaily.com.cn/dengxp/vol3/text/d1090.html>.

297 Deng Xiaoping, “The United States Should Take the Initiative in Putting an End to the Strains in Sino-American Relations” (October 31, 1989), *Selected Works* Vol. 3, available online at <http://english.peopledaily.com.cn/dengxp/vol3/text/d1060.html>.



experience of humanitarian intervention in recent years, and ask whether the international community has been successful in rebuilding sovereign states that can be fully functioning members of international society the picture is not very optimistic. Afghanistan and Timor Leste are two very troubling cases, as is Iraq. Bosnia and Kosovo are still far from fully functional states. There is some cause for optimism in the case of Liberia and Sierra Leone, and Cambodia is probably the most encouraging example. However, overall the picture is, at best, mixed. Only by returning to some basic notion of realism alongside our ideals can we find a way forward. The only hope for nation-building is one where each government provides for the security of its own population and relies on its own population for the resources that make that possible. For the right to development to have any meaning also places obligations on other states to help provide the means for this. Indeed, this obligation is written into the International Convention on Economic and Social Rights.²⁹⁸ A government that relies exclusively on external support for its survival can only become alienated from its own people, and will end up failing the fundamental tests both of sovereignty and of human rights.

The United Nations was founded in order to “rid the world of the scourge of war.” In today’s world human rights and human rights abuses cannot be confined inside borders. Today’s globalized political economy, with instantaneous communications, and rapid travel makes this a fantasy. Mencius argued that empathy was part of our human nature, using as an example the trauma of a child falling down a well.²⁹⁹ Today that trauma can no longer be confined within a single village. The web of empathy will rapidly spread worldwide. We must incorporate that into a contemporary understanding of realism and adapt that to the relationship between human rights and sovereignty. There can be no impunity because today it is impossible to provide immunity from the court of public opinion. Public opinion is now global in scope and our institutions have to adapt to this, not just because of the actions of a few idealists but because our own populations demand it of our governments. That is a fact that cannot be wished away by traditional diplomats. The challenge is to preserve the structure of sovereignty that is the fundamental trellis on which human rights can be established and maintained, while recognizing that impunity can no longer be tolerated in today’s international society. We must work to promote sovereignty as the best guarantee of human rights and not set it up as a structure of immunity to them.

There is, I submit, a dialectical relationship between human rights and sovereignty or human rights and state rights founded on a reciprocal relationship between states and peoples that underlies the principle of sovereignty. The Charter of the United Nations makes peace a common purpose of humankind. In keeping with this ideal all governments are accountable for their actions

298 Article 2 (1) states Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation,...with a view towards achieving progressively the rights recognized in this convention...Article 11 of the Convention reads in part, “The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

299 The works of Mencius 2A6



to one another. While Chapter I Article 2.7 denies the right of the UN to interfere in the internal affairs of any state, the purpose of the United Nations to promote human rights is clear. Hence, it is impossible to conclude on this basis that initiating a debate and dialogue over human rights can be seen as a “matter that essentially domestic in character.”

No government, no individual is immune from accountability on questions of human rights. There are circumstances in which the rights of some need to be balanced against the rights of others. No right is absolute. However, in any circumstance when the rights of some need to be balanced against the rights of others it is always possible to provide an explicit explanation. Rightly or wrongly, today’s liberal democracies view human rights as a defining aspect of Western civilization. As with any statement of identity, the definition of self is bound up with its counterpart other. For the liberal West to define itself in terms of the respect for the values of human rights at the same time projects an image of its counterpart - the state where human rights are not respected. I am well aware of the so-called “standard of civilization” that was used invidiously in the 19th century to subvert and deny the sovereignty of China, and how this was used to justify colonialism and imperialism throughout the world. But we also cannot deny that the foundation of the United Nations and the *Universal Declaration of Human rights* also ushered in the springtime of decolonization and the universal right of self-determination that is enshrined in human rights law today. For this reason human rights are not the monopoly of any particular civilization or culture and serve the interests and development of all people and all nations. There can be little doubt that human rights can be and often are used to project the superiority of some governments over other and as a means to smugly represent to the superiority of some forms of government over others.

And yet, it is never a defence to accuse the accuser. Countries that engage in human rights violations diminish their moral standing to accuse others, but this does not obviate the need for human rights dialogue. Instead it reinforces it. There is no question that Guantanamo and AbuGhraib are blots on the human rights record of the United States of America and have damaged the human rights standing of that country. There are more reasons to engage further on the need to protect human rights. Nor is it satisfactory to claim a cultural predisposition to “collective rights” or the priority of “the right to development” is in some way a valid reason to deny the rights of any particular individual or group (such as an ethnic or religious minority) unless it can be shown that there is some connection between the abridgement of the rights of a group or individual and a public purpose which may subsume their individual rights under some developmental need. In many ways, the reciprocal relationship I am outlining here is perfectly consistent with a moral universe as outlined by Confucianism. However, since Confucian thought prioritizes the value of harmony, whereas rights are fundamentally contentious claims, there may be a clash of values here. Should we avoid making contentious claims that may embarrass others, even those we consider our friends for the sake of maintaining harmony? However, there must remain room for contention along with a desire for harmony. He er bu tong or “harmony without sameness” means that there will be disagreement but that disagreement must not preclude dialogue even argument.



Liu Jie asks:

When the West preaches human rights, they often willfully or unwittingly avoid a common-sense historical problem, that is, with their cruel slaughter of other peoples how can they let other people believe that their motivation is really to protect human rights and justice, and not to turn those states and nations into new forms of colonies?³⁰⁰

Liu rightly argues that “the fundamental mistake of Western interventionists is using the values of human rights to substitute for realistic politics, and using philosophical consequentialism to substitute for political reality.”³⁰¹ We have witnessed the limitations of interventionism but should we conclude that human rights abuses should be excused or tolerated? Is there no middle way between impunity and intervention? I would argue that the way forward is to argue for universal accountability and for accountability to be included in the framework of dialogue both bilaterally and on regional and international human rights bodies. No voice should be excluded *prima facie*, and no government should be excused from providing an explanation of their actions. From this perspective the efforts taken at human rights bodies to avoid responding to complaints represent the subversion if not the fundamental rejection of the entire idea and purpose of international human rights. The fundamental aspect of international cooperation and accountability is for each state member of the international community to respond and to justify its action in respect of human rights. If a state cannot justify its actions then it may be right and proper that these activities should be condemned - not as an expression of moral superiority of one nation or group of nations over another, but as an expression of the international community of the norms of acceptable behaviours. Without the possibility of censure or sanction there can be no norms.

Clearly there are cases where intervention is both necessary and desirable. Those are cases already provided for under the Charter and international law such as internal conflicts that spill over the frontier with large scale refugee flows or terrorist activity, or in extreme cases the threat or apprehension of genocide. It is to be hoped that any future cases of intervention should be rare and would involve careful attention to maintaining supporting and rebuilding the structures of sovereignty so that states are truly able to provide security both to their own population and along the frontier. However, the extreme caution with which such actions should be undertaken flows from the fundamental purpose of the United Nations which is in the first instance to preserve and promote peaceful international cooperation. The recent record shows very clearly that intervention has not furthered the cause of peace. We should not abstractly promote human rights and democracy. Democracy is a framework to establish and maintain legitimate government. Elections are properly a means to provide the entire population with a stake in the continued life of the state, not be held as an auction to deed the state assets to the highest bidder. It is therefore irresponsible to push for elections in any situation where the rights of minorities cannot be guaranteed. A government that has a healthy relationship and dialogue

300 Liu Jie, *Renquan yu guojia zhuquan* [Human Rights and State Sovereignty] (Shanghai: Renmin Chubanshe, 2004), p. 257.

301 Ibid.



with its domestic population will respect human rights and will be able to engage effectively with other governments in a human rights dialogue.

I am speaking therefore of two-sided reciprocity: a reciprocity among states, where sovereignty is recognized in return for mutual security, and domestic sovereignty where legitimate government proceeds on the basis of reciprocal obligations to the people and society. Such a government is unafraid to engage externally over human rights because it is already engaged in the same dialogue domestically. It does not fear intervention, because it continually seeks the welfare and support of its population. The international community cannot remain deaf to the cries of people that cannot be heard domestically.

I want to be clear about the nature of rights and the nature of rights claims. To say that rights are enjoyed by an individual or by a group (and I don't believe there is any basis on which to make a sharp distinction between individual or collective rights or that there is a fundamental conflict between individual or collective rights) is to say that it is possible for the rights bearer to make a public claim for that right and to have that right recognized and responded to. Human rights are generally claimed of states, and that means that rights claimants must be able to lodge a claim and to get a response.

There can be no doubt that over the past thirty years in China the material basis of life for the vast majority of Chinese has improved enormously. Continuous economic development has meant an improvement in the standard of living for all Chinese, and more people have been lifted out of poverty than in any other country than in any comparable period of human history. This means that the resources to enjoy human rights have been both generated and distributed. Not only is life richer it is also freer. Chinese today exercise a much higher degree of choice in their lives and are free to travel, to move, to change jobs and even spouses as well as to communicate with each other and with the outside world more than at any other time in history. However, to admit, acknowledge, and even celebrate this, as I and any fair-minded person should, does not change the fact that I and others look at rights as claims, and measure the state of human rights by the yardstick of an improvement in the ability to lodge claims and have them heard. It is nevertheless true that in this area also, there has been a vast improvement in China. Thirty years ago the legal machinery to make rights claims in China did not exist. There were few laws, almost no lawyers and very few courts. You had passed through a period that you yourself call "legal nihilism" or *falu xuwuzhuyi*. Today there is a constitutional and legal system that makes possible and encourages rights claims as well as a vastly improved level of legal consciousness both by the public and by the government.

The problem is, that those who are concerned about rights, including human rights activists and NGOs, generally do not measure human rights against the claims that are heard and responded to, but rather against those claims that are made and not responded to. This is not simply a matter of prejudice or bad faith towards China. It is in the very nature of how rights are understood. Rights are understood as cries waiting for recognition and a measured response. If there is no response, or if the cry is repressed or the rights claimant deprived of their liberty as a direct result of making a claim against the state, this proves to the observer that rights are absent.



When in an international forum those claims are further ignored or dismissed this again proves to the international actors and observers that rights are absent. Even where specific rights claimants are eventually released and in some cases allowed to go abroad to Western countries, this does not bring any credit to China. Because the expected response to a rights claim is either for public power to acknowledge the legitimacy of the claim, or to adjudicate it in such a way so that the rights claim is specifically analyzed in relation to other rights - be they the rights of other persons, or collective rights, and a justification provided for the denial of that specific rights claim. When such justification is not given, the conclusion drawn is that the initial act could not be justified and therefore proves the illegitimacy of the state. We all know the expression. "Justice must not only be done, it must be seen to be done." The various White Papers on human rights that have been issued by the Chinese government since 1991 generally refer to improvements in public welfare and legislation. However, that is often not the yardstick by which China's progress in human rights is measured by rights activists. They measure human rights by the volume of unanswered or repressed claims cases. I can well understand the frustration and anger of Chinese people and officials at continued efforts to censure and condemn China's rights practice in various public forums and international bodies. You should also understand however, that whenever China dismisses rights claims and condemns rights claimants for making rights claims this provokes international rights activists and is viewed by the rights conscious general public in much the same way. A real rights dialogue can only make progress when rights claims are addressed directly and the Chinese state's acts are justified publicly. There should not be "take no action" resolutions. If Chinese feel that a double standard is being applied to China, I would welcome more Chinese claims about human rights in my country or other western countries because active engagement in pointing out human rights abuses expands the terrain for human rights. Human rights abuses should be exposed, not hidden.

I well understand that the embarrassment of public power and public officials is not encouraged in the Chinese culture and tradition, and therefore there is a reluctance to engage in the public shaming of others also. However, the true meaning of the *Universal Declaration of Human Rights* is that we are all accountable, and in the language of the Charter all nations are committed to promote the progress of human rights. The only way that can happen is if we are ready to answer human rights claims. The best way to advance human rights in a way that does not invidiously privilege one set of countries over another is for all countries to engage each other, to advance jurisprudence by more fully engaging with each other on the ways that rights claims are handled and adjudicated without hiding behind sovereignty as a shield at the same time, countries must reassure one another that human rights cannot and will not be used to undermine sovereignty - under the sole condition that rights claims will be addressed within their own domestic legal system.

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THE RESPONSIBILITIES OF THE STATE

Mohan Guruswamy
India

The current discourse on human rights is generally circumscribed by the December 10, 1948 Universal Declaration of Human Rights proclaimed by the UN General Assembly. A close scrutiny of this declaration will reveal that while endowing an individual anywhere in the world with certain rights considered to be “self evident and inalienable”, except for Articles 25 and 26 there is little suggestion of the responsibilities of States to provide the individual the minimum means of sustenance, basic education and health care, and the means to have a worthwhile standard of living. Even these two articles speak of the individual’s rights without making incumbent on the signatory states to take responsibility for this. It seemed that while individuals had rights, states had no or few responsibilities.

It would be worthwhile to note that at the time when this was being adopted the leading lights of the new UN like the USA, UK and France either had active segregation policies or were in physical control of other nations and routinely denied these very same Human Rights, so eloquently proclaimed, to people of other races. On the other hand the former USSR too had enslaved millions of its own people in the Gulag and had established a defacto control over much of Eastern Europe.

Realizing that the so-called right to self-determination was a double edged sword that could atomize many a new nation, particularly the multi-ethnic ones, countries like India did not subscribe to this notion elaborated in General Comment 12 on the Right to Self-determination. In fact self-determination was seen as a sword that was liable to be used whenever certain external powers decided it was in their interest to either stoke such notions or lend support to indigenous movements. India has expressed herself very explicitly on this when ratifying the International Covenants on Economic, Social and Cultural Rights; and on Civil and Political Rights when it declared that “the words ‘the right of self-determination’ appearing in this apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation - which is the essence of national integrity.”

Many of the newly independent countries such as India faced such challenges no sooner than they had emerged from long and despotic colonialism. A country like the USA, which was one of the moving forces behind the Universal Declaration, not only permitted segregation in many states but also denied African Americans voting rights and basic human dignity. Apart from this the USA squelched the aspirations of the people of Puerto Rico for nationhood. At the other end of the world, Britain which had extended its Indian Empire into the Naga Hills region now fomented



a secessionist movement there with the elements of the Anglican Church at its forefront.

It is not without some irony that Europe has now come together as the EU; for the great lesson of history is that only larger entities which successfully collectivize their many lesser identities can survive and thrive in the emerging world order. It would suffice to say that if China and India did not exist in their present form, many of their parts would have come under the domination of extra-territorial powers. For instance, can one contemplate the economic viability of the Naga Hills without the active support of foreign powers?

It goes without saying that larger States have a responsibility to cherish and even nurture their diversity. This is best ensured by giving people institutional mechanisms such as free and fair elections and a level of self-government. The great lesson from the collapse of the USSR is that ideological monoliths cannot imperviously exist in a world where the forces of new economics and technology have given rise a new set of aspirations, expectations, values and beliefs. It will be worthwhile to note here the oft stated views of President Hu Jintao to see China as an “advanced democracy” by 2020.

It is also now very clear that as with the case of self-determination, the notion of individual human rights as provided by the Universal Declaration was at once also intended as a sword that could be conveniently wielded on some states. The notion that all people are equal and have certain inalienable rights is unchallengeable. This is the single great notion upon which modern political thought and societies are structured. Without it we lapse into medieval times. Many countries, such as the monarchies, theocracies and military dictatorships however still exist without even a modicum of the notions of equality and justice permeating them. The great irony of our times is that nations and organizations at the forefront espousing human rights seem quite comfortable with such political structures that exist in many of their national allies. We don't, for instance, hear of the USA or UK expressing concern about the human rights and individual freedoms situation in Saudi Arabia or in the Israeli occupied areas of Palestine, and for that matter nor do we hear much comment from the self styled watchdogs of human rights like Human Rights Watch and others.

The discussion on Human Rights has centered for far too long on the rights of the individual. It now needs to shift focus on the responsibilities of the State. It must be mentioned here that one of the principal responsibilities of the State would also to preserve its existence. If minorities have rights, so do majorities. But this does not automatically give the majority the right to steamroller over minority aspirations. Clearly there is need to discuss this further. But I will leave this for others more qualified to do so.

If rights of individuals are central to good government, then responsibilities of governments to their citizens are also central to good government. Thus if the right to education or good health is a basic right, it would be a meaningless right if the State did not provide the infrastructure and facilities for education and health care. We find that many States routinely deny these on the specious plea that they are not feasible to cover all areas and citizens. Even in a country like India with a plethora of progressive and egalitarian laws, the State is not held entirely responsible when citizens are denied these. It has been sixty years since the world has become party to the Universal



Declaration and many of its covenants are still not fulfilled. Its time then that the responsibilities of States also are defined and the powers that be become answerable to laws specifically enacted to impose these responsibilities upon the rulers.

In 1976, the Supreme Court of India declared “the right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and co-mingling with fellow human beings.” Civil Society institutions in India, including its great newspapers have fought many battles in defence of the people’s right to read, express and move freely and won them. From time to time the State has had to retreat from its attempts to encroach upon them. Yet when it comes to the “bare necessities of life such as adequate nutrition, clothing and shelter” we find that Civil Society in India has been less than active on ensuring equality of benefits to all Indians. Consider this, despite its great economical and technological strides, no less than a quarter of all Indians live below the official poverty line. This means not only inadequate food, but no shelter and wherewithal to live with even a modicum of minimal human dignity. In absolute terms the numbers have increased significantly since independence in 1947. According to the Government of India, 24.6% of the population lives below the official poverty line, which translates to about US\$ 1 per day.

Once again India’s Supreme Court has expressed itself even more explicitly on this. In the case of *Paschim Banga Khet Majoor Samity v. State of West Bengal*, (1996) the Supreme Court found that “government hospitals run by the State and medical officers employed therein are duty bound to extend medical assistance for preserving human life. The failure on the part of the government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.” Despite stressing the need “to provide timely medical treatment” the Supreme Court has been ambiguous about the state’s responsibility to extend medical coverage so as to provide timely medical treatment. Even today much of rural India has to do without even the most basic medical facilities. Thus even the most treatable ailments often cause death or prolonged suffering.

However in the case of the Right to Education the Supreme Court has been quite explicit in what it expects from the State. Article 45 of the Constitution of India provides that “the State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.” The fact of the matter is that even after over five and a half decades of its adoption, this great objective of the Indian Constitution remains unachieved. Even today no less than 20% of its 15-24 years cohort is illiterate, which means that even if the primary education coverage is 100% now, for the next 40-50 years at least 20% of India will be illiterate. The overall literacy rate is now 64.8%.

The 2001 Census of India informs us that there are over 635,000 villages in India. The same Census tells us that there are 712,000 primary and middle schools in India. If we consider the incidence of schools required to cover the cities, towns and larger villages, it comes evident that many villages in India have no access to education.

In the matter of *Mohini Jain v. State of Karnataka*, (1992) and *Unnikrishnan J.P. v. State of*



Andhra Pradesh, (1993) the Supreme Court of India once again explained that the core obligations as follows: “The right to education further means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development.” At one time this would have been clearly inadequate at it allows the State to determine what its economic capacity and development levels are. With post 2000 economic growth about 7% per annum and poised to rise even further, the economic capacity has quite clearly increased. With a GDP currently in excess of US\$1 trillion, it is obvious that the willingness to spend only 2.4% of its GDP on education is now a self-imposed one and not constrained at all by economic capacity and development. It is now just a matter of political and administrative desire and will. Now is the time to put a weight on what it means when it is stated that ‘the State shall endeavor.’ That the State has the economic capacity is not in doubt. What is in doubt is the willingness of the State to endeavor to fulfill its obligations.

In such circumstances how can the citizen expect the State to discharge its obligations and responsibilities particularly since, as we have seen, its failure to fulfill goes unpunished save by electoral retribution. And since electoral retribution is always by the majority the voice of the poor and unsung is hardly ever heard. Is the time now for a new path to be broken by the jurists? With the often claimed constraints of economic capacity no longer valid, the Supreme Court of India can now direct in more specific terms what it expects by way of coverage, standards, amenities and facilities. If the State finds it unfeasible to build and maintain a school for every village or population cluster, quite evidently it has adequate resources now to provide transportation facilities for children to be taken to and back from schools located elsewhere.

We also have a vast diversity of standards in India’s school system. If the notion of equality of opportunity is to be meaningful, then we must begin with equal education based on equal standards and facilities. The Indian State has not showed any inclination to move in this direction.

Its time the Supreme Court of India ordered the State to properly discharge its responsibilities and commitments with the proviso that failure to do so will invite retribution from it upon the persons constitutionally and administratively deemed responsible. This is not without precedent. In the well known case of Kalyan Singh, former Chief Minister of Uttar Pradesh state, the Supreme Court held him guilty of not fulfilling his commitment to it to protect the disputed Babri Masjid and sentenced him to a token term in jail. India’s courts at all levels must hear the complaints of its citizens on matters relating to the failure of the State to discharge its functions as mandated by law. This should include elected as well as appointed officials of the government. Otherwise the people will have no other choice other than to impose their will upon the State, by whatever means possible. Many a time this would mean a direct physical assault on the instruments of the negligent State.

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THE DEVELOPMENT OF THE CONCEPT OF HUMAN RIGHTS IN THE UNITED NATIONS

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Introductory remarks

Nobody denies that the West was the cradle of the concept of human rights. Since the American and French revolutions of the end of the eighteenth century, the human rights were centered on the individual. Human rights were considered to be individual rights. However, within the expression "human rights," the word "human," meaning individual human beings, was during a rather long time understood in a rather narrow sense. Women, poor white male individuals and especially coloured individuals were excluded from the scope of the adjective "human" as a part of the term "human rights" understood at that time especially as rights to protect the individual against the state (such as the right to be protected against censorship) and as political rights (such as the right to participate at elections).³⁰² This exclusion of coloured people from the scope of Western human rights could be observed until 1997 in Hongkong: Great Britain extended the European Convention on Human rights to all kinds of dependent territories with a white colour population such as Bermuda, St. Helena and the Falkland (Malvinas) Island, but not to Hongkong although inhabitants of Hongkong expressed the wish to profit from the European Convention on Human rights.³⁰³ At the beginning of the 21st century, the traditional individual-centered concept of Human Rights is still dominating the Western human rights doctrine. But on a global level, this traditional Western individualistic Human Rights doctrine is since the end of World War II exposed to big challenges. The main challenges are the United Nations.

It is paradoxical that the United Nations which nowadays is rather unpopular in the United States has been established in 1945 mostly under the influence and on the initiative of an US president, namely Franklin D. Roosevelt (1882-1945). *The Charter of the United Nations* (June

302 Harro von Senger: From the Limited to the Universal Declaration of Human Rights: Two Periods of Human Rights, in Wolfgang Schmale (ed.): *Human Rights and Cultural Diversity: Europe-Arabic-Islamic World-Africa-China*, Keip Publishing, Goldbach 1993, p. 50-76.

303 Harro von Senger: Die Ausgrenzung Hongkongs aus dem europäischen Menschenrechtsschutz, in: Gregor Paul/Caroline Y. Robertson-Wensauer (Hg.): *Traditionelle chinesische Kultur und Menschenrechtsfrage*, Nomos Verlag, Baden-Baden 1997, 2. ed., 1998, p. 91-116, the same author: The Non-Extension of the European Convention of Human Rights to Hong Kong, in: *Revue de droit international, de sciences diplomatiques et politiques*, soixante-seizième année, numéro 3, Lausanne, septembre-décembre 1998, p. 309-327; "Ouzhou Renquan Gongyue" weihe wei yanzhan zhi Xianggang (Why was the European Convention of Human Rights not extended to Hong Kong?), in: *Fazhexue yu Fashehuixue Luncong* (Archive for Legal Philosophy and Legal Sociology) Zhongguo Zhengfa Daxue Chubanshe, vol. 2, Beijing 1999, p. 225-243.



1945) stipulated for the first time in human history the protection of human rights as a task to be fulfilled by an international organization. Since then, the human rights have entered international public law and became a matter of worldwide concern and cooperation. The principles concerning human rights enshrined in *the Charter of the United Nations* remained until present times the legal base for global activities in the field of human rights. In *the Charter of the United Nations* (19 chapters, 111 articles), the human rights are mentioned 7 times. In the Preamble, the peoples of the United Nations declare their determination “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to promote social progress and better standards of life in larger freedom.” According to Article 1 of the Charter, one of the purposes of the United Nations is “to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” Article 13 stipulates that “the General Assembly shall initiate studies and make recommendations for the purpose of assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (Article 55).” For the achievement of this purpose, “all Members pledge themselves to take joint and separate action” in cooperation with the United Nations (Article 56). “The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights” (Article 68). Accordingly, the United Nations Commission on Human Rights (UNCHR) was established in 1946.

The Charter of the United Nations is the basic document of the United Nations. All activities of the United Nations and its member states are bound by its articles. Recently, the revision of *the Charter* was discussed, but until April 2008, *the Charter* remained unchanged. All the articles regarding human rights contained in the Charter continue to be the fundamental guidelines for the global development of the human rights within the organization of the United Nations. The first achievement in this respect was the promulgation of the *Universal Declaration of Human Rights* on December 10, 1948. Since then, the General Assembly of the United Nations and especially the United Nations Commission on Human Rights and its successor since 2006, the Human Rights Council, have made important contributions to the development of the concept and the system of human rights.

The United Nations “turn” in the development of the human rights

Below, I want to introduce different aspects of the development that the concept of the human rights has undergone within the United Nations.

1. With respect to the meaning of the term “human”

The term “human rights” is composed of two words: “human” and “rights.” Publications on human rights are mostly concerned with the second element of the term “human right,” that is to say with the “rights” of human beings. In this part of my paper, I do not speak about the rights,

but on the meaning of the word “human,” being a component of the expression “human rights.” Thanks to *the Charter of the United Nations and the Universal Declaration on Human Rights*, the component “human” within the expression “human right” was for the first time in the history of human rights understood, on a global scale, in a broad sense. Before the foundation of the United Nations, Westerners interpreted “human” within the term “human rights” in a rather narrow sense. In their eyes, in international relations, only human beings with a white skin were “human” in the sense of “human rights,” and only they were the enjoyers of human rights. After World War I, the Japanese delegation at the Paris peace negotiations of 1919 proposed the inclusion of an article confirming the equality of human races into the draft of *the Versailles Peace Treaty*. But the United States which was confronted with immigration problems and discriminated the black and Japanese people (a treatment considered by the United States as a domestic legal and jurisdiction question) and the English Empire which dominated at that time at about 30 million square kilometres of colonial territory firmly opposed the Japanese proposal. Therefore, the first attempt in human history to enshrine the principle of the equality of human races - which is the fundament of human rights - in an international legal document ran aground.³⁰⁴ During the Second World War, it was the Chinese leader Jiang Kaishek who proposed that the international organization to be founded after the war should proclaim the respect for the principle of the equality of human races. This time, the Western powers could not resist.³⁰⁵ As a result of the Chinese proposal, the principle of the equality of human races was included in *the Charter of the United Nations* and in the Universal Declaration of Human Rights. By doing so, the United Nations extended, on a global scale, the meaning of the element “human” within the term “human rights” to human beings of all races. But the meaning of the word “human” in the human rights terminology of the United Nations remains vague in one respect. In *the United Nations Convention on the Rights of the Child*³⁰⁶, the term “child” is only defined with respect to the end of childhood, not with respect to the beginning of childhood.³⁰⁷

The Universal Declaration of Human Rights refers only to human beings who are born, and it does not refer to unborn human beings. As can be seen, according to the human rights concept of the United Nations, only born human beings are the subjects of human rights. Unborn human beings are not protected by the human rights proclaimed by the United Nations. With respect to this point, there are differences of opinions on human rights between the United Nations and

304 Harro von Senger: Zur japanisch-westlichen Menschenrechtskontroverse vom Jahre 1919: Shandong statt Rassengleichheit. Ein unbekannter Meilenstein auf dem Wege zur Entwestlichung der Menschenrechte, in: Lutz Bieg; Erling von Mende: *Ad Seres et Tungusos: Festschrift für Martin Gimm zu seinem 65 Geburtstag am 25. Mai 1995*, Harrassowitz Verlag, Wiesbaden 2000, p. 377-399.

305 Harro von Senger: From the Limited to the Universal Declaration of Human Rights: Two Periods of Human Rights, in: Wolfgang Schmale (ed.): *Human Rights and Cultural Diversity: Europe-Arabic-Islamic World-Africa-China*, Keip Publishing, Goldbach 1993, p. 79-87.

306 Convention on the Rights of the Child, in: *Human Rights: A Compilation of International Instruments. Volume 1 (First Part) Universal Instruments*, United Nations, New York, 1993, p. 174-195.

307 “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier,” op.cit., p. 175.



certain Western people, such as people in Catholic churches.

2. With respect to the meaning of the term “right”

As far as the second element “right” within the term “human rights” is concerned, I want to speak about three aspects, namely the scope of human rights, the inter-relationship between different human rights and the restriction of human rights.

a. The scope of human rights

As I have already mentioned, according to the traditional Western concept, individual human rights are the core of human rights. But some scholars, especially from Eastern Europe and Third World countries, developed the theory of the three generations of human rights. Human rights of the first generation were the “negative human rights,” because they entitled the individual to resist the excessive use of state power in the newly established Western territorial states. The human rights of the second generation were “positive human rights,” because they entitled the individual to demand from the government to take positive measures for the economic, social and cultural welfare of the citizens. The human rights of both generations served the individual only. The United Nations widened the scope of human rights. At one hand, the U.N. recognized the human rights of the first and second generation, but, on the other hand, it developed the so-called human rights of the third generation. These are collective human rights such as the right to development³⁰⁸ and the right to peace³⁰⁹. In this context, both the right of peoples and nations to self-determination can be mentioned. It is on the agenda of the United Nations since 1952³¹⁰. Both the International Covenant on Civil and Political Right and the International Covenant on Economic, Social and Cultural Rights and of December 16, 1966, stipulate at the very beginning, in article 1: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Through the extension of the subjects of human rights to collective entities, the U.N. emancipated itself from the traditional individual-centered Western human rights concept.

The contemporary Western human rights concept can be called the “concept of the core of human rights.” This concept dominates the human rights discussion in Western Europe and in the United States. At the beginning of the 21st century, it is the Western key concept concerning human rights. As a Swiss citizen, I want to point in this context to Europe only.³¹¹ The origin of the European concept of the core of human rights is the European Convention for the protection of human rights and fundamental freedoms of November 4, 1950.³¹² According to the preamble, of

308 Declaration on the Right to Development, referring to *Yearbook of the United Nations* 1986, p.717-721.

309 Declaration on the Right of Peoples to Peace, in: *Yearbook of the United Nations* 1984, p.118-119. The Rights of Peoples and Nations to Self-Determination, in: *Yearbook of the United Nations* 1952, p.439-447.

310 The Rights of Peoples and Nations to Self-Determination, in: *Yearbook of the United Nations* 1952, p.439-447.

311 Harro von Senger: Ostasiatische Sicht - Menschenrechte im Clinch, in: Denise Buser, Felix Hafner, Béatrice Speiser, Barbara Weise (ed.): *Menschenrechte konkret - Die Rolle der lokalen NGOs. Referate des 1. Basler Menschenrechtssymposiums*, Helbing & Lichtenhahn, Basel/Genf/München 2003, p.96-97.

312 Convention for the protection of Human Rights and Fundamental Freedoms, in L. J. Clements: *European Human Rights: Taking a case under the Convention*, London 1994, 227 f.

this document, “the Governments signatory hereto, being Members of the Council of Europe” are “considering *the Universal Declaration of Human Rights* proclaimed by the General Assembly of the United Nations on 10 December 1948” and are “considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared.” But this manifestation in favour of *the Universal Declaration of Human Rights* is immediately relativised. The Members of the Council of Europe proclaim in the following text of the preamble that they are only “resolved, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;”³¹³ To say it clearly: The Members of the Council of Europe disapproved and rejected - for whatever reasons - the inclusion of the totality of the human rights enshrined in *the Universal Declaration of Human Rights* into the European Convention for the protection of human rights. As a consequence, not all the human rights of *the Universal Declaration of Human Rights* were incorporated into *the European Convention on Human Rights*. This selective way to accept some human rights in *the Universal Declaration of Human Rights* and to reject some other human rights in the same Declaration is the starting point of the European concept of the core of human rights. Human rights protected by *the Universal Declaration of Human Rights*, but not included into *the European Convention on Human Rights* are for instance:

- *the right to asylum, Universal Declaration of Human Rights, article 14 (1)

- *the right to a nationality, article 15 (1)

- *the right to social security, article 22

- *the right to work, article 23 (1)

- *the right to rest and leisure, article 24

- *the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing 25 (1)

- *the right freely to participate in the cultural life of the community, article 27 (1)

- *the right to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized, article 28

b. The relationship between the human rights

Contrary to the Western concept of “core human rights,” *the Universal Declaration of Human Rights* does not distinguish between priority human rights and non-priority human rights. According to the text of *the Universal Declaration of Human Rights*, all human rights mentioned in this document have the same importance. *The International Covenant on Civil and Political Rights* of December 12, 1966³¹⁴, stipulates that “in time of public emergency which threatens

313 “The Governments signatory hereto, being Members of the Council of Europe, Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on December 10, 1948; Considering that this Declaration aims at securing the universal and effective recognition and observance of the rights therein declared; [...] Being resolved [...] to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,” p. 227.

314 International Covenant on Civil and Political Rights, in: *Human Rights: A Compilation of International Instruments. Volume 1 (First Part) Universal Instruments*, United Nations, New York, 1993, p.20-40; Felix Ermacora; Manfred Nowak; Hannes Tretter: *Human Rights: Documents and Introductory Notes*, Vienna 1993, p.24-33.



the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant.” No derogation may be made from articles 6 (the right to life), 7 (the prohibition of torture), 8 (paragraphs I [the prohibition of slavery] and 2 [the prohibition of servitude]), 11 (the prohibition to imprison somebody on the ground of inability to fulfil a contractual obligation), 15 (*nulla poena sine lege*), 16 (the right to be recognized everywhere as a person before the law), Article 17 (the right not to be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation) and 18 (the right to freedom of thought, conscience and religion)³¹⁵. This article shows that in the opinion of the United Nations, certain human rights are more important than others. But this hierarchy of human rights exists only “in time of public emergency.” In times of peace, the United Nations does not differentiate between primary human rights and secondary human rights. The equality of the human rights is emphasized in several documents of the United Nations, as for instance in the:

**Proclamation of Teheran* of May 13, 1968³¹⁶. Article 13 declares: “Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.”³¹⁷

**The International Covenant on Economic, Social and Cultural Rights* as well as *the International Covenant on Economic, Social and Cultural Rights*, both of December 16, 1966, recognize in their preambles that, “in accordance with *the Universal Declaration of Human Rights*, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”

*The resolution accepted by the General Assembly of the United Nations on December 16, 1977, on “Alternative approaches and ways to improve the effective enjoyment of human rights and fundamental freedoms.”³¹⁸ This resolution is called in the People’s Republic of China “Resolution on the new concept of human rights (Guanyu renquan xin gainian de jueyi’ an). According to this resolution, “all human rights and fundamental freedoms are indivisible and interdependent” and “equal attention and urgent consideration should be given to the implementation, promotion and protection of civil and political, economic, social and cultural rights.”

*The resolution 40/114 on the “Indivisibility and interdependence of economic, social, cultural, civil and political rights,” adopted by the General Assembly of the United Nations on

315 International Covenant on Civil and Political Rights, article 4 (2), in: *Human Rights: A Compilation of International Instruments. Volume 1 (First Part) Universal Instruments*, United Nations, New York, 1993, p. 22.

316 Proclamation of Teheran, in: *Human Rights: A Compilation of International Instruments. Volume 1 (First Part) Universal Instruments*, United Nations, New York, 1993, p.51-54.

317 *Human Rights: A Compilation of International Instruments Volume I (First Part) Universal Instruments*, New York 1993, p. 53; Christian Tomuschat (chief editor): *Menschenrechte: Eine Sammlung internationaler Dokumente zum Menschenrechtsschutz*, Bonn 1992, p. 68.

318 *Yearbook of the United Nations 1977*, p. 733-735.



December 13, 1985³¹⁹.

*In the same way, the *Vienna Declaration and Programm of Action* of June 25, 1993³²⁰, reiterates in section 1 (5) that “all human rights are universal, indivisible and interdependent and interrelated.”

c. The restriction of human rights

Already the *French Declaration on the Rights of Men and Citizens* provided that human rights can be restricted, for instance in article 10:

No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.³²¹

The United Nations accepted this European tradition according to which human rights can be restricted, but they widened the scope of the limitations of human rights. For instance, the *International Covenant on Civil and Political Rights* of December 12, 1966³²², stipulates in article 19 which corresponds to article 10 of the *French Declaration on the Rights of Men and Citizens*:

Article 19 (1) “Everyone shall have the right to hold opinions without interference”

Article 19 (3): “The exercise of the rights provided for in this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (order public), or of public health or morals.”³²³

In Western countries, these restrictions of human rights are not paid much attention to by the general public and the mass media. As far as article 19 of the *International Covenant on Civil and Political Rights* is concerned, the common Westerner knows only its paragraph 1: “Everyone shall have the right to hold opinions without interference.” Most Westerners are not aware of the third paragraph of article 19 regulating the manifold legitimate limitations of the freedom of opinion. Whenever this right is restricted somewhere, Westerners will automatically consider this restriction as a “violation” of the human rights concerned.

In general, Westerners do not want to take into consideration the limitations of human rights provided for in relevant documents of the United Nations, especially not in states under

319 *Yearbook of the United Nations* 1985, p. 874 ff.

320 World Conference on Human Rights, 14-25 June 1993: *Vienna Declaration and Programm of Action*, in: <http://www.un.org/esa/devagenda/humanrights.html/> and <http://daccessdds.un.org/doc/UNDOC/GEN/G93/142/33/PDF/G9314233.pdf?OpenElement> (June 14).

321 Declaration of the Rights of Man and of the Citizen, in: <http://www.everything2.com/title/Declaration%2520of%2520the%2520Rights%2520of%2520Man%2520and%2520of%2520the%2520Citizen> (Website visited on March 22, 2008); the original French text is: “Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leurs manifestations ne troublent pas l’ordre public établi par la loi.”

322 *International Covenant on Civil and Political Rights*, referring to *Human Rights: A Compilation of International Instruments. Volume 1 (First Part) Universal Instruments*, United Nations, New York, 1993, p.20-40; Felix Ermacora; Manfred Nowak; Hannes Tretter: *Human Rights: Documents and Introductory Notes*, Vienna 1993, p.24-33.

323 <http://www.hrweb.org/legal/cpr.html>, Website visited on March 22, 2008.



Western observation. Westerners do not want to differentiate between restrictions of human rights which correspond to the principle of proportionality and are therefore legitimate and illegitimate violations of human rights.

3. Human rights and the sovereignty of states

The focus of this part of my paper is put on two aspects, a. on the principle of non-intervention and b. on the limitations of the principle of non-intervention.

a. The principle of non/intervention

According to a rather common Western opinion, human rights are above the states and do therefore not know any state borders. Therefore, Westerners believe that Western states have, with respect to all human rights questions, in principle the right and even the duty to discuss, evaluate, control and criticize all countries of the world and, in case of need, to intervene all over the world for the sake of human rights. The United Nations does not support this opinion. *The Charter of the United Nations* stipulates in article 2 (1) “the principle of the sovereign equality of all its Members.” That means that there is no category of superior particular countries acting as global human rights teachers and of inferior particular countries to be taught human rights by the superior particular countries. The situation is different in the case of an institutionalized action through the United Nations. According to article 2 (7) of *the Charter of the United Nations*, “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” Chapter VII refers to “actions with respect to threats to the peace, breaches of the peace, and acts of aggression.”

Time and again, the United Nations emphasized the principle of non-intervention, for instance in *the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, accepted by the General Assembly of the United Nations on December 21, 1965.³²⁴ This Declaration stipulates in paragraph 1 that “no state or group of states has the right to intervene or interfere in any form or for any reason whatsoever in the internal and external affairs of other States.” Paragraph II (I) prescribes “the duty of a State to refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States, of exerting pressure on other States or creating distrust and disorder within and among States or groups of States.” Furthermore, *the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* in accordance with *the Charter of the United Nations*,³²⁵ passed by the General Assembly of the United Nations on October 24, 1970, once again confirms the principle of non-intervention. According to *the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, adopted by the General Assembly of the United Nations on December 9, 1981, the “full observance of the principle of non-intervention and non-interference in the internal

³²⁴ *Yearbook of the United Nations* 1965, p. 87-95.

³²⁵ *Yearbook of the United Nations* 1970, p. 789-792.

and external affairs of States is of the greatest importance for the maintenance of international peace and security and for the fulfillment of the purposes and principles of the Charter,” and it is “the duty of a State to refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States, of exerting pressure on other States or creating distrust and disorder within and among States or groups of States.”³²⁶ Besides that, *the Resolution of the General Assembly of the United Nations on the Inadmissibility of the Policy of Hegemonism in International Relations* (December 12, 1979)³²⁷ can be mentioned in this context.

b. Exceptions of the principle of non-intervention

According to the human rights concept of the United Nations, the principle of non-intervention is not absolute. In some cases, human rights based interventions into the internal affairs of other states are legitimate. Under what conditions? Let us look at *the Declaration on the Right to Development*, which was adopted by the General Assembly of the United Nations on December 4, 1986.³²⁸ Article 5 stipulates:

“States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self determination.”³²⁹

This means that, according to the United Nations, the presumed violation of the human rights of an individual is not a sufficient reason to intervene into the internal affairs of another state. Exceptions of the principle of non-intervention are legitimate only in a rather limited variety of cases centering on the violation of collective human rights. In this respect, the United Nations once more are upholding another concept of human rights than that of Westerners. Some Westerners think that they are entitled or even obliged to criticize other states because of individual “political criminals,” and they even transmit name lists. This kind of activity seems not to have any legal base in the human rights documents of the United Nations.

Let me add, at the end of my contribution, some remarks on the relationship between human rights and democracy. “Human rights and democracy” is a formula often used by Westerners. This fixed combination of human rights with democracy creates the impression that human rights and democracy are inseparably interrelated. Of course, Westerners think that “democracy” always means some Western type of democracy. Again, the United Nations deviates from the Western viewpoint. According to the United Nations, “democracy” is not necessarily the common Western type of democracy. This opinion is inscribed in several U.N. documents, for instance in the resolution No. 2003/35 on “Strengthening of popular participation, equity, social justice and non-

³²⁶ *Yearbook of the United Nations* 1981, p. 148.

³²⁷ *Yearbook of the United Nations* 1979, p. 146-150.

³²⁸ <http://www.unhcr.ch/html/menu3/b/74.htm>, Website visited on March 22, 2008.

³²⁹ Chinese translation in: Dong Yunhu; Liu Wuping (editors): Shijie Renquan Yuefa Zonglan (Conspectus of the Human Rights Law of the World), Chengdu, 1992, p. 1366.



discrimination as essential foundations of democracy,”³³⁰ adopted by the U.N. Commission on Human Rights with 29 votes in favour (among them the vote of the People’s Republic of China), 12 votes against and 12 abstentions. Article 3 of this resolution stipulates:

“There is no one model of democracy; therefore we must not seek to export any particular model of democracy.” The United Nations Commission on Human Rights did not only refuse the attempts of Western countries to declare the Western type of democracy as the only global standard of democracy. Also with respect to other human rights questions, the United Nations did not follow the intentions of Western countries. For instance, in 2003 and 2004, the Commission on Human Rights refuted a draft resolution on human rights and sexual orientation (concerning homosexuality).³³¹ Another rift between Western countries and the United Nations broke out at the conference against racism in Durban, South Africa (August 31-September 7, 2001) and continues in the Human Rights Council in the discussions about the Durban follow up conference which is planned for 2009. The concept of anti-racism propagated by the United Nations is not welcomed and not accepted by Western countries.

The disappointment of Western countries with the way on which the United Nations have developed the human rights went so far that on the initiative of Western countries, among them Switzerland³³², the U.N. Commission on Human Rights was abolished and replaced in the year 2006 by a Human Rights Council. This Council, however, does not please Western countries and is time and again criticized by them.³³³

Final remarks

In developing and globalizing the originally Western concept of the human rights, the United Nations has already gone a rather long way. It seems as if Western countries have been left far behind the stage of development of the human rights attained already by the United Nations. They have lost the control over the destiny of the human rights concept under the guidance of the United Nations. The United Nations largely transformed the individual centred traditional Western concept of human rights. It is obvious that the human rights are no more an asset of Western

330 Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy, referring Commission des droits de l’homme: *Rapport sur la cinquante-neuvième session (17 mars - 24 avril 2003)*, Conseil économique et social, documents officiels, 2003, Supplément No 3, Genève 2003, p. 139-143.

331 Harro von Senger : Positionen der BR Deutschland und der VR China in der UNO-Menschenrechtskommission 2003, in : *Zeitschrift für Schweizerisches Recht*, Basel, 2/2004, p. 284-285; Arvid Narrain: Brazil resolution on sexual orientation: Challenges in articulating a sexual rights framework from the viewpoint of global south, <http://bangkok2005.anu.edu.au/papers/Narrain.pdf> , Website visited on March 31, 2008; The U.N. Commission on Human Rights discusses equal rights for gays and lesbians, http://www.religioustolerance.org/hom_unchr.htm, Website visited on March 22, 2008; Sexual Orientation and Gender Identity: Human Rights Concerns for the 61st Session of the U.N. Commission on Human Rights, 2008. <http://www.hrw.org/english/docs/2005/03/10/global10303.htm>, Website visited on March 22, 2008.

332 See for instance: Walter Niederberger: Schweiz wirbt für einen Menschenrechtsrat, in: *Tages-Anzeiger*, October 13, 2004, p. 7.

333 See for instance Jean-Pascal Obembo: Recreating the Human Rights Commission with only a name change while replicating its main flaw, in: *Humanitäres Völkerrecht: Informationsschriften / Journal of International Law of Peace and Armed Conflict*, Volume 20, No. 2, Bochum 2007, p. 91, footnote 1, and 103.

countries. The wave of globalisation has overflowed and greatly changed the Western concept of human rights.³³⁴ The universalization of the ideal of the human rights is, on one hand, a victory, but in the same time also a defeat of Western civilization. Maybe, the defeat is even greater than the victory. I dare to predict that the united-nationization of the human rights will cause to Western countries more grief than joy.

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UNIVERSAL PERIODIC REVIEW: DEVELOPMENT OF THE UNITED NATIONS' HUMAN RIGHTS MONITORING MECHANISM

Jiang Guoqing
China

On March 15, 2006, the United Nations General Assembly adopted Resolution 60/251 to create a 47-member Human Rights Council (the Council) in place of the 60-year-old Commission on Human Rights (the Commission). The Universal Periodic Review (UPR) is an important mechanism and power that the resolution imparted to the Council. It ensures that all UN member states are subject to review in their fulfillment of human rights obligations and commitments. Generally, as an institute under guidance of the UN General Assembly to coordinate the UN human rights activities, the Council has undergone considerable changes and development from its predecessor the Commission in its responsibilities, legal framework and executive power. The UPR, which has been activated by the Council, is rightfully a miniature of these changes. The essay will elaborate the basis and characteristics of the mechanism.

Part One: Legal basis and general regulations

The UN General Assembly Resolution 60/251 provides that the Council shall “undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States.” It also stipulates that the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs. Such a mechanism shall complement and not duplicate the work of treaty bodies. The Council shall “develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the

334 Harro von Senger : Die Volksrepublik China und die Menschenrechte, in: Boike Rehbein; Jürgen Rüland; Judith Schlehe (editors): *Identitätspolitik und Interkulturalität in Asien: Ein multidisziplinäres Mosaik*, Lit Verlag Berlin 2006, p. 119-143.



holding of its first session³³⁵.” These rules are the direct legal basis of the UPR mechanism.

On June 18, 2007, the Council, in its fifth meeting, adopted Resolution 5/1 which was entitled “United Nations Human Rights Council: Institution-Building.” The first part of the text specified the basis of the Universal Periodic Review, its principles and objectives, periodicity and order, process and modalities and format and content of the outcome and follow-up of the review.

On September 21, 2007, the Council adopted a schedule to review all 192 UN member states in the first four years of the review mechanism, and listed the dates and order of the 48 countries to be reviewed in 2008.

According to the Council’s 5/1 Resolution, the UPR review is based on the Charter of the United Nations, the Universal Declaration of Human Rights, Human rights instruments to which a State is a party, and voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council. It said that the review shall also take into account applicable international humanitarian law, considering the complementary and mutually interrelated nature of international human rights law and international humanitarian law.

As to the process and modalities of the review, the 5/1 Resolution provides that the review will be conducted in a working group, chaired by the President of the Council and composed of the 47 member States of the Council. Each Member State will decide on the composition of its delegation. The working group and the council shall conduct reviews according to the following types of documents: (1) information prepared by the State concerned according to Council guidelines³³⁶, which can take the form of a national report or refers to any other information considered relevant by the State concerned. Written presentations will not exceed 20 pages. States are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders; (2) compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents, which shall not exceed 10 pages; (3) credible and reliable information provided by other relevant stakeholders to the universal periodic review which should also be taken into consideration by the Council in the review. The Office of the High Commissioner for Human Rights will prepare a summary of such information, which shall not exceed 10 pages.

Both the State’s written presentation and the summaries prepared by the Office of the High Commissioner for Human Rights shall be ready six weeks prior to the review by the working group. The duration of the review will be three hours for each country in the working group. Additional time of up to one hour will be allocated for the consideration of the outcome by the plenary of the Council. The final outcome will be submitted to the plenary session of the Council.

335 A/Res/60/251, 5 (e).

336 Referring to the general guidelines adopted by the Council’s sixth session on September 27, 2007.



Part Two: Basic characteristics of the UPR

Before the establishment of the Council, the UN human rights supervision and monitoring took two forms: (a) supervision based on UN human rights treaties, (b) the country-specific special procedures based on the Commission.

The treaty-based monitoring referred to the special mechanism established on the basis of the treaties. There are six treaty-based mechanisms or bodies within the UN, namely, The Committee against Torture (CAT), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Rights of the Child (CRC) and the Human Rights Committee (HRC). In the above-mentioned mechanisms, committees of independent experts monitor implementation of the core international human rights treaties in the signatory States. The monitoring procedures under these mechanisms include reports prepared by the signatory States, member states' complaints and individual appeal. The treaty-based bodies initiate dialogues between relevant countries to help improve and enhance the implementation of these treaties. These monitoring instruments, however, are different from international judiciary or arbitration measures in that they are only suggestions. Presentations submitted by these bodies are usually not legally binding.³³⁷

In the 60 years between 1946 and 2006, the Commission on Human Rights has been a charter-based body and a subsidiary of the UN Economic and Social Council (ECOSOC). In its first 20 years, it had no rights to directly handle any human rights issues in member states, but was only responsible for submitting human rights reports to the Economic and Social Council. Not until the 1960s when the international society underwent remarkable changes and particularly the dismantlement of apartheid in South Africa did the Economic and Social Council imparted some rights and procedures to the human rights commission to directly handle human rights issues of member states, including the 1235 and 1503 procedures. Generally, these procedures were extra-conventional mechanisms established under UN charters but outside the UN human rights treaty system. In principle, they should be applicable to all UN member states, but in reality these mechanisms were not the most effectively applied.

For example, the 1235 Procedure, which was invoked by the Economic and Social Council's Resolution 1235 in 1967, provides that the Commission shall review "the question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories." However, since the Cold War was over, more than 100 country-specific special procedures invoked by the Commission had been directed at developing countries but spared all Western European and Northern American countries. The

337 Different from the UN treaty bodies, regional human rights monitoring mechanisms are of judiciary or quasi-judiciary forms, such as the European Court of Human Rights and the Inter-American Court of Human Rights. In times of monitoring procedures, the regional human rights conventions highlights individual appeal and adopts the inter-states appeal, but rarely resorts to the periodic reports.



political conflicts that were born out of the special procedures gradually led the commission to deviate from its path of promoting human rights development, and eventually led to the replacement of the Commission ridden by credit deficit.

Compared with the former two human rights monitoring mechanisms, the universal periodic review of the Council has the following distinctions:

1. Universality and Equality

The UPR mechanism ensures that all UN member states are reviewed in terms of their fulfillment of the human rights obligations and promises, as opposed to the partial applications of treaty-based monitoring and the country-specific special procedures. The Council's 5/1 Resolution provides that the review shall "ensure universal coverage and equal treatment of all States" and ensure that the monitoring mechanism an extra-conventional one. It is a systemic betterment and avoids the selectivity and partiality of the human rights commission.

2. The authoritativeness and equality

The authoritativeness and equality of the UPR does not entail that it has taken on the judiciary nature of some regional human rights institutions, but its review mechanism is guaranteed with equality in that the legal status of the Council is comparatively higher than any generic treaty bodies and the Human Rights Commission. The Council, similar to the Commission, is a charter-based institution, but it is more authoritative and powerful than the latter as the Council was established under the General Assembly, rather than the Economic and Social Council, under which the Commission was established. Meanwhile, the Council is an official mechanism made of government delegations and not made of individual experts like the treaty bodies. Meanwhile, the 5/1 Resolution provides that the UPR shall be conducted by working groups and take in consideration the differences between individual countries without harming the basis and obligations stipulated in the review. The final outcome of the review shall be approved by the Council, and the member states of the Council shall be among the first to be reviewed during their terms. These rules also help ensure the authoritativeness and equality of the UPR.

3. Equal cooperation among member states

Resolution 5/1 highlights that the UPR shall be "a cooperative mechanism based on objective and reliable information and on interactive dialogue." Firstly, it involves interactivity in dialogues. The UPR is an intergovernmental process, United Nations Member-driven and action-oriented. It invites full involvement of the country under review. The interactive dialogue between the country under review and the council will take place within the working groups. The rapporteur shall make issues of focus and in doubt available to the country under review, which could be better prepared for the dialogue. The interactive dialogue ensures the equality and transparency of the review. Secondly, the interaction and cooperation in review objectives. The objective of the review is to improve the human rights situation on the ground and help realize the fulfillment of the State's human rights obligations and commitments. The working groups shall undertake the assessment in an objective and transparent manner of the human rights situation in the country under review, including positive developments and the challenges faced by the country. They should work towards the enhancement of the State's capacity and of the technical assistance. Thirdly, the

interaction in the outcome. The UPR invites the full involvement of the State under review in the outcome. Before the adoption of the outcome by the plenary session of the Council, the State concerned should be offered the opportunity to present replies to questions or issues that were not sufficiently addressed during the interactive dialogue. The State concerned and the member States of the Council, as well as observer States, will be given the opportunity to express their views on the outcome of the review before the plenary takes action on it.

These stipulations exemplify the equality and cooperation between the Council and the member states. The UPR upholds the credo of “Help States help themselves” and avoid close-door review or publishing outcomes without consultations with the States concerned. The review brings to full play the role of the States concerned and avoid pointless anger-venting and finger-pointing. It is a rectification of the unsightly phenomena in which the Human Rights Commission used human rights to create political stand-offs and member states poking at each others anger buttons.

Part Three: Existent and potential problems of the UPR

The UPR, in its system design, attempts to overcome the shortcomings of the treaty-based bodies and the Commission on Human Rights, but its effect remains to be tested in reality. Problems that co-existed with the treaty-based bodies and Commission, such as delay in submitting reports, resource limitations and overlapped reviews, are likely to surface in the UPR mechanism.

1. Delay in submitting reports and review efficiency

One of the most obvious problems is the huge backlog in state reports due under the various treaties. There is, however, no provision that enables delinquent states to be censured, other than by committees noting the delays in their annual reports, and by repeated and so far ineffectual calls on the part of the General Assembly. Over the years, cases of delay have only increased and worsened. Furthermore, even if the reports were handed in by the signatory nations in time, the commissions wouldn't always be able to timely attend to these reports due to time and resource restraint.³³⁸ These symptoms are also likely to occur under the UPR mechanism. According to the current schedule, the duration of the review will only be three hours for each country in the working group³³⁹. Should insufficiencies or other problems are found in the report, the working group would have difficulty in balancing review quality and time restraint.

2. Redundancy of review work

Resolution 5/1 provides that the UPR is supplementary rather than duplicating other human rights organizations. But the review mechanism would need more specific measures to make sure that its work does not overlap with functions of other human rights organizations and at the same time does not add to the burden of the UN member states. In this regard, the Office of the High Commissioner for Human Rights is given the obligations to collect the reports of treaty bodies, special procedures, suggestions and comments of the countries concerned, compilation of related UN formal documents and additional credible and reliable information provided by other relevant

338 James Crawford, “The UN Human Rights Treaty System: A System in Crisis?”, in *The Future of The UN Human Rights Treaty Monitoring*, pp. 4-5.

339 The review shall not take up too much time, manpower or finance.



stakeholders to the universal periodic review which should also be taken into consideration by the Council in the review. But the Commissioner's office is not entitled to coordinate the review work of relevant organizations, and nor does such coordination instrument exist in the UN system. Redundancy and resources waste are still likely in this context.

3. The nature and follow up of review outcome

The human rights monitoring within the UN is not of judiciary or quasi-judiciary nature. The review outcome or conclusions are only suggestions that are not legally binding.

According to the review, the outcome of the UPR, as a cooperative mechanism, should be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders. The subsequent review should focus, among other things, on the implementation of the preceding outcome. The international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with, and with the consent of, the country concerned. In considering the outcome of the universal periodic review, the Council will decide if and when any specific follow-up is necessary. After exhausting all efforts to encourage a State to cooperate with the UPR mechanism, the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism. We can see that the review mechanism is largely based on self-criticism and self-perfection, and the implementation of the outcome is largely decided by the political will of the countries concerned.

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THE ROLES OF INTERNATIONAL ORGANIZATIONS IN THE PROTECTION OF HUMAN RIGHTS

Anatoly Krasutsky
Belarus

Honorable Chairman, honorable colleagues, ladies and gentlemen,

First of all, please allow me to show thanks to the government of the People's Republic of China and the China Society for Human Rights Studies. Thanks for offering the Belarussian delegation this opportunity to attend the forum and share our views on human rights protection issues.

The importance and urgency of Beijing Forum on Human Rights is most obvious. It opens on the occasion of the 60th anniversary of adoption of the Universal Declaration of Human Rights, a basic international law to safeguard legal rights and interests. It opens under the backgrounds of globalization and of many "hotspot" regions existing in the world where human rights are being trampled under various excuses. It also opens at a time when the international community is forced to face new contemporary challenges - a period of international terrorism, illegal



immigration, human trafficking and drugs.

So, we think the forum is not only an authoritative international platform for human rights, but also a special “club” for people who cherish the same ideals in the field of human rights.

We are also very glad to see our Chinese friends are the closest colleagues with the same goals. They also contribute a lot to ensuring the human rights issue is discussed fairly and honestly under the framework of international rights organizations.

Mr. Chairman, human rights are undoubtedly one of the most important civilizations and wealth. To protect human rights is the responsibility of every country and the whole international community.

Today, human rights issue is the major topic for discussion in the activities of all kinds of international non-governmental organizations. Through this topic, they discuss the development of the most important international relations, including mankind’s sustained development, the safeguarding of peace and security.

The reports by international non-governmental rights organizations prove that no country in the world can escape criticism concerning human rights.

But it is a pity that in practice, some countries like to teach other nations to develop the “only right” democratic standard they have designed and manipulate human rights issue and international rights safeguarding mechanism for their own interests. Usually, these acts are accompanied by the naked interference in the internal affairs of sovereign states and the imposition of political and economic pressure upon other states. Very few Western countries, first the United States, promote publicly their totalitarian politics under the excuse of safeguarding human rights but their purpose is to overthrow the regimes of “unpopular” countries. Most recently, there is a stronger trend to use the topic of safeguarding human rights to cover up their purpose of separatism and to sabotage the territorial integrity of a nation. The Republic of Belarus condemns this kind of acts which violate international laws and are out and out attempts to interfere in the internal affairs of a sovereign state. The attempts, no matter how high-sounding their slogans are, should be checked.

Usually, the focus that the invited “tutors” are concerned with is those countries implementing independent domestic and foreign policies. Their final purpose is not to build a democratic society in these countries, but serve their own political and economic interests. The international events in recent years have clearly proved this time and again, that is, to impose “the only right” democracy model upon others led to irreversible negative consequences and the deaths of innocent civilians.

The Republic of Belarus cannot accept the so-called “blacklist” put forward by the United States. There are countries on the blacklist who oppose states adopting double standard in human rights and freedom advocated in the superpower and vassal states.

When participating in the crackdown on activities of any place involving rude and large scale trampling of human rights, the international community should only allow the adoption of the forms approved by the UN Security Council and other authorized organizations.

The UN should play a leading role in safeguarding the world’s human rights. As a member of the UN, Belarus supports the reform activities of the UN, including its rights



safeguarding mechanism.

The reform of the UN Human Rights Council - the new special rights safeguarding institution, had ended in 2007. The reform proves the institution could carry out its own activities after making a clear distinction between itself and the double standard and equivocal attitude toward human rights.

In restoring a fair, equal and impartial atmosphere inside the UN, the council took such preliminary constructive measures as the withdrawal of the decision to carry out political review of the special reports on Belarus and Cuba in June 2007.

This is a practical step on the road to discard distrust and hostile policies for cooperation and mutual respect. The decision is in complete accord with the spirit and literal meaning of the UN General Assembly resolution to encourage dialogues on the basis of equality and mutual respect. The resolution, under the proposal of Belarus and Uzbekistan, was adopted by the 61st UN General Assembly in 2006. We thank the Chinese side for supporting Belarus to carry out work for the withdrawal of the political review and the adoption of the above resolution.

I am very glad to point out that it has been more and more difficult for Western countries to manipulate rights safeguarding slogans in the UN. The adoption of resolutions against Russia, China and Belarus will be unpromising.

We believe the Human Rights Council, as a special rights institution, should discuss those problems to which it does not find solutions because of double standard to prove itself, for example, the problems in Iraq, Afghanistan, members of European Union, secret prisons and the U.S. Guantanamo naval base.

According to the resolution adopted in 2007, a regular comprehensive review is the main mechanism of the human rights supervision committees of every country in the world. The reviewing and analyzing capabilities and principle of the mechanism will spread some hope. That is, the "student-tutor" times will be gone, as the human rights of all countries will be reviewed according to the principle.

In our view, the international rights safeguarding organizations should pay attention not only to encouraging citizens' rights and political rights (Currently these aspects are obviously stressed), but also to economic, social, cultural and development rights. The organizations should not only react to the facts of human rights trampling, but also take measures to prevent these from happening. This needs a deeper analysis of the number one root of human rights trampling - the gap between rich and poor, poverty, social inequality, discrimination and prevailing diseases.

Recently, some countries have used the extraterritoriality and taken unilateral compulsory measures, posing a more and more serious threat to human rights. These measures sabotaged the independent selection of its own development road of any country and hindered the implementation of human rights. The major rights safeguarding institutions passed resolutions many times, condemning the unilateral economic and political compulsory measures. Although unilateral compulsory measures are against the principle of international laws and the UN Charter, such practices have not ended but become more common. Therefore, we think international rights



safeguarding organizations should pay special attention to the unilateral measures and react to them in a most resolved manner.

Today, Belarus has been under heavy pressure of the economic sanctions of the U.S. government. It cannot be ruled out that other sovereign states whose national interests are above the U.S. ambitions will also become its target of sanctions. We call for international rights safeguarding organizations to take immediate measures to ensure all countries adhere to the *Charter of Economic Rights and Duties of States* contained in Resolution 3281 at the 29th UN General Assembly on Dec. 12, 1974. The 32nd article stipulates any country should not use or encourage to use economic, political and other compulsory measures to damage the sovereignty of other countries.

We strongly believe the role of Non-Aligned Movement (including in safeguarding human rights) must be strengthened. Belarus is a member state of the Non-Aligned Movement and unswervingly sticks to the promotion of the movement in safeguarding rights in the UN.

Non-Aligned Movement should promote the democratization of international relations and strive for a multi-polar, fairer world in which all countries and people, big or small, developed or underdeveloped, should have their own place. The movement should let itself and others believe the world does not belong to faraway future, but the reality of tomorrow of the international community. To establish the multi-polar international relations began with the recognition of diversified development roads of all countries. The respect for the diversity of values and cultures is the guarantee for all people to respect human rights. Human rights are no strange to any culture.

Belarus believes the international interaction in human rights must be based on the principle of dialogue and equal partnership. These principles are all recognized in the key documents of Non-Aligned Movement.

It must be admitted that human trafficking is one of the most urgent problems concerning the rights and fate of tens of thousands of people worldwide every year.

The global scale of the phenomenon demands all of us take coordinated and specific actions. Many countries, inter-governmental and non-governmental organizations are taking steps to crack down on human trafficking. However, just as practice proves, no single country in the world can handle the problem on its own.

Given the situation, Belarus first proposed to discuss the struggle against human trafficking in the UN. At the UN Summit held in New York in September 2005, Belarus' President Lukashenko proposed to make use of international force to crack down on human trafficking.

To develop the proposal, Belarus suggests the international community build a global partnership relationship to combat enslaving and human trafficking under the flag of the UN, so as to cooperate with relevant sides - international inter-governmental and non-governmental organizations, the source, transfer and assigned countries for concerted action against human trafficking.

Belarus thinks the near goal is to build the global partnership relationship for crackdown on enslaving and human trafficking and formulate a global strategy for UN crackdown on the phenomenon. We think it is just the UN who should ensure to coordinate international force to



uproot human trafficking.

In fact, Belarus has already been taking specific steps to strengthen the UN's role in cracking down human trafficking. At the 61st UN General Assembly, we proposed to pass a resolution to coordinate forces to crack down human trafficking. Last year, with our active participation, an international conference was held with the theme "traffic in women and children, deal with challenge together." Belarus also proposed a special debate on crackdown of human trafficking under the framework of the 62nd UN General Assembly. We thank those countries who support our proposal and work with us to implement the proposal.

Belarus unswervingly sticks to international cooperation in safeguarding human rights on the basis of the principle of mutual respect and equal partnership relationship. Our country will spare no efforts to promote international rights safeguarding organizations to follow the principles of generality, fairness, objectiveness and non-selectiveness, and of international constructive dialogue and cooperation.

Thank you all.

(The author is Deputy Chairman of the Standing Committee on International Affairs and Ties with CIS of House of Representatives of the National Assembly, Belarus.)

THE UNVIERSALITY AND RELATIVITY OF HUMAN RIGHTS

- AN APPROACH FROM ICCPR

Sun Shiyan
China

There have been many debates about the universality and particularity/relativity of human rights, or the relations between human rights as a universal value and the diversity of cultures. However, most debates have been approached from rather abstract, conceptual and comparative approach. It is therefore desirable to discuss the issue from the perspective of international human rights standards, which have been generally accepted by the whole international community.

It is a fact that there are different and diverse cultures in the world. It is also a fact that international human rights standards are universal, at least in their forms, and so is a fact that these two facts coexist with each other in the world. How can these two facts coexist? In other words, what is the relationship between the diversity of human rights and universality of human rights in the context of international human rights standards? If it is not the case that one side dominates the other, then how are they balanced? The following part will briefly address this problem from the perspective of *International Covenant on Civil and Political Rights* (ICCPR), which has 161

State parties³⁴⁰ and “is probably the most important human rights treaty in the world.”³⁴¹

I. The universality of human rights as reflected by the ICCPR

Firstly it is for certain that no provisions in the ICCPR leave any room for relative interpretation from the cultural or other perspectives. Article 2(1) of the ICCPR merely provides that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,” without any unreasonable distinctions. In this article or any other parts of the ICCPR, there are no provisions by which the State parties are entitled to interpret, accept and implement the ICCPR at their own wills and in accordance with their specific conditions and situations.

Secondly, the Human Rights Committee (HRC), the organ responsible for monitoring the implementation of the ICCPR, has always denied, or more accurately, ignored the justification of noncompliance with the ICCPR on the ground of particular situations - cultural or of other natures - in specific State parties.³⁴² There are many examples to show that the HRC has never permitted any exceptions to the requirements of the ICCPR on the cultural ground. For example, in contrast with the European Court of Human Rights that has developed, elaborated and applied the “margin of appreciation doctrine” in dealing with many delicate cases, the HRC has never recognized that the State parties enjoy any margin in applying and implementing the ICCPR, with only one exception of quite obscure reference to “margin of discretion” in *Leo R. Hertzberg et al. v. Finland*.³⁴³ This approach of the HRC may seem strange, for it would be more reasonable to make use of the doctrine in the sphere of the ICCPR, which applies to a more heterogeneous world, comparing with the European Convention on Human Rights applying to a relatively homogeneous area. The HRC has never explained its reluctance in this respect. Nevertheless, it could be arguable that the HRC has a strong justification to do so: if the State parties were allowed to have a certain margin of appreciation/discretion in applying the ICCPR, it would give rise to the frequent and enormous noncompliance with and even avoidance of the ICCPR obligations by way of invoking so called “specific conditions and situations” of the State parties concerned. However, it is an important task of the HRC to maintain and uphold the universal applicability of the ICCPR requirements. If the State parties were to be allowed to apply the ICCPR in any ways they wish, the HRC would not be able to carry out its monitoring functions, and even its very existence would become redundant.

The HRC criticised the noncompliance of the ICCPR by some State parties in some of the individual communications. For instance, in *Michael Andreas Müller and Imke Engelhard v.*

340 <http://www2.ohchr.org/english/bodies/ratification/4.htm>

341 Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Right: Cases, Materials, and Commentary*, p. 4 (2nd edition, 2004).

342 See, e.g., *Bernard Lubuto v. Zambia*, Communication No. 390/1990, paras. 5.1, 5.2, 7.3; *Lantsova v. Russian Federation*, Communication No. 763/1997, paras. 6.4, 9.2.

343 “It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.” Communication No. 61/1979, para. 10.3.



Namibia, the State party argued that it is “a long-standing tradition in the Namibian community that the wife normally assumes the surname of her husband.” The HRC, however, commented that “[i]n view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant,” and thus denied any regulations and practice of treating men and women differently on the basis of cultural traditions.³⁴⁴ In *Errol Pryce v. Jamaica*,³⁴⁵ the author of the communication was sentenced to six strokes of the tamarind switch. Despite the fact that such practice as caning and birching is still an acceptable and lawful punishment in some countries, the HRC categorically concluded that stroke of the tamarind switch constituted a cruel, inhuman and degrading treatment or punishment in violation of article 7 of the Covenant, without referring to any cultural or traditional considerations whatsoever.

In the same vein, in the consideration of State reports under article 40 of the ICCPR, the HRC also expressed its concerns and regrets, or in less euphemistic terms, criticisms, about the laws and practices with cultural implications in some State parties. For example, in the sphere of the equality between men and women that is most vulnerable to cultures and traditions, the HRC criticised those laws, customs and practices of such acts as polygamy, genital mutilation, subordination of women to men, different punishment for women and men regarding adultery and so on.³⁴⁶ With respect to the issue of equality between men and women, the HRC clearly indicated in its *General Comment 28 on Article 3 of the ICCPR*: “State Parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights” (para. 5).

In the light of the brief discussion about the provisions of the ICCPR and the HRC’s practice, it is hardly convincing to say that the ICCPR has left any room to cultural relativism for human rights or at least for civil and political rights. In other words, the underlying premise of the ICCPR is the recognition of the universal acceptability and applicability of civil and political rights.

II. The Cultural Diversity as Embodied in the ICCPR

The ICCPR and the practice of the HRC have never upheld the cultural traditions as justifications for not complying with the ICCPR requirements; instead, the HRC has not infrequently concluded that some laws, practice and customs with cultural roots are contrary to the ICCPR. Does this mean that the ICCPR and the HRC’s interpretations cannot coexist with the diverse cultures in the world, requiring a certain type of culture that might be mostly conducive to the protection of civil and political rights? This question can be understood as follows:

Firstly, in the 18 years history of drafting the ICCPR, there had been numerous negotiations, consultations and compromises, in which the considerations and concerns of all countries -

³⁴⁴ Communication No. 919/2000, paras. 4.4, 6.8.

³⁴⁵ Communication No. 793/1998.

³⁴⁶ See, e.g. CCPR/C/79/Add.82, A/53/40, para. 61; CCPR/C/79/Add.95, A/53/40, para. 361; CCPR/CO/69/KWT, A/55/40, para. 458; CCPR/CO/77/MLI, A/58/40 (Vol. 1), para. 81(10); See also, *Simalae Toala et al v. New Zealand*, Communication No. 675/1995, § 6.4.

many of them are non-Western countries - involved in the drafting were taken into account and accommodated to the greatest possible extent. Maybe contrary to many people's imagination that the Western states dominated the negotiation and drafting and the three groups of states (Western, Socialist and Third World) always maintained the solidarity within its own group, the fact is that no provision of the ICCPR was adopted under the pressure or coercion of a certain group and the group only. The rule of majority vote, having been applied to almost each and every article of the ICCPR and even single words, that was employed at the Commission on Human Rights and the Third Committee of the General Assembly, also guaranteed that the provisions of the ICCPR could be and were accepted by the participating states by and large.³⁴⁷

Secondly, the ICCPR now has 161 State parties, which constitute 80% countries in the world. This indicates at least for those 161 states, their respective cultures and traditions were not the obstacles for them to accept the requirements of the ICCPR, and also reflects that cultures of any type and form would tend to accept the ICCPR - How much similarity may we find between Germany and Botswana, between Republic of Korea and Bolivia? If those countries accepted the ICCPR, can the rest dozens of states that have not yet ratified the ICCPR argue that they cannot endorse the ICCPR merely for cultural reasons? Therefore, as pointed by one commentator, "the large percentage of States, representing all types of cultures and religions, that have freely ratified, indicating a reasonable degree of international consensus over the validity of the broad principles therein expressed."³⁴⁸

Some people might and do believe that the civil and political rights and the ICCPR containing those rights are basically "Western" and "Capitalist," while economic, social and cultural rights and the ICESCR containing those rights are "non-Western" and "Socialist." Consequently, non-Western civilizations and states would encounter more difficulties in accepting and applying the ICCPR than that of ICESCR. The fact is, however, that among the 157 State parties of the ICESCR, 153 have also ratified the ICCPR; only 8 State parties to the ICCPR have not accepted the ICESCR,³⁴⁹ and 4 State parties the other way around.³⁵⁰ This proves that at least as far as those 153 states or 3/4 states of the world are concerned, there is no formal preference to a certain category of rights, they indeed "treat human rights in a fair and equal manner, on the same footing, and with the same emphasis."³⁵¹

Thirdly, the above two points also illustrate that the rights enshrined in the ICCPR reflect the minimum consensus of the international community as regards civil and political rights, the so-called "common denominator" of all types of cultures. The fact that the ICCPR was adopted by the GA unanimously should not be overemphasized so as to conceal the different understandings

347 Manfred Nowak in his CCPR Commentary (2nd revised ed., 2005) introduced such negotiations and compromised in great details. See also, Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, 1987.

348 Sarah Joseph, Jenny Schultz & Melissa Castan, *op. cit.* p. 39.

349 The 8 states are Andorra, Belize, Botswana, Haiti, Mozambique, Samoa, South Africa and United States of America.

350 The 4 states are China, Guinea-Bissau, Lao People's Democratic Republic and Solomon Islands.

351 *Vienna Declaration and Programme of Action*, Part I, para. 3, 25 June 1993.



and interpretations behind the generally approved, consolidated text of the ICCPR. The numerous reservations and declarations made to the ICCPR also exemplifies that states may and do have different understandings and interpretations of the rights contained therein, even though not all reservations can be regarded as being acceptable or compatible with the object and purpose of the ICCPR.³⁵²

Fourthly, following the above point, it is understandable that the State parties, the HRC and the individuals concerned may have different understandings and interpretations of the ICCPR. In fact, it is a common phenomenon that legal standards are analysed and interpreted differently, and for the ICCPR it would be even more obvious. A state, upon its ratification of the ICCPR, would no longer be able to justify its nonacceptance of or noncompliance with the requirements of the ICCPR, the Covenant nonetheless leaves some room for cultural differences, in particular with respect to the limitation clauses contained in many articles of the ICCPR. Any concepts, regulations and practices with respect to the ICCPR on the basis of cultural or even political, economic, legal and social considerations would be permissible so long as they do not break the bottom line set up by the ICCPR and the HRC. This is also implied by article 5(1) of the ICCPR. Consequently, a state may establish a state or official religion, as long as it does not contravene the object and purpose of article 18 of the ICCPR, especially the restrictions upon the limitations; a state may prohibit or even criminally prosecute the pornographic publications, as long as it does not contravene the object and purpose of article 19 of the ICCPR, especially the restrictions upon the limitations, and the punishment imposed is not incompatible with other provisions of the ICCPR such as articles 7, 9 and 14. For instance, the views of the HRC adopted in the *Mauritian Women* have been used quite often as an example to the effect that the ICCPR and the HRC would tolerate cultural differences to the extent that they have not violated the ICCPR requirements: the Committee was of the opinion that, with respect to the term “family” within the meaning of article 23(1) of the Covenant, “the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions.”³⁵³

Lastly, the Human Rights Committee, an organ consisting of independent experts and

352 The number of reservations made by the State parties to the ICCPR is quite large, meeting with nonetheless only very few objections from other State parties. However, the few objections do not mean that other reservations not subject to objections are acceptable in terms of their compatibility with the object and purpose of the ICCPR. There are quite complicated reasons why states are reluctant to object inappropriate reservations, such as the non-reciprocity nature of the ICCPR or human rights treaties in general, or “States have often not seen any legal interest in or need to object to reservations”. The controversial opinions of the HRC regarding the reservations issues, see General Comment 24: “Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant”, Fiftysecond session (1994).

353 *Shirin Aumeeruddy-Cziffra et al. v. Mauritius*, Communication No. 35/1978, para. 9.2 (b) 2 (ii) 1. It was accordingly argued that “[t]hus, there have been some indications that the HRC is prepared to adopt a relativist interpretation of ICCPR rights”. The same commentator however also pointed out that “since the Toonen decision in 1994, the HRC has clearly exhibited disapproval of culturally relativist arguments”. Sarah Joseph, Jenny Schultz & Melissa Castan, op. cit. p. 43. Cf. *Nicholas Toonen v. Australia*, Communication No. 488/1992.



crucial to the development of the ICCPR jurisprudence, has also guaranteed that the interpretation and application of the ICCPR would respect the different cultures and traditions of the State parties. Article 31(2) of ICCPR provides: "In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems." The purpose of this provision is to prevent the HRC from being controlled by experts from a certain group of countries and representing only a certain type of culture or legal system. Due to the fact that ratification ratios of countries from different regions of the world are not even - by far the ratifications in Asia are the least in proportion to the number of countries in this area, there are relatively more members from the Western and Eastern European groups.³⁵⁴ But in general, the HRC has been satisfying the requirement of representing "the different forms of civilization and of the principal legal systems" during the past three decades of its functioning, and the states under its monitoring are also from different parts of the world. The interpretations produced by the HRC may therefore "provide fertile ground for identifying and perhaps resolving cultural clashes over human rights."³⁵⁵

III. Brief summary

It may be concluded from the brief analysis of the ICCPR practice and jurisprudence that the international human rights treaties in specific and standards in general on the one hand reflect and maintain the universality of human rights, on the other hand also respect and accommodate different cultures and traditions. From the perspective of international human rights covenants and conventions, there are some tensions and contradictions between the universal human rights standards and the diverse and multiple cultures. Nevertheless, they are the two sides of one coin and therefore can be perceived as a dialectical unity: it is the very existence of different, but not mutually exclusive and alien, cultures and their different concepts of human rights that on the one hand makes the establishment of the universal human rights standards possible in logical terms, and on the other hand endows the universal human rights standards with significance and necessity. In summary, the proclamation in the *Vienna Declaration and Programme of Action* should become a starting point and benchmark to comprehend the universality of human rights and diversity of cultures: "While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

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354 At present, among the 18 members of the HRC, 7 are from the Western group, 1 from Eastern and Central European group, 2 from Asia, 5 from Africa and 3 from Latin America. See, <http://www2.ohchr.org/english/bodies/hrc/members.htm>.

355 Sarah Joseph, Jenny Schultz & Melissa Castan, *op. cit.* p. 43.



EU HUMAN RIGHTS POLICY

Michalis Rokas
European Commission

Central to the EU's approach is the concept of human security - an idea of security which places people at the heart of our policies. It means looking at the comprehensive security of people, not the security of states, encompassing both freedom from fear and freedom from want.

A world in which people can live in freedom, security and dignity, free from poverty and despair, is still a dream for many. Yet only in a world based on the rule of law and the freedom from fear and want can people develop their individual and collective potential. Respect for human rights is one of the most fundamental and universal values of our world. All of us have a responsibility to promote and protect the rights of our fellow members of the human family, be that at home or elsewhere in the world.

The EU takes this obligation seriously. We have been pursuing an active human rights policy with our partners for many years, through political dialogue, human rights clauses in our agreements with partner countries, in the international fora as well as through our development aid programs, in particular the European Initiative for Human Rights and Democracy (EIDHR).

We take a two-pronged approach: first, mainstreaming human rights concerns into all our policies and programs (complementarily), and second, financing specific projects to promote and protect human rights.

By mainstreaming we mean integrating human rights and democratization throughout the EU policies, programmes and projects. Our work is guided by the human rights guidelines that the EU has issued on the death penalty, torture, dialogues with third countries, children affected by armed conflict, human rights defenders as well as by the international human rights conventions, which translate into the founding Treaties of the European Union. We have given particular attention to the vulnerable situation of women human rights defenders: in this framework we have implemented a world wide campaign including meetings with women human rights defenders, issuing demarches, declarations and statements and raising the issue with our partner governments.

The EU's external representations also play a central role in promoting human rights. The Commission has made sure that, in the mandate granted to its Head of Delegation worldwide, human rights are given a prominent role. Our Heads of Delegation are tasked to maintain regular contacts with all civil society organizations active on human rights issues, to follow closely human rights issues - including the situation of individual human rights defenders - and to integrate a human rights perspective in to all actions which they undertake. This may also include providing financial support to human rights defenders, or in cases where human rights defenders are under



pressure, observing trials or visiting them in prison.

Turning to the issue of complementarity between policies, let me mention two issues where trade and human rights intersect. The commission is responsible for implementation of the GSP Regulation, which has two important human rights aspects. The GSP trade advantage can be withdrawn from a beneficiary country for serious and systematic violations of human rights. The GSP has been withdrawn from both Burma and Belarus on these grounds. Moreover, certain States which ratify and effectively implement the core UN human rights conventions and ILO conventions on labour rights, as well as key environmental conventions, are eligible for special incentive GSP privileges (the “GSP+”). Fifteen countries currently benefit from the GSP + scheme and the Commission is currently reviewing with the Member States the progress which beneficiaries have made under this scheme.

Human rights are systematically addressed within the political dialogue that the European Union conducts with third countries or regional groups, in the framework of the Common Foreign and security Policy (CSFP). In addition, the European Union has engaged in dedicated human rights dialogues with a number of countries.

Human rights dialogues and consultations are an essential tool to intensify the process of integrating human rights and democratization objectives into all aspects of EU external policies. They take place on a variety of levels: with China and Iran, the EU conducts dialogues focusing exclusively on human rights. These are highly structured dialogues held at the level of senior human rights officials. This type of dialogue has so far only been used with countries with which the European Community has no agreement and/or where the agreement does not contain a human rights clause. With many other third countries, human rights dialogues are held at a local level or in the framework of the agreements the EU has with these countries. Detailed consultations take place with African, Caribbean and Pacific (ACP) states in the context of the Cotonou Agreement.

Following endorsement at the EU-Russia Summit in November 2004, the EU and Russia have started to hold consultations on human rights on a regular, bi-annual basis. Both sides have agreed that the consultations are an important part of overall EU-Russia relations. The EU has also established human rights and democracy subcommittees with a number of partner countries, principally in the European Neighborhood Policy area. Regular consultations on human rights issues are also held on the basis of broadly converging view with countries such as the United States of America, Canada, Japan or New Zealand. These take the form of six-monthly meetings of experts, in the run up to key human rights meetings at the United Nations.

The specific objectives of human rights dialogues may vary from one country to another. In general, they aim at seeking information about the human rights situation in the country concerned; expressing EU concerns about aspects of the country’s human rights record; identifying practical steps to improve the human rights situation on the ground, in particular through the setting up of co-operation projects; and discussing questions of mutual interest and enhancing co-operation on human rights in multinational fora such as the United Nations. Moreover, human rights dialogues can identify at an early stage problems likely to lead to conflict in the future. They can also be useful in exposing governments to international human rights



standards and EU practices.

The key challenge is for the human rights dialogues to go beyond a mere recitation of well-known positions and to lead to concrete improvement of the human rights situation on the ground. Detailed benchmarks have been drawn up by the EU for the structured dialogues with China and Iran, or for resuming cooperation with countries under sanctions (art. 96 of the Cotonou agreement) but not yet for the other types of dialogues with other third countries.

The example of the EU's structured human rights dialogue with China

In 1994, the EU accepted a proposal from China to engage in a regular dialogue on human rights. A first meeting took place in January 1995. since then, with few exceptions, the EU-China human rights dialogue has taken place once every six months, alternating in China in Europe. The formal dialogue has been complemented by EU-China human rights legal seminars bringing together officials, academics and representatives of the NGO community.

The EU-China human rights dialogue has been a useful channel of communication, a platform for the EU to express concern on a number of issues and to seek information about human rights developments in China. The dialogue has been a way to expose the most reform-minded Chinese decision-makers to international human rights standards and EU practices. It has allowed the Commission to identify human rights co-operation priorities and for both sides to agree on future projects.

On the other hand, the dialogue remains an incremental process which aims to generate long-term improvement. Progress is therefore rather slow. On many issues, the dialogue is not likely to generate immediate change but to contribute to establishing a favourable environment for gradual or experimental improvements. Although the impact of the dialogue is difficult to measure, positive steps have come out of the process, such as China's greater engagement with UN human rights mechanisms (for example invitations to the UN High Commissioner for Human Rights and to UN Special Rapporteurs, signing of the International Covenant on Civil and Political Rights, signing and ratification of the International Covenant on Economic, Social and Cultural Rights).

EU partners carried out in 2004 a comprehensive evaluation of the dialogue. The EU Council of Ministers concluded that the dialogue and its related legal seminars remained useful instruments to engage China on human rights and trigger positive change in the long turn.

We have seen a number of positive developments in the human rights field. We have worked hard to implement the 2005 UN Summit's decision to establish a Human Rights Council. Its inauguration last year gave us an important mechanism to better protect and promote human rights around the world-empowering women; helping states meet their international obligations; assisting human rights defenders and children in armed conflict; and sounding the alarm when violations occur. We now need to ensure it is able to work as efficiently and effectively as possible.

Through our European Neighbourhood Policy (ENP) we have, for the first time, been able to set up forums to discuss human rights and democracy issues with Jordan, Morocco, Lebanon and Tunisia and others are in the pipeline. The first progress reports on the implementation of the ENP confirmed that profound reforms are underway as regards legislation, administration and judiciary. These reforms geared to enhance protection of human rights and fundamental freedoms as well as



to strengthen democracy and good governance will no doubt make a significant difference in the lives of all people in our neighbour countries.

Since 1995, the Commission - which is responsible for negotiating EC external agreement in accordance with a mandate granted by the Member States - has sought to include a "human rights and democracy clause" in every agreement concluded with third countries, with the exception of sectoral agreements and agreements with industrialized countries. There are now more than fifty agreements, covering more than one hundred and twenty countries, which include a human rights clause. We view the human rights clause as an important way of demonstrating the shared commitment of the European Union and its partners to upholding and promoting human rights.

The human rights clause opens the door to developing a deeper and more intensive dialogue on human rights issue. Human rights issues are already raised systematically with all partners in political dialogue. However, human rights clauses enable us to establish human rights Sub-Committees with the partner country and a growing number of such Sub-Committees are being established. Furthermore, human rights may be raised at Association/Co-operation Council or Association/Co-operation Committee meetings.

We view the human rights clause as a foundation for dialogue rather than as a basis for sanctions. However, in appropriate cases, the human rights clause has been invoked as the legal basis for sanctions. The decision to suspend an agreement lies in the hands of the Member States and depends on their political willingness to do so.

The clause has been invoked twelve times since 1995 (Niger, Guinea Bissau, Guinea, Central African Republic, Togo, Haiti, Comoros, Ivory Coast, Fiji, Liberia, Sudan and Zimbabwe). To take just two examples, after a coup d'état in the Central African Republic in 2003, the EU partially suspended development co-operation and macro-economic support, and decided progressively to reduce the 9th EDF funds by 20% per year. Co-operation was resumed following democratic elections in 2005 in Haiti, following significant fraud in May 2000 legislative elections, the EU suspended almost completely development aid. Development aid was resumed in October 2005 once the Haitian government had announced a timetable for election, which took place in February 2006. In both cases, we feel that the imposition of sanctions has played an important part in encouraging the resumption of the democratic process.

Other well-known cases where the human rights clause has been used to impose sanctions are Sudan and Zimbabwe. In the case of Sudan/Darfur, the European Union has been actively involved at diplomatic and political level since the beginnings of the international efforts to resolve the Darfur crisis. The Union has supported efforts to broaden support for the Darfur Peace Agreement, concluded between the government and rebel factions in May 2006, as a crucial element of an all-inclusive political process to achieve a political settlement of the conflict in Darfur. The EU has applied sanctions under the human rights clause against the Bashir regime (EU arms embargo for Darfur), as well as implementing UN Security Council travel bans on several individuals. The EU also supports the indictment of two Government ministers by the International Criminal Court. These measures do not seem, unfortunately, to have yet yielded results.

The Council, in its conclusions of 10 December 2007, reiterated its readiness to consider



further measures, notably in the UN framework (in line with Security Council Resolution 1591), against:

- * any party that obstructs the prompt deployment of an effective force in Darfur;
- * any party that undermines peace and security in Darfur or the region through committing acts of violence, especially against any party that obstructs humanitarian access;
- * any party deemed to be failing to engage constructively in the peace process, and consequently to be considered as an obstacle to peace.

But the EU deems it is important to maintain pressure on the Government of Sudan, while at the same time avoiding totally burning bridges with the Bashir regime; and between the Government and non-signatories to the Darfur Peace Agreement.

Following the refusal by the Zimbabwean authorities to allow the entry of EU election observers for the 2002 elections, continual harassment of the opposition and the illegal occupation of farms, the EU suspended development co-operation (leaving in place humanitarian aid and health and food security programmes) as well as imposing an arms embargo, travel restrictions and asset freeze against certain officials. These targeted measures remain in place, and the number of officials subject to sanctions has been increased.

EIDHR

But of course more remains to be done. Through the European Instrument for Democracy and Human Rights (EIDHR), which currently has an average annual budget of some £ 140 million, we fund a broad range of human rights projects across the world.

The focus of the new EIDHR (2007-2013) is on enhancing respect for human rights, and fundamental freedoms, and the protection of human rights defenders worldwide. This new funding instrument will also pay particular attention to activities relating to the EU guidelines on human rights issues and strengthening of civil society. It will seek to promote fundamental rights in countries and regions where they are most at risk. Moreover, it will support the international framework for the protection of human rights, the rule of law and justice, and the promotion of democracy. Confidence in democratic electoral processes will continue to be built through further development of electoral observation.

As you see the EU has been very consistent in pursuing its policies in the field of human rights. We firmly believe that human security, democracy and prosperity can only be achieved in societies where fundamental human rights are respected. Humanity will not enjoy security without development; it will not enjoy development without security; and it will not enjoy either without respect for the human rights.

As Aung San Suu Kyi, Burma's opposition leader, so famously wrote, "Please use your liberty to promote ours." That is what the EU, with all the instruments at its disposal, is striving for.

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SINO-AFRICAN RELATIONS AND DEVELOPMENT OF AFRICAN HUMAN RIGHTS

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Since the advent of the 21st Century, Sino-African relations have witnessed rapid development and become a worldwide highlight. They are universally acknowledged that Sino-African relations have boosted the economic development of Africa and elevated its international status. However, understanding of the influence exerted by Sino-African relations on African human rights development has diverged. To understand this influence, we need a comprehensive and deep understanding of Sino-African relations.

Section 1 Features of Sino-African relations

Sino-African relations have a long history, dating back to the first century A.D., when the first exchanges between China and North African countries occurred. In the 15th century A.D., Emperor Mingchengzu of the Ming Dynasty dispatched a huge fleet led by Zheng He to visit East African countries. Later on, material and cultural exchanges between China and Africa persisted. After the foundation of People's Republic of China, Sino-African relations have made new breakthroughs. The new Chinese government unswervingly supported the African people in their fight against colonial domination for national independence. African countries that had gained independence were willing to develop political, economic and cultural relations. Over the past decades, Sino-African relations have been developing healthily. The 21st century has injected new impetus into the development of Sino-African relations which have assumed much exuberance. Compared to other international relations, Sino-African relations stand out alone.

First, Sino-African relations are based on mutual respect and equality. China and African countries are similar in that both had been subjected to imperialist and colonist oppressions and experienced the pains of unequal international relations. Even after independence, China and many African countries have suffered from political isolation, diplomatic blockade, and economic control by Western countries. Therefore, both China and African countries are in dire need of equal international relations. China highly respects the sovereignty of African countries and their choice of development path. It also refrains from interfering with their internal affairs, imposing no additional conditions while providing them with assistance.

China has always deemed African countries as independent and sovereign countries, and treated them all with equality, despite their difference in territory, prosperity, and strength. China never imposes its ideology or developing path on other countries. While giving aid to African countries, China has been considerate about the volition of African countries and attentive to



their own voices. China has treated all African countries equal, regardless of their respective political system, whether it be one-party or multi-party system. Meanwhile, China has promised African countries that it is willing to share its experience in development, reform and poverty-elimination. However, it discourages them from blindly copying China's experience. Countries, especially African countries should choose their development path according to their national situations and characteristics.

China holds in high regard African countries' status and roles on the world stage and maintains close negotiation and cooperation with them in international affairs. Leaders from China visited African countries frequently and deepened China's relation with them. Over the years, foreign ministers have taken African countries as the first destination of visit for each year, a fact mirroring the importance of African countries in the opinion of China. China has held its relations with developing countries as its diplomatic foundation, and Africa is the region with most developing countries.

Secondly, Sino-African relations are sincere, cooperative and mutually supportive. China and African countries have no old scores, and virtually no modern conflicts. After the Second World War, China was subjected to isolation and blockade from Western countries, while African people also suffered from colonist oppressions.

In fighting against imperialism and colonialism, the people of China and Africa came together. China unswervingly supported African countries' battle against colonialism for national independence and helped them in economic development. For African countries that had not achieved independence, it offered political and economic assistance, and training of personnel for national liberation.

According to statistics from African Liberation Committee under Organization of African Unity, China furnished 75% of the weapon assistance obtained by African National Liberation Campaign from 1971 to 1972. It has trained tens of thousands of African "freedom fighters" and adamantly voiced its support to African people in their fight against colonialism and racialism. African countries have been unanimously supportive of China's grand cause of reunification, its entry into the international community, its role in international affairs and strongly resisted intervention into its domestic affairs with human rights issues by Western countries.

In 1971, China regained its legitimate seat in the UN, a success in which African countries played an important role. Former Chairman Mao Zedong once remarked on the effect that, it is our third-world brothers that carried China into the United Nations.³⁵⁶

Algerian president, Abdelaziz Bouteflika said in his capacity as a witness, that when the UN General Assembly announced its decision to give back to China its role as a UN member, "all delegates from African countries unanimously voiced their congratulations, as if it were their own victory, their facial expression denoting heartfelt happiness."³⁵⁷

The majority of African countries abide by one-China policy, and 48 of them have established

356 Pang Xianzhi, Jin Chong et. Al., *Biography: Mao Tse Tung*, P1634, Central Intelligence Agency, 2003.

357 *Sino-Africa Cooperation Forum-Beijing 2000 Ministerial Meeting Proceedings*, P91, World Affairs Press, 2001.



diplomatic ties with China so far. African countries are strongly supportive of China on many multi-lateral occasions, and have become an important foundation for China to play its part in the international community. It is well acknowledged that China owes to African countries its victory over human rights offenses from Western countries. Because of their adamant support, China has managed to defeat anti-China motions proposed by Western Countries at UN Human Rights Commissions.

Thirdly, Sino-African relations are a mutually beneficial and win-win relation. The profound base for the relations lies in the common good of the two sides. Politically, China and African countries are developing countries, faced with similar international situations and common challenges. They both have to bear considerable pressures from developed countries in the West, prevent external forces from interfering with domestic affairs, and rely on themselves to choose a development path and model according to their situations. They both have to reshuffle the unjust international economic and political orders, and improve their own political and economic status. They both have to achieve modernization and all-around economic and social development, so as to meet the ever-growing material and cultural demands from their own people. Obviously, China and African countries should join hands and cooperate with each other so as to realize their objectives of safeguarding national sovereignty and developing their economies.

Economically, Sino-African cooperation can bring the two sides considerable benefits. China and African countries are enormously complementary. Heralded as world factory, China possesses stronger competitive edges in manufacturing industry, and can provide African countries with industrial products and applicable advanced technologies, which will help them to improve the life-standards of their people and to develop their economy. Meanwhile, China is an important importer of energy resources and raw materials. The rapid increase of demand from China boosts the price rise in energy resources and raw materials, a situation beneficial for energy-exporting African countries. Likewise, Sino-African economic cooperation also benefits China, which obtains stable energy resources and raw material supply from African countries and opens up new export markets. Via cooperation, both China and African countries can improve their economic situations and trade and obtain greater benefits. Therefore, Sino-African relations are a mutually beneficial and win-win relation, and incarnation of all economic cooperation.

Section 2 The significance of Sino-African relations for development in African human rights

Human rights development should be the domestic affairs of African countries, and should rely on their governments and people. External factors may exert certain influence, but such influence is after all limited. Essentially, the level of their human rights development depends on the efforts by their governments and people, and their economic and political development. Like other countries out of Africa, China can only be an external factor to indirectly affect the development in African human rights. Compared with Western countries, China is not bound by colonialism. Therefore, its influence is positive.

First, China supports African people in their struggle against colonialism for national



independence and right to self-determination. Right to self-determination is primarily the right of a people to determine the political status of their country independently. This right has been denied to African people by prolonged colonist domination. Since its foundation in 1949, the People's Republic of China has trenchantly supported African people in their anti-colonist campaigns. In the 1950s, China supported Algerians in their armed struggle for national independence. Abdelaziz Bouteflika, President of Algeria said, "Algerian people will never forget the assistance offered by the Chinese people in their resistance. It is the Chinese people that have encouraged us in this campaign, furnished us with material aid, and trained hundreds and thousands of Algerian youths for the war."³⁵⁸ Virtually all African countries have received assistance of one kind or another from China in their liberation.

During the colonist rule, the most heinous policy implemented by the racist administration of South Africa is racial segregation. The Afrikaner regime deprived the black people of their land, drove them to narrow black towns, forbade them to settle down in residential areas for the white, and implemented systematic policies biased against the black people. The South Government forbade blacks to work in government agencies, to serve in regular armed forces, to become higher-paid skilled workers, and to get married to white people. It also implemented apartheid in trains, ships, hotels, stadiums and other public premises.³⁵⁹

Those most appalling infringement of human rights aroused strong resistance from South African people. Led by the African National Congress of South Africa, they launched all kinds of resistance campaigns, and won extensive compassion and support from the international community. Since 1960, China imposed trade sanction against the racist South Africa regime, and severed all economic and trade ties with its colonist administration. China offered political support to national liberation organizations in South Africa, helping them train cadres. It also trained a number of quality freedom fighters proficient with military contention theories and strategies for the three major national liberation organizations, and offered them with material aid.³⁶⁰

Secondly, through assistance and economic cooperation, China has helped African countries in improving the life of their people and developing human rights. As of 2006, China has offered 53 African countries assistance free from political conditions, and helped African countries to complete over 800 projects.³⁶¹ Those assistance projects mainly cover agricultural productive projects, infrastructure, educational, medical and physical culture facilities, which benefit African people directly. Since 1963, China has been sending medical teams to African countries. By the end of 2005, medical teams sent by China had reached 19 thousand person-times, diagnosing and treating 240 million person-times of the diseased. From 2000 to 2005, China received 11,296 person-times of African students to study in China, among which 7,562 were awarded with

358 *Sino-Africa Cooperation Forum-Beijing 2000 Ministerial Meeting Proceedings*, P90, World Affairs Press, 2001.

359 Lu Ting'en, *African Issues*, P221-224, World Affairs Press, 2005.

360 Xu Sujiang, *China's Support to National Liberations in South Africa*; Lu Miaogen, Huang Shejiao and Lin Yi ed., *Same Heart-the Glamorous Path of Friendly Sino-African Relations*, P166-177, World Affairs Press, 2006.

361 http://news.xinhuanet.com/newscenter/2006-06/15/content_4703721.htm, China Offers Aids to 53 African Countries without Political Strings



government scholarships.³⁶²

Generally, for African countries that have diplomatic ties with it, China signs bilateral economic and technological cooperation agreement with them and offers them RMB loans free of interest. Over the recent years, under Sino-Africa Cooperation Forum, China reduced or waived debts amounting to RMB 10.9 billion yuan payable by 31 African debt-bound and poverty-stricken countries and least developed countries. For the 30 least developed African countries, China gives zero tariff treatment to them for 190 kinds of commodities exported to China. In addition, China has also trained 14,600 qualified workers in various fields.³⁶³ Those deeds benefit thousands upon thousands of African people, and make available to more people the right to medical care, education and other essential human rights.

Sino-African economic and trade ties have exerted even greater influence on African human rights development. Over the recent years, Sino-African trade has witnessed rapid progress. In 2007, the total amount of trade between China and African countries exceeded 70 billion dollars. And China became Africa's third largest trade partner.³⁶⁴ The fast developing Chinese economy boosts price rise in energy resources and raw materials in the international market, and helps improve the trade conditions for raw material exporters in Africa. The prices of energy resources and raw materials exported by African countries to China are usually higher than those exported to the West, greatly increasing their trade revenues. Sino-Africa trade has directly contributed to GDP growth in African countries by one percentage point. At the same time, African countries can import electro-mechanical products, consumer products and other industrial finished products from China at a much lower price than from the Western countries. In this way, African countries obtain greater benefits from Sino-African trade, directly improving the life of African people.

A still greater influence of Sino-African economic and trade relations consists in giving confidence and creating conditions to African countries and people for development. Over the decades, especially after the wake of the Cold War, Africa has experienced a period of slow development, and has been called "the stagnant continent." The development of China encourages the African people. They see that a developing country can virtually start from scratch and attain long-term and quick-paced economic development.

China's development experience also furnishes a very good reference for African countries. An important factor lies in completing infrastructure construction, in which China has more experience to build rails, roads, bridges, power stations, hospitals, factories and municipal facilities at much lower prices than Western countries. China offers preferential loans to help chaos-and war-imbued African countries for post-war reconstruction, creating favorable conditions for their economic development. Since the advent of the 21st century, African countries have

362 Lu Miaogen, Huang Shejiao and Lin Yi ed., *Same Heart-the Glamorous Path of Friendly Sino-African Relations*. World Affairs Press, 2006. p.307 and p. 319.

363 "Ministry of Foreign Affairs: Sino-African Relations Threatens No Country's Interests", http://news.xinhuanet.com/world/2006-10/27/content_5256167.htm

364 "Sino-African Trade Volume To Exceed USD 70 Billion", <http://www.africabuyer.cn/bencandy.php?id=25289>



attained about 5% growth in economic development. And it is almost universally acknowledged that China is an important factor for such growth.

Thirdly, China joins hands with the international community in the effort to resolve grave human rights issues in Africa. Since 2003, conflict broke out in Darfur Region in Southern Sudan between the government forces and the non-Arabian militia organization, resulting heavy casualties and leaving millions of people homeless.

This is a grave issue of human rights attracting attention from the international community. The Chinese government has gone to great lengths to resolve it. With the urge from international community including China, the Sudanese government principally accepted the three-stage plan proposed by former UN Secretary General Annan to resolve the issue. When China was on duty as Chairman of UN Security Council, the Security Council passed Resolution 1769 on July 31, 2007, authorizing dispatch of hybrid peacekeeping forces to Darfur.

China played a proactive role in pushing forward this resolution, and persuaded the Sudanese government to accept peace-keeping forces. Meanwhile, China sent a 275-strong peace-keeping engineer unit to Darfur.³⁶⁵ China advocates resolving the issue through peaceful means and diplomatic efforts. It believes that the issue is essentially an issue of development. To eradicate conflicts and avoid human rights catastrophes, the exasperating ecological environment should be improved, economy developed and local people's subsistence ameliorated.

Section 3 China and human rights issues in Africa

The prime issue consists in the subsistence of its people. Of the world 50 least developed countries, 34 are from Africa, more than half of African countries and 700 million people. And 8 of the 10 poorest countries are African countries.

According to statistics from the World Bank, about 985 million people lived in dire poverty in 2004. Among them, about 298 million lived in Africa to the south of the Sahara, accounting for 41% of the total population in this region. Eliminating poverty and satisfying the essential needs of their people are the most important human rights issues facing African countries. Poverty directly threatens life safety of their people. In African countries, another threat to people's lives comes from AIDS. In 2005, AIDS patients and AIDS virus carriers in the African continent almost reached 100 million. Over the recent years, at least 1.5 million of Africans die from AIDS yearly. AIDS has become the NO.1 killer in Africa, and a major hurdle tying down its social and economic development.³⁶⁶

The population in the African region to the south of Sahara accounts for 10% of the world's population, but 60% of the AIDS population. It is an area most severely inflicted with AIDS. In 2005, 3.2 million people in this region were infected with AIDS virus and 2.4 million died from the disease.³⁶⁷

³⁶⁵ Special Representative Liu Guijin on Africa and Darfur, World Affairs, 23rd Issue, 2007

³⁶⁶ AIDS Patients and Virus Carriers Reaching 100 Million, <http://www.39.net/aids/channel/world/93810.html>

³⁶⁷ African Regions to the South Sahara Is Still Most Severely Inflicted by AIDS, <http://news.sina.com.cn/w/p/2005-11-22/19048372969.shtml>



In addition, Africa has been torn by various complicated contradictions between nations, countries and over territory. Those contradictions have not been properly resolved and given rise to frequent wars and turmoil. Numerous innocent paupers have been slaughtered and tens of thousands of people left homeless. In 1993, tragic bloodbath between Hutu and Tutsi nationalities broke out in Rwanda. In mere three months, about 500 thousand Hutu nationalities were killed by Tutsi nationalities. The commotion in Sudan's Darfur Region took at least 10,000 lives, some estimating the figure to be 200,000-450,000. At the same time, millions of people were made refugees.³⁶⁸ Therefore, improving the subsistence of its people has become the most urging human rights issues in Africa.

African human rights crises are caused by various reasons, but the most important one is the colonial domination over hundreds of years by Western Countries. Poverty and disease result from retard of economic development, which has been impeded by Western colonial rule. Wanton slave trade by Western colonists has gravely sabotaged the productive force of Africa. They ravished resources from Africa but seldom invested in its education or infrastructure. They demolished the original social structure of Africa, and relied on a handful of urban elites to govern the vast masses living in the traditional countryside. European powers ignored the original social and historical conditions in Africa, and took to carve it up according to longitudes and latitudes. As a result, the composition of African countries is very unreasonable. African countries founded on the basis of colonies often have no common language or national identity. One country consists of many nationalities, which in turn are divided among countries. The pandemonium and carnage in Africa is directly related to Western colonial rule.

Therefore, Western countries are directly responsible for current human rights issues in Africa and are morally obliged to pay back historical debts. They are in no position to rebuke African countries from a position higher-up. Instead, they should make practical efforts to help them eliminate the after effects of colonial domination, assist their economic and social development, and completely improve the human rights conditions in Africa.

Unlike Western countries, China does not have to bear historical responsibility for the current human rights issues in Africa. It believes that human rights issues are the concerns of governments and people in Africa, and should be dependent on them. Other countries or international organizations should refrain from meddling in their affairs. Western countries have conducted colonialism in Africa for hundreds of years and hold considerable power over Africa. They have had their power and time to practice Western human rights concept.

However, how much human rights were Africans entitled to when Western colonists left the continent. After independence of African countries, Western countries controlled their economic arteries for about 30 years and had considerable influence on them. During this period, how much progress did African human rights make? In the wake of the Cold War, Western countries not only dominated African economies but also brought their political system and ideology into Africa, in their effort to remodel Africa. Over one decade has passed. What can we see now? An Africa with

368 Special Representative Liu Guijin on Africa and Darfur, *World Affairs*, 23rd Issue, 2007



stagnant economy and human rights conditions.

Countries really concerned about development of human rights in Africa should at first respect the right of African countries to independently choose developing paths and to decide for themselves on how to manage their country and develop their economy. Imposing a certain ideology, political system and development mode on Africa can only impede human rights development. Only African countries and people know how to best achieve progress in this aspect.

China believes that African human rights issues are essentially issues of development. Elimination of poverty and solution to hunger, medical care and education issues can only be achieved through development. Only by development can a series of gravest human rights crises be solved.

Even humanistic disasters caused by war can be traced to development issues. Lots of conflicts in Africa stem from backwardness, poverty and material scarcity. For instance, Darfur issues result from contentions for pasture and land between the Arabians and non-Arabians³⁶⁹. With reference to its own experience over 30 years, China realizes that development lies in the center of solution to human rights issues.

Only with economic development can the people of one country be entitled to economic, social and cultural rights, and can poverty and hunger be eliminated. With economic development, social freedom will be magnified and the people will have more basic freedom and human rights. It is just because of this realization that China emphasizes the importance for Africa to achieve development, helps African countries to construct infrastructure and prepares them for self-development, and forge conditions for all-round development in Africa's human rights.

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THE DEVELOPMENT AND PROTECTION OF HUMAN RIGHTS IN THE RUSSIAN FEDERATION

Yury Mikheev
Russia

Before referring to the problem of the development and protection of human rights let's touch briefly the notion of "human rights."

In spite of a person's residence, nationality, belief and sex he has the same feeling of resentment when he is hurt or unjustified accused. Everyone wishes to express his opinion freely

369 Special Representative Liu Guijin on Africa and Darfur, World Affairs, 23rd Issue, 2007



and have the freedom of choice. And certainly we wish to be treated as other persons in case those persons are treated with dignity.

Among human rights it should be noted the right for impartial hearing, the right for freedom of speech and belief, the right for non-discrimination etc. in other words human rights are all the complex which gives the person the opportunity to feel his valuable individuality.

The threat to human rights can be originated from two basic social sources. They are bureaucrats and human vices among which we can especially mark greediness and aggressive lust of power.

Irrepressibly striving for maximum profit can make the employer to hold his illegal employees as slaves, exploit child labour, destroy valuable types of flora and fauna, happy-go-lucky pollute the environment.

Here we should say about some invulnerability of commercial organizations as there is no control from the society. From the point of view of human rights protection this tendency is inadmissible and destroying. Today it is very important to take the private sector on board of "human rights' ship."

Every power tends to rule over civil society with the help of the stick and the carrot policy. To countervail this tendency the relevant balance is necessary.

Even at the beginning of the civilization a man should defend his rights. Thus our ancestry beating off the nomad's raid defended the basic human right - the right for life. Later, with the complication of the human society structure the whole system of protection of human rights has been created and formed legally.

Nowadays in every country where a person lives his rights are under protection. After World War II a number of international documents were adopted which oblige all the countries ratified those documents to observe basic human rights without any exceptions.

The prominent legal act in this sphere became the Universal Declaration of Human Rights adopted by the UN General Assembly 10 December 1948. Today there is a peculiar international code which comprises of numerous treaties and obligations of the governments to their citizens.

The observation of these obligations is monitored not only by NGO's but also international bodies including the UN Council on Human Rights, the Council of Europe, the European Court of Human Rights etc.

Our country can say that its Constitution is one of the leaders in the sphere of human rights - 48 of 137 articles are devoted to protection of human rights and freedom. But one thing is to proclaim rights and freedom and the other is to bring them to life.

The ombudsman institution which can be viewed as an advocate of the society before the state plays the important role in protection of human rights.

Sweden is considered to be the Motherland of the ombudsman institution where even in the XIIIth century the ombudsman called a man elected from the side of the victim for demanding of a penalty from murders. The Swedish and other Scandinavian people translated the word Ombudsman as attorney or plenipotentiary. In the epoch of absolute monarchism ombudsmen were the people of the Crown who controlled the activity civil servants and judges on behalf



of the supreme authorities. In the transition to the constitutional monarchy ombudsman began monitoring the administration on behalf of Parliament which was stipulated in the Constitution of Sweden of 1809.

The second country where the post of an ombudsman was established became Finland (the Constitution of 1919) and from the middle of the XXth century this institution spread all over the other countries.

The democratic state needs such institution as an ombudsman which is a mediator between authorities and society in the sphere of protection of human rights and a stabilized factor and guaranty of effective functioning of the democratic system.

The legal basis of the ombudsman institution in Russia was laid in the declaration of human rights and freedoms of the citizen of RSFSR of 22 November 1991 which proclaimed that, "the Parliamentary Plenipotentiary is appointed by the Supreme Council of RSFSR for the period of five years, who should report to the Supreme Council and has the same immunity as a deputy." The next step to the establishing of the post of Russian ombudsman became the Constitution of the Russian Federation of 1993 which in its article 103 foresaw that the Competence of the state Duma is "the appointment and dismissal of the Commissioner for Human Rights functioning in accordance with federal constitutional law."

Before the adoption of the Law the ombudsman institution functioned on the basis of the Decree of the President "On measures for provision of constitutional functions of the Commissioner for Human Rights" dated August 1994. This document stipulates that "before the adoption of relevant federal law the realization of constitutional functions of the Commissioner for Human Rights is provided by the realization of the powers conferred on the Head of the Commission of Human Rights under the president of the Russian Federation."

The law "On the Commissioner for Human Rights in the Russian Federation" was adopted and came into force only in the beginning of 1997.

What are the rights and the duties of the Commissioner for Human Rights in the Russian Federation, and what are the conditions of his activities?

In accordance with the Law the Commissioner "contributes to the restoration of the violated rights, to the improvement of the legislation of the Russian Federation on human rights and bringing it into line with the universally recognized principles and norms of the international law, to the development of the international cooperation in the sphere of human rights, to the legal education in the matters of human rights and freedom, forms and methods of their protection."

Though the Commissioner shall be appointed to his post and shall be dismissed from his post by the State Duma of the Federal Assembly of the Russian Federation, in discharging his duties he is independent and not accountable to any state bodies or officials.

The Commissioner investigates the complaints about the decisions or actions (inaction) of the state bodies, institutions of local self-government, officials, state employees, if a complainant appealed against these decisions or actions (inaction) according to court or administrative procedures, but does not agree with the decisions reached on his complaint. Though the ombudsman's conclusions are of recommendation (i.e. officials are not obliged to follow them) it

is considered non-ethic to ignore his recommendations.

All the countries which established the ombudsman institution noted that no matter how traditional systems are improved the ombudsman institution is the necessary means of control, which has its own recess, real sphere of action. The ombudsman guarantees the help of impartial and qualified institution which functions informally, urgently and free of charge, without advocates and adversary proceeding.

The Russian ombudsman is not constrained with obligatory proceeding rules in his functioning- he has vast credential in the methods and types of investigation.

He is not limited by the protection of human rights stipulated in the Constitution but orientate himself to the international legal standards.

The ombudsman institution is a peculiar connection between the authorities and society as he settles down conflicts of state and individual interests. The ombudsman as a duplicating link of monitoring of human rights indicates mistakes and injustice of management which are out of view of other legal bodies.

At the same time the ombudsman does not pretend to substitute traditional bodies and mechanisms of control. His work is aimed to cooperate critically with the administration and not to arouse public conflict with it. In his activity he makes efforts for mediation between authorities and citizens.

The ombudsman institution is a democratic institution of people strengthening a democratic state. The ombudsman must oppose not to a democratic state but to the attempts to undermine or distort its legal character.

At the same time state advocated should not become a decoration to the bureaucracy. The specificity of the ombudsman position to the authorities is that his activity lies in researching and correcting defects of state and legal system.

The formal instruments of the ombudsman's influence on the situation for protection of human rights are rather restricted. He does not have the executive power for making the officials to obey; he is not a judge who can pass a sentence or obligatory decision for everybody; he has not the right of legislative initiative (though it would be useful for him and the society).

In his activity the ombudsman rests upon public opinion as he protects legal rights of citizens. And for this purpose the society should receive the information about ombudsman's activity. That is why one of the basic aspects in the ombudsman's activity is his cooperation with media. On one hand, the media publishing his speeches and initiatives can form the public opinion, on the other hand they serve as irreplaceable source of information for the ombudsman in cases of violation of human rights in the country. That is why one of the necessary conditions for effective work of the ombudsman is the freedom of speech.

Another important task of the ombudsman is the legal education in the matters of human rights and freedoms, forms and methods of their protection.

Very often human rights are violated because people do not know much about their rights. Everyone should study the rights and duties of a citizen from the childhood. That is why it is necessary to include in the compulsory school curriculum teaching of constitutional rights and



freedoms either in the frames of social science or as a separate subject. This can be a considerable help in the legal education.

Today's attempts to turn Russia into a legal state not only in words but in reality have become a natural result of undertakings from one generation to another, efforts of restraining of uncontrolled power from one century to another, and so of enlarging of human rights.

Thus we can say that the idea of human rights itself is not imported to our homeland from the west but cultivated on the Russian soil.

Unfortunately a new problem which became very important recently has appeared in Russia - the inequality in the society. The gap between the richness of a few people and the poverty of major population causes social conflicts, gives rise for the appearance of Xenophobia. And all of that is of great concern of the ombudsman.

Now the ombudsman and its office carrying out within the limits of its competence close interaction with the state authorities' bodies and bodies of local self-management, mass-media, with NGOs and all society in the whole, pay special attention to:

The maintenance of social and economic human rights during realization of corresponding national projects in view of essentially increased financial opportunities of the state, on the one hand, and unacceptable a low level of its separate administrative parts on the other hand;

The overcoming of more and more dangerous tendency of the increase of the racial, national and religious intolerance which obviously represents a challenge for public stability and for the future of the democracy in the country;

The increase of awareness of the citizens about the rights and freedom guaranteed by the Constitution and the legislation of the Russian Federation, ways and forms of protection of these rights;

The development and introduction of new more effective methods of interaction with citizens and their organizations;

The realization of monitoring of a situation in the human rights sphere in Russia.

Summing up, it is possible to draw a conclusion, that the ombudsman institution in the Russian Federation for the past ten years has proved its necessity. It is necessary both to people and authorities. Without dialogue of authorities and people of Russia it is impossible to carry out a problem of construction of the democratic state in which observance of human rights will be a sacred duty of the state bodies and the state as a whole.

(The author is the counselor of the Commissioner on Human Rights of the Russian Federation.)



INTERNATIONAL ACTIVITIES OF RUSSIAN SPECIAL ENVOY FOR HUMAN RIGHTS

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Russia

I. Pursuant to Russian law, the Russian special envoy for human rights is responsible for protecting the rights and freedom of Russian citizens at home and abroad and for protecting foreign citizens and non-citizens within the territory of Russia.

Therefore, the special envoy acts on the ground that the diplomatic agencies and consulates of the Ministry of Foreign Affairs of Russia are responsible for safeguarding the rights, freedom and lawful interests of Russian citizens in foreign countries. In practice, this denotes that a complaint a Russian citizen (who stays in a foreign country temporarily or long) files to the special envoy for human rights generally is submitted by the special envoy for human rights to the Ministry of Foreign Affairs of Russia according to relationship of administrative subordination, with which related explanations and suggestions (when coming up with personal suggestions to the Ministry of Foreign Affairs of Russia, the special envoy for human rights shall follow his/her judgment on if a citizen's claim has any basis in international law and on the situation in the country where the complainant stays) are enclosed. The special envoy for human rights performs supervision over complaints of such citizens, including supervision over actions an agency functioning abroad or branch of the Ministry of Foreign Affairs of Russia has taken to truly solve problems.

II. Improving the level of and mechanism for maintaining human rights based on advanced international experience studies plays important roles. Therefore, participation in international forums, workshops and round table conferences, reciprocal visits and intelligence analysis have special meanings.

To achieve these goals, the special envoy collaborates with international organizations and international human rights protection agencies, meets and engages in informal discussions with delegates of foreign delegations and diplomatic missions.

In such collaboration, great attention is paid to observation of international rules and criteria concerning the protection of human rights and freedom, supervision over trampling on rights of Russian citizens in foreign countries, and restoration of a Russian citizen's rights according to his/her personal appeals.

III. An important part of international activities of the special envoy is to cooperate with national human rights protection organizations in the post-Soviet space, CIS countries and Baltic countries to restore rights of complainants who, for example, complain about non-payment of



pension, receive subsidies from the original place of residence, complain about length of service or industrial injury, and are dissatisfied with trial of property disputes. Among Russian citizens' complaints submitted to the special envoy, there are also accusations against foreign agencies which look into illegally (allegedly) criminal liabilities, pleas for submitting appeals of Russian citizens to foreign specialized agencies, and requests for delivering Russian citizens to the relevant agencies of the Russian Federation for further punishment.

IV. The special envoy presents these complaints to their foreign counterparts for discussion based on related bilateral agreements or on applicable procedures.

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THE NATIONAL ACTION PLAN ON HUMAN RIGHTS: THE INDONESIAN STRUGGLE

Harkristuti Harkrisnowo
Indonesia

The year was 1993. The then President Suharto's power was at its height. Even then he could not ignore the universal cries for human rights. Moreover, the Vienna Convention on Human Rights would soon be conducted. Hence he established a new organization called Human Rights Commission, to deal with human rights issues in the country, and to show the world that Indonesia did care about human rights. Due to the then political condition, a number of candidates of the Commission declined the offer to join it, for fear that it would only serve as an extended hand of the government, i.e. the President, and hence it would not have significant impact on the promotion, protection, and fulfillment of human rights in the country. Moreover, this Presidential Decree no. 50 of 1993 which established the Commission was so vague on the issue of mandate and authority accorded to this new institution.

Despite the apathy and pessimism, the Human Rights Commission disregarded all that and started its embryonic works on human rights. Surprisingly, by and by the Commission gained credence through its work, that people started to reach for the allegation of human rights violation. Of course, during that time Human Rights was not considered as one of the priority issues that need to be addressed immediately. Au contraire, it was seen as a threat to the unity and nationalism, or was proclaimed as such by some people who really were against universal human rights. Little wonder that civil society organizations working in human rights issues started to emerge one by one although with much timidity. The year of 1996 and 1998 found the Human Rights Commission an institution much sought after by the public at large who experienced



human rights violation, that during this time they gained credibility surpassing the Supreme Court and the Parliament. In addition, the establishment of The National Human Rights Commission since 1999, has been fortified through Law no. 39 of 1999, instead of a lower form of regulation, i.e. Presidential Decree, hence has significant impact upon the strengthening of its authority, including in budgeting process.

Unsurprisingly, fulfillment or un-fulfillment of human rights in Indonesia remains to be scrutinized both at the national and international levels. The stigma left by the past New Order regime employing security approach, resulted in human rights being perceived as something that could be in contrary to national security. At the end of Suharto's regime, various gross violations of human rights had been committed by certain groups in the community, abusing the chaotic condition during that time. Mass murders, mutilations, rapes, assaults and enforced disappearances were alleged to be committed against certain groups of people.

The social movement occurring in 1998 which ousted Suharto brought a totally new environment both to the government and the public. The most significant change was seen on the issue of freedom of the press. Previously, during the Suharto era, the press was not allowed to publish news or opinion that would be considered as threatening the national security, unity and establishment. A number of laws to prohibit such conduct were in existence, such as the Law on Subversive Acts, Law on the Press, The Criminal Code, etc., so that freedom of expression was clearly curtailed.

Nowadays it is clear that Human Rights constitute one of the key issues in Indonesia, its implementation being one of the most scrutinized issues both at the national as well as international level. This is understandable since human rights are a set of basic rights and fundamental freedom, inherent in the existence of each individual on the face of the earth, based on an individual's dignity as a human being. Little wonder that human rights have become one of the indicators taken into account by donor states in order to provide assistance to other countries.

While it is true that a National Commission of Human Rights has long been established in 1993, but at that time, only a few believed that this institution would take up its job accordingly, since its members were handpicked by Suharto himself. Nevertheless, by and by this institution gained people's trust until early late 1990s when more and more human rights and civil society groups were established, thus providing more alternative avenues for people to resort to should they experience a problem related to human rights. This was made possible since the 1998 collapse of Suharto's regime; the following successors of Suharto have created a much more liberal approach on human rights compared to the stifling condition engendered during Suharto's time. Even those alleged gross violations of human rights have been legally processed through a special proceeding established through the enactment of Law no. 26 of 2000 on Human Rights Court.

Following the establishment of the National Commission of Human Rights and in line with the recommendations produced by the 1993 Vienna Declaration and Program of Action, the government of Indonesia adopted the First Five-year National Action Plan on Human Rights in 1998, to be implemented from 1998 through 2004. Immediately after the ousting of Suharto, the Parliament enacted a Law on Human Rights no. 39 of 1999. These measures were further



strengthened by the issuance of the Decree on the People Consultative Assembly of the Republic of Indonesia No. XVII/MPR/1998 dated 13 November 1998. Hence it became the foundation for drafting and then promulgating Law no. 39 of 1999 on Human Rights, which serves as an umbrella act for human rights laws and regulation onwards. After that a flow of human rights instruments were ratified or acceded, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by Law no. 5 of 1998), and Convention against Discrimination (ratified by Law no. 29 of 1999).

While today there is a growing civil society movement to uphold human rights in all regions in the country, in general, human rights issue is a still predominantly covered issue in the media. The present political condition today also opens a vast space for human rights development. Despite the efforts made by the government, the media and the civil society, human rights violations are still occurring in various parts of the country. As such there is no doubt that it left a whole range of measures to be taken by all parties in order to rectify this condition, particularly in providing human rights knowledge to both the state apparatus and the public at large.

The human rights law regime

In summary, the human rights law regime in Indonesia has shown significant improvement in the past decade, since in addition to a number of domestic new rulings, a number of international instruments have also been ratified or acceded by Indonesia. Needless to say, the 2nd Amendment of the Constitution where ten articles on human rights were added in 2002 shall be considered as a milestone for constitutional rights. The Constitution itself has declared, among others that

The State recognizes and upholds human rights and fundamental freedom;

Protection, promotion, and fulfillment of human rights are primarily the responsibility of the State;

Everyone is born equal with inherent dignity and equal and inalienable rights; and

Every one is entitled to human rights protection without discrimination of any kind.

The main national laws with regard to Human Rights in Indonesia include, but not limited to, the following:

Law no 39 of 1999 on Human Rights

Law no. 29 of 1999 ratifying the Convention against Discrimination

Law no. 26 of 2000 on Human Rights Court

Law no. 7 of 1984, ratifying the Convention on the Elimination of All Forms of Discrimination against Women

Presidential Decree no. 36 of 1990 ratifying the Convention on the Rights of the Child.

Law no. 5 of 1998 ratifying the Convention against Torture

Law no. 23 of 2003 on Child Protection

Law no. 11 of 2005, accession to the International Covenant on Economic, Social and Cultural rights;

Law no. 12 of 2005, accession to the International Covenant on Civil and Political Rights.

Despite the strong legal bases for implementing human rights, it would escape no one's attention that today's social, political and economic condition in Indonesia is far from satisfactory.



This is no easy challenge to deal with, since without taking the matters at hands seriously, it would be impossible to be able to implement human rights in general accordingly. It is the obligation of the state to create a conducive environment in order to provide space for human rights to flourish. One of the pillars that have been built exactly for this goal is through the process of democratization, a sustainable one, whereby the people are accorded autonomy; hence regional autonomy has gained credence more and more. This has undoubtedly become the prerequisite to implement human rights accordingly.

Supporting institutions of human rights

There are a number of units dealing with human rights issues in various government institutions:

At The Ministry of Law and Human Rights there are two first echelon units:

The Directorate General for Human Rights

The Human Rights Research and Development Agency

These two institutions are expected to complement each other in the promotion and protection of human rights at the policy level, but they do not have implementing authority.

At the Ministry of Foreign Affairs there is a Directorate of Human Rights which deals mostly with international organization especially in terms of human rights reporting and facilitating the visits of UN organs to Indonesia.

At the Attorney General Office there is a Directorate of Human Rights, a recently established unit responsible solely for prosecution of gross violation of human rights cases.

In addition, there is a Human Rights Court established within the judiciary to deal with cases of genocide and crimes against humanity. Actually, according to Law no. 26 of 2000 on the Human Rights Court, there should be a National Truth and Reconciliation Committee, as mandated by Law no. 27 of 2004. This committee shall seek truth with regard to alleged Gross Violation of Human Rights occurred before the enactment of the Law on 1999, and promote for reconciliation among the parties. Unfortunately, the Constitutional Court declared Law no. 27 of 2004 unconstitutional, for, among others, it rules that rehabilitation and restitution to victims of crimes are dependent upon the granting of amnesty to the perpetrators by the President. Hence, even though the last stage of selection of members of the committee has been conducted, its establishment cannot be realized for the Law mandating its establishment is no longer in existence. Complementing the above institutions, a number of organizations supported by the government for ensuring the implementation of human rights include:

The National Human Rights Commission

The National Commission against Violence Against Women

The National Commission on the Rights of the Child

The National Commission on Ombudsman

The Constitutional Court

At the community level, we find many various community-generated non-governmental organizations as well as Human Rights Study Centers established in universities across the country.

Needless to say, The National Human Rights Commission plays a very significant role in



promoting human rights, for this organization, as stipulated by Law no. 39 of 1999. According to this law, there are four main functions of this institution, i.e. research, dissemination, monitoring and mediation of human rights. There is, however, an additional but very important role accorded to this institution which is in conjunction with the Human Rights Court, that is, as an independent institution to conduct pro justice preliminary investigation for alleged cases of gross violation of human rights. The investigation which could lead to adjudication is left on the hand of the Attorney General Office. There are, sadly, many instances where findings of the Attorney General Office are not in line with the earlier findings of the Commission. The discrepancy should be understood since while the Attorney General Office conduct its investigation according to the rules of criminal procedure and the rules of evidence, the Commission is not bound by such strict regulations.

This Commission has established local representative in regions, based on the request by local community who alleged occurrence of human rights violations in their areas. Representatives of the Commissions are located in Aceh, Papua, Padang, Pontianak, Palu and Ambon.

In ensuring that the laws on the land adhere to the Constitution, i.e. in line with human rights and standards, the Constitutional Court is accorded the authority to review and determine the constitutionality of a Law or its articles. Consisting of nine judges mostly from the academia thus far this Court has delivered a number of verdicts. Some of the laws revoked by it include Laws of Anti-Subversion of 1999, Laws on Terrorism, Articles 154 and 155 of Indonesian Penal Code on incitement of hatred against public officials, Article 34 on perjurying one's Boss, while on the other hand it upheld death penalty.

The national action plan on human rights

The First Plan was adopted in 1998 after a series of consultation with the stakeholders through National Workshops held by the government in cooperation with the National Commission on Human Rights. Basically, this document serves as a Guideline and General Plan to ensure the enhancement of respect, promotion, protection and fulfillment of human rights without any discrimination as to race, religion, and ethnicity. Recognizing the heterogeneity of Indonesian people, and the Plan also takes into account religious and cultural values including customs of Indonesian people. In order to ensure its sustainability and relevance, it was asserted that this Plan shall be progressively and continuously implemented in a five-year program (following the tradition of the previous Five-Year Development Program). Dissemination of human rights is the primary issue in this Plan, followed by acceleration of ratification of international human rights instruments.

Due to the socio-political situation during that time in particular the multi-dimensional crisis and the succession of three President during that very period - it was unfortunate indeed that many of the measures stipulated in The Plan were not able to be fully implemented. Hence the Second Plan was drafted and adopted in 2004 with the Presidential Decree no. 40 of 2004. This Second Plan reiterates the importance of the First Plan to promote, protect and fulfill human rights, and asserts six main pillars to be conducted as significant measures to achieve this end, i.e.

Establish and Strengthen the National Action Plan on Human Rights Committees

Prepare ratification of and accession to International Human Rights Instruments

Prepare harmonization of laws & regulations in accordance with human rights standards and norms

Disseminate human rights

Apply human rights norms and standards

Monitor, evaluate and prepare report of human rights

At present, globally there are only 24 countries including Indonesia - who already have National Action Plan on Human Rights as recommended by the Vienna Declaration and Program of Action, which identifies steps of each State to improve the promotion and protection of human rights. Learning the lessons from the previous Plan, it also calls for the establishment and empowerment of implementing institutions both at the National and Regional/local levels. The National Committee to implement the Plan is chaired by the Minister of Law and Human Rights, and the advisors consist of the Coordinating Minister for Political and Security Affairs, the Coordinating Minister for Economic Affairs; and the Coordinating Minister for Welfare of the People. Acting as the first Chair is the Minister of Home Affairs, while the Minister of Foreign Affairs serves as the second Chair, assisted by the Director General for Human Rights, Ministry of Law and Human Rights as its Secretary. Members of this committee are representatives from all 42 government institutions (represented by the Secretary General of each institutions), and Chairs of four National Commissions: The National Human Rights Commission; The National Commission on the Elimination of Violence Against Women; The National Commission on Child Protection, and The National Commissions on Ombudsman.

At the provincial level, the Ministry of Law & Human Right and the Governor in each province shall establish Provincial Committees, and their secretaries' seat in the Regional Office of the Ministry of Law and Human Rights. The Ministry of Law & Human Right and the Regent/Mayor in each region shall establish regency/municipality Committees. Representatives of local governments, experts and community elements constitute members of these regional committees. One of the most important roles of these regional committees is to ensure implementation of human rights by government institutions. As such, members of local committee representing the government are those officials in charge of local governance, with the expectation that all public services would be based on human rights standards and norms. The fact that part of the civil servants and society still have limited knowledge on human rights is one of the homework needed to be addressed and condition to be rectified by the regional committee. As of today, there are 436 Committees nationwide out of the targeted 481 provinces, regencies and municipalities. Despite this huge number, however, there is no equal understanding of what human rights are all about amongst the members of the committees. Hence the Directorate General for Human Rights has conducted capacity building programs for some of these committees, supported by various donor agencies, in cooperation with human rights study centers and human rights NGOs. These measures are taken in order that the implementing institutions would be able to address human rights issues accordingly.

In conjunction with this, the following activities have been carried out:



Human rights training

Seminars, discussions and workshops

Distribution of leaflets and more comprehensive readings

Developing human rights library collection

The above measures are not taken by the Directorate General for Human Rights alone, but by all stakeholders both from government and non-government institutions contributing to these.

To accelerate the implementation of Human Rights Action Plan, an effort to establish networks with local government and non-government institutions has been done. This measure is primarily important in particular to disseminate human rights to specific targeted groups in certain areas, to establish information system on human rights through data collection on implementation of and violation of human rights in various regions, and also to harmonize relevant regional bylaws in line with human rights norms and standards.

The challenges

Governing a State with more than 220 million residing in more than 17,000 islands in this archipelagic nation, spreading in an area of almost 1.9 million km², with multi cultural multi-religion characteristics is quite an arduous if not daunting task. While it is true that these geographic and demographic features should not be used as a pretext not to implement human rights fully, it is impossible to ignore the these facts do have some impact on the degree of implementation human of rights in Indonesia.

The rise of democracy indeed has brought a lot of significant improvement to the people.

(The author is Directorate General of Human Rights of Ministry of Law and Human Rights of Indonesia.)

WOMEN'S RIGHTS - STILL A CHALLENGE!

Karin Gastinger
Austria

Women's rights around the world are an important indicator of understanding global well-being. Many may think that women's rights are only an issue in countries where religion is law, such as many Muslim countries. Or even worse, some may think this is no longer an issue at all.

Almost every country in the world still has laws that discriminate against women, and promises to remedy this have not been kept, Ms Louise Arbour, UN High Commissioner for Human Rights stated in the eve of International Women's Day on March 7th, 2008. "It is shameful that, in the 60th anniversary year of the *Universal Declaration of Human Rights*, fundamental rights are still not enjoyed by many women around the world. "In some cases, they suffer from multiple forms of discrimination, such as race, age or disabilities as well as their gender. Unless

states take their commitments seriously, investing in women and girls will remain a matter of rhetoric,” she added.³⁷⁰

Women still face gender discrimination throughout a lifetime

The UNICEF Report on State of the World’s Children in 2007³⁷¹ had an informative section on how women are discriminated against at various stages through life, summarized here:

1. Foeticide and infanticide

UNICEF notes that “Where there is a clear economic or cultural preference for sons, the misuse of [pregnancy diagnostic tools] can facilitate female foeticide.”

2. The middle years

“A principal focus of the middle years of childhood and adolescence is ensuring access to, and completion of, quality primary and secondary education. With a few exceptions, it is mostly girls who suffer from educational disadvantage.”

3. Adolescence

“Among the greatest threats to adolescent development are abuse, exploitation and violence, and the lack of vital knowledge about sexual and reproductive health, including HIV/AIDS.” Specific areas that UNICEF highlighted were female genital mutilation/cutting; child marriage and premature parenthood; sexual abuse, exploitation and trafficking; sexual and reproductive health; and HIV/AIDS.

4. Motherhood and old age

These are “two key periods in many women’s lives when the pernicious effects of both poverty and inequality can combine.” Shockingly, “It is estimated that each year more than half a million women—roughly one woman every minute—die as a result of pregnancy complications and childbirth,” 99% of which occur in developing countries. Yet “many of these women’s lives could be saved if they had access to basic health care services.” In addition, elderly women may face double discrimination on the basis of both gender and age. Many older women are plunged into poverty at a time of life when they are very vulnerable. However, “children’s rights are advanced when programs that seek to benefit children and families also include elderly women.”

Women and children: the double dividend of gender equality

The above title also comes from the above mentioned The UNICEF’s Report on State of the World’s Children, in 2007 where they focus on the discrimination and disempowerment women face throughout their lives and how that impacts children’s lives.

The key messages that came out from the report were as follows:

Gender equality and the well-being of children go hand in hand and gender equality furthers the cause of child survival and development.

Gender equality produces a double dividend. It benefits both women and children. Healthy, educated and empowered women have healthy, educated and confident daughters and sons. Gender equality will not only empower women to overcome poverty and live full and productive

³⁷⁰ <http://www.un.org/womenwatch/>

³⁷¹ UNICEF, State of the World’s Children, 2007, p.4 ff



lives, but will better the lives of children, families and countries as well.

Women's equal rights and influence in the key decisions that shape their lives and those of children must be enhanced in three distinct arenas: the household, the workplace and the political sphere. A change for the better in any one of these realms influences women's equality in the others, and has a profound and positive impact on child's well-being and development.

Gender equality is not only morally right; it is pivotal to human progress and sustainable development. Achieving Millennium Development Goal Number 3 - promoting gender equality and empowering women - will also contribute to achieving all the other goals, from reducing poverty and hunger, saving children's lives, improving maternal health, ensuring universal education, combating HIV/AIDS, malaria and other diseases, to ensuring environmental sustainability.

In recent years, agreements at major UN summits - including the Beijing Platform for Action, the Monterrey Consensus and the 2005 World Summit Outcome - have highlighted women's empowerment as a key factor in economic development and called for the provision of sufficient resources to that end.

Women and equality in employment

The informal slogan of the Decade of Women in the 1990s became "Women do two-thirds of the world's work, receive 10 percent of the world's income and own 1 percent of the means of production."³⁷²

All over the world - also in Austria - estimated earnings for women are substantially lower than that for men. Reasons for such disparity include the fact that women are generally underpaid and that they often perform low-status jobs, compared to men.

UNICEF's main summary of equality in employment (chapter 3) included the following points³⁷³:

For many women, unpaid work in and for the household takes up the majority of their working hours, with much less time spent in remunerative employment. Even when they participate in the labor market for paid employment, women still undertake the majority of the housework.

When women work outside the household, they earn, on average, far less than men. They are also more likely to work in more precarious forms of employment with low earnings, little financial security and few or no social benefits.

Women not only earn less than men but also tend to own fewer assets. Smaller salaries and less control over household income constrain their ability to accumulate capital. Gender biases in property, inheritance laws and in other channels of acquiring assets also leave women and children at greater risk of poverty.

Paid employment for women does not automatically lead to better outcomes for children. Factors such as the amount of time women spend working outside the household, the conditions under which they are employed and who controls the income they generate determine how the

³⁷² Richard H. Robbins, *Global Problems and the Culture of Capitalism*, (Allyn and Bacon, 1999), p. 35

³⁷³ UNICEF, *State of the World's Children*, 2007, p.36



work undertaken by women in the labour market affects their own well-being and that of children.

One key for success - Education

“Education is a human right and an essential tool for achieving the goals of equality, development and peace.” (Beijing Platform for Action)

Every woman, man, youth and child has the human right to education, training and information, and to other fundamental human rights dependent upon realization of the human right to education. Equality of access to all levels of education is crucial to empowering women and girls to participate in economic, social and political life of their societies. Education unlocks a woman's potential, and is accompanied by improvements in health, nutrition, and well-being of women and their families.

Despite widespread agreement that all people have the fundamental human right to education, 100 million children, at least 60% of them girls, do not have access to primary education. 960 million adults in the world are illiterate, and about two-thirds of them are women. Women and girls continue to face discrimination at all levels of education, a fact which poses tremendous obstacles to their advancement.³⁷⁴

The Fourth World Conference on Women in Beijing in 1995 recognized that “investing in formal and non-formal education and training for girls and women, with its exceptionally high social and economic returns, has proved to be one of the best means of achieving sustainable development and economic growth”, and through the Beijing Platform for Action, called on Governments to ensure equal access to education and to eradicate illiteracy among women.³⁷⁵

The UNESCO Institute for Statistics stated in its recent fact sheet that gender parity in education is not yet there.³⁷⁶

Following this fact sheet from March 2008, gender disparities tend to increase at higher levels of education. Approximately 63% of countries with available data have achieved gender parity at the primary level of education, compared with 37% at secondary and less than 3% at the tertiary level.

Globally, about 72 million children were out of school in 2005, with girls accounting for 57%. However, regions vary considerably: in sub-Saharan Africa, 54% of out-of-school children were girls compared with South and West Asia at 66% and the Arab States at 60%.

Enrolment patterns at the primary level

In 2005, 94 girls started Grade 1 for every 100 boys, according to the global average. Overall, gender disparities in access have improved since 1999, especially in South and West Asia (from 83 to 92 girls per 100 boys). However, there are just 80 girls (or less) for every 100 boys starting school in Afghanistan, the Central African Republic, Chad, Niger, Pakistan and Yemen.

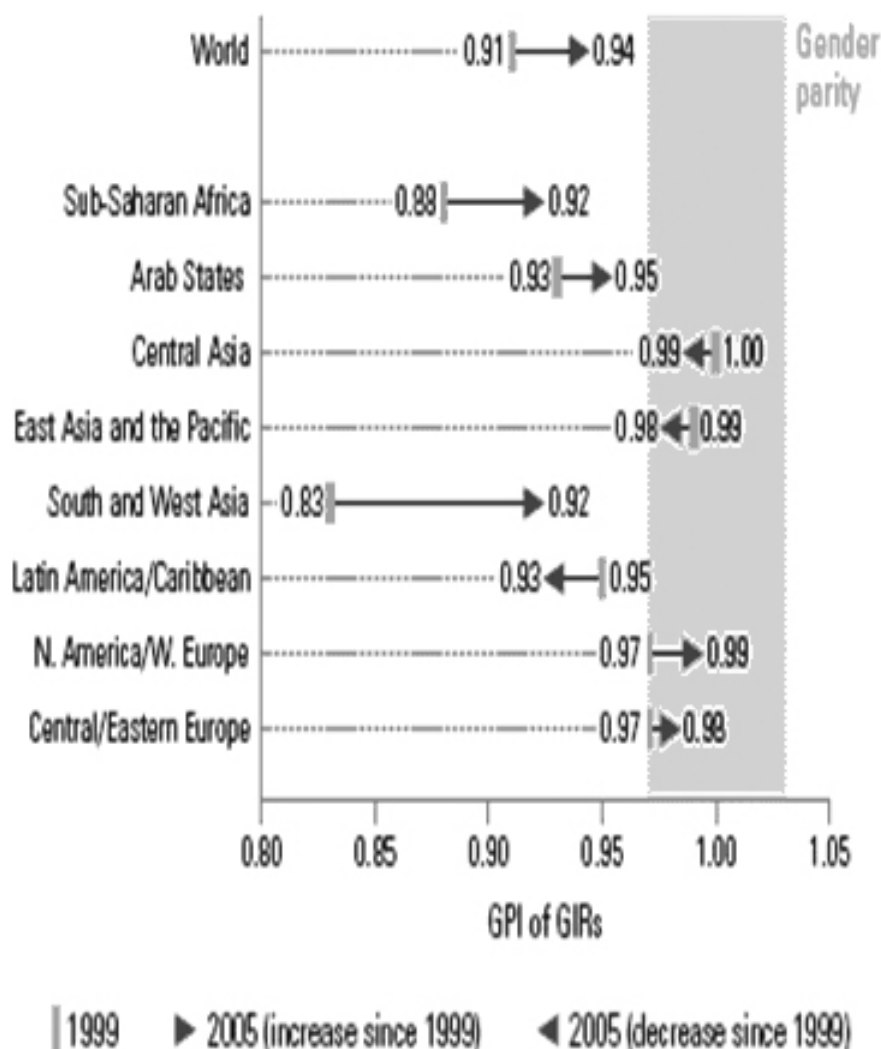
³⁷⁴ http://www.pdhre.org/rights/women_and_education.html

³⁷⁵ UN Report of the Fourth World Conference on Women, Beijing, 1995, chapter I, resolution 1, annex II, paras. 69, 80(a) and 81(a).

³⁷⁶ UNESCO Institute for Statistics “GENDER PARITY IN EDUCATION: NOT THERE YET”, March 2008, No. 01, http://www.uis.unesco.org/template/pdf/EducGeneral/UISFactsheet_2008_No%201_EN.pdf

Once girls gain access to school, they tend to do better than boys. The few countries where girls repeat grades more than boys are mostly in sub-Saharan Africa and the Arab States. Overall, girls and boys reached the last grade of primary school in equal proportions in 2004. However, important differences in school survival persist, especially those favouring girls in Latin America and the Caribbean. In sub-Saharan Africa and the Arab States, roughly the same number of countries report gender gaps in favour of boys as those in favour of girls.

Figure 1: Changes in gender disparities in access to primary schooling, by region, between 1999 and 2005:



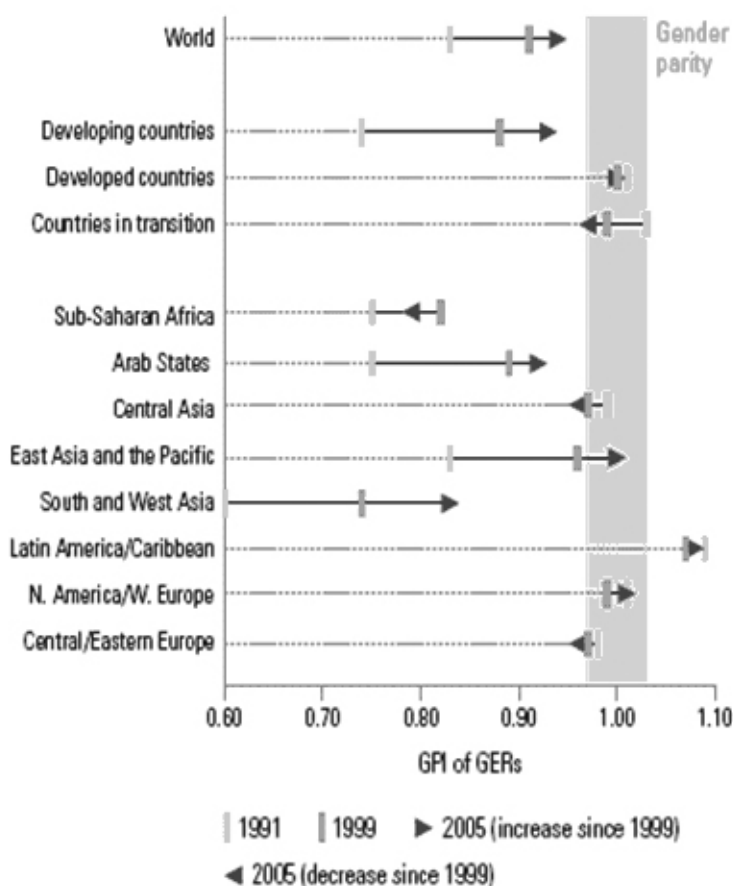
Source: Illustration produced for the 2008 EFA Global Monitoring Report with data from the UIS database

Gender disparities in secondary education

In 2005, disparities at the secondary level favoured boys in 61 countries, slightly more than the 53 countries where girls were at an advantage. Boys' underachievement in terms of participation and performance is increasingly an issue, especially in Latin America and the Caribbean. This is the only region where there are more girls enrolled in secondary education than boys (90 boys or fewer enrolled for every 100 girls in 11 countries).

As shown in Figure 2, there were 94 girls enrolled in secondary education for every 100 boys compared to 91 in 1999. It is important to note that the pace of change actually slowed during this period, compared to 1991 and 1999. In fact, gender disparities actually increased in sub-Saharan Africa between 1999 and 2005. This region, as well as South and West Asia, report the lowest levels of girls' participation in secondary education, with 83 and 79 girls enrolled, respectively, for every 100 boys.

Figure 2: Changes in gender disparities in secondary gross enrolment ratios, by region, 1991, 1999 and 2005



Source: Illustration produced for the 2008 EFA Global Monitoring Report with data from the UIS database.

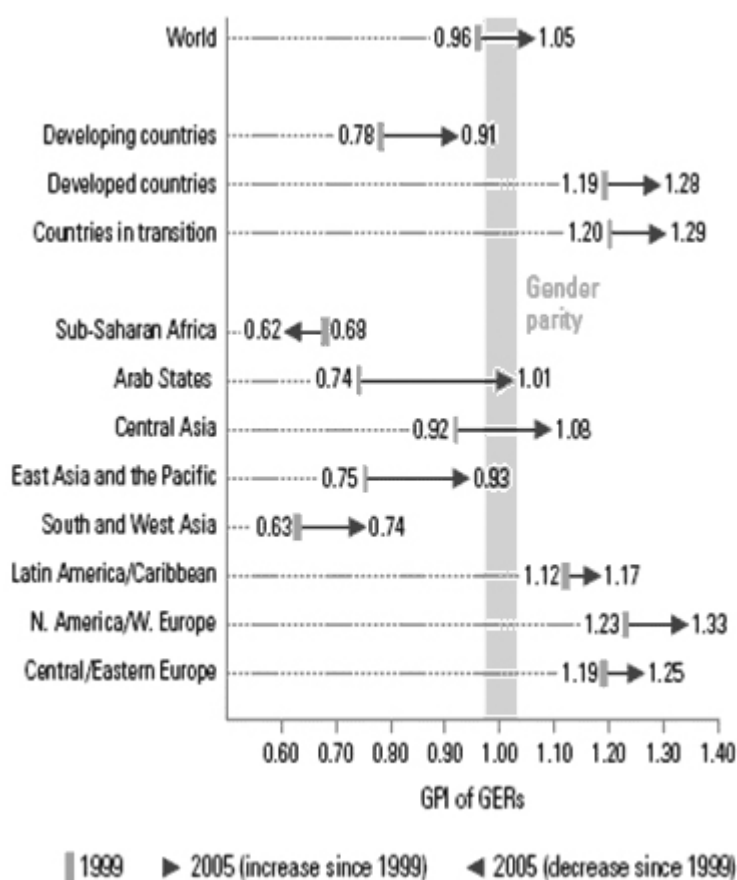


Tertiary education: Parity is rare

Only 4 countries - Botswana, China, Mexico and Peru - out of 144 with data achieved gender parity at the tertiary level by 2005. According to the global average, there were 105 women enrolled for every 100 men. This marks a major reversal since 1999 (when the gender parity index for tertiary enrolment was 96).

In general, gender disparities in favour of women have widened and increased over time, as shown in Figure 3. In developed countries and those in transition, there are close to 130 women enrolled in tertiary education per 100 men. Women remain at a serious disadvantage in sub-Saharan Africa, with just 68 enrolled per 100 men since 1999, in addition to South and West Asia (74) and East Asia (92). There are as many men as women enrolled in tertiary education in the Arab States overall, but the regional average conceals very low participation among females in several countries.

Figure 3: Change in gender disparities in tertiary gross enrolment ratios, by region, 1999 to 2005



Source: Illustration produced for the 2008 EFA Global Monitoring Report with data from the UIS database.



It was already stated in the Beijing Declaration³⁷⁷ that discrimination in girls' access to education persists in many areas, owing to customary attitudes, early marriages and pregnancies, inadequate and gender-biased teaching and educational materials, sexual harassment and lack of adequate and physically and otherwise accessible schooling facilities. Girls undertake heavy domestic work at a very early age. Girls and young women are expected to manage both educational and domestic responsibilities, often resulting in poor scholastic performance and early drop-out from the educational system. This has long-lasting consequences for all aspects of women's lives.

There was a change since 1995, but as women still account 64% of illiterate adults in 1995-2004³⁷⁸, there is still a lot to do.

The theme of this year's International Women's Day, "Investing in Women and Girls," is for this reason a timely reminder that women's access to sources of finance, their participation in decision-making processes and opportunities for sustainable livelihoods are vital to bridging the gap between universal human rights standards and the realities of the majority of the world's women.

The Beijing Platform of Action gives a clear roadmap to women's rights to education for governments at each level, not only for international and intergovernmental organizations, for NGOs, for educational institutions, but also for employers about what to do and by when. 13 years after this 4th Conference on Women this Beijing Platform of Action is still current and should be the basis for still further necessary actions.

(The author is Former Austrian Federal Minister of Justice, Chairman of the Advisory Committee of the Austrian and Chinese Association Friendship.)

377 Beijing Declaration, chapter 4, para 73, 1995

378 UNESCO Institute for Statistics, Gender Parity in Education: Not There yet, March 2008, No. 1