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CROSS-CULTURAL HUMAN RIGHTS REVIEW

FREEDOM FROM FEAR: HAS IT FADED SINCE THE UDHR? ON THE APPROACHES OF EUROPE AND CHINA

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ABSTRACT

The famous "Four Freedoms" were included in the preamble of the Universal Declaration of Human Rights (UDHR) around 70 years ago. Whilst freedom of speech and belief, and freedom from want have been further implemented afterwards, this seems not the case with freedom from fear. In the human rights discourse, freedom from fear has faded since its inclusion in the UDHR. European countries take the approach in reflecting it as primarily public interests in security, which often conflicts with human rights. China adopts, although not completely, a different approach, where it is reflected as both public interests in security and as a human right. However, the approaches within Europe and of China, both encounter challenges. This article argues that despite their different cultures and histories, Europe and China can mutually benefit from each other's approaches.

KEYWORDS

Freedom from fear; security; public interests; human rights; Europe; China

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1. INTRODUCTION

Freedom from fear, along with the three other essential freedoms, was addressed by the then US President Franklin Roosevelt,[1] and later enshrined in the preamble of the Universal Declaration of Human Rights (hereinafter UDHR) in 1948.[2] When first addressed in 1941, the term "freedom from fear" demonstrated a clear connection with the Second World War. At the time France had already fallen into the hand of Nazi Germany, and the UK was mostly struggling alone on the continent. On the other hand, the US was physically outside the battlefield, being dominated by the "American First Movement" and isolationism.[3]

Peace, during that time, became a primary concern among the people. It was in this context Roosevelt made his annual address to Congress, articulating the Four Freedoms – freedom of speech, freedom of worship, freedom from want, and freedom from fear.[4] These freedoms attempted to provide some shared values or a blueprint of the future world that would be accepted by people from all nations.[5]

After the War, the Four Freedoms did not descend into an empty promise. As the fundamental "freedoms", their inherent linguistic connections with "human rights" allowed them, as a whole or separately, to be reiterated as well as reflected by various human rights instruments. However, among the Four Freedoms, freedom from fear has not been translated into human rights treaties as perfectly or directly as others did.[6] Rather it surfaces as an underlying concept of some human rights or is transformed into public interests for purposes of (national) security.

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[1] Franklin D. Roosevelt, 'The Four Freedoms' (*Voices of Democracy*, 6 January 1941) <www.voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/> accessed 6 April 2019.

[2] United Nations, Universal Declaration of Human Rights 1948, A/RES/217(III).

[3] See Office of the Historian, Bureau of Public Affairs, United States Department of State, 'American Isolationism in the 1930s' <https://history.state.gov/milestones/1937-1945/american-isolationism > accessed 1 August 2019. See also Robert Longley, 'America First — 1940s Style' (25 May 2019) <https://www.thoughtco.com/america-first-1940s-style-4126686> accessed 1 August 2019.

[4] Franklin D. Roosevelt (n 1).

[5] William J. Vanden Heuvel, 'The Four Freedoms' in Stuart Murray and James McCabe, *Norman Rockwell's Four Freedoms: Images That Inspire a Nation* (Berkshire House 1993) 108.

[6] James Spigelman AC, 'The Forgotten Freedom: Freedom from Fear' (2010) 59(3) The International and Comparative Law Quarterly 543, 545.

This article employs a comparative methodology, relying on a historical and legal analysis in the context of human rights. Such analysis is conducted on the basis of relevant international human rights instruments and domestic legislations, as well as caselaw. This article intends to answer the question on how freedom from fear is reflected in human rights discourses, and to what extent it has faded within human rights. In this manner, the Section 2 addresses the origin of freedom from fear within the context of disarmament. It then moves on to argue that freedom from fear effectively means freedom from violence and aggression generally. Given the lack of human rights instruments and provisions directly addressing this, it is argued that freedom from fear has somewhat faded within the human rights discourse. Section 3 and 4 both provide an analysis on the approach of Europe and China, with regards to freedom from fear, respectively. It is within their specific context that translation of freedom from fear into public interests in security becomes clearer, and the challenges which follow. This raises question as how to reconcile freedom from fear with human rights. Even though China's broader definition of the right to life, which includes physical security offers an opportunity of rethinking freedom from fear within human rights, the prevalence of its national security policies raises further difficulties. In conclusion, this article argues that, freedom from fear, although faded, still strives in approaches of China and Europe. Nevertheless, both demonstrate that protecting freedom from fear either as a human right or public interests in security, requires ensuring that the primary object of protection – people – are not undermined during this process.

2. FREEDOM FROM FEAR: FROM DISARMAMENT TO HUMAN RIGHTS, HAS IT FADED?

Fear refers to subjective and psychological features. It is not fear itself which the freedom aims to dispel, but those incidents causing this state of emotion. Within Roosevelt's 1941 speech, the need for freedom from fear was mentioned in the context of incidents caused by war.[7] In this sense, freedom from fear defined a

[7] Roosevelt addressed the freedom from fear in his speech as,

demand from the people for world peace and protection from aggression and violence, seen in the context of war.

Freedom from fear should, first and foremost, be understood within the scope of Roosevelt's attention on "a world-wide reduction of armaments".[8] That is, freedom from fear is linked to facilitating disarmament. An extreme interpretation of this notion would mean that, if all nations reduced their armament to the extent that no one was ever able to take aggression against another, then peace would ultimately prevail. However, it is too idealistic to expect a State to completely give up its own arms. Consider, the arms race which occurred during the Cold War, which posed an overwhelming risk to world peace, in the breakdown of international relations.

Nevertheless, substantial progress has been seen in the area of disarmament over the years. The United Nations (hereinafter UN), has played a key role in this process, given that "peace and security" is one of its three founding pillars. Such achievements in disarmament is seen especially concerning nuclear weapons.[9] For instance, the Treaty on the Non-Proliferation of Nuclear Weapons entered into force in 1970, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction in 1975.[10] Weapons of mass destruction, including nuclear, biological and chemical weapons as well as missiles, continue to be of primary concerns for disarmament.[11]

With the institutionalisation of the UN charter, the influence of freedom from fear, emerges in the prohibition States' resorting to warfare in international relations.[12] Adopting a pragmatic approach, the drafters of the UN Charter, moved

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The fourth is freedom from fear–which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour – anywhere in the world.

[8] Ibid.

[9] United Nations, *The United Nations and Disarmament Yearbook 1945-1970* (United Nations 1970) VI.

[10] See Disarmament Treaties Database <http://disarmament.un.org/treaties/> accessed 6 April 2019.

[11] United Nations Office for Disarmament Affairs <https://www.un.org/disarmament/about/> accessed 6 April 2019.

[12] Article 2 (4) of the Charter of the United Nations reads as follows,

away from disarmament in the language of its provision, and rather focused on deterring the use of force.[13] This is crucial as deciding otherwise may have undermined securing this freedom effectively. The UN Charter stipulates only two exceptional circumstances within which the use of force can be resorted to.[14] According to Article 42, an exception is given in the case of the Security Council, under whose authorisation military enforcement action can be taken to maintain or restore international peace and security.[15] The other exception is in Article 51, which allows use of force for States' self-defence when facing an armed attack from others.[16] However, in practice, these legal mechanisms are not immune from challenges. Several wars have started without the Security Council's authorisation and outside the scope of Article 51. In such cases States have provided only a rather indirect link with their "self-defence" characteristics. For instance, the Iraq War, initiated in 2003 by the United States-led coalition, was not authorised by the Security Council, and its contentious argument based on self-defence have faced much scrutiny.[17]

Whilst, in Roosevelt's original formulation in 1941, freedom from fear was mostly "a notion of arms control",[18] however, linguistically speaking, a "freedom" has inherent connections with human rights. Shortly after the establishment of the UN, the UDHR was drafted and then published. The Four Freedoms are enshrined in its preamble, as well as repeated in the International Covenant on Civil and

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All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

[13] Mark R. Shulman, 'The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity' (2008) 77 Fordham Law Review 555, 571.

[14] Nico Schrijver, 'The Ban on the Use of Force in the UN Charter' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford 2015) 473.

[15] United Nation Security Council <https://www.un.org/securitycouncil/> accessed 6 April 2019. See also Article 42 of the Charter of the United Nations.

[16] This exception is stipulated by Article 51 of the Charter of the United Nations.

[17] Gerry Simpson, 'The War in Iraq and International Law' (2005) 6 Melbourne Journal of International Law 167. See also David Krieger, 'The War in Iraq as Illegal and Illegitimate' (2006) The Iraq Crisis and World Order: Structural, Institutional and Normative Challenges.

[18] Mark R. Shulman (n 13), 560.

Political Rights[19] (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights[20] (hereinafter IESCR). Among the Four Freedoms, the first two – freedom of speech and freedom of belief – are reflected directly by provisions respectively, not only in the UDHR, but the ICCPR and the Convention for the Protection of Human Rights and Fundamental Freedoms[21] (hereinafter ECHR). For instance, freedom of expression is provided by Article 19 of the ICCPR and Article 10 of the ECHR, and freedom of belief by Article 18 and Article 9, respectively. As to the freedom from want, it has been distributed through several articles of the UDHR, and also specifically, to a Covenant – IESCR. Freedom from fear, on the other hand, surprisingly suffered a dissimilar lack of direct translation into human rights provisions and instruments. The meaning of freedom from fear, being derived from context of war, has strong links with ensuring the protection of people against aggression and violence. Consequently, the absence of a specific right that guarantees protection from any form of violence generally, such as a possible right to physical security, is striking. Instead, freedom from fear, surfaces only as an underlying concept related to different human rights provisions. Its most present manifestation is in the context of public interests affecting national security.

The text of UDHR contains provisions bearing relation to freedom from fear. Article 28 provides for a right to "a social and international order",[22] which conveys the "world peace" aspect of freedom from fear mentioned in above. However, such a right has not been enumerated in other human rights treaties. Article 3 states, "everyone has the right to life, liberty and security of person". The right to life is protected by ICCPR and ECHR.[23] The right focuses on the arbitrary deprivation of life by the authorities rather than third parties such as terrorist groups.[24] One of its

[19] United Nations, International Covenant on Civil and Political Rights 1966, A/RES/2200A(XXI).

[20] United Nations, International Covenant on Economic, Social and Cultural Rights 1966, A/RES/2200A(XXI).

[21] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

[22] Article 28 of the UDHR reads as, "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized".

[23] Article 6 of the ICCPR and Article 2 of the ECHR.

[24] Human Rights Committee, 'General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' 2018, CCPR/C/GC/36. In certain occasions,

main concerns is the restriction and abolishment of the death penalty. The right to liberty and security can be found in Article 9 of the ICCPR and Article 5 of the ECHR.[25] The right should be read as a whole,[26] "security of person" thus means protections against arbitrary interference with liberty.[27] This fails to address freedom from fear as protection against aggression and violence.

Article 5 of the UDHR, however, reads that, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The prohibition of torture is widely accepted as a basic, non-derogable right, and is provided in Article 7 of the ICCPR and Article 3 of the ECHR, as well as a specific treaty, that is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[28] Its main concerns are on the authorities' treatment towards, especially, suspects, detainees, criminals and other individuals who are physically under control of the authorities.[29] Whilst this does directly, engage with violence, its scope is limited to torture, which begs the question of how are other forms of violence and aggression addressed?

Bearing this in mind, I propose that freedom from fear faded within the discourse on human rights. By this, I mean that international human rights treaties do not provide for comprehensive right to physical security, which otherwise would better reflect the freedom from fear. The rights which do attempt to address freedom from fear lack primarily in two ways. First, it tackles mainly the interference and violation from authorities but not from private parties. Second, it focuses only on some forms of violence such as those causing death or torture. It is in this sense that freedom from fear has faded after the UDHR.

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the authorities are under positive obligations to protect the individual from the criminal acts. See Council of Europe,' Guide on Article 2 of the European Convention on Human Rights' 2019, para. 17.

[25] The right to security is always provided together with right to liberty in both ICCPR and ECHR.

[26] *East African Asians v the United Kingdom* (1978) 13 DR 5, paras. 219-220.

[27] *A., B., C., D., E., F., G., H. and I. v. Federal Republic of Germany* (1976) 7 DR 8, p. 26. See also *Bozano v. France*, 18 December 1986, Series A no. 111, pp. 18-19.

[28] United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, A/RES/39/46.

[29] Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel 2005) 157-58.

3. EUROPE'S APPROACH TO FREEDOM FROM FEAR: PUBLIC INTERESTS IN SECURITY

The ECHR is recognised as the first step on the collective enforcement of the UDHR. Its initial proposed draft was inspired by the Declaration, from its content to its form. The former French Minister Pierre-Henri Teitgen[30] made it clear that the draft, "as far as possible", had been based on the UDHR.[31] This is not the case for its preface. Since the very beginning of the drafting stages, the Four Freedoms were not mentioned, and in final the text of the UDHR it was omitted.[32]

However, the issue concerning freedom from aggression or violence inevitably arose. Freedom from fear was transformed into public interests in security, such as national security and public safety. These public interests share the same purpose with freedom from fear, which is protecting people against violence, disorder, and crimes. However, such public interests in security often conflicts with human rights. This begs the question as to how both can be reconciled.

3.1. SECURITY AGAINST HUMAN RIGHTS

The text of the ECHR demonstrates that European countries' approach to security focuses on public interests. The people's security is closely linked with theories on the State's origin, the ideas of which have been concluded by John Locke in his *social contract* theory. A political association, such as the government, is established on the basis of a primary aim – preserving people's liberty, property, and security. Security forms part of a government's duty to the community and it is a shared interest, rather than a right entitled to by each member of the community.[33] Furthermore, a public interest does not necessarily conflict with the individual's own interests, in

[30] Pierre-Henri Teitgen was the French representative in Consultative Assembly of the Council of Europe, who, with other representatives, initially put forward the very first draft Convention to the Assembly for reference, and later played a crucial role in the drafting process as the Rapporteur appointed by the Committee on Legal and Administrative Questions.

[31] *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (Martinus Nijhoff Publishers 1975) Volume 1, 266-68.

[32] James Spigelman AC (n 6), 544.

[33] John Locke, 'Of the ends of political society and government', in *Two Treatises of Government* (1689).

that being a member of the community, the person himself receives individual benefits. Due to public interests in the ECHR functioning as justifications for reducing rights protections, European countries are inclined to viewing security issues as external to human rights. In addition, such understanding is significantly amplified by the fact that protecting security is a power wielded by the authorities. Therefore, under the ECHR, the relation between security and human rights takes on the direct appearance as binary oppositions.

Through the mechanism provided by the ECHR, apart from making reservations when acceding it, restrictions and derogations on certain human rights are the only legal basis available to weigh the interests of security. Taking national security for instance, it is listed in Article 6, 8, 10, 11, Article 2 of Protocol 4, and Article 1 of Protocol 7 under the Convention; and Article 15 provides derogations in time of emergency. As a principle, invoking restrictions or derogations out of concerns for security should be an exceptional situation.

To avoid the public interests always prevailing over individual rights, the European Court of Human Rights (hereinafter ECtHR, or the Court) has developed a three-layered requirement. This requirement limits authorities' discretion in cases where they intend to restrict rights, on the basis of *legality, legitimacy,* and *necessity*.[34] With regards to *legitimacy*, only the excuses exhaustively listed within a provision can be invoked to rationalise limitations to the respective right. Such excuses are as follows, for purposes of "national security", "economic well-being of the country", "territorial integrity", "public safety", "public order", and "prevention of disorder or crime".[35] The *legality* requirement assesses the quality of the law in terms of *accessibility* and *foreseeability*. In practice, *accessibility* is usually satisfied by the publication of the law. It can be provided in the form of both *lex specialis* and (certain provisions) in *lex generalis*. On the other hand, *foreseeability* demands a more

[34] Stefan Sottiaux, *Terrorism and the Limitation of Rights – The ECHR and the US Constitution* (Hart Publishing 2008), 42.

[35] Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2018), 307-308.

substantive assessment.[36] In connection with national or public security offences, it requires acknowledging "what acts and omissions will make [one] criminally liable", what would be the adverse consequences of such action.[37] The requirement of *necessity* is usually assessed on two criteria. These are, first, weighing the various conflicting interest, and then the legitimacy of measures taken in relation to the aim sought.[38] The balancing exercise in the former concerns interests at stake, which usually involves a public interest, on one hand, and an individual's human right, on the other. As a bottom line, the Court has maintained that the very essence of the right shall not be damaged by protecting public interests. With regards to the latter, the focus is on the *proportionality* between the means and ends.[39] When reviewing the *necessity* requirement in caselaw, national security is often seen as a rather paramount public interest, leaving authorities a wide discretion. For instance, in *Leander v. Sweden* case, when assessing the *necessity* of secret surveillance, the Court noted the importance of the public interest at stake. It ultimately held that the authorities should have discretion over evaluating threats to national security and adopting different methods to combat such threats.[40]

Derogation, provided by Article 15, is another permissible option for a State limiting its protection of human rights in the face of security concerns. The requirements for invoking it follow a similar pattern to the restrictions on rights identified above, with the exception that derogations are applied only in more serious situations.[41] Such situations concern military security, territorial security,

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[36] Pernilla Nordvall, 'Flexible Foreseeability – A Human Rights Rule of Law Perspective on Interferences with the Right to Peaceful Protest through Vague Law' (2016) Graduate Thesis Master of Laws Program, 38-41.

[37] See, for instance, *Novikova and Others v. Russia*, nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, §125, ECHR 2016; *Protopapa v. Turkey*, no. 16084/90, §97, ECHR 2009.

[38] Fan Jizeng, 'Rethinking the Method and Function of Proportionality Test in the European Court of Human Rights' (2016) 16(1) Journal of Human Rights 46.

[39] Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 (5) The Modern Law Review 671, 679.

[40] *Leander v. Sweden*, 26 March 1987, § 59, Series A no. 116.

[41] Aly Mokhtar, 'Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights' (2007) 8 (1) The International Journal of Human Rights 65, 66-70.

sovereignty security, political security, and security of citizens, which are all essential elements of national security. As to the conditions under which Article 15 on *derogations* applies, the former European Commission of Human Rights has stated that,[42]

- It must be actual or imminent;
- Its effects must involve the whole nation;
- The continuance of the organised life of the community must be threatened; and
- The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

Through rights restriction and derogations, it becomes clear, that freedom from fear manifests in the human rights discourse in Europe, as a public interest in security concern. Strikingly, the focus on security challenges the extent of human rights protection, and increasingly so in the rise of terrorist attacks.

3.2. Terrorism & National Security: Challenges to Human Rights

Terrorism is more frequently treated as a threat to national security. For instance, due to the 2015's jihadist atrocities, France declared and then extended a state of emergency (*état d'urgence*).[43] Terrorism can be defined, regardless of its motivations, as "the disproportionate use of violence, applied with the specific intent to cause terror and intimidation amongst parts or the whole of a population".[44] This "disproportionate use of violence" with unpredictable characters, amplified by its

[42] *Denmark, Norway, Sweden and the Netherlands v. Greece,* nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12, p. 70, § 153.

[43] Council of Europe, 'Declaration from the Permanent Representative of France' (*Council of Europe*, 22 July 2016)
<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=N5hF4XrW> accessed 29 August 2019.

[44] Anna Oehmichen, *Terrorism and Anti-terror Legislation - the Terrorised Legislator? A Comparison of Counter-terrorism Legislation and its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France* (Intersentia 2009) 127.

expanding network, triggers the mechanism of fear in terms of psychology. Security, despite being public interests, becomes much more personal in this context,[45] making it seem as though a choice must be made between security and human rights.

Once a case is identified or reasonably presumed as terrorism-related, it usually implies increasing scrutiny of intelligence services, broad authorisation for police investigations, and aggravated sanctions.[46] In terms of counter-terrorism strategies, proactive measures against terrorist attacks have been attached critical importance, considering people's lives are at stake. Such measures including secret surveillance are caught between security and human rights.[47] In applying three-layer test in the restriction of rights noticeable differences has been noted in the approach of the Court. Whilst the three-layer *test* is normally used to ensure that public interests prevailing over human rights is exceptional, in such cases, concerning national security, the criterion of "exceptionalness" is significantly reduced.

The *legitimacy* layer, in most circumstances, is assessed so briefly that it reiterates either some detailed facts of the case, or merely cites arguments from the Governments.[48] Under this part of the assessment, the authorities seem to be handed a considerably wider discretion when national security is at stake.[49] This is because the Court is often ready to accept the State's judgement on its own national affairs, except in cases where the applicants make arguments on the legitimate aim, or where the government fails to provide more specific information, and simply rely on

[45] Ronald Dworkin, 'Terror & the Attack on Civil Liberties' (2003) 50 (17) New York Review of Books 37.

[46] Anna Oehmichen (n 44), 350-351.

[47] Paul Bernal, 'Data Gathering, Surveillance and Human Rights: Recasting the Debate' (2016) 1 (2) Journal of Cyber Policy 243.

[48] The exceptions do exist. For instance, in the case of *C.G. and others v. Bulgaria*, the Court held that the applicant's involvement in the unlawful trafficking of narcotic drugs in concert with some Bulgarian nationals did not pose a threat to national security. See *C.G. and others v. Bulgaria*, no. 1365/07, §43, ECHR 2008. Occasionally, the government did not even invoke any specific legitimate aim, and it was the Court who proposed them. But its analysis was also succinct. For example, *Ciubotaru v. Moldova*, no. 27138/04, ECHR 2010.

[49] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 205.

stating that the issue concerns counter-terrorism. With regards to the requirement of *legality*, the criteria of *accessibility* and *foreseeability* are often overlooked, given the difficulty in identifying a precise law. Instead, the requirement turns on whether the law provides adequate guarantees against abuse of power.[50] The requirement of providing safeguards against abuse plays an important role especially when a rather wide discretion is given to authorities. Such safeguards consist of substantive and procedural arrangements.

The substantive aspect is a "corollary" of the *foreseeability* test. This requires authorities to clarify the scope of their discretion so that they cannot apply it in an arbitrary way. In the Courts caselaw, the legislations concerned are required to indicate the scope of such discretion and the manner of its exercise.[51] This is of particular importance when powers are exercised in secret by the authorities. For example, the interception regimes are required to incorporate, among other minimum safeguards, a limit on the duration of such measures.[52] The procedural safeguards are commonly required during the decision-making phase, as well as, afterwards. In general, there should be procedural arrangements to prevent decisions from being made arbitrarily, and judicial remedies available to the persons concerned. In connection with national security, while the arrangements of procedural guarantees do not regularly invoke disputes in caselaw, it has been attached particular importance when the authorities exercise their powers in secret.[53] For instance, in the context of secret surveillance, both external supervision when making decisions, and judicial remedies that are available to the individuals, are always under detailed scrutiny by the Court, in order to assess whether the law provides sufficient safeguards against abuse of power.

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[50] Antonella Galetta, Paul De Hert, 'Complementing the Surveillance Law Principles of the ECtHR with its Environmental Law Principles: An Integrated Technology Approach to a Human Rights Framework for Surveillance' (2014) 10 (1) Utrecht Law Review 55, 67.

[51] See, for instance, *Roman Zakharov v. Russia*, no. 47143/06, § 230, ECHR 2015; *Malone v. the United Kingdom*, 2 August 1984, § 68, Series A no. 82; *Leander v. Sweden*, 26 March 1987, § 51, Series A no. 116; *Huvig v. France*, 24 April 1990, § 29, Series A no. 176-B; *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 94, ECHR 2006-XI.

[52] See, for instance, *Centrum För Rättvisa v. Sweden*, no. 35252/08, §103, ECHR 2018.

[53] Eliza Watt, 'The Right to Privacy and the Future of Mass Surveillance' (2017) 21 (7) The International Journal of Human Rights 773, 779.

On the assessment of *necessity*, it has been accepted, in general terms, that terrorism nowadays does pose a growing challenge to the security of a State. Most of the popular counter-terrorism measures, such as secret surveillance programmes, are not identified as interference that would automatically extinguish the very essence of the individual's privacy and confidentiality rights in their correspondence. This is supported by the very fact that the duration and scope of the interception have been provided for in legislations, as required by the *legality* layer. Considering, the *proportionality* of the means and ends, it is often not too difficult to demonstrate how the measures in question appropriate meet the aim of counterterrorism.[54] The focus then usually turns on whether there are less intrusive means to achieve such purpose. In Ürper and Others v. Turkey case, the requirement of adopting a less-intrusive measure played a deceive role in the Court's judgment. The Court held that it might be reasonable to confiscate those newspaper issues that contain terrorist propaganda, but it was found disproportionate when future publication of entire periodicals was also banned. [55] The latter was an unnecessary intrusive measure.

In conclusion, terrorism cases call in to question the effectiveness of the three-layer test to protecting individuals' rights from being arbitrarily or severely restricted. This makes it difficult to ensure that public interest in security prevailing over human rights is exceptional. Although, one justification could be that terrorism appropriately fits within the 'exceptional'; this still, however, does not overshadow the need to ensure proper safeguards are put in place. Indeed, we see that the three-layer test, as a mechanism testing reasonableness, has gradually been replaced by a system of safeguards against abuse of power.[56] Through this case study on terrorism, it can be seen that under the framework of human rights, freedom from fear in the form of public interest in national security, acts counterintuitively to the protection of rights.

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[54] Common sense can sometimes be resorted to. For instance, see Big Brother Watch and Others v. the United Kingdom, nos. 58170/13, 62322/14 and 24960/15, §314, ECHR 2018.

[55] Ürper and Others v. Turkey, nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, §§37-44, ECHR 2009.

[56] Paul De Hert, 'Balancing Security and Liberty and Liberty within the European Human Rights Framework – A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11' (2005) 1 (1) Utrecht Law Review 37, 72.

4. CHINA'S APPROACH TO FREEDOM FROM FEAR: GOING BEYOND PUBLIC INTERESTS IN SECURITY

4.1. FREEDOM FROM FEAR AS A HUMAN RIGHT – RIGHT TO LIFE

As discussed in *Section 2*, the fading of "freedom from fear" means that it has merely survived as an underlying concept in other human rights, or that it has been transformed through notions such as public interests in security. Whilst in Europe, freedom from fear is approached primarily as public interests in security, China addresses this freedom differently, focusing mainly on human rights. Although, there is an absence of an actual "right to physical security", a number of provisions in Chinese law more closely link with the protection within freedom from fear against aggression and violence, more generally.

To begin with, I propose the three following criteria as indicators which can helpfully determine whether a human right recognises freedom from fear. The first concerns its content. The essence of such a right is that the individual is free from various harm, ranging from military aggression to physical violence. The second requirement concerns the horizontal effect. That is, such aggression or violence may be committed by those outside State authorities, including organisations and individuals. Thirdly, such right must also call for State's positive obligations. Authorities' that abstain from interference cannot properly protect individuals from violence and aggression, consequently a more active engagement is necessitated in such cases. This is all the more so as modern doctrine no longer emphasises the division between the first and second generation of human rights.[57] The consensus has been reached that the former, civil and political rights, also imposes positive obligations on the State. Such change is well reflected and confirmed by treaties' interpretation and practice.[58] I must concede at this point that this article does not answer all questions concerning these criteria, but seeing its application within the

[57] Patrick Macklem, 'Human Rights in International Law: Three Generations or One?' (2015) 3 London Review of International Law 61.

[58] For example, the General Comment on Article 6 of the ICCPR, see Human Rights Committee (n 24). See also *Kaya v. Turkey*, no. 22729/93, ECHR 1998.

context of China will arguably make clearer how freedom from fear can effectively be used within the field of human rights to better protect people.

The third aspect of these criteria which imposes positive obligation, strike as the most contentious. However, before addressing China's approach, it may prove helpful to set out how positive obligations, especially with regards to protection against physical violence, are commonplace within European discourse on human rights. The right to life, under article 2 of the ECHR, is a relevant example here. The ECtHR has broadened the protection of this right, through the horizontal effect and concept of positive obligations.[59] To protect life from dangers emanating from persons and entities, the Court imposes a due diligence obligation on States. This requires first, that the State put in place effective laws criminalising the offence, mechanisms and machinery for its enforcement as well.[60] Secondly, States must put in place preventative measures, a reasonable burden exists on States where, threats to the victim's life are real and immediate; and such threats have been known, or ought to be known, to the authorities. [61] This criteria crucially places positive obligations on States to protect individuals against third parties,[62] although it most frequent application is seen in cases on domestic violence,[63] rather than that of terrorism or organised crime for example. Thirdly, the State needs to carry out an effective investigation into the alleged death,[64] this is also required under Article 13, which protects the right to an effective remedy.

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[59] Jean François and Akandji Kombe, 'Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights' (2007) <https://rm.coe.int/168007ff4d> accessed 8 August 2019.

[60] *Osman v. the United Kingdom*, 28 October 1998, §115, Reports of Judgement and Decisions 1998-VIII.

[61] Jean François and Akandji Kombe (n 59), 25-26.

[62] Most cases are from Turkey, concerning a widespread practice in its south-eastern region of murdering persons suspected of belonging to the Partiya Karkerên Kurdistan (PKK). For instance, *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, ECHR 2000, and *Mahmut Kaya v. Turkey*, no. 22535/93, ECHR 2000.

[63] Lee Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection', (2010) 8(2) Northwestern Journal of International Human Rights 190, 200-15.

[64] *Ergi v. Turkey*, 28 July 1998, §85, Reports of Judgement and Decisions 1998-IV.

The content of Article 6 of ICCPR, on the right to life, has been interpreted along similar lines as Article 2 of the ECHR. In its recent General Comment on the right to life issued last year, the Human Rights Committee[65] not only adheres to the due diligence doctrine from the ECtHR,[66] but also specifically points to its application to the "terrorist attacks",[67] "organised crime",[68] and even "deprivation of life by other States".[69] In spite of not ratifying the Covenant yet, China, as a signatory party, is obliged to "refrain from acts which would defeat its object and purpose".[70] More importantly, Chinese authorities have repeated on several occasions that they continue to steadily pursue administrative and legislative reforms in preparation for ratifying the ICCPR.[71] Although China does not have a human rights act, its understanding of the right to life is not as dissimilar to that of Human Rights Committee. Chinese scholars accept the definition of right to life as being that, no one shall be arbitrarily deprived of his life.[72] They concur, that such right places both negative and positive obligations on the State for protection of the individual and of people.[73]

In terms of protective legal framework, this is enacted in both private and public law.[74] In the draft of the Civil Code, the right to life is seen as deriving from

[65] Human Rights Committee is the treaty body of the ICCPR.

[66] Human Rights Committee (n 24), para. 7.

[67] Ibid. para. 20.

[68] Ibid. para. 21.

[69] Ibid. para. 22.

[70] Article 18 (1) of the Vienna Convention on the Law of Treaties. See also Xu Jintang, 'Several Questions about Treaties' Implementation' (2014) 3 Chinese Review of International Law 69, 77-78.

[71] National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution, A/HRC/WG. 6/17/CHN/1(2013), para. 7.

[72] Liu Liantai, 'Comparation between International Bill of Human Rights and China's Constitution' (1999) 5 Journal of Zhejiang Provincial Party School 84, 86.

[73] Feng Yanting, 'The right to life in China: From the Perspective of Article 6 of the ICCPR' (2011) 4 Legal System and Society 268, 268. See also Qiao Shuzhen, 'The Right to Life in Constitution' (2018) 6 Journal of Henan University of Science & Technology (Social Science) 101, 101.

[74] Chen Modi, 'Analysis of Current Study on Constitutional Protection of Right to Life' (2019) 5 Legality Vision 235, 235.

people's dignity and personality,[75] being listed along with a right to health. Article 783 of the draft Code provides, "Natural persons enjoy the right to life and have the right to preserve the security and dignity of their lives. The right to life of others must not be violated by any organization or individual."[76] The victim is entitled to demand the cessation of infringement, elimination of danger, as well as compensation.[77] Considering that the Chinese Constitution does not provide a right to life, the theoretical significance of the provision in the Civil Code is that it confirms the moral value of the right to life, apart from providing a horizontal application. However, considering that the Civil Code is merely private law, this still questions the extent to which the right to life is entrenched a higher value within the Chinese legal system. For this reason, scholars have called for addressing the absence of such right in the Constitution,[78] and so that China remains in compliance with the ICCPR.[79] With regards to public law, the Criminal Law and Criminal Procedure Law play a leading role in protecting the right to life of the citizens. The offences against an individual's life and physical integrity will be prosecuted by the authorities.[80]

The key point concerning Chinese law is that physical security is seen in the context of protecting life, as opposed to just liberty. For this reason, the concept of freedom from fear is properly married to the rights discourse in China. By specifically stipulating security, it facilitates the capacity of this right to encompass the general aggression and violence, freedom from fear was initially created to address. In China's approach, the right to life moves past focus on authorities which is seen in the European context and the ICCPR, and rather identifies more directly that threats or dangers to one's physical security can be caused by anyone. We

[75] Wang Liming, 'Highlights and Improvements of Personality Rights in the Draft Civil Code' (2019) 1 China Law Review 96.

[76] Standing Committee of the National People's Congress (NPC), 'Civil Code Part on Personality Rights (Second Deliberation Draft)', Article 783.

[77] Ibid. See also Article 15 of the Tort Law.

[78] Feng Yanting (n 73), 269. See also Shangguan Peiliang, 'How to Incorporate Right to Life into the Constitution' (2008) 5 People's Congress Studying 27; Shangguan Peiliang, 'The Constitution should Stipulate the Right to Life' (2003) 4 Legal Forum 100.

[79] Liu Liantai (n 72), 86.

[80] For instance, Chapter IV stipulates the crimes of homicide and body injury.

should recall that all human rights are "indivisible", "interdependent", and "interrelated".[81] The right to life in the context of China also provides a more holistic mechanism by which to address a number of issues. This broader scope attached to the right is exactly why freedom from fear has been translated into the right to life in the Chinese context.

4.2. Freedom from Fear as Public Interests in Security

In the context of Chinese law, public interests, in spite of being expressed in various terms, refers to those basic interests shared by the majority.[82] As discussed in the last section, since each individual is entitled to be free from physical harm, security issues are among such basic interests that are shared by the majority. It is usually reflected in terms of "public safety", "public order", "social security order", "social stability" or "national security".[83] Different to the approach adopted by Europe, in China, security, as a public interest, takes precedence over human rights.

Article 51 of the Constitution is commonly seen as the general provision regulating the relations between the individual's rights and public interests. It reads as follows, "Citizens of the People's Republic of China, in exercising their freedoms and rights, shall not infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens."[84] The interests "of the state", "of society", and "of the collective" are normally concluded as the public interests by scholars.[85] Xian Xinhua and Wu Qingshan, by comparing

[81] World Conference on Human Rights, Vienna Declaration and Programme of Action 1993, A/CONF.157/23, para. 5.

[82] Zheng Yongliu, 'The Text and Interpretation of Public Interests in China's Public Laws' in Zheng Yongliu and Zhu Qingyu, *Public Interests in Chinese Law* (Peking University Press 2014), 12.

[83] Such expressions can be found, *inter alia*, in the Constitution, National Security Law, Counterterrorism Law, and Public Security Administration Punishments Law. In these legislations, security serves as a public interest need to be protected.

[84] National People' s Congress of China, Constitution of the People' s Republic of China (2018 Amendment) <http://en.pkulaw.cn/display.aspx?cgid=311950&lib=law> accessed 29 November 2019.

[85] For example, Wang Jinwen, 'Interpreting and Applying Limitation Clauses' Functions on Protecting Fundamental Constitutional Rights: How to Confirm and Protect the Emerging Rights' (2018) 5 ECUPL Journal 88, 91. See also Zheng Yongliu (n 82), 11.

European countries' provisions,[86] hold that Article 51 implies that "public interests not being undermined" is a general principle or request for the individual to exercise his rights.[87] A substantial difference with Europe's approach in public interest is that rights restriction, within China's Constitution, does not require the application of *legality* or *necessity* criteria to justify limitations on the respective right.[88] In other words, the approach of China can be understood as, under no circumstances shall the public interests be infringed by one's exercising his rights. Such an understanding should not be totally unexpected in the context of China, taking into account the principle of communitarianism. The primacy of public interests reached a peak during the planned economy era of China (1957-1978). During this period, while the focus was put on its reconciliation with individual rights, it was often achieved in practice by the latter yielding to the interests of - collective, society, and State's - the public interests.[89] Since introducing the market economy 1979, this has had a substantial impact on the relations between personal and public interests. The importance of individual interests has been attached to its role in economic development.[90] In this sense, the primacy of public interests has dwindled, and is

[86] Especially the Article 19 of the Basic Law for Germany, which reads as follows,

(1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.

(2) In no case may the essence of a basic right be affected.

(3) The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits.

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.

[87] For example, Xian Xinhua and Wu Qingshan, 'Reconstructing the Limitation Clauses of China's Constitution from Article 51' (2017) 1 Journal of Xiangtan University (Philosophy and Social Sciences) 25, 27.

[88] Shi Wenlong, 'The Development of Right Limitations Mechanism in China: Comparative Study on Article 51 of China's Constitution and Article 19 of Germany's Basic Law' (2014) 5 Journal of Comparative Law 161, 163.

[89] Shi Wenlong, 'The Limitations and Regulations on Limitations of Exercising Rights: The Study on Article 51 of China's Constitution' (2013) 7 Political Science and Law 67, 69.

[90] Shi Wenlong (n 83), 70-71.

dwindling, as China moves to protect personal economic interests. One of the remarkable changes this has triggered in recent years is the reform to the judicial system.[91] This focused on strengthening the independence and impartiality of the courts. For instance, the judicial system will take charge in managing its own personnel, finance, and property, with an aim to reduce possible pressure from local government. Furthermore, due to the introduction of the "case-filing register system", access to the court is also significantly being promoted.[92] However, whilst the 1979's Reform and Opening-up Policy had the effect that economic growth was seen as a "cure-all" for all problems in China,[93] security still served as a vital prerequisite of this priority.

More recently, China has made a dramatic turn on its policy on national security under the heading, *a holistic approach to national security.*[94] This approach particularly determines and concludes 12 aspects of national security. This includes, security of people; political security; territorial security; military security; economic security; cultural security; society security; technological security; cybersecurity; ecological security; resource security; and nuclear security. Followed by this, a series of legislations have been passed, with an aim to construct a national security legal architecture. However, some of these legislations have received heavy criticisms from non-governmental organisations and other States,[95] due to its unbalanced

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[91] The State Council Information Office, 'New Progress in the Judicial Protection of Human Rights in China' (*The State Council Information Office*, June 2016) <http://english.www.gov.cn/archive/white_paper/2016/09/12/content_281475440241794.htm> accessed 27 August 2019.

[92] Supreme People's Court of the People's Republic of China, 'White Paper on Judicial Reform of Chinese Courts (2013-2018)' (2019) < http://www.court.gov.cn/zixun-xiangqing-144192.html> accessed 27 August 2019.

[93] Zhou Zunyou, *Balancing Security and Liberty – Counter-Terrorism Legislation in Germany and China* (Duncker & Humblot 2014) 135.

[94] Global Times, 'Xi stresses importance of security' (*Global Times*, 16 April 2014), <http://www.globaltimes.cn/content/854853.shtml> accessed 23 April 2019.

[95] For example, Samantha Hoffman and Elsa Kania, 'Huawei and the Ambiguity of China's Intelligence and Counter-espionage Laws' (*Australian Strategic Policy Institute*, 13 September 2018) <https://www.aspistrategist.org.au/huawei-and-the-ambiguity-of-chinas-intelligence-and-counter-espionage-laws/> accessed 21 August 2019. See also Arjun Kharpal, 'Huawei Says it Would Never Hand Data to China's Government. Experts Say it Wouldn't Have A Choice' (*CNBC*, 4 March 2019)

preference for security over human rights. The primacy of security reflected in the Chinese approach does raise increasing human rights concerns for the of abuse of power. Consequently, it is argued that legislations which intend to legitimise used of broad discretion by State authorities to protect people's right to life and ensure public security, must be reconciled with strong substantive and procedural arrangements.

Regarding the Chinese approach, freedom from fear is demonstrated as a human right and as public interests in security. By doing so, this shows a legal and political preference for protecting one's physical security. On one hand, the right to life is regarded as encompassing the protection of broader acts of aggression and violence. It is also seen as the prerequisite to the enjoyment of other human rights listed in the UDHR, ICCPR, IESCR, and other conventions. On the other hand, the primacy of public interests has a profound impact on China's law, economic development and its implementation. Whilst China's human rights approach to freedom from fear differs to that of Europe, their approach in terms of security largely coincides in both its form and challenges.

5. CONCLUSION

After the adoption of the UDHR, freedom from fear has faded noticeably in the context of human rights in Europe. Instead, it has been reflected as public interests in security, serving as legitimate excuses for reducing human rights. Terrorism and the fear it brings along with it has granted much weight to security considerations, challenging the reconciliation between public interests and human rights. On the other hand, due to the understanding of its importance as a human right and public interest, preferences are usually given to security concerns in the approach adopted by China. However, a pragmatic balance between security and human rights is urgently required. In spite of departing from different points, both Europe and China face the same question, how can freedom from fear be reconciled with human rights?

<https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html> accessed 21 August 2019.

Even though Chinese and European society are rooted in different cultures and histories, it is possible, or maybe inevitable, for them to work towards a community of a shared future for mankind.[96] Given the strained relations between security and human rights faced by both China and European nations, they can possibly learn from each other. Europe may benefit from a broader approach to the right to life, as seen in the context of China. Thus, freedom from fear should not only be seen as public interests in security, but a human right.[97] With regards to China, since there is increasing attention on legislations which provide scope for authorities' abuse of power, it is important to include effect human rights safeguards into the national and public security regime. The national security legislations of China serve as the *legality* basis to balance security and human rights. Nevertheless, State measures will not necessarily be legitimate just because they have legal bases in domestic law. In order to protect human rights, the State should promote considering the *necessity* of their decisions and conduct. Among others, procedural safeguards against abuse of power may serve as an ideal compromise between the sensitiveness of security and advocate for human rights. To be specific, such safeguards are required to prevent decisions from being made arbitrarily and ensure that judicial remedies are available to the persons concerned.

More than 70 years ago, a world in which people would enjoy freedom from fear, along with other freedoms, was recognised by the UDHR as "the highest aspiration of the common people". The approaches adopted by China and Europe in the protection of freedom from fear, demonstrates that though there is much work to be done, this aspiration continues to thrive.

[96] China Daily, 'Work Together to Build a Community of Shared Future for Mankind', (*China Daily*, 18 January 2017) < http://language.chinadaily.com.cn/a/201701/19/WS5b20d22ba31001b82572148f.html> accessed 21 April 2019.

[97] Zhou Zunyou (n 93), 129. See also See Alex P. Schmid, 'Prevention of Terrorism: Towards a Multi-pronged Approach', in Tore Bjørgo (ed), *Root Causes of Terrorism: Myths, Reality and Ways Forward* (Routledge 2005) 223.