

A STUDY OF THE INSTITUTIONS
OF FUNDAMENTAL HUMAN RIGHTS
IN CONTEMPORARY CHINA

当代中国人权保障 法律制度研究

林喆 主著

23

山东人民出版社
Shandong People's Publishing House

2003年度国家社会科学基金项目“当代中国人权保障

法律制度研究”结项成

D923.04/64

2007

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图书在版编目(CIP)数据

当代中国人权保障法律制度研究/林喆主编. —济南: 山东人民出版社, 2007. 4
ISBN 978-7-209-04231-4

I. 当… II. 林… III. 人权—保护—法律—研究—中国 IV. D923.04

中国版本图书馆 CIP 数据核字 (2007) 第 044974 号

责任编辑: 李怀德

封面设计: 柳 岩

当代中国人权保障法律制度研究

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山东出版集团

山东人民出版社出版发行

社 址: 济南市经九路胜利大街 39 号 邮 编: 250001

网 址: <http://www.sd-book.com.cn>

发行部: (0531) 82098027 82098028

新华书店经销

青岛星球印刷有限公司印装

规 格 16 开 (165mm × 238mm)

印 张 34.75

字 数 620 千字 插 页 2

版 次 2007 年 4 月第 1 版

印 次 2007 年 4 月第 1 次

印 数 1—3000

ISBN 978-7-209-04231-4

定 价 62.00 元

如有质量问题, 请与印刷厂调换。(0532) 88194567



前言

人权和人权保障正在成为当今国际社会关注的热点问题。

近些年来,几乎在所有出兵干涉他国内政或侵犯他国主权的军事行动中,在西方发达国家讨论是否给予某个发展中的国家以某种经济援助,或者是否同意某个国家进入某个国际组织(如世贸组织),是否延长某个国家最惠国待遇的场合中,该国的人权状况问题都会被提出,它成为出兵的最好借口,或者制裁、拒绝、延长最具有说服力的理由。

建国以来很长一段时期,人权问题被视作是理论研究的禁区,被当做资产阶级的理论而加以排斥。20世纪80年代坚冰开始融化。

这一禁区的突破首先开始于哲学界,这是因为人学思潮的兴起;之后是政治学界,这一方面是由于政治学界对人道主义理论的争论,另一方面更是因为国际斗争的需要。

直到90年代初,法学界才加入进来。法学的加盟具有划时代的意义——正是法学对于人权问题的关注,使得中国人权理论的研究有了一个真正现实的立足点,这就是法的立足点;使得人权问题不再只是政治问题,而更是一个法律问题。

在我国,以法律制度来保障公民基本人权并非近些年来的努力,早在90多年前为辛亥革命胜利欢庆之时,革命者们就已意识到了以法律制度保障人权的重要意义,他们参照西方人权宣言,以宪法大法的形式确定了人民的权利,从而使得那部以相当于五分之一篇幅规定了人民各项权利和义务,因此被称做为“中国第一部权利大典”的《中华民国临时约法》,成为这场革命的重要果实之一。然而,旧中国统治集团的阶级利益决定了这一立法的虚假性,处于半殖民地半封建国度中的广大人民根本不可能通过这一立法获得普遍且真实的人权。

在整个新民主主义革命时期,以毛泽东为代表的中国共产党人在为中国人民进行争取生存权的斗争中,不断地以根据地法律文件的形式将人民来之不易的权利确定下来并予以真实的保障。在社会主义时期,党和国家在以法律制度改善中华民族的生存和发展环境方面做了大量的工作。期间也有过反复,也曾遭遇如“文化大革命”那样践踏人权的灾难。正是基于对如此惨痛且深刻教训历史的反思,对公民基本人权保障的重大意义,以及改革开放以来我



国人权保障巨大成就的深刻领悟,才有了2004年全国人大十届二次会议上,“国家尊重和保障人权”表述的入宪。

“国家尊重和保障人权”表述的入宪是社会主义中国人权保障实践的一个划时代的进步,它不仅使人权保障成为国家不得不为、不可推卸的责任,而且使人权保障成为整个国家工作及其法制建设的中心、基点、内容和价值取向。

国家尊重和保障人权必须通过法律制度的完善来体现。换言之,所谓“完善国家尊重和保障人权”实际上讲的就是完善国家尊重和保障人权的法律制度和其他社会制度,也即以法律制度为重点的各种社会制度。

在我国,从法律制度层面上研究人权理论,从我国法律制度上对于公民基本人权进行系统的描述和分析,并与国外人权制度进行比较,应当成为人权研究领域的一项重要理论工作。鉴于我国长期以来在人权保障法律制度研究方面的不足,本课题的进行分为两个阶段:第一阶段梳理公民基本人权的理论,并对我国人权保障法制建设的实践领域(尤其是改革开放以来)的热点问题进行研究,已出版的近百万字的《公民基本人权法律制度研究》(北京大学出版社2006年版)反映了这一阶段的研究成果;第二阶段系统梳理建国以来(尤其是改革开放以来),我国在尊重和保障人权主要领域的主要法律文件和法制建设,追溯其演变线索,探求其变化原因,总结其变化特点,同时介绍西方国家近些年来在尊重和保障人权法律制度建设方面的特点。本课题的这一结项成果《当代中国人权保障法律制度研究》展现了这一阶段的研究成果。

这一结项成果包括13个部分。第1章追溯了我国人权研究的历史进程,分析了我国尊重和保障人权法律制度的研究状况;第2—11章分别对我国宪政、选举、民事、婚姻家庭、交通、宗教、公安执法监督、刑事、行政诉讼和律师领域人权保障的法制建设进行了研究,梳理了这些领域人权保障的规范性文件,剖析了其存在的问题,提出了其法制完善的措施或途径;附录一研究了德国人权保障的法律制度,涉及德国《基本法》、德国法院、政党与人权保护;附录二包括本课题组在西部分别对三级法院“民告官”案例的受理状况,救助站运行现状和社会慈善组织的发展近况,进行实证调查后形成的3份调查报告:近年来甘肃省三级人民法院行政诉讼案件审理基本情况,近年来兰州市救助站基本状况,近年来甘肃省社会慈善组织活动状况。这些报告从不同的角度反映了国家和社会在尊重和保障弱势群体方面所作出的积极努力,以及贯穿于其中的法制建设状况,并针对它们面临的问题提出了对策性的意见。

在人权保护日趋国际化的今天,人权研究为越来越多的学者所青睐,保护人权的理念日益渗入社会生活的方方面面,尽管民众权利意识的增长与权力者关于人权保护的自觉意识的提高并不必然同步发展,但是关于公民基本人



权必须受保护的观念近些年来如此深入人心,保护人权的整体意识的存在已是一个不争的事实。“和谐社会”的提出,以及由此获得的种种设计和所得到的热烈响应,清楚地表明了这一点。

2005年,温家宝总理在《关于制定国民经济和社会发展第十一个五年规划建议的说明》中指出:“建构社会主义和谐社会,是我们推动经济社会发展的重要目标,也是社会发展的重要保障,要按照民主法治、公平正义、诚信友爱、充满活力、安定有序、人与自然和谐相处的要求,加快推进和谐社会建设。特别要突出解决好人民群众最关心的就业、社会保障、扶贫、教育、医疗、环保和安全等问题。”这里,他在明确地指出国家在第十一个五年规划中人权保障法律制度建设的工作重点之时,预示了当代中国人权保障法律制度建设的未来发展方向。

当一种要求转为一种理念,继而化为一种根深蒂固的内在信念时,社会就滋长出一种希望和信心。借用先驱者当年的一句名言:“试看人权旗帜必将插遍全球。”

人权保护的理念渗入社会的每一角落,人权旗帜插遍全球之时,也就是和谐社会、和谐世界建成之日,以及生活于其中的每一个人满面春风之日。



Introduction

Human rights and their protection are becoming a hot issue with which the international community is concerned.

In recent years, in almost every dispatch of troops to intervene a country's domestic affairs or every military action taken to invade a country's sovereignty, in discussing in western countries whether to give a third world country some kind of economic aid or whether to agree to the accession of a country into an international organization such as the WTO, or whether to extend a country the most favored nation treatment, the human rights issue would certainly be raised, which has become the best excuse or the most convincing ground to send troops or impose sanction, to reject or extend the mentioned treatment.

For a long time since the founding of the P. R. China, human rights had been regarded as a forbidden area for theoretical study, and rejected as a theory of bourgeoisie class. By the 80s of the 20th century, the ice began to melt.

The breakthrough took place first in the circle of philosophy due to the rise of humanistic thoughts and ideas there; then it occurred in the circle of political science because of two reasons; one was the theoretical debate in the area over humanitarianism, the other was the urgent need in the international political struggle.

Not until the 90s did the legal circle joined in. The participation of legal science had an epoch – marking significance. It was the concern of legal science with the human rights issue that gave the theoretical study of human rights a true and real footing, that is the footing of law; human rights issue was no longer only a political issue, but also a legal issue.

In China, it is not true that only in recent years efforts have been made to protect fundamental human rights. In fact as early as 90 years ago when the 1911 Revolution was celebrated, the revolutionaries had realized the significance of protection of human rights through institutions. By making reference to the declarations of human rights in the Western countries, they drafted a provisional constitution to protect people's rights, one fifth of which was devoted to people's various rights and duties. Accordingly, this provisional constitution was referred to as Chi-



na's first "Bill of Right", and became one of the most important achievements of this Revolution. However, the class interests of ruling elites in the old China determined the hypocrisy of the enactment. It was impractical for the people in a semi-feudal and semi-colonial country to rely upon this enactment to have fundamental and real human rights.

In the whole phase of the New Democratic Revolution, the Communist Party of China, led by Mao Zedong, in the struggle for the right of existence, constantly wrote people's hard-won rights into the legal documents in the revolutionary bases and provided real and effective protection. In the socialist period, the Party and the state did a lot of work, through legal institutions, to improve the environment of the Chinese nation's existence and development, despite the up and downs occurred in the meantime and even disaster tramping on human rights such as the so-called Cultural Revolution happened. It was just based on the reflection on such hard and painful historical lesson and a thorough understanding of the significance of the protection of human rights and the great achievements made on the protection of human rights since the implementation of the policy of reform and open to the outside world that a constitutional amendment was adopted at the second session of the 12th People's Congress in 2004, that "the state respects and protects human rights".

The constitutional amendment that "the state respects and protects human rights" is an epochal progress in the practice of protection of human rights in socialist China. It has not only made it an undeniable responsibility for the state to protect human rights, but also made the protection of human rights the center, core-content and value orientation of the whole state work and legal construction.

That the state respects and protects human rights must be materialized through the improvement of the legal institutions. In another word, the "the improvement of the respect and protection of human rights by the state" actually means the improvement of the legal institutions through which the state respects and protects human rights and other social institutions.

In China, to study human rights at legal institutional level, and to describe and analyze systematically the fundamental human rights and to compare with the human rights institutions in foreign countries should an important theoretical work in the area of human rights study. In consideration of the long time weak study in the legal institutions for the protection of human rights, this project has been carried out in two different phases. In the first phase, theories of fundamental human



rights were combed and a study was made of the hot issues in practice since the implementation of the reform and open door policy, in the legal construction on the protection of human rights. A Study of the Legal Institutions on Fundamental Human Rights, published by Beijing University in 2006, reflects the research achievement in this phase. In the second, main legal documents and legal construction in the main areas of respect and protection of human rights were combed systematically, a pursue was made for the clue in its evolution, an inquiry was made for the causes of its change, a summary was made of the features of such change, at the same time an introduction was added to the features of the legal construction in the area of respect and protection of human rights in recent years in the Western countries. A Study of the Institutions of Fundamental Human Rights in Contemporary China, represents the final research achievement in this phase.

The final research achievement consists of 13 chapters. In chapter 1 the author pursued the history of human rights study in China and analyzed the present state of study in legal institutions for respect and protection of human rights in China; from chapter 2 to chapter 11, the author made a study, respectively, in the areas of constitutionalism, election, civil law, family, transportation, religion, supervision on the enforcement of law by public security organs, criminal law, administrative litigation and legal practice, analyzed the existing problems in these areas, and proposed measures or approaches for further improvement.

The research achievement in a book form is also with a few attachments. Attachment 1 includes a study of the legal institutions for human rights protection in Germany, which covers the German Fundamental Law, German court system, political parties and human rights protection; in Attachment 2, three reports were included, made by the task group on the handling of administrative cases by courts of three levels, the present operation of the salvation stations and the recent development of social charitable organizations in Gansu Province. These reports reflect, from different angles, the positive and active efforts made by the state and the society on the respect and protection of the weak in the society, and the present situation of legal construction throughout, and also put forward proposals of countervailing measures.

In today's world, the protection of human rights is becoming more and more internationalized, the study of human rights is attracting more and more scholars, the idea of protection of human rights has been accepted gradually but steadily by all walks of life, despite the fact that the consciousness of right of the people does



not rise simultaneously with the rise of the self – consciousness of the power – holders for the protection of human rights. However, the concept that fundamental human rights must be protected has been so deeply rooted in people's heart and mind that an existence of a whole consciousness for the protection of human rights can not be denied. That the call for the construction of a harmonious society with the various designs to realize it has been answered and echoed warmly, which clearly proves this.

In the year 2005, Premier Wen Jiabao in the Explanation on the Proposal for the Formulation of 11th Five Year Plan for the National Economy and Social Development pointed out that . To construct a socialist harmonious society is the main object of our promotion for the development of national economy and society; it is also an important safeguard for the social development. The construction of a harmonious society should be facilitated and accelerated according to the democracy and rule of law, fair and just, good faith and fraternity, full of vitality, security and order, man living harmoniously with nature. Especially, such issues with which people are most concerned as employment, social security, assistance to the poor, education, medical care, environment protection and security should be well resolved. In his explanation, in pointing out the focus on the legal construction on the protection of human rights in the 11th five year plan, the Premier indicated the direction for the future development of the legal construction on the protection of human rights in the contemporary China.

When a demand turns into an idea, and then reduces into a deep rooted inherent belief, a hope and confidence will grow in the society. To put it in a word uttered by a former pioneer: "the banner of human rights is certain to rise in all parts of the world."

The day when all walks of life is imbued with the idea of human rights protection, and the banner of human rights rises in all parts of the world is also the time a harmonious society and a harmonious world have been constructed, and where every one will lead a happy life.

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