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新兴权利保障：中国与欧洲的视角

论文集

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数字技术发展与人的意义危机

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作为一个人权学者，我认为，人权研究的终极目标实际上是追问人是什么以及人的意义是什么。只有这样，我们才能够完整地把握人存在的意义并更好地给予人权很好地保护。

在不同的时代人权被塑造成不同的样态，由此我们将人权定义为历史的。

数字技术的到来赋予了人新的形象，创造了新的历史，也给人权保护带来了新的话题，这是人权学者 20 年前不可想象的。但我们也清楚地看见，数字技术发展对人类社会带来了复杂而多层次的影响。它改变了人们的日常生活方式，还深刻影响了社会结构、文化和人际关系，而且还改变了人的思维方式以及人的存在形式。

所以，关注数字技术如何改变我们对自我、他人和世界的理解，以及这些变化对人类价值观和伦理的影响尤为重要。比如：

一、存在与自我认知。数字技术改变了我们对自我存在的理解。虚拟现实和增强现实等技术模糊了现实与虚拟的界限，挑战了我们对真实和虚假的传统观念。这引发了关于身份、真实性和自我认知的哲学思考。

二、自由意志与自主性。在数字时代，算法和人工智能在很大程度上影响着我们的决策和行为。这引发了关于自由意志和自主性的讨论：但我们在多大程度上是自主的，还是被技术所操控？

三、伦理与道德责任。数字技术的发展带来了新的伦理挑战，如隐私、数据安全和人工智能的道德决策。哲学家需要探讨如何在技术进步与人类价值观之间找到平衡，确保技术的使用符合伦理标准。

四、人际关系与社会结构：一般而言，我们说，数字技术改变了人际关系的性质，影响了社会结构和文化。但我们更应该关注的是这些变化如何影响人类的社会性和共同体意识，以及如何在数字时代重建人的意义和价值。

五、知识与真理：数字技术改变了知识的生产和传播方式，信息的泛滥和虚假信息的传播挑战了我们对真理的理解，以及我如何审视知识的本质和获取真理的方法。

六、幸福与生活意义：在数字时代，技术对幸福和生活意义的影响是一个重要的哲学问题。技术可以提高生活质量，但也可能导致孤独、焦虑和疏离感。那我们如何在技术驱动的世界中实现有意义的生活。

七、未来与人类命运：数字技术的发展对人类未来的影响是一个深远的问题。技术可能改变人类的本质，甚至引发关于后人类时代的讨论。我们如何思考人类在技术进步中的角色和责任。

其实，我们更要关心的是人类今后存在意义。随着数字技术不断进步，按照马斯克（Elon Musk）说法，今后的人类进入了按需分配的时代，人类不需要劳动。“人类不需要劳动”，这是一个最危险的命题！用今天我们对劳动的理解，思考也是劳动，也就是说，那时，我们甚至都不需要思考，人完全丧失了劳动能力，那这样的物种还是不是人，人的意义难道就是追求成为一个什么都不需要做，完全可以通过机器“投放”生存的物种？

人类是通过劳动将自己塑造成了像莎士比亚所说的“万物之灵长”。如果人类演变成了什么都不需要做的物种，那人类还配叫人类，还配称之为“万物之灵长”吗？这是人的意义危机，而那时，我们的人权又是什么呢？

总之，数字技术的发展对人的意义是多层次的，涉及存在、伦理、知识和未来等基本问题。通过反思这些问题，我们应更好地理解技术对人类的影响，并指导我们在技术进步中保持人类价值观的核心。

The Development of Digital Technology and the Crisis of Human Meaning

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As a human rights scholar, I believe that the ultimate goal of human rights research is to fundamentally question what it means to be human and the significance of being human. Only by doing so can we fully grasp the meaning of human existence and better protect human rights.

Human rights have been shaped into different forms throughout different eras, which leads us to define human rights as historical.

The advent of digital technology has given humanity a new image, created a new history, and introduced new topics for the protection of human rights—topics that were unimaginable to human rights scholars 20 years ago. However, we can also clearly see that the development of digital technology has brought complex and multi-layered impacts on human society. It has altered people's daily lives, profoundly affected social structures, culture, and interpersonal relationships, and even changed the way humans think and the very form of human existence.

Therefore, it is especially important to focus on how digital technology changes our understanding of self, others, and the world, as well as the impact of these changes on human values and ethics. For example:

1. Existence and Self-Perception: Digital technology has altered our understanding of self-existence. Technologies like virtual reality and augmented reality blur the boundaries between the real and the virtual, challenging our traditional notions of what is real and what is false. This raises philosophical questions about identity, authenticity, and self-awareness.

2. Free Will and Autonomy: In the digital age, algorithms and artificial intelligence greatly influence our decisions and behaviors. This sparks discussions

about free will and autonomy: To what extent are we truly autonomous, and to what extent are we being controlled by technology?

3. Ethics and Moral Responsibility: The development of digital technology brings new ethical challenges, such as privacy, data security, and the moral decision-making of artificial intelligence. Philosophers need to explore how to strike a balance between technological advancement and human values to ensure that the use of technology adheres to ethical standards.

4. Interpersonal Relationships and Social Structures: In general, we often say that digital technology has changed the nature of human relationships, affecting social structures and culture. However, more importantly, we should focus on how these changes affect human sociality and community consciousness, and how to rebuild the meaning and value of human existence in the digital age.

5. Knowledge and Truth: Digital technology has transformed the way knowledge is produced and disseminated. The overabundance of information and the spread of misinformation challenge our understanding of truth and prompt us to re-examine the nature of knowledge and the methods of obtaining truth.

6. Happiness and the Meaning of Life: In the digital era, the impact of technology on happiness and the meaning of life is a crucial philosophical issue. While technology can improve the quality of life, it can also lead to feelings of loneliness, anxiety, and alienation. How, then, can we achieve a meaningful life in a technology-driven world?

7. The Future and Human Destiny: The development of digital technology has profound implications for the future of humanity. Technology may change the very essence of humanity, potentially sparking discussions about a post-human era. How should we think about humanity's role and responsibility in the face of technological progress?

In fact, what we should be more concerned about is the future meaning of human existence. As digital technology continues to advance, according to Elon Musk, humanity is heading towards an era of "allocation on demand," where humans no longer need to work. The statement "humans no longer need to work" is one of the

most dangerous propositions! Based on our current understanding of labor, thinking itself is a form of labor. This implies that, in the future, we might not even need to think. If humans completely lose the ability to labor, then what would this species become? Could we still call ourselves human if our only pursuit is to become a species that survives solely through what is "delivered" by machines, with nothing required of us?

Human beings have shaped themselves into what Shakespeare referred to as the "paragon of animals" through labor. If humanity evolves into a species that does nothing, can we still be called human? Can we still be considered the "paragon of animals"? This would lead to a crisis of human meaning. And in such a future, what would human rights even mean?

In summary, the development of digital technology has a multi-layered impact on the meaning of humanity, touching on fundamental issues of existence, ethics, knowledge, and the future. By reflecting on these issues, we can better understand the influence of technology on humanity and ensure that we maintain the core of human values amidst technological progress.

追求公正的世界和平以作为国际法律秩序的基础

法比奥·马尔切利 意大利国家研究委员会国际法研究所前所长

文明交流互鉴与现代人权哲学思想的发展

The Quest of A Just World Peace as A Basis for the International Legal Order

Fabio Marcelli Former Director of the Institute of International Law of Italy National Research Council

Exchanges and Mutual Learning Among Civilizations and Development of Modern Human Rights Philosophy

人工智能与教育：从权利到政治参与

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摘　要:本报告探讨了人工智能（AI）在教育领域的盛行，对年轻人理解和践行公民身份和权利的程度产生了重大影响。以汉娜·阿伦特[1]的作品为蓝本，本报告中的人权概念基于公民身份和更广泛的政治背景。在这种背景下，权利得以合法化，同时得以实现。据此，本报告将进一步论证教育在资格认证以及在践行公民身份方面所起到的重要作用。然而，人工智能变得日益复杂、商业化，对教育的上述作用构成了重大挑战，因为数据驱动型产品越来越多地被作为一种自动化教学、学习和机构管理活动的手段进行营销，同时对社会和环境的影响也愈加广泛。

本报告有四个主题，人工智能正在通过这些主题塑造教育实践及公民实践相关机会：承诺和假象——关于未来教育方式和社会的设想；知识和专业技能——突出了教育权威的场所转变；包容与平等——与利益分配相关的人工智能；最后，治理和代理——聚焦教师和学生决定教育行业未来的发展程度。每个主题均涉及教育和公民身份之间的基本关系，因此为在人工智能时代理解权利的方式提供了重要见解。

报告最后呼吁教育机构在“数字公民”的发展中发挥核心作用，为年轻人提供实用及概念型工具，以塑造人工智能发展的未来及其对社会的影响。

[1] https://h5.ifeng.com/c/vivo/v002-_AKif96kTarawJxu9a5ZNCxYqh9Y8kQQIR5GVwva9tY__

AI and Education: From Rights to Political Engagement

Jeremy Knox　The University of Oxford

Abstract: This presentation examines the increasing prevalence of artificial intelligence (AI) in education, in ways that are significantly impacting the extent to which young people can understand and practice citizenship and rights. Drawing on the work of Arendt, the concept of human rights in this presentation is grounded in citizenship and the idea of a wider political context in which rights are legitimised and realised. Extending this view, this presentation will argue for the considerable role of education in qualifying and enabling the practice of citizenship. Yet, the increasing sophistication and commercialisation of AI are presenting substantial challenges to this role, as data-driven products are increasingly being marketed as a means to automate the activities of teaching, learning, and institutional administration, while at the same time, being implicated in broader impacts on society and the environment.

This presentation will suggest four themes through which AI is shaping education practice and related opportunities for the practice of citizenship: promises and imaginaries, concerning the ways that the future of education and society are being envisioned; knowledge and expertise, highlighting a shift in the sites of educational authority; inclusion and equality, related to the distribution of benefits associated with AI; and finally, governance and agency, focusing on the extent to which teacher and students can make decisions about the future of the sector. Each of these themes entail fundamental relationships between education and citizenship, and therefore oOer key insight into the ways rights might be understood in the era of AI.

The presentation will conclude with a call for education institutions to play a central role in the development of a ‘digital citizenship’ that can provide the practical and conceptual tools for young people to shape the future of AI development and its impact on society.

AI and Education: From Rights to Political Engagement

Jeremy Knox　The University of Oxford

Introduction

This presentation begins with a discussion of the significant influence of AI in education across ideological, epistemological, sociological, and political dimensions. The presentation will provide a detailed critique of how AI technologies are framed as enhancing learning eOiciency, productivity, and personalization, as well as raising concerns about the deeper implications these technologies have on education's broader purpose. The presentation argues that education is being impacted on four key ways:

Ideologically

AI is often presented as a tool that will transform education through promises of adaptive and personalized learning, or imaginaries of highly eOicient process and timesaving opportunities. These promises create powerful visions of a future where every student has access to customized instruction, and teachers and educational institutions become laboursaving and cost-eOective. 'Acceleration, eOiciency, and enhancement' have become the key rationales for an AI-driven education future (Eynon 2022). However, the underlying ideology is often rooted in market-driven concepts of eOiciency, enhancement, and competitiveness, which does not always align with more holistic and expansive views of the project and purpose of education. AI therefore align with, and intensify, an already-marketized education section. As Donoghue suggests, 'market categories of productivity, eOiciency, and competitive achievement, not intelligence or erudition, already drive the academic world' (Donoghue 2008, xvi).

Furthermore, visions of AI futures often derive from powerful vested interests, framing the uptake of technology as inevitable, leaving little room for alterative ideas about educational and social change.

Epistemologically

AI's role in shaping what constitutes valid knowledge and expertise is another key concern. There is a growing focus and valorisation of 'data science' and other computational skills, which give authority to data-driven insights at the expense of other ways of knowing in education. This has been highlighted through the increasing use of student data and associated 'data infrastructure' incorporating AI to shape education policy and governance (Williamson 2019). At the same time, automated learning technologies increasingly render student activity into 'analytics'that are fed back to teachers in the form of performance data (e.g. Francis et al. 2020). This foregrounds and privileges narrow, partial, and limiting knowledge about what happens, and what is ultimately valued in education, downplaying other forms of knowledge and critical pedagogical approaches.

Sociologically

While often simplistically promoted as widening access to education or overcoming economic barriers, AI has been shown to exacerbate existing social inequalities, particularly in terms of amplifying achievement gaps. Technologies often reflect and intensify biases present in society, which has the eOect of increasing inequalities between those who have access to high-quality educational tools and those who do not. The promotion of AI in education often emphasises seductive ideas about universal education provision, or the benefits of one-to-one learning through AI – as Friesen suggests, 'the educational "dream" of 'everyone learning everything' (Friesen 2019, p2). However, the reality is likely to be a substantial rise in inequality and marginalisation, as commercial products seek revenue returns, and the greatest benefits from an AI infused education remain located in the global north.

Politically

Governance and agency are also critical issues in AI-driven education, particularly as AI products, services, and infrastructure are being provided by increasingly powerful and global private companies. The agency of education institutions, teachers, and students to make decisions about the use of AI is being significantly impacted. For example, a recent analysis of contracts between private digital education companies and universities reveals several concerns. These include

the targeting of marginalized students, revenue extraction, lack of transparency in the terms of the relationship, and the locking of institutions into agreements through automatically renewing contracts or overly complex termination processes (Hamilton et al. 2024, p.11). Furthermore, big tech companies have amassed significant power and influence, turning educational institutions into experimental grounds for new AI technologies. As Williamson suggests:The analytics, data, and AI systems developed by global technology companies and edtech businesses have become experimental engines of algorithmic education— and school systems have become their laboratories. (Williamson 2021) Just where the boundaries of governance and decision-making are within such opaque data infrastructures is becoming increasingly diOicult to discern.

Rights for AI and Education

The concerns discussed in the previous section - about the future of education, powerful new rationales for data science, social inequalities, and obscure modes of governance - might be addressed through engagement with notions of human rights. This section will therefore draw on the Council of Europe's educational interpretation (Holmes et al. 2022) of the Turing Institute framework for human rights (Leslie et al. 2022), to examine the impact of artificial intelligence (hereafter AI) on education, with a particular concern for the role of citizenship. Eight of these rights are considered in turn: the right to education; the right to autonomy; the right to be heard; the right not to suOer from discrimination (fairness and bias); the right to privacy and data protection; the right to transparency and explainability; the right to withhold consent; and the right to be protected from economic exploitation (Holmes et al. 2022).

The right to education

Across rights frameworks (and AI ethics guidelines) the 'right to education' is frequently emphasised. This often suggests that a fundamental right to education should be supported, rather than hindered, by AI. Proponents of the technology often suggest that AI can widen access to education, typically by providing 'personalised' assessments and feedback in contexts that lack qualified teachers. However, others

warn that AI systems could exacerbate inequalities, particularly for disadvantaged groups, because more advantaged populations are more likely to benefit. A key question here is therefore what kind of education is being proposed as a fundamental human right. If it is simply access to some kind of educational activity where there has previously been very little, then the expectation for the sophistication of the AI intervention is likely to be fairly low. If the aim is to provide education of a similar quality universally, it seems unlikely that AI can address such a disparity on its own.

The right to autonomy

This discusses the importance of students maintaining control over their learning processes and decision-making abilities in the context of AI-driven education. It highlights concerns that AI systems could undermine students' independence by overly dictating their learning paths, thus restricting their freedom to make choices about their own education. This right calls for ensuring that AI tools are designed and used in ways that respect and support students' autonomy, allowing them to retain agency over their learning experiences.

The key question here is the extent to which autonomy over learning is actually educationally valuable. An uncritical shift to valorising student autonomy overlooks the complexity and professional judgement of the teacher, as well as the idea of a collective (rather than individual) purpose for education (Biesta 2009; 2013; 2015).

The right to be heard

This emphasizes that student and other stakeholders in education should have a voice in decisions involving AI systems that impact them. This right aligns with broader human rights frameworks, advocating for the inclusion of students in discussions about how AI is used in educational settings. It stresses the importance of ensuring that AI systems do not marginalize students' input, encouraging a participatory approach where their views and concerns are acknowledged and addressed in the development and deployment of AI in education. These ideas potentially align with emerging areas of research and practice, variously termed inclusive design (Mohammed and Watson 2019), co-design (Akama & Light 2018), design justice (Constanza-Chock 2020), universal design for learning (ULD) (Dalten

et al 2019). However, as this research discusses, challenges remain how students can have an authentic voice in shaping a technology with a high level of sophistication, such as AI.

The right not to su=er from discrimination (fairness and bias)

This addresses concerns about how AI systems in education might unintentionally perpetuate or amplify existing biases. It stresses the importance of fairness in AI, ensuring that these technologies do not discriminate based on race, gender, socioeconomic status, or other characteristics. The document calls for transparency and accountability in AI algorithms to prevent discriminatory outcomes and ensure that all students are treated equally, reinforcing the need for ethical standards in AI design and implementation.

While bias is often highlighted as a key concern in the educational use of AI (e.g. Onesi-Ozigagun et al. 2024), it is also argued that bias needs to be understood as a deeply embedded aspect of society, rather than a simple technical error in the AI system (Whittaker, et al. 2018).

The right to privacy and data protection

This addresses the challenges AI poses in protecting students' personal data in education settings. It highlights concerns about how AI systems collect, store, and process sensitive information, potentially compromising students' privacy. The document calls for strict data protection regulations, ensuring that AI technologies comply with existing laws like the General Data Protection Regulation (GDPR). It stresses the need for transparency in data handling and informed consent to safeguard students' privacy rights in AI-enhanced education systems.

A focus on privacy and data protection dominates the discussion of AI, both in terms of rights frameworks and ethical guidelines. However, as Knox (2021) argues, there is a danger in fixing on the struggle for ownership while avoiding much more substantive questions about the ways the processing of that data is valorised. Furthermore, privacy (re)entrenches an individualistic view of solutions to the harms of AI and data, and exists in tension with collective values and ideals, for which indvidiuals might want to sacrifice their personal data sovereignty.

The right to be protected from economic exploitation

This highlights the potential risks of commercial interests influencing the use of AI in education. It emphasizes that students should not be treated as commodities, and their personal data or educational activities should not be exploited for profit by tech companies. Knox notes this as a concern where 'private companies appear to extract value from the conduct of teachers and students engaged in public education' (Knox 2021, p7). This right therefore calls for safeguarding students from being unfairly monetized through AI-driven educational tools, ensuring that education remains a public good rather than a means of generating financial gain for private entities.

Conclusions - from rights to political engagement

The presentation will conclude by suggesting a need for greater political engagement, both in the ways the technology is understood and the ways education is practiced. As Morozov (2013) argues, the discussion of technology, in which we can include the latest deliberations around AI, has failed to address social impact because engrained assumptions about the separation of technology and society remain: '[t]he reason the digital debate feels so empty and toothless is simple: [it is] framed as a debate over "the digital" rather than "the political" and "the economic"' (Morozov, 2013). In other words, concerns about AI continue to be unsolved because the technology is viewed as a distinct domain of 'innovation' acting upon society from the outside, rather than a technology that is enmeshed and inextricable from society itself.

While rights frameworks, such as the dimensions discussed in the previous section, provide a useful way of defining society values and raising public awareness of pertinent issues and concerns, their universal relevance and applicability has been questioned (Arendt 2004). The ability to assume 'rights' for students engaged in an AI-infused education appears implausible without those students already belonging to some kind of political community. This is precisely why education must not simply or exclusively focus on rights, but rather citizenship, through which young people can learn with and through technologies such as AI in ways that foster and sustain the public sphere and the common world.

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新兴权利与普遍人权

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摘要：新兴权利的出现和被认可是特定历史阶段社会观念的产物。当人们对人性尊严作出新的解释和要求，新的道德诉求就会出现；而人们之所以会对人性尊严作出新的解释和要求，根本上是因为人们对人性尊严提出了更高的期待，而这种更高期待的背后是更高的经济社会发展程度。普遍人权清单处于增长之中，意味着很多权利都是由尚未被接受的相对性逐渐走向被国际社会接受的普遍性。随着新兴权利的不断增加，国际社会的人权清单呈现出令人忧心的“泛化”趋势，其结果导致国际社会对于一项诉求是否应该被承认为人权存在争议。人权清单的变动性必然导致人们对人权普遍、普遍人权进行新的思考。

关键词：新兴权利；人权普遍性；普遍人权

Emerging Rights and Universal Human Rights

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Abstract: The emergence and recognition of new rights are products of social concepts at specific historical stages. When people provide new interpretations and demands regarding human dignity, new moral claims arise. The reason for these new interpretations and demands fundamentally stems from a higher expectation of human dignity, which is rooted in a higher level of economic and social development. The universal human rights list is growing, indicating that many rights are transitioning from relative acceptance, which has yet to be acknowledged, to universal acceptance by the international community. As emerging rights continue to increase, the human rights list in the international community presents a concerning trend of “generalization,” leading to disputes over whether a particular claim should be

recognized as a human right. The volatility of the human rights list inevitably prompts a rethinking of the universality of human rights and universal human rights.

Keywords: Emerging Rights; Universality of Human Rights; Universal Human Rights

新兴权利与普遍人权

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一、新兴权利产生的历史性

二战以来，国际社会逐步形成了以《世界人权宣言》和联合国人权核心公约为基础的人权清单。这一人权清单大致包含着三个方面的权利类型，一是以保障自由为核心的权利类型，主要体现为公民权利和政治权利；二是以保障社会平等为核心的权利类型，主要体系为经济、社会、文化权利；三是以强调集体人权为核心的权利类型，如自决权、发展权、和平权、环境权等。从人权清单的产生历史来看，首先是 17 世纪以来逐步兴盛的自由权概念和自由权规范，其次是 19 世纪开始兴盛的社会权利概念和社会权利规范，最后是二战后逐步提出并被认可的自决权、发展权概念和规范。《世界人权宣言》人权清单中的权利观念和规范并不是同步形成和出现的，至少不是在同一时期获得社会和法律认可的。换言之，人权观念和规范的形成不是一蹴而就的，而是随着政治、经济、社会、文化的发展而不断丰富的。

既然人权清单的形成具有历史性，那么人权清单就不可避免地会进一步扩展，即不断产生新兴权利。产生新兴权利的社会动力是什么？第一，新兴权利所包含的道德诉求得到社会的广泛承认。随着经济社会的不断发展，人们对人性尊严的认识也在不断变化。物质生活条件的不断提升、个人自我意识的不断张扬，导致人性尊严的范围出现扩大化趋势。原来不被认为是人性尊严所必需的诉求或利益，现在可能就被社会所广泛认可，成为维护人性尊严所必需的道德诉求。例如，同性婚姻的社会诉求。第二，新的道德诉求难以在既有法律规范中找到依据。如果新的道德诉求能够通过现有权利规范得到保护，那么就不一定形成新的权利概念和规范。在法律层面上，它可能是法律解释、法律适用等技术问题；从社会学角度来看，它也可能涉及资源配置、社会意愿等问题。当一个社会没有足够政治意愿时，往往会依赖已有法律规范来实现对该道德诉求的法律保护，而不愿意推动新的法律变革。第三，新的道德诉求能够通过法律予以保护。从立法技术和司法裁判来看，新的道德诉求可以成为法定权利并得到司法保护。某些新的道德诉求即便得到社会承认，但是如果在立法技术或司法裁判中难以实现，那么它也可能

难以成为新兴权利。由此可见，新兴权利的出现和被认可是特定历史阶段社会观念的产物。当人们对人性尊严作出新的解释和要求，新的道德诉求就会出现；而人们之所以会对人性尊严作出新的解释和要求，根本上是因为人们对人性尊严提出了更高的期待，而这种更高期待的背后是更高的经济社会发展程度。

从新兴权利的形成与发展历程来看，权利观念不是天生的，当社会文明和个人自我意识发展到一定程度，人性尊严才能成为社会共识生发出近代人权观念。人权所追求的自由、平等、发展等价值，本质上是在特定社会或特定历史阶段求而不得的普遍诉求。人权本身就表明人们会对社会的一种期待。当处于霍布斯所设想的自然状态时，人人都是自由的，不可能产生追求自由的诉求。只有当国家或社会形成后出现公权力与个人权利、个人权利之间的冲突时，自由诉求才会产生。同样，虽然早在工业革命之前，许多国家都存在扶贫济困的社会保障实践，但是只有到工业革命和机器化大生产带来伤残、贫困、失业、童工等普遍的、严重的社会问题时，社会保障权利才被承认为一项基本人权并受到法律保护。自决权虽然早在 18 世纪就有思想基础，但成为一项基本人权主要是二战后非殖化运动的推动。总而言之，人权不是天生的，人权观念和规范的形成与发展，必然根植于特定的历史背景、社会语境。

二、新兴权利与人权普遍性

普遍人权是指得到普遍承认并被普遍享有的人权。众多学者提出了不同版本的普遍人权清单，逐渐将普遍人权理解为将人权当作一种应当被普遍尊重和遵行的价值，体现为各国所公认的人权清单的内容，其中最广为接受的版本便是《世界人权宣言》列出的人权清单。坚定的普遍论者往往以《宣言》的广泛接受来论证人权普遍性的不可置疑，但是人权清单并非不可变动的，而是处于不断增长的态势。

20 世纪 50 年代国际社会对于是否将经济、社会和文化权利纳入人权清单就发生过严重分歧，无独有偶，20 世纪 80 年代在人权清单中纳入发展权的呼声也引发了旷日持久的争议，时至今日，众多国际组织、国家甚至学者呼吁将诸如“数字人权”“环境人权”“工商业与人权”“体育与人权”等一系列新兴人权纳入人权清单。之所以能够不断产生“新兴人权”并成为人权清单的一部分，是因为“新兴人权”来自于特定的历史、经济、社会背景之中，不同国家通过论证利益

需求的哲学基础，并向国际社会提出有说服力的理由，使得多数国家通过在宣言或法律中确认这种权利，使之成为一项具有普遍性的、获得正式承认的新兴人权。所以，新兴人权——社会保障权、受教育权、健康权等经济、社会和文化权利一度也是新兴人权——的产生历史以及“三代人权”的发展表明，人权清单中的大部分权利并非当然的具有普遍性，它取决于特定政治、经济、社会、文化发展状况。若是某项权利仅仅得到个别国家或社会的承认，显然不足以进入普遍人权清单，无法被视为普遍人权。

普遍人权清单处于增长之中，意味着很多权利都是由尚未被接受的相对性逐渐走向被国际社会接受的普遍性。随着新兴权利的不断增加，国际社会的人权清单呈现出令人忧心的“泛化”趋势，其结果导致国际社会对于一项诉求是否应该被承认为人权存在争议。在一些国家内部，一些学者热衷于提出并论证新的人权类型，并且认为是维护人性尊严所不可或缺的。在国际社会上，一项在某些国家得到立法承认的权利，却无法得到其他国家的承认与支持。

那么，一项具有国际争议的新兴权利，是不是普遍人权？人权清单的变动性必然导致人们对人权普遍、普遍人权进行新的思考。一方面，包括新兴权利在内的很多权利是从相对性走向普遍性，其背后取决于国际社会共识度。有人或许认为，权利具有法律和道德两个维度。作为一种法律权利，它的普遍性取决于社会共识，因而存在实践上的相对性；但是作为一种道德权利，它的普遍性取决于人性尊严的普遍价值，因此是普遍的。但是，这一观点没有认识到，既然人性尊严的范围是在不断发展的，就表明人性尊严价值也是取决于社会共识的。另一方面，即便一些权利被纳入国际人权公约，它也难以被所有国家所接受。此时，它作为普遍人权标准的地位就受到质疑。确实，《宣言》人权清单中也并非每项权利能够取得被每个国家所接受的普遍性，也不是每一份联合国人权公约都得到了每一个国家的批准或加入。不可否认，的确存在一部分被国际社会普遍公认的、在任何时候都不可克减、不可施加限制的权利，诸如禁止酷刑、禁止奴役、禁止种族灭绝等，除此之外的大部分权利仍然带有可以进行讨论的相对性问题。正如查尔斯·贝茨(Charles Beitz)所言，尽管《世界人权宣言》的起草者对人权达成一致理解，并确立了共同的人权基本原则，但其只是在观念层面，而非实践意义上的认同。这种在实践意义上形成共同认同的困难，使得米尔恩、纳斯鲍姆、格里芬、

罗尔斯等学者试图压缩普遍人权的内涵，以一份具有政治（道德）影响力的“薄”的人权清单，获得“不同的经济、文化和政治传统的社会”的广泛接受。[2]这再次说明，大部分权利的普遍性不一定取决于该权利的性质，更可能是取决于特定阶段的社会。

2 Alistair M. Macleod. *Rawls' s Narrow Doctrine of Human Rights*. in Rex Martin & David A. Reidy, Rawls' s Law of Peoples: A Realistic Utopia?, Blackwell Publishing Ltd, 2006, p.134-149.

中国特色社会主义人权：将环境权重新视为集体权利

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摘　要：从本质上看，环境与人权息息相关。环境权是生命、健康、获得水和其他基本必需品等基本权利的基础。国际法已逐步认识到这种联系的重要性，其主要人权条约中纳入了具体的环境条款，人权法院所审理的与环境问题相关的案件数量亦呈显著上升趋势。尽管存在这种内在联系，但在一般的人权讨论中，环境层面往往被忽视。尤为关键的是，全球生态危机对人类生存构成了威胁，发展中国家受到的影响尤为严重。在世界努力应对气候变化问题的进程中，各国在环境治理中发挥着日益重要的作用。中国，作为世界上最大的发展中国家，位于这一挑战的风口浪尖。中国通过其人权模式（通常被称为“中国特色人权”）展示了自身的独特视角。本文试图通过对当前中国人权方案文献及其相关官方文件（包括宪法文本和白皮书，特别是习近平主席执政时期发布的宪法文本和白皮书）的内容进行定性分析，探讨中国模式对人权生态重新评估所作的贡献。支撑中国人权观的哲学基础和政策框架是什么？这些如何促使全球承认环境权是具有约束力的集体人权？中国的“生态文明”和“人类命运共同体”愿景可以通过哪些方式为推进这些努力做出贡献？中国为理解人权的唯物主义和集体主义内涵提供了一个全面框架。该框架与全球对环境权的认可相吻合，并有助于将环境权重新设定为对世界各国具有约束力的集体人权。同样，中国提出的“生态文明”和“人类命运共同体”愿景反映了一种独特的合作方式。这种方式不仅偏离了主导西方自由主义人权话语的个人主义，而且通过全球参与和积极投身全球环境治理，跨越了中国的国界。

关键词：集体主义；人类命运共同体；生态文明；环境权；中国特色人权；唯物主义

Socialist Human Rights with Chinese Characteristics: Re-Envisioning Environmental Rights as Collective Rights

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Abstract： The environment is fundamentally linked to human rights, serving as the foundation for essential rights such as life, health, and access to water and other basic necessities. The significance of this link is increasingly recognized in international law, with major human rights treaties incorporating specific environmental provisions and a growing number of cases related to environmental issues being addressed by human rights courts. Despite this intrinsic connection, environmental dimensions are often overlooked in general human rights discourse. Importantly, the global ecological crisis poses an existential threat to humanity, with its impact disproportionately felt by developing countries. As the world grapples with the consequences of climate change, the role of these countries in environmental governance becomes increasingly critical. China, as the world's largest developing country, stands at the forefront of this challenge, offering a unique perspective through its model of human rights, often referred to as "human rights with Chinese characteristics". This paper seeks to explore what the China model might contribute to an ecological reappraisal of human rights based on a qualitative content analysis of the existing literature on China's current human rights approach and its official documents on the subject, including constitutional texts and white papers, particularly those issued during the Xi Jinping era. What are the philosophical foundations and policy frameworks that underpin China's human rights perspective? How might these contribute to the global recognition of environmental rights as binding collective human rights? In what ways can China's visions of "ecological civilization" and a "community with a shared future for humanity" contribute to advancing these endeavours? China's materialist and collectivist understanding of human rights offers

a comprehensive framework that aligns with and contributes to the global recognition of environmental rights re-envisioned as collective human rights binding for all nations. Similarly, its visions of “ecological civilization” and “community of shared future for humanity” reflect a uniquely cooperative approach that not only departs from the individualism that dominates Western liberal human rights discourses but also extends beyond China’s borders through its global engagement and active participation in global environmental governance.

Keywords: collectivism; community of shared future for humanity; ecological civilization; environmental rights; human rights with Chinese characteristics; materialism

现代人类命运共同体中的人权问题

博喜文 德国联邦州黑森州欧洲与国际事务部门前负责人

——在人类命运共同体中践行有效人权观

——全球共同体是一个文化多样性的共同体

——作为人权的概念，不能单纯地照搬法国大革命形成的西方概念，这将是新殖民主义

——最基本、最突出的人权是生命权

——这项权利主要受到极端贫穷和血腥战争的威胁

——保障这一基本人权的重点是消除贫困，积极促进和平与解决

Human Rights in a Modernized Community of Shared Future

Michael Borchmann Former Head of the Department of European and International Affairs in the German Federal State of Hessen

- A practical view to effective human rights in a global community with shared future
- Global community is a community full of cultural diversity
- As a concept of human rights you cannot just transfer the western concept, formed by the French revolution. This would be neo-colionalism
- The fundamental and outstanding human right is the right of life
- This right is mainly endangered by extreme poverty and bloody wars
- The main focus of safeguarding this basic human right are the eradication of poverty and engagedly working for peace and settlement

现代化与人权：中葡论坛在促进包容发展中的作用

佩德罗·安若思 葡萄牙智库“中国观察”青年观察员

摘　要：现代化日益体现了一种整体性的人的发展观，人权为其奠定了基础。在全球化、技术进步与经济发展的挑战下，审视这些力量如何塑造人权框架至关重要。本文探讨了现代化与人权的交汇点，通过澳门论坛的视角，重点关注中国和葡语国家（PSC）的经验。通过强调中国与葡语国家（PSC）合作所建立的经济伙伴关系、文化交流以及基础设施投资，它认为现代化可以与保护多元人权传统并行不悖，同时促进共享繁荣。此分析展现了澳门论坛是如何体现一种尊重主权、促进发展、培育跨文化交流的多边合作典范，最终对可持续现代化做出贡献。

关键词：人权；现代化进程；中国；澳门论坛；葡语国家；经济发展；跨文化交流；可持续发展

Modernization and Human Rights: The Role of Fórum Macao in Promoting Inclusive Development

Pedro Anjos　Young Observer of the Portuguese think tank “Observation for China”

Abstract: Modernization increasingly embodies a holistic approach to individual development, with human rights as its foundational element. As the global community grapples with challenges stemming from globalization, technological advancement, and economic growth, it becomes essential to scrutinize how these forces shape human rights frameworks. This article investigates the intersection of modernization and human rights, focusing on the experiences of China and Portuguese-speaking countries (PSC) through the lens of Fórum Macao. By highlighting economic

partnerships, cultural exchanges, and infrastructural investments fostered by China's engagement with the PSC, it argues that modernization can coexist with the protection of diverse human rights traditions while promoting shared prosperity. This analysis illustrates how Fórum Macao exemplifies a model of multilateral cooperation that respects sovereignty, advances development, and nurtures intercultural dialogue, ultimately contributing to sustainable modernization.

Keywords: Human rights, modernization, China, Fórum Macao, Portuguese-speaking countries, economic development, intercultural dialogue, sustainable development.

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Abbreviation List:

CPDFund – China-PSC Cooperation and Development Fund

MSAR – Macau Special Administrative Region

PSC – Portuguese-Speaking Countries

Introduction

The discourse on human rights has traditionally centered on the protection of fundamental freedoms and equality. However, the dynamic nature of globalization and technological advancement necessitates a re-evaluation of human rights in contemporary contexts. How can nations effectively navigate the complexities of modernization while safeguarding the holistic development of individuals? This question is particularly pertinent in the context of China's relations with developing nations, especially the PSC, through platforms like Fórum Macao. This article explores the role of Fórum Macao in facilitating inclusive development and demonstrates how modernization can coexist with respect for diverse human rights frameworks.

This paper is written in the context of the seminar on "*The Protection of New and Emerging Rights: Views from China and Europe*" which seeks to address key issues surrounding the definition and implementation of human rights. It investigates how modernization efforts—often propelled by economic growth and technological advancement—impact human rights, with a specific focus on the dynamics between China and the PSC.

Defining Modernization and Human Rights

Modernization is commonly understood as the process through which societies transition from traditional to modern states, typically characterized by rapid industrialization, technological advancements, and economic progress. While these factors are crucial in assessing a country's modernity, a comprehensive understanding of modernization also encompasses broader social and human development aspects, including cultural fulfillment, intellectual growth, and access to basic rights. Thus, a key measure of modernization lies not merely in economic growth but in the capacity of individuals within society to pursue their potential freely.

Human rights frameworks, which provide the normative basis for such individual freedoms, must adapt to the challenges posed by modernization. Globalization, economic inequality, and technological change all affect the implementation of human rights, necessitating a holistic approach that integrates these developments. In this context, China's engagement with developing countries, particularly through initiatives like Fórum Macao, offers valuable insights into how modernization can align with human rights protection, emphasizing not only economic growth but also the capacity for individual and community development.

China's Approach to Developing Countries: Cooperation and Development Dynamics

China's foreign policy approach towards developing countries is often framed by its adherence to the Five Principles of Peaceful Coexistence, which include mutual respect for sovereignty, non-interference in domestic affairs, and equality. This framework underpins China's interactions with various nations, facilitating partnerships aimed at development while avoiding the imposition of external political models. The flexibility of this model allows partner countries to pursue modernization within their specific cultural and social contexts.

For developing countries, comprehensive development is closely tied to access to infrastructure that fosters self-reliance and long-term growth. Rather than creating dependency through foreign aid, sustainable development should empower local communities, equipping them with the necessary tools to direct their own progress. This shift underscores the importance of localized development efforts in achieving

broader social and economic goals.

China's engagement with developing countries includes support in diverse areas such as infrastructure development, technological cooperation, human resource training, and humanitarian assistance. These initiatives are part of broader efforts to alleviate poverty and promote development, but they must be analyzed in light of their long-term impact on local capacities and economic sovereignty. While China's contributions often take the form of critical infrastructure and debt relief, the effectiveness of these initiatives depends on their ability to enhance human well-being and dignity in the countries involved.

Fórum Macao, established in 2003, is one example of China's strategy to foster multilateral cooperation with Portuguese-speaking countries (PSC). It provides a platform for collaborative economic projects, cultural exchanges, and capacity building. The multilateral nature of the Fórum allows for inclusive decision-making, with each country playing a role in shaping the agenda. However, it is essential to critically evaluate whether the benefits of these collaborations are equitably distributed among the participating nations, as well as how diverse traditions and human rights perspectives are respected within these interactions.

Fórum Macao: A Platform for Inclusive Development

The Forum for Economic and Commercial Cooperation between China and Portuguese-speaking Countries (Macao), referred to as Fórum Macao, was established in October 2003 at the initiative of the Central Government of China. Organized by the Ministry of Commerce of China, it benefits from collaboration with the Government of the Macao Special Administrative Region (SAR) and coordinates with nine Portuguese-speaking countries: Angola, Brazil, Cape Verde, Guinea-Bissau, Equatorial Guinea, Mozambique, Portugal, São Tomé and Príncipe, and Timor-Leste. Fórum Macao serves as a multilateral intergovernmental cooperation mechanism focused on economic and commercial development, aiming to strengthen economic and trade exchanges between China and the PSC, enhance Macau's role as a cooperation platform, and promote common development among inland China, the PSC, and the Macao SAR.

Fórum Macao has played a pivotal role in fostering development within the PSC, with China acting as a key partner in infrastructural investments, technological cooperation, and capacity-building initiatives. In 2011, the Training Centre of Fórum Macao was established, conducting 54 seminars by the end of 2021 in collaboration with the Ministry of Commerce of China and various higher education institutions. These seminars engaged over 1,300 participants from PSC, focusing on areas such as public administration, taxation policies, and trade law.

This development extends beyond economic metrics, encompassing a broader context of human development, which includes education, cultural exchanges, and access to essential resources. The training initiatives aim to enhance local capacities and empower professionals from the PSC, contributing to their active participation in sectors like tourism and airport management.

China's commitment to development is reflected in its extensive support for the PSC, including significant investments in infrastructure, agriculture, energy, and education. Initiatives such as the China-PSC Cooperation and Development Fund (CPDFund) highlight China's dedication to fostering sustainable growth in these regions. Notable projects include the Agricultural Park Project in Mozambique, aimed at enhancing agricultural productivity and food security, and the São Simão Hydroelectric Project in Brazil, which supports clean energy production.

These investments transcend mere economic endeavors, representing efforts to improve quality of life and promote self-sufficiency in the PSC. Fórum Macao exemplifies how modernization can be pursued in a manner that respects national sovereignty while promoting holistic development.

The CPDFund: A Model for Sustainable Development

The CPDFund, established as part of China's broader commitment to the PSC, serves as a vital instrument for promoting sustainable development. Through targeted investments across sectors such as infrastructure, health, and education, the Fund contributes to the overarching goal of modernization while ensuring the protection of human rights. By facilitating projects that enhance access to essential resources and empower local communities, the CPDFund exemplifies how modernization can align

with human rights, fostering environments where individuals can thrive.

One of the key strengths of the CPDFund is its emphasis on sustainability. Rather than promoting short-term economic gains, the Fund prioritizes long-term development projects that build local capacity and reduce dependence on external aid. This approach reflects a commitment to empowering communities to shape their own futures, a crucial aspect of both modernization and human rights.

Intercultural Dialogue and Human Rights

Beyond its economic contributions, Fórum Macao plays a crucial role in promoting intercultural dialogue between China and the PSC. The annual Cultural Week of China and Portuguese-speaking Countries provides a platform for celebrating shared cultural heritage while respecting the distinct identities of each nation.

This event, organized by the Permanent Secretariat of the Forum for Economic and Trade Cooperation between China and Portuguese-speaking Countries, aims to enhance cultural exchange and understanding. It showcases the rich traditions and diversity of both cultures through music, dance, cuisine, and the arts. Activities include performances from various Portuguese-speaking countries and China, culinary demonstrations by renowned chefs, and exhibitions featuring local artisans. The event also incorporates traditional games, ensuring engagement across all ages. By serving as a vibrant platform for cultural dialogue, the Cultural Week reinforces Macau's role as a bridge between China and the Lusophone world.

This focus on cultural exchange counters the misconception that modernization leads to cultural homogenization, demonstrating instead that diverse civilizations can coexist and collaborate toward shared goals of development and human dignity. The respect for cultural diversity promoted by Fórum Macao aligns with a broader understanding of human rights that acknowledges the plurality of civilizations. Rather than imposing a single model of human rights, modernization efforts should be flexible, allowing for different interpretations that reflect the unique histories and cultural contexts of each nation. In this regard, China’s approach to modernization in the PSC offers valuable insights into how diverse human rights frameworks can coexist in a globalized world.

Challenges and Opportunities for the Future

While the relationship between China and the PSC has been largely positive, challenges must be addressed to ensure that modernization efforts continue to promote human rights. One key issue is the potential for economic dependency, as some critics argue that China's investments in the PSC may create imbalances in power dynamics. However, the multilateral structure of Fórum Macao and China's policy of non-interference mitigate these concerns by ensuring that development respects the sovereignty of partner countries.

Moreover, the increasing influence of technology in modernization raises questions about data privacy and surveillance, especially in countries with varying legal frameworks. It is essential for all stakeholders to engage in constructive dialogue about the implications of technological advancements for human rights and development.

Conclusion

The relationship between China and the Portuguese-speaking countries (PSC), facilitated by Fórum Macao, presents a compelling framework for pursuing modernization that honors and integrates diverse human rights traditions. By fostering economic development, cultural exchange, and human capacity-building, China's engagement with the PSC illustrates that modernization extends beyond mere economic growth; it is fundamentally about creating environments where individuals and societies can flourish.

A critical aspect of this process is the comprehensive development of individuals in developing countries, which significantly relies on access to infrastructure that facilitates genuine emancipation. Rather than perpetuating cycles of dependency through external aid, it is essential for these nations to acquire the tools necessary for self-sufficiency. This shift towards sustainable development promotes local empowerment, enabling communities to shape their own futures.

As the global community navigates the evolving landscape of human rights within the context of modernization, we must recognize the potential for collaboration among diverse civilizations in pursuit of shared goals centered on development and

human dignity. Fórum Macao exemplifies how a strategic platform can support inclusive development that respects human rights while celebrating cultural diversity.

Ultimately, the synergy fostered through Fórum Macao demonstrates that the path to modernization can be a shared journey—one that empowers communities, honors their unique cultural identities, and provides the infrastructure necessary for sustainable growth. By prioritizing holistic development, we can work towards a future where modernization not only enhances the fundamental rights and values inherent to all peoples but also equips them to realize their own aspirations for prosperity and autonomy.

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发展是实现人权的一部分：中国和欧洲发展模式概述

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在过去二十年里，世界各地，尤其是发展中国家，越来越重视人权。这主要源于 20 世纪 90 年代初至 21 世纪初的大规模民主化和自由化进程。同期，评估显示，中国贫困人口锐减了 8 亿。相比之下，欧洲有约 7370 万人面临陷入贫困的风险，约 2700 万人处于严重物质贫困和社会贫困的困境。除此之外，另有约 2930 万人生活在低劳动强度的家庭中，他们陷入贫困的机率大大上升。有趣的是，在该时期，最富有的人资本积累不断增长，从而导致贫富差距扩大（尤其是在新冠疫情期间）。在此背景下，本文就中国和欧盟发展模式中发展是实现人权一部分的问题进行了探讨。早期证据表明，中国的发展模式以发展作为人权的基础，而欧洲盛行的是自由放任模式。

Development as a Facet of Human Rights: An Overview of Chinese and European Development Models

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The last two decades have seen an increased focus on human rights across the world, with a particular emphasis of developing nations. This is largely due to the mass democratisation and liberalisation process in the early 1990s leading up to the early 2000s. Within the same period, China has remarkably decreased the number of people who live in poverty by an estimated 800 million. Contrastingly, 73.7 million people in Europe were estimated to be at risk of falling to into poverty, whereas 27 million were severely materially and socially deprived. In addition to this, it was also estimated that 29.3 million lived in a household with low work intensity, thereby

increasing their chances of falling into poverty. Interestingly, this period is also marked my capital accumulation for the richest, thereby widening the gap between the rich and the poor (especially during the COVID-19 pandemic). Against this backdrop, this paper interrogates development as a human right between China's and EU's development model. Early evidence shows that China's development model is anchored by development as a human right condition, whereas a laissez-faire model prevails in Europe.

中国刑法对环境权的保障

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摘　要：中国重视用包括刑法在内的法律手段保护环境权，目前已经形成的完整的环境资源犯罪体系体现了主客一体的哲学思想和中国天人合一的理念。环境资源犯罪的保护法益包括对人的生命、身体、健康、财产利益和经济利益的保护，以及对环境、资源本身的生态法益的保护。司法实践中在适用环境资源犯罪时，应当区分行政违法和刑事违法，并根据刑法的规范保护目的对构成要件做实质解释。

关键词：环境资源犯罪；生态学的人类中心主义法益论；天人合一；规范保护目的；实质解释

Protection of Environmental Right in Chinese Criminal law

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Abstract： China attaches great importance to the protection of environmental rights by legal means, including criminal law, and the complete environmental resources crime system that has been formed so far embodies the philosophical idea of the unity of subject and object and the concept of the unity of nature and man in China. The protection of legal interests in environmental resource crimes includes the protection of human life, body, health, property interests and economic interests, as well as the protection of ecological legal interests of the environment and resources themselves. In judicial practice, when applying environmental resource crimes, a distinction should be made between administrative violations and criminal violations,

and substantive explanations of the constituent elements should be made in accordance with the normative protection purposes of the criminal law.

Keywords： environmental resource crimes, anthropocentrism in ecology, the theory of legal benefits, the unity between human being and nature, the purpose of normative protection, and the substantive interpretation

中国刑法对环境权的保障

王政勋 西北政法大学

环境权指公民享有在健康、安全、舒适的环境中生存的权利。中国重视对环境权的保障，我国《宪法》第 9 条规定，“国家保障自然资源的合理利用，保护珍贵的动物和植物。禁止任何组织或者个人用任何手段侵占或者破坏自然资源”；第 26 条规定，“国家保护和改善生活环境和生态环境，防治污染和其他公害。国家组织和鼓励植树造林，保护林木。”刑法是保障环境权的重要手段。

一、中国刑法中环境资源犯罪立法变迁

改革开放以来，中国经过四十多年的高速发展，经济社会各方面都取得了日新月异的变化，人民生活水平得到极大的提高。但另一方面，也产生了较为严重的环境问题，如水土流失、土壤荒漠化、一些地方的环境污染等。

十八大以来，中央高度重视环境问题，十九大报告指出，“人与自然是生命共同体，人类必须尊重自然、顺应自然、保护自然。”“我们要建设的现代化是人与自然和谐共生的现代化。”二十大报告指出，“大自然是人类赖以生存发展的基本条件。尊重是自然、顺应自然、保护自然，是全面建设社会主义现代化国家的内在要求。必须牢固树立和践行绿水青山就是金山银山的理念，站在人与自然和谐共生的高度谋划发展。”基于这种认识，中国提出了创新、协调、绿色、开放、共享“五位一体”的新发展理念，形成了经济建设、政治建设、文化建设、社会建设、生态文明建设“五位一体”的中国特色社会主义事业的总体布局，认为绿色是永续发展的必要条件，要坚持节约资源和保护环境的基本国策，建设人与自然和谐共生的现代化；生态文明建设是关乎中华民族永续发展的根本大计，保护、改善生态环境就是保护、发展生产力，决不以牺牲环境为代价换取一时的经济增长。

在新发展理念的指导下，中国坚持山水林田湖草沙一体化保护和系统治理，全方位、全地域、全过程加强生态环境保护，生态文明制度体系更加健全，生态环境保护发生历史性、转折性、全局性变化。

刑法的任务是惩罚犯罪，惩罚犯罪的目的是为了惩恶扬善、规范和引导人们

的行为，从而引领社会发展，在贯彻绿色发展理念、建设人与自然和谐共生的现代化的过程中，刑法起着重要作用。

1979 年刑法对环境犯罪的规定较少。由于当时生产力发展水平不高、人类改造自然的能力有限，环境问题并不突出，也由于当时的中国更强调利用自然、征服自然、改造自然，而不甚强调人与自然的和谐共处，所以 79 刑法的分则只是在经济犯罪一章中以 3 个条文规定盗伐林木罪、滥伐林木罪、非法捕捞水产品罪、非法狩猎罪 4 个罪名。

随着环保意识的不断提高，中国日益重视对环境的保护，1989 年颁布的《环境保护法》将保护环境规定为基本国策；1997 刑法在分则第六章中专列一节“破坏环境资源保护罪”，以 9 个条文（第 338 条至 346 条）规定了 15 种犯罪，从而构建起了完整的环境资源犯罪体系。

此后，中国又几次对环境资源犯罪进行了修正完善，如将“重大环境污染事故罪”修改为“污染环境罪”，增设破坏自然保护地罪等新罪名；对一些犯罪的构成要件、法定刑做了修改；等。

目前，中国刑法在分则第六章第六节以 11 个条文规定了 16 种环境资源犯罪：污染环境罪；非法处置进口的固体废物罪；擅自进口固体废物罪；非法捕捞水产品罪；危害珍贵、濒危野生动物罪；非法狩猎罪；非法猎捕、收购、运输、出售陆生野生动物罪；非法占用农用地罪；破坏自然保护第罪；非法采矿罪；破坏性采矿罪；危害国家重点保护植物罪；非法引进、释放、丢弃外来入侵物种罪；盗伐林木罪；滥伐林木罪；非法收购、运输盗伐、滥伐的林木罪。

二、刑法理论对环境资源犯罪的学说

刑法学界早年多认为环境资源犯罪侵犯的客体是国家对环境资源犯罪的管理制度，如认为重大环境污染事故罪的犯罪客体是“国家环境保护管理制度”，非法采矿罪的客体是“国家的矿产资源保护制度”，等。这种观点把环境资源制度本身作为保护法益，现在已经少有人坚持。目前学界多从人与自然的关系的角度来考察该类犯罪的保护法益。

1.“纯粹的人类中心主义法益论”。该说站在以人类为中心的立场上，将人的利益或需要作为环境资源犯罪的法益，认为环境本身不具有独立的刑法保护价值，环境只有与人的生命、健康和财产相联系时才有保护的必要。以前学者多持

该说，如认为环境犯罪侵犯的是不特定多数人的生命、健康和重大公私财产的安全。

该说符合人类长期的历史实践，其哲学根基是主客二分的哲学体系。以今天的眼光看，该理论存在着明显缺陷：立足于主客二分的哲学，一味强调利用自然、征服自然、改造自然，而不是尊重自然、顺应自然、保护自然，造成了人与自然、人与人、人的心灵内部的紧张，现代社会的一切问题都可以从主客二分的哲学中找到其根源；不符合修正后我国刑法的规定。根据修正后的刑法，污染环境行为即使没有侵犯生命、身体与财产法益，也可以成立污染环境罪；将人的“利益或需要”作为环境犯罪的唯一法益，忽视环境法益自身的价值，不利于保护生态环境。

2.“纯粹的环境中心主义法益论”。该说坚持以生态为中心的立场，强调应将伦理平等的观念扩大到全体生态系统中去，自然具有与人类同样明确且值得敬畏的权利，因而，环境犯罪是危害生态系统的犯罪，其保护法益是“自然环境”，即生态学上的环境及其他环境利益。根据该理论，只要严重侵犯了生态法益就可以成立犯罪，因而有利于保护生态环境。

该理论也存在着明显缺陷。（1）主张生态系统各要素具有与人类平等的权利义务，生态界其他成员的存在和人的存在等价。以此观点，当人类利用自然行为侵犯其他生物的平等权利时，就应当加以禁止。这样，一些生产建设因为会不同程度地破坏某些野生动物的栖息地，侵犯它们的权利，因而应当予以禁止。这显然不符合现实。（2）既然人类的利益不能优越于环境利益，那么就应当禁止为了人类的利益而污染环境。该种观点抹杀了主体的重要性，把主体降低到了客体的程度，降低了人类的价值。事实上，人是万物之灵，没有万物，人的灵魂无处安放，没有人，世界万物是没有意义的。之所有要保护环境资源，就是因为环境资源对人类有用。“绿水青山就是金山银山”的说法就体现了环境对人类的价值，是以人类为主体的，“节约资源、保护环境”等都为了保护人类的长远利益。工业生产必然会产生废水、废气及废渣，对生态环境造成污染，各国所做的只是在工业生产不可或缺、工业污染不可避免的情况下通过颁布污染许可标准，使工业生产的污染处在“可接受风险水平”，环境保护只是禁止人类对环境的过度污染、对自然资源的过度使用。

3.“生态学的人类中心主义法益论”。认为环境刑法的保护法益包括人的生命、身体机能与财产等相关的利益，以及与此相关联的生态系统保持。这一该理论将环境法益和传统的人类法益并列，既提高了环境本身的价值，又肯定了人类的主体性，是主客一体哲学的体现，体现了中国人天人合一的思想，目前成为主流理论。

主客一体的哲学强调万物一体、民胞物与、天人合一。所谓万物一体，是指世界上的万物，包括人在内，虽然千差万别，各不相同，但又息息相通，融为一体。万物以一体为其根源，离开了这个一体，就没有任何人和任何物；天人合一的理念认为“道生一一生二二生三三生万物，人法地地法天天法道道法自然”，所以人和自然应当和谐相处。

一部人类文明史就是一部人与自然的关系史。由于人和自然有不同、有差异，人是万物之灵，自然不可能自觉地理解人、适应人的需求，在和谐相处的过程中人同时要不断地和自然作斗争，否则人类就无法利用自然为自己服务，人类将长期受自然的宰制、自然的奴役，物质生活、精神生活将长期处于低下的水平，人的主体性就得不到展现。所以，人类需要以自己的努力来使自然理解人、适应人，使自然和人类和谐相处——人类主动顺应自然的规律性和必然性，以越来越发达的自然科学、越来越重要的知识和必然性，以万物一体的爱的精神肯定、尊重、顺应、保护自然，使人与自然相通相融、和谐相处。

新发展理念中的绿色发展注重解决人和自然的和谐问题，绿色是永续发展的必要条件，坚持绿色发展，就是要坚持节约资源和保护环境的基本国策，构建生态文明体系，建设人与自然和谐共生的现代化。“总体国家安全观”中包括生态安全、资源安全、生物安全等，这些方面和环境资源的法律保护密切相关，保护生态环境就是保护人类，建设生态文明就是造福人类。保护生态环境、建设生态文明既是关系民生的重大社会问题，更是关系党的使命宗旨的重大政治问题。

对于环境资源犯罪，应该放在新发展理念、总体国家安全观的视域下、在“五位一体”的总体格局中进行理解和解释。我国刑法对环境资源犯罪的规定就体现了生态学的人类中心主义法益论，如 97 刑法关于环境污染罪的规定强调对人的保护，要求发生“致使公司财产遭受重大损失或者人身伤亡的严重后果”，修八将其修改为“严重污染环境”，修十一将“后果特别严重的”修改为“情节严重”；

修十一增加了三个罪名，包括禁食野生动物的规定，破坏自然保护地罪，非法引进、释放、丢弃外来入侵物种罪，这些立法上的修改都进一步强调了环境资源本身的价值，改变了以前那种纯粹人类中心法益论的立场。

据此，环境资源犯罪的保护法益是双重的：（1）对人的生命、身体、健康、财产利益和经济利益的保护；（2）对环境、资源本身的生态法益的保护。由于人的主体性存在，前者更为重要，生态学上的法益需要和人的法益具有关联性，保护环境资源、打击环境资源犯罪，最终在于保护人的利益，不能还原为人类（包括个体和人类整体）的生命、身体、健康、自由、财产、经济利益的环境法益，不能用刑法加以保护。

三、环境资源犯罪的司法适用

司法实践中在适用环境资源犯罪时，应当注意区分行政违法性和刑事违法性。行政法和刑法存在重大区别：（1）规范保护目的不同。行政法是为了实现行政管理的目的，更强调对行政秩序的维护，刑法的目的则是保护法益，是为了惩处以违反规范的方式实施的侵害了法益的行为。（2）刑罚的本质是报应，是一种回顾性的惩罚措施，且具有浓厚的道义谴责性；行政处罚的目的在于维护社会秩序，立足于预防，更多的是一种展望性的保安措施，其中不含有明显的谴责性评价。（3）刑法的最高价值是公正，更强调自由保障的功能；行政法的最高价值是效率，更强调秩序维护的功能。因此，刑事违法性和行政违法性不仅有量上的区别，更有质上的区别。即：

违反行政管理规范=行政违法性；

违反行政管理规范+法益侵害+不存在违法阻却事由=刑事违法性。

也就是说，在认定环境资源犯罪的刑事违法性时，必须注意刑法和行政法不同的规范目的，必须根据不同犯罪的不同保护法益来对刑法分则条文进行实质解释；仅违反行政法规范、并未造成刑法所要求的法益侵害的，不构成环境资源犯罪。

在判定环境资源犯罪的刑事违法性时，大致包括以下步骤：

1.根据前置法的规定划定犯罪的大致范围。

环境资源犯罪都是法定犯，刑法规定相关犯罪必须“违反国家规定”、“违反保护水产资源法规”、“违反野生动物保护管理法规”、“违反土地管理法规”、

“违反自然保护地管理法规”等。所以，环境资源犯罪首先是违反了相关行政法规定的行为，未违反前置法规定的，不可能构成相关犯罪。

2.根据刑法的规范保护目的对构成要件进行实质解释。

违反前置法规定的行为有可能构成犯罪，在此基础上，应进一步根据特定犯罪的规范保护目的，对构成要件进行实质判断。不同的环境资源犯罪有不同的保护法益，如污染环境罪的保护法益是影响人类生存和发展的环境资源质量；非法占用农用地罪的保护法益是保持农用地原有生态性质的环境利益、实现农用地的可持续发展，为人类社会提供可依赖的生产资料；非法采矿罪的保护法益是对矿产资源的合理利用和国家对矿产资源的财产权；等，这些保护法益是对相关犯罪的构成要件进行实质解释的依据。

犯罪的社会危害性通过危害结果体现出来，只有发生了危害结果（结果犯），或者具有发生危害结果的高度危险性（危险犯），才能成立犯罪，既无结果又无危险的，就不具有犯罪的社会危害性。对刑法文本的解释是形式解释和实质解释的结合，形式解释是看当下案件中的行为在语义上是否符合刑法分则的明文规定，实质解释是看当下案件中的具体行为是否具有发生危害结果的现实危险性。所以，环境资源犯罪的行为形式上违反了相关国家规定，实质上具有导致环境资源受到破坏、环境利益受到损害的现实危险。

3.环境资源犯罪中可能存在违法阻却事由，对于包含有利益冲突的案件，应当根据法益平衡、情非得已、手段相当等原则，确定该当于构成要件的行为是否不具有实质的违法性，从而阻却犯罪的成立。

中国保障公民社会经济权利的政策（良好实践）

玛丽安娜·田 保加利亚科学院国家与法律研究所

中国作为世界上最大的两个经济体之一、人口最多的两个国家之一和全面发展的引领者，越来越多地参与国际进程。尽管这一活动（经济、社会、技术、文化）具有复杂的性质，欧洲主要国家传统上首先从人权的角度来考虑这一活动。人权问题一直是西方对中国施压的工具，也是外交政策决定（如制裁）的借口。作为其话语政策的一部分，中国最近从防御转向了进攻，包括在人权问题上。中国的相关论述既维护了自身发展模式的权利，也凸显了西方制度的不足。这种话语实践与中欧在人权理解上的根本差异相对应，体现在《中华人民共和国宪法》第二章、《欧盟人权宪章》和《欧洲保障人权与基本自由公约》的规定中。基于上述文件，本文确定了中国和欧洲在基本人权观念上的差异。这是理解中国和西方话语对抗背后的差异和方法的关键。

China’s Policy for the Protection of Social and Economic Rights of Its Citizens (Good Practices)

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China, as one of the two largest economies in the world, one of the two most populated countries and a leader in the dynamics of comprehensive development, is increasingly involved in international processes. Despite the complex nature of this activity (economic, social, technological, cultural), the leading European countries traditionally consider this activity, first of all, in the context of human rights. The issue of human rights has been an instrument of Western pressure on China, and also serves as a pretext for foreign policy decisions (such as sanctions). As part of its discursive policy, China has recently shifted from a defensive to an offensive position,

including on the issue of human rights. The relevant discourse of China not only defended the right to its own development model, but also highlighted the shortcomings of Western systems. This discursive practice corresponds to the fundamental differences in the understanding of human rights in China and Europe, which are shown in the provisions of the second chapter of the People's Republic of China Constitution, the Charter of the European Union on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Based on the above documents, the differences between Chinese and European perceptions of fundamental human rights are identified. This is the key to understanding the differences and approaches underlying the discursive confrontation between China and the West.

从人权到生命安全权

扬·坎贝尔 捷克左翼研究所学术委员会

摘　要：人权争议的核心是对两套人权之间关系的分歧，即公民权利和政治权利以及社会权利和经济权利。此外，有必要将文明多样性、转型过程和当前的军事冲突视为全球人类学战争的一部分。然而，多数辩论仍局限于理论和规范层面，因此亟待实证性证据来推进这场辩论。

例如，从一项多国调查中获得的数据表明，相较于西方国家，社会和经济权利在中国的支持基础更为广泛，政治和公民权利亦是中国公众关注的重要问题。[1]2019 年 6 月 21 日，我在位于维也纳的奥地利司法部会议厅发表了题为《东西方人权价值观比较》[2]的论文。论文阐述了西方人权概念的四个主要事实，并介绍了两个论点。（1）历史背景。（2）语言表述方式。（3）无法解决的矛盾和悖论。(4)人力资源概念的非科学起源。两个核心论点是：(1)欧洲人权法院（ECHR）的判决理论上是目前仍有效力正式法律文件，因此不受先例约束。该判决试图通过在没有令人信服的理由的情况下不改变其管辖权来树立裁决的法律确定性和可预见性。此外，与《公约》其他条款以及最后但同样重要的《欧洲人权公约》（ECHR）自主解释所确立的权利相冲突的原因众多，允许比国家法律提供的保护范围更广的保护，这实际上制约了国家主权；（2）当前的地缘政治和地缘经济环境的特征是缺乏信任、缺少对话、线性技术发展不足、缺乏普遍认可的价值观和国家利益以及缺乏科学依据[3]的人权概念。这使得两者比较的结果理论价值有限（无法量化和不能比较其本质）。

我在去年于罗马发表的另一篇论文《现代化与每个人的全面自由发展》[4]中提出，只有肯定和保护人们在安全、物质财富、社会关系和公平待遇方面的利益，才能实现社会秩序与和谐。至少在这些问题上，中国以孔孟为代表的儒家思想与欧洲人权的通用概念并不矛盾。但是：

中国伦理道德教育强调的不是主张权利，而是同情的态度，即认为所有的同胞都有相同的欲望，因此也有相同的权利，正如人人都愿意享受那样。这与西方的政治宣传立场相矛盾。西方认可并提倡个人主义，认为中华人民共和国政府极

大程度上剥夺了其公民的权利，并一贯限制公民各项自由权，使其无法实现真正的自由。

本文揭示了战争人类学，描述了从人权到人身安全权的发展过程，这个过程源自上述两篇论文中所得出的结论。经过时间的检验，这一过程被证明是正确、有效的，形成了一种代表新挑战和机遇的趋势。

关键词：欧洲人权法院/公约；人力资源；悖论；病态科学；文明型国家

From Human Rights to the Right to Safety of Life

Jan Campbell　the Academic Committee of the Czech Left Institute

Abstract：At the centre of controversy over human rights is the disagreement on the relationship between two sets of human rights - civil and political rights on the one hand, and social and economic rights on the other. In addition, there is a need to consider the variety of civilizations, the transformation processes and the current military conflicts as a part of the global anthropological war. Much of the debate, however, has been undertaken on theoretical and normative levels. Empirical evidence is needed to advance this debate.

For instance, drawing data from a multination survey suggest that while social and economic rights have a much broader support base in China than in Western nations, political and civil rights are also important concerns to the Chinese public.[3]

In my paper - Comparison of Human Rights Values between the East and the West[4], delivered in Conference Hall of Austrian Ministry of Justice, Vienna, June 21, 2019 I stated four main facts in regard to the Western concepts of human rights and introduced two arguments.　1) The historical background. 2) The language aspect

[3] https://www.researchgate.net/publication/277231222_An_East_and_West_Debate_on_Human_Rights

[4] https://www.vision-gt.eu/publications1/analytical-dossier/comparison-of-human-rights-values-between-the-east-and-the-west/

and the formulations. 3) The fact of non-resolvable contradictions and paradoxes. 4) The non-scientific origins of HR concepts. The two central arguments are: A) Judgments of ECHR as living instrument not formally bound by precedents, trying to establish a legal certainty and foreseeability of rulings by not changing its jurisdiction without compelling reasons. Further the number of reasons of conflict with rights entrenched in other provisions of the Convention and last but not least the ECHR autonomous interpretation, allowing a protection much wider in scope than the protection offered under national law, lead practically to limitations of national sovereignty; B) The current geopolitical and geo-economic environment which could be characterized by the absence of trust, dialog, linear technological development, commonly accepted values and national interests, and the concept of human rights lacking scientific origin[5] make any result of their comparison of only limited and theoretical value (not quantifiable and of quality).

In my other paper - Modernization and the Free and Well-rounded Development of Every Person[6], delivered in Rome last year I argued that a social order and harmony can only be pursued by affirming and protecting people's interests in security, material goods, social relationships, and fair treatment. On these issues, at least, there is no incompatibility between Confucianism and the general concept of human rights in Europe. But:

Instead of claiming rights, Chinese ethical teaching emphasizes the sympathetic attitude of regarding all one's fellow men as having the same desires, and therefore the same rights, as one would like to enjoy oneself. This contradicts the political propaganda stand of the West, which thinks and promotes the individualism and the

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[5] In 1953 Langmuir (1881/1957), an American chemist, physicist, and engineer. He was awarded the Nobel Prize in Chemistry in 1932 for his work in surface chemistry coined the term "pathological science", describing research conducted with accordance to the scientific method, but tainted by unconscious bias or subjective effects. This is in contrast to pseudoscience, which has no pretense of following the scientific method. In his original speech, he presented ESP and flying saucers as examples of pathological science; since then, the label has been applied
1953 年，欧文•朗缪尔（1881-1957），美国化学家、物理学家和工程师，因在表面化学的贡献而获得 1932 年诺贝尔化学奖。他创造了“病态科学”一词。该词描述的研究基于科学方法而进行，但受到无意识偏见或主观因素的影响。这与未遵循科学方法的伪科学形成鲜明对比。在朗缪尔最初的报告中，他以超感知能力（ESP）和飞碟为例阐述病态科学，这个标签从那时起一直沿用至今。

[6] https://www.vision-gt.eu/publications1/analytical-dossier/modernization-and-the-free-and-well-rounded-development-of-every-person/

position that the government of the People's Republic of China deprives citizens of their rights on a sweeping scale and systematically curtails freedoms as a way to freedom.

This paper written in the shadow of the anthropological war describes a process, which has been developing from the conclusions stated in the two papers previously mentioned, and which have been proven by the time as correct, valid a leading to a trend representing a new challenge and opportunity and defined as-From the human rights to the right to safety life.

Keywords: ECHR, HR, contradictions, paradox, pathological science**,** civilizational state.

From Human Rights to the Right to Safety of Life

Jan Campbell the Academic Committee of the Czech Left Institute

Introduction

Human rights form a fundamental pillar of modern international law and morality. They belong to every person, regardless of nationality, ethnicity, gender or religion. One of the key rights within this doctrine – officially - is the right to security of life, which is inextricably linked to the right to life and is considered one of the most important aspects of the protection of the individual. Unfortunately for reasons of politics shaping the discussion and application of human rights, the right to security of life has been for 75 years plus neglected, although it had to be the governing law for the human rights from the day one and only now it comes out from the shadow.

The history of human rights goes back a long way, but their systematic formulation did not begin until after the Second World War. In 1948, the Universal Declaration of Human Rights was adopted, which established fundamental rights and freedoms for all. The right to life, the right to personal safety and protection from violence are explicitly mentioned in Article 3 of the Declaration: *Everyone has the right to life, liberty and security of person*.[7]

Given issues, like the absence of trust in geopolitics and international relations, ruthless competition between states and civilizations to name a few the key fundamental human rights cannot be protected in absolute terms for four main reasons: 1) The historical background. 2) The language aspect and the formulations. 3) The fact of non-resolvable contradictions and paradoxes. 4) The non-scientific origins of HR concept.[8]

As every person has its own individual map of the world; no one is any more

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[7] The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. https://www.un.org/en/about-us/universal-declaration-of-human-rights

[8] HR concepts belong in the understanding of the author to pathological science as defined by Nobel Price laureate (1932) Irving Langmuir (1881-1957).

'real' or 'true' than another, human rights cannot be absolute. And that is why human rights in a variety of civilizations demand the acceptance of diversity, insight, spontaneity, creativity (mainly as the result of a cognitive process) and other dynamics. In other words: we all need to consider the right to safety to life as the base of all other human rights and depolitize it. This requires a strong political will. Such a will stands currently for a deficit at all levels of executive politics. Why it so, is a question for a separate session.

Further to the what I said there are two central arguments which also need to be considered:

1) Judgments of ECHR as living instrument not formally bound by precedents, trying establish a legal certainty and foreseeability of rulings by not changing its jurisdiction without compelling reasons. And the number of reasons of conflict with rights entrenched in other provisions of the Convention and the ECHR autonomous interpretation which leads practically to limitations of already homeopathic and evaporating national sovereignty.

2) The current geopolitical and geo-economic environment and the concept of human rights lacking scientific origin make any result of comparison of human rights of only limited and theoretical value (not quantifiable and of quality). There is an opportunity that Paxology[9] as a complementary science theory to Clausewitz - On War[10] would be established and accepted in the foreseeable future in the East.

As the Eastern and Chinese concepts differ from corresponding Western concepts it follows first that we needed to understand what it means for concepts to differ from one another. Further we need understand that concepts are usually emerging from relatively stable agreements in a community's norms, rather than as single, unchanging things that people had to share for communication to succeed. And that concepts are messier and more complex than one may imagine.

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[9] Cernoch, Felix, University of Defence - Centre for Security and Military Strategic Studies, ISSN: 1210-3292 Central and Eastern European Online Library - CEEOL Journals. There is no self-contained theory dealing with war and peace, the so-called paxology—the theory how peace can be maintained in the world.

[10] On War (Vom Kriege) is a seminal work on military strategy and theory written by the Prussian military theorist Carl von Clausewitz (1780-1831). It was published posthumously by his wife in 1832. The book explores the nature of war, its complexities, and the principles that govern it. Clausewitz introduces the concept of the trinity of war, which consists of the government, the military, and the people,

It should be enough for one begin to understand the complexity of the question – *What makes the difference between concepts* – by analysing what His Excellency Mr. Liu Huaqiu, head of the Chinese delegation to Vienna had written about *quanli,* his term for rights, in June 1993.[11]

The linguistic aspect

Although creativity is considered mainly a cognitive process it is also worth to recall that the knowledge and characteristics of Chinese language and literature stand for a serious challenge to everyone dealing with Chinese text, documents, people and organizations. Similar applies to other Eastern countries. As a result, we all are facing not only a serious creativity and linguistic challenge, but much more also in regard to HR, politics, thinking and cooperation.

For instance, the main characteristics of the Chinese language are: 1) linguistically analytic and isolating, 2) word units do not change because of inflection, 3) idioms and allusions from traditional Chinese culture. From this follows that the concepts in West are West´s own. In East are East´s own. Therefore, concepts in China are China's own. And we in the West should accept this fact, also because all concepts in contexts within which they have emerged and been contested, have in common central episodes in history of the East and the West.

In addition, China's cultural and political history have always drawn on pre-existing concepts and concerns – even when they criticized some of the commitments central to those existing values promoted by the West.

The qualitative difference

A discussion about HR would not very much help as there is a qualitative difference between the time aspect, the way of thinking and arguing. All are different. Under the assumption that all involved in the rights discourse do not think of HR

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[11] In June of 1993, His Excellency Mr. Liu Huaqiu, made the following statement in the course of his remarks to the United Nations World Conference on Human Rights in Vienna: *The concept of human rights is a product of historical development. It is closely associated with specific social, political, and economic conditions and the specific history, culture, and values of a particular country. Different historical development stages have different human rights requirements. Countries at different development stages or with different historical traditions and cultural back-grounds also have different understanding and practice of human rights. Thus, one should not and cannot think of the human rights standard and model of certain countries as the only proper ones and demand all countries to comply with them*. [Liu Huaqiu 1995, p. 214]

values as parochial, and no one wishes a global war, no one can be immune from criticism. Therefore, the words of Nicolas K. Roerich (1874-1947)[12] are still valid: *The last war between men will be a war for truth. This war will be in every person. War with one's own ignorance, aggression, irritation. And only a radical transformation of each individual can become the beginning of a peaceful life for all people*.

And also, the Chinese proverb: *A hut of straw in which people laugh is worth more than a palace in which people cry.*

Further to this, the ECHR autonomous interpretation allowing a protection much wider in scope than the protection offered under national law lead practically to limitations of national sovereignty. There is a question to be asked: Cui buono?

In general, we can say that ECHR stands for a play with words. On the Chinese internet we can find two words - *meizhong buzu*. In my interpretation they mean something like – *in the beauty there is a deficit*. Deficit in understanding the fundamentals in relations between the East and the West seems to me grow by day.

In this paper I focus on a trend, which has been developing from the conclusions stated in the two papers which have been proven by the time as correct, valid a leading to the trend with new challenges as opportunities in times of fundamental changes in the world order and civilizations: The right for safety of life as the only right which has its roots in the law of naturae meets the criteria of the law of science also in the teaching of René Descartes (1596-1650).[13]

The definition of the West and the East

East Asia' refers to countries in the East Asian region that have been subject to prolonged Chinese cultural influence and that have demonstrated economic prowess in the post-World War II era: mainland China, Hong Kong, Taiwan, South Korea, and Japan. Singapore is also included because it is predominantly Chinese, though it is located in the Southeast Asian region.

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[12] Roerich was nominated several times to the longlist for the Nobel Peace Prize. The so-called Roerich Pact was signed into law by the United States and most other nations of the Pan-American Union in April 1935.

[13] Everyone has the right to the highest attainable standard of protection against natural and man-made hazards. This definition is supported by other economic, social and cultural rights agreed in international human rights instruments. This means that nobody, including the Government, can try to end your life.

There are also other countries in the Southeast Asian region, such as Indonesia, Malaysia, Philippines, and Thailand. In general, the *East Asian cultures and regions* are countries and regions affected by Chinese culture (especially Confucianism) in Northeast Asia and Southeast Asia. This definition is also shared by other political philosophers and politicians of the West.

East Asian rights are moral claim rights held by East Asians; Western rights are moral claim rights held by Western people. While universal rights are held by all human individuals, East Asian rights and Western rights are only held by some human individuals. This implies that if some rights are not East Asian rights, then these rights are not universal rights as well as Western rights cannot be universal either.

Therefore, there is a need to identify and define the necessary condition for being a right everywhere, if we want to talk about universal rights. And have the answer to the questions like: What is the concept of the safety? What is the content of the concept of the safety? What action would require the concept to be sustainable?

The current state of the world

For those who can apply *critical thinking*[14], meaning a clear thinking, there is no doubt that we have been witnessing a stage of what I call an *anthropological war.*[15] It means war about moral, ethical, political and material values, resources needed for technological development, and people willing and able to be creative by applying other forms of thinking than the predominantly linear and understanding that the future lies in nature like technologies.

Even those who are not able or willing to accept clear thinking and that we have been already a part of the anthropological war may accept that security community is not only army, technical and secret services, but also NGO, a variety of institutions of which the majority of the public knows a little.

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[14] In simple words, critical thinking is a kind of thinking in which you question, analyse, interpret, evaluate and make a judgement about what you read, hear, say, or write. The term critical comes from the Greek word kritikos meaning “able to judge or discern”.

[15] The neo-imperialism and totalitarianism, which are inborn to the hegemonial globalization and as it saps the resources of culture and destroys its structure, is incompatible with the constitution of human societies for the normal business of producing, maintaining, and transmitting wealth, solidarity, reason, and conscience, all of which are the real indices and values of civilization. See also: Kathleen Gough, “Anthropology and Imperialism,” Monthly Review 19, no. 11 (April 1968): 12–27.

Mentioning security, one should not ignore what has been postulated and confirmed at the yearly Munich security conference 2024[16]: *Our western society is no more attractive, no more developing and practically no more patriotic.*

This means that the key triplet (triad) – life, family, civilization – creating a group value with potential to be valid everywhere does not exist in the West at least. As an example, I would mention the western understanding of the human being (the individuum) as a human capital. This is totally different to human resource. And, also different to understand a variety of concepts, the law, public administration and last but not least, the environment (surroundings).

To keep the individual or / and group value alive, one need a safe environment. We don´t have it. And if somebody would claim, yes, we have it, it would not be possible to prove it by facts.

In regard to human rights held by individuals and which protect individuals against the actions of other individuals and / or collectives (including political and economic organizations), they are egalitarian because they are held equally by all individuals. They could be called universal because they apply in all cultural contexts. But, the controversial part of this claim, however, is the specificity of the content of universal human rights. Therefore, there is a question: Which rights are fundamental, universally valid, and which ones are locally valid, 'peripheral' rights?

This begs the question: What are the causes of the decline of the Western world, and the Western civilization? Why did not only I see the phenomenon, that the salvation of any civilization has its roots in strong power and strength? The question – Cui buono[17], has been many times in history asked and answered. It proved that physical punishment could occasionally be more ecological, effective and economical than repeated traditional diplomatic protests and notes.

The inevitable rise of China, the de-globalization, and blurring the individual

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[16] The 60th Munich Security Conference took place from 16 to 18 February 2024. The motto "Lose-Lose?" also referred as central theme to the conference: The need to reshape the global order for the benefit of all as an inclusive alternative to the growing "lose-lose" dynamics of isolationism. Judging by the debate in Munich, implementing reform proposals requires more political will. https://securityconference.org/en/publications/munich-security-report-2024/

[17] It is a principle that probable responsibility for an act or event lies with one having something to gain.

traits of each personality and much more indicate that a time of disintegration of the traditional way of life would continue to bitter end. As any disintegration has always been connected with war, national interests and values the right to safety enjoys the priority before any human made right.

Slavism is, Slavism is not

This is a famous Konstantin Nikolayevich Leontiev´s (1831-1891) saying[18]. In essence, it is a very actual today: The absence of a unified Slavic ideology. And, also questions: What is Slavophilism?[19] Could this not be the great utopia? For a better understanding I recall that Slavophile thinkers approached the Slavs naively, believing that there was a possibility to unite them all not only in one state, but in some special formation that they – unfortunately or intentionally had never defined.

In his catastrophic predictions, Leontiev prophesied that the 20th century would be a bloody. His aesthetic and political theories had some similarities to those of Friedrich Nietzsche (1844-1900, Also sprach Zarathustra 1883) and Oswald Spengler (1880-1936, Untergang des Abendlandes, 1918 a 1922). Preceding the latter's theory of the cyclical nature of civilizations and The Decline of the West by several decades, Leontiev proposed that all societies undergo a state of flowering and increasing complexity followed by one of "secondary simplification", decay and, ultimately, death.

The current military confrontation on the Ukraine territory and the Fjodor Michailowich Dostojevsky (1821-1881) statement prove[20]: *Russia will not have and never has had such haters, envious, slanderers and even obvious enemies as all these Slavic tribes*. What is happening today in the Czech basin, Poland and the rest of Ukraine speaks for itself. It proves that the ECHR is dead and the right to safety of life should enjoy the priority if we want to survive.

The Eastern question

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[18] Konstantin Nikolayevich Leontiev was a conservative tsarist and imperial monarchist Russian philosopher who advocated closer cultural ties between Russia and the East against what he believed to be the West's catastrophic egalitarian, utilitarian and revolutionary influences.

[19] A movement originating from the 19th century that wanted the Russian Empire to be developed on the basis of values and institutions derived from Russia's early history. Slavophiles opposed the influences of Western Europe in Russia.

[20] https://dzen.ru/a/XfDbXzSAggCvliUd?ysclid=m1usdziijb620327145

The Eastern question[21] first became acute at the end of the 18th century. It was characterized by the growing role of the Russian Empire in the Middle East. As a result of the victorious wars with the Ottoman Empire, the military-political successes contributed to the awakening of the national consciousness of the Balkan peoples and spread the ideas of the liberation movement among them. The interests of the empire came into conflict with the efforts of other European powers in the Middle East, especially Great Britain and France. Here, too, it is possible to see and evaluate historical parallels with today´s events and ask: Has the Eastern question really been eliminated as a problem of world politics? In my personal evaluation – the Eastern question has not been eliminated, and it still significantly affects the human rights issue and discussions at least in Europe. An analogy applies to the Near East, Gaza, Izrael a.o. states.

Also, in this case the right to safety should enjoy the priority before any human made rights.

Europe – the engine of everything that happens in history is dying

To be able say the above, I considered three characteristics of Europe. First, egalitarianism[22]. That is, equality of rights and opportunities, which does not exist in nature and cannot exist anthropologically. That is why I consider egalitarianism to be a long-term disease of European civilization, despite the fact, that it was the Western world, still the spiritual world that created and continued to create culture. The Age of Enlightenment[23], which culminated in the French Revolution[24], began the end of European civilization. The revolution was made in the name of equality, which never happened. At best, there was an equalization of all classes and political rights, which

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[21] Eastern Question, diplomatic problem posed in the 19th and early 20th centuries by the disintegration of the Ottoman Empire, centring on the contest for control of former Ottoman territories.

[22] Egalitarianism (from French égal 'equal') is a school of thought within political philosophy that builds on the concept of social equality, prioritizing it for all people. Egalitarian doctrines are generally characterized by the idea that all humans are equal in fundamental worth or moral status. They supported many modern social movements, including the Enlightenment, feminism, civil rights, and international human rights.

[23] European politics, philosophy, science and communications were radically reoriented during the course of the "long 18th century" (1685-1815) as part of a movement referred to by its participants as the Age of Reason, or simply the Enlightenment. Enlightenment thinkers in Britain, in France and throughout Europe questioned traditional authority and embraced the notion that humanity could be improved through rational change.

[24]French Revolution, revolutionary movement that shook France between 1787 and 1799 and reached its first climax there in 1789—hence the conventional term "Revolution of 1789," denoting the end of the ancien régime in France and serving also to distinguish that event from the later French revolutions of 1830 and 1848.

have to be considered contrary to the very nature of man and the equality between people is unnatural.

Second, the establishment of happiness and well-being of the individual as the supreme achievement of the entire life. It does sound simply ridiculous, because happiness in (this) life cannot be comprehended. It is therefore a convulsive effort that embraces all people, but can have no result.

The third object is the individualism in ontological, methodological or explanatory sense. A man who fights only for himself, for his own benefit – ideally within the limits of the rules laid down by law, nevertheless, destroys the (European) civilization and makes all people the same. Sex in all its forms, sadness and depression with negative stress cannot offer a happy life.

As a result, we have to deal with an anthropological degradation[25] when there is no exceptional personality or heroism. Therefore, it is a symptom of the historical decline offering questions like: What is its dignity, when the masses are the subject of the formation of national culture in all its colours, moral features and religiosity? When the rights discourse began in the East, including Russia and China if there was no concept of rights in traditional thought?

China – the past and the present

In general, I am convinced that a social order and harmony can only be pursued by affirming and protecting people's interests in security, material goods, social relationships, and fair treatment. And I have been asking myself: Can we in fact find in China today a distinctive conception of rights? Do we consider the last century, including the period before and after the establishment of PRC in 1949? Do we really try our best to find more about the rights discourse in the old China and consider Confucius teachings as one of a few other teachings?

ECHR relates explicitly to politics, effective political democracy and the belief, that the rule of law stands for a pre-condition for peaceful cohabitation of peoples and states. Ideas of ECHR were based on the strongest traditions in the UK, France and

[25] We witnessed rape, dishonour and the destruction of families. And when we anchor our politics on identity, any compromise seems like dishonour.

other member states of the Council of Europe, not on Asian or Chinese strongest traditions. Therefore, as I argued previously the Chinese concepts differ from corresponding Western concepts.

From a philosophical and religious point of view, we can also quote the Gospel[26]- *My strength is perfected in weakness*, and the famous command of Jesus Christ: *The kingdom of heaven is taken by force. Think not that I have come to bring peace to earth; I have not come to bring peace, but a sword.*

Therefore, it has not been difficult predict the epoch of great violence of the twenties and thirties of the 20th century, and the current violence in the world. Therefore, it seems that to save the statehood is possible only with the paternalistic cult of the leader. And China has it. And China stands for one of the pillars of the right for safety of life.

The symphony of civilizations and the rapprochement

The symphony of civilizations is an old idea Leontiev entertained for many years. Today, we call it the multipolar world. Or a new phenomenon of modernity – the *Civilizational State*. It challenges the neoliberal standard of globalization, based on the European model of the *Nation-State*, which is recognized now as the universal one for the political modernization of all countries of the world. I mention the Chinese *Civilizational State's* prototype, because it is currently considered as the most criticised in the West, considered and investigated one.[27]

There is a question: How to realize the symphony of civilizations in a peaceful way, how to incorporate European civilization with all its pathologies, monstrous obsession and will to expand into all other worlds, and if considerations cannot exclude Europe's impending doom?

The rapprochement between East and West, including the Muslim world, could

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[26] Originally meant the Christian message ("the gospel"), but in the 2nd century it came to be used also for the books in which the message was reported. In this sense a gospel can be defined as a loose-knit, episodic narrative of the words and deeds of Jesus, culminating in his trial, death and reports of his post-resurrection appearances.

[27] The new picture of the world confirms F. Braudel's theory. The latter asserted the existence of the multiplicity of independent "world-civilizations", which sometime cease to be "worlds-in-themselves", "zones of silence" and open a new era of the existence of the world community – the "time of world" thus also the human rights as such. See also: Coker Ch. The Rise of the Civilisational State. Cambridge, UK; Medford, MA: Polity Press, 2019. And: Weiwei Zhang. The China Model and its Implications // Eircom. 2017. August 18. URL: https://larouchepub.com/eiw/public/2017/eirv44n33-20170818/07-18_4433.pdf

be possible when Europe got rid of its insane self-confidence. And accepts, that the creators of European culture were not some nameless masses and processes, but people with exceptional talents, kings and knights. They should therefore be treated with great piety, their work studied today. And it should include the basics of the system of intensive development of individual abilities.[28]

The principles are based on the competencies in the field of cognitive, behavioural and creativity processes allow solving tasks and challenges using modelling processes.

The right to safety of life

The right to safety of life is a concept that is part of the broader framework of the right to life. In my opinion it has its roots in the law of nature. It includes the protection of an individual from threats to life from various causes, including physical violence, war, crime, terrorism, as well as natural disasters or environmental threats. This right is inseparable from the fundamental right to life, which is enshrined in many international treaties, including the International Covenant on Civil and Political Rights (ICCPR)[29], Article 6 of which states: *Every human being has a natural right to life. This right must be protected by law.*

Current challenges in the area of the right to safety of life

Despite the international recognition of the right to safety of life, the world still faces many challenges. They include armed conflicts, terrorism, domestic violence, poverty, lack of access to basic needs such as healthcare and clean water, but also problems related to climate change and environmental protection.

Although states and the international community have a duty to ensure that individuals and communities are protected from threats through preventive measures and relief programs, we can observe a deficit of moral and ethics in handling the

[28] Campbell Jan, Antalová Adela, SID(I)A – System of Intensive Development of Individual Abilities. 2012 ISBN: 978-80-245-1813-8 (e-book), 978-80-245-1853-4 (printed). The book is intended for the students of University of Economics, Prague. It presents the System of Intensive Development of Individual Abilities – SID(I)A for short – that deals with languages (both mother tongue and foreign), individual and group psychology, management of stress and creativity. The text may be used in a variety of ways by a variety of readers, allowing them to decide and act ecologically, efficiently and economically amid the challenges of uncertainty and change.

[29] The ICCPR is considered a seminal document in the history of international law and human rights, forming part of the International Bill of Human Rights, along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR). Further please refer to: https://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights.

challenges. At the same time, we also can observe the degradation of the state as such, of the international organizations such as the United Nations and its agencies, which should provide humanitarian aid and support governments that are unable to ensure the security of their populations on their own.

That there is no will to cooperate and coordinate effort at the level of OSCE (Organisation for Security and Cooperation in Europe) confirms the fact, that since the winter of 2023, Moscow has received five arrogant refusals from the chairmanship of the OSCE Forum in response to an invitation from high-ranking Russian speakers to voice the country's position. Even Russian students were denied access to attend meetings as listeners via Zoom or similar platforms, although students from other OSCE states have this opportunity and actively use it.

Conclusion

The right to security of life belongs to the category of laws of the nature, it stands for a priority and it forms an essential part of human (made) rights. The practical right to security of life could ensure human dignity and the development of society only in accordance to the laws of nature.

Although the right has been formally recognized and enshrined in many international documents, its practical implementation still faces many challenges, because the security of life is not only a matter of physical protection, but also includes a broader concept of security, which includes short term politics, protection against poverty, disease and environmental threats.

Ensuring this right requires the effective functioning of the state, an active cooperation of the international community and not politicized non-governmental organizations. As an example, in need to be mentioned, is the fact, that since the winter of 2023, Moscow has received five arrogant refusals from the chairmanship of the OSCE Forum in response to the request from high-ranking Russian speakers to voice the country's position. As a result, even Russian students were denied access to attend meetings as listeners via Zoom or similar platforms, although students from other OSCE states have this opportunity and actively have been using it.

Last but not least: when a tree or a forest is cut down, a lot of noise is heard,

when the tree grows, nothing.

This applies to the regular and boring critic of China´s human rights record. It indicates that the ECHR has been cut down by its own ambitions and that Europe is lacking the will, courage and sovereignty needed for accepting other concepts. Engaging in wars and supporting the hegemonial ambitions of globalists under the control of the United States and Great Britain stands for a one way road. China has been on the way to show, how not to do it. Consent not needed. 30.09.2024

气候人权的反思与重构

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摘　要：近年来在国际和国内层面兴起的气候变化诉讼试图通过人权方法应对气候变化的风险和挑战，客观上反映了国际气候变化条约机制谈判的缓慢以及国家在应对气候变化意愿和行动不足的困境。气候人权的主张具有政治话语和法律意义（法教义学）的双重属性。作为政治话语的气候人权主张在国际人权机制与国际气候变化机制之间建立起联系，推动了政府应对气候变化的积极作为和环境权在联合国层面的承认。同时也为气候人权的法律化发展提供了政治共识和民意基础。然而，作为法律意义的气候人权主张仍在法律适用上面临着诉讼主体资格、域外管辖和因果关系等障碍。为避免气候人权过度扩张带来的空心化、碎片化和权利滥用等负面影响，需要在既有气候诉讼和环境权发展的基础上重构气候人权的概念，符合合法性和相称性原则，明晰所涉法律关系中的权利、义务和法律责任。

关键词：气候诉讼；人权；反思；重构

Reflection and Reconstruction of Climate Human Rights

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Abstract: Climate change litigation, which has emerged at the international and domestic levels in recent years, attempts to address the risks and challenges of climate change through a human rights approach, objectively reflecting the slow negotiation of international climate change treaty mechanisms and the dilemma of insufficient national willingness and action to address climate change. The claim of climate

human rights has the dual attributes of political discourse and legal significance (jurisprudence). As a political discourse, climate human rights proposes to establish a link between the international human rights mechanism and the international climate change mechanism, promoting governments' active response to climate change and the recognition of environmental rights at the United Nations level. It has also provided a basis for the development of the legalization of climate human rights in terms of political consensus and public opinion. However, as a legal claim, the climate human rights claim still faces obstacles in legal application such as locus standi, extraterritorial jurisdiction and causality. To avoid the negative effects of over-expansion of climate human rights, such as hollowing out, fragmentation and abuse of rights, it is necessary to reconstruct the concept of climate human rights on the basis of existing climate litigation and the development of environmental rights, ensure the adherence to the principles of legitimacy and proportionality, and clarify the rights, obligations and legal responsibilities involved in the legal relationship.

Keywords: Climate Litigation; Human Rights; Rethinking; Reconstruction

当今人权——法律主体意义的再思考

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摘要：“西方”世界对该主题的传统理解（实证法和普通法）主要包括三个方面:•个人主义•人类中心主义（尤其是笛卡尔传统） o 被理解为“与自然分离” o 被理解为人类智能的优越性和排他性。然而，这种理解面临着 4 个挑战：•人工智能不仅质疑“优越性”，而且重新定义人类的存在。例如，大脑植入物可能使个人拥有新的思维和行为方式——最具代表性例子当属斯蒂芬·霍金，他能够以前所未有的方式进行交流。科学的进步使通过体外受精和域名系统（DNS）操纵“人类”成为可能。线粒体捐赠治疗（MDT）的应用就是一个例证。“最近，关于环境保护必要性的科学知识、社会和政治态度以及法律标准都在不断演变”，这种演变引发了一系列讨论，最终提出了将“非人类自然”作为议题的建议•引用的演讲还表明,因果关系事关集体行动和关切,个人关切不属于优先考虑事项，因此答案和解决方案也必须如此。

在此背景下，对人权的审视必须接受根本转变的必要性，这意味着不去寻找普遍主义的意义和不同概念的共同点。更重要的是，应以跨学科思维研究这个问题，从而解决新的挑战。这些挑战反映了这样一个事实，即人类作为“世界主人”的传统理解受到来自大自然的越来越多的压力，人工智能以不同的方式主张其权利。最近的一些案件，尤其是欧洲人权法院（ECHR）处理的案件，在人权法领域开拓了新思路。

关键词：法律主体；环境保护论；人工智能；法理学方法论

Human Rights Today-Rethinking the Meaning of the Legal Subject

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Abstract: Traditional "Western" understanding of the subject (in positive and common law) is characterised by three main orientations

- individualism
- anthropocentrism (not least in the Cartesian tradition)
  - understood as "separation from nature"
  - understood as superiority and exclusivity of human intelligence

However, such understanding is facing four challenges:

• Artificial intelligence is not only questioning "superiority", but redefining human existence, for instance by possible brain implants that allow new ways of thinking and acting - perhaps an outstanding example is Stephan Hawking, enabled to communicate in unprecedented ways

• progress in science made the "of human beings" via IVF and DNS-manipulation likely, using for instance mitochondrial donation treatment (MDT)

•• "in recent time there had been an evolution of scientific knowledge, social and political attitudes and legal standards concerning the necessity of protecting the environment",[30] leading to discussions that culminate in proposals of considering "non-human nature" as subject

• the quoted delivery speech also suggests that individual concerns cannot maintain priority as both, causes and effects are a matter of collective action and concern, thus answers and solutions must be so too.

[30] transcript from the delivery speech; http://static.coe.int/webtv/video_echr.html#20240409_arret; 7:41-7:57; 18/08/2024
演讲实录；http://static.coe.int/webtv/video_echr.html#20240409_arret; 7:41-7:57; 18/08/2024

Against this background, looking at Human Rights must accept the need for a fundamental shift which means not to look for the meaning of universalism und a common ground of different concepts. More important is in fact an interdisciplinary gathering to develop even the question, allowing to address the new challenges that reflect the fact that the traditional understanding of human beings as “master of the world” is increasingly under pressure by nature and AI claiming in one way or another rights in their own respect.

Recent cases, not least dealt with by the ECHR, are pioneering new thinking not least in Human Rights law.

Keywords: Legal Subject, Environmentalism, Artificial Intelligence, Methodology in Jurisprudence

当前背景下，什么是人权？——论个人与国家的关系

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人类是宇宙中唯一已知的具有创造力的物种，这意味着人类可以不断获得关于物质世界合法性的新的、更深刻的见解。当这一科学进步应用于技术以及生产过程时，会提高生产能力和劳动力效率，从而提高人类的相对潜在人口密度、生活水平和预期寿命。这种创造力是人类独有的，因此人权的概念必然与之有直接关系。

What Constitutes Human Rights in the Present Context? - On the Relationship between Individual and State

Helga Zepp LaRouche The Schiller Institute, German Think Tank

Mankind is the only known species in the Universe endowed with creativity, which means that man can gain again and again new and deeper knowledge about the lawfulness of the physical universe. When this scientific progress is applied to technologies and used in the production process, it leads to an increase in productivity of the production capacities, as well as of human labor, which raises in turn mankind's relative potential population density, living standards and life expectancy. This creativity is the unique feature of the human being, and therefore the notion of human rights must be in a direct relation to it.

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An equally central concept for the definition of human rights is being itself, in other words, the right to life[31]. Being (Latin: *esse*), as the ontological basis of everything that is, has played a decisive role in European philosophy. Today, however, we are confronted with the paradoxical situation that the human species is not only uniquely capable of creativity, it is also uniquely capable of willfully bringing about its own extinction, of its own accord. No other species of living being is capable of completely and willfully destroying itself.

Given the immediate danger that both regional wars – NATO's war against Russia over Ukraine, and the war in South-West Asia between Israel and its neighbors, including Iran – could potentially escalate to a global nuclear war, which could be followed by a nuclear winter that would wipe out all life on our planet, the highest priority of all people must obviously be to rise above the level on which this existential threat arose. An essential characteristic of this level is without a doubt

31 Universal Declaration of Human Rights, Art.3, "Everyone has the right to life, liberty and security of person."

geopolitics, that is, the idea that one nation or group of nations would have any legitimate interest that it were allowed to impose against any other nation or group of nations with all possible means. Overcoming geopolitics clearly lies in the concept of a community with a shared future for mankind, which President Xi Jinping has formulated for some time now. It involves the idea of the one mankind, which as a whole represents a higher order than the many nations, of the One that is more powerful than the many[32]. However, to be able to conceive of this unity requires thinking dynamically, not statically, as this unity is a process of becoming. It is based on the assumption that man is good by nature and that all evil in the world stems from a lack of development, and can therefore be overcome with development.

Geopolitics rejects this idea of the one mankind, and assumes a zero-sum game in the relationship between nations or groups of nations, in which one wins and the other loses. But this by no means reflects the natural relationship between people of different nations and civilizations, as can be seen in how easily so-called “ordinary citizens” of different countries communicate with one another and live together in solidarity[33]. Geopolitics, on the contrary, is based on the claim to power of oligarchical elites who intend to assert or to maintain their empire or their privileges over other nationalities.

There is a significant difference in the strategic foreign policy perspective of China and Europe, for example. While China offers a “win-win” cooperation for the common future of humanity, which is, in principle, open to all states, the collective

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32 On the Subject of Metaphor, FIDELIO Magazine, Vol . 1 No.3 (Page 26) , Fall 1992 by Lyndon H. LaRouche, Jr.:"Consider Cantor's alephs. We have Aleph0, Aleph1, Aleph2, and so on. These alephs, so ordered as in any sequence, form a manifold. This manifold is of a Cantor Type; this Type is ontologically of the quality of discontinuity separating each of Aleph0, Aleph1, etc., from all others.

This manifold and its Type cannot be reduced to any notion of function which is consistent with our use of the term "function" to denote a class of geometrical, non-algebraic, or transcendental functions. Yet, the aleph-manifold, with its many alternative orderings, is defined by a typical quality of all such orderings. That implies a notion of "function," although in no conventional sense of a mathematical-physics function. History proves such a higher aleph-manifold quality of functional ordering to exist."

33"Xi stresses giving play to unique role of people-to-people diplomacy," The State Council of the People's Republic of China, October 11, 2024, https://english.www.gov.cn/news/202410/11/content_WS6708970fc6d0868f4e8ebb14.html.

West seems to always need an enemy against which its own supposed interests can be defined. The definition of what constitutes inalienable human rights is a derivative of these two opposing views.

This is not just about different cultural traditions in Europe and China, but depends primarily on the image of man on which this definition is based.

The assumption that man is inherently good and can develop this quality provided he is given the conditions to develop all his inherent potential is common to very different philosophies, world views and political systems. These include the three monotheistic religions, Judaism, Christianity and Islam, as well as a number of other religions and philosophies, such as Hinduism, Buddhism, Confucianism and humanism, but also communism and socialism. All of these religions, world views and philosophies also share the idea that this human potential also implies the moral duty to develop and perfect it to the best of one's ability during one's lifetime.

On the other hand, all empires, oligarchies and dictatorships are based on a completely contrary view of man, that considers him as inherently evil, and one whose tendency to sin or to commit crimes can only be kept in check by an overbearing state power, which is of course ruled by an elite of “the good”. Typical variants of this model are all forms of state which differentiates between a privileged upper class and a backward population, or slaves, helots or other groups whose rights are in principle denied.

The first historically precise account in Western history is reported by the Greek historian Thucydides in his description of the Peloponnesian War in the so-called Milesian Dialogue. When the Milesians were asked why it was advantageous for them to submit to the Athenians, they replied that the surrender would spare them, the Athenians, the loss of soldiers and animals, as well as costs and time, while the Milesians would escape with their lives and remain in possession of their territory as subjects.[34]

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34 Thucydides, The History of the Peloponnesian War, trans. Richard Crawley, Chapter XVII (Project Gutenberg, 2003), eBook #7142. (https://www.gutenberg.org/files/7142/7142-h/7142-h.htm)

Typical representatives of this oligarchic view are also to be found among thinkers of the English Enlightenment, such as Thomas Hobbes and his "Leviathan", and John Locke with his social contract and ideas about "life, liberty and property"[35]. One of the most shameless protagonists of the oligarchic world view was certainly Joseph de Maistre, a forerunner of Synarchy and the Conservative Revolution, who argues in a way, that is indistinguishable from what certain neocons of the Military Industrial Complex say today: "Unhappily, history proves that war is, in a certain sense, the habitual state of mankind, which is to say that human blood must flow without interruption somewhere or other on the globe, and that for every nation, peace is only a respite."[36]

And in his „Seventh Dialogue"[37] he writes:

"War is divine in itself, since it is a law of the world. War is divine through its consequences of a supernatural nature which are as much general as particular, consequences little known because little studied, but which are nevertheless incontestable. War is divine in the mysterious glory that surrounds it and in the no less inexplicable attraction that draws us to it. War is divine by the manner in which it breaks out."

Besides the conception of man as either inherently "good" or "evil", a further distinction must be made before we take up the question of human rights per se. This concerns the difference in emphasis that European and Asian cultures generally give to the relationship between the common good and individual freedom. The Confucian tradition, which plays a role not only in China but also in other Asian nations, places much greater emphasis on the well-being of society as a whole. If the whole family is doing well, the individual family members will also be well, if the nation is doing well, the families prosper, and if the nations are doing well, there is harmony in the

35 Locke is generally considered as the father of liberalism. Together with Newton and Hume, he is the main representative of British empiricism and was of the opinion that all knowledge is based solely on experience. In addition to Thomas Hobbes (1588-1679) and Jean-Jacques Rousseau (1712-1778), he is one of the most important contract theorists in the early Age of Enlightenment.

36 De Maistre: Chapter III, p. 23, Considérations on France , 179

37 De Maistre: "Seventh Dialogue," p. 218

world. In general, the desirable goal is a harmonious development of all. As a result, there is an organic affinity between the Confucian tradition and the "socialism with Chinese characteristics" that representatives of the Chinese Communist Party speak of, which is a product of a completely different cultural sphere than the socialist states of the Soviet Union, for example.

In Europe, on the other hand, several influences came together that emphasized the role of the individual much more strongly. The Italian Renaissance, the humanist currents in various nations and, above all, the German classicism of Schiller and Wilhelm von Humboldt emphasized the freedom, rights and duties of the individual. This went together with the conviction that the realization of all individuals and their perfection were the prerequisite for the well-being of the state. The key reason for this lay mostly in the repressive nature of feudal governments, which often ignored the interests and rights of the people and against which the interests of the individual had to be defended.

Taking into consideration these historical differences, it becomes clear that, as Confucius demanded, we must first agree on the interpretation of terms when it comes to questions of human rights. The Universal Declaration of Human Rights, which was adopted by the United Nations in 1948, is certainly one of the most important documents on this issue. However, it is above all a reaction to the horrors of Nazi rule in Germany and arose from the desire to agree on principles that would prevent such a descent into barbarism forever. But for many nations in Asia and the Global South, the "Bandung Principles", which emerged from the 1955 Bandung Conference, are an even more direct reference to the need to eliminate the human rights violations resulting from the colonial era.

Poverty as a violation of human rights

It is as pointless as it is superfluous to accuse each other of wanting to "reinterpret" human rights, as is often the case with China.[38] One could just as easily accuse the authors of this accusation of pursuing a narrow-minded Eurocentric view

38 See SWI swissinfo.ch, "How China Rewrites Human Rights," October 16, 2024, available at: https://www.swissinfo.ch/ger/politik/wie-china-die-menschenrechte-umschreibt/48845494.

that is completely blind to the real conditions of the global South. For example, the Universal Declaration makes no explicit reference to the eradication of poverty as a human rights issue. It is true that Article 25 (Right to welfare) states:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood through no fault of his own. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

But there is no direct demand to overcome existing poverty and underdevelopment, and to this day there is no anti-poverty program in the EU or the US, for example, although there is considerable poverty. Although according to a study by the FES, 140 million people in the EU are at risk of poverty in 2023, and many are not only at risk but are in fact poor, there is no explicit program in the EU to reduce or even overcome poverty. According to the surveys, 15.8 % of the German population was affected by poverty in 2021, especially people living alone and single parents. For 33.2 % of single parents, the net income was less than 16,300 euros and around 26.6 % were at acute risk of poverty.

In 2023, the poverty rate in the U.S. was around 11.1 %, or almost 37 million people, but there are no national programs for eliminating poverty. In China, on the other hand, President Xi Jinping made poverty reduction a national priority and extreme poverty had been eradicated by the end of 2020, after lifting a total of 850 million people out of poverty. President Xi was personally involved in this effort, in that he visited many rural regions and worked with local governments to develop individual solutions for all families suffering from poverty. The rural poverty rate fell from 97.5% in 1978 to 4.5% in 2016, and China's achievements in poverty reduction were officially recognized by the UN as an extraordinary achievement.

Although it is hardly an issue in the West, there can be no doubt that poverty is an enormous violation of human rights. If a person has to worry about having enough

to eat the next day and has to devote a large part of his energy to meeting the bare necessities of life, he has no leisure to develop all his potential, pursue lifelong education and shape his life harmoniously with art and science. No other country has done as much to combat poverty as China, both in China itself and through the Silk Road Initiative in some 150 countries. Therefore it is absolutely obvious, that China has done more for the defense of human rights than any other country in the world or in history.

What is “freedom”?

The Universal Declaration of Human Rights speaks in Article12 of the sphere of freedom of the individual, which includes his privacy, family, home, correspondence, honor and reputation, and declares that everyone enjoys protection against encroachments and interference in such areas. For the sake of clarification of the notions used, as Confucius recommends, let us take a look at the meaning of “freedom”.

In Western philosophy, the concept of freedom first appears in Homer: “ἑκών.” (hekóon). Homer describes thus the state of man in which he is able to act on his own initiative, unhindered by any external force. An essential step forward beyond ancient Greece occurred in the Italian Renaissance, which effectuated a basic change in the image of man. The individual was increasingly perceived as independent of the church, and free on the basis of his own intellectual accomplishment. Humanism developed a notion of education, which aimed at enabling the person to nourish and unfold all his potential capacities. But with that possibility came the obligation to improve his morality and service to the community. A major leap forward was also made with Gutenberg’s invention of the printing press, which made it possible for more strata of the population to read, and a greater percentage of people participated in urbanization. Scientific and technological progress began to play a more significant role, leading to better living standards.

The idea of the perfection of the human being found its expression in the works of many philosophers, poets, painters and scientists in many European nations - such names as Francesco Petrarca, Erasmus of Rotterdam, William Shakespeare, Nicholas

of Cusa, Gottfried Wilhelm Leibniz come to mind. But the most consequential period of humanism was that of the German classics in music , which roughly runs from Johann Sebastian Bach to Mozart, Beethoven, Schubert, Schumann and Brahms, and in poetry from Gotthold Ephraim Lessing to Friedrich Schiller, Johann Wolfgang Goethe and Heinrich Heine. The von Humboldt brothers, Alexander and Wilhelm, were towering giants of this tradition. Wilhelm in particular created an education system, which was influential throughout the 19th Century not only in Germany,but also in the United States, at least until the First World War. The essence of the Humboldt education system is the requirement that the goal of education be to form the beautiful character of the student, which is the result of the harmonious development of all aspects of his personality. Humboldt argues that there are certain topics, which are more suitable than others to contribute to the development of a beautiful mind and character, such as the command over his own native language in its most advanced expressions, that is, in the most developed poetry, and other topics, such as natural sciences, universal history, music, geography, etc. This conception of the beautiful character is a reflection of Friedrich Schiller's notion of the highest ideal of man, that is, that every human being has the potential to be a "beautiful soul". Schiller's definition of that is a person for whom "freedom and necessity, passion and duty" are one; therefore a person who can blindly follow his emotional impulse, because his emotions will never tell him anything contrary to what reason demands. The only person in whom that condition is truly fulfilled, is the genius, and he arrives at that point through aesthetic education.

This idea of finding one's freedom in doing what is necessary, not with a feeling of resignation or loss, but in doing your duty with passion, is obviously very different from a notion of freedom as the absence of rules, i.e., anarchy. This latter idea of freedom was characteristic, for example, of the Jacobins in the French Revolution, who would just do away with all traditional customs, and eliminate the difference between classes and ranks by simply using the guillotine liberally on everybody. This anarchistic notion of freedom, a freedom which just signifies doing what you like, obviously rests on a completely different axiomatic basis. This difference is very

relevant for the way in which the issue of human rights, or the violation of human rights, is discussed today.

In those periods of European and American - which is actually European-history, in which a humanistic outlook was dominant, it was regarded as self evident, that society would only function well if all citizens followed a high moral standard and aimed at improving themselves through education and life-long learning and contributing to the common good of their family, neighborhood, city or country. They would adhere to Christian values, or if they lived a secular life, would cherish the high ideal of man as expressed in classical art or the teachings of humanist philosophers. And it can be easily demonstrated, that these values were very similar to to those which exist in Chinese society today. They both emphasized lofty conceptions, such as creativity, self-perfection and commitments to the welfare of society, but also basic virtues such as industriousness, honesty, punctuality, reliability, etc.

The basic problem is that Western society has abandoned those values and replaced them with the liberal world outlook of "everything goes", everything is allowed, there are no accepted standards of moral behavior anymore. This is actually a process of deconstruction which, at least in German culture, one can trace back to the attack on the Classics by Romanticism, which consciously sought to dismantle the highly organized form, as it was expressed for example in the music of composers like Beethoven or in the poetry of Schiller. What followed was a continual deconstruction, whereby the revival of the ancient Greek ideal of the "Beautiful, the Good and the True" was replaced with the "Interesting". And naturally, what is interesting today is no longer interesting by tomorrow, so it has to be more exciting to the senses and more titillating for a degenerating popular appetite. Thus, step by step, the requirements of reason, which were the foundation of art and culture during the classical period, were replaced by a degeneration into all forms of modern taste, up to the deconstructionism of today, where there are absolutely no accepted standards in art anymore.

Russian Foreign Minister Sergey Lavrov aptly described the phenomenon in his remarks and answers to media questions at a news conference in Moscow on January 17, 2017 concerning the results of Russian diplomacy in 2016, in the following way:

"If we talk about Western and European values, which are constantly put forward as example for us, these are probably not the values the grandfathers of today's Europeans espoused but something new and modernised, a free-for-all, I would say. These are values that can be called post-Christian. They are radically and fundamentally at odds with the values handed down from generation to generation for centuries in our country, which we would like to cherish and hand down to our children and grandchildren. When during foreign policy battles we and many others face a demand to accept these new post-Christian Western values, including permissiveness and the universality of liberal approaches to the life of the individual, I think it is indecent on a human level. But in terms of professional diplomats, it is a colossal mistake and a completely unacceptable overestimation of your own influence on international relations."

There has indeed been a cultural paradigm shift in the West during the recent 50-60 years, starting with the rock-sex-drug counterculture of the 60ties. While most contemporaries of that time celebrated the "hippie culture" and "flower power" trends, the American economist and statesman Lyndon LaRouche was among the very few, who recognized the corrosive impact this counterculture would have on the cognitive potential and therefore on the productivity of society. As part of his Presidential campaign in 2004 he issued a statement with the title: "**REVIEWING AN ORIGINAL DISCOVERY, Believing Is Not Necessarily Knowing"**[39] **in which he referred to his analysis of the 60ties:**

"During the middle to later 1960s, this already emerging trend was unleashed with great destructive force, in forms such as the "rock-drug-sex youth-counterculture," and the moral and economic decadence resulting from the intention to transform a formerly productive society into a "post-industrial" form of

39 See Lyndon H. LaRouche, Jr., "Believing Is Not Necessarily Knowing," Fidelio, Vol. 12, No. 3, Fall 2003, available at: https://archive.schillerinstitute.com/fidelio_archive/2003/fidv12n03-2003Fa/fidv12n03-2003Fa.pdf.

"consumer society" utopia. As a result of this post-Missiles Crisis cultural paradigm-shift, which descended upon the adolescents of the 1960s, the world is now gripped, not only by the present, potentially terminal, systemic decline of the economies of Europe and the Americas, but by an ominous intellectual decadence among the generation presently occupying many leading positions, both in government and relevant private institutions."

In the following decade, this alternative culture evolved layer by layer into ever more eccentric forms, reflected in a variety of forms of pop music, drug consumption and choices in sexual behavior. The word "woke" originally, in the 1930s, referred to being aware of social and racial issues affecting the Afro-American part of the population. Later, in the 2010s, the meaning of "being woke" expanded to include concern with social injustice, social profiling, sexism, and an ever expanding LBGTQ+ community and their rights.

Today, the term "woke" is used by conservatives to describe extreme liberal values in an insulting way, while left-leaning circles regard "staying woke" as something desirable. From members of the Black community, the criticism is voiced, that white liberals don't understand the original meaning of the notion "woke". So it is clear, that it means different things to different people, with diverse opinions.

But that does not prevent advocates of woke culture and LBGTQ+ forms of life to travel around the world and attempt to proselytize people of other cultures and even make it a human rights issue, if countries show openness to this trend. Many African countries, on the other hand, consider that such representatives of international institutions are preaching new forms of cultural colonialism, which goes against Africa's traditional values. Other countries, that uphold traditional Christian values, such as Hungary and Slovakia, are attacked massively by the EU for supposed violations of human rights.

In 2013, Russia passed a law prohibiting the distribution of "propaganda about nontraditional sexual relationships" to minors. This law was augmented in 2022 to include all forms of LBGTQ+ practice, and then again in 2023, to outlaw gender transitions and prevent transgender persons from adopting children.

Another area which, from a Western point of view, involves interference into individual "freedom", are regulations in China, such as the one restricting the time children and youth under 18 years of age play online games to only one hour on weekdays, and three hours on weekends. The is a constant review of the content in terms of violence, sexual content and other sensitive aspects of these games and their potential impact on youth. The concern is the addiction to these games, which it has been proven impair the cognitive potential of users.

The *US Journal of Criminal Justice* reports (Volume 72, January–February 2021) about the impact of recreational marijuana legalization on crime. The evidence shows the effects of marijuana legalization on specific crime rates in Oregon, namely that it led to significant increases in the rates of not only property crime overall , but also subtypes of crimes such as burglary and motor vehicle theft. The overall negative effect of the use of drugs on the mind, which is obviously the most important aspect, is not even considered here.

Friedrich Schiller, in his essay "*The Legislation of Lycurgus and Solon*", which was one of the bases for the lectures he gave on universal history in Iena in 1789, contrasts two models of state: the oligarchical system, where all the nice rhetoric is only a facade for the protection of the privileges of the oligarchical elite, and the republic, whose purpose, Solon says, is the "progress of the people". Applying that yardstick to the three examples given above, where there is a clear controversy over who better protects human rights, the West or Russia and China, the conclusion is, that Russia and China may infringe on individual liberties, but they are the better protectors of society as a whole and therefore the better protectors of real freedom.

One last thing must be said as well: After the experience of the last year, where many Western countries have completely ignored the rulings of the International Court of Justice and the International Criminal Court and their findings of the ongoing genocide in Gaza, the moral standing of these countries has suffered a blow in the eyes of the vast majority of the world population, the Global Majority, which has changed the debate around human rights for ever. It will never be again a situation,

where the representatives of some countries can pretend, that they are "living in a garden" and the rest of the world is a jungle. A new era has started.

But lets remind ourselves of what we started with: Mankind is the only creative species known so far. The relationship between the state and the individual must not be one of contradiction for the indefinite future, however. Because if the individuals are aesthetically educated to the point that they fulfill Schiller's ideal of the beautiful soul - for whom necessity and freedom, duty and passion, are one - that contradiction disappears. Throughout his entire "*Aesthetic Letters*", the topic is discussed of how the perfect state can be developed simultaneously with a maximum freedom of the individual, he offers the following beautiful definition for this concept in his Fourth Letter:

"It may be urged that every individual man carries, within himself, at least in his adaptation and destination, a purely ideal man. The great problem of his existence is to bring all the incessant changes of his outer life into conformity with the unchanging unity of this ideal. This pure ideal man, which makes itself known more or less clearly in every subject, is represented by the state, which is the objective and, so to speak, canonical form in which the manifold differences of the subjects strive to unite. Now two ways present themselves to the thought, in which the man of time can agree with the man of idea, and there are also two ways in which the state can maintain itself in individuals. One of these ways is when the pure ideal man subdues the empirical man, and the state suppresses the individual, or again when the individual becomes the state, and the man of time is ennobled to the man of idea!"[40]

40 Johann Christoph Friedrich Schiller, On the Aesthetic Education of Man, Fourth Letter, Open Space of Democracy, https://openspaceofdemocracy.wordpress.com/wp-content/uploads/2017/03/letters-on-the-aesthetic-education-of-man.pdf.

和平是一项人权：25 项国际秩序原则

阿尔弗雷德-莫里斯·德萨亚斯 联合国人权理事会前促进民主和公平的国际秩序独立专家

除非和平与安全得到保障，否则公民、文化、经济、政治和社会权利就无法得到充分行使。我们需要裁军以促进发展。执行裁军的一个前提条件是相互信任。因此，必须采取构建信任的措施，必须停止战争贩子式的鼓吹和对对手的妖魔化。《公民权利和政治权利国际公约》[41]（ICCPR）第二十条规定："1. 任何鼓吹战争的宣传，应以法律加以禁止。""2. 任何鼓吹民族、种族或宗教仇恨的主张，构成煽动歧视、敌视或强暴者，应以法律加以禁止。"

联合国大会和联合国人权理事会通过了关于和平权的决议，但各国政府将大部分预算用于军事。各国政府非但没有推进可持续发展目标，反而在战争、导弹和核潜艇上滥用资源。结果非但没有解决冲突的根源，反而冲突在不断升级。每一次挑衅都违反了《联合国宪章》第二条第四项，该条款不仅禁止使用武力，而且禁止以武力相威胁。2014 年我向人权理事会提交的报告着重探讨了将军事优先经济转变为人类安全经济的必要性。2018 年我的报告阐述了《国际秩序 25 项原则》。这是一项行动计划，旨在根据《联合国宪章》确保地方、区域和国际和平。它类似于众所周知的唯一"基于规则的国际秩序"——世界宪法。联合国在人权标准制定方面付出了诸多努力，建立了监督和执行机制，但未能确保这些机制的执行，包括未能确保国际法院（ICJ）的判决、命令和咨询意见得到切实履行。全人类的未来取决于能否确保和平。联合国未来峰会和联合国《未来契约》[42]对一般原则和目标进行了确认，但在缺乏政治意愿的情形下，能够实施这些原则和目标的机率很小。

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41 中国政府签署《公民权利和政治权利国际公约》 — 中华人民共和国外交部 (mfa.gov.cn)
42 https://www.un.org/zh/summit-of-the-future/pact-for-the-future

Peace as a Human Right: 25 Principles of International Order

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The UNESCO Constitution[43] places great importance on the dialogue of civilizations and the necessity of mutual respect for the promotion of peace and prosperity through enhanced educational, scientific and cultural cooperation, through learning about other cultures and trying to understand the perspectives of other peoples, always recognizing our commonalities as human beings and our responsibility vis-à-vis the common heritage of mankind.

Article of 1 of the UNESCO Constitution proposes to achieve its aims

"By encouraging cooperation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information."

Article 8 the UNESCO Constitution reminds us:

"That ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war."

The Constitution's preamble already emphasizes

"That a peace based exclusively upon the political and economic arrangements of governments would not be a peace which could secure the unanimous, lasting and sincere support of the peoples of the world, and that the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind."

Further "that the wide diffusion of culture, and the education of humanity for

[43] https://www.unesco.org/en/legal-affairs/constitution

justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern." Indeed, in my reports I have frequently called for a Global Compact on Education for Peace and Empathy, education on the common dignity of all human beings and on the common heritage of mankind[44].

It is not difficult to see how the international community is failing to implement these noble goals. We are experiencing domestically and internationally a surge in political intransigence, in hate speech, in incitement to violence, rejection of mediation, refusal to negotiate. We are confronted with censorship and self-censorship, fake news, fake history, fake law, fake diplomacy, fake democracy. We deplore the Orwellian destruction of language, cognitive dissonance, the development of a "cancel culture" that excludes persons who hold different opinions. We witness how "groupthink" and mobbing have replaced rational dialogue. We decry the weaponization of human rights by governments and non-governmental organizations, the practice of "naming and shaming" by the media and government-funded think tanks, the politicization of sports, music, art. Instead, what humanity needs is openness and intellectual honesty, a rejection of double-standards and readiness to discuss social phenomena with a view to redressing legitimate grievances and preventing their festering into violence.

The first of my 25 Principles of International Order, which I presented to the Human Rights Council in 2018 in my capacity as Independent Expert on International Order focuses on the paramount importance of peace as a human right and the necessity to promote peace at the local, regional and international level.

The United Nations Charter already commits all States to prevent conflict so as to achieve peace, justice, development and human rights. The Preamble and articles 1 and 2 of the Charter stipulate that the principal goal of the Organization is the promotion and maintenance of peace, to "save succeeding generations of the scourge

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[44] https://www.youtube.com/watch?v=btUDPmKlfdo
https://masspeaceaction.org/event/jfk-peace-speech-as-reflected-in-the-zayas-principles-for-a-peaceful-international-order/

of war"[45]. This entails the adoption of concrete measures to prevent local, regional and international conflict, and in case of armed conflict, the rapid deployment of measures aimed at achieving a cease-fire, facilitating peace negotiations, compromise, reconstruction and reconciliation.

Without a doubt, the production and stockpiling of weapons of mass destruction constitutes a continuing threat against peace[46]. Hence, it is necessary that States negotiate in good faith for the early conclusion of a universal treaty on general and complete disarmament under effective international control[47]. Although The United Nations Treaty on the Prohibition of Nuclear Weapons entered into force already on 22 January 2021, none of the nuclear powers have ratified it.

Peace is much more than the absence of war, and necessitates an equitable world order, characterized by the gradual elimination of the root causes of conflict, including the *animus dominandi* of imperial countries, new forms of colonialism, exploitation, racism, Apartheid, extreme poverty, endemic injustice, and structural violence.

Already in 1933 the League of Nations entrusted Albert Einstein and Sigmund Freud with the question "Why War?" Their answers are as valid today as they were then[48]. In 2017 I held up the Einstein/Freud book to the assembled diplomats at the Human Rights Council and again before the Third Committee of the General Assembly, and told the delegates in no uncertain terms that it is their responsibility to stop sabre-rattling, provocations and escalations, because such behaviour generates tension, miscalculation and constitutes a threat to international peace and security within the meaning of article 39 of the UN Charter. No one wants to stumble into a nuclear confrontation.

In order to achieve universal peace, it is necessary to create and safeguard the

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[45] https://www.un.org/en/about-us/un-charter/full-text

[46] The UN Human Rights Committee regularly issues "general comments" to elucidate the scope of its provisions. See General Comments Nr. 6 and 14 on the right to life, which condemn the production and stockpiling of weapons of mass destruction that may destroy life on Earth. https://www.refworld.org/docid/453883f911.html https://www.refworld.org/docid/45388400a.html

[47] See my 2014 report to the Human Rights Council A/HRC/27/51, paras. 6, 16, 18 and 44. https://www.un.org/disarmament/wmd/nuclear/tpnw/ https://news.un.org/en/story/2020/10/1076082

[48] Albert Einstein, Sigmund Freud, Why War, International Institute of Intellectual Cooperation, League of Nations, Geneva, 1933. https://en.unesco.org/courier/may-1985/ why-war-letter-albert-einstein-sigmund-freud

conditions for sustainable peace, including economic development and progressive social legislation. The motto of the International Labour Organization deserves being recognized as the universal motto of our time: *si vis pacem, cole justitiam* (if you want peace, cultivate justice). I have quoted this motto in many of my reports and publications and adapted it as follows: *si vis pacem, para pacem* – if you want peace, prepare the *conditions* for peace. I flatly reject the unethical maxim, *si vis pacem, para bellum* – if you want peace, prepare for war – which is based on a cynical view of humanity,[49] and in any event is incompatible with the Object and Purpose of the United Nations Organization. I also reject the apologetics of war and the intimate relationship between war and genocide. Already in the year 98 AD Tacitus decried in his *Agricola* the propagandistic use by the Roman legions of the concept of peace: *ubi solitudinem faciunt, pacem appellant* – where they make a desert, they call it peace[50]. That means the peace of cemeteries, as, unfortunately today in Gaza and Lebanon, and this with the complicity of the mainstream media.

Peace must be recognized as a human entitlement, the most fundamental human right. It is also an enabling right, a pre-condition to the enjoyment of all civil, cultural, economic, political and social rights[51].

In Principle No. 2 of my 25 principles, I emphasize that the UN Charter takes priority over all other treaties (Article 103, known as the "supremacy clause"[52]). Indeed, there is a hierarchy of international norms which places the United Nations Charter at the top of the system, as a kind of world constitution. States have a duty to ensure that all treaties and conventions are in conformity with the purposes and principles of the United Nations as laid down in articles 1 and 2 of the Charter. Concretely, this imposes a responsibility on States to adopt effective domestic legislation and concrete measures to promote the Purposes and Principles of the United Nations, and to enforce the *erga omnes* obligation on all States to safeguard

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[49] https://www.counterpunch.org/2022/11/03/the-good-and-the-bad-in-latin-maxims/
[50] https://www.gutenberg.org/files/7524/7524-h/7524-h.htm
[51] Alfred de Zayas, "Peace" in William Schabas (ed.), *Cambridge Companion to International Criminal Law*, Cambridge 2016, pp. 97–116
[52] Prof. Robert Kolb gave a lecture at the Hague Academy of International Law in 2014 under the title "L'article 103 de la Charte des Nations Unies," Collected Courses of the Academy, Vol. 367, 2014.

the coherence of the system of collective security, development and human rights.

Article 103 of the UN Charter stipulates: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

This has very concrete consequences. It means that all treaties must conform with the UN Charter, and if they do not, their implementation would entail an international wrongful act within the meaning of the 2001 Code on State Responsibility elaborated by the International Law Commission[53]. For instance, free-trade agreements and bilateral investment treaties cannot be used as neo-colonial tools to subvert the sovereignty of states and make it impossible for States to comply with their obligations under the UN Charter and the human rights treaties. I elaborate on these topics in my 2015 and 2016 reports to the Human Rights Council and General Assembly[54].

There are many treaties that conflict with the UN Charter, among them the Treaty of the North Atlantic Treaty Organization. Initially NATO was a regional arrangement within the meaning of article 52 of the UN Charter. Since 1991, and especially since its expansion into Eastern Europe, NATO has ceased to be a "defence alliance" and morphed into a military coalition that has committed aggression and war crimes in Yugoslavia, Afghanistan, Iraq, Libya, Syria to name a few of its victims. NATO has tried to usurp the peace-making functions of the United Nations. This is contrary to Article 52 of the Charter, which stipulates:

"Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action *provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations*."

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[53] https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf
[54] https://documents.un.org/doc/undoc/gen/g15/156/78/pdf/g1515678.pdf
https://documents.un.org/doc/undoc/gen/g16/151/19/pdf/g1615119.pdf
https://documents.un.org/doc/undoc/gen/n15/244/85/pdf/n1524485.pdf

Concretely this means that because "colour revolutions", aggressions and war crimes are incompatible with the Purposes and Principles of the UN, NATO has lost its legitimacy. Either it subordinates itself to the UN, or it should be disbanded, as the Warsaw Pact was disbanded in 1991.

Allow me now to address another threat to international peace and security. **The principle of non-intervention is part of customary international law.** States may not organize or encourage the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State. No State may organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.[i] Whereas a State may be invited by the government of another State to assist in containing an internal armed conflict, it is not permitted for any State to support financially or otherwise the insurgency in another State. The fact that such interventions occur with impunity when the perpetrators are permanent members of the Security Council does not give rise to new international law (*ex injuria non oritur jus*). Such interventions constitute continuing violations of international law, which justify investigation and prosecution by the International Criminal Court, *ad hoc* tribunals and Peoples' Tribunals.

The above was principle 18 of my 25 principles, which is then further elaborated in principle 19: "**States must refrain from interfering in matters within the internal jurisdiction of another State.** No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Unilateral coercive measures are incompatible with the United Nations Charter. Only the Security Council can impose sanctions under Chapter VII of the Charter. Therefore, States shall refrain from imposing unilateral coercive measures[55] and financial blockades on other countries. When unilateral

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[55] see my 2018 report to the Human Rights Council on my mission to Venezuela https://undocs.org/A/HRC/39/47/Add.1, paras. 34-39. See also the Preliminary Conclusions of the UN Special Rapporteur on unilateral coercive measures, Alena Douhan, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26747&LangID=E

coercive measures cause widespread hunger and death, they may amount to crimes against humanity under article 7 of the Statute of the International Criminal Court[56]. While the promotion of human rights is of legitimate international concern, and there is an *erga omnes* obligation of States parties to the ICCPR and ICESCR to ensure their enforcement, the doctrines of "humanitarian intervention" and "responsibility to protect"[57] have been demonstrably counter-productive, and harbour grave dangers of selectivity and abuse, as evidenced in the General Assembly debate on R2P in July 2009,[58] and empirically shown in the chaos visited upon the people of Libya in the name of humanitarian intervention by great power instrumentalization of Security Council Resolution 1973 not for purposes of humanitarian assistance but for purposes of inducing "regime change".

Before concluding, I should like to refer to the 20th principle of my 25 principles of international order:

States have a duty to protect and preserve the natural environment and the common heritage of humankind. The crime of ecocide[59] entails the irreversible degradation or destruction of the human environment. It constitutes a crime against humanity that must be suppressed by the international community and prosecuted under article 7 of the Rome Statute of the International Criminal Court.

War causes ecocide. That is yet another reason to prevent war and the use of depleted uranium, napalm, agent orange, white phosphorus, and other indiscriminate weapons. The use of Artificial Intelligence in connection with war also raises huge issues with regard to international humanitarian law and the Geneva Conventions.

Ladies and gentlemen,

we should all be concerned about war and its consequences. We must push-back against those who want to escalate conflicts and ultimately bring us and the rest of the

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56 https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf
57 https://www.un.org/en/genocide-prevention/responsibility-protect/about
58 See my 2012 report to the General Assembly, https://undocs.org/A/67/277, paras 14-15.
59 https://www.stopecocide.earth/polly-higgins, https://www.bbc.com/future/article/20201105-what-is-ecocide https://www.stopecocide.earth/press-releases-summary/european-parliament-urges-support-for-making-ecocide-an-international-crime?ss_source=sscampaigns&ss_campaign_id=602c3a28cf72d92df8b3e8aa&ss_email_id=602e4c785978483a806d89c6&ss_campaign_name=EU+supports+recognition+of+ecocide&ss_campaign_sent_date=2021-02-18T11%3A16%3A36Z

world in danger of Apocalypse.

Allow me to conclude by citing from the commencement address delivered by John F. Kennedy on 10 June 1963 at American University[60]:

2. “Above all, while defending our own vital interests, nuclear powers must avert those confrontations which bring an adversary to a choice of either a humiliating retreat or a nuclear war. To adopt that kind of course in the nuclear age would be evidence only of the bankruptcy of our policy--or of a collective death-wish for the world.”

[60] https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/american-university-19630610

人权是美帝国主义的保护伞

尤雷·佐夫科 国际哲学学会

在报告中，我想证明法国大革命和《美国人权宣言》中宣布的人权起源于德国以莱布尼茨、克里斯蒂安·沃尔夫和康德为代表的哲学传统。德国古典哲学从三个方面探索了对人的衡量，并将其视为人权正当化的基础。首先，从所谓的原始社会契约入手，剖析了对人的尊重；其次，通过理性的约束性和人类的理性自由，证明了人权的普遍性；第三，详细讨论了承认他人作为人的差异性是在社会或国家中切实实现人权的条件，且将其作为人权正当化的基础。康德在其著作《永久和平论》（1795 年）中主张在每个国家都应有一部共和宪法，这将是一种具有公共法治状态的政治秩序。在康德看来，共和国是源于原始契约理念的唯一宪法形式，一个民族的所有法律立法都必须以原始契约为基础。对于康德而言，共和国的建立以公民的自由、平等和相互依存原则为基础。在这里康德关心的不是道德自由，而是政治和法律自由，这种自由源于人民的普遍、统一意志。这是一个成熟有理性的人会为自己设定的基本秩序。在此，我的观点是，美国实行的人权是美帝国主义的标志，被滥用为世界终极统治手段。在 1991 年克罗地亚宣布独立时，这一论点显得尤为合理。

Human Right as Umbrela of American Imperialism

Jure Zovko The Institut Intemational de Philosophie

In my presentation I would like to prove that human rights, which were proclaimed in the French Revolution and the American Declaration, originate from the German philosophical tradition (Leibniz, Christian Wolff, Kant). In classical German philosophy, three determinations of the human being were explored, which were targeted as the basis for the justification of human rights. Firstly, respect for human beings was analyzed from the point of view of the so-called original social

contract; secondly, the universality of human rights was justified by the binding nature of reason and the rational freedom of human beings; and thirdly, the recognition of others in their otherness as persons as a condition for the practical realization of human rights in society or in the state was discussed in detail and approved as the basis for the justification of human rights. In his treatise On Perpetual Peace (1795), Kant argued for a republican constitution in every state, which is characterized as a political order with a public state of law. For Kant, a republic is the only form of constitution that emerges from the idea of the original contract, on which all legal legislation of a people must be based. For Kant, the principles of a republic are based on the principles of freedom, equality and interdependence of citizens. Kant is not concerned here with moral freedom, but rather with political, legal freedom, which is derived from the general, united will of the people. It is a basic order that a people with mature reason would prescribe for itself. In my presentation I would like to show that the human rights practiced by the USA are a sign of American imperialism, which is misused as a means to the end of world domination. This is made particularly plausible in the case of the declaration of independence of Croatia in 1991.

具有中国特色的人权

玛丽安娜·佩雷拉 柏林泽特金社会研究论坛

本次演讲的目的是阐明，该文件如何将对“改革开放”的着重强调与就政府治理及私人利益群体权利的细微差别结合起来，与此同时日益保障社会和集体权利。演讲指出，中国在某种程度上走上了一条与西方“相反”的道路，即从“上一代人权”出发，构建其人权体系的适用范围，同时在经济和个人权利的个体维度上取得了更多进步，其通常被视作“第一代人权”。

当然，这种道路的独特性基于中国共产党在这一过程中所扮演的关键且独特的角色。此外，中国共产党还发展了一套环境话语体系，符合中国逐步融入国际社会及其对多边体系（从联合国到世贸组织）日益增强的支持。

Human Rights with Chinese Characteristics

Mariana Pereira The Zetkin Forum für Social Research

Berlin

This presentation aims to explain how the strong emphasis on "Reform and Opening Up[61]" in the document is combined with nuances regarding governance and the rights of private interest groups, while increasingly safeguarding social and collective rights. It suggests that China has taken a somewhat “reverse” path compared to the West by structuring its human rights framework from the "human rights of the last generation". Meanwhile, China has made significant progress in the individual dimensions of economic and personal rights, which are typically recognized as “first-generation” rights.

The uniqueness of this path lies in the critical and distinctive role of the Communist Party of China (CPC) in this process. Additionally, the CPC has developed a specific environmental rhetoric in line with China’s progressive

[61] http://www.chinadaily.com.cn/kindle/2018-10/30/content_37162957.htm

integration into the international community and its growing support for the multilateral system, from the United Nations to the World Trade Organization (WTO).

中国百年来体育赋权女性的逻辑延展

徐翔　西北政法大学人权研究中心

摘　要：1924 年至今，正处于中国女性赋权一百年的重要阶段。文章以女性权利保障为主旨，以体育赋权女性为主要切入视角，通过文献分析、比较分析等研究法对百年来体育赋权女性的历程进行总结和探索，继而探究体育赋权女性背后的逻辑延展，从外在权利的完善与内在力量的加强两个层面解析保障女性体育权对女性群体自身发展的积极作用，并对未来中国女性体育的发展提出从国家政策方向的引导、社会意识的转变以及女性认知的完善三个层面助推女性权利的完善。

关键词：体育权；女性权利；法治保障；体育法

The Logic of Empowering Women through Sports in China Extends over the Past Hundred Years

XU Xiang　Northwest University of Political Science and Law

Abstract: From 1924 to present, it is an important stage of empowering Chinese women for a hundred years. The article focuses on the protection of women's rights and takes the empowerment of women through sports as the main perspective. Through literature analysis, comparative analysis, and other research methods, it summarizes and explores the process of empowering women through sports over the past century. It then explores the logical extension behind the empowerment of women through sports, analyzes the positive role of safeguarding women's sports rights in the development of women's groups from two aspects: the improvement of external rights and the strengthening of internal strength, and proposes three aspects to promote the improvement of women's rights in the future development of women's sports in China: guidance from national policy direction, transformation of social consciousness, and improvement of women's cognition.

Keywords: sports rights; Women's rights; Rule of law guarantee; Sports Law

中国百年来体育赋权女性的逻辑延展

徐翔　西北政法大学人权研究中心

一、引 言

1924 年中国通过了“妇女在法律上、经济上、教育上一律平等”的提案，明确规定：“于法律上、经济上、教育上、社会上确认男女平等之原则，助进女权之发展。”从国家基本原则的层面上赋予女性权利，自此确立了妇女在社会各方面平等合法地位，成为中国女性权益保障的一个重要节点，中国妇女也因此获得了政策肯定的平等参与体育活动的权利，并通过体育领域的赋权强化女性的权利意识。在 2024 年法国巴黎夏季奥运会的开幕式上，伴随着 34 名女性的高声合唱，十座法国历史上杰出女性代表的雕像在塞纳河畔缓缓升起，这是新时期女性权利地位深化在国际体育领域的生动写照。

体育一直是促进性别平等、推动女性发展的重要动力，体育赋权女性是从体育的视角出发，丰富完善女性群体体育领域的权利享有。我国体育赋权女性后，妇女自身权利意识不断加深。体育参与强化了女性对自身力量的关注，外在权利日益得到保障，逐渐减轻了封建文化对于女性思想的束缚，打破了传统思想对于男女社会分工与力量差异的固有印象，有效的促进了女性权利意识的觉醒。

二、体育赋权女性的内在逻辑

（一）体育消解女性权利认知困境

1.体育赋权女性：身体赋权

1.1 强身健体

“体育”一词经历了一个漫长的演化过程，广义上指为大众所熟知的体育运动，包括体育教育、竞技体育、身体锻炼三个方面；　　狭义上指的是体育教育。大众对于体育的理解大多停留在体育活动以及身体锻炼的层面上，因此体育在人类社会中一直扮演着促进身体活动提升身体素质的角色。本文所提出的体育赋权女性中的“体育”是公法视角下的体育，强调的是对于女性群体体育参与及其相关权利的赋予与强化，是公法视角下对于女性体育权和健康权的保障。

女性体育权是保障其健康权得以实现的高质效途径。体育拥有强身健体的功能已是社会的共识，社会意识形态的发展以及女性自我认知的强化，女性参与体

育活动的主动性逐渐增强，对于女性体育参与权利的完善也是保障女性群体健康权实现的应有之义。首先，体育锻炼能够强化女性的身体素质，使个人保持良好的机体状态，通过体育锻炼保证身体的健康、强壮、积极是进行其他一切社会活动的基础。

1.2 自我意识强化

体育赋权有内外两层含义，从外在含义理解，体育赋权即赋予女性以体育参与方面与男性同等的权利，强调的是基本的权利的享有；从内在含义理解，体育赋权即通过体育领域权利的赋予促进女性体魄的锻炼，唤醒女性对于自我与自我权益的认知。

自我关注的三大表现，一是在于对自我健康的重视，二是对自我形像的关注，三是对自我投入与收获的强调。[62]体育锻炼通过对女性身体素质的强化以及外在力量的提升，重塑女性体魄，强化自我认知，使其摆脱传统思维局限；其次，体育锻炼过程能够磨练人的意志，培养其坚持、规划性等方面的优秀品质。体育锻炼中获得的成就感能够激发女性对于身体的掌控力与自信感，从对外界给予过多关注转移到关注自身的发展上来，暂时摆脱固有观念下社会角色对自我的束缚；此外，体育锻炼给予了女性更多的自由空间，体育运动对于女性来说是一种自由、可选择的活动。从这个层面看，体育锻炼给了女性较之日常生活中更多的自由度，可以完全根据自己的喜好进行选择，将自我需要放在第一位。

2.体育赋权女性：认知赋权

2.1 打破性别固化

首先，体育锻炼有助于女性从“私域”走向“公域”，大多体育运动都带有社交性、互动性、开放性等特点，女性在体育参与过程中可逐渐强化与社会的连接，增进女性群体对于社会情况的认知，强化其主体意识。同时，参与体育活动可以满足女性的社交需求，给予女性在“私域”与“社会公域”间的选择自由权，将其从家庭束缚中解放出来。

其次，体育锻炼作为带有力量性特点的训练，在现代生活中构成展现人身体素质与力量感的主要场所，女性群体参与体育锻炼对于其身体力量感的塑造与自我的正确认知都有着十分积极的作用。一方面，体育参与可以强化女性群体的身

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62 熊欢：《“自由”的选择与身体的“赋权”——论体育对女性休闲困境的消解》，载《体育科学》2014 年年第 4 期，第 11-17 页。

体素质，使其更加自信、独立；另一方面，体育锻炼在发展初期及后很长时期都是专属于男性的休闲方式，女性被排除在可参与的范围之外，随着社会发展以及女性意识觉醒，现代女性体育参与权利一步步强化，通过体育平台展现女性力量有助于改善社会的固有偏见，强化女性群体的社会主体意识与地位。

2.2 女性权利的认知强化

体育赋权女性，关键在于原权利体系的解构，重新将女性与男性共同置于权利体系的中心位置。新的权利体系的建构的有效途径——斗争，体育赋权女性就是以女性自我意识觉醒为主、外部政策为辅同社会固有性别体系之间进行博弈的结果。

之所以体育权的实现可以折射出女性权利意识的强弱，关键在于历史背景下男性权利长期为社会主导的直观原因就在于男女身体力量的差异，体育活动是最能提升人的身体素质与力量的途径，也是现代生产方式下展现力量强弱的主要场所。从女性自身出发，体育能够直接帮助其体型的塑造及保持身体机能的良好运行，体育活动中的专注状态给了女性思考自我、认识自我的基础，对于自我的审视、社会结构的认识、性别差异的认知都在此过程中不断深化。体育权随着女性权利意识的增强逐步扩大，体育权的完善也促进了女性对权利的重视与认知。

（二）体育参与增强女性精神力量

1.体育参与提升女性自我成就感

首先，休闲体育活动对于女性发展的助力。休闲体育是以休闲为目的的体育活动，是以身体活动为基础的一种娱乐、健身的过程。我国的休闲运动随着国民经济与生活水平的提升逐步发展完善，在一定程度满足了人们的精神需求。女性群体越来越广泛的参与休闲运动之中，休闲运动对于女性来说既有休闲健身的外在成就，又能满足其娱乐、社交、实现自我等内在需求。女性在休闲运动中享有完全的自主选择权，参与的项目、时间、地点等都由其自主安排，参与休闲体育的过程就是实现自我需求的过程，能够充分实现自己的权利。

其次，竞技体育对于女性发展的促进。竞技体育是指在最大限度的挖掘和发挥人在体力、心理、智力等方面的潜力的基础上，以最大程度提升运动技术难度和创造优异运动成绩为主要目的活动过程，是一种制度化、公平化、观赏化的竞争性体育活动。对于女性来说，竞技体育参与所带来的成就感是更直观也更生动

的。第一，竞技体育对于一般的女性运动员来说，能够完成极具挑战的运动，已经是对自身身体力量、素质的一种极大认可，这是自我成就感的来源之一。第二，竞技体育的精神在于竞争，在竞技体育的赛场上，女性运动员通过与其他优秀的参赛者进行激烈比拼以获胜，充分向社会展现自己的实力，其成就感是最为直接的。

2.榜样力量强化女性权利意识

体育权的主体范围扩大是女性权利完善的重要体现，其既包括取消一般体育活动的女性参与门槛，也包括竞技体育领域中女性的参与机会与男性达成基本平等。无论是在竞技体育领域还是全民健身领域，女性已经占据着越来越重要的地位，运动场上的女性不仅有着优秀的运动实力，更展现出了女性坚韧不拔、顽强拼搏的精神与品格，树立了新时代中国女性强有力的新形象。在竞技体育领域，越开越多优秀的女性运动员涌现，例如以顽强拼搏精神著称的中国女排、被誉为“铿锵玫瑰”的中国女足等，充分展现了新时代中国女性的风采，为女性群体树立了一个良好榜样。女性运动员们在赛场上为自己的热爱、为国家的荣誉而奋斗的英姿会影响带动更多的女性走出“私域”为自己的热爱而奋斗，不要被社会的固有观念和他人的偏见眼光所界定，勇敢的展现自我。

三、体育赋权女性的外在逻辑

（一）体育赋权女性：政策法规促进保障女性体育权的实现

1.以《宪法》为根本遵循，其他法律法规为基础保障女性体育权

体育赋权的逐步完善是以各法律的保障为基本构成的，我国《宪法》第48条规定“中华人民共和国妇女在政治的、经济的、文化的、社会的和家庭的生活等各方面享有同男子平等的权利。”以《宪法》为基本遵循，《民法典》第四条规定“民事主体在民事活动中的法律地位一律平等”，为女性与男性在民事生活领域的平等权利作基本保障；《妇女权益保障法》以保障妇女基本权益为指向，促进男女平等与妇女全面发展制定而成，对女性包括政治权利、文化教育、社会生活、婚姻家庭等多个领域的权益作了全方面的保障，是维护女性权益的有力基础。《体育法》是女性体育权的最直接保障，其中第五条规定“国家依法保障公民平等参与体育活动的权利，对未成年人、妇女、老年人、残疾人等参加体育活动的权利给予特别保障。”第二十三条规定“全社会应当关心和支持未成年人、

妇女、老年人、残疾人参加全民健身活动。各级人民政府应当采取措施，为未成年人、妇女、老年人、残疾人安全参加全民健身活动提供便利和保障。”为女性与男性平等享有体育权提供了直接保障。

2.以体育权保障为重要指引，推动实现性别形式平等

首先，政策法规以促进男女性别平等为方向，对于女性体育权利的保障基本完善。建设体育强国是新时期体育改革的工作方向与目标，体育强国的基础在于群众体育，习近平总书记指出：“从体育强国到健康中国，人民的健康、人民的体质、人民的幸福，都是一脉相承的。这是全面小康、全面现代化的题中之义。”

其次，体育发展中女性力量更加强大。女性体育参与权利的完善是群众体育、竞技体育、体育产业等全面发展的应有之义，在国家政策的支持、法律的保障之下，女性体育的发展在新时期达到了新的高度，男女体育参与形式平等初步达成男女参与体育运动的形式平等初步达成。第一，女性体育人才队伍不断壮大。2013年至2020年，我国女性等级运动员增长迅速，累计14.20万人，平均年发展女性等级运动员为1.76万人。其中，累计发展国际级女性运动健将480人，展现出了中国女子运动员的强大竞争力；女性教练员人数也大幅上升。据《中国妇女儿童状况统计资料》显示，我国女性等级教练员人数不断增长，2013到2017年女性等级教练员从417人提升到1450人，增长了2.4倍。[63]以上迹象表明，我国女性参与体育活动的环境以及参与人数都在不断壮大中，在国家体育建设中占有至关重要的地位。第二，男女平等始终是我国的基本国策，政府促进女性体育参与与男性逐步达成形式平等。在2024年于巴黎举办的第33届夏季奥运会赛场上，中国体育代表团中运动员比例较以往相比更加呈现出性别均衡的特点，从运动员性别比例上看，405名运动员中，女运动员269人，约占比66.42%，男运动员136人，约占比33.58%，[64]女性体育权的实现得到了更生动的诠释，这也是我国竞技体育不断追求性别均衡发展、促进竞技体育发展性别平等的突出表现。

（二）体育：展现、强化女性权利的平台媒介

首先，女性体育领域相关权利的完善是女性权利完善的组成部分以及重要展现。体育随着社会发展已经逐渐演变为一种生活方式，对于促进身体健康、培养

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[63] 周星,刘翰林：《共绘体育产业发展新篇章》，载《经济》2023年第8期：第34-37页。
[64] 《为中国加油！一组数字速览巴黎奥运中国军团》，载中国妇女网，https://www.cnwomen.com.cn/2024/07/13/99690612.html，最后访问时间：2024年8月2日。

坚韧品质、展现国家文化软实力等方面有着十分积极的作用，因此女性体育权的完善是女性权利完善有助于提升女性群体在寻求合理社会权利时的斗志与自信，引发女性关于权利的深入思考。

其次，体育权利的完善与女性权利的强化二者之间是正相关的促进关系，一方面，女性在体育领域领域相关权利的完善，是意识觉醒、斗争的结果，体育权利的完善本身就是女性权利完善的具体领域展现。女性在为获得体育权利而与社会固有性别体系斗争中展现的坚持、顽强的精神，是女性对于公平享有社会权利的强烈渴求，该精神会影响更多女性的加入与思考，对现女性社会权利不足的地方进行补正；另一方面，女性体育权利的完善意味着体育参与更广泛的面向女性群体，女性群体体育参与的积极性展现了其对于自身享有权利的重视，展示出女性群体在争取自身合理权利时强有力的姿态，激发女性群体在寻求性别权利平等过程中的信心。

参与发展和保护新兴人权

奈玛·维默 诺德豪森应用科技大学

目前为完成我的学士论文研究，我试图找出移民和难民如何通过参与志愿工作融入他们想要生活的社会群体。

但是，融入和参与和一般意义上的人权有什么关系呢？

融入意味着每个人都有平等的参与权。这项人类权利在《联合国儿童权利公约》[65]和《联合国残疾人权利公约》[66]中均有规定，但融入不再仅仅是儿童或身心残疾者拥有的权利。这意味着，每个因语言不通或移民背景等原因而需要帮助或出现任何问题的人都有融入的权力。

在抵达东道国后，有过逃亡或移民经历的人若从事志愿者工作，可更好地获得存在价值，并能够创造逃离家园后的新生活。因此，志愿者工作是实现参与人权的低门槛方式。从长期来看，这也是在东道国享有实现就业、拥有独自住所或教育的人权途径。因此，在考虑人权发展时，必须考虑到志愿服务环境中的融入和参与。

人类在未来必须面对各种变化，如气候变化、人口变化，以及人工智能、社交媒体平台和其它各项发展对人们的影响。在此背景下，发展这些人权的意义变得日益重要。因此，以可持续的方式发展人权意味着人类需要将彼此视为同类，每个人都必须参与并拥有提高自身才能的机会。因此，成为社会的一部分并融入其中是一个过程，且实现这个过程绝非易事。然而，如果人类开始平等地看待拥有不同资源和知识的彼此，世界或将变得更为团结。

总之，为了发展和保护人权，人类需要就相关问题达成一致，包括人权是什么、人权背后的不同含义/观点以及如何让人们参与改变人权并成为社会的一部分。

因此，人类开始抛弃这些旧习惯，比如对“不发达”国家的人民行使强权。表面看来，这像是支持对方，促进发展合作，实则是利用其资源为自身利益服务。

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[65] https://www.un.org/zh/documents/treaty/A-RES-44-25
[66] https://www.un.org/disabilities/documents/COP/9/RT3/CRPD_CSP_2016_4-1603540C.pdf

Participation in the Development and Protection of New and Emerging Human Rights

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In my current research for my bachelor thesis, I am trying to find out how participation of migrants and refugees in a volunteering work helps them to include themselves in the society they want to live in.

But what does inclusion and participation have to do with human rights in general?

Inclusion means equal participation rights for everyone. Which is a huma n right and stipulated in “The United Nations Convention on the Rights of the Child” and in “The United Nation Convention of the Rights of Persons with Disabilities”. But inclusion not only is a right for children or persons with physically or mentally disabilities anymore. It means that every human being with the need of help or any kind of problems because of a missing knowledge of language or a migration background for example, has the right to participate.

To do volunteering work as a person with an escape or migration experience after arriving at the host country is helpful to get the feeling of being useful and able to create a new life, which is normally taken by fleeing from the homeland. Therefore, volunteering work is a low-threshold way to enable the human right of participation but also is a long-term perspective to enable the human rights of an employment, an own apartment or education structures in that host country. So, inclusion and participation in a volunteering setting for example, must be considered when thinking about d evelopments in human rights.

The meaning of developing those human rights with all the changes humans must face in the future like climate change, demographic change, artificial intelligence, social media platforms and the influence they have on people, is gaining

even more importance. Ergo developing human rights in a sustainable way means that humans need to look at each other as humans and that everyone must participate and get the opportunity to embrace and empower their abilities and talents. Therefore, being a part of a society and being included in one is a process and not easy to handle. But if humans start seeing each other as equals with different resources and knowledge we might start to act as a united world.

To sum up for developing and protecting human rights humans need to be in an agreement about what human rights are, the different meanings/perspectives behind them and how people can be included in changing them and be a part of their society.

So that mankind starts to leave these old habits like using power on people in “underdeveloped” countries to make it look like support and development cooperation but instead using the resources for own purposes behind.

启蒙与现代性——对宗教与理性关系的挑战

伊丽莎白·格雷本-施密特 图宾根大学

现代性在欧洲被视为启蒙运动的传统。现代性指的是在 1750 年至 1850 年这一时期，所产生的世俗化。世俗化往往对宗教作为一种自然文化背景的角色提出质疑，或至少持怀疑态度。随着这种现代性的发展，理性成为处世的重要标准，成为从与宗教直接相关的教义和教条指导方针中解放出来的标志。世俗化论题为这一问题提供了解决方案。世俗化论题构成了 20 世纪自我理解的核心要素，至少在欧洲知识分子群体中如此。世俗化理论从最严格意义上指出，一个不可阻挡、不可逆转和普遍理性化过程的发展必然伴随着宗教的边缘化，甚至消失。因此，世俗化辩论的立场各异。在世俗化过程中，现在有必要放弃宗教或对其进行重新定位。一些人将此视为对宗教不可或缺性的肯定，而另一些人则将此视为宗教的反叛和暂时回归。然而，世俗化理论不再以这种形式被推崇，因为宗教对人类个体与社会的不可或缺性为理解宗教的人类学转向铺平了道路。但无论如何，理性和宗教之间的关系已成为讨论的主题。我认为：宗教的人类学转向在此表示在宗教功能理解方面的变化。宗教的导向力不再仅仅源于更高的力量——上帝的权威，而是建立在超越人类的基础之上。通过触及生命的整体性，从而能够阐明生命中所有碎片的意义，宗教获得了认识论和行动理论的双重功能。

Enlightenment and Modernity – A Challenge for the Relationship of Religion and Reason

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In Europe, Modernity is seen as standing the tradition of the Enlightenment, referring to the period from 1750-1850, which has brought about secularisation. Secularisation typically questions or at least problematises religion as a natural cultural background. With this kind of modernity, reason became the prominent

standard for dealing with the world as a sign of emancipation from doctrinal and dogmatic guidelines, which primarily are associated with religion. This problem is addressed by the secularisation thesis. This became a central element of self-understanding in the 20th century, at least among European intellectuals. In its strictest form, the secularisation thesis states that an unstoppable, irreversible and universal process of rationalisation is accompanied by the marginalisation of religion, even to the point of its disappearance. A wide variety of positions therefore characterise the secularisation debate. In the course of secularisation, it was now necessary either to abandon religion or to assign it a new place. Some see this as a confirmation of the indispensability of religion, while others see therein only a rebellion and a temporary return of religion.

However, the theory of secularisation is no longer advocated in this form, since the indispensability of religion for the human as an individual and for society was thus paving the way for an anthropological turn in the understanding of religion. But in any case, the relationship between reason and religion became the subject of discussion.

My thesis is: The anthropological turn of religion is understood here as a change in the comprehension of the function of religion. Religion's power of orientation no longer lies simply in the authority of a higher power, God, but is established in the transcendence of the human being. By reaching out to the wholeness of life and thus being able to illuminate meaning in this life in all its fragmentariness, Religion gains both, an epistemological and an action-theoretical function.

基于人权的气候危机化解、挑战与应对

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摘 要：气候变化带来深刻的人权危机。目前基于人权方法的化解气候危机路径面临权利基础不明、义务主体存疑、治理效果有限三方面的问题。需要构建以环境权为核心的气候人权体系；合理配置气候风险下人权义务主体范围；凝聚全球气候风险治理共识。

关键词：人权方法；治理效果；义务主体；共识

Addressing the Climate Crisis Based on Human Rights: Solution, Challenges and Responses

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Abstract: The climate crisis brings about profound human rights crises. The current path of resolving the climate crisis based on human rights faces three problems: unclear rights basis, uncertain scope of the subject of duty, and limited effects. It is necessary to build a system for climate human rights centered on environmental rights; rationally allocate the scope of the subject of duty of human rights in the context of climate risks; and consolidate global consensus on climate crisis governance.

Keywords: Human Rights Approach; Governance Effect; Subject of Duty; Consensus

基于人权的气候危机化解、挑战与应对

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气候变化是一个环境问题，更是发展和人权问题，是当今世界面临的最严峻挑战之一，对生态系统、自然资源以及人类社会都将产生深远影响。气候议题是全球风险社会语境下最具紧迫性的议题之一。[67]现代社会最突出的特征就是风险社会。德国社会学家乌尔里安贝克提出，近代以来风险的结构和特征发生了根本性转变，人类成为风险的主要制造者，产生了现代意义的风险社会。

气候变化是风险社会的典型范例之一，既具有“外部风险”的底色，又暗含某些“人造风险”的特征。也即，气候变化所引发的气候风险是自然因素和人为因素共同作用的结果，自然界本身存在温室气体的排放，太阳变化、火山活动及海洋变动等自然活动排放甲烷和二氧化碳等温室气体，在人类活动的放大作用下，温室效应得到加强，从而引发气候风险。联合国政府间气候变化专门委员会（以下简称“气专委”）在报告中明确证实，气候变化真实存在，其主要原因是人为的温室气体排放。

从人权的视角来分析，气候变化将会威胁一系列的人权，包括生存权、健康权、发展权和食物权等，更将给那些还没有能完全享有人权（特别是生存权和发展权）的弱势群体带来毁灭性影响。[68] 气专委和人权理事会决议中均表示，气候变化现象直接和间接地威胁到全世界人民能否充分有效地享有一系列人权。对人权充分享有的威胁是气候变化下的直接人权风险，也是气候风险在人权领域的直接展现。在当前世界气候治理的态势之下，应当通过何种方式为全球气候风险中的人权提供救济和保障？

一、基于人权的气候风险化解路径

基于人权的气候诉讼和基于人权的气候应对方法是当前气候治理的两个主要方面。一些主要的气候变化受害国和受害群体开始探寻国际法上的救济途径[69]，

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[67] 闫桥,曾繁旭.气候议题的国际传播：天然潜力、特殊困境与可能路径[J].新闻与写作,2024,(09):98-106.

[68] 参见何晶晶. 气候变化的人权法维度[J]. 人权, 2015, (05): 84-101.

[69] 龚宇. 人权法语境下的气候变化损害责任:虚幻或现实[J]. 法律科学(西北政法大学学报), 2013, 31(01): 75-85.

出现了被视为气候变化人权诉讼开端的因纽特人诉美国政府案。以人权论证为基础，提出人权诉求的气候变化策略诉讼，逐渐成为一种发展趋势。[70]

2015 年，《巴黎协定》序言中加入了关于气候变化与人权关系的论述，这一表达被视为气候变化人权诉讼的权利基础。此后，气候变化人权诉讼呈现蓬勃发展的态势。据伦敦政治经济学院发布气候变化诉讼全球趋势报告中显示，全球已有超 2600 起气候变化诉讼案件，其中 70%的案件在 2015 年巴黎协定提出后提起诉讼。气候变化诉讼数据库现今已经记录了 1763 个美国气候诉讼案例和 905 个全球气候诉讼案例。此外，部分国家和地区的法院开始接受以人权为基础的气候变化诉讼，如巴基斯坦的 Leghari v. Federation of Pakistan 案，这都显示着气候变化的“权利转向”，越来越多的气候变化诉讼开始应用人权论证。

此外，人权理事会倡导采用基于人权的方法应对气候变化。“气候变化造成的负面影响会根据最终发生的气候变化的程度而成倍增加。因此，气候变化需要全球采取基于权利的应对措施。”基于人权的方法要求有关治理的计划、政策和进程以国际人权法中所确定的权利和义务为基础，赋权个人尤其是社会中最边缘化的群体有能力参与政策制定，并有权要求责任承担者对其行为负责，以实现可持续的发展。人权理事会强调，基于人权的气候变化应对方法必须明确“权利持有人”及其权利，并明确相应的“义务承担人”及其义务，以便找到办法加强权利持有人提出要求的能力和义务承担人履行义务的能力。

基于人权的方法强调实质性的人权标准，在气候变化治理过程中，能够通过人权法律和政策规范评估治理的水平和效果。此外，基于人权的方法将国家等相关的行为体视为“责任承担者”，要求其承担保护“权利享有者”的责任。

二、人权路径应用于气候治理的困境

（一）人权方法应用于气候治理的权利基础不明

人权方法应用的基础是明确权利持有者及其权利。气候风险下，权利持有者是受气候变化所影响的世界人民，这一点无争议；但对于气候风险所影响的具体人权类型，目前并无定论。

欲将人权法作为气候变化救济的停泊点，需要首先明确气候变化是否侵犯了人权。[71] 以气候变化人权诉讼为例，气候诉讼的起点是对基础请求权的识别。由

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[70] 杨欣. 气候变化诉讼中的人权论证[J]. 人权, 2023, (02): 18-37.
[71] 何志鹏、张昕：《气候变化救济的审思与突破:以人权法为视角的展开》，载《北方法学》2021 年第 15

于实体性的环境权在国际法上尚未建立，将环境权作为一项独立人权的努力遭遇到诸多难题。[72]尽管联合国首次承认健康环境权是一项人权，但实体性环境权因修饰词的不同，在现有国际公约、国家宪法中的界定并不统一。[73]在实体性环境权缺失的情况下，将人权法适用于气候变化领域仍依赖第一代和第二代人权，[74]只能利用现有的生命权、生存权、健康权等人权来阐明和解释环境权利，“转录”至人权法的涵摄范围，也即部分学者指称的人权法的“绿化”。然而，在界定因果关系时，主要难点是在温室气体排放和侵犯人权行为之间建立直接联系。[75]虽然气候变化会对人权造成一系列负面影响，但从法律角度来看，各国排放温室气体的行为并不必然违反国际法的规定，由此引发的气候变化并不一定能被认定为侵犯人权法。[76]

（二）人权方法应用于气候治理的义务主体存疑

人权方法应用的另一要求是明确义务承担者。人权法语境中，气候变化责任主体在理论上指向国家和跨国企业，但在实践中，将上述二者确定为责任主体存在困难。国家层面，在确定责任主体的义务时，虽然人权法要求国家承担尊重、保护和实现人权的义务，但在实践中难以真正追究一国政府需要承担的人权法责任。气候侵权责任成立面临受害人与加害人的确定、排放者的注意义务、排放与损害之间的因果关系等重大法律技术障碍，几乎不可能为各国司法承认，[77]这使得人权视角下的气候变化损害责任无法成立，更遑论将国家确认为责任主体。有学者认为，《巴黎协定》为实现气候治理目标而做的核心制度安排——国家自主贡献承诺，明确了国家层面的法律义务。但《巴黎协定》所规定的国家责任强调的是各国应当承担的“行为义务”，也即以各缔约国实施编制、通报和保持连续的国家自主贡献承诺为履约方式，至于各国气候治理的实效在所不问。

跨国公司层面，根据国际人权法，国家依然是国际人权法中的单一义务主体，跨国公司并不需要承担直接义务。[78]由于缺乏直接基于国际人权条约或习惯国际

卷第 5 期，第 104-115 页。

[72] 陈海嵩：《论程序性环境权》，载《华东政法大学学报》2015 年第 18 卷第 1 期，第 103-112 页。

[73] [1]何志鹏,张昕. “双碳”目标下气候变化诉讼的人权之维及中国进路[J]. 北方法学, 2023, 17(06): 135-147.

[74] 田静：《人权法语境下的气候变化损害救济:挑战与进路》，载《北京理工大学学报(社会科学版)》2023 年第 25 卷第 6 期，第 46-55 页。

[75] 田静：《人权法语境下的气候变化损害救济:挑战与进路》，载《北京理工大学学报(社会科学版)》2023 年第 25 卷第 6 期，第 46-55 页。

[76] 何晶晶：《气候变化的人权法维度》，载《人权》2015 年第 5 期，第 84-101 页。

[77] 谢鸿飞：《气候变化侵权责任的成立及其障碍》，载《政治与法律》2022 年第 7 期，第 2-17 页。

[78] 刘冰玉、汤希灵：《以跨国公司为被告的气候变化诉讼困境与归责路径探究》，载《学习与探索》2024

法的权利或义务，跨国公司难以作为气候变化人权诉讼的适格被告，承担气候变化损害责任。

（三）人权方法应用于气候风险治理效果有限

一方面，强制性人权规范缺乏，人权方法的强制力不足。联合国人权高专办就人权机制在气候变化领域的应用进行了总结，可以发现，国际人权治理体系在气候变化领域发挥主要作用的是人权条约机构、人权理事会特别程序和普遍定期审议等人权机制。人权条约机构是监测核心国际人权条约执行情况的独立专家委员会，条约缔约国都有义务采取措施，确保国内每个人都能享有条约规定的权利。人权条约机构主要通过一般性意见和一般性建议讨论气候变化和人权问题，如五个条约机构发表的关于 2019 年联合国气候行动峰会的联合声明、消除对妇女歧视委员会关于气候变化背景下减少灾害风险所涉性别方面的第 37（2018）号一般性建议。然而，各条约机构发表的“一般性意见”或“一般性建议”是其对各人权条约规定的解读，本身并不具备法律约束力，仅规范性内容在对其表示同意的国家之间构成嗣后实践。

此外，自 2008 年以来，人权理事会的特别程序机制积极参与应对气候变化对人权的影响，发布了包括气候变化、清洁空气与享有健康和可持续环境的权利、全球对享有安全、清洁、健康和可持续环境权的认可在内的一系列报告。但特别报告员仅通过向各国和其他行为方发送信函的方式，提请注意国内侵犯人权的行为，其所发布的报告也并不对当事国具备强制约束力。人权理事会的普遍定期审议机制被运用到气候变化与人权领域中，但纵观现行应用于气候治理的人权机制，均无强制执行力。

另一方面，基于人权的气候诉讼实效不佳。虽然气候变化人权诉讼被视为推动气候变化应对的有效落地措施之一。然而，当前的气候变化人权诉讼象征意义远大于实际意义。

国际社会对于以人权为基础的气候变化诉讼的作用抱持着较大的希望，联合国环境规划署在报告中称其为“改变气候变化应对态势的前沿解决方案”。在积极的设想中，气候诉讼被战略性地用作“影响政策结果或改变企业行为的工具”，甚至能够被定位为气候监管的一种形式。[79]诚然，以人权为基础进行气候变化诉

年第 3 期，第 156-167 页。

[79] 陈若鸿,张媛媛. “后《巴黎协定》时代”的气候治理——基于战略性气候诉讼的考察[J]. 区域国别学刊,

讼有其积极作用。相较于以国家为主体的气候谈判治理模式，基于人权的气候变化诉讼作为一种自下而上的气候变化治理方式，为个人提供了参与气候变化治理的救济途径。在使用人权作为基础的尝试中，大部分案件的被告是国家，诉求多为希望法院确定政府应对气候变化不力，从而构成对人权的侵犯[80]，这在一定程度上能够督促各国政府完成减排承诺，履行气候治理责任，并能够通过宣传和示范效应提升国际社会对于气候变化问题的关注程度。

然而，由于当前世界上大部分国家缺乏体系性的气候变化法[81]，多数气候变化人权诉讼是以宪法、环境法、普通法或国际条约为法律依据而提起，其适用结果依赖各国司法机关对于本国法律做出的创新性解释，而司法机关能否主动承担政策审查的责任却存疑。以美国为例，法院对于要求行政部门管制碳排放的气候诉讼采取审慎的态度，似乎更倾向于以“不适合法院审理的政治问题”为由对气候诉讼采取回避的立场。

更悲观的是，在以政府为被告的气候变化诉讼中，即使法院支持了原告的诉讼请求，其执行实效仍旧依赖于各国政府；若政府不认可或怠于履行法院判决，司法机关无法运用强制力要求行政机关履行其气候义务。

三、 基于人权的气候危机治理的破局之路

（一）构建以环境权为核心的气候人权体系

气候变化带来的人权风险需要人权法重新审视自身，构建以环境权为核心的气候人权体系。环境权既包括实体环境权，也包括程序性环境权，公众只有拥有并行使程序性环境权才能实现实体性环境权[82]。

确立环境权为核心的气候人权体系有其独特优势，首先，能够明确气候变化人权诉讼的基础请求权，为气候风险的人权治理提供权利基础；其次，能够缩短气候变化与侵犯人权之间的因果链条，提升裁判效率。在气候变化诉讼中，不需要经过第一代人权和第二代人权的阐释，能够直接将气候变化导致的侵犯人权行为与实体环境权相联系。最后，以实体环境权为核心能够更好地处理气候变化导致的人权损害结果，便利国家间的责任承担。

在气候变化人权诉讼中，环境权的适用路径可以概括为“扩权型、程序型以

2024, 8(03): 135-151, 160.

[80] 朱明哲. 气候变化诉讼的人权进路及其局限[J]. 人权研究, 2022, (03): 2-20.

[81] 边永民. 气候变化诉讼的法律依据辨析[J]. 太平洋学报, 2023, 31(03): 94-106.

[82] [1]何志鹏,张昕. “双碳”目标下气候变化诉讼的人权之维及中国进路[J]. 北方法学, 2023, 17(06): 135-147.

及创权型路径”[83]。“扩权型”路径也即人权体系的绿化，指采取扩张解释的方法将环境议题纳入既有人权体系[84]，利用现有的生命权、生存权、健康权等人权来阐明和解释环境权利。程序型路径强调重视参与权、补救权和诉诸司法权等环境程序性权利。创权型路径即为创设独立的环境权。为保障人权，防范化解因气候变化引发的人权风险，需采取创权型路径，突出环境权的人权属性。

从宪法角度出发分析，我国宪法已经以国家目标条款为核心规范形成了内涵丰富的环境宪法，宪法环境权可同时作为实体权利和程序权利，一方面通过人权理论形成有特定内容构造的宪法基准，另一方面辅助开启合宪性审查程序。[85]

（二）合理配置气候风险下人权的义务主体范围

气候变化的传统治理范式强调“国家中心”，而在人权方法广泛应用的背景下，多元共治的气候治理格局逐渐形成。要采取多中心的路径，合理配置气候风险下的义务主体范围，考虑多利益攸关方的参与，实现全球治理的范式调整。

具体而言，国家仍然是重要的义务承担者。国家义务正随着人类社会的危险世界观（现代性）向风险世界观（后现代性）转变的历史过程逐步转型，[86]要整合国家在气候风险下应承担的人权义务，推动各国在气候治理中的“行为义务”向“结果义务”发展。从法律方法的角度看，人权论证通过法律解释续造新的规范，最突出的例证是对国家义务的法律诠释。[87]

以跨国公司为代表的企业是主权国家之外的不可忽视的义务承担者，要明确企业在气候风险下的人权义务，完善人权视角下的企业环境责任。跨国公司是国际治理中的重要主体，也是全球碳排放的主要贡献者。[88]研究表明，包括壳牌在内的部分大型跨国公司也需要对历史上的全球温室气体排放承担责任。如果只将国家确立为责任主体，忽视企业的义务，将导致企业责任的疏忽。值得注意的是，在基于人权的气候变化治理中，企业作为与主权国家相同的责任主体，其索要承担的企业环境义务并非传统人权法观念中道德性的社会责任，而是由国家强制力

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83 参见田静：《人权法语境下的气候变化损害救济:挑战与进路》，载《北京理工大学学报(社会科学版)》2023 年第 25 卷第 6 期，第 46-55 页。

84 杜群、都仲秋：《环境权利的人权演进及其法治意蕴——以国际人权法为视角》，载《中国政法大学学报》2023 年第 6 期，第 16-36 页。

85 段沁：《宪法环境权的有限功能与发展空间——以德国联邦宪法法院“气候裁定”为切入点》，载《人权研究》2022 年第 3 期，第 21-35 页。

86 孙雪妍. 气候风险下人权保障的司法类型化：法理探析及路径选择[J]. 人权, 2023, (02): 38-61.

87 杨欣. 气候变化诉讼中的人权论证[J]. 人权, 2023, (02): 18-37.

88 杜中华. 以人权法强化公司气候侵权责任的失败尝试?——对荷兰皇家壳牌公司案的批判性研究[J]. 人权研究, 2022, (03): 36-57.

确立和保障的制度和责任；如若违反，相关主体需要承担相应的法律责任。[89]在这一层面上，需要在气候变化领域推动跨国公司责任规则，通过气候变化诉讼实现跨国公司气候责任追溯。

（三）凝聚全球气候风险治理共识

气候治理共识匮乏、国际领导力缺失是联合国人权机制、基于人权的气候诉讼难以发挥实效的直接原因。以联合国为中心的气候谈判机制陷入僵局后，国际社会在气候治理领域陷入无政府状态与领导力赤字的双重困境，对全球气候治理形成了一定约束，以人权治理机制为代表的多元化气候治理机制开始出现。多元化的气候治理机制虽然有其优势，但很难将绝大多数的“利益攸关方”都纳入到同一机制之中。[90]对此，需要整合当前的气候治理机制，形成各机制有序结合的国际气候治理格局，凝聚气候治理共识。风险社会时代，气候风险是全球性的，要有效化解必须通过国际合作，重铸全球气候治理领导力，整合气候治理人权机制、气候谈判等多种气候治理机制。整体性治理并不一定要求各个国际组织或治理机制放弃独立行动的能力，相反则可以利用各自的优势在气候治理的整体过程中扬长避短，避免碎片化造成的桎梏。

[89] 张万洪,王晓彤. 工商业与人权视角下的企业环境责任——以碳达峰、碳中和为背景[J]. 人权研究, 2021, (03): 41-52.
[90] 张丽华,付悦. 全球气候治理机制复杂化及中国应对[J]. 理论探讨, 2024, (01): 47-53.

人权“社会化”的必要性

穆罕默德·奥卡尤兹 土耳其中东科技大学

无论是从政治和法律角度来看，还是从诸如工作权、医疗保健权、住房权等核心权力的具体实现来看，以及从更广泛地保护人的尊严的角度来看，历史上的人权问题一直处于紧张状态，因其实现方法往往相互矛盾。在阶级冲突及其社会支持者的背景下，以及全球各地区差异的背景下，对上述核心人权会有不同的解释。尽管最近一再试图克服这些“特殊性”，实现普遍意义上的人权概念，但这些目标从未真正实现。在我看来，造成这种情况的一个主要原因是，各种学术和民间社会行为体之间缺乏联系，双方在人权问题上的活动（仍然）缺乏合作。这种情况会导致多种后果，包括使人权问题的“社会化”难以实现。在分析这一情形后，我们将探索其他的道路以寻求进展。

The Need for a “Socialization” of Human Rights

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The Human Rights discourse, but also human rights ‘policies’ (that means efforts to implement certain values and norms reflected latest since the relation between individual and society/political power became a topic of philosophical-legal conceptualization) in social and political structures, have always been caught in the tension between concreteness and abstraction.

Within this framework, it is possible to state - on the one hand - the focus on the importance of categories such as human dignity (derived from Natural Law based categories) (Hier eingehen auf die mehr moralische als politische Annäherungen an das Thema, und auf die Abstraktheit: Beispiel: Spartakus-Aufstände), and - on the other hand – approaches based on needs and interests, that means approaches elaborating on the everyday life of the people, on their material production and

reproduction in a time when something like ‘modern’ ideologies’began to emerge (when we have social carriers for ideas etc.).

After World War II as a result of fascism, we can state an attempt to bring these two dimensions together by focussing on the neeed to somehow reorder the world by focussing – this time also on an let’s stay international institutional level – on materal and social needs as the precondition of aspects such as freedom of speach and the above mentioned dignity. It is worthwile to mention that – by doing this – the international dimension was included. The right to live and work under human conditions, the right of housing (which will be one the topics of our meeting), of sufficient medical care, of adequate nutrition (the list can continue), in sum the right to live under such conditions that we won’t be forced to concentrate our energy on ‘survival’.

Here I would like to mention the first time the keyword of the title of my presentation: Socialisation. Socialization as the way to interrelate norms and values with material living and working conditions. With other words to overcome the results of the above mentioned tension between concreteness and abstraction. At this point another claim would be that the aim of socialization would be a sort of universalism, that means an universalization of human rights.

By speaking of universalism I would very much like to speak of a sort of universalism derived from the results of social struggle to be observed in particular (but not only) during the 19th and up to the third quarter of the 20th century (Beispiele geben: education, public participation, legal relation with the state etc.)

It is exactly this sort of universalism which is not realized until now even if – as mentioned above – there were attempts to do so in certain periods of time.

The categories of defining, determining and evaluation the human rights issue are more than ever approached differently by the needs and interest of different social groups, and furthermore by the needs and interests of different socioeconomic and state formations. Of course all these different needs and interests have a material base, and this can and should not be ignored, especially not from a point of view where conditions of global unequality are still determining the privilege to setup norms.

Despite the mentioned fact that different needs and interests are an undebatable reality, and that there should not be a - I would call it ‘constructed harmony’ (think of the tons of documents concerning human rights on the one hand, and the continuously bad situation human rights in reality), it is however necessary to overcome these ‘particularities’ of different approaches to establish a (new) universalism of human rights.

I think one the preconditions to do so, is to overcome the lack of cooperation between the various scientific and civil actors. Often outspoken, and often tried, we must never tire of emphasizing this again and again. At this point I will focus on the importance of Law, which I found essential still in reflecting and articulating ceratin things. I think Law has one thing immanent which – for example – for social sciences is much more difficult to achieve: the ability to establish ‘doctrinal’ norms, a framework of theoretical categories of orientation which is always useful.

克服绝对贫困意味着加强人权

乌韦·贝伦斯 德国经济学家、国际物流专家

在中国和印度担任物流经理期间，我亲眼目睹了国内的贫困状态以及为克服贫困而作的努力。虽然印度的减贫进展非常缓慢，甚至停滞不前，但整个中国都在积极摆脱贫困。

我独自一人从北京到贵州进行了一次为期三个月的公路旅行，我说服自己此程定能成功。中国的基础设施建设覆盖整个中国：铁路和公路相连，电力和通信相连。有这些基础作保障，第二步便是系统记录原因和制定措施，以便最终在第三阶段实施这些措施。目前，重点是安全，以保证个人或整个村庄不会返贫。

中国所有人都能享有安全的食物、穿得暖、有住房、享受医疗和社会保障，这些才是最重要的人权。为了维护这一人权，群体的权利比个人的权利具有更高的优先级。

“全球北方”可以而且应该吸取中国的经验，克服“全球南方”的贫困，最终保证各国人民在祖国过上有价值的生活，并消除经济移民。

Overcoming Absolute Poverty Means Enforcing Human Rights

Uwe Behrens German Economist, International Logistic Expert

During my activities as a logistic manger in China and India, I was able to see poverty and the efforts to overcome it. While in India the progressed only very hesitantly or even stagnated, a process of overcoming it took place in China as a whole.

During a private road trip from Beijing to and through Guizhou within three month, I was able to convince myself of the success.

Starting with construction of an infrastructure covering the whole of China: rail- and road connection, electricity an communication connection. The basis was laid. The systematic recording of the causes and the development of measures were the second step in order to finally implement the measures in a third phase. At present, the focus is on security, so that individual People or entire villages will not fall back into poverty.

A life for all people in the society with secure food, clothing and housing, medical and social security is the most important human right. In the interest of this human right, the rights of the group take a higher priority than those of the individual.

The “Global North” can and should learn from China#s experience how poverty in the “global South” can be overcome, how people can ultimately be guaranteed a life worth living in there homeland and how economic migration can be overcome.

一个地球和人类命运共同体——为什么多边主义指向世界和平而民族主义是死胡同

贝恩德·安迈尔 德中经济、教育和文化协会

一、引言：同一个地球与人类命运共同体

- 正视全球挑战（经济衰退、流行病、战争）
- 世界各国相互联系和相互依存
- 主题：多边主义是通向世界和平之路

二、多边主义：前进的方向

- 多边主义的定义和本质
- 全球问题（财富、健康、气候变化）的合作性解决方案
- 开放性和包容性的重要性
- 国际机构和规章（如联合国）的作用
- 益处：可持续发展和共同繁荣

三、民族主义：死路一条

- 民族主义和单边主义的负面影响
- 从历史冲突和危机中吸取的教训
- 民族主义阻碍全球问题的解决
- 零和思维和孤立主义的危害
- 克服意识形态偏见的必要性

四、构建人类命运共同体

- 促进各国之间的相互尊重和理解
- 协同性全球治理与规则制定
- 促进创新和可持续发展
- 针对共同挑战的集体行动
- 一个和谐、包容、繁荣的世界愿景

One Earth and a Shared Future for Humanity：Why Multilateralism Will Lead to World Peace and Nationalism Is a Dead End

Bernd Einmeier　the German-Chinese Economic, Educational and Cultural Association

I. **Introduction: One Earth and a Shared Future**

Acknowledgment of global challenges (economic recession, pandemic, wars)

Interconnectedness and interdependence of nations

Thesis statement: Multilateralism as the path to world peace

II. Multilateralism: The Path Forward

Definition and essence of multilateralism

Cooperative solutions to global issues (wealth, health, climate change)

Importance of openness and inclusivity

Role of international institutions and rules (e.g., United Nations)

Benefits: sustainable development and shared prosperity

III. Nationalism: A Dead End

Negative impacts of nationalism and unilateralism

Historical lessons from conflicts and crises

Nationalism hinders global problem-solving

Dangers of zero-sum mentality and isolationism

Need to overcome ideological prejudices

IV. Building a Shared Future for Humanity

Embracing mutual respect and understanding among nations

Collaborative global governance and rule-making

Promoting innovation and sustainable development

Collective action against common challenges

Vision of a harmonious, inclusive, and prosperous world

劳工标准工具化与国际贸易法秩序的衰变

曾琪也 中南大学人权研究中心

摘　要：核心劳工权利作为基本人权受国际法律文件保护，但其正被利用为贸易制裁工具，凸显了人权与国际贸易规则的复杂关系。美国长期以来在推动国际劳工标准工具化方面扮演关键角色，导致多边世界贸易体系稳定性受损。多哈回合谈判的僵局标志着曾由美国主导的多边贸易法秩序的转折点，背后涉及美国经济霸主地位的跌落及新兴经济体的崛起。美国通过《维吾尔族强迫劳动预防法案》等立法行为，对农业特别是棉花进出口实施针对性限制，绕过世界贸易组织多边规则，扩张国内任意执法权力，操纵进出口贸易量。这种劳工标准工具化策略破坏了多边国际贸易法秩序，削弱了国际贸易法框架的有效性和权威性，违背了公平和透明原则，破坏了国际经济合作基础，对国际贸易法秩序的长期发展构成威胁。

关键词：国际劳工标准；国际法秩序；域外适用；单边制裁

The Instrumentalization of Labor Standards and the Decay of the International Trade Law Order

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Abstract: Core labor rights, as fundamental human rights, are protected by international legal documents, yet they are increasingly being utilized as tools for trade sanctions, highlighting the complex relationship between human rights and international trade rules. The United States has long played a critical role in promoting the instrumentalization of international labor standards, leading to a deterioration of stability in the multilateral world trade system. The deadlock in the

Doha Round of negotiations marks a turning point in the multilateral trade law order previously dominated by the United States, reflecting the decline of U.S. economic hegemony and the rise of emerging economies. Through legislative measures such as the *Uyghur Forced Labor Prevention Act*[91], the U.S. has imposed targeted restrictions on agriculture, particularly in the import and export of cotton, circumventing multilateral rules established by the World Trade Organization (WTO) and expanding domestic arbitrary enforcement powers to manipulate trade volumes. This strategy of labor standards instrumentalization undermines the multilateral international trade law order, weakens the effectiveness and authority of the international trade law framework, violates the principles of fairness and transparency, disrupts the foundation of international economic cooperation, and poses a threat to the long-term development of the international trade law order.

Keywords: International Labor Standards; International Law Order; Extraterritorial Application; Unilateral Sanctions

[91] https://china.usembassy-china.org.cn/implementation-of-the-uyghur-forced-labor-prevention-act/

劳工标准工具化与国际贸易法秩序的衰变

曾琪也 中南大学人权研究中心

一、概述

国际法律秩序是一种历史现实，如三十年欧洲大战结束时形成的威斯特伐利亚秩序体系就是当时的国际法律秩序，具体表现为一系列双边和多边条约[92]。国际贸易法秩序则是国际法律秩序在国际贸易法领域的具体表现，是调整国际贸易关系的国际法规范和国内法规范的一种整体状态[93]。

在国际劳工标准中，核心劳工权利作为基本人权受国际法律文件保护[94]。然而，在国际贸易法秩序的变动下，这些权利正被异化为贸易制裁工具，凸显了人权与国际贸易规则的复杂关系。自 14 世纪初，美国主导推动国际劳工标准工具化，在塑造国际贸易法律秩序方面一直扮演关键角色。自第二次世界大战结束以来，在以规则为基础的国际贸易体系、《关税及贸易总协定》及其继任者世界贸易组织下，国际贸易和政治斗争曾实现一定程度的分离，世界经济和国际贸易迅速扩张和繁荣。但是近年来由于贸易措施的滥用，过去几十年来一直保持的世界贸易体系的稳定性正在遭受破坏[95]。国际劳工标准、全球环境保护以及国家安全等议题，由于其往往具备公认的合法性、正当性，作为贸易制裁工具时具有高度隐蔽性。当这些议题被蓄意工具化，服务于特定国家的政治与经济利益诉求时，其潜在后果便是引发国际贸易法秩序的衰变。

二、多边贸易法秩序的转折点：多哈回合谈判

2001 年至 2011 年，多哈回合谈判由于农业等核心产业问题存在不可调和的分歧、区域贸易协定分散其影响力等原因，多次陷入僵局。虽然为提振多边贸易体制公信力，2013 世界贸易组织第九届部长级会议最终达成了多哈回合“早期收获”一揽子协议[96]，但世界贸易组织的颓势已难以挽回。多哈回合谈判是自 1947

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92 Onuf N G. International legal order as an idea[J]. American Journal of International Law, 1979, 73(2): 244-266.
93 张晓东.国际经济法原理【M】.武汉：武汉大学出版社，2005.
94 承认并保护核心劳工权的国际法律文件有: Art. 23, UDHR; Art. 8, CCPR; Art. 5(e) (i) , CERD; Art. 11, CEDAW; etc.
95 Lee Y S. Weaponizing International Trade in Political Disputes: Issues Under International Economic Law and Systemic Risks[J]. Journal of World Trade, 2022, 56(3).
96 中华人民共和国商务部网站，http://chinawto.mofcom.gov.cn/article/ap/p/202209/20220903348766.shtml

年《关税及贸易总协定》签订以来，延续了几十年由美国主导的多边贸易法秩序的转折点，其背后是美国世界经济霸主地位的跌落及中国等新兴经济体的崛起。

1960-2010 年，美国 GDP 在世界经济总量中所占比重数据经历了三次峰值，分别为 1962 年达 39.17%，1985 年降至 33.66%，2001 年再降至 31.97%；同时，也遭遇了三次低谷，分别为 1980 年降至 25.19%，1995 年略减至 24.73%，2010 年达最低点 23.13%。此间，美国经济波动周期缩短，峰值间隔时间从 23 年减少至 16 年，同时经济下滑加速，滑坡时间段从 18 年加速至 9 年。不仅如此，美国经济回升速度也减缓，从 5 年经济回暖时间延长至 6 年。这一趋势体现了美国 GDP 全球占比的震荡下滑，意味着美国经济霸权已“绝对衰退”[97]。值得注意的是，美国积极参与多边贸易协定的建设时期，往往与其 GDP 全球占比的峰值呈正相关，美国 1960 年-2010 年的首次经济峰值在 1962 年，处于 1947 年《关税及贸易总协定》的稳定建设期；第二次经济峰值在 1985 年，为乌拉圭回合谈判进行时期；第三次经济峰值在 2001 年，为多哈回合谈判启动时期。质言之，美国经济实力增长时，其更倾向于积极推动多边贸易制度建设，支持多边主义；其经济实力衰退时，其便转向区域制度建设与单边主义。

从 2001 年多哈回合谈判启动，到 2019 年世界贸易组织上诉机构陷入功能停滞困境，这一系列事件标志着以世界贸易组织为核心的国际贸易法律秩序经历了一个显著的衰退阶段。此衰退过程主要由美国引领并加速，其本质根源在于美国、欧盟等国际法主体在世界贸易组织框架内对若干核心议题存在深刻的利益分歧。当前，国际贸易谈判的焦点已从多边体制转向区域贸易协定，这一现象预示着国际贸易法秩序正步入一个碎片化新阶段。

三、作为单边制裁新型手段的劳工标准工具化

多哈回合谈判长期无法解决的核心问题，集中在农业领域，其中棉花问题凸显。近年来，美国 2021 年《维吾尔族强迫劳动预防法案》等立法行为，实质上是对农业，特别是棉花进出口的针对性限制。借助劳工标准工具化方式，美国可以暴力式实现其在多边贸易谈判中无法达成的、违反国际法的贸易目的。国际劳工标准工具化也展现出更为显著的舆论影响力，特别是美国所挑起的“新疆棉花事件”，在全球范围内引发了广泛争议。

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[97] 徐海燕,何健宇.美国经济霸主地位的衰退趋势研究——基于 GDP 比重分析的视角[J].复旦学报(社会科学版),2013,55(05):108-115+135+158.

劳工标准工具化，是美国实施单边制裁的新型手段，2021 年《维吾尔族强迫劳动预防法案》是其典型体现。美国官方对经济制裁的定义是对一个或多个国家采取的强制性经济措施，目的是迫使其改变政策或表达对其政策的看法[98]。最常被引用的关于制裁的研究又将这一术语定义为“……故意的、政府鼓励的习惯性贸易或金融关系的退出或威胁退出。”[99]经济制裁通常包括对特定出口或进口的限制、控制涉及美国公民或企业的外国资产和经济交易，目的是通过非经济手段改变另一国的行为。2021 年《维吾尔族强迫劳动预防法案》通过设置举证责任倒置、“有罪推定”和任意解释权，限制中国新疆地区棉花的进口，控制相关交易，完全符合美国对“经济制裁”的定义。当美国的国家利益受到其他国家威胁时，经济制裁通常被用作回应措施；当努力改变其他国家的行为未能成功时，美国政府也可能会采取制裁，这在美国国会的立法报告中得到体现。在可用于实施制裁的经济政策工具中，限制特定商品或全部商品的进出口措施，如拒绝发放许可证、关闭航运码头或限制相关交易，被视为关键手段。每项法律都有特定的条款来触发制裁的实施，并规定了对制裁的报告、缓和、加强、放弃和终止。某些法律规定制裁是强制性的，而另一些法律则赋予总统或其代表实施制裁的自由裁量权。还有一些法律虽然一般授权行政部门制定和执行外交政策，但初看并不被视为制裁立法，具有很强的隐蔽性。当美国总统改变政策以损害目标国家时，通常会引用这种权力。例如，利用立法权力削减对外援助可能既是行政决策，也可能是惩罚措施。在美国的立法体系中，《1930 年关税法》第 307 条被明确界定为一种制裁立法[100]。

美国制裁式、惩罚性立法的底层逻辑仍为经济驱动。美国作为全球第三大棉花生产和主要出口国，在全球原棉贸易中占据近三分之一的份额，而其进口量占国内纺织厂用量不足 1%。在 2018 至 2020 年间，美国的棉花出口价值占到了其农产品出口总额的 6.8%，仅次于大豆，期间中国是美国第三大农业出口目的地[101]。2018 年《农业改善法案》对美国国内棉花生产商进行了全方位支持，意在促进

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美国国内棉花产业的发展。美国国会对该法案的官方解读指出，除了法案本身，其他贸易行动也可能间接支持美国棉花生产商。如 2021 年 1 月特朗普政府对中国新疆维吾尔自治区种植的含棉产品实施了制裁，具体表现为 2021 年《维吾尔族强迫劳动预防法案》禁止了使用强迫劳动制造的产品的进口，包括含棉花的产品。这一法案的实施可能会增加对中国以外地区，包括美国本土种植的棉花的全球需求[102]。美国 2018 年《农业改善法案》以及该时期对棉花产业发展的加大投入，连同针对中国新疆地区棉花产业实施的 2021 年《维吾尔族强迫劳动预防法案》，构成了一个相互关联的经济叙事。这一系列措施揭示了美国在国际经济格局中的策略：一方面通过国内农业法案加强对本国棉花产业的支持和发展，另一方面通过限制性贸易政策及单边制裁法案，限制中国棉花产业的出口以保护本国市场，国际劳工标准在这一策略下扮演着以正义之名掩盖真实动机的关键角色。这不仅体现了美国在全球贸易中自我利益优先的立场，而且也映射出国际贸易政策中日益增长的保护主义倾向。

四、结语

将人权与贸易政策联系起来可能导致经济民族主义、区域主义、保护主义和进一步的反制措施的加剧，也可能会导致现有贸易架构的重塑[103]。国际劳工标准工具化驱动国际贸易法秩序衰变的基本逻辑为美国通过国内法对特定国家或地区的商品实施进口限制，实际上绕过了世界贸易组织的多边规则，极大地扩张了国内的任意执法权力，进而达到操纵进出口贸易量的经济目的。国际劳工标准工具化策略对以世界贸易组织为核心的多边国际贸易法秩序构成了明显的破坏，实质上削弱了现有国际贸易法框架的有效性和权威性，不仅违背了国际贸易的公平和透明原则，也破坏了国际经济合作的基础，短期内会影响特定国家或地区的经济利益，长期看还将减损国际社会对多边贸易体系的信任和依赖，导致国际贸易法秩序进一步走向衰落。

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中国与欧洲在社会权利方面的趋同

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欧盟由 27 个国家和 5 亿人口组成。中华人民共和国是一个拥有 14 亿人口的单一国家。欧洲联盟的每一个成员国都有自己的社会和经济权利法律制度，也有自己的有关司法和执行社会和经济事项立法的法律制度。欧盟各成员国社会权利状况的历史和现实既有共同之处，也有重大差异。每个人都知道，欧盟内部的生活水平以及对社会权利的满意程度是非常不同的。例如，西班牙、葡萄牙和希腊的生活和工作条件肯定与瑞典、丹麦或德国有很大不同。在中华人民共和国这个单一的国家，当然有集中的社会权利法律规定，但在不同省份和地区的实际运作中，实际上显示出高度的自治。两国的生活水平也存在显著差异。由于它是世界上千万富翁人数最多的国家，因此，随着整个国家经济和技术的巨大腾飞，近年来不平等现象明显加剧，这是合乎逻辑的。请记住，最近中国有 8 亿人摆脱了极端贫困。在欧洲联盟，现有的社会多样性有一个共同点，即市场是经济的主要调节者，从而也是社会权利状况演变的主要调节者。在中华人民共和国，虽然当局所谓的社会主义市场在国家经济中起着决定性作用，因此在社会权利的发展程度上起着决定性作用，但未来的预测表明，人口的生活水平将大幅提高，其中一些部门目前的生活水平与欧洲联盟公民的平均水平一样高或更高。中华人民共和国的政治制度明显不同于欧盟国家的政治制度。它被认为是一个社会主义国家，渴望在 21 世纪实现现代化，这将使它在世界上获得它认为应得的地位，而这是目前尚未给予它的。具有类似政治制度和在福利国家领域取得巨大成就的欧洲联盟发现自己处于某种停滞状态，这无疑影响到其国家的社会权利状况和政治演变。寻找中华人民共和国的社会权利可以与欧洲联盟国家现有的社会权利相接近的途径，是这项工作对本次研讨会的贡献。

Convergence in Social Rights between the People's Republic of China and the European Union

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The European Union is composed of 27 states and 500 million inhabitants. The People's Republic of China is a single state with 1400 million inhabitants. Each of the Member States of the European Union has its own legal system for social and economic rights and also its own legal systems related to the administration of justice and the enforcement of legislation on social and economic matters. The history and reality of the state of social rights in each member country of the European Union has some points in common, and at the same time major differences. Everyone knows that the standards of living within the Union and therefore the degrees of satisfaction of social rights are very different. The living and working conditions in, for example, Spain, Portugal and Greece are certainly quite different from those in Sweden, Denmark or Germany. In the People's Republic of China, a single state, there are certainly centralised legal regulations on social rights, but the reality in the functioning of the different provinces and regions shows in practice a very high level of autonomy. The standards of living also present notable differences. As it is the country with the largest number of multimillionaires in the world, it is logical to think that inequalities have developed considerably in recent years, coinciding with the great economic and technological take-off of the country as a whole. Remember that recently 800 million people in China have emerged from extreme poverty. In the European Union, the existing social diversity has as a common point the market as the main regulator of the economy and consequently, of the evolution of the state of Social Rights. In the People's Republic of China, although the so-called Socialist Market by the Authorities plays a determining role in the country's economy and therefore in the degree of development of social rights, the future projection points in

the direction of a substantial increase in the standard of living of the population, some of whose sectors have it at this time as high or higher than the average of citizens of the European Union. The political system of the People's Republic of China is clearly different from that of the countries of the European Union. It is considered a Socialist State that aspires to modernization during the 21st century that will place it in a place in the world that it considers to be its due and that is not currently granted to it. The European Union, with its similar political systems and its great achievements in the field of welfare state, finds itself in a certain stagnation that undoubtedly affects the situation of social rights and the political evolution of its countries. Finding the ways in which social rights in the People's Republic of China can approach and vice versa the social rights existing in the countries of the European Union is the contribution of this work to this seminar.

平衡权利和义务：在社会和自然的背景下的个人

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每个社会和每个国家都面临着组织社区与个人之间关系的任务，使社区和个人都受益。这种组织任务自然而然地出现在每个人群体中，包括宗教团体如基督教教会或体育俱乐部。

现代人权的作用是确保在一个合法组织的国家中，社区与个人之间的关系不会对个人造成损害，并且每个人都能发展自己的个性并实现自己的潜力。1948年12月10日联合国大会在巴黎通过的《世界人权宣言》，使联合国所有会员国在某种程度上承诺在其国家秩序和法律体系中考虑这些内容。

现代人权经常受到批评，认为它偏向个人主义，削弱了国家中的社区。然而，必须考虑个人在国家中的权利和义务之间的关系。

Balancing Rights and Duties: The Individual Person in the Context of Society and Nature

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I. The context of the topic

Every society and every state is confronted with the task of organising the relationship between the community and the individual in such a way that both the community and the individual are favoured. This task of organisation naturally arises in every community of people, including religious communities such as Christian churches or sports clubs.

The role of modern human rights is to ensure that the relationship between the community and the individual in a legally organised state is not organised to the detriment of the individual and that every person can develop their personality and

fulfil their natural potential. With the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948 in Paris, all member states of the United Nations have committed themselves in a certain sense to take these into account in their state order and legal system.

Modern human rights are repeatedly criticised for favouring individualism and weakening the community in a state. However, the relationship between the rights and duties of individuals in a state must be taken into account.

According to a statement by the current government in the German Bundestag, 1,797 laws with 52,401 individual standards and 2,866 ordinances with 44,475 individual standards were in force at federal level in Germany as of 24 May 2024. The laws and individual standards of the 16 federal states are not included in this figure, nor are the ordinances at municipal level. The vast majority of these legal norms formulate obligations for individuals. Some also formulate the rights of individuals, in particular human rights, but there are also a number of legal norms that formulate the social rights of individuals in the German welfare state.

In the legal system of the Federal Republic of Germany, human rights are included in the Basic Law in the paragraphs 1 - 19 as fundamental rights. There are also a few paragraphs in the Basic Law with rights equivalent to fundamental rights. In total, as a citizen of the Federal Republic of Germany, I am subject to more than 100,000 norms that impose duties on me towards the community and oblige me to conform to the community. Only 19 norms impose obligations of the community towards me, which restrict the community's access to me and grant me a small individual freedom in the midst of a very comprehensive community obligation. Obligations to the community include, for example, taxes and contributions, which in the Federal Republic of Germany include in particular contributions to the social security systems for pensions, sickness and unemployment. On average, these payments by individuals into the community coffers amount to 50% of their income. This means that German citizens (indeed: all employees in Germany) spend around half the year working for the community of the people living in the Federal Republic

of Germany. Only in the second half of the year, from 1 July so to speak, do they work for securing their own basic needs and their own interests.

Now someone might say that this is exactly the right balance between community and individual person in a society and a state: half of life for the community and the other half for oneself – the latter including the sociality of the individual in the family and in social communities (such as religious communities or sports clubs).

For the sake of correctness, it should be added to the considerations just made that the obligations of the individual person towards the community do not only benefit the community as such, but also many fellow human beings or social groups in society. For me, the legal norms of the Highway Code are not only a restrictive obligation, but also an enabler, insofar as compliance with the corresponding legal norms by other fellow human beings, and thus by restricting them, is what makes modern mobility possible for me in the first place, and thus a gain in freedom.

Conversely, this also applies where human rights legally protect certain possibilities of individual freedom (such as freedom of expression), but this also means that I allow the opinions of my fellow human beings, even if I feel oppressed by them. My own rights to freedom require the realisation that these rights to freedom are inherent to all people in the state and society and that my rights and freedoms are limited by the rights and freedoms of others.

In every state and in every society, the rights and duties of citizens must be brought into the right balance and constantly renegotiated.

Of course, modern societies now have an internal tendency towards ever more intensive communitisation of individuals. This applies to democracies based on the separation of powers as well as to authoritarian states. In Germany, this can be seen in the permanent increase in legal norms and regulations. Recently, this has been given a new dynamic by the endeavours to protect the climate and nature, but also by the intention to enforce human rights outside the state's own territory and people (e.g. through corresponding trade laws such as the administrative monster of the Supply Chain Act). When it comes to climate protection and nature conservation, new legal

norms restrict the central human right to property. I am thinking here, for example, of the planned new Federal Forest Act, but also of the general over-regulation of agriculture in Europe.

II. The point of modern human rights

The point of modern human rights can best be understood if we take a look at the historical origins of human rights from a political and anthropological perspective. I am not referring to the discussion about natural law, but simply to historical developments in the establishment of what was later called human rights.

The historical core of modern human rights is freedom of religion or freedom of belief and conscience. The first historical document on this is Roger Williams' book "The Bloudy Tenant of Persecution for Cause of Conscience Discussed", published in 1644.

This book is a theological treatise in which Roger Williams deals with the subject of religious freedom and the persecution of people on grounds of faith and conscience. In it, Williams rejects the commitment of individuals to a faith or religion by state authorities (such as the English Parliament or the English King). He himself was a Puritan (later Baptist) and – like others – was persecuted by English state authorities even in North America. In his book, he denies the legitimacy of state persecution of people on the basis of their convictions and beliefs. Instead, Williams argues in favour of the right to believe and practice religion on the basis of individual conscience – and this in the context of massive religious intolerance. Williams points out that it is precisely the persecution of people because of their faith and religion that leads to violence and suffering. At the same time, he discusses the historical foundations of religious governance and criticises the collapse of state and religious authority. He emphasises that true faith cannot be imposed by force. This is a principle that was particularly emphasised by the Reformation of Western Christianity in the 16th century. It formulated that the spread of faith must take place "sine vi, sed verbo: without force, but with the word". This applies to all matters of faith and religion, that they are to be settled without force, but with words alone.

Overall, Roger Williams' book is the historical basis for an in-depth philosophical and theological examination of the right of individuals to a religious belief according to their own convictions. In matters of religion, Williams opposes all forms of state and religious coercion and advocates the recognition of religious plurality.

With the founding of the state of Rhodes Island in North America by Roger Williams, the right to individual religious freedom or individual freedom of faith and conscience was politically realised for the first time in modern history. Implicit in this is a clear distinction between state and church respective state and religion in the sense that state authorities keep out of the internal affairs of religious communities and at the same time politically guarantee their free practice of religion on the basis of their own convictions of faith and conscience.

Since Roger Williams originally opposed England's interference in religious affairs in North America, it is worth noting that during the period of Puritan government in England in the 17th century, the famous and authoritarian Oliver Cromwell also recognised the principles of religious freedom in England on the basis of the individual right of freedom of belief and conscience and was thus able to establish a plurality of religious communities in England – which, however, was unfortunately politically reduced again after Cromwell's government.

At the beginning of his book, Roger Williams presents 12 fundamental theses. He questions the doctrine of state persecution of people on the basis of their faith and convictions of conscience. He does not consider this doctrine acceptable on either religious or political grounds. His 5th thesis states:

"All civil states, with their officers of justice, in their respective constitutions and administrations, are proven essentially civil, and therefore not judges, governors, or defenders of the spiritual, or Christian, state and worship".[104]

The eighth thesis states:

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[104] Roger Williams "The Bloudy Tenent of Persectution for Cause of Conscience Discussed" can be found in an online version in "Project Gutenberg": https://gutenberg.org/cache/epub/65739/pg65739-images.html
In this online version, the page numbers of a 19th century publication of the book are noted in brackets in the right-hand margin. The theses quoted here can be found on pages 1 - 2.

"God requireth not an uniformity of religion to be enacted and enforced in any civil state".

Roger Williams was convinced that the political recognition of religious freedom respective freedom of belief and conscience serves the peace of a country and its social harmony, and that people who are granted this by a state will also be better citizens of a country. This is stated in the eleventh thesis:

"The permission of other consciences and worships than a state professeth, only can, according to God, procure a firm and lasting peace; good assurance being taken, according to the wisdom of the civil state, for uniformity of civil obedience from all sorts."

And the twelfth thesis states:

"True civility and Christianity [sc. all religion] may both flourish in a state or kingdom, notwithstanding the permission of divers and contrary consciences".

III. The legal-theoretical problem of human rights

During her time in office, German Minister of legal affairs, Herta Däubler-Gmelin, was particularly committed to the German-Chinese dialogue on human rights and the rule of law. She coordinated this dialogue from 2002 on and was involved in it for more than 20 years. In a recent interview (Berliner Zeitung of 8 January 2024), she regretted that the German side had split this dialogue into two parts: a human rights dialogue (conducted by the German Foreign Ministry) and a rule of law dialogue (conducted by the German Ministry of Justice).

I can only agree with Herta Däubler-Gmelin's view. The problem with human rights in terms of legal theory is that in many states they are only understood as a prosaic introduction to the law as a whole and have no regulatory function for the entire law of a state. In this respect, the Federal Republic of Germany follows precisely this view of the secondary status of human rights under the rule of law, in splitting in the dialogue with China human rights from the rule of law (Rechtsstaat). In German law, however, this is different because human rights have the status of fundamental rights within the Basic Law and therefore every law in Germany can and must be checked for consistency with fundamental rights (and therefore human rights).

The fact that this sometimes does not quite fit in with the reality of the law gives rise to corresponding complaints, which may ultimately have to be decided by the Federal Constitutional Court.

The United Nations repeatedly emphasises the importance of the Universal Declaration of Human Rights. However, they fail to urge their member states to integrate human rights into national law as fundamental rights, which would then have to regulate all law.

The problem with the legal-theoretical secondary status of human rights in national legal systems lies in the fact that they are meaningless in legal practice and therefore legally unenforceable.

The former German Minister of Justice, Herta Däubler-Gmelin, is a firm supporter of the Chinese-German dialogue on human rights and the rule of law. She believes, that it is necessary and makes sense. The point of a dialogue is precisely that it is a conversation about differences. If people who all have the same opinion talk to each other, it is not a dialogue. Dialogue always involves dialectics: trying to reconcile opposing views in conversation with each other and jointly develop the next steps for the future.

Of course, Herta Däubler-Gmelin is also aware of the fundamental differences between a German and a Chinese understanding of human rights. She says so in the above-mentioned interview:

"The systemic differences between Germany and China are serious, including in the way they deal with human rights. The Chinese Communist Party prioritises the law of the community, which it determines in terms of content, over individual human rights and wants to make this interpretation globally binding."

What Herta Däubler-Gmelin is addressing here is a long-known and thematised difference in the discussion about human rights. In the 1970s, there was a whole series of philosophical and theological studies on the subject of "human rights", which often spoke of two approaches to understanding human rights: a Western understanding of human rights and a communist/Marxist understanding of human rights. Nowadays, a third approach could be added here and we could speak of a Muslim understanding of

human rights. It is always a question of how the relationship between the right of the community and the right of the individual is determined. The first part of my previous lecture dealt precisely with this topic by pointing out that in the German legal system, the obligation of citizens to the community also takes precedence, in that the community of the people of the state represents the context in which unconditional rights of the individual are then also guaranteed by the community. It is the community that values the free development of individuals in its common law – and precisely because of this, expects them to make a valuable contribution to the community of the nation.

This legal-theoretical concept takes into account both the community and the individual. The rights and duties of the individual person towards the community and the rights and duties of the community towards the individual person are well balanced. This means that the community respects and values each individual person, but also that each individual person respects and values the state and society. When I speak of appreciation and respect, I mean that the individuals and the community in the state support each other: the individuals contribute time and money to strengthen the community and the state institutions; they work not only for themselves, but also for the community. The state community and its institutions give individuals the freedom to become their own personalities and develop their talents so that the community flourishes through the contributions of individuals and justice and peace (harmony) grow in society.

It is an inappropriate polemic to claim that in the Federal Republic of Germany and in the Western world it is all about an individualistic way of life for which human rights are used as a justification. A closer look shows that human rights as fundamental rights are part of a well-balanced relationship between the community and individuals, in which the community and individuals mutually favour each other.

IV. Freedom of religion and belief as the centre of human rights

Freedom of religion and belief makes it clear what human rights are all about. It is the historical origin and the factual centre of modern human rights. The right to freedom of religion and belief is also a good example of what human rights are not

about. In recent decades, many things have been demanded as human rights. For example, human rights include the right to an adequate standard of living and adequate food, clothing and housing. With such a human right, the question naturally arises as to who should grant and realise this right of the individual. Ultimately, it is addressed to the state or the community of citizens. Here, of course, a certain idea of the state is the guiding principle, which regards the state and society as guarantors of their own provision and sustenance. The community of the people of the state is confronted with the right of individuals to be provided with what is necessary for their own self-preservation.

The human right to freedom of religion and belief, on the other hand, is orientated quite differently. It is not a right that imposes an obligation on the community to actively support and care for its members. Rather, it is a right that does not require the community and state institutions to take any action at all, but only to allow it. Of course, "allowing" is also an action, albeit a passive action. Granting the right to freedom of religion and belief does not require time or money – in contrast to an alleged human right to an adequate standard of living and adequate provision of food, clothing and housing. A modern welfare state should of course take care of these things and help the poor in the community to lead a dignified life. However, the reason for this is not that it is a human right that demands this from a community and state institutions. Rather, this justification is a misunderstanding of what human rights are. Rather, the point of human rights lies in the fact that the state, and therefore the community, refrains from acting and grants individuals freedom in certain respects in a world that is otherwise heavily regulated by laws and regulations. This does not include the task of maintaining life, as this may require extensive and financially costly state action. The freedom of individual life in a state and social context, which human rights are intended to claim and protect, includes all those aspects of life that are clearly individual and are part of the life of a responsible individual personality. In the first case, in the activities in which people gain certainty about themselves and come to terms with the basic conditions of their existence, their origins and future, the meaning of their lives and the death that awaits them, we are dealing with the human

right of freedom of religion and belief as well as freedom of conscience. A state cannot standardise these ways of living and this confrontation of individuals with fundamental existential questions. Rather, it must want people in the state, either individually or in religious communities, to have the space to develop their own perspectives on their own existence in the context of life in general and the world as a whole and within the horizon of transcendence.

This significance of religion and faith for the existence of individuals requires a clear distinction between state and religion. Religion is where the state reaches its limits. The state cannot provide people with a relationship to transcendence and thus also no certainty about their own existence.

In Europe, this distinction between state and religion is currently being called into question, particularly by religious groups. As a result of religious terrorism in 2001, the phenomenon of "religious politics", which has existed for much longer, became visible in Europe and was rightly analysed as a political threat in the Western world. In 2010, the Bosnian philosopher Samir Arnautovic published a clever, internal analysis of "religious politics" and the associated problems with reference to his home country of Bosnia-Herzegovina and the Western Balkan states in general. His essay is entitled: "Religious politics. The anti-integrative discourse as a discourse of a pre-modern age that came too late".[105] According to Arnautovic's observation, "politics ... ideologically founded in religion, while the religious relationship has no obligation towards political action, as its position, with regard to its justification in the transcendental, is predominant over social reality".[106] Arnautovic describes the social and religious mechanisms that enable this dominance of religion over politics in a very comprehensible way: the recruitment of politically active people in religious institutions, the special religious position that clergymen and politicians ascribe to each other, and so on. From a philosophical point of view, the central problem of such politics or this religious-political concept is that "modernity is understood exclusively

[105] Samir Arnautovic, Religious Politics. The anti-integrative discourse as a discourse of a pre-modernity that came too late - Southern European remarks on European cultural policy. In: Integration of Religious Plurality. Philosophische und theologische Beiträge zum Religionsverständnis in der Moderne, ed. by Hans-Peter Großhans and Malte Dominik Krüger, Leipzig 2010, pp. 31-38.
[106] Arnautovic, Religious Politics, p. 33.

in the technological sense", "while the conceptual and intellectual discourse is barely touched upon."[107] Formally, there are democratic, power-sharing and constitutional structures, but in reality, the relevant actors are engaged in pre-modern – personalised, network-like and religious – politics. Arnautovic adds, almost a little sarcastically, the observation: "Therefore, in the countries of the world Balkans, a dissolution is taking place in the political sphere, both in relation to the state and in relation to the religious communities that support this policy, while at the same time there are people who live in complete misery and whom no one helps."[108] According to Arnautovic, it is also part of the religious policy in his country, which is pursued in variations by all three religious communities there, that misery is maintained and promoted in its permanence. Politics is not understood as the elimination of misery, but is given the "role of the seeker of truth", in the course of which conditions are to be created "for a better, non-real and borderless world"[109] – in other words, a religiously conceived world. All of this has fatal consequences for society and its citizens.

If we look closely, we find such religious politics – in many variations, of course – in far too many contemporary societies. I would like to mention just one example. One of the recent research projects at my institute dealt with the coexistence of Buddhists, Christians and Muslims in Myanmar and thus in one of the five Asian countries characterised by a distinctive form of Buddhism, Theravada Buddhism, namely Sri Lanka, Thailand, Laos, Cambodia and Myanmar. Theravada Buddhism is a form of Buddhism with a clear political concept. The incredibly bad military governments in Myanmar also have a religious side to Theravada Buddhism. The long-standing civil war in Sri Lanka between the Buddhist Sinhalese and the Hindu and Christian Tamils can ultimately only be understood against the background of the political dimensions of Theravada Buddhism – just like the imperial colonisation of the Tamil settlement areas with Buddhist monasteries that has been taking place since the end of the civil war in 2009.

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[107] Arnautovic, Religious Politics, p. 32.
[108] Arnautovic, Religious Politics, p. 33f.
[109] Arnautovic, Religious Politics, p. 34.

The patience with which the populations in these countries bravely endure their difficult-to-tolerate governments is not only rooted in Buddhist spirituality, but rather in the social construction of Theravada Buddhism, which assigns a high religious role to those in power and legitimises their exercise of power in the overall religious system.

"Religious politics" with its highly problematic connection between religion and politics is therefore not only found in the Islamic world, which we in Europe have been focussing on particularly intensively in recent years.

The counterpart to "religious politics" is the state's attempt to control religions politically. This was common in Germany until 1918, when there were state churches. The churches were part of the state administration and accordingly also instruments of the governments. For Protestant Christianity, Martin Luther already argued in favour of clear boundaries between church and state with his two-regiment doctrine.

This is also made clear in the Augsburg Confession of 1530, which states that "the two regiments, spiritual and secular, are not to be mixed together"[110] , which is emphasised by the fact that the spiritual regiment of the church is to be carried out without any force whatsoever. The old two-sword theory was thus completely obsolete, because the sword no longer matched the spiritual power, even in a figurative sense. According to Luther, the sword as an expression of the possibility of exercising force belonged entirely in the hands of the secular, state regiment.

For Luther, both spiritual and secular government are the highest gifts of God on earth; this is precisely why they are to be clearly distinguished from one another and not mixed together – neither to form a religious, ideological policy nor a politically controlled religion.

The intention of Luther's two-regiment doctrine was not to divide the world or people's lives into two separate areas of politics and religion. Rather, Luther wanted to emphasise the previously hidden unity of the world in such a way that God rules over the entire world, but exercises this rule in different ways: in one way through the law (in the form of the state) and in another way through the gospel (in the form of the

[110] CA 28, BSLK, P. 122.

church). In other words: the Protestant church also serves the state without being controlled by it, precisely in the free proclamation of the Gospel, the good news of God's infinite grace and mercy.

It is almost a point of Christianity, which was re-emphasised by the Reformation, that the separation of the world into profane and sacred areas is fundamentally abolished. People can serve God not only in the temple, in churches or other places of worship, but everywhere in the world. And they can serve God not only through sacred sacrifices and religious rituals, but through everything they do, if they do it well.

Through the two regimes, God exercises his rule in the world in two ways: in the secular regiment politically through the law with its demands, which wants to be generally enforced to preserve life and secure justice, peace and freedom; in the spiritual regiment in the community of believers religiously through the gospel, which is an invitation to the kingdom of heaven and the promise that God will be faithful.

The law can be understood by reason and is intended to serve the just and peaceful coexistence of people in community. The Gospel, on the other hand, is to be believed and requires trust, which is higher than reason.

For Luther, it was important to make a clear distinction between law and gospel or promise, as well as between reason and faith. Their confusion was and is the main cause of the twilight in life: when trust is to be placed where it is actually a matter of reasonable arguments and knowledge, or vice versa, when knowledge and reasonable arguments are demanded where it is a matter of trust.

Similar confusion arises when, where common life in justice, peace and freedom should be secured by the rule of law, promises, pledges and fond hopes take their place, or conversely, when promises, pledges and hopes in life are at stake, legal regulations are demanded in order to clearly secure life.

An example of such confusion are the constitutions of numerous states in which human rights are part of the prosaic introduction, which express a promise and a pledge for future life, but which are not worth a cent in court and in no way regulate

and standardise the concrete law in these states – something I have already said something about earlier.

The human right to freedom of religion and belief implies a clear distinction between state and religion, which is also good from the state's point of view, because individual people can freely come to terms with the truth of their own lives in the horizon of transcendence (which a state cannot do) and because under this assumption the state has religious citizens and religious communities that fully support the state in its task. From the perspective of Lutheran Christianity, the state is primarily responsible for the security of its citizens, for protecting their lives; then also for justice in terms of criminal and civil law and for reasonably just economic conditions. Luther also saw the state as responsible for remedying social hardship and providing for the poor if they were unable to work. The European idea of the welfare state was already present in Martin Luther's work. But in economics, art and even religion, however, the state should allow individuals to act freely.

The human right to freedom of religion and belief therefore has far-reaching consequences for the understanding of the state and the understanding of politics. However, it is in no way directed against the state as such, but should in turn benefit the state and the community of a nation and improve peace, justice and harmony in a society.

To avoid any misunderstandings, I would like to add two comments here:

The human right to freedom of religion and belief does not imply that anything can be declared a religion. Even if there is no clearly defined concept of religion, boundaries can be defined in a society as to what is considered a religion. In the Federal Republic of Germany, for example, the "Church of Scientology" is not recognised as a religion because it is regarded as an economic enterprise through which people are virtually de-individualised and made dependent. Organisations similar to religions can also be considered dangerous, for example if they alienate young people from their families and friends.

In a second remark, I would like to add that the human right to freedom of religion and belief does not imply that some laws in a state do not apply to religious

people and religious communities. The practice of religion must take place within the framework of the laws and regulations of the state. In Germany (and in European countries in general), the increase in religious plurality as a result of migration has led to corresponding legal conflicts, such as the Animal Protection Act and the Animal Protection Slaughter Ordinance, which originally prohibited Jewish and Islamic slaughtering of animals. In the meantime, the law and the ordinance have been adapted to religious plurality.

And one last point seems to be important in my understanding: The understanding of the human right to freedom of religion and belief outlined here and the corresponding understanding of a clear distinction between state and religion also includes religious education as a task of the state. Religions also become problematic for the state if their members lack education about their own religion and other religions. Religious education as a state task does not contradict the separation of state and religion. Rather, it is a consequence of the fact that a state ensures in its school system that the members of a religion have all the knowledge about their own religion and also the religions of their fellow citizens. Religious illiteracy, on the other hand, is a threat to peace and harmony in a society and therefore also a challenge for a state.

中欧视角下的居住权：挑战、驱动因素和政策应对

乔·芬纳蒂 爱尔兰国立科克大学

在未来十年，欧洲和中华人民共和国的住房体系都面临着许多艰巨的挑战，其中许多与住房不平等和排斥问题有关。本文探讨了在欧洲一些国家和中国的住房不平等和排斥挑战、驱动因素以及政策应对措施方面的相似之处和差异。特别感兴趣的是住房体系金融化带来的挑战、代际不平等的住房获取、以及不同的住房保有方式变化，以及可用于解决这些问题的不同政策工具。

Housing Inequalities and Exclusion in Europe and in China: Challenges, Drivers, and Policy Responses

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Housing systems in both Europe and the People's Republic of China face a number of daunting challenges in the coming decade, many relating to issues of housing inequalities and exclusion. This paper explores similarities and differences in the challenges, drivers of, and policy responses to housing inequality and exclusion in selected European countries and in China. Of particular interest are the challenges posed by the financialisation of housing systems, intergenerational inequalities in access to housing, and changing tenure trajectories, and the different policy tools available to address these.

数字弱势群体的权利保护

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摘　要：科技的加速迭代发展和数字资源的共享性、非排他性为权利的实现带来新的机遇。与此同时，“数字利维坦”和“数字鸿沟”不断加剧，由此引发的一系列社会危机使社会不平等愈演愈烈，数字弱势群体产生并不断壮大。要厘清数字弱势群体权利保护的基本情况，需要对其研究现状、实践发展、数字时代的生成逻辑方面进行系统研究。针对此问题，应结合数字弱势群体及相关行动者参与社会行动的内在规律，并根据数字弱势群体权利特点能够搭建数字弱势群体权利运行的基本模型。在模型搭建的过程中，需要明确行动者、强制通行点、转译过程和异质性网络的运行。这不仅是探寻数字人权问题的题中应有之义，同时也成为了数字时代弱势群体权利研究理论体系中的核心构成。

关键词：数字弱势群体；权利保护；多元向善；多维协同；多方联动

Protection of Rights for Digitally Disadvantaged

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Abstract: The rapid iterative development of technology, along with the shared and non-exclusive nature of digital resources, presents new opportunities for the realization of rights. At the same time, the “digital Leviathan”[111] and the “digital divide” are continuously worsening, leading to a series of social crises that exacerbate social inequality and give rise to an expanding digitally disadvantaged group. To clarify the basic situation regarding the protection of rights for digitally disadvantaged groups, it is essential to conduct a systematic study on their research status, practical

[111] https://www.nature.com/articles/s41562-022-01404-9

development, and the generative logic of the digital age. In addressing this issue, it is important to integrate the inherent rules governing the participation of digitally disadvantaged groups and relevant actors in social actions and to develop a basic model for the operation of rights for digitally disadvantaged groups based on the characteristics of their rights. During the model-building process, it is necessary to clearly define the actors, points of compulsory passage, the translation process, and the operation of heterogeneous networks. This not only addresses the essential inquiry into the issues of digital human rights but also forms a core component of the theoretical system for studying the rights of disadvantaged groups in the digital age.

Keywords: Digitally Disadvantaged Groups; Rights Protection; Pluralism for Good; Multidimensional Cooperation; Multi-party Collaboration

数字弱势群体的权利保护

李文军 西南政法大学人权研究院

建设数字中国是数字时代推进中国式现代化的重要引擎，是构筑国家竞争新优势的有力支撑。数字技术的飞速迭代使得信息的生成与传播方式更为多元，为我们的生活带来了诸多便利。然而，大数据、云计算、人工智能、区块链等新技术的出现与应用加速了时代变革，为社会发展带来了巨大的数字红利，同时也使“数字鸿沟”不断扩大。我国目前仍有 8500 余万残疾群体，视障人士 1691 万，听障人士 2780 万，肢体残障人士 2977 万， 60 岁及以上老年人 2.6 亿。由于受制于地区经济发展失衡、教育资源分配不均文化水平低、身体技能等方面的影响，这部分人群主动或被动地与数字化生活产生距离，成为数字弱势群体，不断被数字社会边缘化。

在“数字化生存”的今天，我们面临的问题不仅是理解数字技术对人类社会带来的改变，更重要的是在数字变革中构建新的社会形态。“数字鸿沟”的出现不仅会影响经济增长，加剧社会不公平问题，甚至可能引发链式反应，对国家治理体系完善和国家治理能力现代化造成严重影响，对社会稳定和国家安全造成威胁。对此，曼纽尔·卡斯特提出：“我们的社会逐渐依循网络与自我之间的两极对立而建造。”[112]当前数字社会正在逐步走向去中心化，关注数字网络对群体和个人基本权利的实现成为了学界研究的重要问题。数字人权领域的研究已经从最初的概念界定和人权代际划分发展到如今结合多种学科理论工具分析具体场景的新阶段。跨学科研究的勃兴意味着数字弱势群体权利研究并非数字法学领域或社会网络领域的闭门造车，而是具有现实意义的理论关切。

一、多元向善的价值确立

多元向善作为一种价值理念，其内在要求在于平衡多元数字利益共享数字红利，保持有限的工具理性和根本性的人本价值关怀。早在 2014 年习近平总书记便提出：“让科技为人类造福”等关于科技伦理的重要论述，阐明了科技进步和创新的价值目标。这要求我们以马克思主义科技观为指导，在实现人的自由全面发展的基础上开辟科技向善的价值旨归。

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[112] [美]曼纽尔·卡斯特：《网络社会的崛起》，社会科学文献出版社 2006 年版，第 3 页。

首先，多元是向善的基础路径。在数字空间中，公民身份突破了原有的时间和空间限制，动态化、非二元性的思想力量要求我们在数字权利的弥散流动发展的过程中充分尊重其异质性，进一步挖掘“在一个多元价值观的社会使人安身立命”这一人权论断的价值。[113]行动者网络理论的意涵要求在衡量数字弱势群体权利的保护力度时需要进行综合性价值判断，使权利保障在特定情形下达到最合适的状态。在面对数字弱势群体权利保护的具体事项时，如无法预设建立一个稳定的权利价值位阶，可以结合相应的情境，根据权利冲突的主体、原因、具体表现和后果等条件，在必要和损害最小的情况下确定权利保护的先后次序和相应比例，从而避免权利冲突解决的不确定性和任意性，维持权利保护体系的有序运作。

其次，向善是多元的目标指向。科技向善作为当前解决科技伦理问题的首要原则，是建构数字弱势群体权利保护体系的重要价值取向。2023 年 10 月，科技部会同教育部等十部门联合印发《科技伦理审查办法（试行）》，肯定了科技向善的基本考虑，从国家层面强调了对防范科技活动潜在风险的重视，通过科技伦理审查的方式为科技创新活动把握正确方向保驾护航。因此，探寻数字弱势群体权利的保护进路需要坚持以数字技术服务人类社会发展为出发点，将尊严与平等作为应然向度的概念指引和数字正义的伦理支撑，避免使人沦为自动化社会中的一个符号，遵循使公民免于被歧视的平等权、自我完善和发展的人格权，以及免于受支配的自由权三方面的价值基础。[114]

二、多维协同的规则设定

法律是一个黑箱集合，一旦立法获得通过，所有的要素不管多么武断，都会被封闭在一中固定而稳定的关系中并且不会轻易受到质疑。[115]数字弱势群体权利体系内部的运行也类似于一个黑箱，各模块的规律性和稳定性维持着系统的运行，同时其封闭性也意味着规律的不可考，这也就导致了权利运行的模式化和高度惯性化，掩盖了系统内部的腐败和建造失误。有鉴于此，解决规则设定的黑箱问题的关键点不在于通过侵权事件的暴露而形成“硬件”，而更应该发挥质疑黑箱要素的主观能动性形成“软件”对黑箱进行升级。在设定有关数字弱势群体权利保

113 参见严海良：《人权论证范式的变革——从主体性到关系性》，社会科学文献出版社 2008 年版，第 14 页。
114 参见蓝江：《一般数据、虚体与数字资本：历史唯物主义视域下的数字资本主义批判》，江苏人民出版社 2022 年版，第 128 页。
115 参见[英]提姆·梅伊、詹森·L.鲍威尔：《社会理论的定位》，姚伟、王璐雅等译，中国人民大学出版社 2013 年版，第 169 页。

护的相关规则时，需要避免部分利益节点利用黑箱运行在数据交互中进行数字资源的攫取致使权力分配的进一步不平衡。将结果公正转变为全过程的公正，将形式平等和实质平等均衡放置于利益保护的天平中，在多维聚焦的过程中完成规则制定，在协同发力中共创数字治理的新面貌。

一方面，应多维聚焦健全规则内容。数字弱势群体权利保护的规则制定涉及多个法律部门的立法建设、各层级行政部门的规范制定，以及各方权利主体的利益博弈，因此增强规则的灵活性、系统性和可适用性成为健全规则内容的重点。第一，需要健全具有代表性的数字弱势群体的权利内容。权利是需求的表达，利益磋商和转译是权利生成中的必要过程。国家可以吸纳利益相关的行动者参与到规则制定的过程中来，赋予其适当的参与性与沟通性权利，使数字弱势群体和其他利益相关者共同参与到数字鸿沟治理标准和规则的制定过程中。考虑到各权利模块之间的相互影响和数字弱势群体的脆弱性，在资源分配上可以对数字弱势群体进行一定程度的倾斜性赋权。[116]对此，可参考《厦门经济特区老年人权益保障规定》《广州市养老服务条例》等文件，对与老年人出行、就医、消费、文娱和办事等日常生活密切相关的规则设定，为不同地域和不同类别的数字弱势群体权利保护制定相关规则；第二，需要注重表达的连贯、细化与更新。技术发展使数字弱势群体权利的保障和治理逐渐变成一个包含诸多异质要素的复杂系统，以数字弱势群体为例的“人类行动者”和以科学技术为例的“非人类行动者”都是治理系统中的要素。在此过程中，片面强调数据流动优先或对个人权利的保护优先都会导致发展的不平衡。要将多元聚焦的理念贯彻至数字弱势群体权利保护的规则制定中，就要坚持一种动态的眼光，在技术发展的过程中更新发现和检测侵权情形的方法手段，通过细化对策性规定，更新技术性规定，以及加强对权利保障和救济，从而为科技发展保驾护航，实现权利保障和科技发展的“异质耦合”。针对此问题，需在不同层级的法律法规体系中强调对数字弱势群体权利的保护，具体来看：一是将《宪法》第 33 条中的人权保障条款“国家尊重和保障人权”的精神嵌入数字社会中，[117]起到引领全局的作用；二是《个人信息保护法》《数据安全法》《无障碍设施建设法》等法律的出台明确权利保护路径；三是国务院

[116] 参见许可：《论新兴科技法律治理的范式迭代——以人脸识别技术为例》，载《社会科学辑刊》2023 年第 6 期，第 3 页。
[117] 参见季卫东：《数据、隐私以及人工智能时代的宪法创新》，载《南大法学》2020 年第 1 期，第 5 页。

发布《关于切实解决老年人运用智能困难的实施方案》《未成年人网络保护条例》，工信部发布《互联网应用适老化及无障碍改造专项行动方案》，明确不同主体对老年人和未成年人等代表性数字弱势群体保护的责任与义务，进一步细化了行动要求。总之，要健全数字弱势群体权利保护的相关规定，就要注重内容的系统性和可适用性，在参与主体协同发力中实现多层级、宽领域的规定。

另一方面，应协同发力推动规则落实。习近平总书记强调："要适应人民期待和需求，加快信息化服务普及，降低应用成本，为老百姓提供用得上、用得起、用得好的信息服务，让亿万人民在共享互联网发展成果上有更多获得感。"健全数字弱势群体权利保护规则相关内容的最终目的是为了服务人民生活，在立法之外还需通过案例对规则进行落实和补充。与数据技术发展的快速性和多变性相伴而生的是潜在问题的不确定性，立法规定常常滞后于实际案例中所遇到的困难。商业问题可以通过市场调节而非法律权利配置，[118]因此，立法活动不可操之过急，要尊重市场规律的客观运行，在促进数字红利共享中不断弥合数字鸿沟。

三、多方联动的实践运行

当前的信息无障碍化建设存在节点化、碎片化以及有效供给不足和服务质量不高等问题。[119]因此要坚持共同发展、共商发展、共建发展和共享发展的理念。[120]在国家治理中，要充分利用大数据分析进行政策研判、制定、效果评估和风险防控，努力提供更高质量政务服务，健全数据要素流通和保护机制，构建结构耦合、联动互促的数字政府治理生态。在平台治理中，要规范并加强非国家主体在平台治理中的参与，在公私合作中进一步强化数字平台的社会责任意识。在社会治理中，要发挥社群作为公权利主体、个人作为私权利主体对于公私权力主体的协调制衡作用，从而弥合数字利维坦造成的数字鸿沟。

第一，应重视国家在多方联动中总领全局的动力。通过数字无障碍设施和信息通讯基础设施的建设推动规范理念的落地，为数字弱势群体的权利保障提供坚实的物质基础。增设"数字图书馆""智慧农村"等项目以提供多样化的电子商务、远程教育、远程医疗服务。引领和指导互联网应用进行适老化改造及无障碍

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118 参见高富平：《数据生产理论——数据资源权利配置的基础理论》，载《交大法学》2019 年第 4 期，第 19 页。

119 参见李静：《论残障人信息无障碍权：数字时代下的理论重构》，载《中外法学》2023 年第 3 期，第 838—839 页

120 参见李桂、锡宇飞：《让科技为人类造福"——试析习近平关于科技伦理的重要论述》，载《学习与探索》2019 年第 11 期，第 30 页。

改造，在数字“接入沟”中解决数字弱势群体基础设备“不能用”和保护制度“无所依”的困境，助力数字弱势群体社会保障权、文化共享权、受教育权、政治参与权等权利的保障和救济。

第二，发挥数字平台和社会组织在多方联动中合作共赢的活力。数字平台可以通过开展各类数字化培训、开发各类“无障碍”“适老化”应用软件，从而达到社会利益和经济利益的平衡。此外还要确保算法的公开、中立与可问责，尽可能减小机器自主的负面效应，[121]防范算法不正当和不对等，从实体层面和程序层面实现数字弱势群体的权利保护，并对数据财产权和算法正当程序权的充分实现与保障，在数字“使用沟”中解决数字弱势群体权利实现不充分的问题。

第三，加强数字弱势群体在多方联动中自我赋能的能力。要尊重权利主体的能动性，创造公平和具有活力的数据发展环境，增强数字弱势群体表达其权利诉求的意愿和能力。通过降低其心理排斥，减少习得性无助从而提高其自我效能感，丰富其数字思维。对此利用代际互动和文化反哺，以教育和文化活动的形式，从主观心理层面实现数字弱势群体的权利保护。该领域主要涉及到在线平等和不受歧视、素养权等数字生存权与人格权，在数字“知识沟”中解决数字弱势群体权利成果巩固难的问题。

随着数字时代的加速发展，数据已然成为当前重要的生产要素。围绕其产生的权利保障体系面临着新的挑战，同时也对未来的数字治理提出了新的要求。运用行动者网络理论可以更好地检视、建构和落实数字弱势群体权利保护体系。当前“数字利维坦”的咆哮已萦绕在耳边，如何让数字弱势群体融入数字生活，让每一个人从技术异化的桎梏中挣脱出来，不仅需要完善相关行动者网络理论，把握其中蕴含的多元化、动态化和开放化思想，更需要我们在有限的境况中重新发觉人的能动性，找回那根“思考的苇草”。 如此，才能使人类在数字丛林的生存中不被“无限的权利和无身体的不朽的幻想所诱惑”，[122]在科技革命迈向纵深中实现数字正义。

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121 参见蔡星月：《算法决策权的异化及其矫正》，载《政法论坛》2021 年第 5 期，第 36 页。
122 参见[美]凯瑟琳·海勒：《我们何以成为后人类：文学、信息科学和控制论中的虚拟身体》，刘宇清译，北京大学出版社 2017 年版，第 7 页。

人权和人民权利，以及西方的特殊审查

让-米歇尔·卡雷 法国导演、纪录片制作人

摘　要：多年来，西方一直在谈论人权，尤其是关于他们难以掌权的国家的人权。这也是通过非政府组织、尤其是总部位于华盛顿、由美国国家民主基金会（N.E.D.）资助的非政府组织来实现的。当然，在许多国家都存在着这些人权缺失的情况，在西方国家中也是如此。例如在中国，首要的人权是教育、工作、住房和健康权。这些是在许多西方国家没有真正行使的权利。其他一些人权也至关重要，言论自由和创作自由。独裁统治国家往往没有这些权利。但最近几年我们注意到，在自称“民主”的国家，这些权利也越来越受到限制，竟变成了“非法民主”。最近，我的一部由 Arte 频道制作的电影《西藏，不止一面》（«Tibet, un autre regard» / «Inside Tibet»）就遭受了这种情况。尽管这部电影的最终剪辑被正式接受，但仍然因为受到了一些具有正统观念的教育界人士的讽刺批评而遭到了禁播。这是另一种类型的精神压力。我将在本文中谈到这些问题。

Human Rights and Peoples' Rights and the Particular Censorship of the West

Jean-Michel Carré　French Director, Documentary Producer

Abstract: Depuis de longues années, l'Occident parle de Droits de l'Homme à tous propos mais surtout spécifiquement à propos de pays sur lesquels ils ont du mal à prendre le pouvoir. Et cela aussi par l'intermédiaire d'ONG, notamment celles qui ont leur siège social à Washington et que la *National Endowment for Democracy* (N.E.D.) finance.

Il y a certes de nombreux cas d'absence de ces droits humains dans de nombreux pays mais aussi dans les pays occidentaux.

Pour la Chine par exemple, les premiers droits humains sont l'éducation, avoir un travail, un logement et le droit à la santé. Des droits qui ne sont pas réellement exercés dans nombre de pays occidentaux.

D'autres droits humains sont aussi essentiels, la liberté d'expression et la liberté de création. Ces droits sont souvent absents de pays ayant un régime autoritaire. Mais on remarque depuis plusieurs années que ces droits sont de plus en plus restreints aussi dans des pays se définissant comme « démocratiques » et qui deviennent incidemment des « démocratie illégitimes ».

Je viens récemment de subir violement cette situation avec mon film produit par la Chaîne Arte « Tibet, un autre regard » (Inside Tibet) et qui s'est vu totalement interdit malgré que sont montage définitif avait été officiellement accepté, s'appuyant sur des critiques caricaturales de certains universitaires bien-pensants. Un nouveau type de pression intellectuelle. Ce sont ces différents sujets que j'aborderais dans mon texte.

Human Rights and Peoples' Rights and the Particular Censorship of the West

Jean-Michel Carré French Director, Documentary Producer

The short excerpt of my film that you have just seen is one of the reasons why I am here with you today. My speech in the context of human rights aims first of all to reflect on the right to freedom of expression and creation. As a documentary filmmaker, this issue is personally relevant to me.

Then I will talk about the concepts of human rights and peoples' rights.

For five years, I have co-produced a documentary on China-Xizang relations with the Franco-German public service channel Arte.

Although this channel accepted the subject from the beginning and the film was fully in line with the contract signed between us, the production gradually turned into a confrontation with the program manager.

However, a year ago, when my edit was officially accepted by the head of the channel, I learned that they would never broadcast my film. A unique case since the birth of the channel more than 30 years ago!

It has been almost eighteen years since Western filmmakers have been able to shoot films in the Xizang region. A film may help to understand why China's policies, especially those on human rights, are so satirized by the Western media.

After months of discussions with the Chinese authorities, they gave me carte blanche to make the film. Meetings with people in Xizang of my own choice from all social classes, filming that lasted for months, activities in cities, villages, schools, businesses, temples, homes… and it was very free.

Even if the film refers to the very old history of relations between China and Xizang, the most important part deals with the decisive geostrategic position that the Xizang region represents for Western countries in the 20th and 21st centuries.

My long and careful research in archives, mainly British, German and American, allowed me to reveal important and indisputable documents.

It was mainly the highlighting of these documents that made the existence of my film unbearable for certain French scholars, who provided ARTE with very dubious arguments that justified the banning of the channel.

Faced with this situation, which is shameful for a public service, I feel obliged to react and take legal action against this TV channel.

By the way, I do not know if the managers of the German channels participating in Arte (mainly ZDF and ARD) were present. I wonder if they themselves knew about this censorship decided by the French part of Arte?

Logically, every inhabitant of the planet supports human rights. And this, whether they are atheists, Christians, Jews, Muslims, Buddhists or others. But we know that not everyone has the same vision of respecting human rights, especially women's rights.

For me, it is also important to question the so-called "universal" aspects of human rights, because countries with very ancient cultures and very different from those of the West have ancestral traditions that are equally worthy of respect.

For the Chinese government, if it wants to talk about human rights, it must first question the rights of the people. For China, the first human rights of the people are the right to education, employment, housing and health. If we look at the increase in poverty and the growing social inequality, in many Western countries, for example in France, rights are increasingly undermined.

Behind the use of the concept of human rights are the economic or ideological interests of countries over others. A French historian who appears in my film told me about the first human rights demonstrations against China in the 1980s, which were organized by fundamentalist American Catholics against the one-child policy and were considered to be incitement to abortion!

For many years, the West has used the issue of human rights, sometimes through NGOs, particularly those with their headquarters in Washington and which the

National Endowment for Democracy (NED) happily finances, to stigmatize countries over which they have little influence on the economic, political or military front.

During the making of my film, in discovering these unpublished archives, whether in interviews with the Dalai Lama himself or in CIA films, the distortion of the idea of human rights by certain countries became obvious to me: proxy wars under the guise of human rights.

Human rights are essential, including freedom of expression and creation. If these rights are often missing in countries with authoritarian regimes, let's clean up our own doors too! We can only notice that freedom of expression in the West is increasingly restricted, the billionaires' control of the media uses it as a propaganda tool, making it impossible to express opinions or knowledge contrary to those of the Atlanticists, especially about the Chinese reality, but also about other conflicts that disturb the world.

For years, these self-proclaimed rights to freedom of expression in Western countries have been increasingly restricted in countries that call themselves "democracies" and gradually become "illegal democracies".

In 1975, I founded my own production company, driven by a simple dream: to let the public understand how the world works. Knowing where we are can give us an understanding of where we can go. As Julian Assange recently said: "Let's stop closing ourselves off once and for all. Let's implement these fundamental principles and other political, economic and scientific processes to make room for knowledge. Then we will have the necessary space to get closer to a certain truth. »

Defending the fundamental rights of every individual, freedom of information and the public’s right to form reasoned opinions through the encounter of ideas and viewpoints must become a constant practice for scholars and researchers.

社交媒体对全球人权保障的影响：基于二元视角的审视

胡雅娟 中国外文局当代中国与世界研究院新闻发布研究中心

摘　要：进入21世纪以来，互联网技术的迅速发展推动了社交媒体的出现和迭代升级，从社交平台到电商平台再到虚拟现实，社交媒体不仅成为全球受众获取信息的主要渠道，也深刻改变了人们的生活方式，并为全球人权发展与保障提供了巨大助力：推动保障生存权的实现，赋能助力发展权，极大提升了公众的知情权。但同时也应看到社交媒体迅速发展所产生的一系列问题，仇恨言论的传播、网络欺凌和虚假信息的泛滥、用户隐私遭受侵犯等乱象也在一定程度上消解数字时代的人权发展与进步。本文基于二元视角考察社交媒体在全球人权保障中的作用，并就如何更好发挥社交媒体在全球人权保障中的作用提出思考与建议。

The Impact of Social MediaonGlobal Human Rights Protection

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Since the beginning of the 21st century, the rapid development of Internet technology has promoted the emergence and iterative upgrading of social media. From social media and social e-commerce platforms to virtual reality, social media has not only become the main channel for global audiences to obtain information, but also profoundly changed people's lifestyle, and has provided a huge boost for the development and protection of global human rights: promoting the realization of the

right to survival, enabling the right to development, and greatly improving the public's right to know. But at the same time, we should also recognize the series of problems arising from the rapid development of social media, such as the spread of hate speech, cyberbullying and the proliferation of false information, and the infringement of user privacy, which have to some extent undermined the development and progress of human rights in the digital age. This article examines the role of social media in global human rights protection from a binary perspective, and proposes thoughts and suggestions on how to better leverage the role of social media in global human rights protection.

社交媒体对全球人权保障的影响：基于二元视角的审视

胡雅娟 中国外文局当代中国与世界研究院新闻发布研究中心

一、社交媒体赋能全球人权保障的主要路径

近年来，全球社交媒体的更新迭代不断加快，社交媒体所承载的功能外延在不断拓展，社交媒体信息的裂变式传播深刻改变人们获取信息和知识方式的同时，社交媒体与电子商务的融合也正在重塑传统的商业形态，人们的生存权、发展权和知情权在社交媒体的发展中不断得到强化。

1. 社交媒体推动保障生存权的实现

生存权是一切人权的前提，没有生存权，其他人权也就难以谈起。进入新世纪，随着全球经济的发展，全球生存权的保障取得了长足进步，尤其是贫困等威胁生存权的全球性问题得到一定程度缓解和解决，世界各国保障生存权的水平不断提升。然而，威胁人类生存的全球性问题依然突出，根除贫困任重道远，气候变化日益严峻，全球生存权保障面临新旧问题交织的局面。社交媒体推动了信息的快速传播，社交媒体电商化重塑了新兴商业形态，这种传播属性和商业属性有力推动生存权的实现。

一方面，社交媒体成为全球开展人权倡导的重要平台。信息在社交媒体上裂变式传播，这种便捷快速的特性使社交媒体成为开展人权倡导的主要载体。面对气候变化等威胁人类生存的全球性挑战，国际组织、环保人士以及受气候变化威胁的国家向国际社会发出了有力呼吁，社交媒体在气候变化相关信息的传播过程中发挥了重要作用，这些倡导力量在社交媒体上通过各种形式发布气候变化信息、组建应对气候变化讨论小组，加深全球公众对气候变化问题的认识，凝聚全球应对气候变化的共识。

另一方面，社交媒体电商化改变了传统的商业模式，赋能生存权实现。社交媒体电商化带动了经济发展，创造大量就业，受众群体从中获益。以中国为例，在中国脱贫攻坚的过程中，中国各地结合实际探索出不同的脱贫方式，其中电商

脱贫成为一大亮点。通过在社交媒体平台上销售贫困地区的产品，贫困地区的经济得到有力拉动，群众脱贫有了坚实支撑。同样，社交媒体电商化还给了更多人灵活就业的机会。直播带货和社交电商在社交媒体平台上逐渐融合。通过直播形式展示产品特点和优势，使用户能够更加便捷地购买商品。这种模式不仅提高了销售额，还增强了用户与品牌之间的互动和信任。中国人民大学 2023 年 2 月发布的《2023 中国数字经济前沿：平台与高质量充分就业》研究报告显示，以微信、抖音、快手等为代表的平台，2021 年为中国净创造就业约 2.4 亿，为当年约 27%的中国适龄劳动人口提供就业机会。[123]中国人民大学 2022 年发布的《短视频平台促进就业与创造社会价值研究报告》指出，测算结果显示，社交媒体平台快手共带动就业机会总量为 3463 万个，其中直接带动的就业机会共 2000 万个，主要来自创作者和主播的就业机会；另一类为快手电商生态和内容生态拉动的就业机会共 1463 万个。[124]社交媒体的电商化成为中国互联网经济发展的新引擎，大量的社交媒体平台用户因此找到工作，改善了生活，生存权得到了保障。

2. 社交媒体赋能助力发展权

发展权也是首要人权。社交媒体不仅深刻影响了人们的日常生活和交流方式、学习方式，也为人们探索多样化发展提供了更多可能性。

近年来， Facebook、X（原推特）、 Instagram 和 TikTok 等社交媒体平台成为全球数以亿计受众日常生活中重要的信息来源。通过这些平台，人们可以轻松地获取各种领域的知识。同时，社交媒体还提供了许多有关各类主题的博客、文章和视频，丰富了学习资源的多样性和广度。这种便捷的获取方式极大地降低了获取知识的门槛，使得更多的人能够接触到先进的知识和技术，为其在职业上获得更好发展提供了重要助力。

社交媒体还为学习者之间的合作提供了便利。通过社交媒体平台，学生可以轻松地创建小组，共同完成学校和课堂上的作业。他们可以通过即时通讯工具相互交流，并共享文档、演示稿等学习资料。这种合作学习方式促进了互动与合作，培养了学生的团队合作能力和创新。同时，用户还可以通过社交媒体、在线社区等平台进行交流和协作，促进知识的共享和能力的提升。用户可以通过多种学习

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123 “数字经济研究报告：我国平台企业创造就业约 2.4 亿”，https://www.ndrc.gov.cn/fggz/jyysr/jysrsbxf/202302/t20230228_1350402.html。

124 “短视频平台促进就业与创造社会价值研究报告”，http://slhr.ruc.edu.cn/docs/2022-03/061db596340c4ae0aad12d6d24c3cc5e.pdf。

方式拓宽自己的知识面，这种跨界学习有助于产生复合型人才，提高整体社会的创新能力，有助于整个社会实现更好、更快、更可持续的发展。

在赋能学习的同时，社交媒体的发展使每个人拥有了“麦克风”，短视频平台的兴起更是使普通人拥有了新的展示自我的平台。不管是在中国，还是国外，在短视频平台上走红的短视频创作者正在成为塑造公众舆论的重要力量。“网红”群体的创作既丰富了社交媒体的内容生态，也使其自身获得了社会的关注，流量经济为该群体带来了更大的发展空间。

3.社交媒体保障了公众的知情权和表达权

知情权和表达权是公众政治权利的重要组成部分，相较信息闭塞时代，社交媒体大发展的时代使公众的知情权得到更为有力的提升。

在中国，社交媒体是中国民众获知公共事务、社会事务和私人事务的重要载体，社交媒体成为保障公众知情权的便捷工具。大量的政府部门在社交媒体上开设账号，向公众主动、直接发布政务信息，高效地满足了公众的知政权；新闻媒体、自媒体乃至个体网民都能在社交媒体上呈现社会事件的方方面面都得以并参与社会事务的讨论，进一步满足了公众的社会知情权。

在西方国家也同样如此，社交媒体强化了公众获得公共事务信息的权利。以2024年10月上旬世纪飓风“米尔顿”过境美国为例，社交媒体的存在打破了传统媒体等对“麦克风”的垄断，让人们了解到了灾害现场的真实情况，保障了美国人民的知情权。美国网民拍摄视频称，“我完全明白，为什么我们的政府不喜欢TikTok。因为如果不是Tiktok，我几乎不知道飓风对北卡来罗纳州、佐治亚州以及所有这些陆地封锁地区的破坏有多大。对我来说太疯狂了，你能在TikTok上看到的地面镜头，你在其他媒体找不到。”[125]

二、社交媒体发展对全球人权保障的挑战

社交媒体的迅猛发展在促进信息流动的同时，也对全球人权保障带来诸多负面影响。特别是对于边缘化和弱势群体而言，其在社交媒体上的处境尤为脆弱，这导致他们在社会、经济和政治上进一步受到排斥和边缘化，严重影响了他们生存与发展的权利。

1.社交媒体引发仇恨及虚假信息的传播

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[125] “美国网友：TikTok才是了解真实美国的唯一途径，难怪美国政府不喜欢它”，https://item.btime.com/47g7gqdo39l9teak9mvhrgqmkik。

社交媒体平台上种族主义、民族主义、宗教仇恨等言论无所不在，不仅助长了对边缘化群体的歧视，更是削弱了人们对平等和尊重差异的承诺。从个体层面而言，受害者会因此不良言论承受巨大精神压力，产生自我认同危机，例如因外貌被攻击的青少年更易自我否定，影响价值判断。2022 年联合国儿童基金会发布的一份报告中指出，儿童特别容易受到网上仇恨言论的影响，尤其是在他们的身份认同尚未完全形成之际，这些仇恨信息会对他们的心理健康和社会认同产生长期而深远的负面影响，侵犯了他们的受教育权和免受精神暴力的权利。从群体关系层面而言，会加剧群体对立，如阶层间因仇富等言论产生隔阂，地域间因不当言论互相误解。就社会层面而言，会破坏信任体系，不实仇恨谣言使公众互相猜忌，信任瓦解，甚至还会扰乱社会秩序，大规模仇恨言论传播易引发线下冲突暴力，威胁公共安全。

虚假和错误信息的传播同样是重大挑战，尤其在危机、突发事件和政治关键时期，这些信息往往加剧社会紧张局势，甚至引发暴力事件。例如，新冠疫情期间，关于疫情和疫苗的虚假信息广泛传播，导致许多人拒绝接种疫苗，进而危及公共健康和生命安全，侵犯了人们获得真实信息和保护健康的权利。

2.社交媒体容易滋生网络暴力和网络欺凌

边缘化和弱势群体（如女性、少数族裔以及残疾人等）经常成为网络暴力、网络欺凌的攻击对象，这导致他们在社会、经济和政治上进一步受到排斥，阻碍了他们参与公共事务的权利，增加了受害者的无助感和社会隔离感。2022 年，一份针对女记者网络暴力的相关研究显示，她们在社交媒体上因报道而受到来自各方的性别化攻击。网络欺凌通常以一种极其公开的方式，打击受欺凌者的尊严，而网络交流参与者点赞、评论和分享欺凌内容的行为，也会推波助澜。在很多情况下，霸凌信息都以匿名形式发送，因此确认网上霸凌更为困难。从人权倡议角度而言，霸凌行为尤其对其身份认同产生负面影响，这些具有受保护特性的特征（如种族等）常常成为网络攻击的靶子，严重损害了他们的尊严与自尊，侵害了他们健康成长和获得尊重的权利。

3.社交媒体可能沦为煽动骚乱、引起暴力恐慌的工具

社交媒体平台在设计和运作产品与服务时，可能缺乏对人权的全面考量，从而使社交媒体成为操纵舆论、传播仇恨、煽动骚乱，甚至引起暴力恐慌的工具。

2024 年 8 月，一场由持刀袭击案引发的暴力骚乱在英国多地蔓延，抗议者与警察发生激烈冲突。持刀袭击事件发生后，与行凶者身份相关的谣言在各大社交媒体进行了“病毒式传播”，暗示凶手是一名去年抵达英国寻求庇护的难民。极右翼势力抓住此契机，以“救救我们的孩子”这类极具煽动性的话语反复炒作移民议题，成功撩拨民众情绪。由此，英国多个城市相继爆发抗议活动，这些活动迅速升级为暴力骚乱。民众的生命健康权、财产安全权、和平生活权利等受到威胁。

4.社交媒体的流行使用户隐私面临巨大威胁

在社交媒体上，当记录与分享成为常态，个人信息的安全问题也随之而来。科技公司如何设计服务产品，可能对人权产生重大影响。2018 年，Facebook 数据泄露事件爆发，伦敦的政治咨询公司 Cambridge Analytica 被指利用从中获取的 5000 万用户的个人信息，影响英国脱欧公投和美国大选。该事件进一步揭示了科技公司在保护用户数据方面的失职，使用户隐私权面临巨大威胁。尽管欧盟通过实施《通用数据保护条例》（GDPR）等举措，试图增强用户对个人数据的掌控权，但科技公司仍需承担更多的责任，以确保其产品和服务的设计符合人权标准。

三、思考与建议

在当前全球互联、信息畅通的时代，社交媒体作为联系各方的平台和纽带，在全球人权保障中的二元性特点日益凸显。如何放大社交媒体的积极作用，最大程度减少、抑制其负面作用，是国际社会在加强人权保障过程中亟需正视和解决的问题。对此，我有以下几点思考和建议。

1.国际社会应协作弥补南北数字鸿沟

虽然已经踏入 21 世纪第二个十年，互联网技术日新月异，社交媒体快速发展，但全球南方与北方之间仍然横亘着数字鸿沟。国际电联 2023 年 11 月发布的报告显示，全球使用互联网服务的人口比例为 67%，其中欧洲、独联体和美洲有约 90%人口为互联网用户；阿拉伯国家和亚太地区约三分之二的人口使用互联网，与全球平均水平一致；非洲只有 37%的人口为互联网用户。[126]发达国家在全球网络空间中拥有发展中国家难以企及的数字资源和优势，这种数字鸿沟削弱了社交媒体在发展中国家人权保障进程中所应发挥的作用。包括中、欧在内的国际社会

[126] “国际电联：全球数字鸿沟依然存在”，www.news.cn/2023-11/28/c_1129996902.htm。

应加强协作，通过国际多边机制和行动推动互联网在发展中国家的接入和普及，使发展中国家享受到数字技术发展的红利，为社交媒体赋能全球人权保障、实现联合国可持续发展目标提供基础支撑。

2.全球网络空间治理亟待加强

社交媒体在赋能全球人权保障的同时，也伴生着一些负面影响，国际主流社交媒体垄断在少数国家手中，社交媒体的流行滋生虚假信息、网络暴力与欺凌、侵犯隐私等乱象冲击网络空间秩序。当前，全球网络空间治理规则尚未形成有效体系，网络政治化、安全扩大化、机制碎片化、治理无序化问题依然突出，网络空间国际合作治理举步维艰。面向新阶段，中欧等网络空间的参与者需要以规则为基础、以共商共建共享为原则，不断完善全球互联网治理规则，夯实构建网络空间命运共同体的法治基石，最大程度消解社交媒体对人权保障的负面影响，使互联网发展更具生机活力。

3.加强全球人权保障经验交流共享

实践证明，社交媒体在保障全球人权方面日益发挥着重要作用，社交媒体赋能人权保障的形式在不同国家有不同表现，比如，中国社交媒体电商平台的崛起带动了大量就业，普通人也可以通过社交媒体平台拓宽施展个人的价值。中欧双方可就社交媒体赋能人权保障开展常态化的经验交流，共享经过实践检验的好的做法，使社交媒体在人权保障方面更好发挥作用，惠及中欧双方及世界人民。

人工智能时代的隐私保护

达璐 西南政法大学人权研究院

摘　要：本文通过比较中国和欧盟在人工智能方面的立法（特别是欧盟《人工智能法案》[127]和中国《生成式人工智能服务管理暂行办法》[128]），探讨中国和欧盟在隐私保护方面的异同。本文指出在人工智能的背景下，中国和欧盟应根据数据的流动性和无国界性的特点，携手保护公民隐私，维护人类尊严。

Privacy Protection in the AI Age

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Abstract:The article examines the similarities and differences in privacy protection between China and the European Union by comparing their legislation on AI (notably the EU's AI Act and China's Interim Measures for the Management of Generative Artificial Intelligence Services). It proposes that, in the context of AI, given the mobility of data and the borderless nature of the data, China and the European Union should collaborate to protect the privacy of citizens and safeguard human dignity.

127 http://military.people.com.cn/n1/2024/0604/c1011-40249910.html

128 https://www.gov.cn/zhengce/zhengceku/202307/content_6891752.htm

保护与伤害之间：社交媒体如何影响弱势群体权益

郭 敏 中南大学人权研究中心

摘　要：在当代数字化和全球化的语境中，社交媒体已经成为新兴的公共话语平台，远远超越了其作为娱乐和社交工具的预设角色。事实证明，社交媒体通过其开放性及强大的传播力，赋予了弱势群体前所未有的话语权。然而，这一现象也并非全然向好。尽管社交媒体提供了新的表达空间，但隐藏其背后的算法机制、数据商品化以及话语控制仍然导致了弱势群体权利保障的复杂化。平台通过高度复杂的算法管理活动，在为弱势群体提供发声可能的基础上，也存在着加剧信息不对称、放大群体偏见的隐形威胁。唯有深刻理解社交媒体在弱势群体权利保障中的双重作用，方能在利用其赋权功能的同时，有效规避潜藏的风险，确保实现真正意义的“科技向善”。

关键词：弱势群体；社交媒体；算法

Balancing Advocacy and Harm: The Complex Impact of Social Media on Vulnerable Groups' Rights

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Abstract: In the context of contemporary digitalization and globalization, social media has surpassed its original function as an entertainment and networking tool, emerging as a crucial platform for public discourse. Social media, which is highly open and possesses strong communication power, has empowered vulnerable groups by offering them unprecedented opportunities to voice their concerns. However, this phenomenon is not entirely positive. While social media offers new avenues for expression, the underlying algorithmic structures, data commodification, and discourse control complicate the protection of these groups’ rights. The platforms’

complex algorithmic management can amplify biases, create information asymmetry, and pose hidden threats to marginalized voices. Therefore, it is necessary to understand the dual impact of social media. Only in this way can its empowerment be utilized and hidden dangers be avoided, and the genuine protection of vulnerable groups' rights with its aid be achieved.

Keywords: Vulnerable Groups; Social Media; Arithmetic

保护与伤害之间：社交媒体如何影响弱势群体权益

郭 敏 中南大学人权研究中心

一、社交媒体对弱势群体权利保障的积极作用

第一，公共平台的赋权功能。

福柯的话语权力理论揭示了权力如何通过控制话语来行使和维持社会秩序。在他看来，话语不仅仅是语言的表达方式，更是一种社会实践，塑造着我们对现实的理解和行为方式。长期以来，作为话语媒介中心，传统媒体被认为反映了主流社会和精英阶层的利益。[129]“任何话语场域都是重要的社会化场所，场域中话语权的拥有与改变虽然是各种因素的复杂聚合，但权力占据者却具有明显的优势支配权。”[130]通过议题设置的筛选机制，媒体有效地选择了哪些话题应当被放大，哪些则应被边缘化，从而重塑了公众对社会现实的认知，并巩固了现有的社会阶层结构与不平等权力关系。而现代社会的技术进步和数字化的广泛应用，特别是社交媒体平台的兴起，改变了传统话语权的行使方式。社交媒体的开放性和去中心化模式打破了传统媒体的垄断，高度互动性的平台重新定义了公共对话，在这一背景下，社交媒体为弱势群体提供了一个突破性的平台，使他们能够直接参与全球对话，一定程度上重塑话语权格局。可以说，信息传播的去中心化已经成为新兴社会力量的重要组成部分。[131]

最具代表性的是 Black Lives Matter 运动。2020 年，非裔美国人乔治·弗洛伊德被白人警察暴力执法致死。完整事件被旁观者用手机录制下来，并迅速在社交媒体上传播，激起了美国和全世界对警察暴力和系统性种族歧视的强烈抗议。该运动的扩散打破了传统媒体对种族议题的单一叙事框架，并重塑公众对种族不公问题的理解和共识。他们成功地宣传了这样一个事实：系统性种族主义仍然是发达国家和全世界的一个主要问题，没有人应该对此保持沉默。这场运动显示了去中心化平台所带来的巨大潜力，促使受压迫群体的声音直接进入全球公共领域，

*郭敏：中南大学人权研究中心研究助理。

129 Maxwell E McCombs and Donald L Shaw, 'The Agenda-Setting Function of Mass Media' (1972) 36(2) Public Opinion Quarterly 176.

130 傅春晖，彭金定：《话语权力关系的社会学诠释》，载《求索》2007 年第 5 期，第 79 页。

131 沈国麟，易若彤：《从网络社会到平台社会——传播结构的去中心化到再中心化》，载《探索与争鸣》2024 年第 3 期。

并在不同文化和国家背景下引发了广泛的社会和政治反应。

第二，集体行动的动员力。

社交媒体不仅充当了信息传播的平台，还通过其强大的互动机制和即时传播特点，极大提升了弱势群体的集体动员能力。集体行动是推动社会变革的关键力量，在数字化时代，社交媒体为弱势群体提供了跨越传统动员方式的现代化工具，使他们能够迅速组织并有效传播其诉求。举例而言，#MeToo 运动在 2017 年凭借社交媒体的扩散，迅速突破国界限制，将原本被忽视的性骚扰问题提升到全球关注的高度。#MeToo 运动传到中国后，越来越多的受害者选择公开在网络发声，高校、媒体、职场性骚扰的普遍性和严重性开始为公众所知。这非但是对中国社会在性、性别问题上一贯讳莫如深态度的一种突破，更是推动消除性骚扰真正落实到立法上的一大原因。《民法典》1010 条首次对性骚扰的行为方式、行为对象、法律责任等作出了规定，被认为是全面建立起反性骚扰制度防线的标志。[132] 专家强调了 Metoo 运动对于相关条款出台的意义，指出 Metoo 运动是推动《民法典》纳入性骚扰规制条款的重要因素。[133]通过跨国的网络结构，女性群体得以超越地域和文化障碍，形成更具全球性的舆论和社会支持力量。应当说，社交媒体超越了其为弱势群体表达诉讼的工具功能，还成为了动员社会力量，推动政策变革的桥梁。

第三，监督与问责机制的强化。

社交媒体在维护弱势群体权益以及推动社会公平方面，还发挥着监督与问责的功能。针对弱势群体困境，尤其是在人权侵害行为上，社交媒体通过即时性和广泛覆盖性，使得其境况为公众所知。在这方面，最典型的例子是至今还在社交媒体广为传播的叙利亚男孩艾兰·库尔迪的照片。2015 年，艾兰和弟弟在土耳其海岸附近因超载翻船而溺水身亡，后来有人在海滩发现了他的尸体并拍摄照片发布在社交媒体上。该照片迅速激起了公众对难民问题的关切，并推动多个国家在此问题上采取紧急措施。[134]新闻图片发行机构盖蒂图片社（Getty Images）的副总裁休·皮尼（Hugh Pinney）表示，发布一张死亡儿童的照片，这是新闻界的黄金规则之一，通常是不被允许的。然而，这次事件的独特之处在于，许多新

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[132] 澎湃新闻：https://m.thepaper.cn/baijiahao_9868884 acced 23 Sept. 2024.
[133] Xinbao Zhang, 'Research on the Anti-Sexual Harassment Duty of Organizations and Relevant Tort Liability' (2022) 227(3) China Legal Science 60.
[134] What the Image of Aylan Kurdi Says About the Power of Photography

闻媒体在决定发布这些图片时，是在社交媒体上的公众呼声之后做出的决定。“我认为这给了主流媒体勇气和信念去发表这张照片。”[135]

二、社交媒体对弱势群体群里保障的消极作用

主流媒体被认为是精英群体利益的代表者。[136]美国著名学者诺姆·乔姆斯基提出了“制造同意”理论，他指出主流媒体实际上是强大实体，如公司和政府的工具，用于维持现有的权力结构，强化精英群体利益。在这一背景下，媒体注定不会成为弱势群体的利益代表者。他提出了影响媒体功能的五个关键过滤器：第一，所有权。大型媒体机构由追求利润的富有公司或个人控制，报道内容自然会偏向这些所有者的利益。第二，广告。媒体依赖广告收入，这意味着广告商可以通过控制广告投放来影响报道内容，媒体也会避免触及有争议的议题。第三，信息来源。媒体依赖政府官员和公司实体提供信息，这种依赖使得报道内容偏向这些权威信息源的立场。第四，压力。来自强大实体的负面反馈或压力，会导致媒体自我审查。第五，恐惧。媒体经常利用对“敌人”的恐惧，制造一种表面的团结或被动，转移公众对内政问题的注意力，为某些政策正当化提供依据。[137]

乔姆斯基的这一理论解释了为什么即使在民主社会，媒体也能够通过限制公众的讨论空间来巩固现有的不平等结构。但是，互联网和社交媒体的兴起为公众带来了更多的独立新闻和信息来源，公民新闻在新闻报道中的民主化效应，赋予了普通用户模仿新闻专业人士的能力，一定程度上打破了传统新闻媒体的局限。[138]基于此，社交媒体是否会超越制造同意理论，“主流媒体不代表弱势群体利益”是否仍适用于今天的媒体环境呢？

首先，从所有权和广告收入影响来看，目前社交媒体平台，如 Facebook、X 等大多由大公司控制，依赖广告收入维持运营。通过一套复杂且隐晦的规则，这些公司既是言论的监督者，又充当行为的裁决者，不仅追踪用户的每一个数字足迹，更将数据信息商品化，从中获取巨大商业利益。利益导向的公司运行机制导致适用于人工智能技术的伦理原则也包含了功利主义导向——“其基本原则对大多数人来说是最好的结果，而这也意味着永远不会寻求以少数群体为中心的解决

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135 Ibid.
136 Mayerhöffer, E., Pfetsch, B., 'Media Elites' in Best, H., and Higley, J. (eds), The Palgrave Handbook of Political Elites (Palgrave Macmillan 2018).
137 Edward S. Herman and Noam Chomsky, Manufacturing Consent: The Political Economy of the Mass Media (Pantheon Books 1988).
138 Simón Peña-Fernández, Ainara Larrondo-Ureta and Irati Agirreazkuenaga, 'Mediatised Participation: Citizen Journalism and the Decline in User-Generated Content in Online News Media' (2024) 13 Social Sciences 266.

方案。”[139]平台的算法设计往往优先显示对广告主和平台利润有利的内容，而非关注弱势群体的声音。值得注意的是，占据支配地位的群体甚至由于利益至上价值的潜移默化而意识不到他们的不公正做法：“公司通常并不自觉意识到它们的政策是如何延续歧视；它们根据通行的标准雇佣员工，仅仅是试图最大化利益。”[140]

其次，从话语权的集中与“过滤”角度来看，社交媒体可能会限制弱势群体话语空间。社交媒体和平台近年来推广使用内容过滤、推荐系统及自动审查机制来处理海量信息。若是算法基于偏见数据集训练，可能导致某些群体的内容被系统性降低可见性。也就是说，尽管理论上每个人都有平等发声的机会，但由于算法的控制和内容推荐机制，拥有更大经济资源和社会影响力的群体，能够获得更多的关注和传播。缺乏文化代表性和广泛性的算法无法正确区分少数群体的文化和语境差异，导致其言论被错误过滤，限制了少数群体的话语空间，进一步强化了他们在社会中的边缘化地位。有研究指出，谷歌自然语言处理模型 NLP 数据集已被广泛过滤，删除黑人和西班牙裔作者、同性恋者及其他少数群体的源数据，研究人员还发现非裔美式英语和西班牙裔英语受到黑名单过滤的影响尤为严重。[141]

再次，从舆论“控向”与刻板印象强化角度来看，社交媒体一定程度上塑造了偏见型社会认知。社交平台上，某些群体的负面刻板印象常常通过有意或无意的方式被放大。乔姆斯基的“制造同意”理论揭示了媒体在控制话语方面的作用，而在社交媒体上，这种现象通过算法和推荐系统变得更加隐蔽和复杂。举例来说，预测性算法会将某些群体（如少数民族或移民）与犯罪行为联系在一起，[142]由此生成的“有色人种需加强监控”的话语实践塑造了公众的认知。如果说前数字时代公众对于特定族裔的负面印象和评价因“消除一切形式种族歧视”“人人生而平等”的明文规定而居于“心证”状态，那互联网时代的这种带有高科技、科学性标签的显性歧视无疑给这种“心证”提供了“力证”，与社会达尔文主义利用“适者生存”粉饰种族歧视异曲同工。平台通过算法对信息流的控制，使得某些有偏见的信息更容易扩散，进一步恶化了对弱势群体的负面刻板印象，损害了他

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[139] Abeba Birhane. *Algorithmic Colonization of Africa*. 17 Scripted 389, 407(2022).
[140] [荷]范·戴克：《精英话语与种族歧视》，齐月娜、陈强译，中国人民大学出版社 2010 年版，第 162 页。
[141] Martin Anderson, *Minority Voices Filtered Out of Google Natural Language Processing Models*,Unite AI (Dec. 9, 2022), https://www.unite.ai/minority-voices-filtered-out-of-google-natural-language-processing-models/.
[142] 同前注[4]，Jane Chung。

们的社会权利。

最后，仇恨言论的定向扩散来看，社交媒体不仅是信息交流的平台，还是仇恨言论的温床，尤其是针对性别、种族、宗教等弱势群体的言语攻击。在匿名性和去中心化的技术特性掩护下，仇恨言论得以迅速扩散，并对特定群体造成极大的心理压力与社会孤立。社会学家 Zygmunt Bauman 在 Liquid Modernity 一书中认为，在传统社会中，个人的伦理责任通常是基于稳定的社会结构和道德框架。但在流动现代性中，由于人与人之间的关系变得更加短暂和不稳定，伦理责任逐渐稀释，甚至被忽视。[143]具体在社交媒体上，用户的匿名性和身份虚拟性加剧了责任感的稀释，由于缺乏面对面的互动和即时的社会反馈，许多人在网络空间中不再对他人负有伦理责任。研究表明，社交媒体平台虽然拥有仇恨言论的审查机制，但在许多情况下，这些机制有效性有限，不足以抑制仇恨内容的传播。[144]对此，联合国独立人权专家曾点名批评大型社交媒体平台公司的首席执行官，并要求他们所领导的公司“必须根据言论自由的国际标准，紧急处理那些宣扬仇恨、煽动歧视的言论和活动”。专家指出，强调言论自由并不意味着可以肆意传播有害的虚假信息，造成现实世界的伤害，社交媒体巨头迫切需要承担更多责任以遏制仇恨言论。[145]

三、结语

总的来说，社交媒体既为弱势群体提供了前所未有的话语空间，但也带来了利益导向和数据操控的隐忧。要尽力可能避免社交媒体的负面影响，需要采取多方位综合措施。首先，平台的算法透明度亟需提升，以减少隐性偏见和歧视性过滤。同时应对平台施加强制影响评估和强制披露的双重义务，即要求此类必须进行算法影响评估，预测并减轻潜在对社会的不利影响，尤其是对弱势群体的影响。其次，需完善相关立法，明确社交媒体在应对仇恨言论、虚假信息以及数据隐私侵害时的责任，防止平台在追求商业利益的同时忽视社会责任。此外，支持提升弱势群体的数字素养也是至关重要的一环。只有增强此类群体对社交媒体算法、隐私风险等复杂技术问题的认知，才能将数字工具的功能最大化。这不仅意味着加强其数字技能的教育，还应包括提高其识别虚假信息、理解平台操控的能力。

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143 Zygmunt Bauman, Liquid Modernity (Polity Press 2000).
144 Alexandra Siegel, 'Online Hate Speech' in Nathaniel Persily and Joshua A. Tucker (eds), Social Media and Democracy (Cambridge University Press 2020) 56-88.
145 ‘Urgent need’ for more accountability from social media giants to curb hate speech: UN experts

当代哲学辩论中的自然权利

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本文探讨了新亚里士多德主义的自然权利和基于权利的伦理学传统是否仍然可以为当代伦理学和法律的辩论提供一些借鉴，并为这个问题的肯定答案提供了理论基础。根据其他一些权利和法律概念，尤其是实证主义，本文还评估了新亚里士多德主义对当前辩论的贡献。

Natural Rights in Contemporary Philosophical Debates

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The paper addresses the issue of whether the neo-Aristotelian tradition of natural rights and right-based ethics has still something to offer to the debates in contemporary moral philosophy and law, and provide a rationale for an affirmative answer to that issue. The neo-Aristotelian contributions to the current debates are assessed against a few other concepts of right and law, especially the positivistic tradition.

欧洲人权法院在减缓气侯变化领域的判例法

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摘　要：2024 年 4 月 9 日，欧洲人权法院大法庭在减缓气候变化领域作出了三项具有里程碑意义的裁决。这些案件的申请人声称，由于被告国没有采取足够的行动来应对气候变化，他们根据《欧洲人权公约》(简称《公约》)享有的权利受到了侵犯(1)。在这三项裁决中，欧洲人权法院探讨了其处理气候变化问题的权限()，引入了气候变化特定背景下代际负担分担的概念(II)，明确了与气候变化案件有关的一般考虑因素(IV)，并澄清了与欧洲人权法院在应对气候变化领域的申请可受理性的相关问题(V)以及《公约》规定的权利和各国在应对气候变化领域承担的义务(VI)。本文将介绍法院就这些事项作出的关键裁决。

The Case-Law of the European Court of Human Rights in the Area of Climate-Change Mitigation

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Abstract: On 9 April 2024, the Grand Chamber of the European Court of Human Rights delivered three landmark rulings in the area of climate-change mitigation. The applicants in those cases had alleged breaches of their rights under the European Convention on Human Rights on account of insufficient action taken by the respondent States to mitigate climate change (I.). In the three rulings, the European Court of Human Rights addressed its competence to deal with issues arising from climate change (II.), introduced the concept of intergenerational burden-sharing in the specific context of climate change (III.), set general considerations relating to climate

change cases (IV.), and clarified issues relating to the admissibility of applications before the European Court of Human Rights in the area of climate-change mitigation (V.) as well as rights under the Convention and obligations incumbent on States in the area of climate-change mitigation (VI.). The present paper will present key aspects of the Court's rulings in respect of these matters.

The case-law of the European Court of Human Rights in the area of climate-change mitigation

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I. The cases adjudicated by the European Court of Human Rights on 9 April 2024

On 9 April 2024, the Grand Chamber of the European Court of Human Rights ("the Court") delivered three landmark rulings in the area of climate-change mitigation: a judgment in the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[146] as well as two inadmissibility decisions in the cases of *Duarte Agostinho and Others v. Portugal and 32 Others*[147] and *Carême v. France*[148]. In *Verein KlimaSeniorinnen Schweiz and Others*, a Swiss association of elderly women concerned about the consequences of global warming on their living conditions and health as well as four individual women complained that the domestic authorities were not taking sufficient action to mitigate the effects of climate change. Their action before the superior Swiss courts was dismissed as they were not deemed sufficiently and directly affected by the alleged failings. *Duarte Agostinho and Others* was lodged by several Portuguese nationals living in Portugal without attempting to use any domestic legal remedies. They alleged a violation of several rights under the European Convention on Human Rights ("the Convention") given the existing and future impacts of climate change, imputable to their home country and thirty-two other States, specifically concerning heatwaves, wildfires and smoke from wildfires, which affected their lives, well-being, mental health and the amenities of their homes. The applicant in *Carême* was the former mayor of a French municipality, Grande-Synthe, who alleged that France had failed to take sufficient steps to mitigate

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146 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, 9 April 2024.
147 *Duarte Agostinho and Others v. Portugal and 32 Others* (dec.) [GC], no. 39371/20, 9 April 2024.
148 *Carême v. France* (dec.) [GC], no 7189/21, 9 April 2024.

climate change and that this failure entailed a violation of his right to life and his right to respect for his private and family life and his home, owing in particular to the risk of climate-change-induced flooding to which the respective municipality would be exposed in the future. The cases raised unprecedented issues before the Court, as the particular nature of the problems arising from climate change in terms of the issues raised under the Convention had not so far been addressed in the Court's case-law.[149]

II. The Court's competence to deal with issues arising from climate change

The Court noted that it could deal with the issues arising from climate change only within the limits of the exercise of its competence under Article 19 of the Convention, which is to ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention and its Protocols.[150] The Court added that:

"[it] is, and must remain, mindful of the fact that to a large extent measures designed to combat climate change and its adverse effects require legislative action both in terms of the policy framework and in various sectoral fields. In a democracy, which is a fundamental feature of the European public order expressed in the Preamble to the Convention together with the principles of subsidiarity and shared responsibility, such action thus necessarily depends on democratic decision-making. Judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government. However, democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the Court is therefore complementary to those democratic processes. The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements. The legal basis for the Court's intervention is always limited to the Convention, which empowers the Court to also determine the proportionality of general measures adopted by the domestic legislature. […] At the same time, the Court must also be mindful of the fact that the widely acknowledged

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[149] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], cited above, para. 414.
[150] *Ibid.*, para. 411.

inadequacy of past State action to combat climate change globally entails an aggravation of the risks of its adverse consequences, and the ensuing threats arising therefrom, for the enjoyment of human rights – threats already recognised by governments worldwide. The current situation therefore involves compelling present-day conditions, confirmed by scientific knowledge, which the Court cannot ignore in its role as a judicial body tasked with the enforcement of human rights."[151]

III. Intergenerational burden-sharing in the specific context of climate change

The Court then introduced a new concept of "intergenerational burden-sharing" in the specific context of climate change. It stated:

"[T]he Court notes that, in the specific context of climate change, intergenerational burden-sharing assumes particular importance both in regard to the different generations of those currently living and in regard to future generations. While the legal obligations arising for States under the Convention extend to those individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party, it is clear that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change and that, at the same time, they have no possibility of participating in the relevant current decision-making processes. By their commitment to the United Nations Framework Convention on Climate Change ('UNFCCC'), the States Parties have undertaken the obligation to protect the climate system for the benefit of present and future generations of humankind. This obligation must be viewed in the light of the already existing harmful impacts of climate change, as well as the urgency of the situation and the risk of irreversible harm posed by climate change. In the present context, having regard to the prospect of aggravating consequences arising for future generations, the intergenerational perspective underscores the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for

[151] *Ibid.*, paras. 411-413.

sustainable policy-making, rendering that risk particularly serious and adding justification for the possibility of judicial review."[152]

IV. General considerations relating to climate-change cases

Noting that the specificity of cases relating to climate change – in the context of human rights-based complaints against States – arose from the fact that they were concerned with a complex global problem, the Court set out general considerations relating to such cases.[153]

Firstly, on the issue of proof, the Court pointed "to the particular importance of the reports prepared by the Intergovernmental Panel on Climate Change ('IPCC'), as the intergovernmental body of independent experts set up to review and assess the science related to climate change, which are based on comprehensive and rigorous methodology, including in relation to the choice of literature, the process of review and approval of its reports as well as the mechanisms for the investigation and, if necessary, correction of possible errors in the published reports. These reports provide scientific guidance on climate change regionally and globally, its impact and future risks, and options for adaptation and mitigation."[154]

Secondly, as regards the effects of climate change on the enjoyment of Convention rights, the Court noted that "[i]n recent times there has been an evolution of scientific knowledge, social and political attitudes and legal standards concerning the necessity of protecting the environment, including in the context of climate change. There has also been a recognition that environmental degradation has created, and is capable of creating, serious and potentially irreversible adverse effects on the enjoyment of human rights."[155] It found it to be "a matter of fact that there are sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of it and capable of taking measures to effectively address it, that the relevant risks are projected to be lower if the rise in

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[152] *Ibid.*, para. 420.
[153] *Ibid.*, paras. 423-444.
[154] *Ibid.*, para. 429.
[155] *Ibid.,* para. 431.

temperature is limited to 1.5°C above pre-industrial levels and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target."[156]

Thirdly, the Court addressed the issue of the proportion of a State's contributions to global GHG emissions and the capacity of individual States to take action and to bear responsibility for a global phenomenon that requires action by the community of States. It noted:

"[W]hile climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact … as well as in the Sharm el-Sheikh Implementation Plan […]. It follows, therefore, that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State […]. The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not. […] [T]he alleged infringement of rights under the Convention through harm arising from GHG emissions globally and the acts and omissions on the part of multiple States in combating the adverse effects of climate change may engage the responsibility of each Contracting Party, subject to it having jurisdiction within the meaning of Article 1 of the Convention […]. Indeed, given that the Article 1 jurisdiction is principally territorial, each State has its own responsibilities within its own territorial jurisdiction in respect of climate change."[157]

V. Issues relating to the admissibility of applications with the European Court of Human Rights in the area of climate-change mitigation

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[156] *Ibid.*, para. 436.
[157] *Ibid.*, paras. 442-443.

In the aforementioned rulings, the Court addressed several issues relating to the admissibility of applications before the Court in the area of climate-change mitigation.

A. Jurisdiction within the meaning of Article 1 of the Convention

Article 1 of the Convention provides that the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention." The Court addressed the question of jurisdiction within the meaning of Article 1 in the context of climate change in *Duarte Agostinho and Others v. Portugal and 32 Others*. The Court found that the applicants fell within Portugal's (territorial) jurisdiction – which it deduced from the fact that they lived in that country – and went to examine whether they fell within the extraterritorial jurisdiction of the thirty-two other respondent States. As it was clear that the applicants' complaints did not correspond to any of the circumstances which in earlier cases had given rise to a finding of extraterritorial jurisdiction under Article 1, the Court examined whether there were valid grounds for developing the existing case-law on extraterritorial jurisdiction on the basis of a number of "exceptional circumstances" and "special features" put forward by the applicants. They had argued that the extraterritorial jurisdiction of the thirty-two other respondent States was established, *inter alia*, because their emissions and/or failures to regulate/limit their emissions produced effects outside their territories.[158]

Noting the specific characteristics of climate-change cases as explained in *Verein KlimaSeniorinnen Schweiz and Others*, the Court acknowledged the following aspects of climate change emphasised by the applicants: Firstly, States have ultimate control over public and private activities based on their territories that produce greenhouse gas ("GHG") emissions. Secondly, albeit complex and multi-layered, there is a certain causal relationship between public and private activities based on a State's territories that produce GHG emissions and the adverse impact on the rights and well-being of people residing outside its borders and thus outside the remit of that State's democratic process. Climate change is a global phenomenon, and each State bears its share of responsibility for the global challenges generated by climate change and has

[158] *Duarte Agostinho and Others v. Portugal and 32 Others* (dec.) [GC], cited above, paras. 121-127.

a role to play in finding appropriate solutions. Thirdly, the problem of climate change is of a truly existential nature for humankind, in a way that sets it apart from other cause-and-effect situations.[159] Nonetheless, the Court held that these considerations could not in themselves serve as a basis for creating by way of judicial interpretation a novel ground for extraterritorial jurisdiction or as justification for expanding on the existing ones.[160] Addressing all of the other arguments put forward by the applicants, the Court concluded more generally that there were no grounds in the Convention for the extension, by way of judicial interpretation, of the respondent States' extraterritorial jurisdiction in the manner requested by the applicants, noting, *inter alia*, that the scope of the extraterritorial jurisdiction sought by the applicants would in effect entail an unlimited expansion of States' responsibilities under the Convention towards people practically anywhere in the world.[161] The applicants' complaint against the thirty-two respondent States other than Portugal was therefore declared inadmissible due to a lack of jurisdiction.[162]

B. The requirement to exhaust to domestic remedies

Article 35 § 1 of the Convention requires applicants to exhaust domestic remedies which are available and sufficient in respect of their Convention grievances prior to lodging an application with the Court. It was uncontested that the applicants in *Duarte Agostinho and Others v. Portugal and 32 Others* had not pursued any legal avenue in Portugal concerning their complaints. The Court found that there was a comprehensive system of remedies in the Portuguese legal order and that there had not been any special reasons for exempting the applicants from the requirement to exhaust domestic remedies. The applicants' complaint against Portugal was therefore inadmissible.[163]

C. Victim status of individuals and the legal standing (locus standi) of associations who are acting on behalf of persons whose Convention rights are alleged to have been violated

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[159] *Ibid.*, paras. 191-194.
[160] *Ibid.*, para. 195.
[161] *Ibid.*, paras. 196-213.
[162] *Ibid.*, para. 214.
[163] *Ibid.*, paras. 216-228.

For an application with the Court to be admissible, a person, non-governmental organisation or group of individuals must be able to claim to be a victim of a violation of the rights set forth in the Convention (Article 34 of the Convention). The Convention does not permit individuals or groups of individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention.[164] In *Verein KlimaSeniorinnen Schweiz and Others*, the Court set out the applicable principles in the context of climate change.

It found that in order to claim victim status under Article 34 in the context of complaints concerning harm or risk of harm resulting from alleged failures by the State to combat climate change, an individual needs to show that he or she was personally and directly affected by the impugned failures. This would require the Court to establish the following circumstances concerning the applicant's situation: (a) the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant; and (b) there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm. The threshold for fulfilling these criteria is especially high, in view of the exclusion of *actio popularis* under the Convention.[165]

The Court held that the individual applicants in *Verein KlimaSeniorinnen Schweiz and Others* (older women and thus members of a group which was particularly susceptible to the effects of climate change) did not meet that threshold.[166] In *Carême v. France*, the Court held that the applicant could not claim to be a victim within the meaning of Article 34 as he had no relevant links with the municipality of Grande-Synthe: notably, he no longer lived or rented property in the municipality, and he did not own property there.[167]

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[164] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], cited above, para. 460.
[165] *Ibid.*, paras. 487-488.
[166] *Ibid.*, paras. 527-536.
[167] *Carême v. France* (dec.) [GC], cited above, paras. 76-88.

As regards the legal standing of associations, the Court held that the special feature of climate change as a common concern of humankind and the need to promote intergenerational burden-sharing rendered it appropriate to make allowance for recourse to legal action by associations for the purpose of seeking the protection of the human rights of those affected, as well as those at risk of being affected, by the adverse effects of climate change, instead of exclusively relying on proceedings brought by each individual on his or her own behalf.[168] The exclusion of *actio popularis* under the Convention requires, however, that, in order for the applicant association to have legal standing to lodge an application on account of the alleged failure of a State to take adequate measures to protect individuals against the adverse effects of climate change on human lives and health, it must comply with a number of conditions: (a) it must be lawfully established in the jurisdiction concerned or have standing to act there; (b) it must be able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and (c) it must be able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention.[169] In this connection, the Court will have regard to such factors as the purpose for which the association was established, that it is of non-profit character, the nature and extent of its activities within the relevant jurisdiction, its membership and representativeness, its principles and transparency of governance and whether on the whole, in the particular circumstances of a case, the grant of such standing is in the interests of the proper administration of justice.[170] The standing of an association to act on behalf of the members or other affected individuals within the jurisdiction concerned will not be subject to a separate

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168 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], cited above, paras. 489-499.
169 *Ibid*., paras. 500-502.
170 *Ibid.*, para. 502.

requirement of showing that those on whose behalf the case has been brought would themselves have met the victim-status requirements for individuals in the climate-change context.[171] In the event of existing limitations regarding the standing before the domestic courts of associations meeting the above Convention requirements, the Court may also, in the interests of the proper administration of justice, take into account whether, and to what extent, its individual members or other affected individuals may have enjoyed access to a court in the same or related domestic proceedings.[172]

VI. Rights under the Convention and obligations incumbent on States in the area of climate-change mitigation

A. The applicability of Articles 2 and 8 of the Convention

The Court also specified the conditions under which Articles 2 and 8 of the Convention apply to complaints of State action or inaction in the context of climate change.

As regards Article 2 (right to life), the Court held that the complaints concerning the alleged failures of a State to combat climate change fell into the category of cases concerning an activity which, by its very nature, was capable of putting an individual's life at risk. It pointed, in particular, to the findings of the intergovernmental panel of experts on climate change, which stated that anthropogenic climate change, particularly through increased frequency and severity of extreme events, increased heat-related human mortality.[173] In order for Article 2 to apply, it needs to be determined that there is a "real and imminent" risk to life, understood as referring to a serious, genuine and sufficiently ascertainable threat to life of a specific applicant, containing an element of material and temporal proximity of the threat to the impugned harm.[174] This would also imply that where the victim status of an individual applicant has been established in accordance with the criteria set out above, it would be possible to assume that a serious risk of a significant

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[171] *Idem*.
[172] *Ibid.*, para. 503.
[173] *Ibid.*, paras. 508-510.
[174] *Ibid.*, para. 513.

decline in a person's life expectancy owing to climate change ought also to trigger the applicability of Article 2.[175]

As regards Article 8, the Court declared, for the first time, that the provision "must be seen as encompassing a right for individuals to effective protection by […] State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life."[176] However, whether Article 8 rights are indeed at stake and whether this provision applies in each case is subject to similar criteria to those set out above concerning the victim status of individuals or the legal standing of associations and the Court will always answer this question on a case-by-case basis.[177] Applying the aforementioned criteria, the Court found that the applicant association in *Verein KlimaSeniorinnen Schweiz and Others* had legal standing in the case at hand and that Article 8 was applicable to its complaint concerning the effects of the alleged shortcomings on the part of the respondent State in its measures to combat the adverse effects and threats of climate change on human health.[178]

While the Court found it questionable whether the alleged shortcomings also had such life-threatening consequences as could trigger the applicability of Article 2, it considered that it did not have to analyse further the issues of the applicability of Article 2, as the principles under Articles 2 and 8 were to very large extent very similar and, when seen together, provided a useful basis for defining the overall approach to be applied in the climate-change context under both provisions.[179]

B. The States' positive obligations in the context of climate change

In accordance with the principle of subsidiarity, the national authorities have the primary responsibility to secure the rights and freedoms defined in the Convention, and in doing so they enjoy a margin of appreciation, subject to the Court's supervisory jurisdiction.[180] As regards width of that margin of appreciation afforded to States in the climate change context, the Court drew a distinction between the scope of the

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[175] *Idem*.
[176] *Ibid.*, para. 519.
[177] *Ibid.*, para. 520.
[178] *Ibid.*, paras. 521-526.
[179] *Ibid.*, paras. 536-538.
[180] *Ibid.*, para. 541.

margin as regards, on the one hand, the State's commitment to the necessity of combating climate change and its adverse effects and the setting of the requisite aims and objectives in this respect and, on the other hand, the choice of means designed to achieve them.[181] Given the nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection by setting overall GHG reduction targets in accordance with the Contracting Parties' accepted commitments to achieve carbon neutrality, the States have only a reduced margin of appreciation as regards their commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives.[182] In contrast, they have a wide margin of appreciation as regards their choice of means to achieve these objectives, including operational choices and policies adopted in order to meet internationally anchored targets and commitments, in the light of priorities and resources.[183]

Reiterating that Article 8 encompassed a right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change, the Court considered that it was, accordingly, "the State's obligation under Article 8 […] to do its part to ensure such protection."[184]

The State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change.[185] These regulations and measures must be aimed at preventing an increase in greenhouse gas concentrations in the Earth's atmosphere and a rise in global average temperature to levels capable of producing serious and irreversible adverse effects on human rights.[186] More specifically, effective respect for rights protected by Article 8 requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective

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[181] *Ibid.*, paras. 542-543.
[182] *Idem*.
[183] *Idem*.
[184] *Ibid.*, paras. 544-545.
[185] *Ibid.*, para. 545.
[186] *Ibid.*, para. 546.

GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades.[187] Moreover, in order for this to be genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality.[188] Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation.[189] The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures.[190]

Thus:

"When assessing whether a State has remained within its margin of appreciation […], the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to:

(a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;

(b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;

(c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a)-(b) above);

(d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and

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[187] *Ibid.*, para. 548.
[188] *Ibid.*, para. 549.
[189] *Idem*.
[190] *Idem*.

(e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures."[191]

The Court's assessment of whether the above requirements have been met will, in principle, be of an overall nature, meaning that a shortcoming in one particular respect alone will not necessarily entail that the State would be considered to have overstepped its relevant margin of appreciation.[192]

States are required to supplement the aforementioned mitigation measures by adaptation measures aimed at alleviating the most severe or imminent consequences of climate change, taking into account any relevant particular needs for protection.[193] Such adaptation measures must be put in place and effectively applied in accordance with the best available evidence and consistent with the general structure of the State's positive obligations in this context.[194]

Finally, the following two types of procedural safeguards are to be taken into account when determining whether a respondent State has remained within its margin of appreciation: Firstly, the information held by public authorities of importance for setting out and implementing the relevant regulations and measures to tackle climate change must be made available to the public, and in particular to those persons who may be affected by the regulations and measures in question or the absence thereof. In this connection, procedural safeguards must be available to ensure that the public can have access to the conclusions of the relevant studies, allowing them to assess the risk to which they are exposed. Secondly, procedures must be available through which the views of the public, and in particular the interests of those affected or at risk of being affected by the relevant regulations and measures or the absence thereof, can be taken into account in the decision-making process.[195]

C. The Court's assessment in Verein KlimaSeniorinnen Schweiz and Others

Applying the aforementioned principles, the Court concluded that there were some critical lacunae in the Swiss authorities' process of putting in place the relevant

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[191] *Ibid.*, para. 550.
[192] *Ibid.*, para. 551.
[193] *Ibid.*, para. 552.
[194] *Idem*.
[195] *Ibid.*, paras. 553-554.

domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, as recognised by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets. By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context.[196] The Court thus found that there had been a violation of Article 8 of the Convention.

D. Right of access to a court of associations in the climate-change context

Lastly, the Court found that there had been a violation of the right of access to a court guaranteed by Article 6 § 1 of the Convention because the Swiss courts had rejected the applicant association's legal action concerning the effective implementation of the mitigation measures under existing law without the merits of its complaints being assessed.[197] Regarding the applicability of Article 6 § 1, the Court noted that, while the general principles concerning the applicability of that provision prevailed in the present climate change context, their application might need to take into account the specificities of climate change litigation and Court highlighted in particular the role of legal actions by associations in the climate-change context as a means through which the Convention rights of those affected by climate change, including those at a distinct representational disadvantage, can be defended and through which they can seek to obtain adequate corrective action for the alleged failures and omissions on the part of the authorities.[198]

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[196] *Ibid.*, paras. 555-574.
[197] *Ibid.*, paras. 590-640.
[198] *Ibid.*, paras. 608-614.

中国环境权的演进路径与未来展望

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摘　要：中国环境权的发展带有鲜明的中国特色。环境权在中国的发展具有宪法基础和法律依据，并受到中国共产党生态文明理念的引领。从 1978 年宪法首次明确国家环境保护义务，到 2018 年生态文明入宪，环境权的保障逐步得到强化。笔者看来，环境权应被视为基本人权和具有宪法权利位阶的基本权利，同时，也应注意环境权在中国特色发展语境下的独特内涵。中国特色环境权强调与传统文化的联系，强调应在生存权与发展权的意义上理解环境权，以及突出强调了环境权的可塑性。为更好保障环境权，笔者建议，可从环境权入宪、宪法条款加环境法典编纂、以及“宪法+”环境法律三种渠道构建环境权的法律保障体系。

关键词：环境权；基本权利；立法方案

The Evolution Path and Future Outlook of Environmental Rights in China

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Abstract: The development of environmental rights in China has distinctive Chinese characteristics. The evolution of environmental rights in China is grounded in the Constitution and has a legal basis. It is guided by the Communist Party of China’s philosophy of ecological civilization[199]. From the first mention of the state’s obligation to protect the environment in the *Constitution of the People's Republic of China*[200] released in 1978 to the incorporation of ecological civilization into the

[199] https://english.news.cn/20220422/d392d7fd6cf14bd898e01605a899a512/c.html
[200] https://english.www.gov.cn/archive/lawsregulations/201911/20/content_WS5ed8856ec6d0b3f0e9499913.html

Constitution in 2018, the protection of environmental rights has been progressively strengthened. In the author's view, environmental rights should be regarded as fundamental human rights and basic rights with constitutional standing. Additionally, it is essential to recognize the unique connotations of environmental rights within the context of China's development. The environmental rights with Chinese characteristics emphasize the connection to traditional culture, advocate for understanding environmental rights in terms of the rights to subsistence and development, and highlight the malleability of environmental rights. To better protect environmental rights, this paper suggests establishing a legal protection system through three channels: incorporating environmental rights into the Constitution, adding environmental provisions to the Constitution, and developing a "Constitution +" environmental law framework.

Keywords: Environmental Rights; Fundamental Rights; Legislative Proposals

中国环境权的演进路径与未来展望

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一、环境权在中国的发展

从中国生态文明法治体系整体来看，环境权在中国的发展既有宪法根据，也有以宪法为根据的部门法生态文明规范作为环境权发展的法律依据，同时，中国共产党的生态文明理念也有机贯穿其中，引领着环境权始终朝着正确的方向发展。我国 1978 年宪法的第 11 条第 3 款规定：“国家保护环境和自然资源，防治污染和其他公害。”这一条款首次在宪法文本中明确了国家是环境保护的义务主体，使得国家对自然资源的所有权与环境保护义务之间形成了文本上的平衡。这不仅是我国宪法中首次规定环境条款，也提供了环境法体系发展的直接宪法依据。在此基础上，1979 年我国通过了第一部专门的《环境保护法（试行）》。《环境保护法（试行）》不仅明确规定其立法目的是“合理地利用自然环境，防治环境污染和生态破坏，为人民造成清洁适宜的生活和劳动环境，保护人民健康，促进经济发展”，而且对各级国家机关、企事业单位在保护环境、防治污染和其他公害方面的职责和义务作了明确和具体的制度安排，并根据“谁污染，谁治理”的原则，建立了环境影响评价、“三同时”等预防性制度和排污收费、限期治理等污染防治制度。这充分表明，《环境保护法（试行）》已初步彰显经济发展与环境保护相协调的生态文明思想理念。此后，我国环境法律规范蓬勃发展，环境法部门日趋成形。

在继承 1978 年宪法的基础上，1982 年宪法进一步丰富了环境和自然资源保护条款。具体包括在《宪法》第 9 条第 2 款规定：“国家保障自然资源的合理利用，保护珍贵的动物和植物。禁止任何组织和个人用任何手段侵占或破坏自然资源。”这一规定与 1978 年宪法规定的“国家保护环境和自然资源”形成了对比，以“合理利用”代替了单一的“保护”，突出了人类与自然之间的和谐关系，显示了立法技术的提升及对生态文明建设的初步认知。《宪法》第 22 条规定：“国家保护名胜古迹、珍贵文物和其他重要历史文化遗产。”这一条款针对的客体是具有典型意义的名胜古迹、珍贵文物和其他重要历史文化遗产，一些珍贵的、具有独特意义的自然资源及景观亦被纳入保护之列，因而此条款可以看作是对部分

重要环境及自然资源的特殊保护条款。《宪法》第 26 条规定：“国家保护和改善生活环境和生态环境，防治污染和其他公害。国家组织和鼓励植树造林，保护林木。”从文义上来看，“这一规定是国家对环境保护的总政策，说明了环境保护是国家的基本职责或义务”[201]。从这些条款可以看出，1982 年宪法已经形成了较为完整的宪法环境条款体系。

2012 年 11 月 8 日，中国共产党第十八次全国代表大会报告中提出“大力推进生态文明建设”，指出“建设生态文明，是关系人民福祉、关乎民族未来的长远大计。面对资源约束趋紧、环境污染严重、生态系统退化的严峻形势，必须树立尊重自然、顺应自然、保护自然的生态文明理念，把生态文明建设放在突出地位，融入经济建设、政治建设、文化建设、社会建设各方面和全过程，努力建设美丽中国，实现中华民族永续发展。”

2014 年 4 月，十二届全国人大常委会第八次会议对 1989 年《环境保护法》作了全面修订，与此同时，《环境保护法》在环境法体系中的基础性地位自此得以确立。[202]新《环境保护法》以宪法生态文明规范体系为依据，在该法中存在大量的生态文明规范。首先，新《环境保护法》对立法目的进行了重新设计，将国家“五位一体”战略之一的生态文明建设纳入立法目的。即该法第 1 条规定立法目的是“保护和改善环境，防治污染和其他公害，保障公众健康，推进生态文明建设，促进经济社会可持续发展”。将立法目的推进至生态文明建设，一方面，反映了我国生态环境保护和治理思路的转变，环境保护的重心由污染防治转向生态建设；另一方面，也反映了中国特色生态法治文明的发展，在社会治理的过程中更加注重体系性治理，要求构筑互相衔接、相互配合的治理体系。其次，新《环境保护法》彰显了促进人与自然和谐共生的生态文明价值取向。即该法第 4 条规定：“保护环境是国家的基本国策。国家采取有利于节约和循环利用资源、保护和改善环境、促进人与自然和谐的经济、技术政策和措施，使经济社会发展与环境保护相协调”。再次，新《环境保护法》确立了体现生态文明共建共治共享理念的生态环境多元治理体系。即该法明确规定了地方政府的生态环境保护职责以及企业、个人、社会的生态环境保护义务，构建了政府主导、企业主责、公众参

201 谭倩、戴芳：《公民环境权的宪法保障路径研究》，载《云南行政学院学报》2018 年第 2 期，第 152 页。

202 参见彭波、毛磊：《全国人大常委会办公厅召开新闻发布会：环保法 25 年首次大修》，载中国人大网：http://www.npc.gov. cn/zgrdw/huiyi/lfzt/hjbhfxzaca/2014-04/25/content_1861322.htm，2023 年 3 月 1 日访问。

与的多元共治新格局，并以“大环保”的理念安排制度体系，统筹考虑生态环境保护与环境污染防治、城市与农村环境治理、统一监管与分工负责等问题。最后，新《环境保护法》在生态文明制度建设方面，既在总结经验的基础上将污染防治领域较为成熟的执法实践上升为法律制度，赋予环保部门按日计罚、查封扣押、限产停产等强制执法权，完善法律责任制度；又在保护和改善生态环境方面着力完善相关制度，规定了生态红线、生物多样性、生态安全、农业农村环境治理、环境与健康保护等新制度。总之，通过在修改《环境保护法》时明确规定环境法的目的是推进生态文明建设，并写入包括生态文明在内的大量生态学术语和概念，我国的环境法正在逐步实现从以防治污染为标志的环境保护法向以建设生态文明为标志的生态法的历史性转变。[203]

2017 年 10 月 18 日，中国共产党第十九次全国代表大会报告中提出“坚持人与自然和谐共生”，指出“建设生态文明是中华民族永续发展的千年大计。必须树立和践行绿水青山就是金山银山的理念，坚持节约资源和保护环境的基本国策，像对待生命一样对待生态环境，统筹山水林田湖草系统治理，实行最严格的生态环境保护制度，形成绿色发展方式和生活方式，坚定走生产发展、生活富裕、生态良好的文明发展道路，建设美丽中国，为人民创造良好生产生活环境，为全球生态安全作出贡献。”

2018 年宪法修改时，生态文明被正式写入现行宪法序言第七自然段，生态文明所蕴含的价值在法律制度中得以合理体现。生态文明被明确写入宪法，结束了长期以来宪法文本中环境条款缺乏统筹的局面，使得宪法文本中的环境条款得以体系化，进而形成宪法上的生态文明规范体系。同时，宪法生态文明规范体系中的环境条款与部门环境法之间的关系得以明确，宪法的根本法尊严进一步得到彰显。由于宪法有了关于生态文明的思想阐述和原则性规定，就可更好地发挥总揽全局的规范作用；我国的基本法律和其他法律、行政法规和部门规章、地方性法规和地方政府规章、民族自治条例和单行条例等，就能全面地、系统地、持续地贯彻和发展生态文明思想，使生态文明建设真正从法律上进入“五位一体”总体布局，真正使生态文明建设在宪法框架下实现法治化。总之，生态文明入宪标志着我国的生态文明建设探索出了符合国情的中国特色环保策略、法治模式和发

203 蔡守秋：《析 2014 年〈环境保护法〉的立法目的》，载《中国政法大学学报》2014 年第 6 期，第 32 页。

展道路，由此步入了生态文明建设和发展的新时代。

2020 年 5 月 28 日第十三届全国人大第三次会议通过了《民法典》，这是新中国成立以来的这第一部《民法典》。这部《民法典》在保持市民社会一般私法的基本属性基础上，被打上了鲜明的“绿色”烙印。《民法典》第一编总则的第一章基本规定之第 9 条再次宣示了“绿色原则”，即“民事主体从事民事活动，应当有利于节约资源、保护生态环境。”此外，《民法典》的物权编、侵权责任编、人格权编等分则中用多个“绿色条款”[204]确立了“绿色制度”、衔接“绿色诉讼”，并与总则第 9 条的“绿色原则”一起，共同形成了系统完备的《民法典》“绿色规则”体系[205]，充分彰显了促进生态文明建设的价值取向。

二、环境权的基本属性

笔者从事环境领域相关研究已有二十余年，期间，在《中国法学》《东方法学》《当代法学》《法学论坛》《政治与法律》等法学核心刊物发表相关论文数十篇。关于环境权的基本属性，笔者有如下理解。

1.环境权是一项基本人权。时至今日，环境权的概念日益被国内接受并已深入人心，环境权被普遍认为是一项基本人权。我国政府也日益肯定环境权的概念，并将其作为一项具体权利肯定下来。例如，《国家人权行动计划 2009－2010 年》中提出环境权利和环境权益的概念，《国家人权行动计划 2012－2015 年》中再次提出环境权利。另外，环境权在 2014 年全面修改后的《环境保护法》等法律法规中得以体现，例如我国现行《环境保护法》第 53 条规定：“公民、法人和其他组织依法享有获取环境信息、参与和监督环境保护的权利。”

2.环境权是一项具有宪法权利位阶的基本权利。原因在于，其一，环境权的基本权利属性决定了宪法意义上的环境权存在的必要性。环境权具有基本权利属性，即便基本权利与宪法权利的概念不能完全等同，但是基本权利基于其与宪法在内在价值上的亲缘性，因而宪法实证化已成为基本权利的发展趋势之一。其二，环境权的人本主义与生态主义相融合的理念与宪法上尊重人的尊严之核心价值具有内在契合性。就环境权的理念而言，人本主义与生态主义二者有机融合的关键在于对人的主体性价值的尊重与肯定，二者有机融合目的则在于实现可持续发展，进而可持续发展的核心是在尊重人的生存尊严价值之前提下实现人类的可持

204 吕忠梅：《以“绿色民法典”回应时代需求》，载《理论导报》2020 年第 5 期，第 58 页。
205 吕忠梅：《实施〈民法典〉绿色条款的几点思考》，载《法律适用》2020 年第 23 期，第 11 页。

续发展。考察现代宪法，其最核心的价值就是保障人的尊严，因此说，环境权的上述重要理念与宪法的核心价值相契合。其三，宪法意义上的环境权要求国家履行生态环境保护义务。环境法、民法、诉讼法、行政法等部门法意义上的环境权，并不能要求整体意义上的国家来履行保护和改善生态环境的义务，而宪法上的环境权基于公民与国家之间的宪法关系而对国家产生直接的权利主张。国家从宪法意义上对环境权有保护义务，这无疑大大拓展了环境权的内涵。其四，宪法意义上的环境权能够对生态环境提供根本和终极的保护。任何权利的最终价值均在于实现，环境权亦概莫能外。当环境权受到非法或不当侵害时，作为国家根本法和人民权利保障书的宪法能为环境权提供救济，从而实现提供根本和终极保护。

3.对中国特色环境权的理解。一是当前环境权理论是对中华优秀传统文化的接续传承。例如，中华优秀传统文化中的“天人合一”理念，强调人与自然的和谐共生，这一思想与当前环境保护有着紧密的关联。在传统文化中，“天人合一”不仅仅是一种哲学思考，更是一种生活实践，它要求人们在生产生活中尊重自然、顺应自然规律，实现人与自然的和谐相处。在现代社会，这一理念启示我们在环境保护中要遵循自然规律，追求可持续发展。二是，应当在生存权与发展权的意义上理解环境权。在生存权与发展权的背景下，环境权意味着人们有权享有一个不受污染和破坏的环境，这直接关系到他们的基本生存条件和生活质量。同时，环境权也保障了人们追求更好生活和发展的机会，因为良好的环境是社会和经济发展的基础。因此，环境权是实现生存权与发展权不可或缺的组成部分。三是，环境权具备可塑性。环境权的可塑性体现在其随着社会进步、科技发展和环境变化而不断演进的特性。它不仅包括传统的清洁空气、水和土壤等基本环境需求，还扩展到应对气候变化、生物多样性保护等新兴领域。环境权的内涵和外延随着人类对环境问题认识的深化而不断丰富，同时也体现了对人类福祉和可持续发展的庄严承诺。

三、环境权立法的中国方案

如何更好保障环境权？必须通过立法。环境权立法在中国有三种方案。第一，是环境权入宪，也即环境权的宪法化。第二，是宪法条款加环境法典编纂。第三，是以“宪法+”建设环境权法制体系。

1.环境权入宪，是环境权彰显基本权利属性的实证反映，也是环境权保护及

实现的必要途径，符合基本权利中的社会经济权利实证化的基本模式，同时又具有该权利自身的特色，反映了具备基本权利属性的环境权宪法实证规定的趋势。环境问题不分国界，环境权宪法化有助于推动国际社会在环境保护方面的合作。各国在宪法中对环境权的承认，可以促进国际环境条约的签订和执行，共同应对全球性的环境挑战。

2.宪法条款加生态环境法典编纂。也即宪法未明确规定环境权，但在正文如第26条提到国家有责任保护和改善生活环境和生态环境，防止污染和其他公害，从而为环境权提供了宪法层面的保护基础。此外，宪法中的人权条款与人格尊严条款也被认为能够涵盖环境权的实质性内容。生态环境法典编纂根据宪法精神，明确界定和保障公民环境权，确保环境权利与义务的平衡，促进人与自然和谐共生。

3.“宪法+”若干其他环境法律。此条方案中，宪法和生态环境法典都未明确规定环境权，但其他单行法可根据宪法的环境保护的基本精神进行具体规定。例如《环境保护法》《水污染防治法》《土地管理法》《大气污染防治法》《野生动物保护法》《森林法》《渔业法》《草原法》《矿产资源法》《煤炭法》《节约能源法》《水法》等。

陌生人的地位

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“陌生人（外人）是群体本身的一个元素，与穷人和各种各样的‘内部敌人’没有什么不同——一个内部成员所处地位需要同时考虑局外人和内部对等人。”（Simmel 1968:63 页及以下页码）

在对“陌生人（外人）”的社会地位（包括穷人和敌人在内）的定义中，格奥尔格·齐美尔定义了社会共存中的对抗点。陌生人（外人）的概念中存在潜在的威胁模式，外人不属于这个社会，但同时又是社会自身描述和构成的一个组成部分。诚然，外人很难融入这个社会环境，因为他们未掌握不言而喻的身势语、规则及其解读。然而，当地人认为外人的模式是一种威胁形式，并将其作为分界线，这是当地人自我形象的一个要素。他们需要外人，或者最起码需要外人的概念，以便对其自身进行定义。（这也是仇外心理不需要外人的原因之一，因为它唤起的是想象而非现实）。如果当地人与其环境的关系是由土地和定居性决定的，那么通过所有权建立的联系就是对原始归属的潜在定义。相比之下，缺乏联系和有距离感的人就是外人。这种特征也将其归为穷人和敌人之类。有了划分，才有融合。就此而言，外人构成了社会的自我描述及其固有的划分策略。如果不采取适当的融合措施，这些方面将确定外人的社会定位。据此，移民问题并非由外人造成或定义，而是源自东道国社会本身。因此，移民问题不应归因于外人，而应归因于促进外人融入社会的强烈意愿。这表明，社会内部结构的状态是决定因素，即特定社会环境中准备向外人开放和接纳外人的程度有多高。

Places Of The Stranger

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"The stranger is an element of the group itself, not unlike the poor and the manifold "internal enemies" - an element whose immanent and member position simultaneously includes an outside and a counterpart." (Simmel 1968: 63f.)

In this definition of the social place of the "stranger" in a sequence with the poor and the enemy within, Georg Simmel defines points of confrontation within social coexistence in a society. The latent model of threat connotatively accompanies the concept of the stranger, who does not belong to this society, but at the same time forms an integral part of society's own description and constitution. The foreigner is admittedly conceded a difficult relationship to his environment because he does not master the self-evident signs, rules and their deciphering. However, since the native chooses the model of the foreigner as a form of threat and demarcation as a dividing line, it is an element of the native's self-image. They need the foreigner, or at least the concept of the foreigner, in order to be able to define themselves. (This is also one reason why xenophobia does not require the foreigner, as it evokes imagination rather than reality). If the relationship of the native to his environment is determined by the land and the associated sedentariness, then the bond through ownership is a potential definition of original belonging. In contrast, a lack of ties and distance defines the foreigner and places him in the proximity of the poor and the enemy within. Integration is created through demarcation. In this respect, the stranger is constitutive for the self-description of society and its inherent strategies of demarcation. These then determine the social location of the foreigner if appropriate steps towards integration are not taken. In this respect, the immigrant's problem is not one that is caused or defined by him, but is produced by the host society. Therefore, it is not to be attributed to him, but to the willingness to promote his integration. This shows the state of the internal constitution of our society as a problem: the extent to which it is prepared to open up to foreigners and recognize them.

基于人权的气候变化诉讼的法律基础与实现路径

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摘要：基于人权的气候变化诉讼在国际法上拥有坚实的法律基础，主要包括国际人权法及其相关公约、国家自主贡献与减排义务、国际法院及区域性人权公约的司法实践，以及国家层面的宪法诉讼。这些法律框架为气候变化诉讼提供了国内和国际层面的救济途径。在国际实践中，欧洲人权法院、美洲人权法院和国际法院已作出重要裁决，为非政府组织提起诉讼提供了法律支持，同时区域合作与协调也发挥了积极作用。此类诉讼的法律内容主要围绕生命权、健康权、适宜生活水准的权利和发展权等核心人权展开，要求政府或企业采取有效措施减少温室气体排放，改善环境质量。然而，实现基于人权的气候变化诉讼面临诸多挑战，包括气候变化的复杂性和跨国性、科学证据收集的难度等。因此，构建完善的法律框架、加强科学证据的支持与运用、明确诉讼主体并加强协作、制定有效的诉讼策略以及加强国际社会的合作与协调，是实现基于人权的气候变化诉讼的关键。

关键词：人权；气候诉讼；法律基础；国际合作

Legal Basis and Implementation Path for Human Rights-Based Climate Change Litigation

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Abstract: Human rights-based climate change litigation has a solid legal foundation in international law, primarily encompassing international human rights law and its related conventions, national contributions and emission reduction obligations, judicial practices of international courts and regional human rights conventions, as well as constitutional litigation at the national level. These legal frameworks provide domestic and international remedies for climate change litigation.

In international practice, the European Court of Human Rights[206], the Inter-American Court of Human Rights[207], and the International Court of Justice[208] have made significant rulings that offer legal support for non-governmental organizations to initiate lawsuits, while regional cooperation and coordination have also played a positive role. The legal content of such litigation mainly revolves around core human rights, including the right to life, the right to health, the right to an adequate standard of living, and the right to development, demanding that governments or enterprises take effective measures to reduce greenhouse gas emissions and improve environmental quality. However, the realization of human rights-based climate change litigation faces numerous challenges, including the complexity and transnational nature of climate change and the difficulties in collecting scientific evidence. Therefore, the key to achieving human rights-based climate change litigation lies in building a comprehensive legal framework, strengthening the support and application of scientific evidence, clarifying the subjects of litigation and enhancing collaboration, formulating effective litigation strategies, and bolstering cooperation and coordination within the international community.

Keywords: Human Rights; Climate Litigation; Legal Basis; International Cooperation

[206] https://www.echr.coe.int/
[207] http://hrlibrary.umn.edu/iachr/series_A.html
[208] https://icj-cij.org/index.php/home

基于人权的气候变化诉讼的法律基础与实现路径

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一、基于人权的气候变化诉讼的国际法依据

首先，国际人权法及其相关公约为此类诉讼提供了坚实的法律基础。国家有义务保护和尊重人权，包括生存权和发展权等基本权利。当气候变化威胁或损害人权时，受害者有权寻求法律救济。《世界人权宣言》第 8 条明确了当基本权利受到侵害时，个人有权获得有效的法律补救，这为气候变化诉讼提供了国内法层面的救济途径。[209]同时，《经济社会文化权利国际公约》和《公民权利和政治权利国际公约》分别规定了经济社会权利和政治权利，如生命权、健康权、受教育权等，这些权利都可能受到气候变化的影响，因此受害者可以依据这些公约寻求法律救济。

其次，国家自主贡献与减排义务也是基于人权的气候变化诉讼的重要依据。《巴黎协定》建立了国家自主贡献减排机制，虽然该协定本身不具有强制性的法律效力，但它为各国应对气候变化提供了法律框架和行动指南。[210]当国家未能履行其减排义务时，可能会面临基于人权的气候变化诉讼。《格拉斯哥气候协定》进一步强调了各国在应对气候变化方面的责任和义务，为气候治理提供了新的里程碑。

此外，国际法院在解决国家之间的法律争端方面发挥着重要作用。虽然国际法院的咨询意见对于当事国来说不具有强制性法律效力，但它承载着国际司法权威，可以为各国解决全球应对气候变化问题提供决策依据。国际法院可以回应气候脆弱国家关于落实各国减排义务的现实诉求，并可能基于各国减排义务、责任诉求与气候公约遵约路径开展论证。[211]同样，海洋法法庭就海洋法和气候变化这一狭窄领域提出的咨询意见可能是一个急需的贡献。[212]区域性人权公约与司法实

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[211] Vanda Lamm. The Obligations of the States in Respect of Climate Change Before the International Court of Justice. Journal of Environmental Law, Volume 36, Issue 1, March 2024, Pages 117-124.

[212] Monica Feria-Tinta. On the request for an advisory opinion on climate change under UNCLOS before the International Tribunal for the Law of the Sea. Journal of International Dispute Settlement, Volume 14, Issue 3, September 2023, Pages 391-406.

践也为基于人权的气候变化诉讼提供了法律支持。例如，《欧洲人权公约》规定了生命权和尊重私人家庭生活权利等，为欧洲地区的气候变化诉讼提供了法律基础。其他区域性公约如《非洲人权和人民权利宪章》等也为特定地区的气候变化诉讼提供了法律支持。

最后，国家层面的宪法诉讼也是基于人权的气候变化诉讼的重要依据。一些国家的宪法直接规定了国家的气候应对义务和公民的气候保护参与权，为公民提起气候变化诉讼提供了国内法层面的支持。例如，《多米尼加宪法》要求国家和地方政府有效和可持续地利用自然资源以适应气候变化，《突尼斯宪法》则规定国家应保障健康和平衡的环境权利以及参与气候保护的权利，并提供消除环境污染的必要手段。

二、基于人权的气候变化诉讼的国际实践

首先，欧洲人权法院（ECHR）于 2024 年 4 月 9 日作出的裁决具有里程碑意义。该案由瑞士年长妇女气候保护协会（Klima Seniorinnen Schweiz）的 2000 多名老年女性提起，她们指控瑞士政府在应对气候变化方面不作为，导致她们面临热浪等极端天气带来的生命威胁。[213]法院裁定瑞士政府在建立国内监管框架方面存在严重漏洞，特别是未能通过碳预算等方式量化国家温室气体排放限制，从而侵犯了公民的人权。这一裁决不仅为受害者提供了法律救济，更可能在欧洲乃至全球范围内引发连锁反应，为处理因气候变化侵犯人权而引发的诉讼浪潮树立了重要先例。

其次，美洲人权法院在处理与气候变化相关的案件时也强调了国家保护人权的义务。一些原住民社区因气候变化导致的自然灾害遭受严重损失，他们向法院提起诉讼，要求相关国家政府承担责任。尽管具体裁决结果因案件而异，但美洲人权法院在裁决中反复强调国家有义务保护原住民和其他弱势群体的基本人权，包括生命权、健康权和生存权等。拉丁没走的案例则挑战了西方以人类为中心的法律范式，从生态中心的角度应对气候危机，以保护人类和自然权利。通过基于生态法反叙事和自然权利视角的新论点，这些案例正在让位于一种新的气候诉讼类型的出现，其中承认所有生命形式的内在价值和利益以及自然的法律地位。[214]

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[213] Corina Heri. Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability. European Journal of International Law, Volume 33, Issue 3, August 2022, Pages 925-951.

[214] Fernanda de Salles Cavedon-Capdeville and others. An Ecocentric Perspective on Climate Litigation: Lessons from Latin America. Journal of Human Rights Practice, Volume 16, Issue 1, February 2024, Pages 89-106.

这些裁决为基于人权的气候变化诉讼提供了坚实的法律基础。

此外，如果说在过去，气候变化的危害被认为过于遥远和不确定，无法在法庭上处理，那么今天的事实是，国际法院和法庭正在越来越多地裁决与气候变化索赔有关的案件。2022 年 9 月 22 日裁决的 “托雷斯海峡岛民案 ”是低洼岛屿上易受气候影响的居民对主权国家提起的第一起法律诉讼，为国际法和气候正义开创了若干突破性先例。国际法院作为联合国主要司法机构，虽然其咨询意见对当事国不具有强制性法律效力，但承载着国际司法权威，为各国解决气候变化问题提供了重要决策依据。国际法院可以回应小岛屿国家等气候脆弱国家的诉求，基于各国减排义务、责任诉求与气候公约遵约路径开展论证，为基于人权的气候变化诉讼提供国际法律支持。

在国际实践中，非政府组织也发挥着不可或缺的作用。它们通常代表受害者提起诉讼，要求相关国家政府或企业承担责任。这些非政府组织具备专业的法律知识和实践经验，能够为受害者提供有效的法律援助和支持，推动基于人权的气候变化诉讼的发展。

同时，区域合作与协调也在推动基于人权的气候变化诉讼方面发挥了积极作用。例如，欧洲人权法院与其他欧洲司法机构之间的合作与协调，为欧洲地区的气候变化诉讼提供了有力的法律支持。这种区域性的合作与协调有助于形成统一的法律标准和判决依据，提高诉讼效率和公正性。

三、基于人权的气候变化诉讼的法律内容

生命权，作为人类最基本且不可剥夺的权利，在气候变化背景下面临严峻挑战。极端天气事件如热浪、洪水、飓风等，直接威胁人类生命安全，并导致生态系统失衡，加剧疾病传播、食物短缺等问题。基于生命权的气候变化诉讼，通常聚焦于政府或企业在减缓与适应气候变化方面的失职行为，要求采取有效措施减少温室气体排放，建立灾害预警和应对机制。

健康权，作为人类生存和发展的基础权利，同样受到气候变化的严重影响。环境破坏、污染加剧以及疾病传播模式的改变，严重威胁人类健康。基于健康权的气候变化诉讼，关注政府或企业在环境保护和公共卫生方面的失职行为，要求减少温室气体和污染物排放，改善空气质量、水源质量和公共卫生状况。

适宜生活水准的权利，包括充足的住房、清洁的饮用水、安全的食品等，是

保障人类基本生活的重要方面。气候变化导致的住房破坏、水资源短缺等问题，直接影响人们的生活水平和居住环境。基于适宜生活水准权利的气候变化诉讼，通常关注政府或企业在基础设施建设、资源分配和环境保护方面的失职行为，要求改善基础设施、保障资源供应和保护环境。

发展权，作为每个人和集体参与、促进并享受经济、社会、文化和政治发展的权利，同样受到气候变化的威胁。资源短缺、生态环境恶化和社会不稳定等问题，直接影响人们的发展机会和成果。基于发展权的气候变化诉讼，关注政府或企业在可持续发展和环境保护方面的失职行为，要求推动可持续发展、保护生态环境和减少贫困。

在法律层面上，这些权利的保护依赖于国家宪法和国际人权法。国家宪法通常将生命权、健康权、适宜生活水准的权利和发展权列为公民的基本权利，要求国家采取必要措施予以保护。国际人权法也明确规定这些权利的保护要求，并要求各国政府采取必要措施。在气候变化诉讼中，原告方通常会引用这些法律条款，要求法院确认被告的失职行为，并判决被告采取措施予以保护。然而，基于人权的气候变化诉讼面临诸多挑战，包括因果关系、管辖权、科学证据收集的难度、损害评估的复杂性以及与其他权利之间的冲突等。[215]

四、基于人权的气候变化诉讼的实现

首先，法律框架的构建与完善。实现基于人权的气候变化诉讼，首要任务是构建一个健全的法律框架。法律需要全面转型，这种转型需要政策、立法、法律推理和裁决决策之间的整合。[216]在国内层面，各国需制定或完善相关法律法规，明确气候变化对人权的影响及各方责任。例如，设立专门的气候变化应对机构，制定减排目标和时间表，并建立监督和问责机制。在国际层面，国际社会需加强气候谈判，推动达成具有法律约束力的气候协议，同时加强国际司法合作，将气候变化对人权的影响纳入国际人权法保护范围。

其次，科学证据的支持与运用。科学证据是证明气候变化对人权造成损害的关键。原告方需收集气象观测、环境监测、健康统计等多方面的科学数据，经过严格评估验证后，转化为法律语言在法庭上呈现。科学及其应用在环境保护中发

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[215] Alexander Zahar. The Limits of Human Rights Law: A Reply to Corina Heri. European Journal of International Law, Volume 33, Issue 3, August 2022, Pages 953-960.

[216] Joanna Bell and Elizabeth Fisher 'The Heathrow Case in the Supreme Court: Climate Change Legislation and Administrative Adjudication' (2023) 86 MLR 226.

挥着关键作用。科学及其应用在环境制度中发挥着重要作用，既是识别环境问题、其原因和解决方案的手段，也是环境破坏的根源（监管对象）。[217]在运用科学证据时，需注重证据的时效性、相关性、多样性和互补性，并加强与国际科学界的合作与交流。

再次，诉讼主体的确定与协作。明确诉讼主体是诉讼成功的关键。原告方通常是受气候变化影响的个人、社区或组织，需具备法律意识和诉讼能力，并与律师、科学家等合作制定诉讼策略。被告方通常是政府、企业或国际组织，需积极应诉并提出抗辩理由。法庭则需确保诉讼程序的公正、公平和高效。在诉讼过程中，各方需加强协作与沟通，寻求和解或调解。

复次，诉讼策略的制定与实施。制定有效的诉讼策略至关重要。原告方需明确诉讼目标，选择合适的法律途径和诉讼程序，并注重证据的收集和呈现方式。同时，需控制诉讼成本，合理安排资源和时间，并寻求法律援助和资金支持。在实施诉讼策略时，需灵活应对各种挑战和变化。

最后，国际社会的合作与协调。气候变化是全球性问题，需各国共同努力应对。在推动基于人权的气候变化诉讼过程中，国际社会需加强合作与协调，共同制定应对气候变化的国际法律框架和行动计划。同时，加强司法合作和交流，促进各国法律实践和经验的分享与交流。此外，还需加强对发展中国家的支持和帮助，提高其应对气候变化的能力和水平。

[217] Anna-Maria Hubert. The Human Right to Science and Its Relationship to International Environmental Law. European Journal of International Law, Volume 31, Issue 2, September 2020, Pages 625-656.