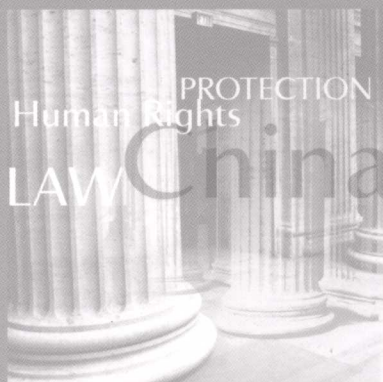


人权保障法 与中国

The Law of Protection of Human Rights
and The People's Republic of China



莫纪宏 主编

Mo JiHong ed.



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前 言

与德国阿登纳基金会进行项目合作是一件令人非常愉快的事情。几年来,作为项目申请人,我们已经与尊敬的容敏德先生、徐迎女士、谭蓉女士形成了彼此之间的默契,对业已形成的合作模式大家都感到卓有成效。从提出项目申请,到社科院报批,再正式签署项目合作协议,然后组织专家进行调研和写出符合项目要求的研究成果,最后汇集成册,交由法律出版社出版。作为一项不可缺少的仪式,每年的三月底在法学所召开一次结项成果发布会和学术研讨会。年复一年,周而复始。其中的工作节奏从来也没有被破坏,这可以说是基金会与项目申请人合作关系最“和谐”的体现。按照固定模式,现在又到了向基金会提交最终研究成果的时候了。这又是一个令人兴奋的时刻。因为基金会对我们的信任又一次得到了证明,而我们又如释重负地完成了一年的研究任务,在宪法学和人权法学研究领域又推出了一点新成果。

2007 年度我们申请的项目是“《中华人民共和国人权保障法》立法论证研究报告”。该选题是在与容敏德先生反复协商的基础之上获得基金会和社科院批准的。选题属于我们与阿登纳基金会合作的“宪政研究”总项目的一个分支。该选题的缘起是 2004 年的宪法修正案。2004 年宪法修改时将“国家尊重和保障人权”写进了宪法。当时在新闻媒体上简单地概括为“人权入宪”。但是,“人权入宪”究竟会给我国的人权保护制度建设带来什么样的影响,这是迄今为止仍然处于学术探讨阶段的问题。我曾在 2005 年出版的《国际人权公约与中国》一书提出应当通过制定《中华人民共和国人权保障法》的

方式来贯彻实施“人权入宪”的精神,但这只是学术上的一家之言。由于对《中华人民共和国人权保障法》的立法可行性没有深入研究,所以,在新闻宣传上也没有着意要产生多大的影响。承蒙阿登纳基金会支持,我对于《中华人民共和国人权保障法》的可行性问题继续保持非常浓厚的兴趣,于是便召集几位志同道合的年轻学者,对于这样一部保障人权的基本法律可能会涉及的重大理论问题进行了立法前的论证性研究,获得了一些研究成果。这些基础性的研究成果内容涉及国际人权公约与中国的关系、如何通过国内法的途径来贯彻实施国际人权公约的规定、基本权利的限制、基本权利的类型和基本权利竞合、正当程序如何引入基本权利的保护领域、一些重要的权利如隐私权和不可克减的权利等如何在基本权利保障体系中得到体现等,课题组成员都对上述问题做了非常系统的研究。这些研究可以说是带有一定的前瞻性,这些问题的理论性都较强,对这些问题的深入研究必然会推动我国基本权利理论研究的向前发展,也有助于今后制定保障基本权利的法律。

本课题的主要学术思想非常丰富,提出的具有新颖性的学术观点也很多,不能够一一列举出来,但是,这些学术贡献都可以在具体的行文中品尝出来。在此,我要认真感谢我们这个研究团队的所有年轻学者,他们是我们事业的希望。需要一一指出他们的学术贡献是:戴瑞君博士撰写的“人权条约的国内适用——以《消除对妇女一切形式歧视公约》为例”,王祯军博士撰写的“论国际人权法中的国家责任问题”、“我国不可克减的权利的保护制度可行性研究”以及“对防治家庭暴力的一些思考——国际人权法视角”,张翔副教授撰写的“论基本权利的限制”,翟国强博士撰写的“基本权利的类型与基本权利竞合”,丁玮副教授撰写的“正当程序对构建宪法权利体系的作用研究——以美国法律演进为视角”,王秀哲副教授撰写的“隐私权的含义及人权保障法规范保护研究”等。

在本课题完成之际照例需要感谢的是给予我们一如既往支持的

容敏德先生、徐迎女士和谭蓉女士,对他们给予的充分信任表示衷心感谢。这种信任也是我们继续合作和深化对宪政问题研究的学术信心所在。

莫纪宏

二〇〇八年二月二十六日于北京西直门

Preface

The Cooperation with the Konrad-Adenauer-Stiftung in the academic program is a pleasant thing. In the recent years, we have reached a tacit agreement on our mutual academic cooperation between Mr. Winfried Jung, Ms. Xuying and Ms. Tanrong and me in much harvest based on the current cooperative model as the following procedure, submitting the application, asking approval of our CASS, signing the cooperative contract, organizing the experts to investigate and engage in research, collecting final results and publishing by Law Press House. As a necessary procedure, our researching group used to hold a seminar on the program at the middle or at the end of every March. This kind of cooperative method has been maintained until now, in shape of harmonious relationship between the applicant and the Foundation. According to the plan, it is time for us to submit our final result to the foundation. This is an exciting time because the trust of the foundation on us will have been verified once more, and we will finish this year's task with a group of new researching works in the field of constitutional law and human rights law.

The title of this year's program is study on feasibility of the Law of Protection of Human rights of the People's Republic of China. This topic has been determined after negotiating with Mr. Winfried Jund and our CASS, one of researching programs concerning constitutionalism funded by the Konrad-Adenauer-Stiftung. The reason why we chose this topic stems from constitutional amendments in 2004. In constitutional

amendments of 2004, “State Respects and Protects Human Rights” was written in the Constitution, which was described as “Human Rights Coming into the Constitution” propogated in mass media at that time. Nevertheless the impact of “Human Rights Coming into the Constitution” has been discussed hotly without any consensus. The author published a book named as “International Conventions on Human Rights” in 2005 in which the author proposed to enact a law on protection of human rights in China. Because of preliminary research on this topic without deep discussion, I have been keeping interested in enacting a law of protection of human rights in China. On the basis of Mr. Winfried Jung’ support , I have organized several young scholars to engage in studying this topic relied on systematic analysis of the basic theoretical issues, in particular, focusing on feasibility of making the Law of Protection of Human Rights of the People’s Republic of China. In the past year, we have achieved a group of researching results including relationship between international conventions on human rights and China, how to implement international covenants of human rights through domestic ways, limitation on fundamental rights, categories and combined application of fundamental rights , how to stipulate due process in the Constitution, how to protect right to privacy and non-derogable rights in the Constitution or the Law. The research in our group can possess advanced guideline in some degree because some issues have been discussed by the other scholars. Our research will be helpful to promote study on the Law of Protection of Human Rights of the People’s Republic of China and deepen academic discussion of this issue.

The new ideas and opinions in our research are too rich and multiple to be exemplified very well, which could be sensed and found in reading concrete paragraphs. Hereinafter, I should earnestly express my thanks to all young scholars in our group , they are the hope of our career. They

have made the following contributions : Doctor Dai Ruijun , writing the essay “Domestic Applicability of Human Rights Covenant — *with CEDAW as a paradigm*”; Doctor Wang Zhenjun , writing the essays as “National Liability in International Human Rights Law”, “Feasibility Study on Setting in Place a System of Non-derogable Rights Protection” and “Thoughts on Preventing and Controlling Domestic Violence— *from IHRL Perspective*”; Associate professor Zhang Xiang, with the essay “Limitations on Fundamental Rights”; Doctor Zhai Guoqiang , working out the essay “Categorization and Concurrence(Combined Application) of Fundamental Rights(*Grundrechtskonkurrenzen*)”; Associate professor Ding Wei , in contribution of the essay “Study on the Role of Due Process in Building Constitutional Rights System — *from the angle of US Law Evolution*”; Associate professor Wang Xiuzhe, with the essay “Implications of Right to Privacy and Regularization of HRP Laws” and so forth.

In time of finishing this year’s task, I should as usual express my honest thanks to Mr. Winfried Jung, Ms. Xu Ying and Ms. Tan Rong for their full trust on our group. Their trust is the resource of our confidence of academic research on constitutionalism issues.

Mo Jihong

February 26th, 2008, Xizhimen, Beijing

目 录

前言	(1)
第一部分 中英文简介	(1)
一、中文简介	(3)
二、英文简介	(15)
第二部分 《中华人民共和国人权保障法》的基本理论	
问题	(33)
一、两个国际人权公约下缔约国的义务与中国	(35)
二、批准《公民权利和政治权利国际公约》两种思考进路	
——关于法治与人权价值次序的选择标准	(48)
三、人权条约的国内适用	
——以《消除对妇女一切形式歧视公约》为例	(73)
四、论国际人权法中的国家责任问题	(134)
五、论基本权利的限制	(146)
六、基本权利的类型与基本权利竞合	(176)
七、正当程序对构建宪法权利体系的作用研究	
——以美国法律演进为视角	(209)
八、隐私权的含义及人权保障法规范保护研究	(255)
九、建立我国不可克减的权利的保护制度可行性研究	(292)
十、对防治家庭暴力的一些思考	
——国际人权法视角	(349)

第三部分 《中华人民共和国人权保障法》立法说明、专家	
建议稿及立法释义	(359)
一、《中华人民共和国人权保障法》专家建议稿立法	
说明	(361)
二、《中华人民共和国人权保障法》专家建议稿	(368)
三、《中华人民共和国人权保障法》(专家建议稿)	
立法释义	(391)
 索引	 (494)
中文参考书目	(506)
主要外文参考文献	(512)

Catalogue

Preface	(1)
---------------	-----

Part I A Brief Introduction Both in Chinese and in English

.....	(1)
(I) A Brief Introduction in Chinese	(3)
(II) A Brief Introduction in English	(15)

Part II The Basic Theoretical Issues on the Law of Protection of Human Rights of the People's Republic of China

.....	(33)
(I) Obligations of States Parties to the Two International Human Rights Covenants and China	(35)
(II) Two Alternative Approaches on Ratifying the ICCPR — <i>the order options between rule of law and human rights values</i>	(48)
(III) Domestic Applicability of Human Rights Covenant — <i>with CEDAW as a paradigm</i>	(73)
(IV) National Liability in International Human Rights Law	(134)
(V) Limitations on Fundamental Rights	(146)
(VI) Categorization and Concurrence (Combined Applica- tion) of Fundamental Rights (Grundrechtskonkurrenzen)	(176)
(VII) Study on the Role of Due Process in Building Consti-	

tutional Rights System	
— <i>from the angle of US Law Evolution</i>	(209)
(VIII) Implications of Right to Privacy and Regularization	
of HRP Laws	(255)
(IX) Feasibility Study on Setting in Place a System of Non-	
derogable Rights Protection	(292)
(X) Thoughts on Preventing and Controlling Domestic Violence	
— <i>from IHRL Perspective</i>	(349)
 Part III Legislative Introduction, the Draft of Experts and	
Legislative Interpretation of the Law of Protec-	
tion of Human Rights of the People's Republic of	
China	(359)
(I) Legislative Introduction	(361)
(II) The Draft of Experts	(368)
(III) Legislative Interpretation	(391)
 Index	(494)
Chines Bibliography	(506)
English Bibliography	(512)

第一部分

中英文简介

