EU AND CHINESE MODELS ON JUDICIAL GUARANTEES OF HUMAN RIGHTS - COMMON WAY OR CROSSROADS?

Dr Aleksandra Wentkowska
Humanitas University

„The human rights issue is the crux of the struggle between the world’s two social systems. If we lose the battle on the human rights front, everything will be meaningless to us”. Deng Xiaoping (James D. Seymour, 1994)

Abstract

Human rights protection has been a major theme of the EU-Chinese relations since the Tian’anmen Square incident in 1989. The EU officially expressed the concern about the human rights situation in China however relations were maintained. Instead, a broad EU-China political dialogue was formally established in 1994 in which China has actively participated since 1997. Nevertheless, the mere existence of the dialogue does not preclude the EU from expressing publicly its concerns about human rights violations in China. Having introduced the EU-China human rights dialogue and the principles of judicial human rights guarantees in Europe, the human rights situation in China is discussed on the basis of some documents. The official human rights White Paper released by the Chinese government in comparison with a reports produced by Human Rights Watch and European Union can be seen through some theses about the acceptability, desirability and workability of (EU) judicial human rights guarantees in China. In other words, it will be investigated whether the EU human rights approach could be used as the human rights model approach for the Chinese situation.

1 As 202. Seymour notes “These remarks (the authenticity of which remains to be certified) are attributed to Deng in Wang Renzhi, “CPC Takes Offense on HR Issue: CPC Central Committee Document,” Dangdai (Hong Kong), July 15, 1992, pp. 39 41, translated in the US Foreign Broadcast Information Service, Daily Report: China July 22, 1992, p. 16.”
1. Introduction

The primary aim of the EU - China dialogue is to promote a positive and result-oriented approach through the discussion and co-operation. The high-level political meetings on human rights which are being held twice-yearly, have already positively contributed to China’s transition towards the open society based on the rule of law. These meetings have also brought some progress and improvement in the overall human rights situation in China. The evolution of China’s politics according to some newspapers, “since the implementation of the “reform and opening up” policies, is not only obviously different from the traditional political ideology and system, but also from the Western political model. A unique politic model with its own characteristics is forming in China now, which is called socialist democracy with the Chinese characteristics. Its ideal is the realization of the organic integration among the leadership of the Communist Party of China, people as the master of the country and rule of law. The most distinctive feature of the political model is to promote gradually China’s democratic governance and increase the citizen’s political interest through incremental reform”.

According to some commonly accepted doctrines, there are basically three possible views on human rights. The first includes the Western, European nations, the UN and Council of Europe documents. The second is the cultural relativist theory and the third is “developmental” version of human rights. The second cultural relativist argument refers to the idea that “a people’s conception of what is and isn’t a human right depends primarily on cultural proclivities at certain points in time and space. Human rights are, therefore, seen as being relative to the values, norms and practices of a given culture, which is to say that “universal human rights” do not exist” (Gregory J. Moore, 1999). The “developmental” version of human rights refers to “a nation’s ability to implement human rights norms is relative to its level of socio-economic development (…) (Gregory J. Moore, 1999). Critics of the latter two visions of human rights argue that they are only used to justify continued repression by governments to maintain the political status quo while critics of the universal notion of human rights argue that it is used as a tool by the West to impose Western values on non-Western nations. The Chinese have variously posited both the cultural-relativist and developmentalist views of human rights”. (James D. Seymour, 1994)

In this context we should start to analyse the human rights situation in China and stress that none of the European human rights codes could ever be mechanically transferred to the Chinese legal system.
2. Legal Basis of EU system to protect on human rights

Membership in the European structures obligates the acceptance of the Community legal system with all its principles “… as a result of living together in a context of both EU and ECHR law, (…) and unavoidably, giving rise to a newly emerging ius commune europeum.” (WALTER VAN GERVEN, 2001). In this context, the Member States are obligated to comply with the general principles comprising in the ECJ judgements. Both the ECJ jurisprudence and literature emphasised that it is in the light of solidarity principle that the character of Community law, other general principles and common obligations of Member States should be analysed (e.g. case Centre v Au Blé Vert, C-231/83, ECR, 1985). Only through uncovering commonalties in concepts, principles and solutions between the domestic legal systems of the Member States “will it be possible to build the emerging ius commune on common ground, and not to be perceived as a Fremdkörper in the participating States. That is a task of ‘strategic importance’ which comparative law research in the broadest sense, and by all those involved, must fulfill now and in the future. In the author’s view comprehensive binding codification of relevant areas of the law can be achieved only, for reasons of legal basis, democratic legitimacy and acceptability, by way of a multilateral treaty” (WALTER VAN GERVEN, 2001)

It is perceived that the most efficient way to create an ius commuae europeum is the comparative method, i.e. to find “the highest denominator” among the general principles in the Member States legal orders. The common principles come into existence as a result of the case law, originating in both domestic courts as well as international tribunals such as the European Court of Human Rights, the European Court of Justice and arbitrate tribunals. These common principles clearly have the important impact on the application of domestic laws of the Member States and contribute to the overall harmonisation of laws throughout the EU. The Community obtains these powers through the general and specific principles enshrined in the Community law. Generally, they are interpreted and prescribed by the European Court of Justice as the court with individual feature and particular position. It is well known that the ECJ is a particular court that operates within the field of Community law, especially to serve the specific interests of Member States within the European Community.

One of the ECJ judgements says that “the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible”. This is the way in which judges have managed to “lay the founda-
tions of an ever closer union”, “eliminating the barriers which divide Europe”. These foundations, based on the judicial review, are also closely linked with the European Community protection of human rights. This protection, in turn, permeates and shapes the EU relations with Third Countries and the attitude of European politics towards them. This principle will be further investigated and explained in the following paper on the basis of the EU-China relations in the field of the protection of judicial guarantees.

On one hand, it is commonly known that up till now the Community law remains a specific terra incognita for judges adjudicating in the Member States. On the other hand, this results from the particular nature of the Community law and also from the national legal tradition, the deep-rooted principles of judicial independence and state sovereignty. The most important problem for the new Member States with ensuring the right to an effective remedy is the attitude of national courts towards application of the Community law. In fact, these are the national courts (and not just ECJ) responsible for the tasks of the primary guarantee of the right to an effective remedy and in case of doubts as to its interpretation before referring preliminary questions to ECJ. There are some problems noted in ensuring the real legal effectiveness by the Member States courts. These are seen as technical problems with the access to the EU law and a lack of ability to apply the principles of the EU law as well as legal measures regulating the specific use of the preliminary reference procedure.

3. Legal Basis of Chinese system of protection on human rights

The context of the three possible views on the matter should be started with the analysis of the human rights situation in China to highlight that none of the European human rights codes could ever be mechanically transferred directly to the Chinese legal system. According to the research in China, there is some evidence that economic modernisation drives social, cultural and political changes (e.g. a series of freely contested municipal elections). Following the “peaceful evolution theory”, this process is very slow in comparison with the American or European dynamic transformation of freedom. In the history of such states as Poland, the Czech Republic, Hungary, the Philippines, Taiwan and Thailand the influence of other values is recognised to have made them more open, free and respectful of human rights; and “China is not so unique that it is immune to the same forces (Edwin J. Feulner, 1997). It should be recognised that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious back-

According to the current Constitution of P.R.C. and the Organic Law of the People’s Court, the guiding thought of the People’s Judicial System is “Marxism and its Chinese edition the theory of Deng Xiaoping” (Zheng Qiang). Following such principles as: the emancipation of the mind and search for the truth from facts; the superstructure that serves the economic basis; the uniformity of legal systems; the service of people wholeheartedly and the leadership of the Communist Party the Judicial System of China at present that is still developed. The basic principles of the People’s Judicial System can be summed up from the Constitution, the organic laws of the People’s Courts and the Prosecutor’s Office, the procedural law and some other laws concerned and there are the principle of judicial sovereignty; the principle of judicial uniform; the principle of judicial independence; the principle of judicial check; the principle of judicial democracy; the principle of judicial equal; the principle of judicial realism; the principle of judicial convenience. (Zheng Qiang)

All the powers of state belong to people and the organizations by which people exercise their state powers are the National People’s Congress and its Standing Committee. The administrative organization (government), judicial organization (court) and prosecutor organization (Prosecutor’s Office) are elected and supervised by the People’s Congress. China’s judicial system only refers to people’s court system. According to Criminal Procedure Law of PRC, during the criminal proceeding, people’s court, people’s Prosecutor’s Office and public security organ shall perform their task respectively as well as cooperate - people’s Prosecutor’s Office and public security organ both execute judicial power, although their judicial function are limited in a very relatively narrow scope [CHINA’S JUDICIAL SYSTEM: PEOPLE’S COURTS, PROCURATORATES, AND PUBLIC SECURITY http://www.olemiss.edu/courses/pol324/chnjudic.htm] (Anonym). Its organic system is to set up: the local People’s Courts of different levels, the Special People’s Courts and the Supreme People’s Court. The judges and prosecutors are selected and appointed by the standing committees of the respective people’s congresses, and assistant judges and assistant prosecutors are appointed by the respective courts and Prosecutor. The prison is subject to the judicial administrative organization. The special organizations of lawyer, notary, people’s mediation and arbitration are all directed by the administrative organization.

One of the major areas of concern relates to the quality of judiciary’s work in China. In other words, reservations are allowed when it comes to the influence of a political dialogue on judicial competencies of the national courts in a sovereign state. There are a lot of problems such as the localization of judicial power, which
means that the local protectionism and the department protectionism are so serious that they make the local courts unable to exercise their judicial powers independently and make lots of effective judgements, especially the judgements of economic cases that could not be enforced. The next problems are the administration of adjudication, the decentralization of the judicial administration, the formalization of the supervision from the People’ Congress and the generalization of judges’ quality (flows from the general provisions in the organic laws of the People’s Court and the People’s Prosecutor’s Office - only make general regulations for the judges and prosecutors, but have no concrete professional, moral and mental demands in a long time) [Do Human Rights Apply to China? A Normative Analysis of Cultural Difference. http://www.hku.hk/philodep/ch/rights.htm] (Anonym). From time to time, the insufficient level of the human rights knowledge within the Chinese judiciary is desirable and still unimplemented procedural changes within the Chinese legal system remain the most problematic areas. The above problems seriously damage not only the judicial system of China, but also the society and people’s psychology as well. Therefore, such changes as reforming the personnel and financial system of the judicial system to exercise their powers independently; making some judicial areas to which some circuits can be set up to handle the appeal cases and review the death penalty cases; strengthening the organizations of arbitration and mediation to make most civil and commercial cases be solved by arbitration or mediation and setting up some special trials, such as the trials respectively for juvenile, family and employment [Democracy and political progress in China china.org.cn, 2007] (Anonym, http://www.iolaw.org.cn/en/art.asp)

It is quite evident that Chinese judges should first of all get acquainted with the objectives and principles of the European human rights law to understand them before any of them could be accepted as the desirable innovation. Unfortunately, no European human rights principle could ever be mechanically transferred to the Chinese legal system without the previous adaptation. However, a primary step could be the practical application of the standard EU norms in the adjudication of cases. It is not a matter of identifying rules that have already been applied being uniformly interpreted in states but rather of seeking the best and most expedient principle in each case. Therefore, “the emergence of such principles or standards means that the margin of those States to interpret a norm differently becomes more limited” (WALTER VAN GERVEN, 2001). The inspiration is drawn from the legal systems of the states and international sources. Consequently, this would require the introduction of changes in the procedural principles and in the court functioning system. An analysis of the recent judicial reforms in China might be helpful in this respect.

For some years China has been strengthening its judicial reform to ensure strict law enforcement and fair administration of justice, guaranteeing citizens’ legal rights according to law. In March 2004, China amended its constitution to read “The State respects and protects human rights.” Although the constitution is not directly enforceable, the amendment does offer some hope that human rights will be legally protected. The term human rights has already been introduced into common discourse in China. Attaching great importance to safeguarding of the human rights through the improvement of legislation, the safety of an impartial judicature and strictly enforcement of the law, China has made considerable progress in building a judicial guarantee for the human rights through the following reforms:

1. substantial law (Chinese Constitution and other acts)
2. procedural reforms (judicial system, prosecutor’s organs, legal assistance)

According to the White Paper released in 2005, China broadened and strengthened its judicial reform in 2004 to ensure strict law enforcement and fair administration of justice in order to guarantee citizens’ legal rights legally. Until then, the extended detention of criminal suspects has deemed as one of the most serious human rights violations in China. The 41-page document, the 8th of its kind since 1991, has been intended to “help the international community toward a better understanding of the human rights situation in China,” said the Information Office of the State Council that released the official report. Through perfecting legislation, ensuring an impartial judicature and strictly enforcing the law, China has officially made considerable progress in building a judicial guarantee of the human rights. According to official records, in 2004 the courts throughout the country provided judicial aid in 263,860 cases, an increase of 15.6 percent from the previous year. The judicial aid totalled 1.09 billion yuan, 3.1 percent more than in the previous year. Hence, taking “vigorous measures” the Chinese public security organs had no extended detention reported by the end of the last year. As of May 2004, the Supreme People’s Procurator has carried out a special campaign to deal severely with criminal cases involving government functionaries’ infringement upon human rights by misusing their powers. Special focus was laid on cases of illegal detention and search, extorting confessions by torture, gathering evidence with violence, abusing people in custody, disrupting elections as well as serious cases of dereliction of duty that cause heavy losses of life and property of the people. In total, 1,595 government functionaries suspected of criminal activities were investigated and prosecuted, thus effectively bringing under control offences of infringement on rights.
Running the country according to the rule of law is the principle of the Chinese Constitution and the basic program of management state affairs of the Chinese government. Over 390 laws and decisions involving legal problems have been formulated. More than 800 administrative laws and regulations by the State Council and 8,000 plus local laws and regulations by the local people’s congresses have been introduced since the initiation of the reform and the country’s opening-up. As a result, a fairly complete legal system has been shaped with the Constitution at the core. There are laws that cover all fields of social life, providing a comprehensive judicial guarantee for the various human rights of the citizens as contained in the Chinese Constitution. The idea is to improve the legal sense of the administrative law executors and judicial personnel at various levels as well as the sense of the rights and duties of the citizens. Therefore, China has actively enforced publicity stressing the rule of law and other mass activities promoting knowledge of the law. About 750 million people in China have participated in activities that involve the study of laws. In particular, over 280 special lectures on the legal system for leaders at the provincial or ministerial level have been held with an accumulative total of 12,000 participants and 184,000 leaders at the prefectural or departmental levels have received regular legal training in the past five years.

China is committed to punish criminal offences legally and protects the safety of citizens life or property and other human rights from infringement. In 2000, the public security and judicial organs adopted forceful measures to crack down on serious crimes of violence in accordance with the law. For example, these were crimes involving the use of guns and explosives, so the gang-related crimes as well as frequently occurring criminal activities such as theft and robbery. They also punished following the law a handful of criminals who caused deaths or gathered people to upset the public order by organising and using the “Falun Gong” cult, effectively safeguarding social stability and the people life and property.

To deepen the reform of the judicial system, courts at various levels strengthened the administration of justice and law enforcement, have actively implemented the system of choosing and appointing presiding judges and individual jurors. They fully accepted the system of public adjudication, perfected the judicial rehabilitation system and further intensified the internal supervisory and circumscribing mechanism of the courts and the mechanism for correcting errors, thereby effectively safeguarding impartial justice. In 2000 China’s courts tried or handled over 560,000 criminal cases at the first instance, in which more than 640,000 criminals were sentenced. In particular, over 3.41 million civil cases at the first instance; more than 1.31 million cases involving economic, intellectual property and maritime affairs, 2,447 cases involving state compensation; 86,614 administrative lawsuits, including 13,635 cases involving the revocation of inappropriate
administrative practices by administrative organs, or 15.74 percent of the total number; and cleared over 138,000 cases exceeding the trial time-limits, and some 475,000 long-pending cases, basically liquidating the arrears of cases and effectively safeguarding the legitimate rights and interests of citizens, legal persons and other organisations.

In order to guarantee earnestly to people with financial difficulty and exercise their litigation rights according to the law, in July 2000 the Supreme People’s Court formulated the Regulations on Providing Judicial Assistance for Litigants Actually in Financial Difficulty that improved the judicial assistance system and the access to judiciary. According to the Regulations, dealing with the civil and the administrative cases that involve litigants actually in financial difficulty, for example the elderly, the women, the minors, the disabled persons and laid-off workers pressing to pay alimony, the costs of maintenance and upbringing, pensions for families of deceased people and the old-age pensions or for payment of medical costs and acquisition of material compensations for victims of traffic or industrial accidents and faulty medical treatment, the payment of litigation costs may be postponed, reduced or remitted in accordance with the law.

Then, the prosecutor organs have reinforced litigation supervision according to the law to improve the quality of handling cases and safeguard the legitimate rights of citizens. In 2000 procurator organs throughout the country placed 4,626 criminal cases, which involved misconduct by judicial personnel on file for investigation according to law. In the meantime, procurators have actively carried out a nation-wide system of the main-suit prosecutor assuming full responsibility for handling cases, selected main-suit prosecutors through competition. On the basis of this the reform, public prosecutions were carried out, trying to implement the systems of public investigations of non-prosecution cases and the demonstration of evidence before the court-all these have gone a long way towards safeguarding impartial justice, the legitimate rights and interests of criminal suspects.

The lawyer system and the system of legal assistance have been constantly improved, and are playing the increasingly important role in safeguarding the rights of citizens and promoting impartial justice. At present, there are over 9,500 lawyers’ offices and more than 110,000 lawyers in China. In addition, 92 foreign law firms and 28 Hong Kong law firms had been allowed to set up offices on the Chinese mainland by July 2000. In 1999, lawyers throughout the country handled 1,364,000 lawsuits; in 2000, they participated in the defence of over 310,000 criminal cases, and provided legal assistance for criminal suspects at the criminal procedure and investigation stage in more than 170,000 cases. By the end of 2000, China had established 1,853 legal assistance organs at various levels, with 6,109 full-time personnel in their employ. In 2000, more than 170,000 cases of legal
assistance were handled in China, in which over 228,000 persons received assistance, and 830,000 persons were offered consultation on law-related problems, thus protecting the legitimate rights and interests of the poor, weak and disabled and other litigants.

China protects, following the law, the legitimate rights of prisoners and has achieved remarkable results in reforming criminals. The recurrence rate of prisoners released at the end of their terms has remained between 6% and 8% for many years, a very low rate compared to the other countries. To strengthen the supervision of the law, the people’s prosecutors at various levels have further improved the enforcement of prison staff, the system of establishing resident agencies and offices in prisons throughout the country. In 1999, the Ministry of Justice began to implement a three-year education program to improve the basic qualities of the prison police. As a result, their level of law enforcement has been markedly improved.

Generally speaking, the governmental version of China’s progress towards a remarkable human rights record is impressing. Within a brief period of time, more comprehensive legal reform has cleared the judicial, executive and legislative branches of some perceived and actual human right violating practices, guaranteeing the Chinese citizens the access to the fair and just judicial system based on the rules of law. However, it is only natural for the government to take pride in those reformative actions. Whether the actual human rights situation has been indeed improved by the recent legal reform can only be determined through a comparison, for example by an outsider’s view, like European Union Annual Report or Human Rights Watch Report.

5. The Other Human Rights Reports

China’s policy concerning human rights questions about the death penalty, forced labour camps, and the freedom of religion, the press and the internet constitute the basis of some reports adopted by the European Union institutions such as Council or European Parliament. The overall assessment of developments showed a mixed picture of progress in some areas and continuing concerns in others. On the one hand, the Council acknowledged that China has made considerable progress over the last decade in its socioeconomic development and welcomed steps towards strengthening the rule of law, on the other hand, the Council expressed concern that, despite these developments, violations of human rights continued to occur, such as freedom of expression, freedom of religion, freedom of assembly and association, lack of progress in respect for the rights of persons belonging to minorities, continued widespread application of the death penalty, and the persist-
ence of torture. The 2005 dialogue focused on the more general theme of human rights and the rule of law as abolition and application of the death penalty and the need to obtain statistics on its use; prevention and eradication of torture and rights of prisoners; independence of judges and the right to legal counsel and a fair and impartial trial. The other document—Parliament’s report “deplores the contradiction between the constitutional freedom of belief (enshrined in Article 36 of the Constitution) and the ongoing interference of the State in the affairs of religious communities.” The European Parliament is deeply concerned “that the practice of torture remains widespread in China,” and calls on China to abolish the death penalty, and to “refrain from intimidating, cracking down on or imprisoning those who advocate freedom of expression.” (EP report of human rights violations in China). In addition to the human rights dialogue, the EU and its member states continued to push for concrete steps to enhance the effective enjoyment of human rights in China at other EU political dialogue meetings with China, including at the highest political level, as well as through bilateral technical co-operation and exchange programmes.

Before the analysis of the next document, it should be considered that despite the official proclamations on progress in establishing the rules of law, the number of lawyers willing to take on criminal cases is dropping steadily. It is according to the following Chinese jokes “If you want to do legal work, for goodness’ sake don’t be a lawyer. If you want to be a lawyer, for goodness’ sake don’t take on criminal cases. If you take on criminal cases, for goodness’ sake don’t collect evidence. If you collect evidence, for goodness’ sake don’t depose witnesses. And if you fail to follow all of this advice, report straight to the detention centre.” (Wang Yi, 2006)

The Human Rights Watch Report, taken as the next example of an outsider’s view of the human rights situation in China, differs on several occasions from the Chinese official view. The recent judicial reform did not supposedly produce an independent judiciary as much as it did not significantly contribute to an improvement in the human rights situation. However, the report does recognise that the constitutional amendment in March 2004 does offer some hope that human rights will be legally protected. The Constitution now includes a reference to human rights by stating that “…the State respects and protects human rights.” And although the Chinese constitution is not directly enforceable, the amendment makes that the term human rights has now made its way into common discourse in China.

On the one hand, the report specifically stresses violations of various human rights. Exemplary are the rights of minorities such as Tibetans (The Voice of Tibetan Women, 2000), Uighurs, and Mongolians. Especially after September 11th 2001, China used the global “war on terrorism” to justify its policies treating cul-
ultural expressions of identity as equivalent to violent agitation. The case of Tibet, a specifically delicate case in terms of human rights violations, demonstrates how Tibetan language and culture Chinese government officials suppress. On the other hand, there is the area of freedom to express where China is known to impose long prison sentences on academics, intellectuals and journalists for expressing political opinions, which challenge the official views. It is according to the popular saying about Chinese prisons that, “Even a puff of wind may blow you in, but even an ox can’t pull you out.” Convictions on charges of “subversion” and of “leaking state secrets” continue to be common place and largely result from vaguely worded state security and state secret laws. Often, the social stability argument is used to restrict freedom of expression, whereby old and new media are equally affected in that e.g. co-operation with overseas media organisations is difficult and censored.

There is also very special situation of lawyers (Li Jianqiang, 2006), defending people’s rights, which is why some people find the new term “rights defence lawyer” (weiquan lüshi) redundant;” but to the majority of lawyers, defending rights and upholding justice is an increasingly remote ideal”( Wang Yi, 2006). Nothing demonstrates the absurdity of China’s judicial system more than the fact that lawyers who defend the rights of ordinary citizens have become the most defenceless professional group in the society according to Article 306 of the Criminal Law of 1997, popularly known as the “Lawyer’s Perjury Clause.” (Tom Kellog, 2003) On the base of this article, “because witnesses are generally not questioned in court in Chinese criminal trials, court hearings are a formality and trials are essentially based on written evidence. Therefore, if defence lawyer presents witness testimony that contradicts that presented by the public prosecutor, the procuratorial organs can easily abuse Article 306 and have the lawyer arrested on perjury charges. Public prosecutors are so arrogant that some have had lawyers taken into custody outside the courtroom even before the trial was over” (Wang Yi, 2006)

According to political standards “no justice for lawyers who represent political dissidents”, one of the lawyers Zhang Sizhi and Mo Shaoping have said, “we have never won a lawsuit.” (Joseph Kahn, 2005) And the following numbers show themselves: “of the hundreds of thousands of lawyers in China, no more than 20 dare take on these kinds of cases. What is even more lamentable is that any lawyer who takes on the government in a court of law is better off losing than winning; indeed, God help a lawyer who wins! The effect of Article 306 has become increasingly evident in recent years. Since the new Criminal Law was promulgated almost a decade ago, more than 500 lawyers have been imprisoned in China. More than 300 of them were charged with perjury under Article 306. The general view among lawyers and legal scholars is that most of these 300-plus cases were mis-
carriages of justice.” Lawyers face a number of restrictions: the government still does not permit individual lawyers to freely pursue their profession, they have no freedom of association and they do not have freedom to take on cases and defend their clients as they see fit. (Wang Yi, 2006)

More in general, the Report assumes judicial processes still to be compromised by political interference, reliance on coerced confessions, legal procedures weighted in favour of the state, closed trials, and administrative sentencing. Vaguely worded state laws permit an immense discretion in interpretation and application to the cases brought before court. Impartiality of judges seems hampered by close social relationships and the fact those local judges owe their jobs to local government and Party leaders. In the name of unification of the country, unity of all nationalities, and stability of society cases are decided in favour of the state. Especially the last requirement is vague enough to give the state control of the outcomes of judicial decisions.

Concluding, a comparison of the official position of China on legal reform results and the outsider view shows major discrepancies with regard to the view of the overall human rights situation of the country. And although the fact that China has so far refused to allow independent monitoring and reporting of human rights abuses does not allow for a qualitative judgement of the actual situation, it does not wipe out international suspicions. Additionally, it makes an independent assessment of the human rights situation and the judicial system difficult. The often used argument of the Chinese government in blocking independent UN investigations into the country’s human rights situation was to assert that the issues under discussion are “the internal affairs” of China. However, two questions remain how “internal” can the abuse of a universal right be and is it possible to improve the present situation by looking at other systems of protection of human rights? In the next section, I will focus on the latter question by assessing a European human rights model in the Chinese context.

6. Is the European human rights model desirable and feasible for China?

The European Union, as foreseen in all the Treaties since the Treaty of Rome, is based upon and defined by universal principles of liberty and democracy, respect for the rule of law, the human rights and fundamental freedoms. Adherence to these principles constitutes the foundation and basic prerequisite for peace, security, prosperity and the EU is fully committed to promote them in its foreign policy. To ensure that human rights concerns continue to receive appropriate attention at all levels within the EU, the Human Rights Working Group was created under the Council of the European Union in 1987. The extension of its mandate
was in 2003 having under its purview all human rights aspects of the external relations. Additionally, the European Council decided in December 2004 to create a post of the Personal Representative on Human Rights in the area of CFSP as a contribution to the coherence and continuity of the EU Human Rights Policy with due regard to the responsibilities of the European Commission.

The principle of judicial guarantee, as defined by the European Court of Human Rights (ECHR), implies that only the independent and impartial tribunal can find the accused guilty and sentence it. It also means that during the investigations and throughout the preparatory phase of the procedure, any measure which seriously affects a person’s human rights, must be authorised by an independent and impartial judge. The role of this judge is to verify that the measure is justified in law and that the facts are sufficiently serious to justify its use”. This principle also brings the respect for the equality of arms as defined by the ECHR. Then, the parties can have access to any evidence or observation presented to the judge (even when this is presented by a party to the proceedings or by an independent prosecutor) with a view to influence and discuss the judge’s decision. Under the judicial guarantee, the accused enjoys all rights of defence guaranteed by the international instruments, namely the European Convention on Human Rights and the UN International Covenant on Civil and Political Rights.

In all official statements, China does also appeal to the same universal values such as human rights, democracy, the rule of law and the judicial guarantee of human rights. According to Randy Peerenboom (2003), “China’s long march towards the rule of law is likely to proceed in much the same way as the transition to a market economy - steadily, despite opposition and the occasional setback. (…) While not ignoring the lessons from the experiences of other countries, reformers will be driven primarily by domestic factors and considerations in determining the pace and content of reforms.” (Randy Peerenboom, 2007) However, one should be careful to speak of these as of values forming China’s common heritage. Also, China does seem to treat the human rights as being the objectives of a social system and a juridical system rather than fundamental rights, intrinsic to human beings in general. And here exactly is the key issue dividing the views and opinions of the human rights specialists. It is the way universal values and fundamental rights are interpreted, defined, implemented and applied to societies. With a judicial system founded on dissimilar interpretations of similar or even alike principles, with biased judges and without a politically independent judiciary, any Western model of the human rights is not transferable into the Chinese setting. The judicial guarantee in China is different from the judicial guarantee flowing from the ECHR. One might ask the question: “Do human rights apply to China?” and the answer would be “Of course, they do” because “the population of China is hu-
man. The fact that Chinese tradition did not or does not value liberty is irrelevant to the normative issue. One correct way to show respect for Chinese tradition of this type would be to give greater weight to the integrity of the discussion internal to the Chinese community. We should not contribute to short-circuiting this internal debate by confusing it with a China-West debate or by treating human rights as some kind of international demand to which the Chinese community must bow because of the superior status of an international consensus. We hand the rulers an irrelevant, but effective way to impugn the integrity of their internal critics. Politically, in urging that these are either international standards to which Chinese must conform or parochial Western attitudes that do not fit China, we give intellectual cover to the authoritarian fallacy within the internal discourse.” [Democracy and political progress in China china.org.cn, 2007] (Anonym)

According to Randy Peerenboom (2003) there are some elements, which create very negative portraits of the Chinese legal reforms. First of all, it is drawn by the Western media, showing just the problem of violating the civil and political rights. However, these rights are concerned with only one aspect of the legal system and not the most important one. The second negative view is specified by the international lawyers and businessmen who reflect on their experiences. The next one is the government’s behaviour itself. China appears to assume that divided power means governmental weakness and this weakness will lead to societal breakdown and chaos. In practice, the process of law makes pretence that public officials are aware of the legal limits of their power and will for the most part accept these limits. The evidence however shows that this is not always so and that the executive will sometimes even manipulate the law to get round judicial rulings, though this is normally not so widespread or blatant as to undermine the legitimacy of the legal and judicial system as a whole. From the other hand, “the reform of China’s democracy is based on “storage”, which means that it has sufficient political and democratic experience for a foundation and regards the already obtained politic and democratic achievement as precondition to add speed and strength for democracy development that is in line with the targeted social economic system and the level of economic development. According to the theory of incremental development, it must hold realistic political force and get support from a majority of people and political elite as well as from a wide social foundation. Meanwhile, the reform should be in line with existing politics and legal reform within the maximum limit while not contradicting the existing Constitution and other basic laws” (Anonym).[Democracy and political progress in China china.org.cn, 2007] One must also take in mind other principles, that China’s democracy will make certain breakthroughs while developing gradually, the essence of the incremental democracy is to increase to a great extent new political interests
without harming the existing political interests of the general public and political reform that continuously promote the citizen participation in politics, thus forming a kind of the orderly democracy.

Sometimes the Chinese government does not convict themselves that “promoting democracy and strengthening rule of law are two different aspects of the same process”. In other words, democracy and the rule of law are closely related to each other. To realize the transformation from rule by people to rule of law is the foundation for establishment of the high degree of the socialist democracy. “Therefore, in China, the degree of realizing the rule of law is almost equivalent to the degree of realizing democracy”. [Democracy and political progress in China china.org.cn, 2007] (Anonym)

Therefore, Fan Yafeng’s idea of a “rule-of-law camp” (zhengfa xi) (Fan Yafeng, 2002) was introduced according to a group of liberal intellectuals with a background in the law gradually to assume the role previously played by humanist intellectuals to become the main current of the “civil rights movement” creating new trends in the process of protection of the human rights. One of the first trends is the rise of a rule-of-law outside the government system camp formed of the professional jurists that includes a group of lawyers, scholars and writers. The second trend is the increase in the legitimacy of rule-of-law discourse and the last trend involves jurists who are making laws and lawyers who are taking part in legislation.

As a result, “establishing a well-functioning legal system is the enormous task, one made all the more difficult by the particular obstacles confronting legal reformers in China.” There is also a very problematic relationship between one-party rule and rule by the law. On the one hand, the party should adhere to the law. On the other hand, the party is obliged to guide the state, i.e. the law. Officially it is said not to be such contradiction, in reality, as critics have pointed out, the party and especially its senior leadership is effectively above the law. The consequence of this imbalance cannot be corrected by any judicial guarantee of the established human rights, no matter how positive the results of legal reform are being portrayed.

7. Conclusion

There are two non-economic factors - the rule of law and participation of civil society as the important for the economic development; both issues have the important human rights aspects. These two factors have been acknowledged by the European Member States so as to shape the complex human rights model, carefully guarded by ECHR’s judicial guarantee.
The same process cannot be said and implemented in China. Thus, we should “stop referring to vaguely defined universal standards (no matter how worthy) or making comparisons with the United States. (Jeffrey N. Wasserstrom, 2000/2001)

The concept of human rights is the matter that definitely exemplifies the differences between the social, cultural, economic and political systems of the world’s most populous and the world’s most powerful nations” (Gregory J. Moore, 2000).

On the other hand, “(…) liberals who think China is on the way to establishing a liberal legal system of the kind found in Western democracies seem at once overly optimistic and not fully cognisant of differences in fundamental values that have led many Asian countries to resist the influence of liberalism in favour of their own brand of “Asian values”. China is more likely to adopt a statist socialist, neo-authoritarian and communitarian version of rule of law than it is to adopt a liberal democratic one.”

Although progress has been made through the legal reform opening towards the rest of the world, the human rights matters in China still remain on the agenda of the international community. The detailed comparison between official documents and the third party reviews reporting on the human rights situation in China reveals discrepancies in this perception. A look behind the curtains discloses substantially diverse interpretations of the universal principles. It is this perception of differences that forms an obstacle to the implementation of the European human rights model in China. The state party defines the desirability and acceptance of such a model, which is also responsible for any other legal definition in China. There is too tight linking between the state party and the judiciary that undermine not only the very substance of a judicial guarantee but also they weaken the legitimacy of the rule of law in general. The ground for profound changes in China’s human rights policy does not seem fertile enough to produce the positive effects and bring those perceptions closer towards a truly universal human rights model.

Finally, the best conclusion seems to be provided by Yu Zheng (2007) “Is China able to pursue democracy? Is democracy something solely defined by the West? No political institution around the world can label itself perfect. Democracy is rather an attitude. Every country has its uniqueness to develop democracy based on its own history, culture and conditions. Even Western democracies have experienced agonizing unique processes. Considering the uniqueness of each democracy and the time-consuming process of breeding democracy, it’s unwise to copy existing foreign democracies. Democratizing China in Western-style is not a cure-all for problems in China. (…) Modern Chinese are aspiring to achieve the biggest economic and social goals at the lowest cost. The Chinese-style democracy we are promoting will have high chances to be the answer to this” (Shanghai Daily, 20.10.2007)
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