

China and International Law **in the 21st Century**

Volume I
Rising Dragon

Edited by
Eric Yong Joong Lee

YIJUN PRESS

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仁人之事者 必務求興天下之利 除天下之害

-墨子 兼愛下-

*The purpose of the magnanimous lies in procuring benefits
for the world and eliminating its calamities.*

- Mozi -

Editorial Note

China's rise is one of the most noticeable features of the twenty-first century global affairs. As the world's largest populated country, she has been fast attaining the status of a truly hegemonic power in the world as well as Asia. China's GDP is expected to surpass that of the United States' in a number of years which will lead to changes in the political economy of the international community. China is finally becoming a superpower of the contemporary world. Its practices are grounds for the new international custom; its attitudes towards international law are shaping the future.

Titled <China and International Law in the 21st Century I: Rising Dragon>, this book collects the academic papers of Chinese lawyers published at the Journal of East Asia and International Law spanning from volume 1(2008) to volume 5(2012). More than twenty leading Chinese lawyers have participated in this publication. Each article represents native Chinese viewpoints on highly topical regional and global affairs. As a whole, the book can thus be a well-designed blueprint to analyze and predict China's law and policy in various issue areas.

Nineteen papers have been selected for the book. They are divided into the following categories: Security and Human Rights, Environment, Maritime Affairs, Economy and Trade, Civil Aviation and Outer Space Development, and Private International Law. The <Security and Human Rights> section includes three articles on Tibet, PSI and ethnic minorities in China each of which is very contentious issue. Here, China's positions on these matters have been clearly manifested. The <Environment> section contains articles on marine ecological damage and the Clean Development Mechanism in China. Articles in the <Maritime Affairs> section mainly deal with the on-going territorial and fisheries issues with neighboring countries in and around the China's coastal areas. This section also includes an article on the more global question of piracy. Leading international lawyers of China have contributed their ideas to the <Economy and Trade> section. These research topics are also intermingled with the critical issues regarding Cross-Strait cooperation, human rights, copyrights, and ASEAN. The <Civil Aviation and Outer Space Development> section touches on the enthusiastic national interest of China in this field. Finally, this book publishes an article on the changing private international law of China.

The five-year period when these articles were individually published at the *Journal of East Asia and International Law* was a historical turning point of China forging her identity as a key player in the turbulent global community. I believe this book is a collective academic response of Chinese legal scholarship to the challenges from the outside world. Such an effort will help readers to understand the real position of China in the face of globalization. Hopefully, it will modify the ill-defined anxiety that people harbor towards this fast coming superpower into mutual trust and, more fundamentally, the common good of today and tomorrow.

Eric Yong Joong Lee

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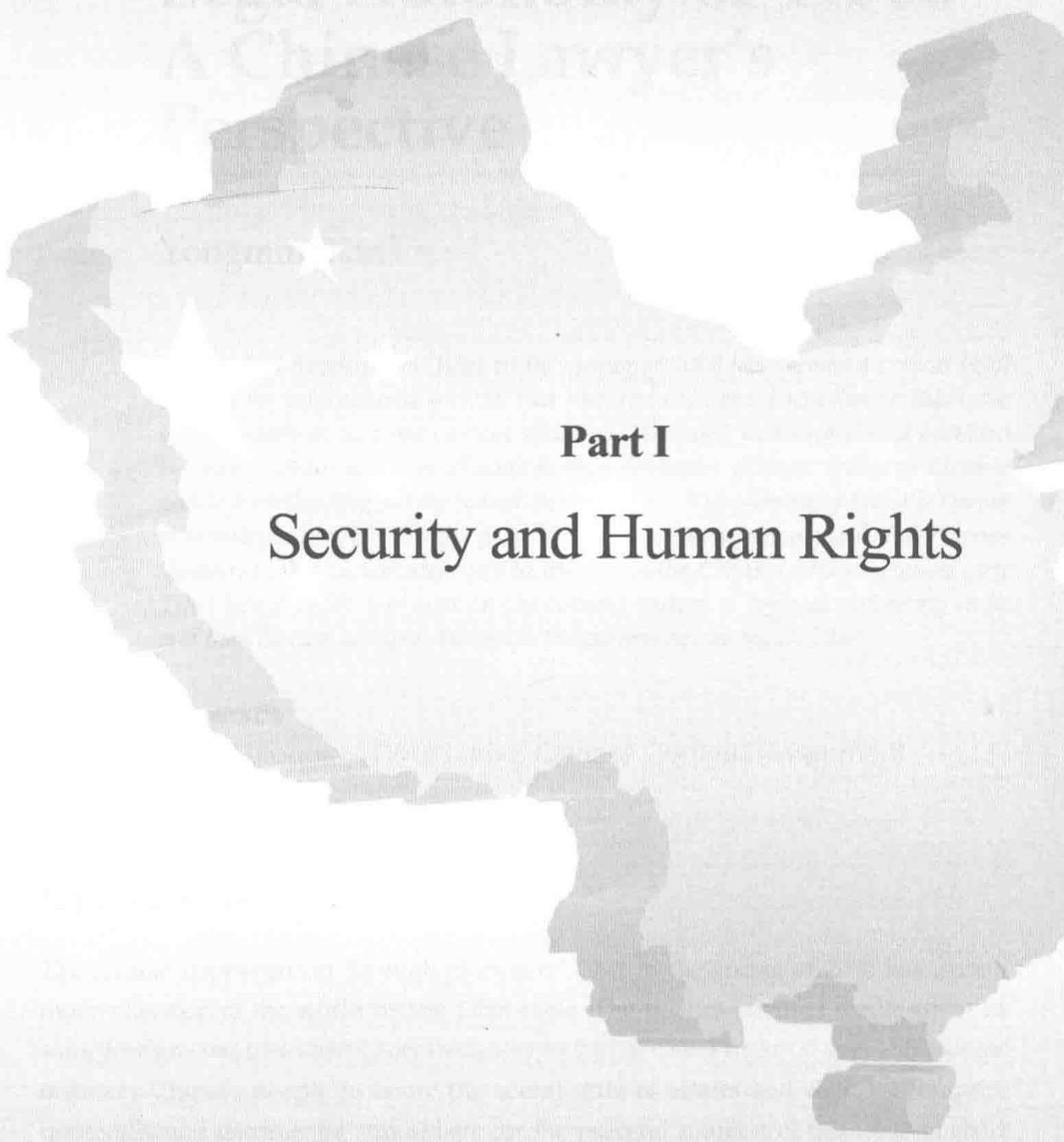
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Legal Autonomy of Tibet
A CHINESE LAWYER'S



Part I

Security and Human Rights

Abstract: This article examines the legal autonomy of Tibet from the perspective of a Chinese lawyer. It discusses the historical and contemporary challenges to the security and human rights of the Tibetan people. The author argues that the Chinese government's policies in Tibet have led to a significant erosion of the region's legal autonomy and the rights of its inhabitants. The article calls for a more transparent and accountable approach to governance in Tibet, one that respects the principles of the rule of law and the fundamental rights of all people.

Legal Autonomy of Tibet: A Chinese Lawyer's Perspective

Yongmin Bian*

The conflict happened in Tibet in the spring of 2008 has become a critical legal issue of the international society. Fair research and open discussion on this issue are necessary to improve current situation. However, mediamorphosis provided by mass communications of some foreign countries prevent ordinary Chinese people from figuring out the actual state of affairs. The purpose of this short paper is to analyze the past and the present of the Tibetan autonomy and find effective measures. The author attempts to introduce the China's administration over Tibet before 1950; comment on the current system of regional autonomy in it; and then discuss possible changes to the current autonomy in Tibet.

Keywords

Tibet Autonomy, Dalia Lama, Chinese Central Government

1. Introduction

The conflict happened on the high plateau of Tibet in the spring of 2008 has drawn much attention of the world on the Tibet issue. The politics-oriented media cover of some foreign countries sharply contradictory to that of China makes it very difficult for ordinary Chinese people to know the actual state of affairs and also creates quite unfriendly and detrimental atmosphere for the peaceful solution of this issue in short time. Open and impartial research and discussion on this issue is necessary and helpful to the final resolution. The Tibet "Government-in-exile" has openly stated its stance and opinions on the autonomy of Tibet, while the Chinese Central Government insists that it

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is not going to negotiate any 'Tibet issue' with the 14th Dalai Lama and his followers except for Dalai Lama' personal future. Since the position of the Central Government on Tibet is very tough, it seems that any autonomy in Tibet beyond the current Chinese law on regional autonomy in ethnic areas is impossible. This paper is dedicated to probing the history and analyzing the current situation of the autonomy of Tibet, and exploring possibilities of changing the current autonomy. Part II introduces the China's administration over Tibet before 1950 when Tibet enjoyed great autonomy. Part III comments on the current system of regional autonomy in Tibet. Part IV discusses possible changes to the current autonomy in Tibet. Due to the big difference between the Central Government of China and the Tibet Government-in-exile, the author concludes that it needs a long way to go to the final solution of the Tibet issue.

2. Tibet is the Part of China

At the beginning of the 13th Century, Genghis Kan established Mongolian Empire. Later he and his successors defeated the Song Dynasty of China and Tibet, and then established the Yuan Dynasty. Since Tibet became part of China in Yuan Dynasty, China has been continually claiming sovereignty over Tibet. But in the past 800 years, the central government of China did not always exercise strong governance over the remote Tibet, especially since the end of Qing Dynasty, when Tibet suffered from the aggression of imperialist powers, which grabbed all kinds of special privileges by means of unequal treaties, subjected Tibet to colonial control and exploitation, and at the same time, groomed separatists among the upper ruling strata of Tibet, in an attempt to sever Tibet from China.¹ Tibet had several chances to separate from China and associate with other states or gain independence, but the Tibetan religious leaders and the Tibetan local government chose to stay with China. When faced with foreign intervention and potential control, Tibet preferred the protection from its China.²

The Tibetan people mainly lived in the Qinghai-Tibetan plateau. In history, including the time after Tibet became part of China, for several periods its territory extended to today's Qianghai and parts of Gansu and Yunnan provinces. So today many Tibetan people still lives in Qianghai, Gangsu and Yunnan provinces. In these provinces there are Tibetan autonomous prefectures especially set up for Tibetan

¹ See China's State Council Information Office, *Regional Ethnic Autonomy in Tibet* (May 2004), available at <http://www.china.org.cn/e-white/20040524/index.htm> (last visited on Jul. 25 2008) [hereinafter 2004 White Paper], at part I, para.3.

² JOHN K. FAIRBANK & KWANG-CHING LIU (ed.), *THE CAMBRIDGE HISTORY OF CHINA*, translated into Chiense by China Academy of Social Science, vol.10 (Late Ch'ing, 1800-1911) 95-97.

compact communities. Today the Tibetan population is about 4.8 millions.³ In the past 800 years, Han Chinese assimilated many alien ethnic people including the founders of Qing Dynasty of China, Manchu ethnicity. However, the Tibetan people still keeps its explicit identity until today.

Before the peaceful liberation of Tibet in 1951, the Tibetan people were co-governed by the central government of China and Dalai Lama together. The Central government, “while handling important affairs concerning Tibet, maintained, by and large, the region’s original local social setup and ruling body, widely appointed upper-strata ecclesiastic and secular members to manage local affairs, and gave the Tibetan local government and officials extensive decision-making power.”⁴ At that time, the Central government maintained troops in Tibet, while the Tibetan local government had its own armed forces. The Tibetan local government also negotiated treaties with neighbor states, but of course the treaties had to be approved by the central government. The current 14th Dalai Lama might miss the more extensive autonomous right that Tibet had enjoyed before 1950. It was very interesting that in history the central government and the Tibetans had different understandings about the relationship between the emperors of China and Dalai Lama.⁵ For the Chinese emperors, although Dalai Lama was a very strong spiritual and secular leader, he was subject to the protection of emperors. For Tibetans, the emperors were merely the secular supporters of Dalai Lama. This means for Tibetans the status of Dalai Lama was higher than that of the emperors because in Tibet only Lamas were governors and the secular people had the obligations to provide support to Lamas. Secular person, no matter how powerful or rich, was in subordinate position.⁶ The transmission lineage system of reincarnation of the great Lama after his death reflected this subtly different and contradicted understanding. In 1793 a gold urn was bestowed to Lhasa from the emperor of Qing Dynasty for confirming reincarnation of the great lama. Before the coming of the gold urn representing the authority of the central government, the transmission lineage system of reincarnation of a great lama followed the traditional way. The local government of Lhasa had to convince the Tibetans that the Living Buddha was searched

3 State Ethnic Affair Commission, *Overview of Tibetans*, available at http://www.e56.com.cn/system_file/minority/zangzu/zangzu.htm (last visited on Aug. 2, 2008). The 14th Dalai Lama claims, however, that there are 6 millions of Tibetans. According to the researchers of the Cambridge History of China, in 1800, there were no more than 6 millions Tibetans who lived in Tibet and neighbor states and areas. At that time the populations that directly under the governance of Lhasa was about 4 million. See *supra* note 2, at 85.

4 The 2004 White Paper, *supra* note 1, at part I, para.1.

5 CAMBRIDGE HISTORY OF CHINA, *supra* note 2, at 94.

6 *Id.*

and confirmed according to their traditional way, while it had to promise the central government that the Living Buddha was actually confirmed through drawing lots from the gold urn.⁷ The yield of the local government, according to the international law of 19th century, was one of the evidences recognizing China's sovereignty over Tibet. It is very interesting that after the gold urn was declared to be used for more than two hundreds years, the gold urn itself has become part of the 'traditional' way.

Today although many states express their concern about the human rights of the Tibetan people, they recognize Tibet is part of China. Even the 14th Dalai Lama, who claims representing the Tibetans, is not seeking Tibet's independence from China. This being the case, it is not constructive to any peaceful solution of the Tibet issue if one argues that historically Tibet never became part of China till 1951 and challenges China's current sovereignty over Tibet. The Dalai Lama observed that "the long history of the past does not lend itself to a simple black and white interpretation. As such, it is not easy to derive a solution form the past history."⁸

3. The Current Regional Ethnic Autonomy in Tibet

A. *The Establishment of the Tibet Autonomous Region*

When the People's Republic of China announced its foundation in 1949, Tibet was still under the control of Dalai Lama. On May 23, 1951, with the signature of the "Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet," the Tibetan people got the promise of the "right to exercise regional ethnic autonomy" as one of the conditions to accept peaceful liberation.⁹ The Central Government agreed that the local government of Tibet and its governance would be generally maintained. However, the local government of Tibet was dismissed in 1959 by the Central Government because some people in the upper governing strata wanted to preserve feudal serfdom and refused to carry out democratic reform demanded by the Tibetan people.¹⁰ Soon afterwards a democratic reform of the Tibetan social system was implemented. Lands were re-distributed and some rebelling serf owners were quelled. By the democratic reform, it was proclaimed that the Tibetan people has 'acquired the citizens' rights and freedom specified in the Constitution and laws, and swept away the obstacles, in respect of social system, to the

⁷ *Id.*

⁸ See *His Holiness of the 14th Dalai Lama of Tibet*, available at <http://www.dalailama.com/march10/47thMarch10.html>. (last visited on Aug. 2, 2008)

⁹ See *The Establishment and Development of Regional Ethnic Autonomy in Tibet*, The 2004 White Paper, part I, paras.5-6.

¹⁰ *Id.* at para.7.

exercise of regional ethnic autonomy.¹¹ But the democratic reform had its negative impacts. Ngapoi Ngawang Jigme, the Vice Chairman of the Chinese People's Political Consultation Conference believed that the democratic reform created the conditions for Culture Revolution to be carried out in Tibet.¹² The Tibet Autonomous Region was formally founded in 1965. At the very beginning, most Tibetans were very happy with the establishment of the Tibetan Autonomous Region without knowing much about this system. The official White Paper 'Regional Ethnic Autonomy in Tibet' (2004) issued by the Information Office of China's State Council did not record the history of the Tibet Autonomous Region from the middle of the 1960s to 1980. Actually the Cultural Revolution starting from 1966 in China almost led the regional ethnic autonomy system to collapse. Many monasteries, mosques and shrines were destroyed and sutras were fired. Monks were forced to give up their religions.

B. The Development of Tibet

Compared with that of 50 years ago, Tibet has made great economic and social progress, although it still remains as the least developed area in China. In the first decade after the Tibet Autonomous Region was founded, its economic and social measures were far from perfection. Many lands and properties of monasteries and mosques were confiscated. Disputes and conflicts between different ethnic people, especially between the Han Chinese and the Tibetans, were defined as 'class contradictions.'¹³ The special natural environment and economy of Tibet was not taken into sufficient consideration in the economic development.

The improvement of people's living standards was mainly achieved during the past two decades. The economic prosperity lays down a solid foundation for the stability of Tibet. The Central Government also justifies the legitimacy of the regional autonomy system mainly based on the fruits of economic development. Following the improvement of transportation, the fast development of trade in commodities and tourism brings new opportunities to the modernization of Tibet and challenges of the protection of the fragile plateau ecology.

Politically the Tibetan people enjoy, according to law, the right of self-governance in their own region and ethnic affairs. Tibetans are appointed or elected to take positions in

¹¹ *Id.*

¹² Ngapoi Ngawang Jigme, *The Truth of Tibet Rebel in 1959*, CHINESE TIBETAN STUDIES (Zhongguo Zangxue), No.2, 1988.

¹³ STATE ETHNIC AFFAIR COMMISSION, TEN LECTURES ON ETHNIC AFFAIRS OF NEW CHINA (MINZU WENTI SHIJIANG), at the Sixth Lecture, para.17 (Ethnic Press 2006), available at http://www.seac.gov.cn/gjmw/zwgk/M150901index_1.htm (last visited on Jul. 10, 2008).

administrative organs at various levels. According to statistics, at present, Tibetans and people of other ethnic minorities make up 57% of the chairmen and vice-chairmen of the Tibet Autonomous Region; 69.23%¹⁴ of the members of the Standing Committee of the Regional People's Congress of the Tibet Autonomous Region. However, considering the Tibetan ethnic making up over 95% of the total population in Tibet, there could be more Tibetan people taking the positions of chairman, vice-chairman, etc. The Communist Party of China also maintains its officials in parallel with all levels of administrative organs. For example, equal with the chairman and vice-chairman of the Tibet Autonomous Region, there are secretary and vice-secretary of the party, who have important powers in decision-making not only limited to the affairs of the party. Most party secretaries in various levels, especially the high level, are not Tibetan or other ethnic minorities.

The freedom to inherit and develop the Tibetan traditional culture and to practice their religious belief is generally respected and protected by law. There are quite different comments from the government and Dalai side on the achievements of the cultural and religious development in Tibet. The government verifies the religious freedom with the fact that today a large number of Tibetans are free to decide whether they believe in Tibetan Buddhism or other religions or atheism. The Dalai side does not dispute in this way. They argue that China's Regulation on Religious Affairs (2004) puts several restrictions on the freedom of religion. For example, Article 12 of the regulation provided that "collective religious activities of religious citizens shall, in general, be held at registered sites for religious activities." In fact with permissions mainly limited to basic teaching and practice of Tibetan Buddhism, masters on Tibetan Buddhism can hardly emerge. This very important religion does not thrive and its impact weakens.

The political, religious and cultural rights and freedom that the Tibetans enjoy have to be understood in the specific background of China and considered as subject to the national interests and social stability. A citizen has the right to decide whether he believes in god or not and which god he believes meanwhile he is expected to love the Communist Party, socialism and the State. Any violation of this is not allowed. For example, the worship of the exiled Dalai Lama may cause trouble. The process to democracy in Tibet has to parallel with the democracy process in the whole China. It is not feasible that Tibet leads the process of democracy in China. The Central Government has committed to enlarge 'people's democracy' with a number of concrete policies.¹⁵

¹⁴ The 2004 White Paper, *supra* note 4, at Part II, para.3.

¹⁵ President Hu Jintao's report delivered at the 17th National Congress of the Communist Party of China (CPC) on Oct. 15, 2007, Documents on the 17th National Congress of the Communist Party of China, People's Press, 2007, Beijing, at 28.

The development of Tibet shows that the current regional autonomous system serves as an effective tool to protect the Tibetan people's interests and rights. After the Union of Soviet Socialist Republics was dissolved, the ethnic conflicts in east Europe and other part of the world caused great attention of the Central Government. The Law on Regional Ethnic Autonomy was modified in 2001 to accommodate itself to the new situations resulting from economic and political reform in China. In 2005 the State Council of China promulgated the Provisions of the State Council on the Implementation of Law of the People's Republic of China on Regional Ethnic Autonomy. Many concrete measures and policies were implemented aiming at improving the economic and social development of the ethnic areas. It is sarcastic that the Tibet issue was not so hot in those days when many faults occurred as today when Tibet is in rising prosperity. International elements may help to explain the reasons behind. Taking advantage of the present international background friendly to ethnic movement, Dalai Lama and its exiled government make great efforts in pursuing a higher level of autonomy in Tibet.

4. Any Changes of the Current Autonomy in Tibet?

It is good news for China that the Dalai Lama and his supporters have given up the pursuit of independence for Tibet. The later are seeking 'meaningful autonomy' or 'authentic autonomy' rather than secession of Tibet from China.¹⁶ However, there seems to be still some disagreement on where autonomy ends and independence begins. No autonomy should be used as a springboard for independence. It might take many years for both sides to reach a common interpretation on the meaning of a 'meaningful autonomy.'

A. China's Experience in Dealing with Ethnic Issue

The policy of the Communist Party of China on ethnic issues evolved over several decades. At the beginning of the 1920s, influenced by the Union of Soviet Socialist Republics, the Communist Party of China wanted to establish federal states to solve ethnic issues.¹⁷ Until the 1930s the Party still acknowledged that the ethnic people had

¹⁶ His Holiness the Dalai Lama discusses the recent unrest inside Tibet with the editors of the Financial Times, 1 June 2008, available at <http://www.phayul.com/news/article.aspx?id=21454&t=1&c=5> (last visited on Jul. 17, 2008).

¹⁷ Documentations on Ethnic Issues (Minzu Wenti Wenxian Huibian), Press of Central Party School, Beijing, 1991, at 18.