

“发展权与中国发展法治化研究”丛书

FAZHANQUAN

汪习根 主编

发展权

全球法治机制研究

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序 言

在 2000 年的联合国千年首脑会议上，各国政府庄严地承诺“我们决心使每一个人实现发展权，并使全人类免于匮乏”。在考虑实现发展权利的现实前景时，这一郑重的申明敲响了虔诚希望的钟声。确实，无论是在数量上或是质量上，发展似乎并未取得多大进展。如果我们对 20 亿生活在贫穷状态的人们和 1 亿生活在赤贫状态的人们进行数量测算或者预测到大部分千年发展目标对于大多数贫困国家在 2015 年指定的时间内难以实现，那么，发展就没有在任何方面取得进展，这证明了世界人民对发展享有一种权利的主张具有正当性。在质量上，不能满足在教育、健康、就业、住房、人身安全和食品安全方面的基本需要，通过羞辱、压迫、强暴、歧视、诬陷、排斥来全面侵犯人的尊严，使“不断提高全体人类和所有个人的福利”成为虚幻的泡影，而这正是《发展权利宣言》所提到的。

发展权是通过将人权融入发展过程和克服相关资源的局限来满足全部上述需要的。在发展权的理想和持续贫困及大多数国家未把人权融入发展进程的现实之间存在着差距，这使我们很难有理由去预期发展权在可预知的将来对许多人将成为现实。正如联合国大会在 1986 年所宣称的，“发展权是一项不可分割的人权，发展机会均等既是所有国家也是组成国家的全体个人的一项权利”，这似乎是充满希望而又荒诞不经的。

尽管如此，当中国决定将发展权付诸实施而非流于形式时，

这就格外引人注目。拥有 13 亿人口的中国是世界上人口最稠密的国家，每年的经济增长率大约在 10%，是世界上经济增长最快的（仅次于赤道几内亚）。它的经济实力及其政治、法律和社会结构的复杂性导致这样一种预期：中国将会把经济扩张置于可持续发展和人权之前。

汪习根教授的这一研究项目表明，与此相反，中国正积极地从事可持续发展和人权如何能成为中国发展的一部分的研究工作。确实，中国已参加不结盟运动并在所有国际会议和高峰会议上呼吁国际社会提升发展权的理念。中国依靠帮助成千上万人民脱贫、经济增长、经济和军事力量，义无反顾地捍卫了发展权，同时拒绝来自外部的对其国内发展政策的干涉以及对其侵犯人权的指责，这被认为是不可容忍的外来干涉。

本研究表明情况并非如此。一个像中国这样的国家考虑自身情况并在国内支持发展权的研究，这确实是非同寻常和充满希望的。愤世嫉俗者会说，人们知道表决仅仅会产生更多的文件而不会影响任何人的实际生活，在联合国大会上就发展权或任何其他议题提出决议是很容易的。本研究表明，中国正通过支持研究像发展权这样的复杂问题来作更多的努力去详细审评国家现实。从支持这类研究可以看出，中国似乎是从长远的角度考虑，以便能调整政策以充分认识到由于快速发展导致的环境破坏、流离失所和人口控制方面的消极影响以支持因践踏公民权利而声名狼藉的贸易伙伴而带来的不利后果。对与这些问题相关的当前情形的外部批评是不受欢迎的，这一事实不应该误解为中国不愿意面对它们。

2008 年 1 月，在由本人担任主席的联合国发展权高级别会议上，汪习根教授描述了这一项目，本书即以该项目为基础。他谈到它以发表于 1991 年的《中国人权白皮书》为基础，指出政府把生存权和国家及其人民的发展权作为首要人权。在他看来，

特别重要的是 2004 年宪法修正案使人权从一个政治概念提升为宪法原则。世界的其他国家正关注中国政府如何正式看待人权,包括作为其构建和谐社会的战略的发展权,以及在中国内部这一正式的认识所带来的现实影响。

毫无疑问,我们相信参与这一项目的人们知道像中国这样的一个大国实现人权,尤其发展权是多么的艰难。在这种不确定的情况下,在中国开展发展权和中国发展法治化的研究,是有相当大的价值的。这即是此项目和著作的目的所在。

正如向我所描述的,该研究涵括法律理论和法律改革。从汪教授对一本新近出版的著作所作的贡献来看^①,我很欣赏他对法哲学基础思想理解的广度和深度以及他对完善作为新一代人权的发展权理论所作的贡献。该研究旨在为实现这一权利提供决策建议和实践意见,包括如何采取具体措施把这一想法变为法律制度。

本研究对全球化和实现发展权的国际法律机制及其与国内法的连接进行了各种维度的全方位分析,尽管此权利在国际法上不具有法律约束力。该项目也从法哲学的视角来检视中国立法结构和法律救济制度。本书及汪教授的贡献最具原创性的特征之一在于聚焦于可持续发展权,他有一个宏伟目标,即改变已被接受的将可持续发展作为责任而不是权利的思想、重塑可持续发展作为发展权的一个方面。该研究的另一优点在于它关注缩小贫困和提出区域发展权这一新概念。最后,本书阐明了在 1986 年宣言中所阐释的发展的四个组成部分,即政治、经济、社会和文化发展

① Xigen Wang, On the Right to Sustainable Development: Foundation in Legal Philosophy and Legislative Proposals, in Stephen P. Marks (ed.), *Implementing the Right to Development: The Role of International Law*, Geneva: Friedrich Ebert Stiftung and Program on Human Rights in Development of the Harvard School of Public Health, 2008, pp. 39-46.

及其法律保护。

本研究所体现的更为广泛的意义在于它对在国际法和国际关系中国家主权这一核心概念的反思。它设想在主权和人权之间有一种辩证关系,也对以发展权为基础的“全球法律制度的价值革命”进行了检视。为克服本研究所识别的关于发展权的沟通、认识和实践障碍,掀起了从理论到实践的运动,这将会受到所有思考此项权利性质和工具性价值的人们的高度重视。通过对社会调查、比较分析、价值分析和案例分析方法的综合运用,作者在中国语境及其与国际社会致力于使发展权从政治承诺转变为发展实践的紧密关联下来理解发展权方面作出了持久贡献。

联合国发展权高级别专家组主席

哈佛大学教授 斯蒂芬·马克

Introduction

The heads of state meeting at the Millennium Summit in 2000 solemnly committed themselves "to making the right to development a reality for everyone and to freeing the entire human race from want." This solemn pronouncement has the ring of a pious hope when one considers the real prospects for the realization of this right. Indeed, development does not appear to be advancing either quantitatively or qualitatively. If we take as a quantitative measure the two billion people living in poverty and one billion in abject poverty or the prognosis that most of the Millennium Development Goals will not be met for most poor countries by the target date of 2015, development is not progressing in any way that could justify the claim that peoples of the world have a "right" to it. Qualitatively the failure to meet basic human needs in terms of education, health, employment, housing, personal safety, and food security, and the systemic violation of human dignity through humiliation, oppression, violence, discrimination, stigmatization, and exclusion render illusory the "the constant improvement of the well-being of the entire population and of all individuals," to which the Declaration on the Right to Development refers.

The right to development is all about meeting these needs

through integrating human rights into the development process and overcoming related resource constraints. The gap between the promise of the right to development and the reality of persistent poverty and failure to integrate human rights into the process in most countries give little reason to expect that the right to development will be a reality for many people in the foreseeable future. Proclaiming, as the United Nations General Assembly did in 1986, "that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations" seems wildly hopeful and probably chimerical.

However, when the People's Republic of China (PRC) decides that the right to development is more than rhetoric, there is good reason to take notice. China is the most populous country in the world with 1.3 billion people and enjoys an annual growth rate hovering around 10%, making it the fastest growing economy in the world (after Equatorial Guinea). Its economic power and the complexities of its political, legal and social structures have created the expectation that China will place its economic expansion ahead of sustainability and human rights.

This research is a demonstration that, contrary to those expectations, China is actively engaged in research on how sustainable development and human rights can be part of China's development. Indeed, China has joined the Non-Aligned Movement in calling for the international community to promote the idea of the right to development at all international conferences and summits. China could rely on its anti-poverty record in lifting hundreds of

millions out of poverty, its growth and its economic and military power to champion the right to development rhetorically while rejecting any criticism of its internal development policies and its human rights record as intolerable outside interference.

These publications are the demonstration that such is not the case. It is truly extraordinary and a cause for hope when a country like the PRC takes it upon itself to support research into the right to development at home. Cynics will say that it is easy to propose resolutions on the right to development or on any other matter at the United Nations General Assembly, knowing that the vote will only produce more paper, without affecting anyone's lives. This research shows that China is doing more by supporting research into a complex issue like the right to development in order to scrutinize national realities. In supporting such research, China seems to be taking a long-term perspective so that it can adjust policies in full awareness of the negative impacts of rapid development in terms of environmental destruction, displacement and control of populations, and support for trading partners who are notorious for trampling on the right of their citizens. The fact that outside criticism of the current situation relating to these problems is not welcome should not be misinterpreted as an unwillingness of the PRC to face them.

In January 2008, Professor Xigen Wang described the project on which this book is based to the UN High Level Task Force on the Implementation of the Right to Development, which I chair. He explained that it builds on China's White Paper on Human Rights in China, published in 1991, in which the government placed the right to subsistence and the right to development of the country and its

people as first priority human rights. Of special significance, from his perspective, is the 2004 Constitutional amendment, which upgraded human rights from a political concept to

constitution principle. The rest of the world is attentively observing how the PRC government is formally recognizing human rights, including the right to development as part of its strategy of building a harmonious society, and what impact this formal recognition has on realities inside China.

It is certainly to the credit of those involved in this project that they acknowledge how difficult it is for a big developing country like China to implement human rights in practice, in particular the right to development. There is considerable value at this time of uncertainty for serious research to be conducted inside China on the right to development and the rule of law in China's development. Such is the purpose of the project and of these publications.

As described to me, this research reported on covers both legal theory and legal reform. From the contribution Professor Wang made to a recent publication,^① I appreciate the breadth and depth of his thinking on the foundation in legal philosophy and his contribution to developing the theory of the right to development as a part of a new generation of human rights. The purpose of these publications is to provide practical advice and suggestions for decision-making on the implementation of this right, including how to introduce measures for

① Xigen Wang, On the Right to Sustainable Development: Foundation in Legal Philosophy and Legislative Proposals, in Stephen P. Marks (ed.), *Implementing the Right to Development: The Role of International Law*, Geneva: Friedrich Ebert Stiftung and Program on Human Rights in Development of the Harvard School of Public Health, 2008, pp. 39-46.

this purpose into the legal system.

These publications offers a welcome overview of the various dimensions of globalization and of the international legal mechanisms available to implement the right to development and their links to domestic law, notwithstanding the non-binding nature of this right in international law. It also examines China's legislative structure and system of legal remedies from the perspective of legal philosophy. One of the most original features of this research and of Professor Wang's contribution to the publication mentioned above is the focus on the right to sustainable development. It has the ambitious aim of changing the accepted wisdom of sustainable development as a duty rather than a right, and to recast sustainable development as an aspect of the right to development. A further advantage of these publications is the attention it gives to poverty reduction and to proposing a new concept of the right to regional development. Finally, it addresses the four components of development as defined in the 1986 Declaration, namely, political, economic, social development, and cultural development and their legal protection.

The broader significance of the analysis presented in these publications is its rethinking of the core concept of state sovereignty in international law and relations. It posits a dialectic relationship between sovereignty and human rights and examines the "values revolution of the global legal system" based on the right to development. The movement from theory to practice in overcoming what this study identifies as the communicative, cognitive and practical obstacles to the right to development will be appreciated by all who ponder the legal nature and instrumental value of this right.

By drawing on various complex methods of social investigation, comparative analysis, value analysis and case studies, the authors have made a lasting contribution to the understanding of the right to development in the context of China, with considerable relevance to international efforts to move this right from political commitment to development practice.

Harvard University



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