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## FOREIGN POLICY AND HUMAN RIGHTS

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What Role for Democracy and Human Rights

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# PRESENTATION



## Foreign Policy and Human Rights

The fields of human rights and foreign policy have coincided with increasing frequency in recent years. The convergence of these areas, however, has not been widely explored in academic circles of the Global South, and is often considered secondary by activists working at the national level. This issue of SUR, prepared in partnership with **Asian Forum for Human Rights and Development**, **CIVICUS: Worldwide Alliance for Citizen Participation** and **Commonwealth Human Rights Initiative**, proposes, on the one hand, to raise awareness about the different interfaces and interactions between the international activities of countries and the national *protection* of human rights, and, on the other, to examine contemporary international dynamics such as the emergence of a multipolar world and its impact on the global protection of human rights.

The thematic group of articles addresses the changes in the international system – primarily the more prominent role played by so-called emerging powers (Brazil, South Africa, India and China, among others) – and their impact on the global protection of human rights.

Reviewing the foreign policy of these countries and their impact on human rights includes, for example, analyzing their increased commitment to and engagement with regional and international human rights protection mechanisms. With respect to this point, the potential role of emerging powers in the field of human rights is examined by David Petrasek in **New Powers, New Approaches? Human Rights Diplomacy in the 21<sup>st</sup> Century**. In his article, Petrasek argues that, despite the reluctance of these new powers to adopt “traditional” tactics such as naming and shaming and the imposition of conditionalities in their bilateral relations, these countries play an important role in the international protection of human rights through standard-setting on specific human rights issues in multilateral forums.

In **Foreign Policy and Human Rights in Emerging Countries: Insights Based on the Work of an Organization from the Global South**, Camila Asano, coordinator of Foreign Policy and Human Rights at Conectas, examines the role of emerging countries,

with a focus on Brazil, in international and multi-lateral bodies. Based on the experience of Conectas, the article provides insights for other civil society organizations wishing to engage with the formulators and implementers of foreign policy to promote policies that are more respectful of human rights. SUR 19 also features a **joint interview with Maja Daruwala, of the Commonwealth Human Rights Initiative (India), and Susan Wilding, of CIVICUS World Alliance for Citizen Participation (South Africa)**, two additional organizations that monitor how their countries’ activities abroad are affecting human rights. Both for Asano and for Daruwala and Wilding, the international performance of their countries leaves a lot to be desired in terms of consistency.

A subgroup of articles analyzes, more specifically, two topics of Brazilian foreign policy: health and international development cooperation. In **Public Health and Brazilian Foreign Policy**, Deisy Ventura addresses Brazilian diplomacy in the field of health – at a regional and international level – and analyzes how the human rights topic has been included in this agenda. In the article, Ventura demonstrates the solidarity that underpins Brazilian health diplomacy, but also warns of the proliferation of cross-cutting contradictions – both internal and external – that weaken, in the current context, the prevalence of human rights and the very effectiveness of Brazilian health cooperation. In **Brazil’s Development Cooperation with Africa: What Role for Democracy and Human Rights?**, Adriana Erthal Abdenur and Danilo Marcondes de Souza Neto revisit the role and presence of Brazil on the African continent, analyzing how and to what extent the “Brazilian model” of cooperation directly and indirectly impacts the dimensions of democracy and human rights on the African continent. The authors identify, despite the non-interventionist rhetoric of Brazilian foreign policy, a positive – albeit cautious – role of the country in its relationship with African nations. They point out, however, that Brazil could be a more active and decisive partner in the promotion of democracy and human rights on the continent.

This group also includes two articles on the national implementation of international norms, decisions and recommendations. These articles were

included with the aim of countering the normative analysis that usually underlies studies on this topic by including the political dimension that permeates the domestic incorporation of international instruments, given that, in the same one country, we find cases of active engagement, limited respect and even defiance of international norms. These dynamics interest us, since they have a considerable impact on the scope that victim protection systems will have in each specific context.

In this context, in **Incorporating International Human Rights Standards in the Wake of the 2011 Reform of the Mexican Constitution: Progress and Limitations**, Carlos Cerda Dueñas examines how the 2011 constitutional reform in Mexico established respect for human rights as a guiding principle of the country's foreign policy and what the impact of this has been on the incorporation of international norms by the country. Elisa Mara Coimbra, meanwhile, discusses the relationship between Brazil and the Inter-American System of Human Rights. In **Inter-American System of Human Rights: Challenges to Compliance with the Court's Decisions in Brazil**, the author comments on the implementation status of the decisions in five cases in which Brazil was condemned by the regional system.

Despite the variety of issues present in this edition, we should briefly mention the major research topics and agendas that emerged during the conception and production of this issue of SUR and that, for practical reasons, have not been fully addressed here. Prominent among them are, for example, the dynamics of transparency, accountability and citizen participation in foreign policy, and comparative studies of foreign policies of two or more countries from the Global South. As expected, and fortunately, the debate does not end with this issue, and SUR remains committed to continuing this dialogue.

## **Non-thematic articles**

This issue of SUR includes four articles in addition to the dossier. The first, **Finding Freedom in China: Human Rights in the Political Economy**, written by David Kinley, addresses human rights in China from an economic policy perspective, proposing new ways of viewing the relationship between the Chinese

economic model and the realization of fundamental freedoms in the country.

Laura Betancur Restrepo, in **The Promotion and Protection of Human Rights through Legal Clinics and their Relationships with Social Movements: Achievements and Challenges in the Case of Conscientious Objection to Compulsory Military Service in Colombia**, presents an analysis of the work of the Constitutional Court of Colombia on the subject of conscientious objection in the specific case of mandatory military service. Based on discourse analysis, the author attempts to comprehend the legal translation of social demands and its direct and indirect impacts for social movements.

Finally, the issue contains two articles that tackle the issue of sexual and reproductive rights. The first, **Modern-day inquisition: A Report on Criminal Persecution, Exposure of Intimacy and Violation of Rights**, written by Alexandra Lopes da Costa, discusses the implications of the ban on abortion in Brazil, in a quasi-journalistic account of a case that occurred in the state of Mato Grosso do Sul.

The second, **Case Study on Colombia: Judicial Standards on Abortion to Advance the Agenda of the Cairo Programme of Action**, by Ana Cristina González Vélez and Viviana Bohórquez Monsalve, examines how Colombia and, more broadly, Latin America, have advanced in the implementation of the Cairo Programme of Action, which addresses access to abortion and the protection of other reproductive rights.

Finally, we would like to emphasize that this issue of the Sur Journal was made possible by the support of the Carlos Chagas Foundation (FCC). Conectas Human Rights is grateful for the collaboration of the partner organizations throughout the production of the thematic section of this issue. We also thank Amado Luiz Cervo, Bridget Conley-Zilkic, Celia Almeida, Daniela Riva Knauth, Deisy Ventura, Eduardo Pannunzio, Eloisa Machado de Almeida, Fernando Sciré, Gabriela Costa Chaves, Gilberto Marcos Antonio Rodrigues, Gonzalo Berrón, Guilherme Stolle Paixão e Casarões, Katia Taela, Jefferson Nascimento, Louis N. Brickford, Márcia Nina Bernardes, Renan Honório Quinalha, Renata Avelar Giannini, Salvador Tinajero Esquivel and Thomas Kellogg for reviewing the articles published in this issue.



DAVID KINLEY

Professor David Kinley holds the Chair in Human Rights Law at University of Sydney. He is also an Academic Panel member of Doughty Street Chambers in London, a member of the Australian Council for Human Rights, and was a founding member of Australian Lawyers for Human Rights. He is currently on the Faculty of Oxford/George Washington Universities' International Human Rights Law Summer School and has previously held teaching positions at

Cambridge University, ANU, University of New South Wales, Washington College of Law, American University, and Paris 1 (La Sorbonne). He has written and edited eight books and more than 80 articles, book chapters, reports and papers.

Email: david.kinley@sydney.edu.au

#### ABSTRACT

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The question of how best simultaneously to achieve and reconcile the twin desirable goals of good governance and economic prosperity has long been a focus of philosophical inquiry. In the modern (post-war) era, a new and important ingredient has been added to the mixture that binds economic and socio-political well-being - international law, and particularly international human rights law. This paper focuses on the different roles that so-called universal rights and freedoms are said to play in forging, sustaining and destroying the relationship between economic and social well-being, and analyses what are and will be the consequences for the political economies of the West and China. Though certain conclusions are drawn as to the significance of the agency of human rights, the paper suggests that it may yet be – as, reputedly, Zhou Enlai believed was the case regarding lessons learnt from the French Revolution – too soon to say.

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#### KEYWORDS

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China – International law – Human rights – Development – Economic growth – Good governance – Political freedoms



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# FINDING FREEDOM IN CHINA: HUMAN RIGHTS IN THE POLITICAL ECONOMY\*

David Kinley\*\*

## 1 Introduction

In February 2012, a rather remarkable article appeared in the *New York Times* written by Eric Li, a self-described Shanghai “venture capitalist”. Under the provocative title of “Why China’s Political Model is Superior”, Li makes some bold claims. First, that “the modern West sees democracy and human rights as the pinnacle of human development. It is a belief based on absolute faith” (LI, 2012). And then, after articulating what he claims to be the Chinese Government’s alternative view that human rights and democracy are negotiable instruments or privileges granted only according to a country’s needs (especially economic) at any one time, Li adds: “The West seems incapable of becoming less democratic even when its survival may depend on such a shift [towards the Chinese Model]. In this sense, America today is similar to the old Soviet Union, which also viewed its system as the ultimate end” (LI, 2012).

And indeed today – more than five years after the onset of the current global financial crisis (GFC) – many Western economies are struggling, with some in serious trouble. The economic down turn following the credit crisis in 2007/8 has had enormous social and political implications, including a diminution in the enjoyment of basic human rights standards for many. Highly regressive austerity measures hurt the poor (and even the not so poor) more than the well-off, precisely because they affect the social welfare programs and public service programmes that the economically disadvantaged depend on. Mass unemployment, especially among the young, has long term detrimental social, political and economic consequences. Further, both the perception of, and experience of, wealth disparity resulting from publicly funded bailouts of private banks, tax breaks and tax avoidance schemes, creates, for many, a generalised sense of economic injustice.

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This essay is based on a paper delivered at the 9th China International Law Forum: “Developing International Law and Global Governance”, sponsored by the Institute of International Law, Chinese Academy of Social Sciences (CASS), Beijing, 17-18 November 2012.

\*My gratitude is owed to the editors of *Sur* and the anonymous reviewer for their insightful and helpful comments on an earlier draft of the paper.

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Notes to this text start on page 154.

As a result, the prevailing economic philosophy is being questioned and challenged. Is the free market promise of ‘trickle down’ benefits for all enough? Is it, more fundamentally, sustainable? The very itch that Li is scratching has yielded serious debates not only over whether bad economic management is endangering democratic government, but also, whether “democratic governance may in some modern situations be inimical to competent economic stewardship”.<sup>1</sup>

## 2 History and the post-war rise of international law

These are not new questions. The simultaneous achievement *and* reconciliation of the twin desirables of good governance and economic prosperity has long been a focus of philosophical inquiry – in Ancient Greece, and before that during the Zhou Dynasty in Ancient China.

The European Enlightenment of the 17<sup>th</sup> and 18<sup>th</sup> Centuries preceded, precipitated and then partnered the 19<sup>th</sup> Century Industrial Revolution, with mixed results, but probably overall an advancement on the improving human circumstances in terms of social outcomes (mobility) and political practices (expanded democracy), as well as increasing aggregate economic wealth.

In the modern (post-war) era, the relationship between economic and socio-political well-being has had an increasingly important ingredient added to the mix, namely, international law. Many forms of international law have played their part:

- International trade law has accompanied and promoted globalisation which has had impacts within and between States far beyond mere trade relations;
- The cross-over between public and private international law regimes in the field of transnational commerce has directly influenced domestic laws governing investment, corporate conduct and dispute resolution;
- Multilateral and regional development and finance institutions have had profound and sweeping effects on how many poor countries govern their States; and,
- Increasingly, international environmental law impacts on the policies of domestic governments.

## 3 Human rights and the economy

Of all the sub-disciplines of public international law, however, it is international human rights law that is of greatest interest to the relationship between economic and political goods. This paper focuses on the different roles that rights and freedoms are said to play in forging, sustaining or destroying that relationship, and analyses what consequences thereby flow for the political economies of the West and China.

Although it sits in the ‘Bronze Medal’ position (behind peace and security, and international comity), the protection of human rights was included in the list of essential aims of the United Nations in its 1945 Charter. The protection



of human rights has an expressly stated object, namely, “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character” (UNITED NATIONS, 1945, art. 1, para. 3). This bold proclamation marked the beginning of the modern era of intense and varied analysis and argument over why, how and with what consequence, the governance of the economy on the one hand, and the rights of people on the other, can be reconciled so as to promote the ends of both.

In the years immediately after the War, and upon the advent of the modern ‘Age of Human Rights’ (HENKIN, 1990), with the Universal Declaration on Human Rights (UDHR) in 1948 and the steady stream of international human rights instruments that followed, the linkage between social and economic goods was dominated by notions of Big Government.

#### 4 Big Government - West and East

Thus began, in the stark but enabling environment of post-war Europe (and the West generally), the ambitious project of building the universal welfare state; a project which was seen as essential to cementing post-war peace and economic security, precisely because it underwrote human rights (and economic and social ones in particular) that had previously existed only as potential opportunities.

At the same time as this was happening in the Capitalist West, so ‘Big Government’ of a very different sort was being rolled out in the Communist East. The Leninist precepts shared by the Union of Soviet Socialist Republics (USSR) and China were being transformed into totalitarian concepts of the state by Stalin and Mao. Here too the political philosophy of the state claimed to be concerned with the welfare and security of the people, albeit in a manner encompassing state control of *all* aspects of societal existence, not just economic management.

Politically and economically, the West and East were divided, and steadily more so over the coming decades. That schism continued into the realm of human rights, as exemplified in the bifurcation of the rights in the UDHR into two separate Covenants by 1966. The West – reflecting its predominant concern with ‘freedom’ – sought to promote primarily civil and political rights, which, it argued, when secured by way of good/democratic governance would yield economic and social benefits (whether or not recognised as rights per se). China and more especially Russia, on the other hand, were more concerned with ‘equality’, stressing the need to focus above all on securing economic, social and cultural rights. In other words, while the West considered the political freedoms of individuals as the preferred path towards greater social wealth and security, the Hammer and Sickle States saw state-imposed or planned economic equity as the path towards individual fulfilment and security.

But times change, and even the best laid plans peter out or die. In fact, whilst at various times, each camp (the democratic/capitalist camp and the communist/planned camp) has claimed to be inimical and unrelated to the other, the direction and trajectory of each has very much been influenced by the development of the other. And so it continues today.

## 5 Changed times and new philosophies - *The West*

In the West, spurred by Hayekian views of how liberty is gained and maintained by protecting it from the totalitarian tendencies of States such as the USSR, which was imposing itself on Eastern Europe (VON HAYEK, 1944), advocates of much freer economic and financial systems raised their voices in the 60s and 70s. Milton Friedman in *Capitalism and Freedom* (1962) argued, that not only did such free markets operate more efficiently in economic terms, they were also the well-spring for the promotion of society-wide political freedoms (FRIEDMAN, 2002). In other words, while he didn't express it as such, Friedman and his acolytes saw the free market as the guarantor of the individual freedoms promised in international human rights laws.

Slowly but surely, upon the battlefield of economic philosophy, the free marketiers prevailed and by the 1970s, Keynesian financial and fiscal controls were replaced by a new vision of a liberalised international trading system that would, it was claimed, benefit us all by combating the scourge of poverty of people and nations, and bolstering the prospects for greater individual liberty (HELLEINER, 1994).

However, in setting this vision into motion, the architects of the project adopted a technocratic view of economics that was based upon theoretical models and sets of principles that were abstracted from any social context and which made no attempt to understand, let alone predict, the way changes in the financial and economic system would interact with different societies and their social structures. Human rights concerns, like all 'social' factors, were externalised from the calculations that determined economic direction.

Unfortunately, the aspect of the economy that is most prone to such unrealistic modelling was and is also one of the most critical, as well as being the least understood. The transformation of the financial sector over the past 20 years into the dominant economic force on the planet today has been truly remarkable.<sup>2</sup> But financiers – like many other professions – stick largely to the narrowly defined confines of their trade and do not spend much time worrying about how financial flows may be creating or exacerbating social tensions. When they do so, they do so from the perspective of country or credit risk – how it may affect the value of their investments or returns – not from the perspective of social cohesion and stability, still less notions of civil and political freedoms. A financial system driven by quantitative mathematical formulae capable of gargantuan leverage (the global derivatives market alone is worth many times the global Gross Domestic Product - GDP<sup>3</sup>), has played a direct role in the acute polarisation of humanity according to wealth (LIN & TOASKOVIC-DEVEY, 2011; DOWD & HUTCHINSON, 2010). The last decade of globalisation has seen an enormous growth in income inequality both within and between nations, for while the financial system creates enormous gains for insiders, it provides no guarantees or insurance for the masses of outsiders who are generally the worst affected by its periodic instability.<sup>4</sup>

In fact, such levels of abstraction provide fertile ground for application

of the law of unintended consequences, as the social realities of such matters as unpredictable patterns of behavioural risk-taking rudely intrude upon fine-tuned economic models. Free market bubbles expand and burst, with detrimental – sometimes disastrous – results for States and their peoples. And sometimes, in the aftermath – as is the case with the present burst bubble – the prevailing economic philosophy is fundamentally questioned in the ways indicated at the beginning of this essay.

## 6 Changed times and new philosophies - *The East*

The 1970s and 80s were times of changes and challenges for the USSR, and China too. The USSR was struggling to maintain political and economic traction as it, together with its satellite States in Eastern Europe, fell further and further behind the West in terms of wealth creation, leading eventually to the stop-gaps of Perestroika and Glasnost and the final collapse of the Soviet Empire in 1989. China, which was recovering from the monumental impacts of famine and an abandoned cultural revolution, moved steadily towards a political crisis that reached its peak in Tian'anmen Square in June 1989, following which the steps towards economic liberalisation taken during the 1970s and 1980s were consolidated and accelerated under Deng Xiaoping's direction in the early 1990s.

## 7 China

The extraordinary changes that China has undergone since that time, though perhaps most dramatic in economic terms, are also profound in terms of politics, social relations and indeed human rights. Critical to those transformations has been the degree of interconnection between all of these spheres. The world over, the hopes and aspirations of people and individuals regarding their economic and political freedoms and opportunities, are tied closely to how economic and political systems are performing. Therefore, in times of growth and plenty, hopes and expectations of gaining or advancing such freedoms are high, while they tumble when economies slacken and systems of governance are challenged. And so it is with China.

### 7.1 *Social, political & economic considerations*

Thus, for example, the instance, size and reporting of public protests is evidently rising at the same time as the economy is slowing from its average annual growth rate of 8-14% over the last 12 years. Such community disquiet is concerning for China's government and citizenry alike. A recent editorial in Caixin, China's leading business journal, warned that "if we continue to hanker after economic 'miracles', we must be prepared to pay a high price in the future". What is particularly interesting about this caveat is the set of indicators that the magazine chooses to illustrate the 'high price' to be paid, namely:

*growth will fall; discrimination will become pervasive, and rent seeking and corruption rampant; our society and environment will be pushed to their limits; and development cannot be sustained. The mass protests, riots and environmental disasters we have seen are just some of the consequences of this growth model.*

(BRANIGAN, 2012).

Apparently, the very same concerns have played on the minds of delegates to the latest 18<sup>th</sup> Communist Party Congress.<sup>5</sup>

The possibility or prospect of the political consequences of economic or financial forces inside China is also a matter of intense and enduring interest to the rest of the world for both economic and geo-political reasons. How financially squeezed is the so-called 'squeezed middle' in China and what are their political hopes and expectations? What will be the social impacts of the reorientation of the Chinese economy from being export driven to having a focus on domestic consumption, as well as the transformation of its industrial model from one based on manufacturing to one based on services? And how long will these transitions take? How susceptible is the local economy to significant political change or unrest, and how, in turn, would that affect the global economy?

## *7.2 Good governance and economic growth<sup>6</sup>*

There are many factors at play here of course – and far too many to be adequately covered in an article of this size – but one that seems to be critical from the perspective of outsiders looking in, relates to the connections between good governance (open, fair and safe, as well as efficient) and sustained economic growth and wealth dispersal. This is difficult terrain to chart, but some – like Kaufmann, Kraay and Mastruzzi at the World Bank Institute – have been trying to do so for nearly a decade now by using six so-called 'governance indicators' for more than 150 countries (WORLD BANK, 2012a). Taking measurements for each country's progress relative to all others over the 10 years since 2002, the results are remarkably stable for China, with only minor changes during the period on all indicators. In only one of those indicators does China reach into the top 50th percentile ('government effectiveness'); and in respect of 'voice and accountability' it ranks in the lowest 10th percentile. For all others ('political stability', 'regulatory quality', 'rule of law', and 'control of corruption') China hovers around the middle of the 25th-50th percentile (WORLD BANK, 2012b). On the basis of these data, the country's Gross National Income (GNI) growth over the same period (from approximately US\$ 1,000 in 2002 to nearly US\$ 5,000 in 2011), would appear to have had little impact on the governance as so measured (WORLD BANK, 2013a; 2013b).

That said, a lurking spectre of widening levels of income inequality has for a decade now threatened to destabilize the nexus between governance and wealth distribution. For the 11<sup>th</sup> year in a row, China's National Bureau of Statistics (NBS) has collected data and calculated the nation's so-called Gini Co-efficient, but then declined to publish it claiming incomplete data sets. Unsurprisingly, many see this as a tacit admission that inequality is considerable, and, significantly, that it

is getting worse, not better. This suspicion would appear to be confirmed by the International Institute for Urban Development in Beijing which, by using what data is available, estimates that the index has crept upwards (i.e. more inequality) from 0.425 in 2005 to 0.438 in 2010 (XUYAN & YU, 2012; CHINA REALTIME REPORT, 2012). As it turns out, in fact, these estimates were somewhat understated. For in January 2013, the NBS reversed its hitherto secretive stance by publishing all its inequality data for the past twelve years, which showed that the Gini coefficient for China in 2012 was 0.474, having come down from a high of 0.491 in 2008 (ECONOMIST, 2013, p. 28).

### *7.3 A Human rights perspective*

Certainly, perceptions from inside and outside the country are that the sheer speed and size of China's economic progress has brought both social (including human rights) and economic gains as well as losses. Some benefits have spread widely and others trickled down deeply.<sup>7</sup> In less than a decade, for example, China has expanded rudimentary health care insurance to cover 95% of the population; abolished state school fees in rural areas; provided farmers with access to a (admittedly minimalist) state pension scheme; and a massive low-cost housing program is currently being undertaken in all major cities (ECONOMIST, 2012, p. 19). Most impressive of all, some 250 million people have been lifted out of abject poverty (measured as an income less than \$1.25 per day) since 2000. Problems remain, however, with some 150 million people (12% of the total population) still languishing below that line, while, at the same time and underscoring the inequality point made earlier, China now boasts more than 100 billionaires (in US dollars), up from zero in 2002 (FORBES, 2012).

### *7.4 Political freedoms*

The Chinese government's expenditure on internal security suggests that the potential for egregious inequalities to tend communities towards fervent expressions for greater economic *and* political freedoms is taken very seriously. The Chinese government spends more on internal (or 'public') security than it does on national security (US\$ 111 billion and US\$ 106 billion, respectively, in 2012 (REUTERS, 2012)). The number and boldness of street protests is increasing, as are criticisms of state cronyism and incompetence posted on social media. The latter, in particular, is not only an increasingly important avenue for public expression (Weibo now has some 300 million accounts with 30 million daily active users), but such micro-blogging – which the *Economist* recently labelled 'the next best thing to a free press' (ECONOMIST, 2012) – also provides the leadership with a barometer to gauge the strength of community feelings over a wide range of social, economic and political matters. The keenness with which the Chinese leadership attends to these signals is evident in its consent in August 2012 to release through official media sites a previously restricted (but leaked) report prepared for the senior leadership that warned of crises looming on a number of

fronts, which, if not properly handled, could set off “a chain reaction that results in social turmoil or violent revolution”.<sup>8</sup>

## 8 A human rights frame of reference

The interconnectedness of the fate of human rights and the management of the political economy - whether in China or in the West – is such that no one grand theory adequately explains their ties *and* at the same time provides a path to their satisfactory reconciliation. Neither the extreme of free market economics, with little or no state intervention, nor the opposite of state totalitarianism yield social and political freedoms that are widespread and sustainable. To vacillate between the two by countering the one with the other is destructive and dangerous. Thus while so many scorned the inanities and inequities of Hitler’s Germany and Stalin’s Russia when arguing for the promotion of individual political and economic freedoms, Karl Popper was rightly careful to warn against using this to justify removing all state safeguards altogether, lest one permit private economic authoritarianism to take the place of state-based versions.<sup>9</sup>

In the space between these two extremes China has come to occupy a place of peculiarity, wonder and some notoriety. Friedman, in the Preface to a Fortieth Anniversary edition to the republication (in 2002) of *Capitalism and Freedom*, acknowledged that China’s (or more specifically Hong Kong’s) powerful, liberalised economy had nevertheless not led to more political freedom, as his thesis would otherwise suggest.<sup>10</sup> Though, reflecting upon the arguments made earlier in this essay, one might prudently add that perhaps it is still too soon to say.

Another philosopher-economist, Amartya Sen, provides an alternative perspective on the relationship in his book *Development as Freedom* (1999). Sen’s objective is to assist the poor and marginalised in terms of their social and economic circumstance, and the means he advocates by which to do so is to reconfigure orthodox (i.e. purely economic) perceptions of ‘development’ such that both their goals and methods combine social and political freedoms with economic capacity.<sup>11</sup> For Sen, it is critical to look at the causal processes that lead to any economic circumstance (SEN, 1999, p. 150), for whether it is wealth or poverty, or somewhere in between, the nature and extent of political freedoms will be at their heart. Far from being in opposition, political freedoms on the one hand, and economic prosperity and development on the other, work, necessarily, in tandem. A position of economic security or even abundance, but *without* attendant civil and political freedom is, for Sen, not development at all, but a sort of misshapen or aberrant version of it.

As such, one might conclude that a robust response to Mr. Li (our Shanghai venture capitalist) is to say that whatever the problems caused by the West blindly worshipping at the altar of democracy and human rights, the situation cannot be repaired by placing the economy on a pedestal and worshipping it instead.

In reality, neither the West, nor China truly worships only at the one altar. Many readers of the *New York Times* article would have laughed at the assertion that the US and the West generally have “absolute faith” in human rights, when it

seems so clear that the power of the economy holds sway in the minds of Western governments. China, equally, does not of course only see the world through economic eyes. It is a growing participant and contributor to the development of international law generally and to international human rights law in particular, having ratified all of the major UN human rights instruments bar one – the International Covenant on Civil and Political Rights (ICCPR) (HUMAN RIGHTS COMMITTEE, 1994).

And it is perhaps with respect to the rights covered by the ICCPR that China faces one of its greatest challenges in terms of international law and domestic governance. For, while the fact that China has signed but not ratified the Covenant, shows earnest intent *not* to dishonour the instrument, it remains to be decided whether for China to eventually ratify (as it surely will), would be to assist in the country's smooth transition to a system democratic government combined with a thriving free-market economy.

On this reading, human rights can be seen as integral components of the processes and ends of development. Their expression, promotion and protection and enforcement in legal and non-legal forms are vital. In practical terms, this requires meaningful domestic application through legal rules and policies that result in acceptance and/or adherence. It might be said, therefore, that international human rights law plays a role in promoting compliance, but only when it reflects what exists 'on the ground' in States. 'Freedom' for many people in many States, however, does not reflect development in practice in the manner envisaged by Sen. Presently that includes countries such as China where political freedoms are restricted, albeit alongside greater economic prosperity and distribution. But also in States such as Greece, Ireland, Spain and the US, economic and social rights are denied to the poorest and most marginalised, even if, in theory, political freedoms are available to them.

All this points to an uncomfortable truth. There are, as Sen argues in his later work, "limits" to the utility of human rights law (SEN, 2006). The legal baggage of human rights can sideline or distort the other necessary elements of development – political philosophy, social and cultural mores, as well as economic capacity – especially if relied on too much.

## 9 A concluding lesson

For me, this point is no better illustrated than by the example of the ongoing, but misguided promotion of the notion of a 'Right to Development', as quintessentially represented by the UN Declaration on the Right to Development in 1986. The right to development as depicted in the Declaration is not only legally compromised (being unclear, circular and contradictory), but far more importantly, it is strategically naïve and politically counterproductive. Almost no one outside a committed band of advocates likes what is being offered. Rich States abjure any legal duty to provide development assistance; developing States might like to see such a duty imposed on rich States, but balk at it being imposed on them; and the individuals and communities that stand to gain from development may like the

idea of an individual (or group) being able to claim a right to such, but distrust the sincerity and commitment of any State or international body claiming to accept responsibility to honour such a claim.

It is on this salutary - even chastening - point that I would like to conclude. For if we are to better understand the nature of the relationship of human rights with the political economy, and how then we might more successfully 'find freedom', we must, as lawyers, know where to draw their legal boundaries. We must accept that there are limitations to the utility of human rights laws. And to know when to step outside the boundaries of our discipline to learn, engage with and argue with others. And while the implications of this circumstance may differ for international and human rights lawyers in China's political economy, as compared to those in the political economies of the West, they all share the overarching goal securing the political and economic benefits of freedom. That is, they seek to understand, explain and promote systems of governance that are fair, efficient and inclusive, and economies that are open, effective and prosperous. In the decades before China's recent rise, a number of its neighbours - Japan, South Korea and Taiwan - enjoyed similarly spectacular trajectories of economic growth. Yet, while each adopted, like China, carefully calibrated economic policies that balanced protectionism and trade liberalization, they did so under the direction of very different forms of government (STUDWELL, 2013). Significantly, however, politically, each of these is now a flourishing democracy with broad recognition of, and respect for, international human rights standards. Certainly, such an outcome was not and is not inexorable, but it surely a prospect understood by many both inside and outside China.

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## NOTES

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1. A neat phrase that I am borrowing from an essay of one of my 2012 postgraduate students, Christianne Salonga.
2. This section draws directly from a conference paper I wrote with Mary Dowell-Jones (KINLEY; DOWELL-JONES, 2012).
3. Statistics from the Bank for International Settlements indicate that there are now nearly US\$650 trillion worth of 'over the counter' derivatives (those negotiated privately between financial institutions, which include only roughly half the outstanding total) in existence. This alone is more than ten times the value of world GDP (BIS QUARTERLY REVIEW, 2012).
4. As we have seen with the recent financial crisis, at the extreme the financial sector cannot insure its own losses, despite the theory of derivatives as risk management tools, and the taxpayer has to subsidise the system as well as cover their own losses from financial instability.
5. See remarks by Premier Wen Jiabao immediately before the NPC (INTERNATIONAL BUSINESS TIMES, 2012).
6. This section is drawn from Kinley; Dowell-Jones, 2012.
7. See, for example, the human rights advances in respect of economic and social rights in particular, as outlined in China's most recent 'White Paper' on human rights in 2009 (CHINA, 2010), and as projected in its *National Human Rights Action Plan (2012-15)* (CHINA, 2012).
8. "Internal Reference on Reforms - Report for Senior Leaders", (re)released in August 2012 (ECONOMIST, 2012).
9. This was the consequence of what Popper called "the paradox of freedom" (POPPER, 1945, Notes to the Chapters, Chap. 7, Note 4).
10. While reviewing how well his arguments have withstood the test of time since their first airing 40 years earlier, Friedman reflects: "[i]f there is one major change I would make, it would be to replace the dichotomy of economic freedom and political freedom with the trichotomy of economic freedom, civil freedom and political freedom. After I finished the book, Hong Kong, before it was returned to China, persuaded me that while economic freedom is a necessary condition for civil and political freedom, political freedom, desirable though it may be, is not a necessary condition for economic and civil freedom" (FRIEDMAN, 2002, p. ix).
11. "Not only is free agency itself a 'constitutive' part of development, it also contributes to the strengthening of free agencies of other kinds" (SEN, 1999, p. 4).

## RESUMO

A questão de qual a melhor maneira de alcançar e conciliar as duas metas desejáveis e complementares de boa governança e prosperidade econômica são há muito tempo objeto do pensamento filosófico. Na era moderna (pós-guerra), um ingrediente novo e importante foi adicionado à relação entre bem-estar econômico e sociopolítico – a saber, o direito internacional, e em especial o direito internacional de direitos humanos. Este artigo trata especificamente dos diferentes papéis que os chamados direitos e liberdades fundamentais devem supostamente desempenhar no sentido de forjar, manter e desfazer a relação entre bem-estar econômico e social e analisa quais são hoje e quais serão no futuro os efeitos destes direitos e liberdades para as economias políticas do Ocidente e da China. Embora este artigo apresente algumas conclusões sobre a importância da agência dos direitos humanos, sugere-se aqui que talvez ainda seja – como supostamente Zhou Enlai acreditava ser o caso das lições aprendidas da Revolução Francesa – muito cedo para dizer.

## PALAVRAS-CHAVE

China – Direito internacional – Direitos humanos – Desenvolvimento – Crescimento Econômico – Boa governança – Liberdades políticas

## RESUMEN

El interrogante de cuál es la mejor manera de alcanzar y conciliar simultáneamente las dos metas deseables de la buena gobernabilidad y la prosperidad económica es objeto de indagación filosófica desde hace mucho tiempo. En la era moderna (de posguerra), se ha sumado un ingrediente nuevo e importante a la mezcla que combina el bienestar económico y el socio-político: el derecho internacional y, en particular, el derecho internacional de derechos humanos. Este trabajo se centra en los distintos roles que se dice que desempeñan los así llamados derechos y libertades universales en forjar, sustentar o destruir la relación entre el bienestar económico y el social, y analiza cuáles son y serán las consecuencias para las economías políticas de Occidente y de China. Si bien se extraen ciertas conclusiones respecto de la importancia de la agencia de los derechos humanos, el trabajo sugiere que –tal como se dice creía Zhou Enlai respecto de las lecciones aprendidas de la Revolución Francesa– aún podría ser demasiado pronto para saberlo.

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