

REVIEW



Between Freedom and Subsistence: China and Human Rights by Ann Kent
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Do human rights begin with breakfast or with the right to request breakfast? This may sound like a chicken-and-egg conundrum. But as with any conundrum, the way critics tackle it sometimes belies the validity of their theories.

In this book, Ann Kent starts with the familiar assumption of a 'universal character of rights.' This she identifies by assuming further a convergence of the conflicting rights discourses, which she describes (following Henry Shue, R J Vincent, et al) as consisting of a 'core' of recognised rights, namely the right to life. The core right has the merit of being ideologically neutral, she argues, for it embraces both the economic/social right to subsistence and the civil/political right to physical security, emphasised by socialist and third world states like China (PRC) and Western liberal democracies respectively. The former is a right to 'adequate food, clothing, shelter, and minimal preventive health care'; the latter a right 'not to be subject to murder, torture, mayhem, rape, or assault.' Together, they form the 'inherent necessities' for the exercise of any other right (pp 15–16).

Theoretically then a core right is not the same as a universal right; and the advantage is obvious. While the universalist must dispel the slightest shadow of cultural relativism by every conceivable means including, occasionally, putting human rights in the mouths of Confucius and Mencius, the core right theorist simply assumes that opposition and conflict can and will end in convergence and diversity. That of course is a respectable moral conviction, to which I shall return. My interest is mainly in how Ann Kent transforms this conviction into a 'comparative international human rights framework' (p 3) within which to renegotiate, 'between freedom and subsistence,' a historical narrative of China's 'rights experiences.' As an illustration, we may take one of her central themes for a brief analysis.

The author observes that the first three PRC constitutions of 1954, 1975, and 1978 were generally congruent with the rights condition of a rigidly controlled society, in which the government arbitrarily limited and cancelled its citizens' civil/political rights but at the same time endeavoured to fulfil promises of improving their economic/social/cultural rights. The result was an 'unmistakable Marxist "trade-off" of civil and political rights for economic, social, and cultural rights.' The 1982 constitution, however, is betrayed by rapid social changes. Its provisions were designed to uphold the 'normal Marxist priorities,' but are 'in fact out of step with the informal and substantive reality of all rights in China' (p 231). Since 1979, the reform has seen much erosion in the economic and social rights (such as the right to work) of Chinese

citizens, in dramatic contrast to their civil and political freedoms (such as freedoms of movement, speech, press, assembly, and association), which actually have flourished, though informally (that is, without enabling legislation), at least up to June 1989 (pp 96-7). The growing incongruity between constitutional norms and social reality in the reform era has created a gradual 'loss of consensual value system,' a 'condition of normlessness or *anomie* and lack of respect for authority,' thereby threatening the continual operation of the prevailing *Gemeinschaft* practices of mediation and conciliation (p 234). Given these grim circumstances, the author warns, unless China discontinues the 'trade-off' of rights and effectively extend formal protection to citizens' informal but expanding freedoms, the nation's political stability will be in jeopardy. A core right theory therefore not only can balance and resolve the conflict of the two kinds (or 'generations') of rights but is essential, as an inevitable political choice, for China's reform programme to succeed.

This last point, though interesting and worth careful study on its own grounds, need not be reached in our analysis, for the author's narrative of (and her argument against) the 'trade-off' seems to have been conceived in a misunderstanding of the nature, condition, and functions of the Chinese constitutions and 'rights,' formal or informal, both before and after the reform. I shall discuss this in two parts.

Relationship between the Chinese constitutions and social reality

The general view in China is that the 1982 Constitution, in rejecting the 'ultra-leftist' line of its immediate predecessors and in reaffirming the principle of equality before the law, comes closer to the 1954 Constitution. So to many Chinese constitutional scholars, Ann Kent's classification which opposes the latter to the former may be a rather enlightening new perspective. However, if they follow her suggestion to approach the 'interplay' between constitutional provisions and 'informal condition of the rights actually enjoyed by Chinese citizens' (p 3), they will probably arrive at a quite different conclusion.

One important function of all four constitutions is to negate (in the Hegelian-Marxist sense) the political line and mode of class struggle represented in the previous constitutional order and to mark the establishment of a new order for a new 'general task.' Therefore to begin with, the constitutional provisions (whether as promises or as prescriptions) must be congruent with the totality of social relationships that gives rise to the general tasks the Preambles enunciate. For example, the controversial Article 90 (1954 Constitution) right of abode and movement was not anachronistic until urban household registration entailed food rationing in the late 1950s. If, however, our examination is about the entire period in which a constitution is supposed to apply, then it is safe to say that, excepting the 1982 Constitution, none kept its congruity for more than two years. The reason is simple: the constitutions failed to follow the political line of the Party (CCP).

Thus the 1954 Constitution is a negation of the 'violent storm' mode of class struggle following the 1949 Liberation (land reform, anti-counter-revolutionaries, etc). Its general task for the new 'transitional period' to socialism provides that forms of property ownership to be protected shall include peasants' right to own land and capitalists' right to own the means of production (Arts 8, 10), as well as that all citizens shall be equal before the law (Art 85). These provisions, however, were soon undermined by a series of collectivisation and 'socialist transformation' measures. Already, in the elementary agricultural producers' cooperatives (*chujishi*) organised under a 1953 CCP resolution, the income distribution was to discount the amount of land member families contributed at a lower rate than that for work they accomplished. In May 1955, the State Council issued a notice that virtually banned the sale and pawning of land in peasants' hands. Peasants' ownership of land formally ended in 1956 in the advanced agricultural producers' cooperatives (*gaojishi*), which established collective ownership of land and the chief means of production. In 1958, the new system was finally consolidated into the People's Commune, which replaced 'unconstitutionally' the township people's committee as the basic organ of state power.

In urban areas, the 'socialist transformation' was completed in 1956. The capitalist ownership system dissolved, along with all its affiliated rights. The 1957 Anti-Rightists campaign turned a new page of class struggle and socialist revolution. The constitutional principle of equality before the law was openly criticised and repudiated. Thereafter, the incongruity of the 1954 Constitution with the social reality of China became an epitome of the entire legal system, until 1979. If in theory, as official legal theory still maintains, law was pronounced an instrument of the proletarian dictatorship, reflecting the will of the ruling classes, then in practice it was certainly not highly regarded, if not held in contempt, by the 'pioneer of the working class.' In fact, the instrument was authoritatively thought to be too bookish, bureaucratic, inherently hostile to the initiative of the revolutionary masses, and therefore not responsive enough to the opposition and ever-changing relations of the class powers.

The same incongruity awaited the 1975 and 1978 constitutions. The former fell with the 'Gang of Four' in October 1976; the latter lost its grace in December 1978, at the Third Plenum of the Eleventh CCP Central Committee which ushered in the reform. In 1979, the principle of equality before applicable laws was revived (Art 5 of the People's Court Organisation Law, Art 8 of the People's Procuracy Organisation Law, Art 4 of the Criminal Procedure Law). Despite the lack of constitutional support (cf Art 25(3) of the 1978 Constitution), the Standing Committee of the National People's Congress made eleven laws during 1979–1982, in anticipation of a new legal regime.

Only the 1982 Constitution, twelve years after its promulgation, is still capable of serving its general task. This is largely due to the overall continuity of the reform and opening-up policies (such as the household responsibility

system and the labour contract system), as well as the amendments introduced to adjust it to these policies (eg, legal recognition of private economy and permission of transfer of the right to use land in the 1988 amendment, and the series of revisions to accommodate the 'socialist market economy' in the 1993 amendment). More significantly, however, the constitution owes its congruity to the emergence of a formal legal system in China. Concepts such as 'citizen' and 'rights' begin to acquire new meanings both substantively and procedurally; that is, in an increasing number of cases, it is now possible to conceive of the freedoms, interests, and obligations of an individual in terms of a form of juridical process and documentation, and even predict, affect, or control according to that conception the consequences of his action (and inaction). Law attains its instrumentality.

The Marxist 'trade-off' and the right to work

Before the reform, the author asserts, the right to work was at the centre of the economic rights 'traded' in for Chinese citizens. This right was broken down when the People's Commune gave way to the household responsibility system. The decollectivisation of agricultural production is said to have effected 'a kind of enclosure system.' Released redundant labour then moved to urban areas, especially coastal cities, seeking new job and business opportunities. 'In the language of rights,' the author explains, the Chinese peasants thus exchanged their previous 'source of subsistence,' or right to work on their collectively owned land, for a new economic right to choose employment and a new civil right of movement (p 118). The Marxist 'trade-off' can no longer be justified.

Whether there is an 'enclosure system' taking over rural China is beyond the scope of our discussion. But to say that the Chinese peasant had a right to work, central to his economic rights, is indeed surprising. Anyone who once earned a living in the People's Commune can recall what work meant to the peasant, a right, an entitlement, or an obligation, a necessity of life. It is true that the three pre-reform constitutions all promised such a right in Chapter Three ('Citizens' Basic Rights and Duties'); from the peasant's point of view, however, far more accurate and certainly in full force were the words of the General Principles, 'those who do not labour shall not eat' (Art 9 of the 1975 Constitution, Art 10 of the 1978 Constitution). Hence this 'right' was called a 'glorious duty,' from which only the sick, the disabled, and the aged could be partially exempted. No peasant would dare to relinquish it, for only its fulfilment entitled him to food and other income for the subsistence of his family, under the socialist distribution principle of 'from each according to his ability, to each according to his work.' If however by right to work is meant life employment, then it has nothing to do with the peasant but applies only to the status of state employees (including the working class). One may note that there were some who could afford not to fulfil the 'glorious duty' after the 'socialist transformation' and still eat and eat well. As the Hohfeldian scheme

of jural relations tells us, these enjoyed not a right not to work but a privilege, the jural opposite of a duty to work. Duty and privilege speak of a distinction in statuses. China was then a society strictly defined by a class status (*jieji chengfen*) system in its allocation of freedoms and necessities.

So 'trade-off' is a rather dubious notion. But even before one can ask what kind of 'trade-off' might take place in this society, one should first ask whether there existed such a thing as 'rights' to be traded off. Or from another perspective, whether there existed such a person as 'citizen' to claim, hold, and enjoy the constitutionally promised 'citizens' rights.'

The 1957 Anti-Rightist campaign condemned the 'citizen' and his equal rights before equal laws as a bourgeois hoax. Under the 'people's democratic dictatorship,' as Chairman Mao determined, conflicts of social relationships (contradictions) are of two kinds, those within the people and those between the people and their enemies. 'People' however is a political concept; its scope varies with the place, time, and mode of class struggle, pursuant to the CCP 'united front' policy designed to isolate and destroy the enemy. It would be meaningless to speak, as the author does, of 'trading off' a 'citizen's rights.' Instead, the questions were, as put in any application and registration forms: Who is this 'citizen'? What is his name, age, vocation, political affiliation, father's class status, and that of his father's father, etc, etc? And above all where does he stand in the two camps of classes, the revolutionary and the reactionary? No 'language of rights,' even a 'Marxist' one, can answer such questions. Once in that language, however, the author has to admit an exception to the 'trade-off': during the Cultural Revolution, people were encouraged to use the so-called 'four great freedoms' (to speak out, air views, debate, and write big character posters). Were these not civil and political rights empowering the masses to overthrow 'enemies within the Party' (p 57)? But like the 'right' to work, the 'great freedoms' carried grave obligations, too. Not to use them or incorrect use may put in doubt one's class position as member of the revolutionary masses; only correct use shows correct political consciousness and is therefore essential for one to obtain, keep, and increase any material benefits. These 'informal' political freedoms are in fact necessities as a consequence of one's class status. In other words, only by carrying out these freedoms/necessities of class struggle, can one justify one's entitlement to the status and its accompanying benefits, economic, social, and cultural. It was not until the reform began, when 'citizen' re-emerged as a rights-holder, did these freedoms/necessities become possible to be vested as rights in a person with no reference to class status and as duties in the state for the protection of these rights. The 'four great freedoms,' too, started to assume qualities now associated with rights. Consequently they were deleted from the constitution.

In the final analysis, Ann Kent's historical narrative of China's 'rights experiences' speaks only of a moral conviction in the convergence and diversity of rights. It is the web of assumptions flowing from the conviction that belies

the core theory. For historically as well as logically, there is no guarantee that the opposition 'between freedom and subsistence' must be due to some incongruity or trade-off, or their reconciliation must depend on a 'universal character.' At least in the case of China, what is called a 'right' may not be a right, but sometimes its opposite, its deviation, its extinction. Discourses on rights are not necessarily discourses for and by rights. That their opposition and conflict today tend to take the form and formalities of 'rights' may simply mean a more common use of the formal law, for a more efficacious regime of social control, with challenges and criticisms more rationally (that is, bookishly, bureaucratically, and professionally) deflected and absorbed, including a core right theory. Perhaps the author has also felt the limitations of her theory. In the Conclusion, she invites in Weber and quotes passages about a society's conscious attitudinal changes, law with rational-legal content, and a 'new line of conduct' to match the 'new meaning' or 'new rules' of law (p 237). These are all needed in China. Yet I cannot help wondering: do the 'new meaning' and 'new rules' of law begin with a 'new line of conduct,' or vice versa?

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Hong Kong Conveyancing. Law and Practice Volume 1 by Judith Sihombing and Michael Wilkinson [Hong Kong, Singapore, Malaysia: Butterworths Asia, 1993. Looseleaf, HK\$2,880 (for two volumes, updates extra)]

Many Hong Kong conveyancing lawyers have made fortunes through the wildly speculative and volatile Hong Kong property market, for in Hong Kong speculators buy and sell property with the speed and intensity of roulette players and a flat may change hands many times before an occupation permit is issued. This is not to say that the practice of conveyancing always runs smoothly.

There has been legal scandal connected with conveyancing and plenty of adverse judicial comment on conveyancing solicitors and their practices. The Law Society of Hong Kong, through the issue of numerous circulars and practice notes, has attempted to inform its members of problems and to advise on areas of difficulty. As a result, a conveyancing practitioner in Hong Kong finds it difficult to practise without a knowledge of the various Law Society edicts.

There are, furthermore, government policies which affect conveyancing in Hong Kong and which are unique to Hong Kong, but which are not explained in a single, easily accessible document. These include the Consent Scheme and the New Territories Small House Policy.

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