

EXPLORING WAYS OF IMPLEMENTING INTERNATIONAL HUMAN RIGHTS TREATIES IN CHINA

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Abstract

China has ratified over 20 human rights treaties. While many laws that were enacted during the reform period relate to human rights, a specific human rights law has not yet been adopted. However, a human rights law has been drafted by Chinese scholars. This article provides an overview of the contents of the Experts' Draft and compares the substantive human rights enshrined in the international covenants with those guaranteed in the proposed law. The analysis then focuses on doctrinal questions of the interpretation and application of the human rights law in addition to its relationship with other sources of law such as the Chinese Constitution and ordinary legislation. It explores how such a law would fit into the current doctrine and practice of the domestic implementation of treaty obligations and whether the Draft can be reconciled with the official Sino-Marxist dynamic-concrete concept of human rights. The article identifies the conditions in which a dedicated human rights law can become an effective means of treaty implementation and it also examines the likeliness of ICCPR ratification and the prospects of actual human rights improvement.

1. INTRODUCTION

The traditional role of law in China has been to strengthen the State as opposed to the protection of the individual rights of citizens. Indeed, this tradition of governmental paternalism is prevalent today which constitutes an antithesis to the concept of individual rights. Although legal reform in the People's Republic of China (PRC) is

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primarily aimed at strengthening party rule and promoting economic development, it has also limited government power and allows individuals to assert their rights in court.¹ However, it remains an open question as to just how far the rights of an individual can be extended under a one-party rule.

China has ratified over 20 human rights treaties² and participates in the international human rights regime by submitting reports, drafting new instruments and engaging in various human rights dialogues.³ Accordingly, domestic implementation of international human rights obligations may be one way, amongst others, to facilitate the development of human rights. It has been argued that although human rights legislation in China has evolved, as a result of multifarious legal activities and complex causes, international human rights law has affected domestic lawmaking by gradually acquiring precedence over domestic laws, as a general practice, and influencing Chinese academic discourse.⁴ While many laws that were enacted during the reform period apply either implicitly or explicitly in a human rights capacity by either restricting the criminal justice and administrative systems or clarifying the rights of Chinese citizens,⁵ a dedicated human rights law has not yet been adopted.

¹ It has been accepted as the 'balance theory' that administrative law both protects individual rights and enhances government efficiency; see Luo, Haocai (ed.), *Xiandai xingzhengfa de pingheng lilun* [On the Balance Theory of Modern Administrative Law], Beijing University Press, Beijing, 1997. Under the Administrative Litigation Law, courts review the legality of administrative acts. *Zhonghua renmin gongheguo xingzheng susongfa* [Administrative Litigation Law of the PRC], 4 April 1989.

² See, for example, Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, 1249 *United Nations Treaty Series* 13; the PRC ratified the convention on 4 November 1980 and declared a reservation regarding Article 29(1); International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966, 660 *United Nations Treaty Series* 195; the PRC ratified the convention on 29 December 1981 and declared a reservation regarding Article 22; International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 *United Nations Treaty Series* 85; the PRC ratified the convention on 4 October 1988 and declared that the Chinese Government does not recognise the competence of the Committee against Torture as provided for in Article 20 of the Convention and does not consider itself bound by Article 30(1); Convention on the Rights of the Child of 20 November 1989, 1577 *United Nations Treaty Series* 3; the PRC ratified the Convention on 2 March 1992 and declared that the PRC shall fulfil its obligations provided by Article 6 of the Convention under the prerequisite that the Convention accords with the provisions of Article 25 concerning family planning of the Constitution of the PRC and in conformity with the provisions of Article 2 of the Law of Minor Children of the PRC; International Covenant on Economic, Social and Cultural Rights of 16 December 1966, 993 *United Nations Treaty Series* 3; the PRC ratified on 27 March 2001. The PRC declared that the application of Article 8(1)(a) of the Covenant to the PRC shall be consistent with the relevant provisions of the Constitution of the PRC, the Trade Union Law of the PRC and the Labour Law of the PRC.

³ Peerenboom, Randall, *China Modernizes: Threat to the West or Model for the Rest?*, Oxford University Press, Oxford, 2007, p. 83.

⁴ Wan, Ming, 'Human Rights Lawmaking in China', *Human Rights Quarterly*, Vol. 29, No. 3, 2007, pp. 727–753, at pp. 738–745.

⁵ Wan identifies a list of 30 laws that are directly relevant to human rights, *ibidem*, at pp. 734–738. See also Wang, Guanghui, 'Zhongguo renquan lifa de huigu yu qianzhan' [Review and prospects of Chinese human rights legislation], *Zhongnan Caijing Zhengfa Daxue Yanjiushengbao* [Zhongnan University of Economics and Law Graduate Studies Journal], Vol. 23, No. 5, 2007, pp. 10–18, at p. 10;

However, the draft of such a law has been contemplated by Chinese legal scholars. In June 2008, a Research Fellow at the Law Institute of the Chinese Academy of Social Sciences (CASS) published a book with the title *The Human Rights Protection Law and China that included an Experts' Draft of a Human Rights Law (HRL)*.⁶ The Draft pursues the ambitious aim to incorporate both the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷ and the International Covenant on Civil and Political Rights (ICCPR)⁸ into Chinese law, although the PRC has signed but not ratified the ICCPR. A further purpose of the proposed law is the substantiation of the notion of human rights, which was introduced into the Chinese Constitution by the 2004 amendment. The application of such norms would ensure the justiciability of the fundamental rights of the Constitution. Moreover, the draft establishes new human rights institutions and new mechanisms for human rights protection.

In November 2003, the Chinese Ministry of Foreign Affairs set up an inter-ministerial working group on the ratification of the ICCPR and nominated the Law Institute of CASS as the only academic member.⁹ Although the CASS is a think tank that is closely connected to the State-party leadership, the research of the CASS Law Institute often prepares new national legislation and the CASS was officially assigned a role in the preparation of the ICCPR, there is no evidence that the specific task of drafting a HRL was initiated by a legislative body. The fact that the publication of the book and related activities were sponsored by an overseas foundation suggests that the draft is a purely academic initiative.¹⁰ The lack of direct State sponsorship implies

and Ji, Minli, 'Zhongguo renquan baozhang de falv tixi' [Legal system for the guarantee of human rights], *Sheke Zongheng* [Social Science Panorama], Vol. 22, No. 12, 2007, pp. 76–78, at p. 76.

⁶ Zhonghua renmin gongheguo renquan baozhang fa (zhuanjia jianyi gao) [Law of the People's Republic of China for the Protection of Human Rights (Experts' Draft)], in: Mo, Jihong (ed.), *Renquan baozhang fa yu Zhongguo* [The Human Rights Protection Law and China], Law Press, Beijing, 2008, pp. 368–390; for a Chinese-English version of the Draft, see *Zeitschrift für Chinesisches Recht* [Journal of Chinese Law], Vol. 16, No. 2, 2009, p. 172; www.iolaw.org.cn/global/en/showNews.asp?id=20165.

⁷ International Covenant on Economic, Social and Cultural Rights of 16 December 1966, 993 *United Nations Treaty Series* 3; the PRC ratified on 27 March 2001. The PRC declared that the application of Article 8(1)(a) of the Covenant to the PRC shall be consistent with the relevant provisions of the Constitution of the PRC, the Trade Union Law of the PRC and the Labour Law of the PRC.

⁸ International Covenant on Civil and Political Rights of 19 December 1966, 999 *United Nations Treaty Series* 171.

⁹ Chen, Zexian, *Gongmin quanli he zhengzhi quanli guoji gongyue de pizhun yu shishi* [Ratification and implementation of the International Covenant on Civil and Political Rights], Zhongguo Shehui Kexue Chubanshe, Beijing, 2008, p. 1. The working group includes, *inter alia*, representatives of the Ministry of Foreign Affairs, the Ministry of Justice and the Supreme People's Court. It was set up to compare the Covenant with Chinese legislation and to prepare a report for the National People's Congress (NPC). Zhou, Chunjie and Cao, Yanmei, 'Guoji renquan gongyue yu woguo gongmin xianfa quanli de wanshan' [The international human rights covenants and the completion of the constitutional rights of Chinese citizens], *Fazhi yu Shehui* [Legal System and Society], Vol. 3, No. 2, No. 6, 2008, pp. 151–152, at p. 152.

¹⁰ The editor of the book describes the selection of the research topic as the result of negotiations between him, CASS and the Konrad Adenauer Foundation. The Konrad Adenauer Foundation is a

that the Draft may not enter the formal legislative procedure in the near future. Of course, it is questionable whether the Draft of the HRL would ever have the chance to become law under the conditions of the current political system. The answer to this question depends on the overall evaluation of the reforms of the People's Republic of China legal and political systems. Views that regard previous reforms as a failure and which reject the approach of 'gradual change' on the grounds that the implementation of many small reform steps would have the main purpose of avoiding necessary fundamental reforms in order to preserve the current political power-structure, will most probably take a negative view on the realisation of the Draft.¹¹ An advocate of the aforementioned views may suggest that a fundamental change within the political system is required in order to operate the HRL in the proposed form. If the reform strategy of 'gradual change' is accepted as an option which can reconcile a one-party system with increased protection for the individual within an authoritarian rule-of-law State,¹² the adoption of the proposed HRL and its implementation in practice seems more realistic.¹³

This article provides an overview of the contents of the Draft and compares the substantive human rights enshrined in the international covenants with those guaranteed in the proposed HRL. The analysis then focuses on doctrinal questions of the interpretation and application of the HRL in addition to its relationship with other sources of law such as the Chinese Constitution and ordinary legislation. It explores how such a law would fit into the current doctrine and practice of the domestic implementation of treaty obligations and whether the Draft can be reconciled with the official Sino-Marxist dynamic-concrete concept of human rights. By applying a comparative approach, the article identifies the conditions in which the adoption of a dedicated human rights law can become an effective means of human rights treaty implementation. The last section discusses the feasibility of the adoption of a dedicated human rights law, as it is envisaged by the drafters of the HRL, and investigates the interrelated question of the likeliness of China's ratification of the ICCPR. Finally, the issue of whether ratification and adoption of a HRL would improve the actual human rights situation in China will also be addressed.

German organisation that funds, *inter alia*, development co-operation and is closely associated with the Christian Democratic Party; www.kas.de. Mo, *op.cit.* (note 6), at pp. 1–3.

¹¹ See Pei, Minxin, *China's Trapped Transition. The Limits of Developmental Autocracy*, Harvard University Press, Harvard, 2008. For an overview of 'pessimistic' views on PRC reforms, compare Shambaugh, David, *China's Communist Party. Atrophy and Adaptation*, University of California Press, Berkeley, 2009, pp. 25–32.

¹² Peerenboom, Randall, *China's Long March towards Rule of Law*, Cambridge University Press, Cambridge, 2002.

¹³ For such a 'positive' view, see Peerenboom, *op.cit.* (note 3).

2. IMPLEMENTATION OF HUMAN RIGHTS TREATIES IN CHINESE LAW

A description of the current practice of Chinese treaty implementation remains difficult. This is owing to the fact that the few court decisions, which do relate to the application of international treaties, are ambiguous on the question as to whether the introduction of an international treaty into the Chinese legal system requires, as a precondition, an act of the legislator or whether courts and the administration can apply international treaties directly. The practice of treaty implementation follows a differentiated approach which aims to provide maximum flexibility.¹⁴

Chinese commentators were initially of the opinion that international treaties would ultimately become part of national law without the requirement of an additional internal act and would be directly applicable by courts.¹⁵ Today, most scholars reject this traditional view. This turn was triggered by legal discourses in preparation of the accession to the World Trade Organisation (WTO) at the end of the 1990s. The studies, following the view of major trading powers,¹⁶ concluded that WTO rules may not be directly applied by Chinese courts and the administration. On the one hand, WTO accession stimulated in-depth research of the effects of international treaties in the Chinese legal system. On the other hand, studies of the internal application of international treaties in China generated a series of arguments that did not only advocate the restriction of the effectiveness of international trade law within the national legal system but also tried to diminish the domestic effectiveness of international law in general.¹⁷

At this point in time, it is not possible to verify whether the courts in China would apply the provisions of international human rights treaties.¹⁸ Chinese scholars predominantly hold the view that human rights treaties should not be automatically incorporated into national law and alternatively would require legislative ad hoc transformation.¹⁹ Often Chinese scholars are not expressing their own notions when

¹⁴ Ahl, Björn, 'China', in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2009, paras 1–42, at paras 35–40.

¹⁵ Ahl, Björn, *Die Anwendung völkerrechtlicher Verträge in China* [The Application of International Treaties in China], Springer, Dordrecht, 2009, pp. 130 and 138.

¹⁶ For an overview of the arguments against and in favour of 'direct effect' of WTO rules, see Cottier, Thomas and Schefer, Kristina, 'The Relationship between World Trade Organization Law, National and Regional Law', *Journal of International Economic Law*, Vol. 1, No. 1, 1998, pp. 83–122.

¹⁷ Ahl, Björn, 'Chinese Law and International Treaties', *Hong Kong Law Journal*, Vol. 39, No. 3, 2009, pp. 737–752, at p. 751.

¹⁸ Chen, *op.cit.* (note 9), pp. 639–655; Zhu, Xiaoqing, 'Renquan liang gongyue shishi zijhi yu tiaoyue de guoneifa shiyong wenti yanjiu' [Analysis of the Implementation Mechanism for both Human Rights Covenants and the Problems of Domestic Application of International Treaties], in: Zhu, Xiaoqing and Huang, Lie (eds), *Guoji tiaoyue yu guoneifa de guanxi* [The relationship between international treaties and domestic law], Shijie Zhishi Press, Beijing, 2000, pp. 301–318, at p. 316.

¹⁹ Sun, Shiyan, 'Guoji tiaoyue he guoneifa de guanxi yu dui guoji renquan tiaoyue de baoliu' [The relationship between international treaties and domestic law and reservations to human rights

promoting a denial of direct applicability of human rights treaties, but instead refer to the view of the Chinese Government as it is expressed in the first Human Rights White Paper of 1991.²⁰ According to the White Paper,

[t]he Chinese Government has always submitted reports on the implementation of the related conventions, and seriously and earnestly performed the obligations it has undertaken. (...) China believes that as history develops, the concept and connotation of human rights also develop constantly. The Declaration on the Right to Development provides that human rights refer to both individual rights and collective rights. (...) China is in favour of strengthening international cooperation in the realm of human rights on the basis of mutual understanding and seeking a common ground while reserving differences. However, no country in its effort to realize and protect human rights can take a route that is divorced from its history and its economic, political and cultural realities. A human rights system must be ratified and protected by each sovereign state through its domestic legislation.²¹

A general adoption of human rights treaties is denied on the grounds that the scope of application of domestic provisions referring to international treaties²² is confined to legal relationships in private or economic law and this does not extend to the relations between individuals and the State. Further, no reference provision in domestic law refers explicitly to human rights treaties.²³ Another argument against the automatic incorporation of human rights treaties is grounded on the claim that international treaties cannot confer rights to individuals.²⁴ Pursuant to an alternative view, the requirement to transform international human rights treaties into the domestic legal sphere is regarded to have evolved from practicing a socialist legal system. It is argued

treaties], in: Zhu and Huang (eds), *op.cit.* (note 18), pp. 270–285, at p. 272; Liang, Shuying, *Guoji gongfa* [Public international law], Zhongguo Zhengfa University Press, Beijing, 2000, at p. 263; and Rao, Geping (ed.), *Guoji fa* [International law], Beijing University Press, Beijing, 1999, p. 381.

²⁰ See Liang, *op.cit.* (note 19), p. 262.

²¹ ‘Human Rights in China’, Chapter X. 34 *Beijing Review*, 4–10 November 1991, at p. 8 and p. 14, www.china.org.cn/e-white/7/7-L.htm; for the latest White Paper on Human Rights, see Information Office of the State Council of the PRC, ‘China’s Progress in Human Rights 2004’, 2005, at: http://english.gov.cn/official/2005-07/28/content_18115.htm.

²² An example of such a rule is Article 142(2) of the *Zhonghua renmin gongheguo minfa tongze* [General Principles of Civil Law of the PRC] of 12 April 1986. Article 142(2) reads: ‘If any international treaty concluded or acceded to by the People’s Republic of China contains provisions differing from those in the civil laws of the People’s Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People’s Republic of China has announced reservations. International practice may be applied to matters for which neither the law of the People’s Republic of China nor any international treaty concluded or acceded to by the People’s Republic of China has any provisions.’

²³ Wan, Exiang and Wang, Guangxian, ‘Guoji renquan tiaoyue zai woguo guonei fayuan de shiyong’ [The application of international human rights treaties in Chinese courts], in: Zhu and Huang (eds), *op.cit.* (note 18), pp. 286–300, at p. 291.

²⁴ Zhu, Qiwu, *Zhongguo guojifa de lilun yu shijian* [Chinese theory and practice of international law], Law Press, Beijing, 1998, p. 14.

that a socialist legal system does not allow a simple adoption of human rights treaties combined with a direct application of treaty provisions within the domestic legal system.²⁵

Advocators in favour of an automatic incorporation of human rights treaties are relatively rare. One approach argues that human rights treaties become part of the national legal system from the moment that they become binding on the PRC, but individuals cannot invoke the provisions of the treaties in court.²⁶ Since there is no national legislation referring explicitly to human rights treaties, the basis for an automatic incorporation is seen in the participation of the Standing Committee of the National People's Congress (NPC) in the treaty-making procedure. In accordance with Articles 67(14) and 81 of the Chinese Constitution, the President shall not ratify a treaty unless the Standing Committee of the National People's Congress, after reviewing the treaty at its session, renders a decision to that effect. Commentators view the decision of the Standing Committee as an act that is comparable to the enactment of legislation. They advocate that whenever the Standing Committee participates in the treaty-making procedure, no further act is necessary in order to give an international treaty legal effect in domestic law.²⁷

Against the background of the current practice of human rights treaty implementation and the predominant scholarly views, the approach that is taken by the proposed HRL fits into the framework of domestic treaty implementation in China.

3. HUMAN RIGHTS LAW DRAFT

3.1. STRUCTURE OF THE DRAFT

The draft comprises of ten chapters and starts with a general part that sets out the aims, the scope of application and the interpretation of the HRL, a general equality clause, obligations of the State to protect human rights and regulations on the relationship between the HRL and the Constitution as well as the relationship between the HRL and international human rights treaties.²⁸ The final chapter of the HRL reiterates and

²⁵ Zhonghua renmin gongheguo renquan baozhang fa zhuanjia jianyigao lifa shuoming (Legislative explanation of the PRC Human Rights Protection Law Experts' Draft), Mo, *op.cit.* (note 6), at p. 364.

²⁶ Wang, Zhigang and Wang, Yan, 'Jingji, shehui he wenhua quanli guoji gonyue de falv xiaoguo ji zai woguo de shishi' [The legal effect of the International Covenant on Economic, Social and Cultural Rights and its implementation in China], *Jinyang Xuekan* [Jinyang Academic Journal], Vol. 3, No. 3, 2002, pp. 36–40.

²⁷ Wang, Tiewa, *Guojifa yinlun* [Introduction to international law], Beijing University Press, Beijing, 1998, p. 209; and Mu, Yaping, *Dangdai guojifa lun* [Theory of current international law], Law Press, Beijing, 1998, p. 26.

²⁸ Articles 1–16 HRL.

substantiates some of these provisions.²⁹ The second chapter establishes Human Rights Committees for the supervision of the implementation of the HRL and provides for additional legal protection in case of violations of the HRL.³⁰ Chapter three to five set out the competences of the legislature, the administration and the courts in view of the application of the HRL.³¹ The subsequent chapter deals with the restrictions of human rights in a state of emergency.³² Chapter seven sets out the substantive civil and political rights whereas chapter eight elaborates on the economic, social and cultural rights.³³ Chapter nine is devoted to international co-operation in the field of human rights and chapter ten contains miscellaneous provisions.³⁴

3.2. CIVIL AND POLITICAL RIGHTS

The substantive civil and political rights are enumerated in chapter seven of the Draft. The order and content of the human rights guarantees of the Draft largely follow the guarantees that are enshrined in the ICCPR, but also contain omissions and significant modifications in order to adapt the international guarantees to the domestic legal and political systems.

At the outset, the Draft guarantees the right to life of which no individual may be arbitrarily deprived. A deprivation of the right to life may only take place on the basis of the PRC Criminal Law and the judicial procedure on the death penalty according to the PRC Criminal Procedure Law.³⁵ The requirement of the ICCPR to impose the death penalty only for the ‘most serious crimes’ was omitted by the draft of the HRL.³⁶ The Human Rights Committee stated that it would interpret the term of ‘most serious crimes’ restrictively and would recognise the imposition of the death penalty to be compatible with Article 6(2) of the Covenant only as an exceptional measure. The death penalty should not be imposed for offences related to property, economic or political crime or in general for offences not involving the use of force.³⁷ The Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions of 2007, gave the term of ‘most serious crimes’ an even stricter interpretation stating that ‘the

²⁹ Articles 102–106 HRL.

³⁰ Articles 17–30 HRL.

³¹ Articles 31–37, 38–43 and 44–51 HRL.

³² Articles 52–57 HRL.

³³ Articles 58–79 and 80–89 HRL.

³⁴ Articles 90–101 and 102–106 HRL.

³⁵ Article 58(1) HRL and, Article 6(1) ICCPR; for a discussion of the right to life and death penalty in China, see Lee, Katie, ‘China and the International Covenant on Civil and Political Rights: Prospects and Challenges’, *Chinese Journal of International Law*, Vol. 6, No. 2, 2007, pp. 445–474, at pp. 462–465.

³⁶ See Article 6(2) ICCPR; for an analysis of Chinese scholars’ views, see Sun, Shiyan, ‘The Understanding and Interpretation of the ICCPR in the Context of China’s Possible Ratification’, *Chinese Journal of International Law*, Vol. 6, No. 1, 2007, pp. 17–42, at p. 36.

³⁷ General Comment 6/16 of 27 July 1982, UN Doc. A/37/40, Annex V, para. 7.

death penalty can only be imposed in cases where it can be shown that there was an intention to kill and that act resulted in the loss of life'.³⁸ The Draft provides for an obligation of the State to reform the death penalty system and to gradually abolish the death penalty for non-violent crimes.³⁹ All persons sentenced to death are granted the right to seek pardon or commutation.⁴⁰ International human rights organisations estimate that China executes at least 5,000 individuals per year; although authorities have claimed a decline of executions since the Supreme People's Court has resumed its review of death sentences in 2007.⁴¹ In respect of the prohibition of the death penalty for persons under the age of 18, the Draft only prohibits the immediate execution of a minor that has been sentenced to death.⁴² This would appear to allow a court to impose the death sentence upon a minor with a two-year suspension of execution,⁴³ although the Criminal Law states that the death penalty is not to be applied to persons who were under the age of 18 when committing a crime punishable with the death penalty.⁴⁴ In accordance with the ICCPR the Draft prohibits the execution of pregnant women. This prohibition may not be circumvented by way of forcing women to an abortion.⁴⁵ Current practice seems to be already in accordance with this requirement.⁴⁶

The prohibition of torture, cruel, inhumane or degrading treatment or punishment as well as the prohibition of medical or scientific experimentation is consistent with the ICCPR. With regard to medical and scientific experimentation, the Draft provides for the acquisition of a lifelong health insurance and necessary health compensatory payments for anyone who participates in such experiments.⁴⁷ Extorting a confession by

³⁸ Human Rights Council, fifth session, agenda item 2, 'Civil and Political Rights, including the Questions of Disappearances and Summary Executions', UN Doc. A/HRC/4/20, 29 January 2007.

³⁹ Article 58(5) HRL. The relevant part reads: 'The State (...) shall gradually abolish the death penalty system for non-violent crimes against life.'

⁴⁰ Article 58(2) HRL and Article 6(4) ICCPR.

⁴¹ The Dui Hua Foundation estimated 5,000 to 6,000 executions for 2007, Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1, 5 January 2009, UN Doc. A/HRC/WG.6/4/CHN/3, at para. 13. See also Zhang, Xiaoling, 'Lun guoji renquan fa zai woguo falv zhong de shishi' [On the Implementation of International Human Rights Law in China], *Zhonggong Zhongyang Dangxiao Xuebao* [Academic Journal of the Party School of the Central Committee of the Communist Party of China], Vol. 13, No. 12, 2009, pp. 86–90, at p. 89.

⁴² Article 58(3) HRL and Article 6(5) ICCPR.

⁴³ See Articles 48 and 50 of the PRC Criminal Law and Article 210 of the PRC Criminal Procedure Law.

⁴⁴ Article 49 of the PRC Criminal Law.

⁴⁵ Article 58(4) HRL and Article 6(5) ICCPR. Pursuant to Article 49 of the PRC Criminal Law, the death penalty is not to be applied to women who are pregnant at the time of sentencing.

⁴⁶ See the replies of the Supreme People's Court of 18 March 1991 and of 4 August 1998 in relation to natural abortions; Ji, Fenghua and Lin, Zhibiao, 'Jianyi xiugai "shenpan shi huaiyun de funv bu shiyong sixinig" guiding de shijian xianzhi' [Suggestions to Change the Time Limit on the Regulation that 'Women Who are Pregnant at the time of Trial shall not be Subject to the Death Penalty'], *Renmin Jiancha* [People's Procuratorate], No. 7, 2005, p. 55.

⁴⁷ Article 59(1) and (2) HRL and Article 7 ICCPR.

torture is explicitly prohibited.⁴⁸ The PRC has often been criticised for not introducing into the Criminal Procedure Law an explicit prohibition of the use of confessions obtained under torture as evidence before the courts.⁴⁹ Although the Supreme People's Court has issued instructions stating that any testimonies of witnesses, statements of victims and confessions of defendants would be invalid if concrete evidence showed that they were acquired by torture or other unlawful means, confessions are still treated as the most valuable form of evidence and are often coerced.⁵⁰ Moreover, the State has, according to the HRL, the duty to adopt the necessary measures to prevent family violence.⁵¹

The Draft guarantees the freedom from slavery and from forced or compulsory labour.⁵² The prohibition of forced and compulsory labour may be restricted in a state of emergency.⁵³ Forced labour is a problem in 're-education through labour' facilities; Chinese commentators have suggested reforming the 're-education through labour' system in order to bring it in compliance with the ICCPR.⁵⁴

The guarantee of the right to liberty and security of the person in the HRL is not consistent with the ICCPR. The duty of the State to bring anyone arrested or detained on a criminal charge promptly before a judge or another officer authorised to exercise judicial power has been reduced to a right to request a prompt interrogation.⁵⁵ The right of anyone who is deprived of his or her liberty to request a court decision on the

⁴⁸ Article 59(3) HRL.

⁴⁹ Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention of 12 December 2008, UN Doc. CAT/C/CHN/CO/4, para. 11. For a detailed account of the legal and factual situation of torture or ill-treatment in China, see Economic and Social Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak', UN Doc. E/CN.4/2006/6/Add.6, 10 March 2006. See also Lee, *loc.cit.* (note 35), pp. 451–456.

⁵⁰ Li, Zhongcheng, 'Xingxun bigong zhi ren shangcan, siwang anjian guanxia wenti tantao' [Study of the Problem of Jurisdiction over Cases of Extorting Confessions by Torture that Result in Disability and Death], *Renmin Jiancha* [People's Procuratorate], No. 24, 2007, pp. 22–26; and Lin, Lihong *et al.*, 'Xingxu bigong shehui renshi zhuangkuang diaocha baogao [A social cognitive survey on extorting confession by torture]', *Faxue Pinglun* [Legal Studies Review], No. 4, 2006, No. 4, pp. 117–136 and No. 5, pp. 123–140.

⁵¹ Article 59(4) HRL. Provisions on the protection of women can be found in the PRC Marriage Law (Zhonghua renmin gongheguo hunyin fa) of 28 April 2001 and in the PRC Law on the Protection of Women's Rights and Interests (Zhonghua renmin gongheguo funv quanyi baozhang fa) of 28 August 2005.

⁵² Article 60(1) HRL and Article 8(1) ICCPR.

⁵³ Article 60(4) HRL. See the PRC Emergency Response Law (Zhonghua renmin gongheguo tufa shijian yindui fa) of 30 August 2007.

⁵⁴ Chen, Xingliang, 'Laodong jiaoyang: genju guoji renquan gongyue zhi fenxi' [An analysis of re-education through labour based on the International Human Rights Covenant], *Faxue* [Legal Studies], No. 10, 2001, pp. 49–53; and Chen, Zhonglin, 'Woguo laodong jiaoyang zhidu de falv kunjing, jiazhi weiji yu gaige fangxiang' [The legal dilemma, value crisis and reform of re-education through labour], *Faxuejia* [Jurist], No. 4, 2004, pp. 121–132.

⁵⁵ Article 61(3) HRL and Article 9(3) ICCPR.

lawfulness of the detention and the right to obtain compensation for unlawful arrest or detention corresponds with the requirements of the ICCPR.⁵⁶

The rights of persons who are deprived of their liberty, the freedom of movement and the freedom of residence as well as the protection of aliens against arbitrary expulsion are guaranteed in accordance with the ICCPR.⁵⁷ The right to enjoy the freedom of movement and the freedom of residence may be restricted by law if it is considered necessary for the protection of national security, public order, public health and so on.⁵⁸ The broad grounds to restrict these rights would enable the government to uphold the current restrictions which exist in the form of the Household Registration (*Hukou*) System that imposes strict limits on the right of citizens to change their permanent place of residence and the activities of the migrant population.⁵⁹

The procedural guarantees in civil and criminal trials in the Draft are, with a small number of exceptions, closely modelled on the guarantees of the ICCPR. One of the exceptions is the right to publicity of proceedings. The Draft allows the restriction of this right, *inter alia*, on grounds of public order or national security and not, as the ICCPR formulates, ‘for reasons of (...) public order (ordre public) or national security in a democratic society’.⁶⁰ Under the ICCPR, the public may only be excluded if the principles of a democratic society are adhered to. The requirement that measures must adhere to the principle of a democratic society serves to function as a restriction of limitations that are allowed on the broadly termed grounds of public order and national security. This means that measures must be oriented along the basic democratic values such as pluralism, tolerance, broadmindedness and people’s sovereignty, that is, popular participation in political decision-making processes.⁶¹ The requirement that rights of the Covenant may only be restricted by measures ‘necessary in a democratic society’⁶² has also been omitted in respect of other rights guaranteed in the HRL. It may be assumed that in the view of the drafters, the principles of a democratic society are a restriction of government power that would be unacceptable by the State-party leadership.

⁵⁶ Article 61(4) HRL and Article 9(4) and (5) ICCPR.

⁵⁷ Articles 62, 64 and 65 HRL and Articles 10, 12 and 13 ICCPR.

⁵⁸ Article 64(3) HRL and Article 12(3) ICCPR.

⁵⁹ See He, Xin, ‘Why Do They Not Comply with the Law? Illegality and Semi-Legality among Rural-Urban Migrant Entrepreneurs in Beijing’, *Law and Society Review*, Vol. 39, 2005, pp. 527–562; Zhao, Tiantian, ‘Cong woguo renquan lifa yu guoji renquan gongyue de chongtu kan erzhe zhi chayi’ [On the differences between Chinese human rights legislation and the International Human Rights Conventions], *Nanfang Lunkan* [Southern Discussion Forum], No. 1, 2007, pp. 38–39; and Shi, Daoyin, ‘Gongmin quanli he zhengzhi quanli guoji gongyue’ yu woguo xianfa de chongtu yu hengping’ [Conflict and balance between the International Covenant on Civil and Political Rights and the Chinese Constitution], *Falv Shiyong* [Journal of Law Application], No. 10, 2007, pp. 70–72.

⁶⁰ Article 66(1) HRL and Article 14(1) ICCPR.

⁶¹ See Nowak, Manfred, *CCPR Commentary*, Engel Publ., Kehl, 1993, Article 14, para. 25 and Article 22, para. 21.

⁶² See Article 21 ICCPR.

However, the standards of Article 14 of the ICCPR are not adhered to during investigation, interrogation and defence at trial. In practice, lawyers require official approval in order to meet with their clients and it is often difficult for them to gain actual access. Moreover, the communication between lawyer and client is not privileged.⁶³ It has also often been criticised that the destruction or forgery of evidence by defence lawyers is a crime in its own right.⁶⁴

The prohibition of retroactive criminal laws, the recognition of legal personality and the protection of privacy and the family follow the wording of the guarantees under the ICCPR.⁶⁵ The guarantees of freedom of thought, conscience, religion and belief are in most parts consistent with the Covenant.⁶⁶ The duty of the State to respect the liberty of parents to ensure the religious education of their children has been modified insofar as it is not formulated as a right of all parents but only as a right of parents of minors of ethnic minorities who may provide religious education for them which is appropriate to their level of understanding.⁶⁷ Hence, this provision may be interpreted in a way that the parental right to religious education of children is only guaranteed in respect of ethnic minorities and not in general. The freedom of opinion, expression and information has been stipulated pursuant to the ICCPR.⁶⁸ The prohibition of the advocacy of war has been limited by the draft insofar as it allows war mobilisation to resist external aggression or to suppress acts of splitting the country.⁶⁹

The freedom of assembly may be restricted to a greater extent than the corresponding right under the ICCPR for the reason that it is not required that the State measure restricting the freedom of assembly is 'necessary in a democratic society'.⁷⁰ The scope of the freedom of association and trade unions has been considerably reduced under the Draft. The right to form and join trade unions is not explicitly stipulated. Instead, it is said that anyone is entitled to enjoy the freedom of association.⁷¹ The reluctance to stipulate in the HRL a right to form and join trade unions is consistent with the fact that the PRC declared a reservation in relation to the right under the ICESCR to form trade unions.⁷² It must be assumed that in the event of the ratification of the ICCPR, the PRC would also declare a reservation on the right to form trade unions

⁶³ Lee, *loc.cit.* (note 35), pp. 458–462.

⁶⁴ Zhonghua renmin gongheguo xingfa [Criminal Law of the PRC] of 14 March 1997, Article 306.

⁶⁵ Articles 67–69 HRL and Articles 15–17 ICCPR.

⁶⁶ Article 70 HRL and Article 18 ICCPR.

⁶⁷ Article 70(4) HRL and Article 18(4) ICCPR.

⁶⁸ Article 72 HRL.

⁶⁹ Article 72(3) HRL and Article 20 ICCPR. On the related problem of Taiwan, see Shi, *loc.cit.* (note 59), p. 71.

⁷⁰ Article 73 HRL and Article 21 ICCPR.

⁷¹ Article 74 HRL and Article 22 ICCPR.

⁷² *Supra* note 2. The PRC declared that the application of Article 8(1)(a) of the Covenant to the PRC shall be consistent with the relevant provisions of the Constitution of the PRC, the Trade Union Law of the PRC and the Labour Law of the PRC.

under that Covenant. The Draft protects marriage, family and the rights of children in accordance with the ICCPR.⁷³

The political rights of participating in public affairs, to vote and to be elected in periodic elections as well as to take part, on general terms of equality, in the public affairs of State organs and government organisations have been modified insofar as PRC citizens enjoy these rights only 'pursuant to the Constitution of the PRC'.⁷⁴ The Draft did not incorporate the requirement that elections must be 'genuine elections'.⁷⁵ It has been recognised that 'genuine elections' can be realised in various electoral systems, including the one-party system, provided that voters have a certain minimum amount of political influence and can at least choose between several candidates of a uniform party.⁷⁶ The decision of the drafters not to incorporate the requirement of 'genuine elections' indicates that they assumed the election system does not even comply with these minimum requirements. Restrictions or deprivation of these rights are only permitted according to the PRC Criminal Law and on the basis of the judgment of a People's Court.⁷⁷

The prohibition of discrimination follows the wording of the ICCPR.⁷⁸ The protection of minorities has been regulated in more detail than in the Covenant, but the HRL does not provide for a general right of minorities to profess and practice their own religion.⁷⁹ According to the Draft, the State is obliged to promote ethnic minority districts to accelerate economic and cultural development according to the characteristics and needs of ethnic minorities; territories inhabited by ethnic minorities establish regional autonomy and organs of self-government.⁸⁰ Ethnic groups have the freedom to use and develop their own spoken and written language as well as to keep or change their own social customs and habits. Courts shall hear cases in the native spoken and written language which is most commonly used by that individual.⁸¹

The Draft has been composed by using a Chinese translation of the ICCPR as a reference. This Chinese translation of the ICCPR is not the authentic Chinese text of the ICCPR, it is merely a translation that has been widely used by the United Nations and in the PRC.⁸² According to Article 53 of the Covenant, the ICCPR has five equally authentic texts, one of them in Chinese. The widely used version is, in

⁷³ Articles 75 and 76 HRL and Articles 23 and 24 ICCPR.

⁷⁴ Article 77 HRL.

⁷⁵ Article 25(b) ICCPR and Article 77(1) 2 HRL.

⁷⁶ Nowak, *op.cit.* (note 61), Article 25, para. 17.

⁷⁷ Article 77(2) HRL.

⁷⁸ Article 78 HRL and Article 26 ICCPR.

⁷⁹ Article 27 ICCPR.

⁸⁰ Article 79(2) and (3) HRL.

⁸¹ Article 79(4)-(6) HRL.

⁸² For an analysis of the differences between both Chinese versions of the Covenant, see Sun, Shiyang, 'The International Covenant on Civil and Political Rights: One Covenant, Two Chinese Texts?', *Nordic Journal of International Law*, Vol. 75, No. 2, 2006, pp. 187-209.

some respects, not consistent with the authentic Chinese and English versions. One of the more obvious mistakes from the widely used version found its way into the HRL. Whereas the authentic version states in the relation to the examination of witnesses under Article 14(3) subparagraph (e) '[t]o examine, or have examined, the witnesses against him', the HRL stipulates, pursuant to the widely used Chinese version of the Covenant: '[T]o examine or to already examined [sic] the witnesses against him'.⁸³ The problems that arise with the use of this version of the text could have been avoided by using the authentic Chinese text of the Covenant as a model of the HRL.

3.3. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

As in the preceding chapter, the guarantees which are provided in the part on economic, social and cultural rights follow the order of the relevant rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The right to work and the right to the enjoyment of just and favourable conditions of work are closely modelled on the ICESCR,⁸⁴ whereas the right to form and join trade unions has been considerably modified. Although it is recognised that every person has the right to form and join trade unions to promote and protect economic and social interests, this right is subject to extensive restrictions. The establishment of a trade union must follow the PRC Law on Trade Unions.⁸⁵ Under the Trade Union Law, workers have the right to join and organise trade unions and to elect their trade union representatives.⁸⁶ When union membership in an institution, enterprise, or State organ numbers 25 or more, union members may establish a basic-level trade union committee.⁸⁷ However, the Trade Union Law prohibits workers from establishing trade unions that function independently from the All-China Federation of Trade Unions (ACFTU).⁸⁸ Pursuant to the principle of democratic centralism,⁸⁹ the ACFTU controls trade unions, including the basic-level trade unions. The ACFTU has control over the establishment of any basic-level trade union organisation by way of requiring all nascent trade unions to obtain approval from a higher-level trade union.⁹⁰ Certain requirements of the Covenant, including the provision that joining a trade union is subject only to the rules of the organisation concerned and that such restrictions are only permitted 'which are necessary in a democratic society in

⁸³ Article 66(3)(e) HRL; and Sun, *loc.cit.* (note 82), p. 198.

⁸⁴ Articles 80 and 81 HRL and Articles 6 and 7 ICESCR.

⁸⁵ Zhonghua renmin gongheguo gonghuiufa (PRC Law on Trade Unions) of 27 October 2001, *Gazette of the NPC Standing Committee*, 2001, p. 584; and Article 82(1) HRL.

⁸⁶ Articles 3 and 9(2) Trade Union Law.

⁸⁷ Article 10(1) Trade Union Law.

⁸⁸ Lehl, Aaron, 'China's Trade Union System under the International Covenant on Economic, Social and Cultural Rights', *University of Hawaii Law Review*, Vol. 21, No. 1, 1999, pp. 203–236, at p. 203.

⁸⁹ See Article 9(1) Trade Union Law.

⁹⁰ See Article 11(1) Trade Union Law.

the interest of national security or public order',⁹¹ were not included into the HRL. Moreover, the Draft does not provide for an equivalent of the right of trade unions to establish national federations, the right of trade unions to function freely and the right to strike.⁹² However, the right to social security,⁹³ the protection of the family, mothers and children,⁹⁴ the right of everyone to an adequate standard of living,⁹⁵ the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,⁹⁶ is stipulated in the Draft pursuant to the wording of the ICESCR.

The right to education has been modified and the aims of education that are laid down in the ICESCR have not been incorporated in the Draft. The Covenant provides that education shall promote the full development of the human personality, the sense of its dignity and the respect for human rights and fundamental freedoms.⁹⁷ Instead of including these aims of education, the Draft provides for the establishment of socialist education facilities and aspires to 'improve the scientific cultural level of the people' as well as popularising the general use of *Putonghua*.⁹⁸ The right to participate in cultural life and to enjoy the benefits of scientific progress are guaranteed pursuant to the Covenant.⁹⁹ The final article in the chapter on economic, social and cultural rights is a catch-all clause according to which the State shall respect and ensure all collective human rights including the right to self-determination, to existence and development.¹⁰⁰

The HRL may be criticised for the fact that it does not put enough emphasis on more extensive social rights. However, it seems to have been the intention of the Drafters to fill in the blank in the area of civil rights since many laws already implement aspects of economic and social rights.

3.4. RELATIONSHIP OF THE DRAFT WITH OTHER SOURCES OF LAW, APPLICATION AND INTERPRETATION

3.4.1. *Scope of Application*

The HRL shall apply as a benchmark to the drafting of laws, regulations and rules, administrative measures that furnish conditions for the realisation of human rights, the realisation of judicial remedies against acts that violate human rights and the

⁹¹ Article 8(1)(a) ICESCR.

⁹² See Article 8(1)(b), (c) and (d) ICESCR.

⁹³ Article 83 HRL and Article 9 ICESCR.

⁹⁴ Article 84 HRL and Article 10 ICESCR.

⁹⁵ Article 85 HRL and Article 11 ICESCR.

⁹⁶ Article 86 HRL and Article 12 ICESCR.

⁹⁷ Article 13(1) ICESCR.

⁹⁸ Article 87(2) and (5) HRL.

⁹⁹ Article 88 HRL and Article 15 ICESCR.

¹⁰⁰ Article 89(1) HRL.

performance of obligations under international human rights treaties.¹⁰¹ With regard to the personal scope of application of the Law, it is applicable not only to PRC citizens but also to aliens, stateless persons and other persons who are not PRC citizens who live and work in China.¹⁰² Another provision clarifies that persons who are not PRC citizens, but reside in China, shall also enjoy the human rights set out in the HRL on an equal footing with PRC citizens.¹⁰³

3.4.2. *Legal Basis*

The Draft stipulates the constitutional ‘principle of human rights protection’ as the legal basis of the HRL. The Draft refers to Article 33(3) of the Constitution that was introduced by the 2004 constitutional amendment and pursuant to which the State ‘respects and protects’ human rights.¹⁰⁴ Moreover, it is said that the law is enacted ‘with reference to’ international human rights treaties.¹⁰⁵ This implies that the HRL is designed to implement obligations of the PRC under international human rights treaties. Meanwhile, the Draft is somewhat distanced from human rights treaties because it does not refer to them as an immediate legal basis but rather as a reference point of the legislation. This implies flexibility in two different ways: firstly, the legislator may take into account treaties that have not yet been ratified by China; secondly, the legislator may not be willing to mirror treaty provisions exactly in national human rights but may want to ‘adjust’ the content of international human rights to ‘local’ or ‘Chinese’ conditions. Further, the first article implies that the law materialises the broad term of human rights in Article 33(3) of the Constitution. The Explanation clarifies that the ‘principle of human rights guarantee’ does not refer to the catalogue of fundamental rights in the Constitution but to Article 33(3).¹⁰⁶ The development of human rights protection under the Draft seems to circumvent the well-established but in practice ineffective constitutional human rights¹⁰⁷ and attempts to substantiate the broadly worded human rights protection clause.

¹⁰¹ Article 2 HRL.

¹⁰² Article 6 HRL.

¹⁰³ Article 96(1) HRL.

¹⁰⁴ For the constitutional amendment, see Blanchard, Hal, ‘Constitutional Revisionism in the PRC: “Seeking Truth from Facts”’, *Florida Journal of International Law*, Vol. 17, No. 2, 2005, pp. 365–404.

¹⁰⁵ Article 1 HRL.

¹⁰⁶ See Mo, *op.cit.* (note 6), p. 391.

¹⁰⁷ Shen, Kui, ‘Is it the Beginning of the Era of the Rule of Law of the Constitution? Reinterpreting China’s First Constitutional Case’, *Pacific Rim Law and Policy Journal*, Vol. 12, No. 1, 2003, pp. 199–231; and Kellogg, Thomas, ‘Courageous Explorers? Education Litigation and Judicial Innovation in China’, *Harvard Human Rights Journal*, Vol. 20, No. 1, 2007, pp. 141–188.

3.4.3. Interpretation

The Draft refers to the general human rights protection clause under Article 33(3) of the Constitution in addition to the general principles of human rights as they are enshrined in the Universal Declaration of Human Rights (UDHR),¹⁰⁸ the ICCPR, the ICESCR and other international human rights treaties.¹⁰⁹ This provision, once again gives the impression that the Draft tries to bypass the constitutional fundamental rights. The reference to Article 33(3) of the Constitution as a ‘basis for interpretation’ of the Draft seems to be meaningless since this broadly termed provision itself requires interpretation. It appears as if the reference to the Chinese Constitution as a basis of interpretation functions as a pretext and that the interpretation of the HRL shall in fact be controlled by the rights enshrined in international human rights treaties.

But another provision of the Draft appears to contradict the understanding that the interpretation of the HRL is controlled by international standards. It is stipulated that the HRL shall be a ‘specific law’ that ‘implements the system of human rights protection set out in the Constitution’ and that the provisions of this law shall be interpreted consistently with the ‘principles and the system of human rights protection of the Constitution’.¹¹⁰ However, the principle of consistent interpretation is weakened by the second part of this provision which requires that cases of inconsistency between the HRL and the Constitution shall be submitted to the Standing Committee of the NPC for constitutional interpretation.¹¹¹ The Standing Committee, under Article 67(1) of the Chinese Constitution, has the power to interpret the Constitution, but it does not exercise this competence in practice. Some scholars have proposed to activate the instrument of constitutional interpretation in cases where the constitutionality of a bill is disputed.¹¹² But within the context of the dynamics of legal reform in China, this scholarly proposal means that provisions of the Chinese Constitution which lag behind the reform development have to be adjusted to more progressive standards that are set out in the level of ordinary laws. Hence, constitutional interpretation as it is understood here does not denote the review and adjustment of laws to a constitutional standard, but rather a constitutional amendment in the form of constitutional interpretation in order to adapt the content of constitutional provisions to more advanced laws. If the provision on constitutional interpretation in the HRL is also based on such an understanding, the HRL would finally prevail over inconsistent constitutional provisions.

¹⁰⁸ Universal Declaration of Human Rights (UDHR) of 10 December 1948, Res. 217 (III), UNGA Official records third Session (part I) Resolutions, UN Doc. A/810, p. 71.

¹⁰⁹ Article 3(5) HRL.

¹¹⁰ Article 15 HRL.

¹¹¹ *Ibidem*, second sentence.

¹¹² Tong, Zhiwei, ‘Wuquanfa cao’an gai ruhe tongguo xianfa zhi men’ [How the Draft of the Property Rights Law shall Pass the Gate of the Constitution], *Faxue* [Legal Studies], No. 3, 2006, pp. 4–23, at p. 22.

Interestingly, current legislation has incorporated the competence of the NPC Standing Committee to decide on conflicts of inconsistent legislation. An example is Article 86(1) No. 2 of the Legislation Law.¹¹³ According to the Legislation Law, the Standing Committee has the competence to decide conflicts between rules issued by departments of the State Council and regulations enacted by local People's Congresses. However, the complicated procedure envisaged by the Legislation Law is not followed in practice and conflicts between local regulations and national departmental rules are not solved by way of formal procedure. Against the background of this legislative experience, the provision that allows for the referral of decisions on conflicts between the HRL and the Constitution to the NPC Standing Committee may in fact be a solution that does not attempt to provide for a real and feasible formal procedure to resolve conflicts of rules.

The chapter on supplementary provisions also sets forth rules regarding the interpretation of the HRL pursuant to which the Law must be interpreted in a spirit consistent with the Constitution.¹¹⁴ The requirement of an interpretation that is consistent with the Constitution is obviously weakened by the addition of 'in a spirit'.¹¹⁵ Similar terminology can be found in the Regulations of the Supreme People's Court on Judicial Interpretation that require an interpretation pursuant to the spirit of the legislation.¹¹⁶ In the context of judicial interpretation, the reference to the 'spirit of legislation' appears to allow the Supreme People's Court to interpret laws against their wording.¹¹⁷ The purpose of the interpretation rule in the HRL becomes clearer if the second paragraph of the provision is taken into account. It provides that any amendments of the Chinese Constitution may not limit or set out to deprive individuals of any human rights that are stipulated in the HRL.¹¹⁸ This attempt to bind the legislator to the standards of the HRL in case of future constitutional amendments implies that the requirement to interpret the Law consistently with the Constitution should not be regarded as a strict standard. Against this background, the principle of consistent interpretation appears to function as a disguise for any attempt to restrict constitutional amendments. The result that the Draft tries to achieve here is a familiar feature that is common in other jurisdictions which have introduced a human rights

¹¹³ Zhonghua renmin gongheguo lifa fa [Legislation Law of the PRC] of 15 March 2000, Fazhi Ribao of 19 March 2000; Li, Yahong, 'The Law-Making Law: A Solution to the Problems in the Chinese Legislative System?', *Hong Kong Law Journal*, Vol. 30, No. 1, 2000, pp. 120–140.

¹¹⁴ Article 102(1) HRL.

¹¹⁵ Chinese: *xiang yizhi de jingshen*.

¹¹⁶ Zuigao renmin fayuan guanyu sifa jieshi gongzuo de guiding [Regulations of the Supreme People's Court on Judicial Interpretation] of 3 March 2007, *Gazette of the Supreme People's Court*, No. 5, 2007, p. 25.

¹¹⁷ Ahl, Björn, 'Die Justizauslegung durch das Oberste Volksgericht' [Judicial Interpretation of the Supreme People's Court], *Zeitschrift für Chinesisches Recht* [Journal of Chinese Law], Vol. 14, No. 3, 2007, pp. 251–258, at p. 255; and Liu, Nanping, 'Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court', *Journal of Chinese Law*, Vol. 5, No. 1, 1991, pp. 107–140.

¹¹⁸ Article 102(2) HRL.

law that formally ranks below the Constitution. Judicial practice has often given such laws a status that places them *de facto* above the constitution.¹¹⁹

3.4.4. Application

According to current legal doctrine, the fundamental rights of the Chinese Constitution may not be directly applied by courts.¹²⁰ The HRL redresses this situation by providing that in the event that no law or regulation has been established in order to guarantee the implementation of the fundamental rights of the Chinese Constitution, the relevant provisions of the HRL shall apply.¹²¹ Moreover, the Draft provides for the direct application of constitutional provisions in judicial proceedings if the fundamental rights in the Constitution or the human rights in the Draft lack legally indispensable procedures for their implementation.¹²²

The chapter on international exchange and co-operation makes stipulations on the effects of international human rights treaties within the Chinese legal system. Courts may apply human rights treaties which are binding on China as a legal basis of a decision by way of reference when they hear human rights cases pursuant to the Draft.¹²³ The wording ‘by way of reference’ tries to find a compromise between making international treaties strictly binding on courts and keeping them outside the reach of judges. Eventually, this provision may allow judges the discretion to decide on the domestic application of an international treaty. A similar wording was used in the 1989 Administrative Litigation Law in relation to the application of government rules.¹²⁴

The idea of Article 18 of the Vienna Convention on the Law of Treaties has been adopted by the Draft, pursuant to which a State may not defeat object and purpose of a treaty after signing a treaty and before the treaty has become binding on the relevant State.¹²⁵ The HRL provides that the legislator shall not act in a way that contradicts the

¹¹⁹ As regards the implementation of the European Human Rights Convention in Germany, the Federal Constitutional Court held in its *Görgülü* decision of 14 October 2004 (*Entscheidungen des Bundesverfassungsgerichts* 111, 307), that the German Constitution must as far as possible be interpreted in such a way as to comply with Germany’s obligations under the European Human Rights Convention. See Lübke-Wolff, Gertrude, ‘ECHR and national jurisdiction – The Görgülü Case’, *Humboldt Forum Recht*, 2006, p. 1, available at: www.humboldt-forum-recht.de/druckansicht/druckansicht.php?artikelid=135.

¹²⁰ Shen, *loc.cit.* (note 107); and Kellog, *loc.cit.* (note 107).

¹²¹ Article 16(1) HRL.

¹²² Article 16(2) HRL.

¹²³ Article 91 HRL, Chinese: ‘keyi zuowei (...) canzhao shiyong de falv yiju’.

¹²⁴ Article 53(1) of the PRC Administrative Procedure Law (*Zhonghua renmin gongheguo xingzheng susong fa*) of 4 April 1989 reads: ‘In handling administrative cases, the people’s courts shall take, as references, regulations formulated and announced by ministries or commissions under the State Council in accordance with the law...’

¹²⁵ Article 18 of the Vienna Convention on the Law of Treaties of 23 May 1969 provides: ‘A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it

contents of a human rights treaty that has been signed but not yet ratified by China.¹²⁶ The Explanation of the HRL holds that although the Chinese Government has not yet ratified the ICCPR, the signature implies that China has to abide by the basic spirit of the Covenant and should actively create the conditions for a prompt ratification.¹²⁷

Moreover, international treaties that have been neither signed nor ratified shall have a specific effect on the national legal system, since the principles that are stipulated in these treaties shall be taken into account when new legislation is adopted.¹²⁸ The HRL further sets out that the State organs of the PRC are required to perform the obligations under human rights treaties which are binding on China thoroughly.¹²⁹ The terms used in this article of the Draft are reminiscent of the ‘theory of automatic co-ordination’¹³⁰ which was introduced by Zhou Gengsheng and is often repeated in the Chinese literature on the application of international treaties in the national legal system. According to this theory, the relationship between international and municipal law regulates itself automatically if States fulfil their international obligations thoroughly.¹³¹ However, the Draft stipulates not only that the PRC is bound by treaty law as a subject of international law in relation to other subjects of international law, but that the State organs of all levels are directly bound by international human rights treaties.¹³²

3.4.5. Rank Within the Hierarchy of Norms

The Explanation of the Draft proposes the adoption of the HRL as a ‘basic law’ by the plenum of the NPC.¹³³ It is not clear whether basic laws are given a higher rank within the hierarchy of norms in relation to laws that are enacted by the Standing Committee of the NPC.¹³⁴ Legislative practice and the wording of the Constitution imply that basic laws passed by the NPC and laws enacted by the Standing Committee

has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty...’

¹²⁶ Article 92 HRL.

¹²⁷ Zhonghua renmin gongheguo renquan baozhang fa zhuanjia jianyigao lifa shuoming [Legislative Explanation of the PRC Human Rights Protection Law Experts’ Draft], Mo, *op.cit.* (note 6), p. 364.

¹²⁸ Article 93 HRL.

¹²⁹ Article 94 HRL.

¹³⁰ Chinese: *ziran tiaozheng lun*.

¹³¹ Zhou, Gengsheng, *Guojifa* [International Law], Shangwu Yinshuguan, Beijing, 1983, p. 16. This theory is based on a form of differentiating dualism that was first formulated by Zhou Gengsheng and pursuant to which international and national law are separate systems that infiltrate and supplement each other rather than conflicting with each other. This view is supported by many Chinese scholars today. See Wang, *op.cit.* (note 27), p. 191.

¹³² Article 94 HRL.

¹³³ Mo, *op.cit.* (note 6), p. 364.

¹³⁴ The plenum of the NPC adopts ‘basic laws’ (Chinese: *jiben falv*), the Standing Committee of the NPC passes ‘other laws’ (Chinese: *qita falv*). See Articles 58 and 57 No. 2 of the Chinese Constitution.

are on the same footing and not on different levels within the hierarchy of norms. The views that advocate giving basic laws a higher rank in relation to laws appear to aim at introducing basic laws as a standard to review laws; but this has simply remained a theoretical proposition of Chinese legal scholars.¹³⁵ The Draft provides that the HRL, including interpretations of the HRL, shall prevail in the event of conflict with laws, regulations and rules.¹³⁶ The relevant provision does not indicate whether the HRL shall only rank in priority in relation to conflicting legislation or whether conflicting legislation shall be void. Since the HRL shall prevail over 'other laws' and shall be given the status of a 'basic law', it appears that the Draft follows the scholarly view which gives basic laws that are adopted by the plenum of the NPC a higher status in relation to laws that are adopted by the Standing Committee of the NPC.

If the principle of constitutional supremacy is taken as a basis, the attempt to restrict the legislator to conduct constitutional amendments that limit or deprive any rights set out in the HRL is in vain.¹³⁷ Although Article 5(3) of the Chinese Constitution stipulates that no law, or administrative or local rules and regulations shall contravene the Constitution, it is questionable whether constitutional practice has adopted the principle of the primacy of the Constitution.¹³⁸

Pursuant to Article 62 No. 1 of the Chinese Constitution, the NPC is conferred with the power to amend the Constitution. A bill to amend the Constitution may be introduced either by the Standing Committee or one-fifth of the members of the NPC. To pass a constitutional amendment, a two-thirds majority of the members of the NPC is required.¹³⁹ Neither the Constitution nor the Legislation Law contains additional requirements. Chinese commentators demand that in general, the Constitution must be amended before the NPC may adopt legislation that deviates from constitutional standards. It is regarded as a basic requirement of a rule-of-law system that lower ranking law does not contravene higher ranking law.¹⁴⁰ Another argument against implied constitutional amendments by way of passing ordinary legislation is that the NPC, as the highest organ of State power, has the function of a role model and must therefore comply with constitutional standards.¹⁴¹

¹³⁵ Zhang, Chengguang, 'Quanguo renda jiqi changweihui lifa quanxian guanxi jiantao' [Discussion of the relationship between the legislative powers of the National People's Congress and its Standing Committee], *Huadong Zhengfa Xueyuan xuebao* [Journal of the East China University of Politics and Law], No. 3, 2004, pp. 40–46, at p. 43.

¹³⁶ Article 105 HRL.

¹³⁷ See Article 102(2) HRL.

¹³⁸ See Ahl, Björn, 'Normative oder semantische Verfassung?' [Normative or Semantic Constitution?], *Verfassung und Recht in Übersee* [Law and Politics in Africa, Asia, Latin America], Vol. 41, No. 4, pp. 477–509, at p. 500.

¹³⁹ Article 64(1) of the Constitution.

¹⁴⁰ Tong, *loc.cit.* (note 112), at p. 19.

¹⁴¹ *Idem.*

In this context, a legal discourse of the 1990s in which the doctrine of ‘benign constitutional violation’ was developed, would become relevant.¹⁴² Pursuant to this doctrine the acts of State organs that violate constitutional provisions are accepted as ‘benign violations of the Constitution’, if those acts promote the development of productive forces or were conducted to further basic interests of the State and the nation.¹⁴³ Between 1979 and 1982, the Standing Committee adopted 11 laws without the necessary constitutional amendments due to the strong demand for new legislation at the beginning of the reform era.¹⁴⁴ These constitutional violations may be regarded as a phenomenon of the first years of the reform period when legal structures were only rudimentary. The State leadership of that time was more concerned with the rapid establishment of a legal framework for economic reform than with the coherence of the legal system.¹⁴⁵ Today most scholars reject the doctrine of benign constitutional violations.¹⁴⁶ It is advocated that the decision on whether a violation of the Constitution constitutes a ‘benign’ or ‘malign’ violation presupposes a standard that is not rooted in positive law. The recognition of criteria that are considered to be above the Constitution questions the authority of the Constitution.¹⁴⁷

The discussion among scholars regarding the theories of ‘benign constitutional violation’ and ‘constitutional amendment by way of ordinary legislation’ indicate that the principle of supremacy of the Constitution that is largely accepted in theory, has not yet won recognition in practice. It seems that in practice, basic laws that are adopted by the plenum of the NPC may lead to an implied amendment of the Constitution. This view is reinforced by the fact that constitutional amendments require a two-thirds majority in the NPC and that basic laws are in practice always adopted by way of a two-thirds majority. Apart from the qualified majority, the Constitution does not stipulate additional requirements for constitutional amendments such as the explicit change of the constitutional text. If this understanding of constitutional practice in China is considered to be the basis of the interpretation of the HRL, it may well be argued that its adoption as a basic law would lead to an implied amendment of the Chinese Constitution. However, since the Constitution itself lacks an effective

¹⁴² Zhang, Qianfan, ‘Xianfa biantong yu difang shiyan’ [The flexibility of the Constitution and local experiments], *Faxue Yanjiu* [Legal Studies Research], Vol. 29, No. 1, 2007, pp. 63–73.

¹⁴³ Hao, Tiechuan, ‘Lun liangxing weixian’ [On benign constitutional violations], *Faxue Yanjiu* [Legal Studies Research], Vol. 18, No. 4, 1996, pp. 89–91.

¹⁴⁴ Jiang, Minlu, ‘You “liangxing weixian” yinqi de dui woguo xianzheng zhidu de sikao’ [Thoughts on the Chinese system of constitutionalism raised by ‘benign constitutional violations’], *Dazhong Kexue* [Public Science], No. 3, 2007, pp. 85–86.

¹⁴⁵ For other reasons, see Han, Dayuan, ‘Shehui biange yu xianfa de shehui shiyingxing’ [Transformation of society and adaptability of the Constitution], *Faxue* [Legal Studies], No. 5, 1997, pp. 19–20.

¹⁴⁶ Tong, Zhiwei, ‘Xianfa shishi linghuoxing de dixian’ (The limits of flexibility in the implementation of the Constitution), *Faxue* [Legal Studies], No. 5, 1997, pp. 15–17.

¹⁴⁷ Li, Yun, ‘Qianlun lifa zhong de “liangxing weixian”’ [Discussion of ‘benign constitutional violation’ by legislation], *Keji Xinxi* [Science Information], No. 1, 2007, p. 209.

implementing mechanism, the question of ‘implied amendments’ will simply retain theoretical value only.

3.5. RESTRICTIONS OF RIGHTS

The rights set out in the HRL may only be restricted on the basis of this law or on the basis of other constitutional laws.¹⁴⁸ Organs of State administration may not restrict the rights of the HRL or the fundamental rights set out in the Constitution on the basis of administrative regulations and administrative rules.¹⁴⁹ Restriction or deprivation of rights may only be conducted according to the special procedure of this law or as stipulated by another law.¹⁵⁰ A person may only be deprived of rights enjoyed on the basis of the HRL pursuant to the provisions of the Criminal Law of the PRC and only upon the decision of a People’s Court.¹⁵¹ The rationale for the requirement of law is supported by the fact that human rights are granted by the Constitution and the HRL and only the NPC or its Standing Committee may impose restrictions on those rights. The imposition of restrictions by other State organs would constitute a violation of the relevant human rights.¹⁵² The rights of the HRL may not be applied or interpreted in a way that they restrict the realisation of the rights provided for in the Constitution or in other laws.¹⁵³ Restrictions of human rights presuppose that any limitation is of a temporary nature and satisfies the need and purpose of public interest.¹⁵⁴ Interestingly, no right stipulated in the Constitution or in other laws may be used as a basis to restrict the human rights set out in this Law.¹⁵⁵ This provision appears to override the principle of the supremacy of the Constitution. Overall, the Draft emphasises the importance of the principle of requirement of law.

The Standing Committee of the National People’s Congress adopted an Emergency Response Law in August 2007.¹⁵⁶ This law is applicable to natural disasters, accidents, public health and social safety incidents that cause serious social damage and need the

¹⁴⁸ Article 5(1) HRL and Article 32 HRL stipulate that the rights set out in the HRL may only be restricted by a law adopted by the NPC or its Standing Committee. For a comparison of restrictions of human rights under the PRC Constitution and the ICCPR, see Wang, Hongming, ‘Woguo xianfa yu guoji renquan gongyue youguan renquan xianzhixing guiding zhi bijiao’ [Comparison of provisions on the restriction of human rights in the Chinese Constitution and international human rights covenants], *Shandong Keji Daxue Xuebao* [Shandong University of Science and Technology Journal], Vol. 10, No. 4, 2008, pp. 41–45.

¹⁴⁹ Article 40(1) HRL.

¹⁵⁰ Article 5(2) HRL.

¹⁵¹ Article 33 HRL.

¹⁵² Mo, *op.cit.* (note 6), p. 396.

¹⁵³ Article 7(1) HRL.

¹⁵⁴ Article 8(1) HRL.

¹⁵⁵ Article 7(3) HRL.

¹⁵⁶ PRC Law on the Response to Suddenly Occurring Incidents (Zhonghua renmin gongheguo tufa shijian yindui fa) of 30 August 2007.

adoption of emergency response measures.¹⁵⁷ The HRL does not explicitly refer to the Emergency Response Law but it incorporates similar terminology and provides for the restriction of rights to that State organ which has the power to decide on whether to declare a state of emergency.¹⁵⁸ The Draft empowers the administration to restrict, during a state of emergency, the rights of citizens and increase the duties of citizens according to law.¹⁵⁹ A number of rights are excluded from restrictions on the grounds of a state of emergency.¹⁶⁰ Pursuant to the ICCPR, the right to life, the right not to be abused or subject to the extortion of a confession by torture, the right not to be enslaved or to perform hard labour, the right to a fair trial, the right to equality before the law and the freedom of religious belief are all considered to be such rights.¹⁶¹ State measures taken during a state of emergency must be fair and just and may not discriminate on the basis of nationality, race, gender, occupation, language, religious belief or social status.¹⁶² The Draft further stipulates that any measures that the administration takes in order to respond to a suddenly occurring incident shall suit the nature, extent and scope of the probable danger to society created by the incident. If different measures can be selected, that measure shall be selected which involves the least harm to the rights and interests of the aggrieved party.¹⁶³ Property that has been subject to requisition in order to deal with the emergency must be returned or compensation shall be paid according to law.¹⁶⁴ Against measures taken during a state of emergency, citizens, legal persons or other organisations may apply for administrative review or commence administrative litigation.¹⁶⁵

The regulations relating to a state of emergency are, apart from the principle of proportionality and the prohibition of discrimination, problematic insofar as they do not adopt the preconditions for the derogation from the obligations under the ICCPR. Pursuant to the Covenant, prerequisites for derogation measures are the existence of a public emergency threatening the life of the nation and an official proclamation of the emergency.¹⁶⁶ The fact that the Draft and the 2007 Emergency Response Law do not provide for specific preconditions, in accordance with the requirements of the ICCPR for the derogation from rights, implies that the rights guaranteed in the HRL may be restricted although the preconditions for such a limitation under the Covenant are not met.

¹⁵⁷ Article 3(1) PRC Law on the Response to Suddenly Occurring Incidents.

¹⁵⁸ Article 52(2) HRL.

¹⁵⁹ Article 52(2) HRL.

¹⁶⁰ *Idem*.

¹⁶¹ Article 4(2) ICCPR.

¹⁶² Article 53 HRL and Article 4(1) ICCPR.

¹⁶³ Article 54 HRL.

¹⁶⁴ Article 55 HRL.

¹⁶⁵ Article 56 HRL.

¹⁶⁶ Article 4(1) ICCPR.

3.6. HUMAN RIGHTS INSTITUTIONS AND SPECIAL LEGAL REMEDIES

As a central institution for the implementation of the proposed HRL, so-called Human Rights Protection Committees¹⁶⁷ are established as an integral part of the People's Congress System.¹⁶⁸ The NPC and local People's Congresses above county level shall establish Human Rights Committees as special committees which are under the leadership of the relevant Standing Committee during the period when the People's Congresses are not in session.¹⁶⁹ The Committee Chair shall be concurrently held by the Chair of the Standing Committee of the relevant People's Congress. Committee Members are chosen by way of election from delegates of the People's Congress Standing Committee of the relevant level or by way of appointment.¹⁷⁰ A Research Centre shall be established under the Standing Committee of the NPC in addition to a News Release Centre.¹⁷¹ The Draft further envisages the establishment of an Expert Group under the NPC Human Rights Committee as an advisory body which shall be composed of scholars who engage in human rights work, government officials, judges, procurators, lawyers and diplomats who engage in affairs of human rights.¹⁷²

The competences of the Human Rights Committees include the conduct of studies on the implementation of the HRL and to give advice to the People's Congress Standing Committee at the relevant level, to supervise the implementation of the HRL and submit views and suggestions to the implementing authorities as well as to accept inquiries on the implementation of the HRL by all sectors of society.¹⁷³ The Human Rights Committee under the NPC establishes a Group for Safeguarding Human Rights Implementation and a Group for the Settlement of Human Rights Disputes.¹⁷⁴ While the Group for Safeguarding Human Rights Implementation is responsible for the study of matters that require analysis and arise out of the process of implementing the HRL, the Group for the Settlement of Human Rights Disputes is responsible for the review of final judgments of the Supreme People's Court involving cases of human rights protection pursuant to the HRL which the parties refuse to obey. It makes recommendations on the question of whether the Supreme People's Court shall retry the relevant case.¹⁷⁵ The participation of a committee of the NPC Standing Committee in the review of a court case is problematic in terms of judicial

¹⁶⁷ Chinese: *renquan baozhang weiyuanhui*.

¹⁶⁸ Commentators regard the establishment of a specific institution to oversee human rights implementation as crucial, see Zhou and Cao, *loc.cit.* (note 9), at p. 152.

¹⁶⁹ Article 18 HRL.

¹⁷⁰ Article 19 HRL.

¹⁷¹ Articles 27 and 28 HRL.

¹⁷² Article 104 HRL.

¹⁷³ Article 21 HRL.

¹⁷⁴ Article 22(1) HRL.

¹⁷⁵ Article 22(2) HRL.

independence. It resembles the practice of individual case supervision¹⁷⁶ by People's Congresses that has been criticised by commentators.¹⁷⁷

The Supreme People's Court shall establish a human rights trial division that is responsible for trying first instance cases relating to the rights set out in the HRL. Such human rights trial divisions may also be established in lower courts.¹⁷⁸ If Intermediate People's Courts and Basic People's Courts discover, during the course of adjudication of a human rights case, that the court is unable to complete the adjudication according to the ordinary judicial procedure, the court is required to suspend the hearing of the case and to submit the case to the High People's Court for adjudication.¹⁷⁹ This provision resembles Article 2 of the Rules on the Jurisdiction over Administrative Cases that were issued by the Supreme People's Court in 2007.¹⁸⁰ Pursuant to Article 2 of these Rules, a party to an administrative dispute may directly bring an action in the Intermediate People's Court if it is considered to be inappropriate for the Basic People's Court having jurisdiction to exercise such jurisdiction. The exercise of jurisdiction is regarded as inappropriate in cases where the administration exerts pressure on the Court to decide in its favour.¹⁸¹

The administrative organs shall suspend the implementation of administrative regulations and administrative rules if the administration discovers that such regulations or rules conflict with the requirements of the protection of fundamental rights of the Constitution, or rights set out in the HRL. Such regulations or rules shall be submitted to the People's Government at the next higher level, which may refer the matter up to the State Council. Further, the State Council may submit the relevant rule or regulation to the Human Rights Committee of the National People's Congress.¹⁸²

The Draft provides a specific procedure for the review of death sentences. Judgments that deprive an individual of the right to life but do not provide for the immediate execution of the death penalty are required to be made by Intermediate People's Courts and shall become effective only after review by a High People's Court.¹⁸³ Death sentences that provide for the immediate execution of the death penalty must be made by High Courts and shall become effective only after a review by the Supreme

¹⁷⁶ Chinese: *ge'an jiandu*.

¹⁷⁷ See Liu, Ruihua, 'Lun renda de ge'an jiandu' [On individual case supervision by the NPC], *Xiandai Faxue* [Contemporary Legal Studies], Vol. 24, No. 4, 2002, pp. 32–36.

¹⁷⁸ Article 30(1) and (2) HRL.

¹⁷⁹ Article 30(3) HRL.

¹⁸⁰ Article 2 of the Rules of the Supreme People's Court on Some Issues concerning the Jurisdiction over Administrative Cases (Zuigao renmin fayuan guanyu xingzheng anjian guanxia ruogan wenti de guiding) of 17 December 2007.

¹⁸¹ See Ahl, Björn, 'Stärkung der Gerichte im Verwaltungsprozess?' [Strengthening the Position of Courts in Administrative Litigation?], *Zeitschrift für Chinesisches Recht* [Journal of Chinese Law], Vol. 15, No. 2, 2008, pp. 93–102, at p. 99.

¹⁸² Article 42 HRL.

¹⁸³ Article 46 HRL.

People's Court.¹⁸⁴ Moreover, it is required that People's Courts on all levels that issue death sentences publish the facts and the legal basis of the relevant judgment in certain official newspapers not later than three days before issuing the judgment. The public is entitled to raise questions regarding the legality and reasonableness of the judgment on the death penalty.¹⁸⁵ Although the drafters obviously aimed at increasing transparency, such a provision is problematic in respect of judicial independence.

When a review of a death penalty is conducted by the Supreme People's Court, it shall report the factual basis and the legal reasons of the judgment to the Human Rights Committee under the NPC not later than ten days before issuing the review decision. If the majority of the members of the Human Rights Committee do not approve the opinion of the Supreme People's Court on the review, the Human Rights Committee shall submit the issue to the NPC Standing Committee for decision.¹⁸⁶ It is again questionable whether such an elaborated formal procedure that gives the NPC Standing Committee a final say in a specific case is of practical value. Moreover, such an arrangement encounters the same criticism as regards individual case supervision by People's Congresses.¹⁸⁷

In the event that the Supreme People's Court raises doubts about the meaning of a provision of the HRL, it shall request the NPC Standing Committee to issue a formal legal interpretation.¹⁸⁸ Against the background of the current practice whereby the Supreme People's Court itself issues binding interpretations and that the NPC Standing Committee generally does not exercise its interpretation power, the practicability of this provision remains questionable. The Standing Committee of the NPC is responsible for the formal interpretation of the HRL; the Human Rights Committee under the NPC may propose the draft of such an interpretation.¹⁸⁹ But pursuant to current constitutional practice the legislative interpretation by the Standing Committee has only become relevant in relation to the Basic Law of Hong Kong.¹⁹⁰ Therefore it is questionable whether this competence of the Standing Committee can be activated for the purpose of interpreting the HRL. However, the intention of the drafters may have been to use the explicit stipulation of the Standing Committee's power of interpretation to exclude the Supreme People's Court from interpreting

¹⁸⁴ Article 47(1) HRL.

¹⁸⁵ Article 48 HRL.

¹⁸⁶ Article 49 HRL.

¹⁸⁷ See above the text accompanying footnote 180.

¹⁸⁸ Article 25 HRL.

¹⁸⁹ Articles 103(2) and 24 HRL.

¹⁹⁰ Pursuant to Article 158 of the Hong Kong Basic Law, the Standing Committee has the power to interpret the Basic Law. See Ahl, Björn, 'Vertagte Demokratisierung – Die Grenzen der Autonomie des Sonderverwaltungsgebiets Hongkong' [Postponed democratization – The limits of autonomy of the Hong Kong Special Administrative Region], *Journal of Current Chinese Affairs*, Vol. 33, No. 7, 2004, pp. 762–773; and Ahl, Björn, 'Justizielle und legislative Auslegung des Basic Law von Hongkong' [Judicial and legislative interpretation of the Hong Kong Basic Law], *Heidelberg Journal of International Law*, Vol. 60, No. 2, 2000, pp. 511–526.

the HRL, which would be in line with the attempt to establish the Human Rights Committee under the NPC and the Standing Committee as organs that supervise the work of the Supreme People's Court.¹⁹¹

4. COMPLIANCE OF THE DRAFT WITH THE OFFICIAL HUMAN RIGHTS CONCEPT AND LEGAL DOCTRINE

The official view regarding the conception of human rights plays an important role in the discussion on the domestic implementation of human rights treaties.¹⁹² The official human rights concept is still dominated by Marxist-Leninist ideology. Accordingly, human rights are not understood as inherent and inalienable rights based on human dignity and as preceding the existence of the State. Such an understanding would be incompatible with the world-view of Marxism, the basis-superstructure model, the legislative monopoly of the State, and the instrumental character of law.

Human rights in China are understood as being derived from and granted by the State which makes them subject to conditions. Following a dynamic and concrete approach, in the course of history the development of human rights paralleled the development of the economic basis. Human rights are further seen as a historical concept, as a product of the cultural evolution of humanity. They are understood not as abstract and absolute but as a concrete product of their relevant environment. In the view of Chinese commentators, against the background of different historical developments, national traditions, value systems and economic-cultural conditions, human rights are expressed in different human rights standards. Different levels of economic development among States has led to a scenario whereby the scope and content of human rights deviate from State to State which forms the basis of a relativism of human rights.¹⁹³ Therefore, only economic and cultural development can raise the level of protection of human rights.¹⁹⁴ As a result of the interconnection between the human rights situation and the economic basis some Chinese authors conclude that China still lacks the political, legal, and economic preconditions to realise international human rights standards.¹⁹⁵ This conception of human rights is equivalent to a negation of individual rights.

Xu Chongde and Zhang Dazhao sum up this view as the 'four restrictions to human rights' in China. The first restriction emanates from the level of economic development, the second is due to political considerations because politics have a

¹⁹¹ See Article 49 HRL.

¹⁹² Peerenboom, Randall, 'Assessing Human Rights in China', *Cornell International Law Journal*, Vol. 38, No. 1, 2005, pp. 71–172; and Svensson, Marina, *The Chinese Conception of Human Rights: The Debate on Human Rights in China, 1898–1949*, Rowman & Littlefield, Lanham, 1996.

¹⁹³ Zhu, *op.cit.* (note 24), p. 14.

¹⁹⁴ Li, Jinrong, *Guojifa* [International law], Law Press, Beijing, 2002, p. 281.

¹⁹⁵ Wang and Wang, *loc.cit.* (note 26), pp. 36–40.

primary status in relation to law within the superstructure. The third limit to human rights is established by legislation in that human rights can only exist in the form of positive law. Therefore, the scope and content of human rights is determined by national legislation. The fourth limit is the cultural restriction of human rights arising from the fact that human rights are a product of cultural development.¹⁹⁶

Zhou Hongjun has attempted to mediate between the opposing views of 'Western' human rights of preceding and universal quality on the one hand, and the 'Sino-Marxist' dynamic-concrete human rights conception on the other. This view recognises rights of a universal and preceding nature and, at the same time, denies the legal effect of such rights. Universal human rights are attributed to the area of morals or a preceding value order. Although human beings are entitled to human rights alone on the basis of their human existence, the rights, in order to become legally effective, require recognition by positive law.¹⁹⁷ A further view distinguishes between two kinds of subjective rights which individuals are entitled to. On the one hand, there are rights which individuals ought to enjoy;¹⁹⁸ on the other hand, there are rights which individuals actually enjoy.¹⁹⁹ Rights which ought to be enjoyed by individuals are grounded on an anthropological basis but are regarded as being only of moral significance. They are inherent in human beings and are a reflection of such values that form the foundation of the existence of an individual as a subject of society. Rights actually enjoyed by individuals are based on an expression of intention by the State and are a positive manifestation of the first category of rights.²⁰⁰

Another view combines this distinction between 'ideal rights' and 'actual rights' with the relationship between human rights treaties and national law: human rights in the international sphere are preceding the law, they are 'moral rights', 'ideal rights', and not normative, 'actual existing rights' that unconditionally oblige the addressee of the norm. International human rights treaties can only lay down an order of values for the domestic protection of human rights.²⁰¹ It is argued that human rights treaties are not directly legally binding, because international human rights are grounded on natural law. The attribution of human rights covenants to the sphere of 'ideal rights' is only valid from the perspective of municipal law. In international legal practice,

¹⁹⁶ Xu, Chongde and Zhang, Dazhao (eds), *Renquan sixiang yu renquan lifa* [The idea of human rights and human rights legislation], Zhongguo Renmin University Press, Beijing, 1992, p. 25.

¹⁹⁷ Zhou, Hongjun, *Guojifa* [International law], Zhongguo Zhengfa University Press, Beijing, 1999, p. 389.

¹⁹⁸ Chinese: *yingyou quanli*.

¹⁹⁹ Chinese: *xianyou quanli*.

²⁰⁰ Gong, Peixiang, 'Hefaxing wenti: quanli gainian de fa zhexue sikao' [The problem of legality: legal-philosophical thoughts on the concept of rights], *Shehui Kexue Zhanxian* [Social Science Front], No. 3, 1992, pp. 131–138.

²⁰¹ Liu, Chao (ed.), *Guojifa Zhuanlun* [International law monograph], Zhishichanquan Chubanshe, Beijing, 2004, p. 74; and Xia, Qingxia, 'Guoji renquanfa shiye xia de guojifa yu guonei fa guanxi' [The relationship between international law and municipal law from the perspective of the law of international human rights], *Nanjing Jingji Xueyuan Xuebao* [Nanjing School of Economics Academic Journal], No. 3, 2002, pp. 67–76.

‘value-guiding rights’²⁰² are not confined to a theoretical or purely ideal existence but appear in the form of positive rights and become, from the perspective of international law, a standard of legality for domestic law.²⁰³

Against the background of the official understanding of human rights in the PRC, this part examines the question as to whether the Draft explicitly follows the official human rights doctrine or whether it is open to other interpretations. The structure of the Draft may be interpreted in favour of the official human rights doctrine, because it places the State at the centre and not the individual. The Draft commences with regulations on the institutions that are responsible for the protection of human rights, it sets out the competences of the legislature, the administration and the judiciary and it includes a chapter on the restrictions of rights in a state of emergency.²⁰⁴ Only after dealing with the protection of human rights from the perspective of the State, the Draft turns to the rights of the individual.²⁰⁵ The Draft defines human rights as ‘legal rights that are enjoyed on the basis of the provisions of’ the Human Rights Law ‘by all natural persons’ residing in the PRC.²⁰⁶ The wording of the definition tends to understand human rights as rights that are granted by State law rather than inherent and inalienable rights based on human dignity and preceding the existence of the State. Another aspect that appears to suggest that the official approach has been adopted is the reference, in many provisions of the Draft, to the PRC Constitution. It may be argued that these references incorporate the socialist principles of the Constitution into the Draft and that these principles embody the official human rights approach. But a closer analysis of the provisions referring to the Constitution indicates that sometimes references are made not to the Constitution in general, but to the ‘principle of human rights protection’ which itself is open to different interpretations.²⁰⁷ Where the Draft points to the Constitution in general, the references appear to have been used as a pretext to conceal that the Draft has mainly incorporated international human rights standards and attempts to give them a rank within the domestic hierarchy of norms that is in fact higher than the Constitution.²⁰⁸ Therefore, references to the Constitution may not be regarded as a clear indication that the Draft has incorporated the official human rights concept.

One provision of the Draft introduces the concepts of ‘legal obligations’ and ‘social responsibilities’ which have to be fulfilled by individuals who exercise human rights.²⁰⁹ Because these concepts remain vague and other provisions of the Draft do

²⁰² Chinese: *jia zhi dao xiang de quan li*.

²⁰³ Liu, *op.cit.* (note 201), p. 74.

²⁰⁴ Chapters 2–6 HRL.

²⁰⁵ Chapters 7 and 8 HRL.

²⁰⁶ Article 3(1) HRL.

²⁰⁷ See, for example, Article 3(5) HRL.

²⁰⁸ Compare Article 102(2) HRL.

²⁰⁹ Article 14 HRL.

not elaborate on them, they may not be construed as a clear indication of an official human rights understanding.

Since it is the exception rather than the rule that the HRL refers directly to principles of socialism²¹⁰ and does not explicitly follow the official human rights rhetoric, it may be concluded that the Draft is open to different interpretations with respect to the underlying human rights conception.

5. COMPARATIVE PERSPECTIVE ON CONDITIONS OF EFFECTIVE IMPLEMENTATION

This section attempts to identify the conditions in which the adoption of a dedicated human rights law can become an effective means of human rights treaty implementation. The comparative study draws on how different jurisdictions, namely the United Kingdom (UK), the Special Administrative Region of Hong Kong (HKSAR) and Germany have implemented international human rights treaties. The UK and the HKSAR both have enacted a dedicated human rights law and Hong Kong, being part of China, is particularly relevant for this study. On the contrary, Germany is a jurisdiction which implements human rights treaties without a specific human rights law. In a further step, it is investigated whether such conditions facilitating the effectiveness of a dedicated human rights law exist in China and whether they would enable the successful operation of such a law.

5.1. THE UNITED KINGDOM

The UK Human Rights Act of 1998²¹¹ provides for the express legal recognition of the fundamental rights and freedoms laid down in the European Convention on Human Rights (ECHR).²¹² The long-running constitutional debate in the UK on the need of a bill of rights that transforms the ECHR into municipal law has revealed most of the arguments that may speak in favour or against the adoption of a dedicated human rights law.²¹³ Criticisms have been advanced against such a law on the grounds that it would replicate rules which are already law, that it would be drafted in such general terms that it would not be enforceable²¹⁴ and that protection of human rights depends

²¹⁰ See the provision on education, Article 87(2) HRL, that speaks of developing 'socialist education facilities'.

²¹¹ Human Rights Act, 1998, c. 42 (UK). The Act came into full force in the UK on 2 October 2000.

²¹² European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 *United Nations Treaty Series* 221; the UK was a founding member of the European Council in 1950.

²¹³ Dworkin, Ronald, *A Bill of Rights for Britain*, Chatto and Windus, London, 1990; Zander, Michael, *A Bill of Rights?*, Sweet and Maxwell, London, 1997; and Allan, James, 'Bill of Rights and Judicial Power', *Oxford Journal of Legal Studies*, Vol. 16, No. 2, 1996, pp. 337–352.

²¹⁴ Zander, *op.cit.* (note 213), pp. 5–7.

more on political climate and traditions than on the existence or absence of a human rights law.²¹⁵ Another major concern is that a human rights law would be too powerful a tool to be entrusted to the judiciary. It was therefore proposed that a law which would not be enforceable by the courts should be enacted. Instead, the vision was to establish a Human Rights Commission with the power to investigate and to report, to make recommendations to the legislature and also to receive complaints from individuals.²¹⁶ It was also discussed how a human rights law in the rank of ordinary legislation could be protected against being amended or repealed.²¹⁷

The UK Constitution is not set out in one consolidated document, but rooted in custom and usage, the sources of constitutional principles being statutes, principles derived from common law and constitutional conventions. In accordance with the theory of parliamentary sovereignty, the Constitution is not superior to other categories of law.²¹⁸ Fundamental rights and freedoms under the Constitution are residual in that they exist to the extent that statutory or common law rules have not restricted them.²¹⁹ Before the introduction of positive rights by the Human Rights Act, the residual freedoms of individuals were protected by the democratic process, rule of law and the system of checks and balances.²²⁰ In accordance with the doctrine of dualism, treaty provisions must be incorporated into an act of parliament in order to become effective within the municipal legal order.²²¹ Hence, the influence of the ECHR on the domestic law of the UK was relatively limited before the adoption of the Human Rights Act.²²²

The Human Rights Act of 1998 did not directly incorporate the ECHR, but identified specific articles of the Convention and its Protocols and embedded them as principles into UK law. Further, the Act does not entrench the Convention rights it enumerates: rights can be modified and the Act itself can be repealed by a simple majority in the House of Commons.²²³ However, the Act imposes a specific obligation

²¹⁵ Report of the Select Committee on a Bill of Rights, House of Lords, paper 176, June 1978 p. 29, para. 30.

²¹⁶ Zander, *op.cit.* (note 213), p. 3 and pp. 8–9.

²¹⁷ *Ibidem*, pp. 111–121.

²¹⁸ Vick, Douglas, ‘The Human Rights Act and the British Constitution’, *Texas International Law Journal*, Vol. 37, No. 2, 2002, pp. 329–372, at pp. 333 and 335.

²¹⁹ *Ibidem*, p. 341.

²²⁰ Blackburn, Robert, *Towards a Constitutional Bill of Rights for the United Kingdom*, Pinter, London, 1999, pp. 17–18.

²²¹ A transformation of international treaties by an act of parliament is required because the parliament does not participate in the treaty-making procedure. The executive enters alone into treaties on behalf of the UK. If such treaties directly became effective in the UK, the executive could evade parliamentary scrutiny of its proposals through the exercise of its treaty-making power.

²²² The ECHR became relevant as an aid to statutory interpretation, see Clapham, Andrew, ‘The European Convention on Human Rights and the British Courts: Problems Associated with the Incorporation of International Human Rights’, in: Alston, Philip (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford University Press, Oxford, 1999, pp. 96–157.

²²³ Vick, *loc.cit.* (note 218), p. 363.

on the government; when it introduces a new bill, it must be declared whether the new bill is compatible with the Convention rights of the Act.²²⁴ The act also establishes a rule of construction. According to this rule, legislation must be read and given effect in a way which is compatible with the Convention rights set out in the Act.²²⁵ Courts have to interpret legislation in a way that it is consistent with the Act unless the provisions of an act of parliament are so clearly incompatible with the Convention rights that it is impossible to do so.²²⁶ The Act empowers certain courts to make a declaration of incompatibility in case legislation cannot be reconciled with Convention rights through the interpretation rule.²²⁷ However, a declaration of incompatibility does not affect the validity or enforceability of the legislation. It is then up to the government to decide whether to amend the inconsistent legislation.²²⁸

Although the performance of the judiciary under the Human Rights Act has been criticised, the adoption of a dedicated human rights law in the UK has definitely changed how human rights are perceived by State actors and has promoted the status of human rights in public discourse.²²⁹ The Act provides for the participation of all branches of government in rights-based scrutiny and it is not only the courts that are actively engaged in review.²³⁰ The effective operation of the Act was also due to the fact that prior to its adoption there was no modern Bill of Rights in the UK and the Human Rights Act has redressed many of the deficiencies in UK civil liberties law. It may be concluded from the experience of the implementation of the ECHR in the UK that a dedicated human rights law works well where no other Bill of Rights is already in place and the judiciary is in a position to enforce the rights set out in the law.

5.2. HONG KONG

Hong Kong continues to follow the common law legal system,²³¹ which means that international treaties require transformation in order to be applicable in the Special Administrative Region. The Basic Law²³² and the Bill of Rights Ordinance²³³

²²⁴ Human Rights Act, Section 19.

²²⁵ *Ibidem*, Section 3(1) and (2)(a).

²²⁶ Vick, *loc.cit.* (note 218), p. 355.

²²⁷ Human Rights Act, Section 4(2).

²²⁸ *Ibidem*, Section 4(6).

²²⁹ Barendt, Eric, 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998', *Indiana Law Journal*, Vol. 84, No. 3, 2009, pp. 851–866.

²³⁰ Hiebert, Janet, 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?', *International Journal of Constitutional Law*, Vol. 4, No. 1, 2006, pp. 1–38.

²³¹ Article 8 Basic Law of the HKSAR.

²³² The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Adopted at the Third session of the Seventh National People's Congress on 4 April 1990.

²³³ Hong Kong Bill of Rights Ordinance (c. 383), 30 (1991) *International Legal Materials* 1310.

constitute the domestic sources of rights and freedoms in Hong Kong.²³⁴ The HKSAR adopted the Bill of Rights Ordinance in 1991 in order to incorporate the ICCPR in local law.²³⁵ The Basic Law implements the rights and freedoms guaranteed in the Sino-British Joint Declaration of 1984.²³⁶ The scope of rights in the Basic Law is wider than in the Bill of Rights. The Basic Law has a supreme status and overrides other Hong Kong legislation which is inconsistent with it.²³⁷ The status of the Bill of Rights is more complicated. The Bill of Rights Ordinance is not entrenched as such and has the status of an ordinary ordinance. It is provided that all pre-existing legislation shall be construed in a manner consistent with the Bill of Rights. If that is not possible, inconsistent legislation shall be repealed to the extent of the inconsistency.²³⁸ Hong Kong's colonial Constitution, the Letters Patent, was simultaneously amended by adding a provision that precluded the local legislator from enacting any law in violation of the ICCPR and thereby ensured indirect entrenchment of the Bill of Rights.²³⁹ After the handover, the role of the Letters Patent was taken over by Article 39 of the Basic Law which confirms that the ICCPR shall remain in force and shall be implemented through the laws of Hong Kong. Since the transfer of sovereignty, it is accepted that the ICCPR is incorporated into the laws of Hong Kong by both the Bill of Rights and Article 39 of the Basic Law.²⁴⁰

Although the incorporation of the ICCPR into domestic law by a dedicated human rights law was imposed on Hong Kong by previous colonial rule, it has evolved into a tool that allowed the local judiciary to seek guidance from international judgments and other materials.²⁴¹ However, it was also noted that Hong Kong judges had

²³⁴ Ghai, Yash, *Hong Kong's New Constitutional Order*, Hong Kong University Press, Hong Kong, 1999, p. 419.

²³⁵ The ICCPR was extended by the UK to Hong Kong in 1976. Prior to 1997, Hong Kong as a dependent territory of the UK had no treaty-making power. Byrnes, Andrew, 'And Some have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights', in: Alston (ed.), *op.cit.* (note 222), pp. 318–391, at p. 325. The Bill of Rights Ordinance was enacted in the aftermath of the violent repression of the Mainland Chinese democracy movement in order to provide Hong Kong citizens with better protection against the government in Beijing.

²³⁶ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 26 September 1984, U.K.-P.R.C., 23 *International Legal Materials* 1366, 1371.

²³⁷ Article 11 Basic Law of the HKSAR.

²³⁸ Bill of Rights Ordinance, Section 3.

²³⁹ Petersen, Carol, 'From British Colony to Special Administrative Region of China', in: Peerenboom, Randall (ed.), *Human Rights in Asia*, Routledge, London, 2006, pp. 224–264, at p. 227.

²⁴⁰ Court of Final Appeal, *HKSAR vs Ng Kung Siu*, 15 December 1999, 2 HKC 117 (CFA). See also Mushkat, Roda, 'Scrapping Hong Kong Legislature: An International Law Perspective', *Hong Kong Law Journal*, Vol. 27, No. 1, 1997, pp. 12–15; and Dykes, Philip, 'The Hong Kong Bill of Rights 1991: Its Origin, Content and Impact', in: Chan, Johannes and Ghai, Yash (eds), *Hong Kong Bill of Rights: A Comparative Approach*, Butterworths Asia, Hong Kong, 1993, pp. 39–49.

²⁴¹ In *R. vs Sin Yau-ming*, the Court of Appeal held that for the interpretation of the Bill of Rights guidance could be derived from decisions taken in common-law jurisdictions which contain a constitutionally entrenched Bill of Rights, from decisions of the European Court of Human Rights or decisions and comments of the United Nations Human Rights Committee; (1991) 1 *Hong Kong*

great difficulties in overcoming common law perceptions such as the supremacy of parliament in interpreting the Bill of Rights.²⁴² Similar to the UK, the Bill of Rights was adopted in a situation where no modern Bill of Rights was in place. Although the HKSAR is part of China, it has a relatively strong and independent judiciary that is in a position to enforce the rights and freedoms set out in the Bill. Moreover, lawyers often invoke the rights set out in the ICCPR in the courts and know how to use foreign and international precedents. Activist and disadvantaged groups also use the ICCPR and the concluding comments of the Human Rights Committee in order to put pressure on the HKSAR government. Based on those conditions, a dedicated human rights law could become a meaningful instrument of human rights protection and an efficient way of implementing the ICCPR.

5.3. GERMANY

In Germany there is no dedicated human rights law. Like most of the members of the ECHR, Germany has made the Convention directly effective in its own law. The ECHR enjoys the status of a federal statute since the federal parliament adopted it in 1952 by law²⁴³ on the basis of Article 59(2) of the Constitution.²⁴⁴ The fundamental rights of the ECHR have the status of ordinary statutory law and rank below the Constitution.²⁴⁵ As part of domestic law, the ECHR is, like other federal statutes, applied by German courts. However, the ECHR also has indirect effects on the constitutional level. The Federal Constitutional Court has held that the text of the Convention and the jurisprudence of the European Court of Human Rights serve as interpretative tools of constitutional norms.²⁴⁶ Hence, German courts are obliged to take account of the

Public Law Reports 88. Petersen, Carole, 'Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong's Constitutional Jurisprudence', in: Fu, Hualing (ed.), *Interpreting Hong Kong's Basic Law*, Palgrave Macmillan, Basingstoke, 2008, pp. 33–49, at p. 35.

²⁴² Chan, Johannes, 'Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence', *International and Comparative Law Quarterly*, Vol. 47, No. 2, 1998, pp. 306–336, at p. 335.

²⁴³ Convention for the Protection of Human Rights and Basic Liberties, 7 August 1952, *Bundesgesetzblatt* [Federal Gazette] II, p. 685.

²⁴⁴ Article 59(2) of the German Basic Law provides that treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the approval or participation of the appropriate legislative body in the form of a federal statute.

²⁴⁵ The Federal Constitutional Court has refused scholarly views that the ECHR has constitutional ranking or ranks even above the constitution: Walter, Christian, 'Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozess' [The European Convention on Human Rights as a process of constitutionalisation], *Heidelberg Journal of International Law*, Vol. 59, No. 4, 1999, pp. 961–983; and Beljin, Sasa, 'Bundesverfassungsgericht on the Status of the European Convention of Human Rights and ECHR Decisions in the German Legal Order', *European Constitutional Law Review*, Vol. 1, No. 3, 2005, pp. 553–568, at p. 556.

²⁴⁶ Federal Constitutional Court, *Görgülü*, decision of 14 October 2004, *Entscheidungen des Bundesverfassungsgerichts*, 111, 307, para. 62. According to the Court, the constitutional dimension of the ECHR is rooted in the openness of the Basic Law towards international law (Articles 23 and

ECHR in the interpretation of domestic fundamental rights. Although the Convention technically enjoys only the rank of an ordinary statute, the Federal Constitutional Court has elevated it to a status that comes close to constitutional ranking. Due to the modern German Constitution, high standards of fundamental rights protection and the broad competences of the Federal Constitutional Court, the domestic effects of the ECHR play only a minor role in practice.²⁴⁷

5.4. CONCLUSIONS FROM THE COMPARATIVE ANALYSIS

From the German experience of human rights treaty implementation it can be concluded that the adoption of a dedicated human rights law may not be the appropriate way of implementation where there are already relatively high standards of rights protection and also effective institutional safeguards. In such a case, it suffices to integrate international human rights into the given domestic system of human rights protection without carrying out major adjustments of substantive law. A combination of giving the treaty provisions domestic effect in the form of an ordinary statute and allowing the treaty and relevant international jurisprudence to guide the interpretation of the Constitution can ensure appropriate implementation of a human rights treaty.

From the experience of treaty implementation in the three jurisdictions discussed above, dedicated human rights laws can become a powerful means of the implementation of international human rights treaties, if the following conditions are fulfilled: (1) the domestic legal system has not yet established a modern Bill of Rights. If modern constitutional rights and freedoms are already part of the domestic system, treaty implementation may be achieved by means of consistent interpretation and the adoption of a dedicated human rights law may be redundant. (2) The rights set out in the law must be enforceable by independent courts. If courts are not given the power to apply a broadly termed human rights law, rights violations may not be promptly and flexibly redressed. Only when legitimate pressure on the executive and the legislature can be generated through litigation, the system becomes more responsive and politically accountable. (3) A dedicated human rights law can best promote a human rights culture within government and society, if lawyers and non-

24), the special protection to some core human rights in Article 1(2) as well as in Article 59(2). Hoffmeister, Frank, 'Germany: Status of European Convention on Human Rights in Domestic Law', *International Journal of Constitutional Law*, Vol. 4, No. 4, 2006, pp. 722-731; and Sauer, Heiko, 'Die neue Schlagkraft der gemeineuropäischen Grundrechtsjudikatur' [The emerging vigour of the common European human rights adjudication], *Heidelberg Journal of International Law*, Vol. 65, No. 1, 2005, pp. 35-69.

²⁴⁷ In 2008, the European Court of Human Rights found about 1,800 violations of the ECHR. Only six decisions concerned violations by German authorities. See European Court of Human Rights, *Annual Report 2008*, p. 125; available at: www.echr.coe.int/NR/rdonlyres/D5B2847D-640D-4A09-A70A-7A1BE66563BB/0/ANNUAL_REPORT_2008.pdf.

State actors are strong and independent enough to argue on the basis of the law and to use it as a lobbying tool.

It is questionable whether all of the above conditions for a successful implementation of the ICCPR through a dedicated human rights law are fulfilled in China. With regard to the first requirement, the situation in the PRC is, at least from a substantive perspective, comparable to a legal system that lacks a modern Bill of Rights. Although the Chinese Constitution contains a catalogue of fundamental rights and freedoms, they are not directly binding on the courts and the administration. Moreover, civil rights such as the freedom of speech, the freedom of religious expression and the freedom of assembly and association are not realised due to the threat the exercise of those rights would pose to the maintainance of the current political system. Only in the area of integrity rights, the government has a genuine interest to improve the protection of such rights.

Enforceable rights and independent courts were identified as the second condition for an effective human rights law. Under the PRC legal system, courts and judges are not independent but subject to the supervision of higher level courts, the People's Congress and the Communist Party. Also, the local government is in a strong position to influence the work of the courts within their jurisdiction.²⁴⁸ Even if rights are enforceable by courts, within such a system, judges may not be readier to find a remedy for a grievance than the executive or the legislature. It is also difficult to see how the third condition can be fulfilled in the PRC. The recent repression of lawyers who defend dissidents and other rights activists in Chinese courts as well as the strict control of the media and of non-governmental organisations shows that the State-Party leadership has the intention and the means to restrict genuine public discourse on human rights and to prevent lawyers from exerting pressure on State actors through human rights litigation.²⁴⁹

²⁴⁸ Lubman, Stanley, *Bird in a Cage: Legal reform in China after Mao*, Stanford University Press, Palo Alto, 1999, pp. 253–271; and Peerenboom, Randall, *China's Long March toward Rule of Law*, Cambridge University Press, Cambridge, 2002, pp. 280–330.

²⁴⁹ Chinese Urgent Action Working Group, 'Manipulation as Insulation: The Non-renewal of Weiquan Lawyers' Licenses in China', 21 October 2009, available at: <http://cuawg.wdfiles.com/local--files/reports/MANIPULATION%20AS%20INSULATION%20October%2021,%202009.pdf>; Fu, Hualing and Cullen, Richard, 'Climbing the Weiquan Ladder: A Radicalizing Process for Weiquan Lawyers', available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1487367; and Shambaugh, David, 'China's Propaganda System: Institutions, Processes and Efficacy', *The China Journal*, Vol. 57, 2007, pp. 25–58.

6. PROSPECTS OF HUMAN RIGHTS TREATY IMPLEMENTATION

6.1. RATIFICATION OF THE ICCPR

It is argued that the ratification of the ICCPR is not necessarily the starting point of the acceptance of human rights norms, but rather only a point in a broader process of incorporation.²⁵⁰ This finding also applies to China. Since signing the ICCPR in 1998, legislative reforms and academic discourse have often referred to the ICCPR. Although the decision to ratify the ICCPR may not be strictly regarded as a precondition for the adoption of a dedicated human rights law, it is important to identify the obstacles that lie in the way of the ratification of the Covenant.

From an international perspective, it could be argued that ratification is costless in that unenforced treaty rules do not require any actual changes in State practice. Other States may reward ratifying States by reducing political pressure to promote human rights standards.²⁵¹ As positive aspects of ICCPR ratification Chinese commentators regard the right to nominate members of the Human Rights Committee, to strengthen the influence of the PRC in international human rights matters and to provide the PRC Government with better opportunity to express their human rights views.²⁵² As a State Party of many human rights treaties, China has experienced manifold criticism of its human rights practice and has learned how to interact with the UN machinery and relevant treaty bodies.²⁵³ By taking into account all these factors, it appears that the reasons for not ratifying the ICCPR are of a domestic nature. The most common reason for non-ratification is that treaties threaten the status quo. Ratification is resisted if States do not agree with the norms contained in the treaty or do not wish their performance in these areas to be subjected to international scrutiny.²⁵⁴ Ratification also increases the legitimacy of human rights concepts. Non-governmental actors who promote human rights benefit from this and gain political prominence in their struggle against a repressive regime. Hence, ratification may empower and legitimate claims of dissidents against a norm-violating government.²⁵⁵

²⁵⁰ Goodman, Ryan and Jinks, Derek, 'Measuring the Effects of Human Rights Treaties', *European Journal of International Law*, Vol. 14, No. 1, 2003, pp. 171–183, at p. 173.

²⁵¹ Hathaway, Oona, 'Do Human Rights Treaties Make a Difference?', *Yale Law Journal*, Vol. 111, No. 8, 2002, pp. 1935–2042, at p. 2007.

²⁵² Yang, Guanyu, 'Pizhun 'Gongmin quanli he zhengzhi quanli guoji gongyue' xiangguan wenti yanjiu' [Exploring the problems relating to the ratification of the International Covenant on Civil and Political Rights], *Gansu Shehui Kexue* [Social Science Gansu], No. 4, 2008, pp. 205–209, at pp. 205–206.

²⁵³ Lee, *loc.cit.* (note 35), p. 466.

²⁵⁴ Heyns, Cristof and Viljoen, Frans, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', *Human Rights Quarterly*, Vol. 23, No. 3, 2001, pp. 483–535, at pp. 487–488.

²⁵⁵ Risse, Thomas and Sikkink, Kathryn, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction', in: Risse, Thomas *et al.* (eds), *The Power of Human Rights:*

It seems that one important reason for non-ratification of the ICCPR lies in the fear of the State-Party leadership to empower groups which promote civil rights and, consequently, threaten the maintenance of the current political system.

6.2. ALTERNATIVES TO THE CREATION OF A HUMAN RIGHTS LAW

Apart from the adoption of a HRL, the legislature could also take the approach: (1) to adjust selected laws to the requirements of the ICCPR; (2) to introduce a constitutional amendment and incorporate the standards of the ICCPR into the Chinese Constitution; (3) to adopt an authoritative interpretation of the Constitution that is consistent with the ICCPR; or (4) to include a rule in the Constitution or in ordinary statutes that provides for prior application of the ICCPR.

In order to prepare for the ratification of the ICCPR and to harmonise domestic laws with the requirements of the human rights treaty, the Chinese Government could choose an approach that makes selective adjustments in all relevant areas of law such as assembly and association, criminal procedure and family law. The Chinese Government has argued before international human rights treaty bodies that it would follow such an approach in respect to certain human rights treaties.²⁵⁶ However, such references by government delegations, particularly to provisions of the Chinese Constitution, served the purpose of demonstrating the conformity of domestic laws with international human rights obligations, although domestic practice often deviated from the standards of international human rights treaties.²⁵⁷ It is therefore doubtful whether these statements express an established legislative approach that will be followed in the event of the domestic implementation of the ICCPR. However, an important argument in favour of selective adjustments of domestic law to

International Norms and Domestic Change, Cambridge University Press, Cambridge, 1999, pp. 1–38, at pp. 25–28.

²⁵⁶ ‘All the rights set forth in human rights instruments are protected by the Chinese Constitution and separate regulations. (...) Other individual statutes and regulations such as the Marriage Act, the General Principles of Civil Law, the National Regional Autonomy Act, the Assemblies, Marches and Demonstrations Act, the Civil Suits Act, the Penal Code, the Code of Criminal Procedure, the Administrative Suits Act, the Compulsory Education Act and the Environmental Protection Act contain specific provisions protecting the rights of Chinese citizens.’ Core Document Forming Part of the Reports of States Parties, 11 June 2001, UN Doc. HRI/CORE/1/Add.21/Rev.2, para. 49.

²⁵⁷ See, for example, the reply of the Chinese Government to the Committee on the Rights of the Child ‘... According to the Chinese laws, when China’s domestic laws are in conformity with international conventions which are ratified by China or of which China is a State party, the domestic laws will be applied and the relevant stipulations of the international conventions are implemented through application of the domestic laws. Only in cases which are not covered by the domestic laws, stipulations of the international conventions will be cited in the court decisions. Since the stipulations of the Convention concerning the trial procedures of minors are in conformity with relevant Chinese laws, the Chinese courts always directly apply the Chinese laws in hearing cases involving minors and there is no need to invoke specific stipulations of the Convention.’ Committee on the Rights of the Child, ‘Written Replies by the Government of China Concerning the List of Issues’, 17 May 1996, UN Doc. CRC/C.12/WP.5, para. 2.

international human rights standards is that it allows drafters and the legislature to avoid publicising how international human rights law shapes domestic law.²⁵⁸ As long as international human rights law is associated with Western hegemonism and power politics, a harmonisation of domestic law with international standards that conceals the connection with the international realm may better take into consideration political sensitivities than the adoption of the HRL. But once the implementation of the ICCPR is taken seriously and the State-Party leadership wishes to publicise the adjustment of Chinese law to international standards, it would probably prefer to adopt the HRL. Another indication that the PRC Government may prefer a piecemeal approach in harmonising the domestic legal order is the adoption of the National Human Rights Action Plan of China (2009–2010).²⁵⁹ The Plan sets out as one of its guiding principles, that ‘in pursuit of the basic principles prescribed in the Constitution of China, and the essentials of the Universal Declaration of Human Rights and the ICCPR, the plan is aimed at improving laws and regulations upholding human rights...’²⁶⁰

In the HRL Explanation, it is stated that it would be premature to introduce universal rights by way of constitutional amendment that provides every individual with subjective rights that mirror the rights embodied in the ICCPR.²⁶¹ This is certainly true as such a constitutional amendment would presuppose genuine political reform, which the Party State has steadfastly refused.

A more feasible way to introduce universal human rights into the Constitution would be an interpretation of the term ‘human rights’ in Article 33(3) of the Constitution by the Standing Committee of the National People’s Congress. The meaning of ‘human rights’ still lacks clarification and in order to ensure the implementation of international obligations, the Standing Committee could interpret the term in such a way that it comprises universal human rights that are protected by international treaties.²⁶² This approach would be in line with previous legislative practice that allowed the application of international treaties via reference provisions. But a clear disadvantage of this approach is that it is without effect as long as there is no implementing legislation in the form of a law adopted by the NPC or its Standing Committee. Chinese commentators have not produced many proposals for the creation of an explicit regulation of the application of international treaties in China. On the one hand, some say that such proposals should follow a ‘tendency of internationalisation’ according to which it is common international practice to incorporate a detailed provision into the Constitution that regulates the domestic

²⁵⁸ Wan, *loc.cit.* (note 4), p. 742.

²⁵⁹ Information Office of the State Council, ‘National Human Rights Action Plan of China (2009–2010)’, www.china.org.cn/archive/2009-04/13/content_17595407.htm.

²⁶⁰ The Action Plan is a reaction to the recommendation of the Report of the UN Human Rights Council Working Group on the Universal Periodic Review of China which calls upon China to publish and implement a National Human Rights Action Plan. Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review’, China, 5 October 2009, UN Doc. A/HRC/11/25.

²⁶¹ Mo, *op.cit.* (note 6), p. 363.

²⁶² *Idem.*

application of international treaties. On the other hand, it is argued that the local characteristics of China, such as the political system, must be taken into account; for example, the internal application of treaties should be brought in line with the People's Congress system. Commentators have suggested that the protection of State sovereignty is the predominant issue that a rule regarding the domestic application of treaties should consider because the international community is based upon the principle of sovereign equality of States.²⁶³

One view considers it adequate to incorporate a provision into the Constitution that provides for the prior application of international treaties in relation to domestic legislation. This approach would ensure a more detailed legal regulation and systematisation of the domestic legal system in line with international treaties and international human rights standards.²⁶⁴ Although the preferable solution appears to be a rule on the constitutional level that regulates domestic treaty application, there may not be enough political support for a constitutional amendment.²⁶⁵ The general practice that constitutional provisions are not directly applied by Chinese courts or that some provisions of international treaties may not be suitable for direct application is another argument against a regulation on the constitutional level.²⁶⁶ Since provisions of the Constitution require ordinary implementing legislation in order to be applied by courts, commentators propose to introduce a rule that ranks as a 'basic law' and has the nature of a 'constitutional law'.²⁶⁷ Such a provision on the domestic application of treaties could be incorporated into the Legislation Law or the Law on the Conclusion of International Treaties.²⁶⁸ It is further proposed that a separate law should be adopted which sets out the principles and procedures of domestic treaty implementation.²⁶⁹ Most scholars agree that both human rights

²⁶³ Liao, Fuyao and Liu, Jian, 'Lun guoji tiaoyue zai Zhongguo de shiyong' [On the application of international treaties in China], *Tianshui Xingzheng Xueyuan Xuebao* [Journal of Tianshui College of Administration], No. 1, 2004, pp. 48–52, at p. 50.

²⁶⁴ Shao, Shaping, 'The Theory and Practice of the Implementation of International Law in China', in: Shao, Shaping and Yu, Minfa (eds), *Guojifa wenti zhuanlun* [Monograph on problems of public international law], Wuhan University Press, Wuhan, 2002, pp. 429–451, at p. 449.

²⁶⁵ Zhu, Xiaoqing and Huang, Lie, 'Guoji tiaoyue yu guoneifa de guanxi pingxi: Zhongguo de lilun yu shijian' [Analysis of the relationship between international treaty law and domestic law: Theory and practice in China], in: Zhu and Huang (eds), *op.cit.* (note 18), pp. 5–19, at p. 17.

²⁶⁶ Gong, Renren, 'Guanyu guoji renquan tiaoyue zai zhongguo de shiyong wenti' [Problems of the application of International Human Rights Treaties in China], in: Xia, Yong (ed.), *Gongfa* [Public Law], Vol. 1, Law Press, Beijing, 1999, pp. 282–296, at p. 295.

²⁶⁷ Chinese: *xianfaxing falv*, compare, for example, Liu, Nanlai, 'Tiaoyue zai guonei de shiyong yu woguo de fazhi jianshe' [Domestic application of international treaty law and the establishment of a Chinese legal system], in: Zhu and Huang (eds), *op.cit.* (note 18), p. 145.

²⁶⁸ *Zhonghua renmin gongheguo dijie tiaoyue fa* [Law of the PRC on the Procedure of the Conclusion of International Treaties] of 28 December 1990, *Gazette of the National People's Congress Standing Committee*, 1990, p. 510.

²⁶⁹ Liu, Yi, 'Dui guoji renquan gongyue zhi guonei fa shang shiyong fangan de bijiao yanjiu' [Comparative analysis of suitable domestic law approaches to International Human Rights Covenants], *Guangzhou Daxue Xuebao* [Guangzhou University Journal], Vol. 7, No. 9, 2008, pp. 9–11, at p. 10.

covenants should be implemented in China by way of adopting a Human Rights Law.²⁷⁰ This is due to the fact that a constitutional amendment or the adoption of statutory reference rules would not guarantee an effective domestic implementation of the treaties. The adoption of a special HRL could be achieved in a short period of time without requiring too many resources. However, commentators admit that it may be difficult to determine the relationship between the HRL and other domestic sources of law.²⁷¹ If the arguments against a constitutional solution are followed, the adoption of a human rights law seems to be the most appropriate mode to implement international human rights treaties in China.

6.3. LIKELINESS OF THE ACTUAL IMPROVEMENT OF THE HUMAN RIGHTS SITUATION

The last question to be examined is whether the ratification of the ICCPR in combination with a Chinese human rights law would improve the human rights conditions on the ground. One study has argued that the ratification of a human rights treaty in the absence of democratic structures may even lead to more human rights violations.²⁷² Various studies have found that the beneficial effect of the ratification of a human rights treaty is conditioned on the extent of democracy and the strength of civil society. The theory of transnational human rights advocacy networks emphasises the role of networks between international and domestic NGOs and other civil society groups committed to human rights. This model distinguishes between different stages of compliance with an international human rights regime. In the last stage, human rights acquire prescriptive status. Governments stop to regard human rights complaints as interference in internal affairs and their behaviour becomes consistent with human rights standards. According to this model, ratification is typically a manifestation of the prescriptive stage. In case ratification forms part of only tactical concessions, respect for human rights on the ground may improve if the increased attention, monitoring, reporting together with the formal acceptance of the validity of human rights allow transnational networks in alliance with domestic groups to increase pressure on a rights-violating government.²⁷³ In case the incentives for the government to maintain human rights violations persist, according to the liberal international relations perspective,²⁷⁴ the implementation of human rights treaties can still be effective if domestic groups pressure the government into respect for

²⁷⁰ *Ibidem*, pp. 10–11; and Zhang, *loc.cit.* (note 41), p. 90.

²⁷¹ Gong, *loc.cit.* (note 266), p. 295; and Liu, *loc.cit.* (note 269), p. 10.

²⁷² Hathaway, *loc.cit.* (note 251), pp. 1935–2042.

²⁷³ Risse and Sikkink, *loc.cit.* (note 255), pp. 25–28.

²⁷⁴ This perspective assumes that States are made up of a large number of actors with different interests. See Moravcsik, Andrew, 'Taking Preferences Seriously: A Liberal Theory of International Politics', *International Organization*, Vol. 51, No. 4, 1997, pp. 513–553.

human rights.²⁷⁵ Since the Chinese Government does not allow opposition, there is not much leeway for such pressure to evolve. Hence, without commitment of the Party-State leadership to human rights, effective implementation of the ICCPR will remain difficult.

The actions taken by China after the ratification of the ICESCR and the CAT may also indicate how the human rights situation on the ground may improve after a ratification of the ICCPR. With regard to the ICESCR, the recommendations of the Committee on Economic, Social and Cultural Rights in its Concluding Observations on China's Report of 2005, have identified main areas of concern.²⁷⁶ Some of the recommendations are also relevant under the ICCPR, for example, to allow independent trade unions and to remove restrictions on freedom of expression.²⁷⁷ The PRC ratified the CAT in 1988. Since then the reform of legislation in the area of criminal law has made some progress. However, it was noted by the Committee against Torture that there is widespread torture and ill-treatment in China due to insufficient safeguards during detention.²⁷⁸ It is argued that the human rights situation with regard to cruel and inhumane treatment has deteriorated over the past decade because of rising crime rates and State campaigns to crack down on crime.²⁷⁹ Hence, the ratification of the CAT and the legal reforms conducted in order to implement the standards of the CAT had little impact on the improvement of the human rights situation on the ground.

As the experience with the implementation of the CAT shows, it may be difficult to improve the human rights situation with regard to personal integrity rights, even if the government fully supports such improvements. In the area of civil rights, the overall aim to maintain the one-party system, to safeguard social stability and to promote economic growth, will make significant progress very unlikely.

²⁷⁵ Neumayer, Eric, 'Do International Human Rights Treaties Improve Respect for Human Rights?', *Journal of Conflict Resolution*, Vol. 49, No. 6, 2005, pp. 925–953, at p. 930.

²⁷⁶ Committee on Economic, Social and Cultural Rights, 'Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the Covenant', People's Republic of China (including Hong Kong and Macao) of 13 May 2005, UN Doc. E/C.12/1/Add.107, paras 40–70.

²⁷⁷ *Ibidem*, paras 55 and 68.

²⁷⁸ Committee against Torture, 'Consideration of Reports Submitted by States Parties under Article 19 of the Convention of 12 December 2008, UN Doc. CAT/C/CHN/CO/4, para. 11.

²⁷⁹ Lee, *loc.cit.* (note 35), at p. 454.