

The Right to Leave and Return and Chinese Migration Law

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Certificate of Authorship/Originality

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

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35. *Circular of State Administration of Industry and Commerce on the Prohibition of Release of Emigration Advertisement* 1995 (PRC), promulgated by State Administration of Industry and Commerce in 1995, Gongshang Guangzi [1995] No.184.
 36. *Circular of State Council Bureau for Religion Affairs, State Administration of Foreign Exchange, the Ministry of Foreign Affairs, the Ministry of Public Security, the Bank of China, Customs General Administration and Civil Aviation Administration of China on Several Rules of Self-support Pilgrimage Abroad Administration (Amendment)* 1995 (PRC) (*Guowuyuan Zongjiao Shiwu Ju Guojia Waihui Guanli Ju Waijiaobu Gonganbu Zhongguo Yinghang Haiguan Zongshu Minyong Hangkong Zongju Guanyu Zifei Chaojing Ruogan Guiding De Tongzhi*), jointly promulgated according to *Some Rules on Self-funded Pilgrimage Abroad* 1990 (PRC) on 28 January 1995
 37. *Circular of State Education Commission and the Ministry of Public Security on Prohibiting Foreign and Domestic Organs and Individuals from Recruiting Students Studying Abroad Self-funded in China without Allowance* 1987 (PRC) (*Guojia Jiaowei Gonganbu Guanyu Guoneiwai Zuzhi He Geren Bude Shanzi Zai Woguo Zaoshou Zifei Chuguo Liuxue Renyuan De Tongzhi*), jointly promulgated by the State Education Commission and the Ministry of Public Security on 21 August 1987
 38. *Circular of the State Education Commission, the Ministry of Public Security and the Ministry of Foreign Affairs on Holding Ordinary Passport for Private Passport of Citizens Studying Abroad* 1993 (PRC) (*Guojia Jiaoyu Weiyuanhui Gonganbu Waijiaobu Guanyu Gongmin Chuguo Liuxue Chiyong Yinsi Putong Huzhao De Tongzhi*), Promulgated by the State Education Commission, the Ministry of Public Security and the Ministry of Foreign Affairs on 8 July 1993
 39. *Circular of the State Education Commission, State Council Bureau for Religions Affairs, the Ministry of Public Affairs and the Ministry of Foreign Affairs on Dealing with Some Issues of Recruiting Students Studying Abroad in China without Permission by Certain Departments and Individuals in China of Foreign Countries and International Organizations* 1990 (PRC) (*Guojia Jiaowei Guowuyuan Zongjiaoju Gonganbu Waijiaobu Guanyu Chuli Mouxie Guojia He Guoji Zuzhi De Zhuhua Jigou Ji Geren Shanzi Zaihua Zaoshou Liuxuesheng Wenti De Tongzhi*), promulgated by the State Education Commission, State Council Bureau for Religions Affairs, the Ministry of Public Affairs and the Ministry of Foreign Affairs on 26 December 1990
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 43. *Circular of the General Office of the Central Committee of Chinese Communist Party and the General Office of the State Council on Refraining of Excessively Sending Group, Team and Individuals Exit Abroad* 1986 (PRC) (*Zhonggong Zhongyang Bangongting Guowuyuan Bangongting Guanyu Zhizhi Lanpai Tuanzu He Renyuan Chuguo De Tongzhi*), promulgated on 23 January 1986

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45. *Circular of the General Office of the State Council on the Approval and Transmission of a Report Submitted by the National Tourism Administration Concerning the Strengthening of Tourist Work* 1988 (PRC) (Guowuyuan Bangongting Guanyu Pizhun He Zhuanfa Guojia Lvyou Guanli Ju Guanyu Jiaqiang Lvyou Gongzuo De Baogao De Tongzhi), promulgated by the General Office of the State Council on 21 December 1988
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47. *Circular of the General Office of the State Council on Transmission of the Ministry of Foreign Affairs and the Ministry of Public Security on Some Issues of Timely Collection and Uniquely Keeping Passport of Individuals Exiting Abroad in the Course of Their Duties and Strengthening Issuance Formality of the Certificate of Exiting Abroad* 1990 (PRC) (Guowuyuan Bangongting Zhuanfa Waijiaobu Gonganbu Guanyu Jishi Shoujiao Bing Jizhong Baoguan Yingong Chuguo Renyuan Huzhao He Jinyibu Yangge Chuguo (Jing) Zhengmin Hefa Shouxu Wenti De Tongzhi), promulgated by the Ministry of Foreign Affairs and the Ministry of Public Security on 19 July 1990
48. *Circular of the Ministry of Public Security on Seriously Carrying out the File of Gongfa(Jing) [84] 59 and Further Relaxing Exiting Abroad for Private Affairs (Abstract)* 1984 (PRC) (Gonganbu Guanyu Renzhen Guance Zhixing Gongfa (Jing) 59 Hao Wenjian Jinyibu Fangkuang Yisi Chuguo De Tongzhi (Zaiyao)), promulgated by the Ministry of Public Security on 22 November 1984
49. *Circular of the Ministry of Public Security, the Ministry of Education, the Ministry of Labour and Social Insurance, the State Administration of Industry and Commerce for Rectifying and Regulating Exit and Entry Intermediary Agencies* 2000 (PRC) (Gonganbu Jiaoyubu Laodong He Shehui Baozhangbu Guojia Gongshang Xingzheng Guanli Ju Guanyu Qingli Zhengdun Churujing Zhongjie Jigou De Tongzhi), promulgated and as effective as 27 November 2000
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 56. *Circular of the State Administration of Foreign Exchange on Relevant Issues Regarding Well Selling Foreign Exchange to Persons who Exit from the Territory for Public Affairs 2002* (PRC) (*Guojia Waihui Guanli Ju Guanyu Zuohao Yingong Chuguo Shouhui Gongzuo Youguan Wenti De Tongzhi*), Huifa [2002] No. 118. 20 October 2003
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 58. *Circular of the State Council of Overseas Chinese Affairs Office, the Ministry of Foreign Affairs, the Ministry of Public Security, the Ministry of Labour and the Ministry of Finance on the Arrangement Measures for Returned Korean and Mogonian Chinese for Permanent Residence 1989* (PRC) (*Guowuyuan Qiaowu Bangongshi Waijiaobu Gonganbu Laodongbu Caizhengbu Guanyu Chaoxian Menggu Huaqiao Guiguo Anzhi Banfa De Tongzhi*), promulgated by of the State Council of Overseas Chinese Affairs Office, the Ministry of Foreign Affairs, the Ministry of Public Security, the Ministry of Labour and the Ministry of Finance on 9 November 1989, [89] Qiaoneihui Zi No. 019
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 60. *Circular of the State Council on Strengthening the Management of Activities of Intermediary Agencies of Exit and Entry for Private Affairs 2000* (PRC) (*Guowuyuan Guanyu Jiaqiang Yinsi Churujing Zhongjie Huodong Guanli De Tongzhi*), promulgated by the State Council in 2000, Guofa [2000] No. 25
 61. *Circular of the State Council on the Implementation of the Law on Administrative Sanctions 1994* (PRC) (*Guowuyuan Guanyu Shishi Xingzheng Chufa Fa De Tongzhi*), promulgated by the State Council on 9 October 1994
 62. *Circular of the State Council on the Unified Responsibility of the Ministry of Public Security Regarding the Administration of the Exit and Entry for Private Purpose of Citizens 1956* (PRC) (*Guowuyuan Guanyu Woguo Gongmin Yinsi Chuguo De Guanli Gongzuo You Gonganbu Tongyi Zhangwo De Tongzhi*), promulgated by the State Council on 14 November 1956
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66. *Circular on Further Regulating Market Order of Self-funded Overseas Studying Intermediary Service* 2002 (PRC) (*Guanyu Jinyibu Guifa Zifei Chuguo Liuxue Zhongjie Jigou De Tongzhi*), promulgated by the Ministry of Education in November 2002
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69. *Circular on Simplifying the Formality of Undergoing Temporary Residence Registration in the Mainland of Taiwan Residents* 1992 (PRC) (*Guanyu Jianhua Banli Taiwan Jumin Zai Dalu Zanzhu Shouxu De Tongzhi*), promulgated by the Ministry of Public Security on 17 June 1992
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71. *Circular on Some Matters of Implementation and Carrying Out Regulations on the Administration for Overseas Employment Intermediary Agencies (Amendment)* 2002 (*Guanyu Guance Shishi Jingwai Jiuye Zhongjie Guanli Guiding Youguan Wenti De Tongzhi (Xiuding)*), promulgated by the Ministry of Labour and Social Security on 24 June 2002
72. *Circular on Some Noteworthy Issues of Moslem Foreign Affairs* 1990 (PRC) (*Guanyu Yishilanjiao Shewai Gongzuo Zhong Ying Zhuyi De Jige Wenti De Tongzhi*), promulgated by the State Council Bureau for Religious Affairs in 1990
73. *Circular on the Amendment of Provisional Regulations of Trial Implementation Establishment of Sino-Foreign Joint Equity Travel Agencies* 1999 (PRC) (*Guanyu Xiuding Shibao Zhongwai Hezi Lvxiingshe Zaxing Banfa De Tongzhi*), promulgated by China National Tourism Administration and the Ministry of Foreign Trade and Economic Cooperation on 19 April 1999
74. *Circular on the Prohibition on Handling with Notarial Certificate of Permanent Residence Certificate for Taiwan Compatriots* 1993 (PRC) (*Guanyu Bude Banli Taibao Dingjuzheng Gongzheng De Tongzhi*), promulgated by the Ministry of Justice on 20 October 1993, Sifatong [1993] 113
75. *Circular on the Prohibition on Issuance of Notarial Certificate of Permanent Residence Certificate for Taiwan Compatriots* 1993 (PRC) (*Guanyu Bude Chuju Taibao Dingjuzheng Gongzheng De Tongzhi*), jointly promulgated by the Department of Unified Front under the Central Committee of CPC, the Ministry of Public Security and the Ministry of Justice in 1993, Tongfa [1993] 14
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78. *Decision of the State Council Relating to Regulating and Regularizing the Order of Market Economy* 2001 (PRC) (*Guowuyuan Guanyu Zhengdun He Guifan Shichang Jingji Zhixu De Jueding*), promulgated by the State Council on 8 May 2001
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80. *Detailed Rules for Implementing of the Law on the Control of Exit and Entry of Citizens (Amendment)* 1994 (PRC) (*Gongmin Churujing Guanli Fa Shishi Xize Xiuding*), made pursuant to the *Law on the Control of Exit and Entry of Citizens* 1985 (PRC), promulgated by the Ministry of Public Security, the Ministry of Foreign Affairs and the Ministry of Communications, and approved by the State Council on 15 July 1994.
81. *Detailed Rules for the Implementation of Law of National Security* 1994 (PRC) (*Guojia Anquan Fa Shishi Xize*), promulgated by the State Council on 4 June 1994
82. *Detailed Rules for the Implementation of Measures for the Administration on Agency Services for Self-funded Studying Abroad (for Trial Implementation)* 1999 (Beijing) (*Beijingshi Zifei Chuguo Liuxue Zhongjie Fuwu Guanli Banfa (Shixing)*) made pursuant to *Measures for the Administration on Agency Services for Self-funded Studying Abroad* 1999 (PRC), promulgated by the Bureau of Education (Beijing), the Bureau of Public Security (Beijing) and the Administration of Industry and Commerce (Beijing)
83. *Detailed Rules for the Implementation of National Security* 1994 (PRC) (*Guojia Anquanfa Shishi Xize*), made pursuant to *National Security Law* 1993 (PRC), promulgated by the State Council
84. *Detailed Rules for the Implementation of Provisional Regulations of Quality Guarantee Deposit for Travel Agencies* 1995 (PRC) (*Lvxingshe Zhiliang Baozhengjin Zanxing Guiding Shishi Xize*), promulgated by China National Tourism Administration on 1 January 1995
85. *Detailed Rules for the Implementation of Rules on the Control of Intermediary Agencies for Self-funded Overseas Study (for Trial Implementation)* 1999 (PRC) (*Zifei Chuguo Liuxue Zhongjie Fuwu Guanli Guiding Shishi Xize (Shixing)*), promulgated by the Ministry of Education, the Ministry of Public Security and State Administration of Industry and Commerce on 24 August 1999
86. *Detailed Rules for the Implementation of the Law on the Control of Entry and Exit of Aliens* 1986 (PRC) (*Waiguoren Rujing Chujing Guanlifa Shishi Xize*), made pursuant to the *Law on the Control of Exit and Entry of Aliens* 1985 (PRC), promulgated by the Ministry of Public Security and the Ministry of Foreign Affairs, and approved by the State Council on 27 December 1994
87. *Detailed Rules for the Implementation of the Law on the Control of Entry and Exit of Aliens (Amendment)* 1994 (PRC) (*Waiguoren Rujing Chujing Guanlifa Shishi Xize Xiuding*), made pursuant to the *Law on the Control of Exit and Entry of Aliens* 1985 (PRC) promulgated by the Ministry of Public Security and the Ministry of Foreign Affairs on 15 July 1994, and approved by the State Council on 13 July 1994
88. *Detailed Rules for the Implementation of the Law on the Control of Entry and Exit of Citizens (Amendment)* 1994 (PRC) (*Gongmin Chujing Rujing Guanlifa Shishi Xize*), made pursuant to *Law on the Control of Exit and Entry of Citizens* 1986 (PRC), promulgated by the Ministry of Public Security and the Ministry of Foreign Affairs on 15 July 1994, and approved by the State Council on 13 July 1994
89. *Detailed Rules for the Implementation of the Laws on the Administration of Tax Collection* 1993 (PRC) (*Suishou Zhengguan Fa Shishi Xize*), promulgated by the State Council on 4 August 1993

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91. *Detailed Rules of the Implementation of Regulations on the Administration of Travel Agencies 2003* (PRC) (*Lvxingshe Guanli Tiaoli Shishi Xize*), promulgated by China National Tourism Administration on 10 June 2003
92. *Detailed Rules of the Implementation on Protection of the Rights and Interests of Chinese and Family Members of Overseas Chinese 1993* (PRC) (*Guiqiao Qiaojuan Quanyi Baohufa Shishi Xize*), made pursuant to *Law on Protection of the Rights and Interests of Returned Overseas Chinese and Family Members of Overseas Chinese Law 1990* (PRC), promulgated by the State Council on 19 July 1993
93. *Detailed Rules of the Implementation on the Administration of Domestic Resident Individuals to Purchase Foreign Exchange for Private Purpose 2002* (PRC) (*Jingnei Jumin Geren Yinsi Gouhui Guanli Shishi Xize*)
94. *Directive of the State Council on Establishing Regular Household Registration System 1955* (*Guowuyuan Guanyu Jianli Jingchang Hukou Dengji Zhidu De Zhishi*), promulgated by the State Council of the PRC on 22 June 1955
95. *Explanation of the Ministry of Public Security on Some Issues on Implementation of Law on the Control of Exit and Entry of Citizens and Its Detailed Rules for the Implementation 1987* (PRC) (*Gonganbu Guanyu Zhixing Zhongguo Gongmin Chujing Rujing Guanli Fa Ji Shishi Xize Ruogan Wenti De Shuoming*), promulgated by the Ministry of Public Security on 19 February 1987
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98. *Explanation of Some Matters on Implementation of Provisional Measures on the Control over Chinese Citizens Travelling for Private Affairs to or from the Regions of Hong Kong or Macao 1986* (PRC) (*Guanyu Zhixing Zhongguo Gongmin Wanglai Gangao Diqu Zanxing Guanli Banfa Ruogan Wenti De Shuoming*), promulgated by the Ministry of Public Security on 19 February 1987
99. *Explanation of the Enforcement of the Amendment of Two Detailed Rules of the Implementation 1995* (PRC) (*Zhixing Liangge Shishi Xize Xiuding Neirong De Shuoming*), promulgated by the Ministry of Public Security on 13 February 1995
100. *Explanation of the Law on Administrative License (Draft) 2003* (PRC) (*Guanyu Xingzheng Xukefa (Caoan) De Shuoming*), promulgated by the Standing Committee of the National People's Congress on 23 August 2003
101. *Explanations of the Sixth Bureau of the Ministry of Public Security on Issues of Providing Comments of Employed The organization Where the Applicant is Services of Citizens Exiting Abroad 1989* (PRC) (*Gonganbu Liuju Guanyu Gongmin Shenqing Chuguo Tijiao Suozai Gongzuo Danwei Yijian Wenti De Shuomin*), promulgated by the Sixth Bureau of the Ministry of Public Security on 11 March 1989

102. *General Principles of the Civil Law 1986 (PRC) (Minfa Tongze)*, promulgated by the National People's Congress on 12 April 1986 and effective on 1 January 1987
103. *Implementation Opinion of Shanghai Municipality on Provisional Regulations of the Establishment and Administration of Sino-Foreign Equity or Cooperative Joint Venture Employment Agencies 2002 (Shanghai) (Shanghaishi Guanyu Jianli He Guanli Zhongwai Hezi Hezuo Rencai Zhongjie Jigou Guanli Zanxing Guiding De Shishi Yijian)*, promulgated pursuant to *Provisional Regulations of the Establishment and Administration of Sino-Foreign Equity or Cooperative Joint Venture Employment Agencies 2002 (PRC)* on 23 April 2002
104. *Implementing Measures on Protection of the Rights and Interests of Returned Overseas Chinese and Family Members of Overseas Chinese 2002 (Guangdong) (Guangdongsheng Guanyu Guiqiao Qiaojuan Quanyi Baohufa Shishi Banfa)*, made pursuant to *Law on Protection of the Rights and Interests of Returned Overseas Chinese and Members of Overseas Chinese 2000 (PRC)*, promulgated by the People's Congress of Guangdong Province
105. *Instruction to Application for the License for a Overseas Employment Intermediary Agencies 2003 (Beijing) (Beijingshi Guanyu Shenqing Jingwai Jiuye Zhongjie Jigou Xukezheng De Shuoming)*, issued by Beijing Municipality Labour and Social Security Bureau in 2003
106. *Interpretation by the Standing Committee of the National People's Congress Regarding Clause 4 Article 22 and Category (3) of Clause 2 Article 24 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1999 (PRC) (Quanguo Renda Changweihui Guanyu Xianggang Tebie Xingzheng Qu Jiben Fa Di 22 Tiao Di 4 Kuan He Di 24 Tiao Di 2 Kuan Di 3 Xiang De Jieshi)*, promulgated by the Standing Committee of the National People's Congress on 26 June 1999
107. *Law of Administration Penalty 1996 (PRC) (Xingzheng Chufa Fa)*, made pursuant to the *Constitution of the PRC 1993*, promulgated by the Standing Committee of the National People's Congress
108. *Law of Civil Procedure 1991 (PRC) (Minshi Shusong Fa)*, promulgated by the National People's Congress on 9 April 1991
109. *Law of Criminal (Amendment) 1997 (PRC) (Xing Fa (Xiuding))*, promulgated by the National People Congress on 14 March 1997
110. *Law of Criminal Procedure (Amendment) 1996 (PRC) (Xingshi Shusong Fa (Xiuding))*, promulgated by the National People's Congress in accordance with the *Law of Criminal Procedure 1979* on 17 March 1996
111. *Law of National Security 1993 (PRC) (Guojia Anquan Fa)*, promulgated by the Standing Committee of the National People's Congress on 22 February 1993
112. *Law of Nationality 1980 (PRC)* promulgated by the National People's Congress on 10 September 1980
113. *Law of the Legislation 2000 (PRC) (Lifa Fa)*, promulgated by the National People's Congress on 15 March 2000 and effective on 1 July 2000
114. *Law of the Organ of the State Council 1982 (PRC) (Guowuyuan Zuzhi Fa)*, promulgated by National People's Congress on 10 December 1982
115. *Law on Administrative License 2003 (PRC) (Xingzheng Xuke Fa)*, promulgated by the Standing Committee of the National People's Congress on 27 August 2003 and effective on 1 July 2004
116. *Law on Administrative Procedure 1989 (PRC) (Xingzheng Shusong Fa)*, promulgated by the Standing Committee of the National People's Congress on 4 April 1989 and effective on 1 October 1990
117. *Law on Administrative Review 1999 (PRC) (Xingzheng Fuyi Fa)*, promulgated by the Standing Committee of the National People's Congress on 29 April 1999 and effective on 1 October 1999

118. *Law on Administrative Supervision* 1997 (PRC) (*Xingzheng Jiancha Fa*), promulgated by the Standing Committee of the National People's Congress on 9 May 1997
119. *Law on Protection of the Rights and Interests of Returned Overseas Chinese and Family Members of Overseas Chinese* 1990 (PRC) (*Guiqiao Qiaojuan Quanyi Baohu Fa*), promulgated by the Standing Committee of the National People's Congress on 7 September 1990
120. *Law on Protection of the Rights and Interests of Returned Overseas Chinese and the Family Members of Overseas Chinese (Amendment)* 2000 (PRC) (*Guiqiao Qiaojuan Quanyi Baohu Fa (Xiuding)*), promulgated by the Standing Committee of the National People's Congress according to *Law on the Protection of the Rights and Interests of Returned Overseas Chinese and the Family Members of Overseas Chinese* 1990 (PRC) on 31 October 2000
121. *Law on State Compensation* 1994 (PRC) (*Guojia Peichang Fa*), promulgated by the Standing Committee of the National People's Congress on 12 May 1994 and effective on 1 January 1995
122. *Law on the Administration of Tax Collection (Amendment)* 2001 (PRC) (*Suishou Zhengguan Fa (Xiuding)*), promulgated by the Standing Committee of National People's Congress on 28 April 2001 pursuant to the *Law on the Administration of Tax Collection* 1992 (PRC)
123. *Law on the Control of the Entry and Exit of Aliens* 1985 (PRC) (*Waiguoren Rujing Chujing Guanli Fa*), promulgated by the Standing Committee of National People's Congress on 22 November 1985 and effective on 1 February 1986
124. *Law on the Control of Exit and Entry of Citizens* 1985 (PRC) (*Gongmin Chujing Rujing Guanli Fa*), promulgated by the Standing Committee of National People's Congress on 22 November 1985 and effective on 1 February 1986
125. *Legal Rights and Interests of Overseas Labours* 2002 (PRC) (*Haiwai Laogong Hefa Quanyi De Tongzhi*), promulgated by the Ministry of Foreign Trade and Economy Cooperation in January 2002
126. *Measures for the Administration on Exit and Entry Agency Service for Private Affairs (for Trial Implementation)* 2001 (PRC) (*Yinsi Churujing Zhongjie Huodong Gunali Banfa Ruogan Guiding (Shixing)*), promulgated by the Ministry of Public Security and the State Administration of Industry and Commerce
127. *Measures for the Administration of the Use of Foreign Exchange on Temporally Exiting the Territory for Public Affairs* 2002 (PRC) (*Yingong Linshi Chuguo Yonghui Guanli Banfa*), No. [2003] 314, the Ministry of Finance
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129. *Measures for the Control of Intermediary Agencies for Self-funded Overseas Study (for Trial Implementation)* 1999 (Beijing) (*Beijingshi Zifei Chuguo Liuxue Zhongjie Fuwu Guanli Banfa (Shixing)*), promulgated by Beijing Municipality Committee of Education, Beijing Municipality Public Security Bureau and Beijing Municipality Administration of Industry and Commerce on 2 November 1999
130. *Measures for the Implementation on Examination and Approval of Exit Abroad (Including Hong Kong or Macao) and Invitation Aliens to China of Employees of National Pilot Enterprises Group (for Trial Implementation Implementation)* 1992 (PRC) (*Guangyu Guojia Shidian Qiye Jituan Renyuan Chuguo (Han Gangao) He Yaoqing Laihua Shixiang Shenpi De Shishi Banfa (Shixing)*), Promulgated by the State Council Foreign Affairs Office, State Planning Committee, State Commission for Restructuring the Economy System, State Council Production Office on 31 March 1992
131. *Measures for the Implementation on Examination and Approval of Sending Employees to Temporally Exiting Abroad (Including Hong Kong or Macao) and Inviting Aliens to China by Industry*

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132. *Measures for the Implementation on Preventing Defaulting Taxpayer from Exiting Abroad* 1997 (PRC) (*Jingzhi Weifushuizhe Chujing Shishi Banfa*), promulgated by the Ministry of Public Security and State Tax Administration on 20 February 1997
133. *Measures of Administration on Citizens Tours Abroad* 2002 (PRC) (*Zhongguo Gongmin Chuguo Lvyou Guanli Banfa*), promulgated by the State Council
134. *Measures of Beijing Municipal People's Government on Formulation of Rules and Regulations* 2002 (Beijing) (*Beijingshi Renmin Zhengfu Guizhang Zhiding Banfa*), promulgated by Beijing Municipal People's Government on 21 May 2002 and effective on 1 June 2002
135. *Measures of Examination and Approval of Intermediary Agencies of Introducing Foreign Professional Talents to Work in China* 1996 (PRC) (*Waiguo Zhuanye Rencai Laihua Gongzuo Zhongjie Jigou Shenpi Banfa*), promulgated by the State Administration of Foreign Experts Affairs on 30 May 1996
136. *Measures of Examination and Approval of Sending Individuals to be Employed in Hong Kong and Macao for a Long Term* 1991 (PRC) (*Guanyu Paiwang Gangao Diqu Changzhu Renyuan De Shenpi Baifa*), promulgated by the State Council Hong Kong and Macao Office on 10 August 1991
137. *Measures of Examination and Approval of Traveling to Hong Kong or Macao for Permanent Residence of Inland Residents* 2004 (PRC) (*2004 Nian Neidi Jumin Fu Gangao Diqu Dingju Shenpi Banfa*), promulgated by the Ministry of Public Security in December 2003
138. *Measures of Examination, Approval and Circulation of a Circular of the Lists of Individuals Prohibited from Entering China* 1992 (PRC) (*Buzhun Rujing Mindan Shenpi Tongbao Banfa De Tongzhi*), promulgated by the Ministry of Public Security on 17 February 1992
139. *Measures of Purchasing Travel Agencies Responsibility Insurance of Travel Agencies* 2001 (PRC) (*Lvxingshe Toubao Lvxingshe Zeren Baoxian Guiding*), promulgated by State National Administration of Tourism on 15 May 2001
140. *Measures of Taiyuan Municipal People's Government on Legislation* 2002 (Taiyuan) (*Taiyuanshi Lifa Tiaoli*), promulgated by Taiyuan Municipal People's Congress on 24 May 2002
141. *Measures of the General Office of the Central Committee of Chinese Communist Party and the General Office of the State Council on Adjusting Examination and Approval Power of Sending Individuals Exit Abroad Temporarily and Inviting Aliens to Visit China* 1993 (PRC) (*Zhonggong Zhongyang Bangongting Guowuyuan Bangongting Guanyu Tiaozheng Paiqian Linshi Chuguo Renyuan He Yaoqing Waiguo Renyuan Laihua Shenpi Quanxian De Banfa*)
142. *Measures on Administration of Passport and Other Travel Abroad Documents of Officials Employed by the CPC, governments, Courts, Procuratorial Courts, Justice Departments and Public Security Departments* 2003 (PRC) (*Dangzheng Sifa Gongan Anquan Ganbu Huzhao Ji Qita Chuguo Zhengjian Guanli Banfa*), promulgated by the Central Committee of Communist Party of China in August 2003
143. *Measures on Encouraging Personnel Who Study Abroad to Service Sichun Province* 2003 (Sichun) (*Sichuanshen Guli Haiwai Liuxue Renyuan Laichuan Fuwu Banfa*), promulgated by Sichun People's Government of China in 2003
144. *Measures on Procedures for Contract Workers Sent Abroad Leaving the Country (Amendment)* 2002 (PRC) (*Waipai Laowu Renyuan Chengxu Banfa*), amended pursuant to *Provisional Measures on*

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145. *Measures on Prohibition of Exit and Entry of National Currency* 1951 (PRC) (*Jingzhi Guojia Huobi Churu Guojing Banfa*), promulgated by the Government Administration Council, Central People's Government
146. *Measures on the Administration of Chinese Citizens' Tours Abroad at Their Own Expense (Amendment)* 2002 (PRC) (*Zhongguo Gongmin Zifei Chuguo Lvyou Guanli Banfa*), promulgated by the State Council on 1 July 2002
147. *Measures on the Administration of Exit and Entry Intermediary Agencies for Private Affairs* 2001 (PRC) (*Yinsi Churujing Zhongjie Huodong Guanli Banfa Ruogan Guiding*), jointly promulgated by the Ministry of Public Security and State Administration of Industry and Commerce on 17 July 2001 and effective 17 July 2002
148. *Measures on the Administration of Opening Employment Cooperation with Hong Kong Region* 1996 (PRC) (*Dui Xianggang Diqu Kanzhan Laowu Hezuo Guanli Banfa*), promulgated by the Ministry of Foreign Trade and Economic Cooperation on 5 September 1996, Waijingmao Hefa [1996] 605
149. *Measures on the Administration of Opening Normal Employment Cooperation with Macao Region* 1998 (PRC) (*Dui Aomen Diqu Kanzhan Putong Laowu Hezuo Guanli Banfa*), jointly promulgated by the Ministry of Foreign Trade and Economic Cooperation and the State Council Hong Kong and Macao Affairs Office, Waijingmao Hefa [1998] 430
150. *Operational Manual of the Processing of Aliens Visas* 1995 (PRC) (*Shenli Waiguoren Qianzheng Chaozuo Shouce*), promulgated by the Ministry of Public Security in 1995
151. *Operational Norms of Application, Examination and Approval of Exiting Abroad and Passport For Private Affairs of Citizens* 1996 (PRC) (*Gongmin Yinsishi Chuguo Huzhao Shenqing Shenpi Guanli Gongzuo Guifan*), promulgated by the Ministry of Public Security on 3rd December 1996
152. *Operational Norms on the Control of Examination and Approval of Traveling to Hong Kong or Macao for Permanent Residence of Inland Residents* 1997 (PRC) (*Neidi Gongmin Fu Gangao Diqu Dingju Shenpi Guanli Gongzuo Guifan*), promulgated by the Ministry of Public Security in May 1997
153. *Opinions for Encouraging Enterprises to Develop Business Overseas* 1999 (PRC) (*Guli Qiye Fazhan Haiwai Yewu De Jianyi*), promulgated by the General Office of the State Council
154. *Opinions of the State Council Overseas Chinese Affairs Office, Exit and Entry Administration under the Ministry of Public Security and Department of Consular Affairs under the Ministry of Foreign Affairs on Returning to China for Permanent Residence of Overseas Chinese* 1991 (PRC) (*Guowuyuan Qiaoban Gonganbu Liuju Waijiaobu Lingshisi Guanyu Lvju Guowai Zhongguo Gongmin Shenqing Huiguo Dingju De Yijian*), jointly promulgated by State Council Overseas Chinese Affairs Office, the Bureau of Exit and Entry Administration under the Ministry of Public Security and Department of Consular Affairs under the Ministry of Foreign Affairs on 27 February 1991
155. *Opinions on Well Handling with the Work of Taiwan Compatriots Traveling to Motherland to Visit the Relatives* 1987 (PRC) (*Guanyu Zuohao Taibao Lai Zuguo Dalu Tanqin Gongzuo De Yijian*), promulgated by the Leading Panel of Taiwan Affairs under the Central Committee of Communist Party of China in 1987, Zhongbanfa [1987] 14
156. *Part Seven of Overseas Talents of Outline of Program of National Talents Forster from 2002 to 2005 (2002-2005 Nian Quanguo Rencai Duiwu Jianshe Guihua Gangyao)*, promulgated by the General Office of the Central Committee of the CPC and the General Office of the State Council in 2002

157. *Proclamation of the Ministry of Public Security, the Central People's Government on the Control over Passengers Traveling to and from the Regions of Hong Kong or Macao* 1951 (PRC) (*Zhongyang Renmin Zhengfu Gonganbu Guanyu Wanglai Xianggang Aomen Lyke Guanli De Bugao*), promulgated by the Ministry of Public Security on 2 August 1951 and effective on 1 September 1951
158. *Provisional Detailed Rules of the Implementation of the Stipulations on Sending Term, Group and Individuals to be Trained Abroad* 1990 (PRC) (*Guanyu Paiqian Tuanzu He Renyuan Fu Guowai Peixun De Guanding De Zanxing Shishi Xize*), promulgated by the State Council Introduction of Foreign Intellectuality Leading Panel Office on 15 April 1990
159. *Provisional Measures for Citizens Travelling on Private Affairs to or from the Regions of Hong Kong or Macao* 1986 (PRC) (*Zhongguo Gongmin Yin Sishi Wanglai Xianggang Diqu Huozhe Aomeng Diqu De Zanxing Guanli Banfa*), promulgated by the Ministry of Public Security and Approved by the State Council on 25 December 1986
160. *Provisional Measures for the Administration of Carrying Foreign Exchange Cash for Persons Entering or Exiting the Territory* 2003 (PRC) (*Xiedai Waibi Xiaoshao Churujing Guanli Zanxing Banfa*) No. [2003] 102 of the State Administration of Foreign Currency
161. *Provisional Measures for the Administration of China National Tourism Administration on Organization of Tour to Thailand, Singapore and Malaysia* 1990 (PRC) (*Guojia Lvyouju Guanyu Zuzhi Woguo Gongmin Fu Dongnanya Sanguo Lvyou De Zaoxing Guanli Banfa*), promulgated by China National Tourism Administration on 5 December 1990
162. *Provisional Measures for the Procedures of Exiting Abroad Examination and Approval and Handling with Passport of Labours Sending Abroad* 1990 (PRC) (*Guanyu Waipai Laowu Renyuan Chuguo Shenpi Shouxu He Banli Huzhao De Zanxing Banfa*), Promulgated by the Ministry of Foreign Economic Cooperation and Trade, the Ministry of Labour, the Ministry of Foreign Affairs and the Ministry of Public Security on 14 December 1990
163. *Provisional Measures of the Administration of Intermediary Agencies of Introducing Foreign Professional Talents to Work in China* 1995 (PRC) (*Waiguo Zhuanye Rencai Laihua Gongzuo Zhongjie Jigou Zanxing Guanli Banfa*), jointly promulgated by State Administration of Foreign Experts Affairs and State Administration of Industry and Commerce on 25 August 1995
164. *Provisional Measures of the Beijing Municipality for Promotion the Establishment of Sino-Foreign Joint Venture Skilled Personnel Intermediary Agencies* 2002 (Beijing) (*Beijingshi Guli Sheli Zhongwai Heying Rencai Zhongjie Fuwu Jigou Zanxing Banfa*), jointly promulgated by Beijing Municipal Bureau of Personnel, Beijing Administration of Industry and Commerce, Beijing Committee of Foreign Trade and Economic Cooperation on 14 June 2002
165. *Provisional Measures of the Reserve Funds of Foreign Labour Cooperation* 2001 (PRC) (*Duiwai Laowu Hezuo Beiyongjing Zanxing Banfa*), promulgated by the Ministry of Foreign Trade and Economic Cooperation on 27 November 2001
166. *Provisional Measures of the Reserve Funds of Foreign Labour Cooperation (Amendment)* 2003 (PRC) (*Duiwai Laowu Hezuo Beiyongjing Zanxing Banfa*) (*Xiuding*), promulgated by the Ministry of Commerce on 21 August 2003
167. *Provisional Measures on Administration of State Dispatched Sports Technicians Exiting Abroad* 1992 (PRC) (*Guanyu Gongpai Chuguo (jing) Tiyu Jishu Renyuan De Guanli Zanxing Banfa*), promulgated by the State Sport Commission on 12 March 1990
168. *Provisional Measures on Exit of Aliens in China* 1954 (PRC) (*Waiguo Qiaomin Chujing Zanxing Banfa*), promulgated by the Ministry of Public Security on 10 August 1954
169. *Provisional Measures on Procedures for Contract Workers Sent Abroad Leaving the Country and Undergoing Passport Application* 1990 (PRC) (*Guanyu Paiqian Laowu Chujing He Banli Huzhao*

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170. *Provisional Measures on Procedures for Contract Workers Sent Abroad Leaving the Country* 1996 (PRC) (*Guanyu Banli Waipai Laowu Renyuan Chuguo Shouxu De Zanxing Guiding*), jointly promulgated by the Ministry of Foreign Trade and Economy Cooperation, the Ministry of Foreign Affairs and the Ministry of Public Security approved by the State Council on 20 December 1996
171. *Provisional Measures on Residence Registration and the Issuance of Residence Certificate of Aliens in China* 1954 (PRC) (*Waiguo Qiaomin Juliu Dengji Ji Juliu Zheng Qianfa Zanxing Banfa*), promulgated by the Ministry of Public Security on 10 August 1954
172. *Provisional Measures on the Administration of Chinese Citizens' Tours Abroad at Their Own Expense* 1997 (PRC) (*Zhongguo Gongmin Zifei Chugu Lvyou Guanli Zanxing Banfa*), promulgated by China National Tourism Administration and the Ministry of Public Security and approved by the State Council on 1 July 1997
173. *Provisional Measures on the Administration of Dispatching Groups and Personals to Other Countries for Training* 1993 (PRC) (*Guanyu Panqian Tuanzu He Renyuan Fu Guo (Jing) Wai Peixun De Zanxing Guanli Banfa*), jointly promulgated by the State Administration of Foreign Experts Affairs and the Ministry of Foreign Affairs on 20 October 1993
174. *Provisional Measures on the Administration of Domestic Resident Individuals Foreign Exchange (Amendment)* 2003 (PRC) (*Jingnei Jumin Geren Waihui Guanli Zanxing Banfa*), Huifa [1999] No. 305
175. *Provisional Measures on the Administration of Foreign Currency Exchange Agencies* 2003 (PRC) (*Waibi Duihuai Jigou Guanli Zhaixing Banfa*), The People's Bank of China No. [2003] 6
176. *Provisional Measures on the Administration of Foreign Exchange of Individual Residents in Inland* 1998 (PRC) (*Jingnei Jumin Geren Waihui Guanli Zanxing Banfa*), promulgated by State Administration of Foreign Exchange on 1 September 1998, Huifa [1998] 11
177. *Provisional Measures on the Administration of Foreign labour and cooperation* 1993 (PRC) (*Duiwai Laowu Hezuo Guanli Zanxing Banfa*), promulgated by the Ministry of Foreign Trade and Economic Cooperation on 5 November 1993
178. *Provisional Measures on the Administration of Foreign Organs and Domestic Intermediary Agencies of Introducing Foreign Experts Culture and Education* 1993 (PRC) (*Guanyu Dui Jieshao Waiguo Wenjiao Zhuanjia Laihua Gongzuo De Jingwai Zuzhi He Jingnei Zhongjie Jigou Guanli De Zanxing Banfa*), promulgated by State Administration of Foreign Experts Affairs on 15 June 1993
179. *Provisional Measures on the Administration of the Ministry of Agriculture on Agricultural Interchange and Communication with the Regions of Taiwan* 1998 (PRC) (*Nongyebu Duitai Nongye Jiaoliu Huodong Guanli Zanxing Banfa*), promulgated by the Ministry of Agriculture on 9 September 1998, Nongbanfa [1998] 14
180. *Provisional Measures on the Administration of Opening Senior Employment Cooperation with Hong Kong Special Administration Regions* 2000 (PRC) (*Dui Xianggang Tebie Xingzhengqu Kanzhan Gaoji Laowu Hezuo Guanli Zanxing Banfa*), jointly promulgated by the Ministry of Foreign Trade and Economic Cooperation on 25 December 2000, Waijingmao Hefa [2000] 660
181. *Provisional Measures on the Control over Inland Residents Traveling for Such Business, Training, Employment as Non-Public Affairs to or from Hong Kong Special Administration Regions* 1998 (PRC) (*Neidi Jumin Congshi Shangwu Peixun Jiuye Deng Feigongwu Huodong Wanglai Xianggang Tebie Xingzhengqu De Zanxing Guanli Banfa*), promulgated by the Ministry of Public Security on 19 March 1998 and effective on 30 March 1998

182. *Provisional Measures on the Exit and Entry National Border of Overseas Chinese*, 1951 (PRC) (*Huaqiao Churu Guojing Zanxing Banfa*), promulgated by the Ministry of Public Security on 2 August 1951
183. *Provisional Measures on the Experiments of China-foreign Equity Joint Venture Travel Agencies* 1998 (PRC) (*Shiban Zhongwai Hezi Lvxingshe Zanxing Banfa*), jointly promulgated by China National Tourism Administration and the Ministry of Foreign Trade and Economic Cooperation on 2 December 1998
184. *Provisional Measures on Travel of Aliens in China* 1954 (PRC) (*Waiguo Qiaomin Lvxing Zanxing Banfa*), promulgated by the Ministry of Public Security on 10 August 1954
185. *Provisional Provisions of the Special Economic Zones in Guangdong Province for the Control of Personnel Entering and Leaving China* 1981 (Guangdong) (*Guangdong Sheng Jingji Tequ Renyuan Churujing Zanxing Banfa*), adopted by the 13th Session of the Standing Committee of the Fifth People's Congress of Guangdong Province on November 17, 1981 and promulgated on 24 December 1981
186. *Provisional Regulations of Administration of Foreign Holding and Foreign Self-funded Travel Agencies* 2003 (PRC) (*Waiguo Konggu Waishang Duzi Lvxingshe Zanxing Guiding*), jointly promulgated by China National Tourism Administration and the Ministry of Commerce on 12 June 2003 and effective on 11 July 2003
187. *Provisional Regulations of Quality Guarantee Deposit* 1995 (PRC) (*Lvxingshe Zhiliang Baozhengjin Zanxing Guiding*), promulgated by China National Tourism Administration on 1 January 1995
188. *Provisional Regulations of the Establishment and Administration of Sino-Foreign Equity or Cooperative Joint Venture Employment Agencies* 2001 (PRC) (*Sheli He Guanli Zhongwai Hezi Hezuo Jingwai Jiuye Zhongjie Jigou Zanxing Guiding*), promulgated by the Ministry of Labour and Social Security and the State Administration for Industry and Commerce on 9 October and effective on 1 December 2001
189. *Provisional Regulations on the Administration of Ordinary Passport for Public Affairs* 1993 (PRC) (*Guanyu Yingong Huzhao Guanli De Zanxing Guiding*), promulgated by the Ministry of Public Affairs in December 1993
190. *Provisional Regulations on the Administration of Sino-Foreign Joint Venture Personnel Intermediary Agencies* 2003 (PRC) (*Zhongwai Hezi Rencai Zhongjie Jigou Guanli Zanxing Guiding*), jointly promulgated by the Ministry of Personnel, the Ministry of Commerce and State Administration of Industry and Commerce on 4 September 2003
191. *Provisional Regulations on the Administration of Travel Agencies* 1985 (PRC) (*Lvxingshe Guanli Zanxing Tiaoli*), promulgated by the State Council on 11 May 1985
192. *Provisional Regulations on the Administration of Urban Household* 1951 (PRC) (*Chengshi Hukou Guanli Zanxing Tiaoli*), promulgated by the Ministry of Public of Security on 16 July 1951
193. *Provisional Rules on Attendance of Games or Competitions Abroad by Employment of Athletes* 1989 (PRC) (*Yundongyuan Shoupin Dao Guo(Jing)wai Cansai De Ruogan Guiding*), promulgated by State Commission for Physical Culture and Sports on 31 May 1989
194. *Provisional Rules on Some Issues of State Dispatched Coaches Aid for Foreign Countries* 1990 (PRC) (*Guanyu Gongpai Yuanwai Jiaolian Renyuan Ruogan Wenti De Zanxing Guiding*), promulgated by State Sport Commission on 16 November 1990
195. *Provisional Rules on the Administration of the Establishment of Sino-Foreign Equity Joint and Sino-Foreign Cooperation Job Intermediary Institutions* 2001 (PRC) (*Zhongwai Hezi Zhongwai Hezuo Zhiye Jieshao Jigou Sheli Guanli Zanxing Guiding*), jointly promulgated by the Ministry of Labour and Social Security and State Administration of Industry and Commerce on 9 October 2001

196. *Provisional Rules on the Exit, Entry and Stay of Aliens in China* 1951 (PRC) (*Waiguo Qiaomin Churu Ji Juliu Zanzing Guize*), promulgated by Government Administration Council on 28 November 1951
197. *Provisional Rules on the Recognition of Overseas Training Qualification of Dispatching Groups and Personals to Other Countries for Training of the Institutions and the Mass Organs* 1993 (PRC) (*Guanyu Shiye Danwei Shehui Tuanti Zuzhi Panqian Tuanzu He Renyuan Fu Guo (Jing) Wai Peixun Gongzuo Zige Rending De Zanzing Guiding*), promulgated by State Administration of Foreign Experts Affairs in June 1993, Waizhuanfa [1993] 204
198. *Provisions on Registration of Marriages Between Chinese Citizens and Foreigners* 1983 (PRC) (*Zhongguo Gongmin Yu Waiguoren Hunyin Dengji Banfa*), promulgated by the Ministry of Civil Affairs and approved by the State Council
199. *Provisions on the Introduction of High Quality Talents Abroad 1997(Shanghai)* (*Yinjin Guowai Gaokeji Rencai Banfa*), promulgated by Shanghai People's Government on 10 April 1997
200. *Public Circular on Issues Concerning Compatriots in the Region of Hong Kong or Macao Traveling to and from with Compatriots in the Region of Hong Kong or Macao Returning Certificate* 1979 (Guangdong) (*Guangdongshen Guanyu Qianfa Gangao Tongbao Huixiangzheng Ruogan Wenti De Gonggao*), promulgated by the Guangdong Bureau of Public Security in 1979
201. *Regulation of Inspection of Exit and Entry Borders 1995 (PRC)* (*Chujing Rujing Bianfang Jiancha Tiaoli*), promulgated by the State Council on 1 September 1995
202. *Regulations for Encouragement of Investment by Overseas Chinese and Compatriots from Hong Kong or Macao* 1990 (PRC) (*Guli Huaqiao Gangao Tongbao Touzi De Guiding*), promulgated by the State Council
203. *Regulations for Labour Cooperation with Hong Kong Region* 1996 (PRC) (*Yu Xianggang Diqu Laowu Hezuo De Guanding*), promulgated by the State Council on 5 September 1996
204. *Regulations for the Administration on Agency Services for Self-funded Studying Abroad* 1999 (PRC) (*Zifei Chuguo Liuxue Zhongjie Fuwu Guanli Guiding*), promulgated by the Ministry of Education and the Ministry of Public Security, and the State Administration of Industry and Commerce on 24 August 1999
205. *Regulations of Overseas Chinese Contributions or Donations* 1997 (Shanghai) (*Shanghaishi Huaqiao Juanzheng Tiaoli*), promulgated by Shanghai Municipality People's Government
206. *Regulations on Border Inspection* 1965 (PRC) (*Bianfang Jiancha Tiaoli*), promulgated by the State Council on 30 April 1965
207. *Regulations on Examination and Approval of Permanent Residence of Aliens in China* 2004 (*Waiguoren Zai Zhongguo Yongjiu Juliu Shenpi Guanli Banfa*), promulgated by the Ministry of Public Security, and effective as of 15 August 2004.
208. *Regulations on Passport and Visa* 1980 (PRC) (*Zhonghua Renmin Gongheguo Huzhao Qianzheng Tiaoli*), promulgated by the State Council 13 May 1980
209. *Regulations on the Record-keeping for Regulations and Rules* 2001 (PRC) (*Fagui Guizhang Beian Tiaoli*), promulgated by the State Council on 14 December 2001 and effective on 1 January 2002
210. *Regulations on Simplifying the Procedure of Examination and Approval of the Chinese Staff Employed in Foreign Investment Enterprises Going Abroad (or to Hong Kong or Macao)* 1993 (PRC) (*Jianhua Waishang Touzi Qiye Zhong Fang Renyuan Chuguo (Huozhe Gangao) Shouxu De Guiding*), promulgated by the Special Economic Zones Office of the State Council, and approved by the State Council
211. *Regulations on the Administration for Overseas Employment Intermediary Agencies (Amendment)* 2002 (PRC) (*Jingwai Jiueye Zhongjie Guanli Guiding (Xiuding)*), jointly promulgated by the

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212. *Regulations on the Administration for Overseas Employment Intermediary Agencies* 1992 (PRC) (*Jingwai Jiuye Zhongjie Guanli Guiding*), promulgated by the Ministry of Labour.
213. *Regulations on the Administration of Entry, Exit, Transit, Residence and Travel of Aliens in China* 1964 (PRC) (*Waiguoren Rujing Chujing Guojing Juliu Lvxing Guanli Tiaoli*), promulgated by the State Council on 13 April 1964
214. *Regulations on the Administration of Labour Market* 2000 (PRC) (*Laodong Shichang Guanli Guiding*), effective on 8 December 2000
215. *Regulations on the Administration of Skilled Personnel Market* 2001 (PRC) (*Rencai Shichang Guanli Guiding*), effective on 1 October 2001
216. *Regulations on the Administration of Travel Agencies (Amendment)* 1996 (PRC) (*Lvxingshe Guanli Tiaoli*), promulgated by the State Council on 15 October 1996
217. *Regulations on the Administrative Legislation Procedure* 1989 (PRC), promulgated by the Standing Committee of the National People's Congress on 4 April 1989, and effective as of 1 October 1990
218. *Regulations on the Administrative of Travel Agencies (Amendment)* 2001 (PRC) (*Lvxingshe Guanli Tiaoli*), amended pursuant to *Travel Agencies Administrative Measures* 1996 (PRC), promulgated by the State Council on 11 December 2001 and effective on 1 January 2002
219. *Regulations on the Procedure for Formulation of Rules* 2001 (PRC) (*Guizhang Zhiding Chengxu Tiaoli*), promulgated by the State Council on 16 November 2001 and effective on 1 January 2002.
220. *Regulations on the Procedure for the Formulation of Administrative Regulations* 2001 (PRC) (*Xingzheng Fagui Zhiding Chengxu Tiaoli*), promulgated by the State Council on 16 November 2001 and effective on 1 January 2002
221. *Reiteration of Strictly Forbidding of Sending Young Women to Abroad to Do Erotic Service by the Name of Working* 1997 (PRC) (*Guanyu Congshen Yanjing Yi Waipai Laowu Deng Minyi Xiang Jingwai Paiqian Nv Qingnian Congshi Seqing Fuwu De Tongzhi*), promulgated by the Ministry of Foreign Trade and Economy Cooperation. No. [1997] 803
222. *Related rules on Strengthening Examination and Approval of Exit China for Public Affairs (Extract)* (PRC) 1993 (*Guanyu Jiaqian Yingong Lingshi Chuguo(jing) Shenpi He Guanli Gongzuo De Youguan Guiding (Zhaibian)*), promulgated by the General Office of the Central Committee of Communist Party of China and the General Office of the State Council
223. *Reply of the Department of Consular under the Ministry of Foreign Affairs to Some Questions on Passport Affairs (Excepts)* 1993 (PRC) (*Waijiaobu Lingshisi Guanyu Huzhao Gongzuo De Jige Wenti De Dafu (Jiexuan)*), promulgated by the Department of Consular Affairs under the Ministry Foreign Affairs
224. *Rules Governing the Implementation of the Measures for the Administration on Agency Services for Exit and Entry for Private Affairs* 2002 (Beijing) (*Beijingshi Guanyu Shishi Yinsi Churujing Zhongjie Huodong Guanli Banfa Ruogan Guiding (Shixing)*), made pursuant to the *Measures for the Administration on Agency Services for Exit and Entry for Private Affairs* 2001 (PRC), promulgated by the Bureau of Public Security (Beijing) and the Administration of Industry and Commerce (Beijing) on 1 January 2002
225. *Rules of Providing Convenience of Enter and Residence with Senior Talents and Investors of Foreign Nationalities* 2003 (PRC) (*Guanyu Wei Waiguoji Gaochenci Rencai He Touzizhe Tigong Rujing Ji Bianli De Guiding*), jointly promulgated by the Ministry of Public Security, the Ministry of Foreign Affairs, the Ministry of Education, the Ministry of Technology and Science, the Ministry of Personnel, the Ministry of Labour and Social Insurance, the Ministry of Foreign Economic Relations and Trade, State Council Overseas Affairs Office and State Bureau for Foreign Experts in April 2003

226. *Rules of Some Matters of the Application of Inland Residents Traveling to Taiwan for Visiting Relatives* 1988 (PRC) (*Guanyu Neidi Gongmin Shenqing Qu Taiwan Diqu Tanqing Deng Wenti De Guiding*), promulgated by the Ministry of Public Security on 16 November 1988
227. *Rules of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of Foreign Affairs, the Ministry of Justice and the Ministry of Finance on Implementation Measures of Forced Expelling Aliens* 1992 (PRC) (*Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Gonganbu Waijiaobu Sifabu Caizhengbu Guanyu Qiangzhi Waiguoren Chujing De Zhixing Banfa De Guiding*), promulgated by Supreme People's Court, Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of Foreign Affairs, the Ministry of Justice and the Ministry of Finance on 31 July 1992
228. *Rules of the Organization Department under the Central Committee of Communist Party of China on Some Issues of Exiting Abroad or to Hong Kong or Macao of Party Member* 1981 (PRC) (*Zhonggong Zhongyang Zuzhibu Guanyu Gongchandangyuan Yinsishi Chuguo Huo Qu Gangao Diqu De Ruogang Wenti De Guiding*), promulgated by the The Organization Department under the Central Committee of Communist Party of China on 11 September 1981
229. *Rules of the Organization Department under the Central Committee of Communist Youth League of China on Some Issues of Exiting Abroad or to Hong Kong or Macao of League Member* 1981 (PRC) (*Gongqingtuan Zhongyang Zuzhibu Guanyu Gongqingtuanyuan Yinsishi Chuguo Huo Qu Gangao Diqu De Ruogang Wenti De Guiding*), promulgated by the the Organization Department under the Central Committee of Communist Youth League of China on 21 September 1981
230. *Rules on Complaint Reporting* 1995 (PRC) (*Xingfa Tiaoli*), promulgated by the State Council on 28 October 1995 and effective on 1 January 1996
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11. *Martial Act of 1934* (ROC) (*Jieyan Fa*)
12. *Measures of Ministry of Education of Sending Overseas Students 1943* (ROC) (*Jiaoyubu Xuanpai Liuxuesheng Banfa*)
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14. *Measures on the Administration of Exit of Military Service Person and Reservists in the Region of Taiwan 1957* (ROC) (*Taiwan Diqu Yinan Ji Houbei Junren Chujing Chuli Banfa*)
15. *Measures on the Administration of Seafarers in the Period of Suppression 1954* (ROC) (*Kanluan Shiqi Haiyuan Guanli Banfa*)
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23. *Regulations on Permission of Hong Kong Permanent Residents Enter into and Permanently Resident in Taiwan Areas (Amendment) 2002* (ROC) (*Xianggang Aomen Jumin Jinru Taiwan Diqu Ji Juliu Dingju Xuke Banfa (Xiuding)*)

24. *Regulations on the Certificate of Overseas Chinese Identity* 2002 (ROC) (*Huaqiao Shenfen Zhengmin Tiaoli*)
25. *Regulations on the Entry and Exit in Taiwan during the Rebellion Suppression Period* 1957 (ROC) (*Kanluan Shiqi Taiwan Diqu Rujing Chujing Guanli Banfa*)
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The USA

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34. *Passport Act of 1926* (USA)
35. *U.S. Code of Federal Regulations Title 22 – Foreign Relations*

Vietnam

36. *Circular of the Ministry of Interior Providing Guidance on the Implementation of Government Decree No. 24/CP dated March 23, 1995 on Entry and Exit Proceedings* 1995 (Vietnam)
37. *Circular of the Ministry of Labour, War Invalids and Social Affairs Providing Guidance on the Implementation of Decree No.07/CP dated 20 January 1995 of the Government, on Sending Vietnamese Labourers Abroad to Work for a Limited Period of Time* 1995 (Vietnam)
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42. *Circular on Prescribing the Regime of Collection, Remittance and Use Management of Fees for Granting Passports, Visas and Papers on Entry, Exit, Transit and Residence in Vietnam* 2003 (Vietnam)
43. *Civil Code of Socialist Republic of Vietnam* 1995
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47. *Decision on Carrying Cash in Foreign Exchanges and Vietnamese Dong Through Border Gates* 1999 (Vietnam)
48. *Decree of the Government of Vietnam Guiding the Execution of Expulsion Penalty* 2001 (Vietnam)
49. *Decree of the Government of Vietnam on Exit and Entry of Vietnamese Citizens* 2000 (Vietnam)
50. *Decree of the Government of Vietnam on Foreign Exchange Management* 1998 (Vietnam)
51. *Decree of the Government of Vietnam on the People's Identity Card* 1999 (Vietnam)
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53. *Joint Circular Guiding the Granting of General Passports and Laissez-Passers to Vietnamese Nationals Overseas According to the Government's Decree No. 05/2000ND-CP of March 3, 2000 on Exit and Entry of Vietnamese Citizens* 2002 (Vietnam)
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2. *American Convention on Human Rights* 1969, enter into force on 18 July 1978, OAS Treaty Series, No.36 (1969), AMR
3. *American Declaration of the Rights and Duties of Man* 1948, AMDRM
4. *Arab Charter on Human Rights* 1994, 2 month after 7 ratification or accession, 8 *Human Rights Law Journal* 151 (1997)
5. *Charter of United Nations*, entered into force on 24 October 1945, Charter of UN
6. *Concluding Document of the Vienna Meeting of January 15, 1989 CSCE*
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12. *Draft Principles on Freedom and Non-Discrimination in Respect of the Rights of Everyone to Leave Any Country, including His Own, and to Return to His Country*, prepared by Judge Jose Ingles, UN Sales No. 64. XIV.2, UN Doc. E/CN.4/Sub.2/220/Rev.1 (1963), 1963 Ingles Draft Principles on RLR
13. *Draft Principles on Freedom and Non-Discrimination in respect of the Rights of Everyone to Leave Any Country, including His Own, and to Return to His Country*, adopted by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Res. 2B (XV), UN Doc. E/CN.4/1846 (1963), 1963 UN Draft Principles on RLR
14. *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950, enter into force on 03 September 1953, ETS No. 5, EHR
15. *European Convention on the Legal Status of Migrant Workers* 1977, enter into force on 01 May 1993, ETS No. 93
16. *European Social Charter (Revised)* 1996, enter into force on 01 July 1999, ETS No.163
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21. *International Convention on the Elimination of All Forms of Racial Discrimination* 1966, enter into force on 04 January 1969, 660 UNTS 195, CERD
22. *International Convention on the Protection of the Rights of All Migrant Workers and Their Families* 1990, 3 month after 20 ratification, UNGA Res. 45/158
23. *International Covenant on Civil and Political Rights* 1966, 16 December 1966, enter into force on 23 March 1976, 999 UNTS 171, ICCPR
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25. *Protocol No. 4 of European Convention for the Protection of Human Rights and Fundamental Freedom*, ETS No. 46, EHR P4
26. *Protocol Relating to Status of Refugees* 1967, 31 January 1967, enter into force on 04 October 1967, 660 UNTS 267, Protocol relating to the CSR
27. *Statute of the International Court of Justice*, ICJ
28. *Strasbourg Declaration on the Right to Leave and Return* 1986, adopted by Experts on the Right to Leave and Return on 26 November 1986, 1986 Strasbourg Declaration on RLR
29. *The Bangkok Declaration* 1993, adopted by the Asian Preparations Conference of the Second Conference on Human Rights
30. *Universal Declaration of Human Rights* 1948, UDHR, G.A. res.217 A(III), UN Doc.A/810, UDHR
31. *Vienna Convention on the Law of Treaties* 1960, adopted 22 May 1960, entered into force 27 January 1980, UN Doc. A/CONF. 39/27

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Lists of Acronyms

Chinese institutions

BBSCA	Bureau of Border Security Check and Administration
BEEA	Bureau of Exit and Entry Administration
CCTV	China Central Television
Central Bank	The People's Bank of China
CEPA	The Closer Economic Partnership Arrangement
CNTA	Chinese National Tourism Administration
CPC	Communist Party of China
HKSAR	Hong Kong Special Administration Region
MFA	Ministry of Foreign Affairs, China
MFERT	Ministry of Foreign Economic Relations and Trade
MLSS	Ministry of Labour and Social Security, China
MOC	Ministry of Commerce, China
MOE	Ministry of Education, China
MOP	Ministry of Personnel, China
MPS	Ministry of Public Security, China
MSAR	Macao Special Administration Region
NPC	National People's Congress, China
SAFE	State Administration of Foreign Exchange
SAFEA	State Administration of Foreign Experts Affairs, China
SAIC	State Administration of Industry and Commerce, China
SBS	State Bureau of the Statistics, China
SHMO	State Council Hong Kong and Macao Affairs Office, China
SOCO	State Council for Overseas Chinese Affairs Office, China
STO	State Council Taiwan Affairs Office, China

International institutions

CPDPM	UN Sub-Commission on Prevention of Discrimination and Protection of Minorities
HRC	UN Human Rights Committee
ICHR	International Court of Human Rights
ICJ	International Court of Justice
IMF	The International Monetary Fund
IOM	The International Organization for Migration
NGO	Non-Governmental Organizations
OECD	Organization of Economic and Cooperation Development

WTO The World Trade Organisation

Regional and other countries' institutions

AFCM African Commission on Human and People's Rights
AMCM Inter-American Human Rights Commissions
AMCT Inter-American Court of Human Rights
CPV Communist Party of Vietnam
ECJ European Court of Justice
EU European Union
EUCM European Human Rights Commissions
EUCT European Court of Human Rights
MLWS Ministry of Labour, War invalids and Social Affairs
OAS The Organization of American States
SBV State Bank of Vietnam
USCR US Committee for Refugees

Others

1963 Ingles' Study

on RLR Study of Discrimination in Respect of the Right of Everyone to Leave
any country, including His Own, and to Return to His Country: Special
Reporteur of the Subcommittee on Prevention of Discrimination and
Protection of Minorities
OAED *Oxford Advanced Learner's English-Chinese Dictionary*
PRC The People's Republic of China
RLR The right to leave and return
ROC The Republic of China
SARS Severe Acute Respiratory Syndrome
USVISIT USA Visitor and Immigration Status Indication Technology System

Abstract

The Right to leave and return (RLR) has been affirmed as a fundamental human right in several international instruments. While being a fundamental human right, each State has the sovereign right to regulate RLR in accordance with its own laws. The regulation of RLR, however, is not only an attribute of sovereignty but an issue with important political, economic and security implications for the State. Given its significance, it is understandable and desirable that States regulate RLR. The regulation must however take account of both the interests of the State and the human rights dimension of the right. This is an issue of balance.

In the case of China, the country's communist political system has significantly affected the development of RLR and the country's approach to it. As a rule China's approach is restrictive. As part of its reform and 'opening up' policies, China has embarked on a range of reforms to liberalise RLR, but the reforms lack cohesion and focus, and remain restrictive. Given its peculiar past and complex social and economic conditions, China may have some justifications for its approach, but on balance, has more to gain from adopting a more liberal approach. The issue of RLR in China is crucial both for the future of China, and for development of RLR in the world.

China's current policy's on RLR still reflects a closed culture. A more open policy is not only consistent with international human rights norms, but also a useful infrastructure for the country's place in the global economy. Great achievements over the last 25 years and encouraging developmental trends demand acceleration of reforms to protect RLR in China. A careful and well-coordinated migration strategy with a well-defined RLR focus could enhance China's economic progress as well as its international human rights image. When designing the reform strategy, the balance of the Western experience and Chinese realities needs to be finely kept.

This thesis will explore the Chinese regulatory regime governing RLR to determine its consistency with international standards. The thesis is divided into 15 chapters. It investigates RLR in international migration law and practice; analyses RLR in the context of China, and identifies its driving factors; investigates the conditions and practical concerns relevant to the protection of RLR; and concludes with recommendations on how the Chinese regulatory regime governing RLR can be improved.

Chapter one

Introduction

1.1 Research objectives

The aim of this thesis is to explore the Chinese regulatory framework governing the right to leave and return (the RLR), to determine its consistency by reference to international human rights ethics. In more specific terms, the thesis focuses on four main objectives: (i) an investigation of the RLR in international migration law; (ii) an analysis of the RLR in the context of China and an identification of the factors that drive it; (iii) an investigation of the favourable conditions and practical concerns relevant to the protection of the RLR in China; and (iv) identification of the policy implications for the protection of the RLR in China.

1.2 Research context

The inevitable trend of globalisation¹ cannot be divorced from orderly international migration, which is, in turn, founded on the RLR.² According to the International Organisation of Migration (IOM), “At the start of the 21st century, one out of every 35 persons worldwide was an international migrant. Over the last 35 years, the number of international migrants has more than doubled.”³ The late 20th century has been described as both “the age of migration”⁴ and

¹ In this regard Peter Van Ness has said: “Many analysts have concluded that, like it or not, we live in an era of globalisation, and humanity increasingly shares a common fate. ...The peoples of the world are linked more closely through a greater participation by virtually all States in the global market, and thanks to the evolution of modern communications technology.” Ness, Peter Van, *Human Rights and Democracy in China: Four Theories on Why the World Should Care*, working paper No.167, Peace Research Centre, Research School of Pacific Studies, The Australian National University, 1996, pages 13-14.

² Ingles, Jose D. “The United Nations Study of Discrimination in Respect of the Right of Everyone to Leave any country, including His Own, and to Return to His Country”, in Vasak, Karel and Liskofsky, Sidney, (ed), *The Right to Leave and Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976, pages 475-485.

³ The total number of international migrants is estimated 175 millions persons in 2002, 2.9 percent of the world population, in *Facts and Figures on International Migration*, International Organization of Migration, *Migrations Policy Issues*, No.2, March 2003, page 1.

⁴ Castles, S. and Miller, M., *The Age of Migration*, Basingstoke, Macmillan, the USA, 1998.

“the age of rights”.⁵ In 1948, the *Universal Declaration of Human Rights* (UDHR) was proclaimed, followed by the *International Covenant on Civil and Political Rights* (ICCPR) in 1966, in which the RLR was affirmed as a fundamental human right that entitles everyone to freely leave any country, including one’s own, and to freely return to one’s country. Without doubt, the RLR has an important role in human rights because one of the most essential and general forms of human freedom can only be realised through it — namely that people are free to choose where to go, where to stay, and where to live.⁶ From a legal perspective, current debate regarding the RLR is mainly concentrated on the precise interpretation of the RLR and its practical enforcement.

In 2000, 513,000 people, 0.04 percent of the Chinese population, or one out of every 2,500 Chinese people was an international migrant. Chinese international migration has increased exponentially, especially since the reforms of exit and entry administration at the end of 2001.⁷ Yet Chinese international migration is a level of migration considerably lower than the rest of the world.⁸ With further integration into the world, China presents a huge potential for human resources with significant implications for international migration and for the protection of the RLR.⁹

⁵ Bobbio, N. *The Age of Rights*, Political Press, Cambridge, the UK, 1995.

⁶ Foldesi, Tamas, “The Right to Move and Its Achilles’ Hell, The Right to Asylum”, *Connecticut Journal of International Law*, Spring 1993, page 289.

⁷ According to 2001-2002 Exit and Entry Data published by the Bureau of Entry and Exit Administration, China, Beijing, 2003; in 2002, 121,330,000 Chinese citizens travelled to 240 foreign countries and areas, an increase of 11.485 percent from the same figure in 2001. 118,000 Chinese citizens were approved to permanently immigrate to other countries, 4 017 000 Chinese were approved to go abroad firstly. In 2002, 112,263,000 aliens entered China from 239 countries and areas, an increase of 10.49 percent from the same figure in 2001.

⁸ According to *International Migration 2002*, Department of Economic and Social Affairs, Population Division, the United Nations, October 2002, different countries and regions migration stock rates have been calculated by the author as following: Egypt (0.29 percent), India (0.62 percent), Indonesia (0.19 percent), Romania (1.4.19 percent), Russian Federation (9.11 percent), Hungary (2.97 percent), Cuba (0.73 percent), Brazil (0.32 percent), Japan (1.27 percent), Republic of Korea (1.27 percent), Singapore (33.65 percent), United Kingdom (6.78 percent), France (10.59 percent), the USA (12.35 percent), Australia (21.4.58 percent) and New Zealand (22.50 percent). Migration stock rate in China is just a little higher than that in Vietnam (0.028 percent). 0.04 percent is also significantly lower than the average rate in more developed regions, less developed regions and least developed countries, which are 8.739 percent, 1.452 percent and 1.566 percent correspondingly.

⁹ China is basically closed society. For more information, please see Chapter five.

The relatively slow pace in the development of international migration in China is mainly due to strict control policies over the RLR. The strict visa policy of destination countries, such as the USA, is the main obstacle for the entrance into other countries of Chinese people. However, it is beyond the research scope of this thesis. With the ratification of the ICCPR by 152 countries in June 2004,¹⁰ concern over the RLR has now passed its global peak, but it is still a problem for China. China is actually one of the few countries worldwide that exercises restrictive policies in relation to the RLR of its nationals.¹¹ Nevertheless, the protection of the RLR in China is no longer as hopeless as it was before 1978. The most important cause for this change of attitude is the relaxation of strict control policies over the RLR in China, which began in 1978 alongside economic reforms. Reforms aimed at the simplification of exit and entry procedures began in December 2001.¹² However, the discrepancy between the RLR protection in China and the rest of the world remains significant.

The universality of the RLR conditions in 21st century cannot be divorced from the experience of China's 1.3 billion people that make up 21 percent of the human population.¹³ Increasing the RLR protection is desperately needed to stop restrictions that are inconsistent with international norms and which encumber effective interchange and cooperation between China and the rest of the world. The issue of the RLR in China is crucial both for the future of China, and the

¹⁰ International Services for Human Rights, "The Ratification Status of the Main Human Rights Treaties", ishr-06-2004, <http://www.ishr.ch/About%20UN/Ratification/Ratification%20-%20Human%20Rights%20treaties.htm> (18/05/2003)

¹¹ Vietnamese and North Korean RLR policies are also restrictive.

¹² "State to Simplify Entry-exit Rule", *The China Daily*, 11/22/2002, at <http://www1.chinadaily.com.cn/news/2001-11-22/44711.html> (18/04/2003); Ling, Han, "Passport Easier to Get in Shanghai", *China Central Television 09:08:21 30-08-2002*, at English Channel, <http://www.cctv.com/english/news/Tvnews/MorningNews/20020830/100017.html> (20/05/2003); Wu, Inner, "Passport Gain Wider Currency in China", *China Central Television*, 15:10:23 17-10-2002, English Channel, <http://www.cctv.com/news/China/FinanceABusiness/20021017/100400/html> (18-04-2003); Zhu, Daqiang, "Chinese Reform Strategy of Exit and Entry Control after Entrance into the WTO" (*Zhongguo Mingque Rushihou Churujing Guanli Fangxiang*), China News Agency, 23-11-2001, <http://review.jerb.com.cn/ournews/asp/readNews.asp?id=63921> (18/04/2003).

¹³ According to "Population and Development Indicators for Asia and the Pacific", 2002, http://www.unescap.org/pop/data_sheet/2002/tab1.htm (23/05/2003), Chinese population was 1,299,656,000 in 2002. China projected population in 2050 will be 1,460,500,000.

development of the RLR in the world.¹⁴

the RLR theory is the cornerstone of Chinese migration law. It forms the basis of entry and exit control, passport administration, and other key mechanisms or systems in Chinese migration law. Chinese migration law is the central safeguard and reflection of the RLR in China. Based on the above considerations, accelerating Chinese migration law reform may improve the protection of the RLR in China.

1.3 Research scope

The Chinese regulatory framework governing the RLR includes Chinese migration law (*Zhongguo Yimin Fa*), the Constitution, administrative law, and administrative procedural law and foreign exchange law. The Chinese government has not yet promulgated statutes that use the terms ‘migration’, ‘immigration’ or ‘emigration’. The contents of migration laws are contained in laws governing exit and entry. Chinese migration law here means Chinese existing laws governing exit and entry, which is also called Chinese exit and entry administration law (*Zhongguo Churujing Guanli Fa*).

Chinese migration law is confined to migration laws on the Mainland of the People’s Republic of China (PRC). The regulations of Hong Kong Special Administrative Region (HKSAR), Macao Special Administrative Region (MSAR) and Taiwan, concerning the control over Chinese citizens including residents in Hong Kong, Macao or Taiwan travelling between those regions and the Mainland, will not be included in Chinese migration law. This is due to the particular administrative status of special administrative regions, as in the cases of Hong Kong and Macao, or as an independent region, in the case of Taiwan. In view of the aim of endeavouring to provide some legal reform recommendations based on the

¹⁴ Michael, Franz and Wu, Yuanli have asserted that, “The size of China adds to the dimension of the Chinese experience; so does the fact that Chinese culture has been one of the most influential in human development. That Chinese communism has tried desperately to undermine this culture implies the importance of the Chinese story.” See, “Introduction: An Overview” in Wu, Yuanli et al, *Human Rights in the People’s Republic of China*, Westview Press, Boulder, Colorado, the USA, 1988.

RLR, apart from migration laws, other pertinent regulations¹⁵ will be scrutinised from the perspective of the RLR.

Given the explicit distinctions between the RLR and the right to freedom of movement within the territory, the latter will not be discussed in this study. The RLR for public affairs or official duties constitutes one part of the RLR. Unless noted otherwise, the RLR in China in this thesis merely implies the RLR for private affairs in China. If there are statistical contradictions between international organisations and the Chinese authorities regarding the same fact, this research will favour the former. As a consequence of the lack of freedom of information legislation, or an effective monitoring system in China, Chinese data is less reliable than that from international organisations.¹⁶

1.4 Organisation of the thesis

The first four chapters of this thesis will explore the RLR in international migration law and among comparable States. The remaining chapters identify factors driving the RLR in China, analyse the historical development, present status and issues of the RLR in China, then argue as to the favourable conditions and practical concerns for protection of the RLR, to then identify the policy implications for its protection.

The introductory chapter briefly sets out the research objectives, context and scope, organisation of the thesis, research methodology, sources and research significance. It gives a general picture of this thesis. In developing the analytical rationale, it is necessary to decide at the outset what the foundations of the RLR are, and what States' responsibility for the protection of the RLR

¹⁵ The *Constitution of People's Republic of China (Amendment)* 2004, the *Law of Nationality* 1980 (PRC), the *Regulations of Inspection of Exit and Entry Borders* 1995 (PRC), the *Law of Administration Procedure* 1989 (PRC), the *Regulations of Administrative Review* 1999 (PRC) and the *Law of Administrative License* 2003 (PRC).

¹⁶ American international professor, economic professors, Korean economic expert and Chinese economic experts questioned the trueness in their papers or works based on systematic analysis. For details see "international community continually question the falseness of Chinese economic data" (Guoji Shixu Zhiyi Zhongguo Jingji Zhaojia) www.epochtimes.com/gb/2/3/22/n178563.htm (08/07/2005)

might entail. In other words, it is necessary to benchmark the measurement of the RLR in China. Chapter two is concerned with identifying the foundations of the RLR from three angles: philosophy, history, globalisation and international migration.

Critical research of the RLR in China and Chinese migration law requires knowledge of the rules and practice in international migration law, of the legal experiences, precedents, lessons from comparable States, and of the present and past situation in relation to future trends. Chapter three summaries and describes the RLR in international migration law. It aims to provide an objective criterion to which China could make reference and comparison from five perspectives, namely general considerations on the RLR, State acceptance of the RLR, permissible limits on the RLR, the right to leave the country, and the right to return to one's own country. Chapter four contains the descriptive cases studies of Vietnam, Taiwan and the USA.¹⁷ These three selected States and regions' practices protecting the RLR provide practical experiences and lessons from which China could learn.

Chapter five identifies the factors that drive the RLR in China from the perspectives of the politics, economics, culture and law. The political and legal factors are the foremost and most direct factors affecting the RLR in China. The analysis of above factors argues that the development of the RLR in China and the emergence of the issues of the RLR, explored from chapters six to thirteen, is a corollary of these driving factors. In order to better appreciate the issues associated with the RLR in China, it is necessary to trace the historical development of the Chinese regulatory framework governing the RLR. A brief historical sketch starting from the Qing dynasty, yet focused on the period from 1979 to 2001, is included in Chapter six. Chapter seven explores planned reform strategies and measures of exit and entry administration from 2001 to 2005, to predict which issues of the RLR in China could be solved with their

¹⁷ Vietnam is experiencing great political and economic reforms, of a similar nature to that of current Chinese political and economic reform. The Taiwanese legal system shares a cultural background with that of Mainland China, and interacts with Chinese legislation governing exit and entry administration. As one of traditional immigration States and typical developed States, the regimes protecting RLR in the USA are advanced. Its RLR policy has the most policy links with other countries.

implementation, what situation might result if no more reform measures were taken, and what influences the reform strategies and measures have had.

Do serious issues of the RLR exist in China? If so, are they serious enough to demand the close attention of the Chinese government and foreign States? Building on reference to the RLR in international migration law and selected States in chapters three and four, chapters eight to thirteen attempt to answer these questions based on an analysis of the Chinese regulatory framework governing the RLR. These chapters form the centre of the thesis — that many serious issues demand prompt resolution in order to protect the RLR in China.

Chapter eight argues that there are bureaucratic barriers to the RLR posed by the formalities of passport application and passport administration. Chapter nine argues that there are many unacceptable prohibitions and limits on the right to leave in China. Chapter ten discusses regulatory measures that limit the right to return of Chinese citizens. Chapter eleven questions and critiques the control over the travel of Mainland Chinese to and from the HKSAR, MSAR and Taiwan. In particular, to question the principles of processing applications, which are questions overlooked by past researchers and officials, as a consequence to their being too accustomed to them. Chapter twelve considers the unique institution of the emigration intermediary agencies. Chinese emigration intermediary agency laws are an indispensable part of the regulatory framework governing the RLR. An advanced agency can help realise the RLR. Chapter thirteen argues that Chinese exit and entry administrative system faces serious issues.

It is worth noting that many of the limits on the RLR identified in chapters from eight to thirteen have been ignored or have received little attention in China because research into the RLR in China is a politically sensitive topic, which brings big risks and little economic benefit to researchers. Further, research into the exit and entry administration in China is underdeveloped, which has the effect of weakening the RLR. Many of the arguments regarding the limits on the RLR in China presented in this thesis have not been previously raised in the academic literature.

Chapter fourteen investigates why it is necessary and feasible to protect the RLR, and explodes

the myths which justify opposing protection of the RLR in China. Chapter fifteen, by a series of recommendations, seeks to find a possible solution to the issues addressed from chapters eight to thirteen.

1.5 Research methodology and sources

Research methodology

The multi-disciplinary nature of this thesis has required adopting a number of approaches for evaluating the Chinese regulatory framework governing the RLR, including an analysis of migration law, of international law, of substantive and procedural administrative law, and of public policy and economics. The overall approach is based on traditional legal methods, such as the analysis of the legal provisions, combined with insights from other disciplines including a comparative methodology, historical methodology and critical theory. The overall approach for this study allows a suitable method to be applied to a specific area of the analysis where that technique is the most relevant. Each research strategy has its limitations and no single strategy is adequate for the complete analysis undertaken. It is only by adopting a multi-disciplinary approach that the constraints of individual disciplines are overcome.

Reference sources

The reference sources used for this thesis include primary legal sources, policies and formal reports; as well as secondary sources such as texts, journal articles, research theses, news reports and governmental speeches. Data, ministerial provisions and reports about exit and entry and the RLR in China, are not totally open to the public, as they can be in Western countries, due to the political sensitivity of the RLR and the lack of freedom of information legislation in China. Textbooks and academic papers regarding the RLR and exit and entry are only published within public security departments. Because it is so difficult to access to Chinese materials from Australia, I returned to Beijing in August 2003 and May 2004 to collect materials.¹⁸ To better

¹⁸ I returned to Beijing in August 2005 and May 2004 to collect materials which include works, journal articles, newspaper articles, the Master theses, the doctoral theses, the collection of relevant laws, regulations and policies. These materials are reliable as they are officially published or internal published in public security authorities or communist party organizations in Mainland China. They are in Chinese only.

understand Chinese statutes, besides the English and Chinese title of Chinese statutes, I also give the promulgation bodies, promulgation date and effective date in the List of Chinese Statutes.

Three more points must be noted. Firstly, no Chinese legal cases are quoted to support the thesis because China has a civil law system. Earlier higher Courts' verdicts are not legal sources for the purpose of making later determinations by the lower Courts. Secondly, I have had to personally translate some materials from Chinese into English because only some Chinese texts have been officially translated into English. Thirdly, the changing nature of existing Chinese laws governing exit from and entry into China requires updated materials to be included in the thesis. Limited by the fact that some provisions are not open to the public, the analyses of the updated provisions are mainly based on official news and speeches, usually found on the Chinese official websites.

Governmental dynamics continue to operate and many aspects of the RLR remain in transition. Thus, it is necessary to establish a cut-off date after which no further legal information would be sought or included. The currency of this research is limited to October 30, 2004.

1.6 Research significance

Although considerable research has been devoted to human rights in the world and in China¹⁹, less attention has been paid to the RLR in China, especially from the perspectives of universal

¹⁹ Ingles, Jose D, *Study of Discrimination in Respect of The Right of Everyone to Leave any country, including His Own, and to Return to His Country: Special Rapporteur of the CPDPM*, United Nations Publication Sales No.: 61.4. XIV. 2 New York, 1963; Freedman, Warren, *The Right to Travel: A Right or a Privilege? Work Paper of Sao Paulo Conference on the Law of the World*, the World Peace Through Law Centre, Washington, the USA 1981; Hannum, Hurst, *The Right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987; Plender, Richard, *International Migration Law*, Revised 2nd ed, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988; Vasak, Karel etc (ed), *The right to Leave and Return: Papers and Recommendations of the International Colloquium Held in the Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Ann Arbour, the USA, 1976

principles and Chinese realities.²⁰ The limited research about the RLR in China has tended to focus on a few limited aspects of economics, social science, demography and history, such as Chinese coolie (unskilled labourer) migration and Chinese life and integration in host countries, rather than law.²¹ The limited research regarding Chinese migration law has been descriptive rather than analytical.²² Chinese researchers have thus in the past considered that there are no

²⁰ Baehr, Peter R. et al (ed), *Human Rights: Chinese and Dutch Perspectives*, Kluwer Law International, The Hague, the Netherlands, 1996; Bradley, Catherine, *What Do We Mean by Human Rights: Freedom of Movement*, Franklin Watts, London, 2002; Cranston, Maurice, *What are Human Rights?* Taplinger Publishing Co., Inc. New York, 1973; Edwards, R. Randle, Henkin, Louis and Nathan, Andrew J., *Human Rights in Contemporary China*, Columbia University Press, New York, 1986; Friedmann, Daniel and Barak-Erez, Daphne (ed), *Human Rights in Private Law*, Hart Publishing c/o, Oregon, the USA 2001; Hegarty, Angela and Leonard, Siobhan (ed), *A Human Rights: An Agenda for the 21st Century*, Cavendish Publishing Limited, London, 1999; Kent, Ann, *Human Rights in PRC*, Discussion Paper No.3, 1989-90, Legislative Research Service, the Parliamentary of the Commonwealth of Australia, 1990; Ness, Peter Van, *Human Rights and Democracy in China: Four Theories on Why the World Need Care*, working paper No.167, Peace Research Centre, Research School of Pacific Studies, Canberra, The Australian National University 1996; Wu, Yuanli et al, *Human Rights in PRC*, Westview Press, Boulder, Colorado, the USA 1988; and Human Rights White Papers of The Chinese Government, Reports of Human Rights in China, and IOM reports, and UN reports

²¹ Campbell, Persia Crawford, *Chinese Coolie Emigration to Countries within the British Empire China* Frank Cass and Company Ltd. London, 1923, Etienne Dennerly, *Asia's Teeming Millions: and Its Problems for the West*, Kennikat Press, Port Washington, 1931; Irick, Robert L., *Ch'ing Policy Toward the Coolie Trade 1847 – 1878*, Chinese Materials Centre Asian Library Series No. 18, 1982; Judith M. Brown & Rosemary Foot, *Migration: The Asian Experience*, The Macmillan Press Ltd. London, 1994; Sun, Wangning, *Leaving China: Media, Migration, and Transnational Imagination*, Rowman & Littlefield Publishers, Inc., Maryland, the USA, 2001, T.P.Buggy, *Chinese Immigration and the Emergence of an Australian Image of China 1848-1861*, the thesis of Master of Arts Macquarie University, 1978; Wang, Gungwu, *Don't Leave Home: Migration and The Chinese*, Times Academic Press, Singapore, 2001; Wang, Sing-wu *The Organization of Chinese Emigration 1848-1888 with special reference to Chinese Emigration to Australia*, Chinese Materials Centre Inc. San Francisco, 1978

²² Committee of Exit and Entry Administration under Chinese Association of Police, (ed), *The Collection of Papers on the Control of Exit and Entry (III) (Churujing Guanli Lunwenxuan (san))*, Interior Published within Public Security Organs (*Gongan Jiguan Neibu Faxing*), the Publishing House of Qunzhong, Beijing China, 2001; Committee of Exit and Entry Administration under Chinese Association of Police, (ed), *The Collection of Papers on the Control of Exit and Entry (II), (Churujing Guanli Lunwenxuan (er))*, Interior Published within Public Security Organs (*Gongan Jiguan Neibu Faxing*), the Publishing House of Qunzhong, Beijing China, 1999; Department of Exit and Entry Administration, Beijing Public Security Bureau, *the Kit of Exit and Entry (Churujing Xuzhi)*, the Publishing House of Renshi, Beijing, 2000; Ministry of Public Security of the PRC, *The Textbook Control of Country Board and Administration of Exit and Entry (Bianfang Yu Churujing Guanli)*, the Publishing House of the University of People's Public Security, Beijing, 1999; Wong, Li, *International Immigration Law and the Practices (Guoji Yimin Fa Lilun Yu Shijian)*, the Publishing House of Law, Beijing, China, 2001; Xiang, Dang, *The Guide to the Law of Exit and Entry in China and Foreign Countries, (Zhongwai Churujing Falv Zhinan)*, the Publishing House of China University of People's Public Security, Beijing, 1998.

gaps and deficiencies in the protection of the RLR in China, or that any gaps and deficiencies are not serious enough to require urgent reform of relevant laws. The reason for this is that the most-used research methodology is that of vertical, rather than horizontal, comparison.²³ With vertical comparison, the main conclusions focus on achievements in the protection of the RLR in China — and tend to unrealistic optimism in regard to the protection of the RLR. An inclination towards vertical comparison may stem from a lack of full understanding of the protection of the RLR in international migration law and comparable States.

This underdeveloped research becomes particularly relevant as the importance of the “the partnership with the countries of origin” is increasingly acknowledged by receiving countries when devising their migration policies.²⁴ It is time to accelerate research on the current status of the RLR, the issues that affect it, and possible solutions in the Chinese context. It is hoped that this thesis will fill the research gaps in the area of the RLR and Chinese migration law by conducting a comprehensive and critical legal analysis.

This research is significant in several respects. It will help to lay the legal groundwork for reform of Chinese regulatory framework governing the RLR, enhancing the effective protection of the RLR in China. Establishing this legal groundwork is an essential precondition for further reform of Chinese regulatory framework governing the RLR. Advancing a legislative reform strategy may turn a theoretically possible the RLR into a the RLR that is real in practice. The Chinese government, in pursuing policies of openness and reform, needs a more comprehensive legal framework as a reference to then support the reform and improve the effective protection of the RLR.

²³ See “Simplified Exit-entry Rules Seen as Vital to China”, 23 November 2001, *The China Daily*, http://www.chinadaily.com.cn/en/doc/2001-11/23/content_9497.htm (19/12/2003); “China to Give Its Citizens More Freedom in Foreign Currency Purchase”, 04 Sep. 2003, *The China Daily*, http://www.chinadaily.com.cn/en/doc/2003-09/04/content_26117.htm (9/10/2003) and Information office of the State Council of The People’s Republic of China, “Fifty Years of Progress in China’s Human Rights (June 2000)”, <http://www.fmprc.gov.cn/eng/32282.html> (20/05/2003)

²⁴ Biao, X, “Emigration from China: A Sending Country Perspective”, *International Migration*, September 2003, vol. 41, no. 3, pages 21-48 (28)

It is hoped that this research will contribute to the development of a more effective regulatory framework, by advocating a regulatory model, and by making practical recommendations to afford effective protection of the RLR in China. It provides a more comprehensive series of recommendations to protect the RLR in China than undertaken to date.

It is also hoped this research will assist the international community to better understand the RLR in China, and promote a better understanding within China of the RLR as it operates internationally. The detailed discussions of the foundations of the RLR in international migration law, and in selected State practice may offer the Chinese government and academics an objective basis for understanding how the RLR can be legislatively implemented. No research of this kind has been previously undertaken by Chinese government or academics. This discussion also partially fills research gaps in the area in international migration law.

Chapter Two

The Foundations of the RLR

Introduction

Although the RLR has been affirmed as a fundamental human right in the UDHR, the ICCPR and other international and regional conventions,²⁵ violations of the RLR are common. By its very nature, the RLR has implications for neighbouring States; violations of the RLR may therefore have important implications for the security and order of neighbouring States. The issue of the RLR thus easily transcends the borders of the State of origin.²⁶

It is therefore necessary to analyse both China-related factors and international-related factors when discussing the RLR in China. An analysis from an international perspective provides the international criteria and a point of reference for China when evaluating the actual situation and issues of the existing Chinese law governing exit and entry. It also provides experiences to consider when designing any reform plan to deal with the RLR in China.

To appreciate the RLR and its special role as a fundamental national and international human right and to appreciate the particular factors that drive it in China, one must first understand the foundations of the RLR. This Chapter seeks to explore the foundations of the RLR from the

²⁵ Article 5 (d) (ii) of *International Convention on the Elimination of All Forms of Racial Discrimination* 1966, Article 22 (3), (4) of *American Convention on Human Rights* 1969, Article VI of *Inter-American Convention on Forced Disappearance of Persons* 1994, Article 12 (2) of *African Charter on Human and People's Rights* 1981, Article 30 of *European Convention on the Legal Status of Migrant Workers* 1977, Article 2 of *Protocol No.4 as amended by Protocol No. II, European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950, Article 45 (2) of *Charter of Fundamental Rights of the European Union* 2000.

²⁶ This point of view is supported by Antonio Cassese, who fully discussed common characters of RLR in "On the Universal Level" in Vasak, Karel and Liskofsky, Sidney, (ed), *the Right to Leave and Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976, pages 493-520; also by Russell, Sharon Stanton in "Migration and Development: Reframing the International Policy Agenda", <http://www.migrationinformation.org/Feature/display.cfm/ID=126> (05/06/2003); also and Tiburcio, Carmen, "The Human Rights of Aliens under International and Comparative Law", *Kluwer Law International*, 2001, page 215.

three aspects of philosophy, history, globalisation and international migration.

2.1 Philosophical foundations

All legal theories must contain elements of philosophy.²⁷ The legal theory of the RLR is no exception. The nature of the RLR cannot be understood effectively without understanding the nature of migration. The analysis of the nature of the RLR to follow focuses on natural rights rooted in natural law, which have evolved into positive rights. This section ends by discussing the consequences of violating the RLR and justifications of the limits on the RLR.

2.1.1 The definition of the RLR

In basic terms, the RLR is the right of a person to be able to freely leave and return to a nation-State. In fact, the RLR has been integrated into international instruments. Before the ICCPR came into force, the RLR was most clearly proclaimed in the UDHR. Article 13 (2) of the UDHR provides that “Everyone has the right to leave any country, including his own, and to return to his country.” the RLR is most clearly contained in the ICCPR provisions on the right to freedom of movement. This is the most comprehensive and well-established UN treaty on civil and political rights, and has yielded the lion’s share of UN jurisprudence in this area.²⁸ The ICCPR also provides for applicable limits on the RLR that are not stated in the UDHR. Article 12 (2) (3) (4) of the ICCPR State that:

(2) Everyone shall be free to leave any country, including his own.

(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other recognized in the present Covenant.

(4) No one shall be arbitrarily deprived of the right to enter his own country.

Article 5 (d) of the *International Convention on the Elimination of All Forms of Racial*

²⁷ . Friedmann thought “all systematic thinking about legal theory is linked at one end with philosophy and, at the other end, with political theory.” See Friedmann, W., *Legal Theory*, Law Publishers, London, 1944, page 3.

²⁸ Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 4.

Discrimination 1965 (CERD) stresses that States parties are duty-bound to prohibit and eliminate racial discrimination in all its forms and to guarantee the rights of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the RLR.

Jose Ingles,²⁹ Hurst Hannum,³⁰ Richard Plender³¹ and Warren Freedman³² regarded the above-mentioned provisions as a statement of the RLR. Later attempts of the international community to codify the RLR have been unsuccessful. While *Draft Principles on Freedom and Non-Discrimination in respect of the Rights of Everyone to Leave Any Country, including His Own, and to Return to His Country* 1963 (1963 UN Draft Principles on the RLR), *Declaration on the Right to Leave and the Right to Return* 1972 (1972 Uppsala Declaration on the RLR) and *Strasbourg Declaration on the Right to Leave and Return* 1986 (1986 Strasbourg Declaration on the RLR) have been accepted as the most known specific international instruments in this area, these regulations have not developed into a unified codification of the RLR. The following statement regarding the RLR, from Article 1 of the 1986 Strasbourg Declaration on the RLR, must be borne in mind.

Everyone has the right to leave any country, including one's own, temporarily or permanently, and to enter one's own country, without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage, age (except for unemancipated minors independently of their parents), or other status.

With the development of evolving jurisprudence of the RLR, the RLR may be defined as the right of the person to leave any country and return to one's country without the discrimination and according to one's own will.

²⁹ Ingles, Jose D, *Study of Discrimination in Respect of the Right of Everyone to Leave any country, including His Own, and to Return to His Country: Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities*, United Nations Publication Sales No.: 64. XIV. 2, New York, 1963, pages 9-12.

³⁰ Hannum, Hurst, *The RLR in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 20.

³¹ Plender, Richard, *International Migration Law*, Revised. 2nd ed., Martinus Nijhoff Publishers Dordrecht, the Netherlands, 1988, pages 133 and 96.

³² Freedman, Warren, *The Right to Travel: A Right or A Privilege? Work Paper of Sao Paulo Conference on the Law of the World*, the World Peace Through Law Centre, Washington, the USA, 1981, page 1.

the RLR can be variously classified by different criteria. According to general purpose, the RLR can be classified as the right to leave, and right to return. Based on the general purpose and the subject the RLR may be classified into the right of a national to leave one's country, the right of a national to return to one's country and the right of a foreigner (including a stateless person) to leave the country. Pursuant to the period of leaving and returning, the RLR can be classified into the RLR permanently and the RLR temporarily. In relation to leaving a country, the RLR can also be classified as the right to seek asylum, the right not to be expelled, the right to travel abroad, the right to leave to study, the right to leave to unite with family members and the right to leave to do business. The right to return can be translated into the right to be admitted to one's own country.

2.1.2 The nature of the migration

The basis of migration is found in the nature of humanity. The focus of migration has gone from seeking a better natural environment in ancient times, into the pursuit of better economic, social, cultural and political environments in modern times. John Hosack contended in 1882 that, "the enterprising nature of man and his migratory habits would lead him frequently to wander beyond the limits of birthplace."³³ A similar view was expressed by the Organisation of Economic and Cooperation Development (OECD) in 1990, that:

Man is naturally mobile. In every epoch, in every part of the world and in every civilization, there has been migration. Migration must not therefore be regarded as abnormal phenomenon disturbing the natural order of things. The migrants are no exception because migration is a normal part of people's individual and collective lives. This is an essential truth that is little appreciated nowadays and of which we should all become more fully aware.³⁴

The United Nations (UN) declared in 2002, that "a fundamental characteristic of people is their movement from place to place."³⁵

³³ Hosack, John, *On the Rise and Growth of the Law of Nations, as Established by General Usage and by Treaties, from the Earliest Time to the Treaty of Utrecht*, Jas. Wade, Covent Garden, the UK, 1882, page 1.

³⁴ Laroque, Pierre, "Conclusions" in *The Future of Migration*, the OECD, 1990, page 27.

³⁵ Population Division Department of Economic and Social Affairs, United Nations Secretariat, *International Migration Report 2002*, ST/ESA/SER.A/220, the United Nations, New York, 2002, 62 pages, page 1.

The RLR is originally derived from people's migratory nature. As with all living beings on earth, human's respond when they face an unbeneficial environment is to escape or quickly move. All people strive for longevity and better living conditions. One of the most important means to realise this basic purpose is to move from an unbeneficial environment to a beneficial one. All detailed causes, such as war, political pressure, employment, education and family union for migration stem from this basic need or purpose.

By nature each human person evaluates the costs and benefits of 'escaping' one environment for another. Different conditions and environments produce different demands and perceptions of escape. In 'pure' theory, it is unnecessary for the government or community to affect or intervene in a person's decision to migrate. Migration is wholly natural phenomenon and needs to be fully recognised as such — the human urge to migrate, where it exists, can be neither ignored nor oppressed. It is my own belief that humans will always have the orientation of migration, when a need presents itself, unless they are psychologically or physically incapable.

Human instinct, however, does not demand that migration should be allowed unconditionally or uncontrolled — people must live together peaceably to pursue their largest interests in the face of sustained challenges from an imperfect world. Peaceably cohabitation requires rules and migrants must follow rules of migration designed by the State on the basis of sovereignty.

2.1.3 the RLR is a natural right rooted in natural law

the RLR has evolved from a natural right to a positive right. The notable legal philosopher Maurice Cranston asserted that the RLR was the first and most fundamental of human rights,³⁶ because it is from human nature or instinct and is the basis of other human rights. Depriving people of the RLR is to oppress human nature or instinct and inhibit human development. Hurst Hannum observed that the RLR gave meaning to other fundamental rights of speech, expression and communications.³⁷ Warren Freedman summarized that the right to travel as a right as

³⁶ Cranston, Maurice, *What are Human Rights*, Taplinger Publishing Co., Inc. New York, 1973, page 31

³⁷ Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 4

solemn and imperative as the right to breathe. It is indivisible from such other human rights as justice, equality, liberty and peace.³⁸

The ancient Greeks most commonly contrasted their freedom to being bound or tied, and being, from this cause, unable to move.³⁹ The freedom of human action based on the will and activity of the individual is the starting point of Samuel Pufendorf's natural law theory.⁴⁰ Samuel Pufendorf's natural law obliges and entitles man to protect one's life, body, migration and all that belongs to him or her to the utmost within his or her power (self-preservation). Thomas Aquinas emphasised self-migration in the theory of natural law — that:

Man is said to be made to God's image, in so far as the image implies an intelligent being endowed with free-will and self-migration: now that we have treated of the exemplar, i.e., God, and of those things which come forth from the power of God in accordance with his will; it remains for us to treat of his image, i.e., man inasmuch as he too is the principle of his actions, as having free-will and control of his actions.⁴¹

To, John Stuart Mill, rights are “grounded on the permanent interests of a man as a progressive being.”⁴² John Locke meticulously explored the motives for the formation of the social contract to protect individual liberty.⁴³ Rousseau made the surrender of all natural rights of the individual to the State dependent on the fulfilment of two conditions: a political one and a social

³⁸ Freedman, Warren, *The Right to Travel: A Right or A Privilege?* Work Paper of Sao Paulo Conference on the Law of the World, the World Peace Through Law Centre, Washington, the USA, 1981, page 1; See also Bradley, Catherine, *What Do We Mean by Human Rights: Freedom of Movement*, Franklin Watts, London, 2002, page 7. Bradley thought that RLR is an important human right. Restricting people's ability to move around is a loss of freedom.

³⁹ Pohlenz, Max, *Freedom in Greek Life and Thought*, Dordecht, Reidel, 1966, page 181

⁴⁰ Pufendorf, Samuel, ed., *On the Law of Nature and Nations*, C.H. and W.A. Oldfather (Oxford, 1934), 1, 1, 8; The concept of natural law was firstly elaborated by Cicero, the foremost scholar of the Stoics of the Hellenistic period, who contended that “there is true law, right cause, in accordance with nature; it is unalterable and eternal.”

⁴¹ Aquinas, Thomas, *Summa Theologiae*, 1-2, Prologue, Benzinger 1947.

⁴² Mill, John Stuart, “On Liberty”, in Warnack, May (ed). *Mill, John Stuart, Utilitarianism, “On Liberty,” Essay on Bentham*, Fontana Press, London, 1962, 17th Impression, 1985, page 138

⁴³ Neumann, Franz, *The Rule of Law: Political Theory and the Legal System in Modern Society*, Berg Publishers Ltd, Warwickshire, the UK, 1986, pages 117 and 118. Locke used the notion of the social contract to demonstrate the transfer of all natural rights to authority, but on the contrary, to justify government by majority and to show that governments hold their power in trust, with the duty to preserve the individual rights whose protection the individuals have entrusted to them. See Friedmann, W., *Legal Theory*, Law Publishers, London, 1944, page 123.

one, to fulfil the two conditions, the individual will may and must be made powerless as against the will of the State.⁴⁴ Immanuel Kant transformed the social contract, which Rousseau regards as an ideal to be realised in history, into a transcendental idea; that is to say, into a rational principle for the judgment of all compulsions. In Kant's theory nothing is left but the postulate that the State ought to realise the idea of right. He envisaged that freedom of thought, feeling and migration was the one sole, original, inborn right, belonging to every man by virtue of his humanity.⁴⁵ As Margaret Ng commented, the concept of rights was quite clear in classical liberalism, and its strength lay in that clarity and in its nature. These rights may not be all that is needed to bring about an ideal society, but they are fundamental, axiomatic and inviolate.⁴⁶

Emmer de Vattel wrote, "every man has a right to quit his country, in order to settle in any other, when by that step he does not expose the welfare of his country."⁴⁷ William Blackstone stated it as the right "to go out of the realm for whatever cause he pleaseth, without obtaining the King's leave, providing he is under no injunction of staying home."⁴⁸

The feature of the RLR as a natural right derived from nature law reveals the moral aspect of the RLR. Legal positivists mainly claim that law and morality are strictly separable. They assert that although legality and morality are of course combinable, they are likewise disjoinable.⁴⁹ The theory of legal positivism is usually taken to be analytical, descriptive and explanatory. The point of legal positivism, on this view, is to provide an accurate account of law as it actually is,

⁴⁴ Rousseau, Jean-Jacques, *The Social Contract*, Translated and introduced by Cranston, Maurice, Penguin Books Ltd, Harmondsworth, Middlesex, England, 1968, page 33.

⁴⁵ Quoted in Neumann, Franz, *The Rule of Law: Political Theory and the Legal System in Modern Society*, Berg Publishers Ltd, Warwickshire, the UK, 1986, page 144.

⁴⁶ Ng, Margaret, "Are rights Culture-bound?" in Davis, Michael C. (ed), *Human Rights and Chinese Values: Legal, Philosophical, and Political Perspectives*, Oxford University Press, New York, 1995, page 60.

⁴⁷ Emmer De Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, bk. 1, Ch. 19, para. 220.

⁴⁸ William Blackstone, *Commentaries on the Laws of England I*, bk. 1, ch. 1, 2, ch. 7

⁴⁹ Kramer, Matthew H., *In Defence of Legal Positivism: Law without Trimmings*, Oxford University Press, 1999, page 1

rather than, as it ought to be.⁵⁰ By the very inclination of their argument, legal positivists opposed the RLR as a natural right.

John Austin asserted, “There are no laws merely creating rights. There are laws, it is true, which merely create duties: duties not correlating with correlating rights, and which, therefore may be styled absolute.”⁵¹ Jeremy Bentham believed that the State existed for the greatest good of the greatest number. Bentham insisted that from real laws came real rights, but from imaginary laws, from laws of nature came imaginary rights; that natural right was simple nonsense.⁵² He also believed that talking about natural rights was mischievous. Governments issuing declarations of the rights of man were merely making rhetorical utterances costing them nothing, instead of getting on with the real work of reform. Certain critics of natural rights, such as David Hume and Edmund Burke, shared his attitude. Both of them were conservatives who disliked talking about the rights of man because it inflamed the common people to revolutionary action. It led men to think they were entitled to have things, which they could not possibly have. In the words of Burke, the rights of man were mere “abstractions”: the rights of Englishmen were realities — a “positive recorded hereditary title to all that can be dear to the man and citizen.”⁵³ Natural law from Grotius to Kant is a scientific foundation for revolution.⁵⁴

The question becomes, what is wrong with common people thinking of rights progress and revolution? The *Bill of Rights* enacted by the English Parliament after the Glorious Revolution

⁵⁰ Campbell, Tom, “The Point of Legal Positivism”, in Campbell, Tom D. (ed), *The International Library of Essays in Law and Legal Theory Second Series: Legal Positivism*, Dartmouth Publishing Company Ltd., Ashgate Publishing Limited, Aldershot Hants England and Brookfield Vermont the USA, 1999, page 323.

⁵¹ Austin, John, “A Positivist Conception of Law”, Feinberg, Joel and Gross, Hyman, (ed), *Philosophy of Law*, 3rd, Wadsworth Publishing Company, Belmont, the USA, 1986, page 33.

⁵² Quoted in Cranston, Maurice, “The Political and Philosophical Aspects of the Right to Leave and Return”, Vasak, Karel and Liskofsky, Sidney, (ed), *the Right to Leave and Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976.

⁵³ Quoted in Cranston, Maurice, “The Political and Philosophical Aspects of the Right to Leave and to Return”, Vasak, Karel and Liskofsky, Sidney, (ed), *the Right to Leave and Return: Papers and Recommendations of the Internation Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976, page 23.

⁵⁴ Stahl, F. J., *Über die gegenwärtigen Parterien in State und Kirche*, Berlin, 1883, page 23.

in 1689 raised the curtain of capitalist revolution.⁵⁵ Another the *Bill of Rights* which was adopted by a representative convention in Virginia, the United States of America (USA) in 1776, proclaimed “all men are by nature equally free and independent, and have certain inherent rights.”⁵⁶ Similar words recur in the *Declaration of Independence* in 1776 and the *United States Constitution 1787*. Following the English and USA models closely, the French National Assembly adopted the *Declaration of the Rights of Man and Citizen* after the great revolution in 1789. It can be argued that the above revolutions exerted a plenary positive influence on civilised society.⁵⁷

Conversely, Germany did not follow English and American models. The later legal theory of national socialist Germany appears to have concentrated on the justification of absolute State supremacy and racial conception of law.⁵⁸ In order to attain this end, it was necessary to abolish all systems of checks and balances in all spheres. The result was absolute obedience to the positive law imposed by the State, tempered by an expression of respects for the idea of right or natural law.⁵⁹ Germany under Hitler promulgated numerous laws on the basis of Neo-Hegelian theories and Duguit positive legal theory. Unfortunately, most Westerners, including millions of deluded Germans, accepted the belief, and therefore required obedience. The consequence, it may be argued, was that it contributed to German provocation of two World Wars which

⁵⁵ Stipp, John L., Dirrim, Allen, W. and Hollister, C. Warren, *The Rise and Development of Western Civilization: 1660 to the Present*, John Wiley & Sons, Inc., New York, London and Sydney, 1967, page 43.

⁵⁶ Quoted in Cranston, Maurice, *What are Human Rights?*, Taplinger Publishing Co., Inc., New York, 1973, page 1.

⁵⁷ Potter, David, Goldblatt, David, Kiloh, Margaret and Lewis, Paul (ed), *Democratization*, Blackwell Publishers Inc. Malden MA the USA, 1997, page 54; also see Willis, F. Roy, *Western Civilization an Urban Perspective: Volume II from the 17th Century to the Contemporary Age*, D. C. Heath and Company, Lexington, the USA, 1973, pages 586 and 603

⁵⁸ The Nazis believed that the aim of life was to live in an “ecstasy” of power which some argue is one dictum of the philosophy of Friedrich Nietzsche. Pidder Lung, a pedagogue who tried his hand at organising Nazi philosophy, said that “Humanity is an abstraction which cannot be translated into practical life.” Chamberlain elaborated the myth of racism in his *Foundations of Nineteenth Century*. He said that blood was the bearer of virtue; that the purest, most virtuous blood was Aryan; that the Germans were Aryan elite; that the worst corruptors of virtuous blood were the Jews. The implication was obvious: as the bearers of the highest culture, Germans were under solemn obligation to carry all Jews out of the coming Aryan dominated world. Quoted in Stipp, John L., Dirrim, Allen, W. and Hollister, C. Warren, *The Rise and Development of Western Civilization: 1660 to the Present*, John Wiley & Sons, Inc., New York, London and Sydney, 1967, pages 539, 544 and 541.

⁵⁹ Friedmann, W., *Legal Theory*, Law Publishers, London, 1944, pages 235-239.

wrought such havoc on the rights of millions during the course of those conflicts over a period of 30 years.⁶⁰

Another example can be found in communist regimes that accepted Marxist-influenced legal theory. In contrast to a natural rights view, in which law is seen as a constraint on the power of the State, law in the Union of Soviet Socialist Republics (USSR) was regarded as a means of enforcing and strengthening government authority.⁶¹ The underlying principle of law was that it should regulate society, rather than the actions of the government; it was designed to impose duties on the people rather than to protect their rights. This situation is greatly changing since 1990s. The rise of communist regimes eventually led to strict emigration controls that lasted up until the early of 1990s. The reunification of Soviet Jews with their families in Israel, for instance, was not permitted before mid-1960s.⁶²

2.1.4 the RLR translation from natural right to positive right

Right comes necessarily into existence as soon as people live together.⁶³ In its broad sense, the right is a formation of relationships of life, with a view to the attachment of freedom, which is realised and developed as the destination of the individual. In its narrowest sense, the right is used as the correlative of duty; and, to convey this meaning, the synonym 'claim' seems best.⁶⁴ the RLR is more than the aspiration or assertion of the good — it is essentially a claim of entitlement founded on a moral order under natural law. Hugo Grotius characterised the right to

⁶⁰ Stipp, John L., Dirrim, Allen, W. and Hollister, C. Warren, *The Rise and Development of Western Civilization: 1660 to the Present*, John Wiley & Sons, Inc., New York, London and Sydney, 1967, pages 449, 450 and 608.

⁶¹ According to Marxism-Leninism, law originating with the State is an expression of the will of the ruling class, and the same causes gave rise to the appearance of private ownership and of antagonistic classes. Law protected the interests of the ruling classes and reflected only their will. The law retained its exploitative character and was adopted to new circumstance and requirements in order to serve the ruling classes. Quoted in Butler, W. E., *Soviet Law* (2nd edition), Butterworth & Co. (Publishers) Ltd., London, 1988, page 28.

⁶² Population Division, Department of Economic and Social Affairs, United Nations Secretariat, *International Migration from Countries with Economies in Transition: 1980-1999*, ESA/P/WP.176, New York, 2002, 123 pages, page 12.

⁶³ Hastie, W., *Outlines of the Science of Jurisprudence: an Introduction to the Systematic Study of Law*, Gaunt, Inc., Holmes Beach, the USA, 200, page 150.

⁶⁴ Wellman, Carl, *A Theory of Rights: Persons Under Laws, Institutions, and Morals*, Rowman & Allanheld Publishers, Totowa, New Jersey, the USA, 1985, page 54.

depart as the “most specific and unimpeachable axiom of the law of nations”.⁶⁵ the RLR creates the corresponding obligations not only from the State itself but from anyone that might try to stop the person from exercising their right. Anyone endowed with the RLR may apply for the remedies when his or her the RLR is violated.

We additionally need to admit that the positive law is the creation of people, and natural law, however, is not. The creation of law logically has a moral purpose, usually for the sake of the common good.⁶⁶ The natural law itself requires that people exercise authority in political communities and that the authority fulfils one’s moral functions by translating certain principles of natural law into positive law and reinforcing and backing up these principles with the threat of punishment for law breaking. A morally valid authority, in a sense, thus derives positive law from natural law; or translates natural principles of justice and political morality into rules and principles of positive law.⁶⁷

Among the achievements of recent analytical jurisprudence is its virtual elimination of false opposition between natural law theory and legal positivism. Theorists of natural law such as John Finnis and legal positivists such as Neil MacCormick have developed refined understandings of relationships between law and morality, in the light of which it no longer makes sense to suppose that a commitment to legal positivism logically excludes belief in natural law.⁶⁸

H. L. A. Hart argued that statutes might be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles. No positivist could deny that the stability of

⁶⁵ Quoted in Plender, Richard, *International Migration Law*, Revised 2nd ed, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988, page 96.

⁶⁶ According to Aquinas, “we can only accept the saying that the ruler’s will is law, on the proviso that the ruler’s will is ruled by cause; otherwise a ruler’s will is more like lawlessness.” See Aquinas, *Summa*, 1a2ae, 90.1, Quoted in Hunter, Ian, and Saunders David, “Introduction”, in Hunter, Ian, and Saunders, David (ed), *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought*, Palgrave Macmillan, New York, 2002, page 2.

⁶⁷ George, Robert P., *In Defence of Natural Law*, Clarendon Press, London, 1999, page 107.

⁶⁸ George, Robert P., *In Defence of Natural Law*, Clarendon Press, London, 1999, page 108.

legal systems depends in part upon such types of correspondence with morals.⁶⁹ Philosophically and historically the RLR was thus conceived to exist before the State, and the State developed as the means to its realisation. Given the widely accepted influence of morality on law, modern civilisation translated the RLR from natural rights to positive rights, serving as a limit of the power of the State.

Human society develops well if positive rights are more consistent with natural rights, and if they are otherwise, society lacks both stability and order. As far as the RLR is concerned, it is the fact that the RLR is a right provided in positive way only late in the evolution of States. The State has an obligation to preserve itself and its resources including human resources, therefore the State has a duty to develop the regulatory regime of the RLR, as it deems necessary. The more effectively realised the RLR, the more developed human society might be in the area of the reallocation of natural and human resources, and the more positive the change of attitudes to and quality of life, thus affecting human and social evolution.

Human rights are a 20th century name for what has been traditional known as natural rights or, in a more exhilarating phrase, the rights of man.⁷⁰ Human rights are not rights which derive from a particular station, they are rights which belong to individuals simply because they are human.⁷¹ In Kent Ann's opinion, human rights embrace three generations of rights, which are civil and political rights as the first generation of human rights, economic and social rights, as the second generation of human rights, and the third generation being group rights.⁷² As one right reaffirmed in the ICCPR, the RLR is usually regarded as one of the civil and political rights. Civil and political rights may be understood as conferring "rights of immunity upon the individual, as requiring non-interference from others and as not normally dependent upon

⁶⁹ Hart, H. L. A., *The Concept of Law*, Oxford University Press, London, 1961, pages 199 and 200.

⁷⁰ Cranston, Maurice, *What are Human Rights*, Taplinger Publishing Co., Inc. New York, 1973, page 1.

⁷¹ *The Right of Man*, London, 1944, page 37.

⁷² Kent, Ann, *Human Rights in the People's Republic of China, Discussion Paper No.3, 1989-90*, Legislative Research Service, the Parliament of the Commonwealth of Australia.

general social conditions.”⁷³ Lester B. Orfield thought in 1965 that the *Charter of the United Nations*, the UDHR and the proposed Covenant on Human Rights showed the recent trend had been to extend the scope of international law to cover matters of interest to the individual.⁷⁴

In practice 152 countries had ratified the ICCPR up until to June 2004,⁷⁵ and therefore recognised the RLR as a fundamental human right. Most ratifying States have translated ‘paper’ the RLR into real the RLR, few have yet to do so.⁷⁶ Hurst Hannum has reminded us that:

Whatever theory one adopts to explain the original source of the RLR, they now have acquired the status of positive law through the widespread acceptance of the international covenants and numerous other international agreements.⁷⁷

This international practice and acceptance has consolidated the RLR as part of customary international law. The party States to the ICCPR thus accepted the international obligations under the ICCPR to respect the RLR in domestic law. The non-party States to the ICCPR must salute the universality of the RLR in domestic law. In this context, we call the RLR a positive right. Admitting the RLR as a positive right is mainly to describe the wide legal recognition in the world, rather than to implicitly accept the utilitarian, or to deny the nature of the RLR as a natural right.

2.1.5 Consequences of violating the RLR

It may be that the effect of barring the RLR can have consequences far more serious than the

⁷³ Kamenka, Eugene, “Human Rights, Peoples’ Rights”, in *Bulletin of the Australian Society of Legal Philosophy*, vol. 9, No. 33, June 1985, page 157.

⁷⁴ Orfield, Lester B. and Re, Edward D., *Cases and Materials on International Law*, Revised Edition, The Bobbs-Merrill Company, Inc., Indianapolis, Kansas City and New York, 1965, page 178.

⁷⁵ International Services for Human Rights, “The Ratification Status of the Main Human Rights Treaties”, ishr-06-2004, <http://www.ishr.ch/About%20UN/Ratification/Ratification%20-%20Human%20Rights%20treaties.htm> (18/05/2003).

⁷⁶ Being a member of the ICCPR, Egypt however provided an illustration of the restrictions on RLR of resident of Palestinians. See Human Rights Watch, *Human Rights Watch Policy on the Right to Return: Relevant Background: Treatment and Rights in Arab Host States*, <https://nadaily.com/cgi/bin/nph/proxyb.cgi/010000A/http/www.hrw.org//> (05/07/2003).

⁷⁷ Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 5.

actual restrictions on the RLR. Restricting emigrants, even when their numbers are only few, creates the general feeling for people of being shut within their own territories. A country seems smaller as soon as individuals are forbidden to leave it, and the desire to leave becomes more urgent. The feeling in the breasts of a whole nation that they are being pent in is perhaps a greater source of danger than the strictures of the lands in which they dwell. Restricting people's ability to move around is a loss of freedom. Someone who is prevented from travelling or is unable to choose where to live, for no good cause, is being denied his or her human rights.⁷⁸

Without freedom of human migration, or the freedom of movement of knowledge and goods, other inherent freedoms and human rights cannot be realised completely. In the words of one international instrument, the denial of the RLR is "the cause of widespread human suffering, a source of international tensions, and an object of international concern."⁷⁹ The protection of the RLR is said elsewhere to be essential for "the effective enjoyment of other human rights and fundamental freedoms, and promotes mutual understanding and co-operation among the peoples of the world."⁸⁰

2.1.6 Justification of the limits on the RLR

If the freedom of individuals may truly exist, it has to be rational, and that means it must maintain itself within the limits of human nature. In practice, there are certain fundamental rights, which cannot be alienated even the Constitution permits amendment.⁸¹ The idea of fundamental rights including the RLR contains the demand for justice on the one hand, and the demand for the satisfaction of vital human and State needs in the various spheres of social life

⁷⁸ Bradley, Catherine, *What Do We Mean by Human Rights: Freedom of Movement*, Franklin Watts, London, 2002, page 7.

⁷⁹ Preamble paragraph 5, *Strasbourg Declaration on the Right to Leave and Return*, adopted by Experts on the Right to Leave and Return on 26 November 1986.

⁸⁰ Preamble paragraph 3, *Declaration on the Right to Leave and the Right to Return*, adopted by the Uppsala Colloquium, Uppsala, Sweden, on 21 June 1972.

⁸¹ Haines, C. Groves, *The Revival of Natural Law Concepts*, Harvard, 1930, page 336; and Willoughby, W. W., *The Constitution Law of the USA*, 2nd edition, vol. I, page 598.

on the other.⁸² In response to the above spirit, almost all current international instruments and national laws recognise the principle of freedom and equity in everyone's dignity and rights.⁸³ These international instruments meanwhile recognise the limits on the RLR to harmonise the possible conflict of every individual's interests.

2.2 Historical foundations

Given the legal basis of the RLR, the history of the RLR is inextricably linked with the history of the laws governing it. The basis of those laws will be dealt with first. The historical development of the laws governing the RLR will be then described in an annalistic style. As passport laws and international instruments related to the RLR play an important role in the historical development of the laws governing the RLR, they will also be described. The factors driving the RLR will be finally analysed from the perspective of the economics and politics.

2.2.1 The basis of the laws governing the RLR

The sovereignty of States forms the basis of the laws governing the RLR. While retaining the character of the RLR as a fundamental human right, each State also has the sovereign right to regulate the RLR in accordance with its own laws. Each State establishes its own legal system to distinguish citizens from foreigners, for border controls to inspect people who wish to enter, and to implement policies that affect the settlement and integration of non-citizens.

The sovereignty of the State is derived from the allegiance of its subjects to the State. In feudal terms it existed in that all persons born within the power or protection of the Crown owed natural allegiance to the King, and were natural-born subjects of the realm, while all who were born out of the allegiance or protection of the King, were aliens born, and remain aliens unless

⁸² Orkheimer, Max, *Zum Rationalismusstreit in der gegenwertigen Philosophie*, Zeitschrift fur Soziaforschung, 1934, p1ff; Mill, John Stuart, "The danger of asking why?", *Dissertation and Discussions*, vol.I, 3rd edition, page 332.

⁸³ Article 29 of the UDHR promulgated that "in the exercise of his right and freedoms, every one shall be subject only to such limits as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

they are subsequently made denizens or naturalised.⁸⁴ Blackstone described the natural allegiance in these terms:

A debt of gratitude which cannot be forfeited, cancelled or altered by any change of time, place or circumstance, nor by anything but the united concurrence of the legislature. An Englishman who removes to France or to China owes the same allegiance to the King of England there as at home, and twenty years hence as well as now [...] Natural allegiance was intrinsic and primitive and antecedent to the other. [...] indeed, the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is uncauseable that, by such voluntary act of his own, he should be able at pleasure to unloose those bonds of by which he is connected to his natural prince.⁸⁵

The term ‘subject’ was brushed aside as a feudal term, and replaced with the term ‘citizen’ in countries with democratic constitutions.⁸⁶ He who before was a ‘subject of King’ is now a ‘citizen of the State’.⁸⁷ Citizenship is conceived of as a territorially determined relationship between subjects and sovereign, by which the subject is tied to one’s sovereign.⁸⁸ There are no essential distinctions between nationality and citizenship, the former is a norm of international law, and the latter is a norm of domestic law. Since the 18th century, the concept of human rights has become an important argument in the campaign to obtain freedom for the individual in relation to the State.⁸⁹ The *Nottebohm case* [1955] ICJ Reports 4 support it as well.

The regulation of international law since the end of Second World War has expanded to include individuals and non-governmental organisations. The idea of membership of a national

⁸⁴ Henriques, H. S. Q., *The Law of Aliens and Naturalization including the Text of the Aliens Act, 1905*, Butterworth & Co., London, 1906, page 29.

⁸⁵ Blackstone, Volume 1, pages 369 and 370

⁸⁶ Koessler, “ ‘subject’, “Citizen”. “National” and “Permanent Allegiance””, in *Yale Law Journal*, 1946-1947, p58-76, page 59.

⁸⁷ Quoted in Henriques, H. S. Q., *The Law of Aliens and Naturalization including the Text of the Aliens Act, 1905*, Butterworth & Co., London, 1906 page 29 in *State v. Manuel* (1838) Dev. & Bat. 20, pages 24-26; *Minor v. Happersett* (1874) 21 Wall. 162, page 166.

⁸⁸ Weis, P., *Nationality and Statelessness in International Law*, Sijthoff & Noordhodd International Publishers B. V., Alphen aan den Rijn, the Netherlands, 1979, page 4.

⁸⁹ Jagerskiold, Stig A. F., “Historical Aspect of the Right to Leave and Return”, in Vasak, Karel and Liskofsky, Sidney, (ed), *the Right to Leave and Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976, page 3.

community, subject to a specific sovereign authority, has begun to lose force. In the sphere of international relations at least a partial limit of the sovereign rights was imposed on each State. People have become more independent and free from the State than ever. The regulation of the RLR is therefore not only an attribute of the sovereignty, but also an issue with important international implications for States. While this is the case links of allegiance between individuals and States still exist, because allegiance continues to be intrinsic and primitive and one is antecedent to the other. The independence and freedom gained are not enough to be divorced from the sovereignty. The sovereignty of States remains a dominant theme in the relationship between the citizen and the State.

2.2.2 The historical development of the laws governing the RLR

It was only in the early 20th century that the system of passports and visas developed to regulate the RLR.⁹⁰ Practical prohibitions and limits on the RLR existed and were serious prior to that time and were gradually relaxed in the 20th century. Since the emergence of the modern idea of the passport it has become the major instrument governing the RLR. With the establishment of international and regional organisations such as the UN and European Union (EU), the RLR has become universally recognised at a regional and world level. During the process of universal recognition, international and regional instruments governing the RLR play an increasingly important role.

2.2.2.1 Laws governing the RLR in ancient times

Ancient societies did not impose prohibitions and limits on the leaving and returning of subjects by law, while the slaves, bondmen, serfs and peasants of those societies were not considered subjects or complete subjects. In other words, the nobility and free townspeople were given the exclusive privilege of leaving and returning, subject to the will of the King.⁹¹

⁹⁰ Martin, Philip and Widgren, Jonas, *International Migration: Facing the Challenge*, Population Reference Bureau, Washington D.C., 2002, 39 pages, pages 3-4.

⁹¹ The privilege is the foundation of slave and feudal societies and its chief curse. See Stipp, John L., Dirrim, Allen, W. and Hollister, C. Warren, *The Rise and Development of Western Civilization: 1660 to the Present*, John Wiley & Sons, Inc., New York, London and Sydney, 1967, page 119.

People in remote regions, such as nomads, often moved from deserts and steppes of Asia and Africa to the vast reaches of the Pacific and Indian Oceans. The extent of migration depended on the spirit of adventure and ability of the relevant population, alongside the practical requirements of trade and agriculture. Some examples of decisive mass movement include the Hebrew exodus from Egypt, the settlement of Eastern Europe, and colonisation of the Americas.⁹² Vinogradoff has pointed out that the country now called Hellas was not regularly settled before. The people were migratory, and readily left their homes whenever numbers overpowered them. They could obtain a bare subsistence anywhere and they were always ready to emigrate.⁹³ From the very earliest times foreigners in large numbers have entered England.⁹⁴

Something akin to the RLR was legally recognised as early as 1215 in the *Magna Carta*.⁹⁵ Article 41 guaranteed to merchants “safe and secure exit”. Article 42 proclaimed:

It shall be lawful to any person, for the future, to go out of our Kingdom, and to return, safely and securely, by land or water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the Kingdom: excepting prisoners and outlaws, according to the law of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above. ⁹⁶

These regulations developed in succeeding centuries a common law writ of *ne exeat regno*.⁹⁷

⁹² Ingles, Jose D, *Study of Discrimination in Respect of The Right of Everyone to Leave any country, including His Own, and to Return to His Country: Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities*, United Nations Publication Sales No.: 64. XIV. 2 New York, 1963, page 1

⁹³ Vinogradoff, Paul, *Outlines of Historical Jurisprudence*, Volume Two, The Jurisprudence of the Greek City, Oxford University Press, Oxford, the UK, 1922, pages 1–2.

⁹⁴ Henriques, H. S. Q., *The Law of Aliens and Naturalization including the Text of the Aliens Act, 1905*, Butterworth & Co., London, 1906, page 2.

⁹⁵ *The Magna Carta* was a worthy climax of the first stage of growth of English law. See Harding, Alan, *A Social History of English Law*, Penguin Books Ltd. England, 1966, pages 55-57

⁹⁶ Article 42 in the version confirmed by King Edward I in 1297; 6 Halsbury’s Statutes (3rd ed.) 401. See Sieghart, Paul, *The International Law of Human Rights*, Oxford University Press, New York, 1983, page 180

⁹⁷ “...the King would command a man that go not beyond the seas or out of the realm without a license”, by issuing a writ based upon information “that you design to go privately into foreign parts and intend to prosecute many things prejudicial to us --- . Many English King issued the writs on a number of occasions, mostly for political causes, but this royal prerogative gradually lost its importance and fell into desuetude, except as a restraint upon absconding debtors’ Ingles, Jose D, *Study of Discrimination in Respect of The Right of Everyone to Leave any country, including*

Chao JU-KUA, Ibn Batuta and Marco Polo enjoyed the comparative freedom to leave and return to their respective countries, as well as in entering and leaving the many kingdoms of Asia and the outlying islands through which they travelled in the Middle Ages. Francisco de Victoria said at the start of 16th century: “It was permissible from the beginning of the world for anyone to set forth and travel wheresoever he would.”⁹⁸

The right to return to one’s country was popularly recognised in ancient times. This can be partly proved by the record of perpetual exile being the only means of avoiding capital punishment in ancient Athens.⁹⁹

Mercantile and military considerations led most States to view their slave populations as valuable commodities to be retained rather than permitted to leave, whereupon they could increase the prosperity of other States.¹⁰⁰ They were bound to the cultivating land in ancient Europe, ancient Asia and America of the 19th century. According to the law of colonial Virginia (1705), Kentucky (1798), and the Louisiana Territory (1806), the slaves were regarded part of the land.¹⁰¹ In ancient Europe, the nobility and free townspeople could move between regions as they pleased.¹⁰² In ancient China, only merchants could be permitted to go abroad, and if people who went abroad were not merchants, they would be given a flogging.¹⁰³ Given the fact

His Own, and to Return to His Country: Special Repporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities, United Nations Publication Sales No.: 64. XIV. 2 New York, 1963, page 3.

⁹⁸ Quoted in Ingles, Jose D, *Study of Discrimination in Respect of The Right of Everyone to Leave any country, including His Own, and to Return to His Country: Special Repporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities*, United Nations Publication Sales No.: 64. XIV. 2 New York, 1963, page 2.

⁹⁹ Vinogradoff, Paul, *Outlines of Historical Jurisprudence, Volume Two, The Jurisprudence of the Greek City*, Oxford University Press, Oxford, the UK, 1922, page 179.

¹⁰⁰ Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 4.

¹⁰¹ Friedman, Lawrence M., *A History of American Law*, Simon and Schuster, New York, 1973, page 197.

¹⁰² Quoted in Cranston, Maurice, “The Political and Philosophy Aspects of the Rights to Leave and Return”, in Vasak, Karel and Liskofsky, Sidney, (ed), *the Right to Leave and Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976, page 29.

¹⁰³ Merchants’ freedom to travel abroad was protected by *Commentaries of Law Codes* the Tang Dynasty (618-907), *Uniform Penal Code*, the Song Dynasty (960-1279). The control of exit and entry in ancient China had been

that slaves, bondmen, serfs and peasants were the overwhelming majority of the population in ancient times,¹⁰⁴ it could be accepted that most people were not entitled to the RLR.

2.2.2.2 Laws governing the RLR in modern and contemporary times

the RLR in modern times, especially in contemporary times has become an entitlement for everyone, without distinction as to one's social status. Recognition of the RLR by States increased following the Second World War; and international instruments have also evinced that the recognition of the RLR is being gradually moved beyond the national borders.

Settlement Laws 1691 was refined to ease the labour mobility in Britain.¹⁰⁵ Blackstone has pointed out that English citizens enjoyed an absolute the RLR in the second half of 18th century.¹⁰⁶ Title I of *French Constitution of 1791* guaranteed "the freedom of everyone to go, to stay, or to leave, without being halted or arrested unless in accordance with procedures established by the Constitution." The 1830s helped to establish the future shape of Australian society, during which time it was possible to freely immigrate.¹⁰⁷

The US Supreme Court has given constitutional protection to the right to travel since 1823.¹⁰⁸ The right to travel abroad is protected under the Fifth Amendment of *The Constitution of the*

regulated in some special regulations such as *Guangzhou Regulations Governing Exit and Entry (Amendment)* 1080 of Song Dynasty, and the *Regulations of Further Governing Exit and Entry* 1293 of Yuan Dynasty and the *Rules of Exit and Entry* 1314 of Yuan Dynasty (1206-1368). See Wong, Li, *International Immigration Law and the Practices (Guoji Yiminfa Lilun Yu Shijian)*, the Publishing House of Law, Beijing, China, 2001, page 13.

¹⁰⁴ Serfs under private landlords were about half of the population in Russian in 1767. See Stipp, John L., Dirrim, Allen, W. and Hollister, C. Warren, *The Rise and Development of Western Civilization: 1660 to the Present*, John Wiley & Sons, Inc., New York, London and Sydney, 1967, page 118.

¹⁰⁵¹⁰⁵ Yu, Shutong and Wen, Jia (ed), *A New Chinese-English Law Dictionary (Xin Hanying Faxue Cidian)*, Publishing House of Law, Beijing, 1998, page 1263.

¹⁰⁶ Blackstone, *The Great Charter and Charter of the Forest*, 3rd edition, 1771, Quoted in Ingles, Jose D, *Study of Discrimination in Respect of The Right of Everyone to Leave any country, including His Own, and to Return to His Country: Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities*, United Nations Publication Sales No.: 64. XIV. 2, New York, 1963.

¹⁰⁷ Molony, John, *History of Australia*, Penguin Books Australia Ltd., Ringwood, Australia, 1987, page 61.

¹⁰⁸ Freedman, Warren, *The Right to Travel: A Right or A Privilege? Work Paper of Sao Paulo Conference on the Law of the World*, the World Peace Through Law Centre, Washington, the USA, 1981, page 6.

USA as an aspect of the 'liberty' of which an individual cannot be deprived save by due to process of law.¹⁰⁹ The Indian Supreme Court has held that the right to travel abroad, though not specially provided for, is implied in the right to personal liberty of which a person may not be deprived according to a procedure established by law.¹¹⁰ Twenty-four countries have formally recognised the RLR in constitutional texts or laws and in 1961 12 countries recognised the RLR through judicial interpretation.¹¹¹ According to the statistics of Richard Plender, up to 1988 the right to depart from a State's territory was recognised expressly in the constitutions of 44 States.¹¹²

The international community recognised that the RLR as an equal and inalienable right of all members of the human family, and is based upon attributes of human personality, and not derived from one being a national of a particular State, in the UDHR,¹¹³ the ICCPR,¹¹⁴ the *Protocol No. 4 of European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 (EHR P4),¹¹⁵ *American Convention on Human Rights* 1969 (AMR),¹¹⁶ *African Charter on Human and People's Rights* 1981 (AFR),¹¹⁷ and *Arab Charter on Human Rights* 1994 and other international or regional human rights conventions.¹¹⁸ The number of States that had ratified the ICCPR was 35 in 1976, 85 in 1985 and increased to 148 in 2002¹¹⁹ and 152 in

¹⁰⁹ Plender, Richard, *International Migration Law*, Revised 2nd ed, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988, page 102.

¹¹⁰ *Maneka Gandhi v. Union of India and another* [1978] SCR 312; *Satwant Singh Sawhney v. Ramarthnam et al.* [1967] 3 SCR 525.

¹¹¹ Ingles, Jose D, *Study of Discrimination in Respect of The Right of Everyone to Leave any country, including His Own, and to Return to His Country: Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities*, United Nations Publication Sales No.: 64. XIV. 2 New York, 1963, page 4.

¹¹² Plender, Richard, *International Migration Law*, Revised 2nd ed, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988, page 95-96.

¹¹³ Article 13 (2) of the UDHR.

¹¹⁴ Article 12 (2) (3) (4) of the ICCPR.

¹¹⁵ Article 2 of the EHR Protocol 4

¹¹⁶ Article 22 (3), (4) of the AMR

¹¹⁷ Article 12 (2) of the AFR

¹¹⁸ Article VI of *Inter-American Convention on Forced Disappearance of Persons* 1994, Article 30 of *European Convention on the Legal Status of Migrant Workers* 1977.

¹¹⁹ Joseph, Sarah and Schultz, Jenny et al, *The National Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 5

2004.¹²⁰ The States parties to above international conventions owe an international duty to give effect to relevant provisions of international conventions by protecting the RLR through domestic law and international cooperation.

2.2.2.3 Historical development of laws governing passport

A national must possess a passport or other travel documents if he or she wishes to leave or return to one's country. Without being entitled to the right to be issued with travel document, especially a passport, the RLR cannot be realised.

Historically, the RLR did not involve the modern document of a passport, for the simple reason that there was no international traffic of travellers, so no need for laws to govern traffic. Possession of a passport was not generally a requirement for the crossing of national borders in Europe prior to 20th century.¹²¹ The growth of the Roman Empire and improvement in means of communication meant that international travel was more easily achieved, and occasionally a traveller could cover hundreds of miles for commercial purposes.¹²² In 1548, the term 'passport' was first used in by English statute, where it referred to a license given by a military authority to a soldier to go on furlough.¹²³ In the 18th and early 19th centuries, the passport was mainly issued to aliens by the territory in which the documents were effective. In the course of 19th century the practice of issuing passports to aliens for travel in the issuing country seems to have fallen into disuse.

The people in ancient China who intended to go abroad had to apply for a letter of approval from the local government. In the Han dynasty (206 B.C.–A.D. 220), the approval letter for

¹²⁰ International Services for Human Rights, "The Ratification Status of the Main Human Rights Treaties", ishr-06-2004, [http: ww.ishr.ch](http://ww.ishr.ch)
<http://ww.ishr.ch/About%20UN/Ratification/Ratification%20-%20Human%20Rights%20treaties.htm> (18/05/2003).

¹²¹ Weis, P., *Nationality and Statelessness in International Law*, 2nd revised edition, Sijthoff & Noordhodd International Publishers B. V., Alphen aan den Rijn, the Netherlands, 1979, pages 222 - 223

¹²² Freedman, Warren, "The Right to Travel: A Right or A Privilege?" Work Paper of Sao Paulo Conference on the Law of the World, the World Peace Through Law Centre, Washington, the USA, 1981, page 7

¹²³ Sibley, "The Passport System", in *Journal of the Society of Comparative Legislation* (1906), pages 26-33, page 32

businessmen was called “*Chuan*”, for government officers it was “*Jie*”. It was then named “*Guoso*” in the Tang dynasty (618-907), “*Gongju*” in the Song dynasty (960-1279), “*Gongyan*” in the Yuan dynasty (1206-1368) and “*Wenyin*” in the Ming dynasty (1368-1644).¹²⁴

In 1905, Lord Alverstone CJ, in *Rex v. Brailsford* defined a passport as:

A document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual’s protection as a British subject in a foreign country, and it depends for its validity upon the fact that the Foreign office in an official document vouches the respectability of the person named.¹²⁵

This definition illuminates the significance of the modern passport. Since the end of the First World War, it has been almost universally recognised that a passport is largely issued to the State’s own nationals as an identity and travel document.

The League of Nations Passport Conference of 1926 reiterated the recommendation of 1920 Passport Conference for the abolition of exit visas. That recommendation has been accepted by a large number of States, however the process of achieving uniform international rules governing passports is a long way off. Daniel Turack has reminded us that:

Although the UN has convened an international meeting of experts on passport and a conference on international travel and tourism during which passports were widely discussed and concrete recommendations adopted, it has not yet prepared a compilation of the passport laws of its members and the member States of specialised agencies similar to the works produced on nationality. The fruit of such an undertaking would stimulate greater activity in an area deserving of independent research.¹²⁶

¹²⁴ “Above laws contain the provisions about the establishment of administrative organs, application for approval letter, inspection of exit and entry, restrictions on the people going abroad and staying period abroad, and punishment.” Wong, Li, *International Immigration Law and the Practices*, the Publishing House of Law, Beijing, China, 2001, pages 13-15

¹²⁵ [1905] 2 K. B. 730 at 745, Quoted in Turack, Daniel C., *The Passport in International Law*, Lexington Books, D.C. Health and Company, Toronto, Canada, 1972, page 16.

¹²⁶ Turack, Daniel C., *The Passport in International Law*, Lexington Books, D.C. Health and Company, Toronto, Canada, 1972, page 33.

2.2.2.4 Historical development of international instruments related to the RLR

Numerous conventions dealing with the RLR entered into force after the Second World War. The UN and regional organisations have made efforts to arrive at uniform rules governing the RLR, to avoid repeating the tragedy of the persecution and murder of six millions Jews' during the 1930s and 1940s.

In the words of a UN General Assembly representative from France, the UDHR represented “a world milestone in the long struggle for human rights”,¹²⁷ Article 13 (2) of the UDHR affirmed that the RLR should be enjoyed fully and without discrimination. the RLR may in no case be exercised contrary to the purposes and principles of the UN.

The *Convention Relating to the Status of Refugees* 1951 (CSR) is the most important international instrument protecting refugees, Article 28 of which obligates States parties to issue travel documents to refugees in their territory, especially those unable to secure such documents from the country of their lawful residence, and to issue travel documents to Stateless persons lawfully staying in their territory.

Article 7 (3) of The *Convention on the Reduction of Statelessness* 1961 proclaimed that, “a national of a contracting State shall not lose his nationality, so as to become Stateless, on the ground of departure, residence abroad, and failure to register or on any similar ground.” Article 9 further regulated that “a contracting State may not deprive any person or group of persons of their nationality on racial ethnic, religious or political grounds.”

the RLR was formally protected in the ICCPR, which is the most important international covenant in this regard. Article 12 (2) provides the general circumstance of the RLR as being that “everyone shall be free to leave any country, including his own.” Article 12 (3) detailed general restrictions on the RLR:

¹²⁷ The Office of the High Commissioner for Human Rights, “The Universal Declaration of Human Rights: A Magna Carta for All Humanity”, [www. Unhchr.ch/udhr/miscinfo/carta.htm](http://www.Unhchr.ch/udhr/miscinfo/carta.htm) (18/05/2003)

The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other recognized in the present Covenant.

These restrictions were reaffirmed and cited in the conventions about the RLR to follow. Article 12 (4) stressed the right to return, as being that “No one shall be arbitrarily deprived of the right to enter his own country.” Article 13 provides procedural rights against expulsion.

Article 5 d (ii) of the CERD regulated that in the enjoyment of the RLR, States parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.

The *Convention on the Rights of the Child* 1989 (CRC) entered into force in 1990. It is an elaboration of human rights standards in respect of the child. It contains several provisions respecting and safeguarding the RLR of the child and one’s parents.¹²⁸

Guiding Principles on Internal Displacement 1997 were “noted” by the Commission on Human Rights and have been referred to in various General Assembly resolutions. Principle 15 provides that:

...internally displaced persons have (a) the right to seek safely in another part of the country; (b) the right to leave their country; (c) the right to seek asylum in another country; and (d) the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

¹²⁸ Article 10 of the *Convention on the Rights of the Child* 1989 provides “1. In accordance with the obligation of States Parties under Article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family. 2. ...States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.”

The 1963 UN Draft Principles on the RLR were adopted by UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (CPDPM) in 1963. The 1972 Uppsala Declaration on the RLR was adopted by the Uppsala Colloquium in 1972, and which contains the right to leave, the right to return, and addresses travel documents and general procedures for responding to violations.

The 1986 Strasbourg Declaration on the RLR was adopted by the Meeting of Experts on the RLR in 1986 and developed procedural safeguards of the RLR. The above instruments are only three international instruments focused on the RLR. They offer the most comprehensive and detailed regulations up to now in this regard. Despite their non-binding character they are of significant importance in the development of laws governing the RLR.

In 1980s and 1990s some international instruments reaffirmed the RLR. They are the *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live* 1985,¹²⁹ the *International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Family* 1990,¹³⁰ the *Declaration on the Protection of All Persons from Enforced Disappearance* 1992,¹³¹ the *Draft United Nations Declaration on the Rights of*

¹²⁹ The *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live* 1985 was adopted by General Assembly Resolution 40/144 without a vote in December 1985. Article 5 (2) (a) sets forth that aliens shall enjoy “the right to leave the country” subject to “such restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others, and which are consistent with the other rights recognized in the relevant international instruments and those set forth in this declaration.”

¹³⁰ *International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Family* 1990 was adopted without a vote by General Assembly Resolution 45/158 of December 1990. It constitutes an elaboration of human rights standards, and consequently migrant workers will remain protected by human rights standards even in States, which do not become parties to the Convention. Article 8 provides “Migrant workers and members of their family shall be free to leave any State including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention. Migrant workers and members of their families shall have the right at any time to enter and remain their State of origin.”

¹³¹ The *Declaration on the Protection of All Persons from Enforced Disappearance* 1992 is annexed to General Assembly Resolution 47/133, adopted without a vote on December 1992. Article 8 regulates that “No State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he

indigenous Peoples 1994,¹³² the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms* 1998,¹³³ and *Nationality of Natural Persons in Relation to Succession States* 2000.¹³⁴ The above international instruments are not effective yet.

As of June 2004, 104 of the 152 States parties to the ICCPR were also parties to the First Optional Protocol to the ICCPR.¹³⁵ Under the optional protocol, individuals of ratified party States can claim any of the rights enumerated in the ICCPR, including the RLR. They can submit communications to the Human Rights Committee (HRC) when all domestic remedies have been exhausted. The HRC has made some notable comments regarding the RLR, such as

would be in danger of enforced disappearance. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable or mass violations of Human rights.”

¹³² *Draft United Nations Declaration on the Rights of Indigenous Peoples* 1994 was duly submitted to the Commission on Human Rights and the Secretary-General in 1994. Article 1 regulates that “Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental recognised under *the Charter of the United Nations*, the Universal Declaration of Human Rights and international human rights law.” Article 10 regulates that “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”

¹³³ The *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and protect Universally Recognized Human Rights and Fundamental Freedoms* 1998 was adopted by the General Assembly in Resolution on December 1998, without a vote. Article 1 provides that “Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.” Article 2 Paragraph 1 provides that “Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.”

¹³⁴ *Nationality of Natural Persons in Relation to Succession States* 2000 was annexed to General Assembly Resolution in December 2000, adopted without a vote. Article 1 provides that “Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the State concerned, in accordance with the present Articles.” Paragraph 2, Article 14 provides that “A State concerned shall take all necessary to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.”

¹³⁵ International Services for Human Rights, “The Ratification Status of the Main Human Rights Treaties”, ishr-06-2004, <http://www.ishr.ch/About%20UN/Ratification/Ratification%20-%20Human%20Rights%20treaties.htm> (18/05/2003).

Vidal Martins v. Uruguay,¹³⁶ *Stewart v. Canada*,¹³⁷ and *Peltonen v. Finland*.¹³⁸

Since 1948, Europe has made the most significant inroads into advancing human rights. Doubtless, the achievements are linked with the origin of the human rights including the RLR in Europe. the RLR is emphasised in the EHR,¹³⁹ the *Final Act of the Helsinki Conference 1975*,¹⁴⁰,

¹³⁶ In *Sophie Vidal Martins v. Uruguay* Communication No. R.13/57, Sophie Vidal Martins was refused the issuance of a passport without any justification therefor, thereby preventing her from leaving any country including her own. Accordingly, the Committee is of the view that the State party is under an obligation pursuant to article 2 (3) of the Covenant to provide Sophie Vidal Martins with effective remedies which would give her the possibility of enjoying the rights under article 12 of the Covenant, including a passport valid for travel abroad. See <http://wwwserver.law.wits.ac.za/humanrts/undocs/session37/13-57.htm> (07/07/2005)

¹³⁷ In *Stewart v Canada* (538/93), UNHRC commented that long-term resident could not regard country as his own, and long-term resident could still be deported. The Committee mainly held: (1) that the phrase 'his own country' in Art 12(4) applied to individuals who were nationals and to certain categories of individuals who were not nationals in a formal sense but, because of their special ties to or claims in relation to a given country, were not 'aliens' within the meaning of Art 13 even though they might be considered as such for other purposes; (2) that the country to which a person has immigrated did not become 'his own country' when it facilitated acquiring its nationality but that person refrained from doing so either by choice or by committing acts which thereby disqualified him. See <http://www.worldlii.org/int/cases/IHRL/1996/84.html> (07/07/2005)

¹³⁸ In the Comments of UNHRC on *Peltonen v. Finland* 492/1992 (1994), HRC comments that it would not be justified to interpret paragraph 3 of article 12 as entitling a State party to deny a passport to a person if a passport would enable him to leave a country other than Finland because he avoids military service in Finland. Such an interpretation would allow the State party to use and abuse the refusal of a passport as a means of exerting pressure on a conscript, so as induce him to return to Finland and perform his military service and be disciplined for his non-appearance in the military call-ups. It is not necessary either for the protection of national security, public order or public morals to use the refusal of a passport for restrictions on a person's freedom to leave any country for such purposes. This would be entirely incompatible with the object and purpose of paragraph 3; I therefore am of the opinion that the State party has violated article 12, paragraph 2, by refusing a passport to the author, which is a prerequisite for the exercise of his freedom to leave any country. See <http://www1.umn.edu/humanrts/undocs/html/vws492.htm> (07/07/2005)

¹³⁹ The *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 entered into force in September 1953. It was the first comprehensive treaty in the world in this regard; it established the first international complaints procedure and the first international court for the determination of human rights matters; it remains the most judicially developed of all the human rights system. Following the entry into force of Protocol No. 11 in November 1998, the control machinery was substantially restructured. All alleged violations of human rights are referred directly to the court. Article 2 (2) (3) Protocol No. 4, as Amended by Protocol No. 11 provides that "2. Everyone shall be free to leave any country, including his own. 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Article 3 and 4 provides that "3 (1) no one shall be expelled, by means either of an individual or a collective measure, from the territory of the State of

the *Document of the Copenhagen Meeting of the Second Conference on The Human Dimension of the CSCE 1990*,¹⁴¹ the *European Social Charter (Revised) 1996*,¹⁴² and the *Charter of Fundamental Rights of the European Union 2000*.¹⁴³

America has generally followed the European model, and made encouraging achievements. Article VIII of the *American Declaration of the Rights and Duties of Man 1948* States that “every person has the right [...] not to leave the State of which he is a national, except by his own will”. the RLR is formally guaranteed under Article 22 of *American Convention on Human Rights 1969* (AMR) that provides for a Commission and a Court, and bears a general resemblance to the European Convention.¹⁴⁴

which he is a national. (2) No one shall be deprived of the right to enter the territory of the State of which he is a national. 4. Collective expulsion of aliens is prohibited.”

¹⁴⁰ Conference on Security and Cooperation in Europe, the Final Act 1975 (1975 Helsinki Final Act) plays a certain role to catalyze the collapse of Communist in Europe. Part 1. d of Co-operation in humanitarian and other fields specially regulate the travel for personal or professional causes. Part 1. d of *Co-operation in humanitarian and other fields of 1975 Helsinki Final Act* The participating States intend to facilitate wider travel by their citizens for personal or professional causes and to this end they intend in particular: gradually to simplify and to administer flexibly the procedures for exit and entry; to ease regulations concerning movement of citizens from the other participating States in their territory, with due regard to security requirements. They will endeavour gradually to lower, where necessary, the fees for visas and official travel documents.

¹⁴¹ Article 9.5 of the *Document of the Copenhagen Meeting of the Second Conference on The Human Dimension of the CSCE 1990* provides that “they will respect the right of everyone to leave any country, including one’s own, and to return to his country, consistent with a State’s international obligations and CECE commitments. Restrictions on this right will have the character of very rare exceptions, will be considered necessary only if they respond to a specific need, pursue a legitimate aim and are proportionate to that aim, and will not be abused or applied in an arbitrary manner.”

¹⁴² Article 19 (6) of *European Social Charter (Revised) 1996* prescribe “(6) to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory.”

¹⁴³ Article 45 of the *Charter of Fundamental Rights of the European Union 2000* provide “1. Every citizens of the Union has the right to move and reside freely within the territory of the Member States. 2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.”

¹⁴⁴ Article 22 (2), (3), (5), (6), (7), (8) and (9) of the AMR States that “2. Every person has the right to leave any country freely, including his own. 3. The exercise of the forgoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent national security, public order, public morals, public health, or the right or freedoms of others. 5. No one can be expelled form the territory of the State of which he is a national or be deprived of the right to enter it. 6. An alien lawfully in the territory of a State Party to this Convention may be expelled form it only pursuant to a decision reached in accordance with law. 7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the State and international conventions,

Taking into account the evolution in the understanding and content of regional instruments related to the RLR, African countries and the Arab world have made great efforts to effectively protect the RLR. the RLR was recognised separately in the *African Charter on Human and People's Rights* 1981 (AFR),¹⁴⁵ the *Cairo Declaration on Human Rights in Islam* 1990,¹⁴⁶ the *Declaration on the Protection of Refugees and Displaced Persons in the Arab World* 1992¹⁴⁷ and the *Arab Charter on Human Rights* 1994.¹⁴⁸

in the event he is being pursued for political offences or related common crimes. 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being curtailed because of his race, nationality, religion, social status, or political opinions. 9. The collective expulsion of aliens is prohibited.”

¹⁴⁵The *African Charter on Human and People's Rights* 1981 entered into force in October 1986. Article 12 (2), (3), (4) and (5) set forth that “ 2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality. 3. Every individual shall have the right when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions. 4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law. 5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.”

¹⁴⁶ The *Cairo Declaration on Human Rights in Islam* 1990 was adopted by the Organization of the Islamic Conference in August 1990. It believes that “fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that not one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them.” It provides that “all human beings are God’s subjects. --- Human beings are born free. Every man shall have the right, within the framework of Shari’ah, to free movement and to select his place of residence whether inside or outside his country and if persecuted, is entitled to seek asylum in another-country. The Country of refugee shall ensure his protection until he reaches safety, unless asylum is motivated by an act which Shari-ah regard as a crime.”

¹⁴⁷ The *Declaration on the Protection of Refugees and Displaced Persons in the Arab World* 1992 was adopted by a Group of Arab Experts, which met in Cairo in November 1992, at the Fourth Arab Seminar on “Asylum and Refugee law in the Arab World”. Article 1, 2 reaffirms “the fundamental right of every person to the free movement within his own country, or to leave it for another country and to return to his country of origin.” and “the importance of the principle prohibiting the return or the expulsion of refugee to a country where his life or his freedom will be danger and considers this principle as an imperative rule of the international public law.” Article 3 considers that “the granting of asylum should not as such be regarded as a unfriendly act vis-a-vis any other State.”

¹⁴⁸ The League of Arab States adopted the *Arab Charter on Human Rights*, in September 1994. Article 21, 22 and 23 provides that “No citizen shall be arbitrarily or unlawfully prevented from leaving any Arab country, including his own, nor prohibited from residing, or compelled to reside, in any part of his country.” “No citizen shall be expelled from his country or prevented from returning thereto.” “Every citizen shall have the right to seek asylum in other countries in order to escape persecution. Persons facing prosecution for an offence under the ordinary law shall not enjoy this right. Political refugees shall not be extraditable.”

It should also be noted that at present there are no Asian conventions pertinent to the RLR, and no regional intergovernmental institution created to protect the RLR. The gist of the Asian countries' rejection of developing a regional convention is that "human rights, as propounded in the West, are founded on individualism and therefore have no relevance to Asia, which is based on the primacy of the community."¹⁴⁹ Asian countries adopted the *Bangkok Declaration* in April 1993. It contains the aspirations and commitments of the Asian regions on human rights, including the RLR.¹⁵⁰

The RLR norms is crystallising into customary international law, and commanding universal observance, binding even those States that are not parties to the conventions setting forth the RLR norms will thus become the trend. Efforts to promote the universality of the RLR by attempts to assure concordant behaviour, both by non-parties to the pertinent instruments and by those States that have dissented from their adoptions, will and must continue, despite the tension, which these efforts generate between the important values embodied in the relevant norms and the sovereignty of non-parties.

The credibility of the norms requires that attempts to extend their universality and further to reduce the already contracting domain of domestic jurisdiction. The fabric of international law need not be torn to establish the legitimate place of the RLR in general international law. Unlike most other fields of international law, the observance of the RLR is not based on reciprocal interests of States, but on the broader goal of States to establish orderly and enlightened international and national legal regimes. By the creative adaptation of the traditional and classical concepts and methods, it is possible to build the customary law of the RLR and humanitarian norms in a process that will enhance their credibility and effectiveness.

2.2.3 The factors driving the historical development of the laws governing the RLR

¹⁴⁹ Ghal, Yash, "Human Rights and Governance: the Asia Debate" in Steiner, Henry J. and Alston, Philip, *International Human Rights in Context*, 2nd edition, Oxford University Press, New York, 2000, page 550.

¹⁵⁰ Asian countries have had some preliminary discussions to establish regional human rights documents. *The Draft Asian Human Rights Charter*, proposed by the non-governmental Asian Human Rights Commission after regional consultations in 1993. See Council of Europe Information Sheet no. 35 (July – December, 1994)

There are many factors that drive the historical development of the laws governing the RLR. They include politics, economics, culture and law. Among these factors politics and economics are foremost. The former decides the grant of the RLR by governments. The latter decides the practical demands of the RLR by people. The influence of politics on the RLR is more significant than the influence of economics. An advanced economic system demands the RLR more, since the realisation of the RLR can benefit economic development. The greater the economic development, and the less economic differences between States, the fewer limits imposed on the RLR.

This correlation can be seen in history. An agrarian society requires a dense and stable labour force to be bound to the land. Although the absence of the systems of ports and customs further increased the need of travel in some senses, the travellers of agrarian societies were mainly youth seeking knowledge, artists, foreign spectators, traders, those seeking cures for bad health, and wealthy people travelling for distraction and recreation.¹⁵¹ The slave in Rome Empire was a man who could not go where he wished, and the free man was a man who could. If the Roman or Greek slave, or European serf could freely leave the castle or manor, the Mediterranean ancient civilisations and European feudal society would not have developed as they did.

Demographic theories assert that economic development involves evolution from a predominantly agrarian, peasant economy to an industrialised, market-oriented economy, characterised by a greater division of labour, urbanisation and weakening of traditional migratory customs.¹⁵² An industrial technology demands inventiveness and depends upon a labour force that is skilled or capable of being trained. The population must be induced to undergo the social dislocations of a mobile labour force and often also undergo a shift of social,

¹⁵¹ Cantor, Norman F. and Werthman, Michaels (ed), *The History of Popular Culture to 1815*, The Macmillan Company, New York and Collier-Macmillan Ltd., London, 1968, page 40.

¹⁵² Coale, A. J. and Hoover, E. M., "The Effects of Economic Development on Population Growth and the Effects of Population Growth on Economic Development" in Drake, Michael (ed), *Population in Industrialization*, Methuen & Co. Ltd., London, 1969, page 12-14.

economic, and political power.¹⁵³ The institutions and policies focused on the liberalisation of the RLR may enhance the social dislocations of a mobile labour force. One of the changes industrialisation underwent has been the conversion of the majority of the labouring population from peasants to an urban proletariat, and the increase of international migrants.¹⁵⁴

According to the *International Migration Report 2002* published by the UN, with the great progress of the world's economy the number of international migrants stood at 175 million in 2000, up from 75 million in 1965. International migrants are not distributed evenly across countries or regions. Sixty percent of the world's migrants currently reside in the more developed regions and 40 percent in the less developed regions. In 2000, international migrants made up 8.7 percent of the population in developed countries, while they accounted for only 1.5 percent of the population in developing countries.¹⁵⁵

Politics has then simultaneously driven the development of the laws governing the RLR, along with economic imperatives. Civilised political systems can improve the recognition of the RLR and the effectiveness of its protection. By contrast, the centralisation of State power or autocracy has the inclination to deny the RLR.

This correlation can also be seen historically. It is widely accepted that slave-owner and feudal King had autocratic powers in slave societies and feudal societies. Feudal monarchy could be interpreted as a lord-subject relationship without reciprocal rights and obligations of the lord-vassal concept. Absolute monarchs built royal supremacy into the machinery of their governments and subjects. Therefore, the slave and bondsman who were numerous could not move freely unless they were liberalised. The word "liberal" in Latin has its origin in the idea of

¹⁵³ Stipp, John L., Dirrim, Allen, W. and Hollister, C. Warren, *The Rise and Development of Western Civilization: 1660 to the Present*, John Wiley & Sons, Inc., New York, London and Sydney, 1967, page 228.

¹⁵⁴ Willis, F. Roy, *Western Civilization an Urban Perspective: Volume II from the 17th Century to the Contemporary Age*, D. C. Heath and Company, Lexington the USA, 1973, page 659.

¹⁵⁵ Population Division, Department of Economic and Social Affairs, *International Migration Report 2002*, United Nations Secretariat, 2002, ST/ESA/SER.A/220, the United Nations, New York, 2002, 62 pages, pages 2 and 11.

being unimpeded in the exercise of movement.¹⁵⁶ David Potter regarded communist rule as the opposite of democracy.¹⁵⁷ The communist States present the most consistent policy, generally very restrictive in the areas of travel and emigration, despite their geo-political differences. None of the countries in this group recognise the RLR by constitutional provision or statute, although Mongolia, North Korea, and Vietnam are parties to the ICCPR.¹⁵⁸

The post-Cold War era has seen the creation of a number of new States, particularly in the former USSR and Eastern Europe. They have changed their political systems from communist systems to Western-style democracies. Most of these States have liberalised the RLR.¹⁵⁹ The rate of economic increase in China is greater than that of the former USSR and eastern European countries, however Chinese laws governing the RLR have not yet fundamentally changed as they have in those countries. This is largely because a dramatic change in the political system has not occurred in China. In other words the advent of socialism in China along with one party rule has as yet brought no strong commitment to human rights which would include the RLR.¹⁶⁰

The influence of the political system on the RLR is ultimately more significant than the influence of economics. The ability to exploit a right and the demand to a right are not the precondition to the rights necessity. As far as the RLR is concerned, the ability to financially afford the leaving and returning, and the demand to leave and return, are not the premise of

¹⁵⁶ Maurice Cranston, “the Political and Philosophical Aspects of the Right to Leave and to Return”, in Vasak, Karel and Liskofsky, Sidney, (ed), *the Right to Leave and Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976, page 29.

¹⁵⁷“As a result of result of the end of communist rule many democracies were established, although a definition of the precise form of democracy that came into existence was often hazardous and – at the end of 1995 – could only be tentative on the basis of just six years of systemic change.” See Potter, David, Goldblatt, David, Kiloh, Margaret and Lewis, Paul (ed), *Democratization*, Blackwell Publishers Inc. Malden MA, the USA, 1997, page 394.

¹⁵⁸ Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 76.

¹⁵⁹ Joseph, Sarah and Seultz, Jenny et al, *The National Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000 page 5.

¹⁶⁰ Edwards, R. Randle, Henkin, Louis and Nathan, Andrew J., *Human Rights in Contemporary China*, Columbia University Press, New York, 1986, page 22.

upholding the RLR. It is thus possible for States to entitle people to the RLR in paper only under law. Upholding the RLR plays a catalytic role in helping people to realise the RLR in practice. Some developing States, such as Burundi and Cambodia grant people the RLR, even though their nationals are unable in practice to exercise those rights. In contrast, some developed States, such as Saudi Arabia and Singapore do not officially grant people the RLR, even though their nationals more often have the financial ability to exit and re-enter their countries.¹⁶¹

2.3 Globalisation and international migration

2.3.1 Globalisation

Globalisation is an inevitable international trend.¹⁶² According to McGrew, globalisation is the multiplicity of linkages and interconnections that transcend the nation-State (and by implication the societies) which make up the modern world order. It defines a process through which events, decisions and activities in one part of the world significantly effect distant individuals and communities.¹⁶³ Capitalism relies upon the market-oriented system, which underlines competition and free-flow of human resources among States. Of the 100 largest economies in the world, 51 are global corporations, whereas only 49 are States.¹⁶⁴

Yet the contemporary age is not the first global epoch. In the words of D. Held:

Globalisation, as an historic process, cannot be characterised by revolutionary logic. Historical patterns of globalisation have been punctuated by great shifts and reversals, while the temporal

¹⁶¹ Burundi and Cambodia are party members of the ICCPR, while Saudi Arabia and Singapore are not.

¹⁶² “Many analysts have concluded that, like it or not, we live in an era of globalisation, and humanity increasingly shares a common fate. ... The peoples of the world are linked more closely through a greater participation by virtually all States in the global market, and thanks to the evolution of modern communications technology.” See Ness, Peter Van, *Human Rights and Democracy in China: Four Theories on Why the World Should Care*, working paper No.167, Peace Research Centre, Research School of Pacific Studies, ANU, 1996, pages 13-14.

¹⁶³ McGrew, T. “A Global Society”, in Hall, S., Held D. and McGrew T. (ed), *Modernity and Its Future*, Cambridge, Polity Press, 1992, page 65.

¹⁶⁴ Quoted in Amnesty International, “AI on human Rights and Labour Rights” at Lechner, Frank J. and Boli John (ed), *Globalisation Reader*, Blackwell Publishers, Malden, the USA, 2000, page 187.

rhythms of globalisation differ between domains.¹⁶⁵

Although the Roman, Germanic and Mongol people were known to have engaged in large scale migration during times of ancient imperialist expansion, and similarly significant movement from 1500 to 1900, contemporary patterns of migration can be distinguished from historical examples on the basis of their extent and intensity.⁵

Globalisation significantly influences international migration. It has made more people aware of conditions and opportunities abroad to study, work and live. Global restructuring generates or amplifies international migration and, in turn, that movement of people across borders is an indication of the globalisation of societies, and of the obsolescence of national boundaries.¹⁶⁶ New development in information and transportation technology increases the volume of temporary-, repeat- and circulatory migration. Globalisation — as the increased international flow of trade, capital, information and people — has delivered undeniable wealth and opportunity and created millions of jobs.¹⁶⁷ Positively speaking, some countries have grown through entering the global economy. In 2003, the IOM observed that like other flows, whether financial, commercial, or flows of information or ideas, the rising tide of people crossing frontiers is among the reliable indicators of the intensity of globalisation.¹⁶⁸ Kofman even suggested that international migration is central to the study of globalisation.¹⁶⁹

Globalisation has underpinned the interdependence of markets, production, culture and

¹⁶⁵ Held, D., McGrew, A., Goldblatt, D., and Perraton, J., *Global Transformations: Politics, Economics, and Culture*, Polity Press, Cambridge, 1999, page 414.

⁵ Kirkbride, Paul, (ed), *Globalisation: The External Pressures*, John Wiley & Sons, Ltd., West Sussex, the UK, 2001, page 35.

¹⁶⁶ Pellerin, Helene, “Global Restructuring and International Migration: Consequences for the globalisation of Politics”, in Kofman, Eleonore and Youngs, (ed) Gillian, *Globalisation: Theory and Practice*, Pinter, New York, 1996, page 6.

¹⁶⁷ Human Rights Watch, “Human Rights Watch World Report 2001: A Human Rights Framework (Introduction)”, <http://www.hrw.org/wr2k1/intro/intro01.html> (25/07/2003).

¹⁶⁸ “Facts and Figures on International Migration”, *Migration Policy Issues*, No. 2, March 2003, IOM International Organization for Migration, Geneva, Switzerland, page 1.

¹⁶⁹ Kofman, Eleonore and Youngs, Gillian, (ed), *Globalisation: Theory and Practice*, Pinter, New York, 1996, page 6.

languages by the exchange of goods, services, capital, information, skills and people. The process has inextricably tied trade, competition and employment to international migration more than ever. The effect on private companies is that their employees, in the course of their employment, need to become “international” citizens in accessing foreign countries. Managing their international mobility is inherent to their human resource value. In relation to multilateral agreements between States, the General Agreement on Trade and Services (GATS) clearly articulates the relationship between trade barriers and immigration controls. The use of immigration laws to restrict the movement of services providers is a non-tariff barrier to the trade of services.¹⁷⁰

2.3.2 International migration

Some introductory facts are that:

- The rate or the distribution of international migration has not dramatically changed over the last 40 years.¹⁷¹ Although the international migration rate grew rapidly in the closing years of the last century, the growth has been evolutionary rather than revolutionary.¹⁷²
- Furthermore, there has not been an even distribution of migrants between countries, but a steady increase in the number of immigrants travelling to developed countries.¹⁷³

¹⁷⁰ Keely, Charles B., *Globalisation Transforms, Trade-Migration Equation*, Blackwell Publishing Ltd. Oxford, 2003

¹⁷¹ Around 175 million persons currently reside in a country other than where they were born in 2000. Compared with 6 057 million persons in the world, it suggests that most people never cross national borders to live or work in another country. In the 25 years from 1975 to 2000, the number of migrants in the world increased by 100 million persons, but the proportion of international migrants within the total population of the world did not change significantly, ranging from close to 2.3 percent to 2.9 percent. International migrants increased 1.9 percent per year since 1965; it is only slightly ahead of the annual world population growth rate of about 1.8 percent. See Population Division, Department of Economic and Social Affairs, United Nations Secretariat, *Measuring International Migration: Many Questions, Few Answers*, UN/POP/MIG/2002/BP/1, New York, 2002, 10 pages, page 4.

¹⁷² Papademetriou, Demetrios, G., *Reflections on International Migration and its Future*, International Organization for Migration, Geneva, Switzerland, 2002, 58 pages, page 10.

¹⁷³ International migrants in 1990 constituted 4.5 percent of the population in more developed countries, while accounted only for just 1.6 percent of the population in developing countries. “The percent of the world’s international migrants living in more developed countries increased from 52.9 percent to 59.6 percent during the period of 1990 to 2000. International migrants live in Europe (56 million), Northern America (41 million), Oceania (6 million), Asia (50 million) and Africa (16 million) in 2000. Its increased by 15.8%, 48%, 22.8%, -0.4% and 0.3%

- The official number of migrants accounts for a small percentage of estimated actual migration.¹⁷⁴
- The effect of international migration on population growth and distribution rates for some receiving States is significant. This is in large part due to the fact that these countries exhibit persistently low rates of natural population growth.
- Migrants' remittances continue to be a major source of some developing countries' national income.¹⁷⁵

With globalisation, new patterns of international migration are emerging, which are closely linked and interdependent with pre-existing patterns. It can be observed that permanent and temporary migration stimulate one another. Some examples of these newer forms of migration include circular migration, the “astronaut phenomenon”, and the migration of retired people, women, students and parents.

Causes of international migration

The most fundamental cause of international migration is the quest for personal security and economic improvement, or rather, the attempt to defend oneself against personal insecurity or economic deterioration or underdevelopment.¹⁷⁶ In terms of family migratory patterns, the cause is generally related to family reunion, the hope for a better future, political stability and

from 1990”, Calculated according to the data at Population Division Department of Economic and Social Affairs, *International Migration Report 2002*, United Nations Secretariat, 2002, ST/ESA/SER.A/220, the United Nations, New York, 2002, 62 pages, page 2.

¹⁷⁴ “In comparison with the total number of 3 million people a year cross national borders and settling in another country, 1.2 million immigrants were officially accepted a year collectively in the USA, Canada, Australia, Israel and New Zealand in 2000, which implies that most people who take up residence in another country each year are irregular migrants including refugees seeking protection and unauthorized or illegal foreigners’, Martin, Philip and Widgren, Jonas, *International Migration: Facing the Challenge*, Population Reference Bureau, Washington D.C., 2002, 39 pages, page 4.

¹⁷⁵ For example, as a proportion of total financial inflows, remittances amounted to 66% and 51% of the Moroccan and Egyptian national incomes respectively. See “Facts and Figures on International Migration”, *Migration Policy Issues*, No. 2, March 2003, IOM International Organization for Migration, Geneva, Switzerland, page 1.

¹⁷⁶ Papademetriou, Demetrios, G., *Reflections on International Migration and its Future*, International Organization for Migration, Geneva, Switzerland, 2002, 58 pages, page 25.

marriage.¹⁷⁷ Emigrants in the humanitarian stream prefer to move in order to escape war or the political situation in their homeland, and to seek better employment opportunities.¹⁷⁸ Skilled migratory patterns prove that immigration may yield economic benefits to the host country.

Circular migrants mainly prefer to temporally return to their home country because they find it very hard to realise their initial hopes, such as finding a better job and having a better future for their family in the host country. Other causes for circular migration can also be due to policies in the country of origin and host country that encourage temporary migration. Some of the essential characteristics of circular migrants are that they retain their original citizenship, consider themselves to be expatriates, maintain important links with their home country, may intend to return to it, and are often highly paid and skilled.¹⁷⁹

The frequency of international migration is more likely to increase because of the above causes. The result may be a strong set of “pull and push” factors, from changing circumstances, which may encourage a growing number of people to migrate in the near future. Other macro motivations will also trigger a future increase of international migration, such as that:

- Some countries regard international migration as one of important measures to relax the ageing of the overall population.¹⁸⁰

¹⁷⁷ Hugo, Graeme, Rudd, Dianne and Harris, Kevin, *Emigration from Australia: Economic Implications*, Second report on an ARC SPIRT grant CEDA Information Paper No. 77, Adelaide University Australia, June 2001, page 72.

¹⁷⁸ Hugo, Graeme, Rudd, Dianne and Harris, Kevin, *Emigration from Australia: Economic Implications*, Second report on an ARC SPIRT grant CEDA Information Paper No. 77, Adelaide University Australia, June 2001, page 74.

¹⁷⁹ Newland, Kathleen, “Migration as Factor in Development and Poverty Reduction,” (<http://www.migrationinformation.org.Feature/display.cfm?ID=136>) (05-06-2003).

¹⁸⁰ “Demographic explanations point to the structural disparities between areas with stagnant economies but high rates of fertility, and areas with fast-growing economies but declining fertility.” (See Hugo, G., “The Demographic Underpinning of Current and Future International Migration in Asia”, *Asian and Pacific Migration Journal*, 7 (1) 1998, page 1-25.) Western and Southern Europe, Japan and Oceania are dramatic cases in the later regard, as of North Africa in the former regard. The proposed ration of those aged 65 and over to those aged 15 to 64 will increase from 2010 and 2020 in Australia (19.0 percent to 24.6 percent), the USA (19.2 percent to 25.4 percent), Japan (32.3 percent to 42 percent) and Italy (30.4 percent and 36.4 percent). Additional working age population required in 2020 for old-age dependency ratio to remain page 2010 levels are 4.4 million, 66.4 million, 22.6 million and 6.8 million respectively. (Calculated from medium variant projections in the United Nations, *World Population Prospects, the 1996 Revision*.) Western and Southern Europe, Japan and Oceania are dramatic cases in the later regard, as of North Africa in the former regard. The proposed ration of those aged 65 and over to those aged 15 to 64 will increase from

- The income gap between different countries is sufficient cause to make a rational choice to migrate. Growing disparities lead to increased migration in the near future.
- The labour migratory movement, once started, develops its own dynamics and cannot easily be stopped. This can be explained by competition between interest groups in receiving countries.¹⁸¹
- It is well known that most migrants follow “beaten paths” and go where their compatriots have established a bridgehead, making it easier to find a job and integrate into the host country. This may be called “chain migration” or “networks migration”.
- Migration for the purpose of seeking asylum, or undocumented migration, is likely to increase, with little hope that global conflicts will be resolved in the foreseeable future.
- More free trade treaties will eliminate the many barriers of all kinds erected between States and parties within States over centuries, bringing freedom of movement in free trade regions for persons pursuing economic activities, and for goods, services and capital.

Management of international migration

The management of international migration is likely to become more controversial, difficult and urgent in the 21st century. It will bring into play many sensitive issues of national security and identity, of social change and cultural adaptation, and of economic vitality and development. Properly managed, immigration may provide important answers to some of the world’s more developed countries’ most intractable current and long-term dilemmas, and it might give some balance and foundation for a more mature international dialogue. The key to dealing with the

2010 and 2020 in Australia (19.0 percent to 24.6 percent), the USA (19.2 percent to 25.4 percent), Japan (32.3 percent to 42 percent) and Italy (30.4 percent and 36.4 percent). Additional working age population required in 2020 for old-age dependency ratio to remain page 2010 levels are 4.4 million, 66.4 million, 22.6 million and 6.8 million respectively. Also see other reports pertinent world population shows that the old-age dependency ratios in more developed countries will be much higher in 2030 and 2050, such as the USA (31.9 percent and 33.5 percent) and Japan (43.5 percent and 50.2 percent). Quoted in Papademetriou, Demetrios, G., *Reflections on International Migration and its Future*, International Organization for Migration, Geneva, Switzerland, 2002, 58 pages, page 34.

¹⁸¹ Castles, Stephen, “Migration and Community Formation under Conditions of Globalisation”, *International Migration Review*, Winter 2002 v36 i4 page 1143 (26),

[http://web6.infotrac.galegroup.com/itw/infomark/740/651/37374829w6/purl=rc1_EAI...\(25-07-2003\)](http://web6.infotrac.galegroup.com/itw/infomark/740/651/37374829w6/purl=rc1_EAI...(25-07-2003))

patterns of international migration is not to prevent or obstruct movement, but to make the order of movement effective. If all actors in the migration process are to gain the maximum benefit from migration, the policy effort must focus on some of the grossly under-explored topics in the public discourse on international migration.¹⁸² Policies at a local level play a considerable role in the management of migration.

2.3.3 International migration policy

An increased number of countries have formulated new immigration policies to face the trend of globalisation and the reality of international migration. Firstly, a diverse group of countries, including Italy, Portugal, South Korea and Germany, have boosted the numbers of immigrants.¹⁸³ Secondly, since the 1980s, many immigrant-receiving countries, including the USA, Canada, Australia, and New Zealand have implemented immigration policies that are designed to attract economic migrants such as entrepreneurs, executives, scientists, professionals and technical specialists.¹⁸⁴

Thirdly, receiving countries have tightened the management of immigration services. The immigration service industry is already regulated in Australia and the UK. Canada and New Zealand are developing a system that aims to provide a dependable mechanism to prevent unscrupulous immigration consultants from using their fiduciary position for their own profit, or

¹⁸² Papademetriou, Demetrios, G., *Reflections on International Migration and its Future*, International Organization for Migration, Geneva, Switzerland, 2002, 58 pages, page 9.

¹⁸³ Hamilton, Kimberly, "Italy's Southern Exposure", <http://migrationinformation.org/Profiles/display.cfm?id=121> (02/05/2003); Malheiros, Jorge, "Portugal Seeks Balance of Emigration, Immigration", <http://www.migrationinformation.org/feature/display.cfm?ID=77> (19-05-2003); *Issues Paper from the Republic of South Korea*, Asia Pacific Migration Research Network, Migration Issues in the Asia Pacific, 11 pages, page 1; Munz, Rainer, *New German Law Skirts Comprehensive Immigration*, <http://www.migrationinformation.org/Feature/display.cfm?id=241> (03/08/2004).

¹⁸⁴ Economic stream migrants between 200,000 and 225,000 in 2000 make up the majority of that immigration to Canada, accounting for slightly more than half of total immigration. See Yale-Loehr, Stephen and Erhardt, Christoph, *Immigration and Human Capital: A Theoretical, Comparative and Practical Perspective*; and Australian governments encourage skilled migration recent years. 66,050 skilled migrants visas have been issued during the period of July 2002 – July 2003, which accounts for 61 percent of Australian non-humanitarian immigration program. See Shen, Juguang, "The New Record of Skilled Migration 2002-2003" (*2002-2003 Niandu Jishu Yimin Chuang Xingao*), in *The Daily Chinese Herald, Australia*, 26, 27 July 2003.

mismanaging their clients' immigration affairs.¹⁸⁵ Similar policies can be found in emigration services in those countries. In China, regulations introduced in 1999, 2001 and 2002 paved the way for comprehensive regulation of several of emigration intermediary agencies through the Ministry of Public Security (MPS), the Ministry of Labour and Social Security (MLSS), the Ministry of Education (MOE) and China National Tourism Administration (CNTA).

Fourthly, asylum seeking and other forms of migration have long been viewed as separate issues by some governments. Asylum policies are now at the core of the discussion of migration in many parts of the world. The international asylum regime prevailed from the early 1950s through the late 1990s, and eventually challenged the States' prerogative to decide on the recognition of asylum seekers. Extensive media coverage of the plight of refugees has contributed to the politicisation of international migration. Restrictions on asylum have become quite common in both developed and developing countries.¹⁸⁶ However, some analysts think that regardless of whether migration has a positive or negative effect, more developed countries will be unable to stop the arrival of desperate migrants, and that only military intervention will prevent large numbers of poor migrants attempting to enter affluent countries, threatening their security.¹⁸⁷

Finally, countries increasingly view flexible citizenship as an important and practical tool of integration. Recent North American and European research indicates that immigrants quickly adopt many conventional norms and values of the receiving society, while still maintaining a strong positive valuation of their own culture and language.¹⁸⁸ Acknowledging the realities of

¹⁸⁵ The National Citizenship and Immigration Law Section of the Canadian Bar Association, *Submission on Immigration Consulting Industry*, 2000, 16 pages, page 1; and Hon Dalziel, Lianne, the Minister of Immigration. *Options for Setting Enforceable Standards for Immigration Consultants*, 2001, 8 pages, page 1.

¹⁸⁶ Population Division Department of Economic and Social Affairs, United Nations Secretariat, *International Migration: Explicit Policies, Uncertain Consequences*, UN/POP/MIG/2002/BP/2, New York, 2002, 15 pages, page 10.

¹⁸⁷ Martin, Philip and Widgren, Jonas, *International Migration: Facing the Challenge*, Population Reference Bureau, Washington D.C., 2002, 39 pages, page 5.

¹⁸⁸ Newland, Kathleen, "Migration as Factor in Development and Poverty Reduction", <http://www.migrationinformation.org/Feature/display.cfm?ID=136> (05-06-2003).

permanent residence abroad, and the process of accessing citizens' rights in receiving countries, many sending countries tend to stress the importance of legal regulations that permit emigrants to qualify for foreign naturalisation without surrendering their original citizenship. Sending countries wish to maintain close contacts with their citizens abroad and tend to encourage emigrants to retain their citizenship and transfer it to their children. The complex situation created by dual citizenship can be limited by bilateral and international conventions.¹⁸⁹

As globalisation creates multi-ethnic societies, and traditional notions of citizenship become increasingly inadequate, some States are considering multiple citizenship, which is occurring both within existing nation-States and in new regional entities such as the European Union (EU).¹⁹⁰ The facts outlined below support the finding that regional free trade agreements usually precede the free flow of people, which simultaneously enhances free trade.

- Following *Schengen Agreement* in 1995 and *Treaty of Amsterdam* in 1999, the EU became a zone of free movement for EU nationals. The EU established a common asylum and immigration policy after May 2004.
- The *North America Free Trade Agreement* permits the temporary entry of highly qualified workers in 64 professions. It allowed open borders for professionals among three countries after 2003.¹⁹¹
- The *Managua Agreement*, which was adopted by the El Salvador, Guatemala, Honduras and Nicaragua in 1993, provided for the creation of a system to facilitate the movement of people without requiring a passport or visa, the functions of which are instead supplied by a valid identity card from the respective country, and an application form as provided for in the Agreement. Travellers are authorized to a 90-day, non-extendable stay in the region, without any territorial limits.¹⁹²

¹⁸⁹ Icduygu, Ahmet, "Citizenship at the Crossroads: immigration and the Nation-State", at Kofman, Eleonore and Youngs, Gillian, (ed), *Globalisation: Theory and Practice*, Pinter, New York, 1996, page 157.

¹⁹⁰ Davidson, Alastair, "Globalisation and Citizenship", *ARENA Journal* No. 12 1998, p83-105, page 83

¹⁹¹ Martin, Philip and Widgren, Jonas, *International Migration: Facing the Challenge*, Population Reference Bureau, Washington D.C., 2002, 39 pages, page 11.

¹⁹² International Organization for Migration, *The State of Migration Management in Central America: an Applied Research, Final Report*, International Organization for Migration, Geneva, Switzerland, 2002, 89 pages, page 13.

The *Closer Economic Partnership Arrangement* (CEPA) was signed between the HKSAR and Mainland China in June 2003, creating a unique free trade zone. Under the arrangement, many HKSAR products will enjoy a zero tariff rate in the Mainland market.¹⁹³ Both the Mainland and the HKSAR have been taking measures to simplify passport and visa application procedures. Since May 2002, it is easier for Mainland Chinese to obtain a visa for Hong Kong.¹⁹⁴ Since August 2003, residents in South China's Guangdong Province have been able to commute to Hong Kong with only an identification card rather than a passport.¹⁹⁵ It is predicted that further increases in the number of people moving between the regions will occur.

2.4 Conclusions

Migration stems from human nature or instinct. It provides the basis for a "natural right" to leave and return. With a progression from agrarian to industrial societies, the RLR has correspondingly progressed and crystallised into a recognised legal right. Admitting the RLR as a positive right is mainly to describe the wide legal recognition in the world, rather than to accept the utilitarian aspect or deny the nature of the RLR as a natural right. In actuality, the more the RLR in the sense of positive law conforms to the RLR in the sense of natural law, the more the relevant laws are efficient and violations lessen. Meanwhile, the RLR needs be rational; to maintain itself within the limits of human nature.

The history of laws governing the RLR reveals that the right developed from the privilege of people with special status, to the right of all people. Following the Second World War, recognition of the RLR by States has increased and international instruments have also evinced that the recognition of the RLR is moving gradually beyond the national borders. While the

¹⁹³ "Guangdong Could Win big form the CEPA", 4 August 2003, *The China Daily*, http://www3.chinadaily.com.cn/en/doc/2003-08/04/content_251571.htm (05-08-2003); Wong, Alan, *Hong Kong: Stronger than Ever* at dinner talks at Four Seasons Hotel, Sydney, Thursday 10 July 2003.

¹⁹⁴ Jiang, Zhuqing, "Mainland SAR Visa Procedures Simplified", 30 May 2002, *The China Daily*, http://www3.chinadaily.com.cn/en/doc/2002-05/30/content_121719.htm (05-08-2003).

¹⁹⁵ Duan, Ruolan, "ID to be travel passport", 18 March 2003, *The China Daily*, http://www3.chinadaily.com.cn/en/doc/2003-03/18/content_158340.htm (05-08-2003).

formal recognition of the RLR is not enough to ensure its enjoyment, it is undoubtedly a significant starting point for its effective protection. Since the emergence of the modern concept of the passport, the passport has become the major instrument governing the RLR. The trend is toward simplification and easing of passport application procedures and the standardisation of forms. Among the factors driving the development of the laws governing the RLR, political imperatives decide the grant of rights and economic imperatives set the practical demands of the RLR by people. The influences of politics on the RLR are more significant than the influences of economics.

Global restructuring generates or amplifies international migration and, in turn, the movement of people across borders is an indication of the globalisation of societies. An increased number of countries have formulated new immigration policies to face the trend of globalisation and the reality of international migration, for example, to attract more economic migrants and be inclined to accept flexible multi-citizenship policies. Although the causes of international migration do not change much, the management of international migration is likely to become more controversial, difficult and urgent in the 21st century, because it brings into play many sensitive issues of national security and identity, of social change and cultural adaptation, and of economic vitality and development.

Chapter Three

The RLR in International Migration Law

Introduction

Few rights are more generally proclaimed or more widely abridged than the RLR.¹⁹⁶ This chapter will define the current legal status of the RLR in international migration law, to identify important issues that determine criteria by which the RLR may be reasonably restricted.

The analysis begins with the recognition and standards of the RLR, and sources of evolving jurisprudence of the RLR. Given that an individual's the RLR is bound with the possession of a passport and enough foreign exchange, this chapter will then analyse rights related to those possessions. Permissible limits on the RLR have always emerged as the most contentious issue in this area and are therefore a focus of attention here. A necessary extended analysis of the right to leave and the right to return then follows in two sections. The analysis in Chapter three may provide an objective criterion and reference by which China could compare its laws.

3.1 General considerations on the RLR

This section examines the recognition of the RLR in international migration law, to clarify the standards of the RLR internationally and domestically, to then consider disputes with respect to standards and review the sources of evolving jurisprudence of the RLR.

3.1.1 The recognition of the RLR

By whichever criterion it is classified, the RLR has considerable international recognition as a human right. Its wide recognition is one of the most important reasons for its significance. Where the RLR is concerned, countries can generally be placed in two groups. The first comprises 152 countries that have ratified the ICCPR before June 2004, and recognised the

¹⁹⁶ Plender, Richard, *International Migration Law*, Revised 2nd ed., Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988, page 95.

RLR as a fundamental human right, with an international obligation to effectively protect it.¹⁹⁷ Most of these countries fulfil their international obligations by incorporating the terms of the international instruments into the detail of their domestic laws, including their Constitutions. The second group of about 40 countries including Indonesia, Malaysia, Pakistan, Turkey, Saudi Arabia, China and Cuba that have not yet ratified the ICCPR. While they ratified the *Charter of the United Nations* and the UDHR, and accordingly might recognize the RLR as a human right, they usually do not regard the RLR as a real right in practice — it remains an aspirational right, on paper.

The recognition of the RLR and the recognition of the freedom of movement within a territory do not necessarily follow one another. In China, for example, the fact that people do not enjoy freedom of movement within the territory is not the key cause for preventing them from leaving China.¹⁹⁸ This is contrary to the idea that “when he is confined to a particular locality or reservation, he is in effect prevented from leaving the State itself.”¹⁹⁹ Freedom of movement and the RLR are not always indivisible.

3.1.2 Standards of the RLR

There is a widely accepted common standard of human right in international migration law, while a particular standard of human rights simultaneously exists in some countries. The UDHR established that:

A common standard of achievement for all peoples and all nations, ...to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and

¹⁹⁷ International Service for Human Rights, “The Ratification Status of the Main Human Rights Treaties”, <http://www.ishr.ch/About%20UN/Ratification/Ratification/Ratification%20-%20Human%20Rights20treaties.htm> (18-05-2003).

¹⁹⁸ Though millions of Chinese people might move around mainland China, their households, personal dossiers, medical treatments, employment, education, housing could not be moved together. There are much differences in these fields between the original resident areas and migration areas. From this angle, Chinese people have not truly enjoyed the freedom of movement. Most Chinese scholars, forexample Liu Wujun, Zeng Wenhong, Peng Xiuzhi, Zhang fan etc. accepted this point.

¹⁹⁹ Ingles, Jose D, *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including his Own, and to Return to His Country*, the UN Publication Sales No.: 64. XIV. 2 New York, 1963, page 9.

among the peoples of territories under their jurisdiction.²⁰⁰

As far as the RLR is concerned, the common standard is stated in Article 13 (2) of the UDHR, which express a universal minimum standard for well-ordered political institutions for all people, as members in good standing and, to a just political society.

The UN Human Rights Committee (HRC) considers that the RLR contained in the ICCPR is the universal minimum standard.²⁰¹ The ICCPR is not merely the codification of our highest values. It is elsewhere considered that it is also a formula for the effective defence of democratic societies from terrorism.²⁰² The ICCPR consider that States have the obligations under the *Charter of the United Nations* to promote universal respect for, and observance of, human rights and freedoms, which certainly include the RLR.²⁰³ The efforts of the international community on human rights have drawn upon earlier notions from religion and natural law that implied the existence of a common humanity.²⁰⁴

It is not surprising that the universal minimum standard mentioned above reflects Western, particularly American values and institutions. This is due to American dominance after the Second World War in the very period that contemporary concepts of international human rights have taken shape. Therefore, some countries do not accept it. The standard and model preferred by Asian countries, for instance, places a heavy emphasis on economic development.²⁰⁵ Asian States have recognised that:

While human rights are universal in nature, they must be considered in the context of dynamic and

²⁰⁰ Preamble, the *UDHR, 1948, UDHR*, G.A. res.217 A(III), U.N. Doc. A/810, page 71

²⁰¹ Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page viii.

²⁰² Charter, Jimmy, "Introduction" in Williams, Paul (ed), *The International Bill of Human Rights*, Entwhistle Books, Glen Ellen, the USA, 1981, page xxi.

²⁰³ Preamble, Paragraph 5 of the ICCPR

²⁰⁴ Li, Victor, "Human Rights in a Chinese Context", in Lee, Tahirih V. (edit), *Law, the State and Society in China*, Garland Publishing Inc., New York, 1997, page 223

²⁰⁵ Hoof, Fried van, Asian Challenges to the concept of Universality: Afterthoughts on the Vienna Conference on Human Rights, of Baehr, Peter R. & Hoof, Fried van, Liu, Nanlai, Tao, Zhenghua, *Human Rights: Chinese and Dutch Perspectives*, 1996, Kluwer Law International, The Hague, the Netherlands, page 5

evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious background.²⁰⁶

The Chinese government contends that the core of exit and entry administration is in the examination and approval of applications. Chinese citizens cannot go abroad without justification.²⁰⁷ This is quite different from the international standard that regards the protection and realisation of the RLR as the core of exit and entry administration, and therefore that it is unnecessary for the authorities of a State to require reasons for going abroad.

The international community respects the various national standards of human rights. The same legal logic can be used in regard to the RLR. The UN has declared, in the Second World Conference on Human Rights that “the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind.”²⁰⁸ In other words, the Second World Conference on Human Rights did not effectively negate the notion of cultural relativism espoused by the earlier Bangkok Declaration. Scholars have also asserted that Western countries should not and cannot regard their own human rights standards as the only proper ones to which all other countries must conform.²⁰⁹ Meanwhile, countries and regions preferring particular standards need also to accept and respect the universal minimum standard — particularity does not justify the denial of a common standard or its substitution with another. Fortunately, Asian countries have reaffirmed their commitment to principles contained in the *Charter of the United Nations* and the UDHR. The Chinese have officially accepted that it will

²⁰⁶ Article 8 of the *Bangkok Declaration* 1993, adopted by the Asian Preparations Conference of the Second Conference on Human Rights.

²⁰⁷ Mao, Fengping, (ed), *The Explanation of the Law and Regulations Governing exit and entry and the Collections of Related Regulations (Chujing Rujing Falv Fagui Sijie Yu Xiangying Fagui Zhaibian)*, the Publishing House of Jilin Renmin, Changchun, China, 1994, page 75. Also see Department of Politics under the Ministry of Public Security, *Frontier Defence and Exit and Entry Administration, the Series of Basic Textbook of People’s Police Operation: (Bianfang Yu Churu Jing Guanli, Renmin Jingcha Gongan Yewu Jichu Jiaochai)*, examined by Committee of Textbook Editing and Examination of the Ministry of Public Security, the Publishing House of Qunzhong, internal Publication in Public Security Organs (Gongan Jiguan Neibu Faxing), Beijing, 1999, page 318.

²⁰⁸ The United Nations General Assembly, *Report of the World Conferences on Human Rights Vienna, 14-25 June 1993 Report of the Secretary-General*, Distr. General A/CONF.157/24 (Part I), 13 October 1993, page 18.

²⁰⁹ Liu, Shengping, Xia, Yong, (ed), *Human Rights and the World (Renquan Yu Shijie)*, the Publishing House of People’s Courts, Beijing, 1996, page 126-130.

perform its international obligations with respect to the RLR in the light of the *Charter of the United Nations*, the UDHR and the ICCPR.²¹⁰

It is a difficult but necessary task to find a way to resolve the differences between national and international standards, because unlike other human rights, usually limited to one country's territory, the RLR is distinguished by its transnational character. The violation of the RLR in one country may lead to the abuse of other fundamental human rights in other countries. The acceptance of the same common standard of the RLR internationally and within all countries will not occur without a joint effort of particular countries, the international community and the West. the RLR in the South can only be empty paper promise without the cooperation and assistance of the North.

The West in this regard is faced with a dilemma. If it requires certain countries to reform the national standard of the RLR, they may receive a mammoth flow of immigration in the short term. If the West ignores the violation of the RLR in certain countries who do not perform their international obligations, their national interest in those countries will be damaged in the long term.²¹¹ In practice, the West has been trying to balance national interests and human rights idealism. As the US Secretary of the State commented in 2003, the “combination of idealism and practical policy implementation has become a hallmark of our foreign policy in the area of international human rights.”²¹²

3.1.3 Sources of evolving jurisprudence of the RLR

As discussed earlier, the RLR has been widely recognised in numerous international

²¹⁰ Committee of Textbook Editing and Examination of the Ministry of Public Security, *Frontier Defence and Exit and Entry Administration, the Series of Basic Textbook of People's Police Operation (Renmin Jingcha Gong'an Yewu Jichu Jiaocai: Bianfang Yu Churu Jing Guanli)*, the Publishing House of Qunzhong, Internal Publication in Public Security Organs (*Gongan Jiguan Neibu Faxing*), Beijing, 1999, page 279.

²¹¹ For more information, please see part 14.2.4 of this thesis International environment favouring protection of RLR in China.

²¹² Colin L. Powell, “Preface”, at “Supporting Human Rights and Democracy: The U.S. Record 2002-2003”, the Bureau of Democracy, Human Rights, and Labour, 2003, <http://www.State.gov/g/drl/rls/shrd/2002/21763.htm> (05-07-2033).

conventions, international declarations and domestic laws. The HRC was established under Part IV of the ICCPR in 1977.²¹³ The European Human Rights Commission (EUCM), the inter-American Human Rights Commission (AMCM) and the African Commission on Human and People's Rights (AFCM) have become far more active in recent years. As Hurst Hannum has pointed out, an increasingly large corpus of jurisprudence of the RLR has emerged since the 1972 Uppsala Declaration on the RLR.²¹⁴ Although the evolving jurisprudence of the RLR does not possess formal institutions responsible for law creation, there are recognised and accepted methods by which legal rules come into existence and several ways in which the precise content of legal rules can be identified. These are the sources of evolving jurisprudence of the RLR.

The first source is international conventions or treaties. Article 38(1)(a) of the *Statute of the International Court of Justice* (Statute of ICJ) speaks of "international conventions, whether general or particular, establishing rules expressly recognised by the contesting States." Treaty means formal agreement between two or more countries.²¹⁵ Treaties range from those generally defining the RLR, such as the ICCPR and the 1975 Helsinki Final Act, to those specially dealing with one part of the RLR, such as the CERD and the CRC and those focusing on the RLR in regional area such as the EHR, AMR, AFR and *Benelux Agreement* 1960. Given the character of consciousness and deliberation, international conventions are the most important source of evolving jurisprudence of the RLR.

The second source is international custom. Article 38(1)(b) of the Statute of ICJ refers to "international custom, as evidence of a general practice accepted as law".²¹⁶ Article 102(2) of *The Third Restatement of the Foreign Relations Law of the United States* 1987 provides that

²¹³ The HRC has the competence to receive complaints from other States, and mediate in order to achieve a settlement. See part IV of the ICCPR.

²¹⁴ Hannum, Hurst, *The Right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 46.

²¹⁵ Hornby, A. S., *Oxford Advanced Learner's English-Chinese Dictionary (Niujiu Gaojie Yinghan Shuangjie Cidian)*, 4th edition, The Commercial Press and Oxford University Press, Hong Kong and Beijing, 1997, page 1625.

²¹⁶ Brierly remarks "what is sought for is a general recognition among States of a certain practice as obligatory." See Judge Read in the *Fisheries* case, ICJ Reports (1951), 191: "Customary international law is the generation of the practice of States."

more specifically, customary international law “results from a general and consistent practices of States which is followed by them from a sense of legal obligation.” Although there has been a tendency to codify customary international law,²¹⁷ and codification brings with it divergences between the opinions of different States and a certain amount of compromise and slow process, international custom has a definite advantage in enabling international law to develop in line with the needs of the time.

The evidence of international custom may be found in the actual practice of States. A rough idea of a State’s practice can be gathered from a State’s statutes, as for instance with the *Norwegian Immigration Act* 1988,²¹⁸ and from reports of actions taken by States. For instance here, the Chinese Xinhua News Agency reports that the Foreign Affairs Committee of the USA agreed to cancel the restrictions on travelling to Cuba.²¹⁹ It can also be gathered from statements made by government representatives to Parliament, to the press, at the international conferences and meetings of international organisations, as for instance in China when spokesperson Zhang Qiyue of the Ministry of Foreign Affairs, China (MFA) told the press that the Chinese government has always committed itself to protecting human rights and fundamental freedoms of the Chinese people.²²⁰

The third source is general principles of law. Article 38(1)(b) of the Statute of ICJ mentions “the general principles of law recognised by civilised nations.” It is designed to provide a solution in cases where treaties and custom provided no guidance, and to ensure that there is always some rule to fall back on.²²¹ It means the general principles of both international law and national law.

²¹⁷ Akehurst, Michael, *A Modern Introduction to International Law*, 6th edition, Harper Collins Academic, London, 1987 and Routledge, New York, 1987, page 33.

²¹⁸ Section 17 of the *Norwegian Immigration Act* 1988 regulate “Any refugee who is in the realm or at the Norwegian border has on application the right to asylum (refuge) in the realm.”

²¹⁹ Chinese Xinhua News Agency, “The Foreign Affairs Committee Agree to Cancel the Restrictions on Travelling to Cuba” (*Mei Canyiyuan Waiweihui Tongyi Jiechu Dui Guba Lvxing Xianzhi*), *Australian Chinese Daily*, at International News (8, 9 November 2003).

²²⁰ “Spokesperson Zhang Qiyue’s Remarks on the Country Report on Human Rights Issued by the US (26/02/2004)”, <http://www.fmprc.gov.cn/eng/xwfw/2510/t69782.htm> (02/03/2004).

²²¹ Dixon, Martin, *Textbook on International Law*, Blackstone Press Ltd., London, 1990, page 30.

In a decision of the European Court of Justice in 1975, it was said that it was a principle of international law, which the (at that time) European Economic Community (EEC) Treaty could not be assumed to disregard in the relations between Member States, that a State is precluded from refusing to its own nationals the right of entry or residence.²²²

The fourth source can be found in judicial decisions, which are described in Article 38(1)(d) of the Statute of ICJ as a subsidiary means for the determination of law. This direction is made subject to the provisions of Article 59 of Statute of ICJ, which states, “the decision of the court has no binding force except between the parties and in respect of that particular case”. However it is widely agreed that judges can also create new law. Many of its decisions introduced innovations into international law, which have subsequently won general acceptance to avoid accusations of bias. The international Court of Justice, European Court of Human Rights (EUCT) and inter-American Court of Human Rights (AMCT) play a key important role in this regard.

The case law of some quasi-judicial international and domestic bodies like the HRC, Ombudsman’s offices, administrative human rights commissions, and/or legislative human rights committees, cannot be ignored. For example, the prevailing majority interpretation of “one’s own country” in *Stewart v Canada* (538/93)²²³ seems quite harsh to a State’s long-term alien residents. States parties have raised limits to justify restrictions on the RLR in *Peltonen v Finland*.²²⁴ They often provide a progressive interpretive approach — albeit not always legally binding, however at times more creative than those found in judicial decisions.

The fifth source is “the teachings of the most highly qualified publicists of the various nations” which is also set forth as subsidiary means for the determination of rules of law in Article 38(1)(d) of the Statute of ICJ. The *Study of Discrimination in Respect of the Right of Everyone*

²²² *Van Duyn v. Home office* [1975] I C.M.L.R. I, 18. See also Weis, Nationality and Statelessness in International Law (1956), page 49-50, Quoted in Goodwin-gill, Guy S., *International Law and the Movement of Persons Between States*, Oxford University Press, Oxford, 1978, page 137.

²²³ See footnote 137.

²²⁴ See footnote 138.

to Leave any Country, including his Own, and to Return to His Country (1963 Ingles Study on the RLR), including *1963 Ingles Draft Principles on the RLR* (1963 Ingles Draft Principles on the RLR) made by Jose D. Ingles²²⁵ has had some formative influence on the jurisprudence of the RLR.

They are many other sources analogous to the ‘publicists’, and at least as authoritative.²²⁶ As far as the RLR is concerned, it is mainly the reports and declarations accepted by the UN, the HRC and other international experts conferences. For example, the 1963 UN Draft Principles on the RLR adopted by the CPDPM, the 1972 Uppsala Declaration on the RLR adopted by the Uppsala Colloquium, the 1986 Strasbourg Declaration on the RLR adopted by the Meeting of Experts on the RLR, and 1999 General Comment No.27 on Freedom of Movement (Article 12) adopted by the HRC.

3.2 State acceptance of the RLR

the RLR is generally conceptualised as a right, or the freedom from arbitrary State interference with an individuals’ rights. It requires States to accept citizens leaving and returning to the territory. The minimum expected of a State, by way of positive activity, are the guarantee of a passport²²⁷ and the ability to exchange foreign currency. In this section, the right to obtain necessary travel documents, particularly a passport, will be outlined, followed by a discussion of passport administration, and the effect on the RLR of not having a passport. Finally, the right to access foreign exchange will be analysed.

²²⁵ Mr. Jose D. Ingles is one Philippine Judge. He, as the Special Rapporteur, drafted *The Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country*. The study was finally submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its fifteenth session in 1963. The principles respecting this right, drafted the study was adopted by the Sub-Commission at the same session. The study is the first comprehensive work focused on the RLR. The principles respecting the RLR is the first international instrument. Both of them exerted great influence on future research on this field.

²²⁶ Brownlie, Ian, *Principles of Public International Law*, 4th edition, Oxford University Press, Oxford, the UK, 1990, page 25.

²²⁷ Foldesi, Tamas, *The Right to Move and Its Achilles’ Heel, The Right to Asylum*, Spring 1993 (8) Conn. J. Int’l L. 289, page 12.

3.2.1 The right to obtain necessary travel document, particularly a passport

An individual's the RLR, in the overwhelming majority of cases, is inextricably linked to one's possession of a passport. In order to enable an individual to enjoy the RLR, obligations are imposed both on the State of residence and on the State of nationality.²²⁸ The State of residence is primarily obliged to avoid interfering with an individual's freedom to leave. The State of nationality owes a positive duty to ensure that it is effectively possible to leave by issuing the necessary travel documents, usually a passport.²²⁹

A passport is intended to distinguish between those who may and may not enter or leave.²³⁰ It is primarily an expression of the attempt by modern nation-States to assert exclusive control over the legal means of international movement. The passport has developed into serving as both a travel and identity document for the nationals of the issuing State, stateless persons, and aliens who are unable or unwilling to obtain passports from the authorities of their countries of nationalities.²³¹ The passport cannot be reduced to an instrument of State control, even if that is its principal function today.²³²

Possession of a passport equates with having permission to leave one's State.²³³ With respect to the right to be admitted into a State, the passport provides a certificate of identification. Passports have come to be universally required for admission to foreign territory, but they may

²²⁸ Communication No. 106/1981, *Montero v. Uruguay*, Paragraph 9.4; Communication No. 57/1979, *Vidal Martins v. Uruguay*, Paragraph 7; Communication No. 77/1980, *Leichtenstein v. Uruguay*, Paragraph 6.1.

²²⁹ Article IV (b) (c), V (a) (b) (c) of Ingles Draft Principle on RLR, Article V of the UN Draft Principle on RLR and Article 14, 15, 16 of the 1972 Uppsala Declaration on RLR and Article 10 (c) (d) (e) of the 1986 Strasbourg Declaration on RLR.

²³⁰ Torpey, John, *The Invention of The Passport: Surveillance, Citizenship and the State*, Cambridge University Press, Cambridge, the UK, 2000, page 1.

²³¹ Weis, P., *Nationality and Statelessness in International Law*, 2nd revised editions, Sijthoff & Noordhodd International Publishers B. V., Alphen aan den Rijn, the Netherlands 1979, page 223.

²³² Torpey, John, *The Invention of The Passport: Surveillance, Citizenship and the State*, Cambridge University Press, Cambridge, the UK, 2000, pages 159-160.

²³³ Turack, Daniel C., *The Passport in International Law*, 1972, Lexington Books, D.C. Health and Company, Lexington, page 13.

not, in themselves, be sufficient to gain admission.²³⁴ In the case of the right to return, the passport is evidence that the bearer has an incontestable right to enter the territory controlled by its issuing State, if the bearer is denied entry into or expelled from other States.

3.2.2 Passport administration

As analysed in last sub-section, States are obliged to grant their nationals the right to obtain the necessary travel documents, particularly a passport. Although the issuance of a passport to a citizen is clearly a matter within the jurisdiction of State authorities, the following rules for the administration of passports need to be followed.

- (1) No State shall refuse to issue a passport on the ground of the applicant's inability to present authorisation to enter another country, such as a letter of invitation, detailed route schedule, or financial evidence.
- (2) Procedures for the issuance of passports shall be expedient, not be uncausably lengthy or burdensome. In the environment of information technology, online or telephone applications play a vital role of facilitating efficiency. It is unacceptable to fail to reply to an application.
- (3) Every applicant shall be entitled to promptly obtain a certified receipt for the application. The receipt must clearly state the date of application.
- (4) Where a passport is denied, withdrawn, cancelled or postponed, the applicant shall be informed officially in writing of the decision, with the facts upon which the decision is based and the available avenues to appeal against the decision.²³⁵ Rejection of the application without providing detailed causes is inconsistent with international law and practice.

²³⁴ Torpey, John, *The Invention of The Passport: Surveillance, Citizenship and the State*, Cambridge University Press, Cambridge, the UK, 2000, page163.

²³⁵ Mr. Mamdouh Habib, the Australian who spent three years in Guantanamo Bay prison. Habib returned to Australia without being charged with an offence in January 2005. Upon arrival, his passport was seized by the Federal Government, amid claims that he remains a security threat. He Mamdouh Habib is appealing that decision to Australian Appeal Tribunal (AAT). See <http://www.abc.net.au/worldtoday/content/2005/s1296064.htm> (2005-7-7)

(5) No one shall be arbitrarily denied passport under domestic law.²³⁶

Further, “The formalities for the issuance of any travel document, including the conditions for its denial, withdrawal or cancellation, shall be provided by law or regulations which shall be made public.”²³⁷ The applicant shall access to all laws and regulations. In countries which have freedom of information laws, such as Australia, people have the right to “see documents (including those containing information about the applicant) held by Commonwealth Ministers, their Departments and some statutory authorities” and to “see rules and practices which are used in making decisions”, and to “look at and buy copies of manuals and guidelines which agencies use in making decisions”.²³⁸ In contrast, in countries without freedom of information laws, such as China, numerous unpublicised administrative measures and policies are inaccessible, reflecting a closed legal culture and presenting a bureaucratic barrier to information concerning the cause for administrative decisions.

3.2.3 The effect on the RLR of not having a passport

Passports or other travel documents certify an individual’s claim to the RLR in some countries and regions,²³⁹ the lack of a passport significantly influences the RLR. In *Vidal Martins v Uruguay*, the HRC commented that:

The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and travel elsewhere.²⁴⁰

²³⁶ These five rules of the administration of passport are draw from Article IV of 1963 Ingles Draft Principles on RLR, Article IV of 1963 UN Draft Principles on RLR, Article 13 to 16 of the 1972 Uppsala Declaration on RLR, and Article 4 (g), Article 9 and Article 10(c) to (e) of the 1986 Strasbourg Declaration on RLR

²³⁷ Article II (d) of *1963 Ingles Draft Principles on RLR*, adopted by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Res. 2B (XV), UN Doc. E/CN. 41846 (1963).

²³⁸ Window on the Law Home Page, <http://law.gov.au/publicaitons>, quoted in Healey, Justin (ed), *Human Rights and Civil Rights, Issues in Society, Volume 139*, The Spinney Press, Independent Educational Publisher, Balmain, Australia, 2000, page 33.

²³⁹ Some countries in Northern American and European Union recognize other travel document for example the identity of nationality or driving license as the replacement of the passport.

²⁴⁰ The HRC, “Freedom of movement (Art.12): 02/11/99. CCPR/C/21/Rev.1/Add.9, the ICCPR General comment 27. (General Comments)”, [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR.C.21.Rev.1.Add.9,+CCPR+General+comment+27.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR.C.21.Rev.1.Add.9,+CCPR+General+comment+27.En?OpenDocument) (30-05-2003).

Additionally, the effect of not having a passport on the right to return are less than on the right to leave. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (CPDPM) determined that “[n]o one shall be denied the right to return to his own country on the ground that he has no passport or other travel document.”²⁴¹ It is presumed that the effect of not having a passport on the right to return might be greatly reduced if this is accepted and exercised in practice.

Refusal to issue a passport, so restricting the right to leave, must be justified pursuant to Article 12(3) of the ICCPR. The issuance of other identity and travel documents is not an acceptable cause. This point was enunciated by the HRC in the Liechtenstein Case, where it was stated that the issuance of identity and travel documents by the State of residence in no way releases the State of nationality from its obligation to issue or renew a passport.²⁴²

States that deny their citizens a passport violate Article 12(2) of the ICCPR, insofar as this denial is not justified pursuant to Article 12(3) of the ICCPR.²⁴³ Even if refusal of a passport did not prevent the applicant from moving to another State, it would still interfere with the freedom of movement. The freedom to leave a country implies that there is freedom to leave any country into which a person has been admitted.²⁴⁴

3.2.4 The right to access foreign exchange

The right to access foreign exchange is not an issue in States that have a freely convertible foreign exchange market. It is a significant issue for the RLR in States that have a managed foreign exchange system. Deprivation of the right to access foreign exchange could result in financial difficulties when travelling abroad. Thus, despite being issued with a passport, the RLR cannot be realised without access to foreign exchange.

²⁴¹ Article II (d) of the 1963 Ingles Draft Principles on RLR, adopted by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Res. 2B (XV), UN Doc. E/CN. 4/1846 (1963).

²⁴² Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: the ICCPR Commentary*, Kehl am Rhein, Strasbourg, Arlington, Germany, 1993, page 206.

²⁴³ Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: the ICCPR Commentary*, Kehl am Rhein, Strasbourg, Arlington, Germany, 1993, page 206.

²⁴⁴ 19583/92 *Finland*, (Dec.) February 20, 1995, 80 D.R. 38, Quoted in Reid, Karen, *A Practitioner's Guide to the European Convention on Human Rights*, Sweet & Maxwell, London, 1998, page 245.

Incontrovertibly, States owe a positive obligation to allow access to a minimum amount of foreign currency.²⁴⁵ “A minimal amount foreign currency” means the amount to meet one’s financial requirements while abroad, consistent with the living standards of the destination State, rather the living standards of the home country. The CPDPM has accepted “economic controls or currency restrictions imposed with a view to safeguarding the national economy shall not be abused to deny any national the right to leave his country.”²⁴⁶

Three matters need to be addressed in order to aid the realisation of the RLR. Firstly, the applicant is entitled to exchange enough currency before leaving the country. Obviously, the applicant cannot plan into the future without adequate funds. Secondly, the applicant must be able to carry outwards enough foreign exchange, as preferred by the applicant, whether in cash or non-cash forms. The capping of carrying foreign exchange sums need to accommodate the sum needed by the emigrant or traveller. Thirdly, applicants need to be entitled to freely remit foreign exchange from their home countries to deal with ordinary and unexpected costs. Otherwise, the right to leave, especially the right to leave for business or investment, will be adversely affected.

3.3 Permissible limits on the RLR

Although the RLR and limits on the RLR have been widely accepted and acknowledged in the international community, permissibility of the limits on the RLR are disputed. This section will clarify the universally permissible limits on the RLR, or reasonable restrictions, to provide a reference point for the assessment of other issues regarding the RLR in international and Chinese migration law.

3.3.1 General permissible limits

²⁴⁵ Foldesi, Tamas, *The Right to Move and Its Achilles’ Hell, The Right to Asylum*, spring 1993 8 Conn. J. Int’l L. 289, page 12.

²⁴⁶ Article I (f) of the 1963 Ingles Draft Principles on RLR, adopted by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Res. 2B (XV), UN Doc. E/CN. 4/1846 (1963), page 40.

Clearly, limiting the RLR can be justified. No reasonable person would wish to assert that the RLR is absolute. States must refrain from violations of the RLR, and any limits on any of those rights must be permissible.²⁴⁷ The question is, what limits are acceptable?²⁴⁸ Article 29 (2) of the UDHR applies to the RLR, which provides:

In the exercise of [one's] rights and freedoms, everyone shall be subject only to such limits as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

In specifically addressing the RLR, Article 12(3) of the ICCPR adds three new terms, beyond those contained in Article 29(2), namely: national security, *ordre public* and public health; and omits the expression “the general welfare in a democratic society”. According to Article 12 (3) of the ICCPR, States may limit the RLR in order to protect the kinds of interests enumerated in the ICCPR, provided that the limits:

- are provided by law;
- are consistent with the other rights recognized in the Covenant;
- to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others; and
- are necessary for achieving this purpose.²⁴⁹

The limits permitted by Article 12(3) of the ICCPR are more extensive than those permitted by Article 29(2) of the ICCPR. However, given the relatively limited cases law of the HRC on the RLR, it can be surmised that the above limits may be interpreted in a similar manner to the way they have been in the context of other ICCPR rights. Similar limits are found in Article 2(3) of the EHR P4, Articles 18 and 19 of *European Social Charter* 1961 (ESC), Article 22(3) and (4) of the AMR, Article 12(2) of the AFR, and other international human rights conventions.

²⁴⁷ Paragraph 6 of General Comment No.31 [80]: the Nature of the General Legal Obligation Imposed on State Parties to the Covenant, adopted on 29 March 2004 (2187th meeting) by Human Rights Committee, ICCPR/C/21/Rev.1/Add.13.

²⁴⁸ Cranston, Maurice, *What are Human Rights*, 1973, Taplinger Publishing Co., Inc. New York, New York, the USA, page 31.

²⁴⁹ Henkin, Louis, (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, page 178.

Permissible limits are statements of duties, rather than rights, because the RLR is framed in negative terms.²⁵⁰ That is, States must not prohibit or obstruct a person's attempt to leave and return.²⁵¹ The permissible limits on the RLR are of a general nature. Individual States are free to enact specific rules regulating the RLR within their jurisdiction. In many cases, permissible limits relating to the RLR apply to other human rights. Although the words used by international instruments should be uniformly interpreted, their practical significance may vary according to character of the right to which they relate.

If States correctly interpret permissible limits, abuse of the RLR is less likely. Examples of permissible limits include road rules, access to nature reserves or animal sanctuaries, earthquake, avalanche or quarantine zones, areas of civil unrest and private property. Specific individuals may be subjected to legitimate limits on their the RLR, such as convicted criminals²⁵² and those performing military service.²⁵³

3.3.2 State practice

Almost all States impose various limits on the RLR. Generally speaking, they are similar to the terms used in international instruments. However terms concerned vary in the laws of different countries. It is necessary to judge these limits from international migration law rather than only from domestic law.

In the USA:

In the case of comparable magnitude, *Koremastu v. United States*, 323 US 214, 218, the court

²⁵⁰ Copenhagen Conference on the Human Dimension of the CSCE, June 1990, Article 9.5.

²⁵¹ Baubock, Rainer, *Transnational Citizenship: Membership and Rights in International Migration*, Edward Elgar, Cheltenham, the UK, 1994, page 325.

²⁵² Joseph, Sarah and Schultz, Jenny et ac, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 259.

²⁵³ the HRC "acknowledges that it is normal for individual performing military service to be subjected to restrictions in their freedom of movement." Quoted in Joseph, Sarah and Schultz, Jenny et ac, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 237.

allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of “the gravest imminent danger to the public safety”.²⁵⁴

In the case of Egypt:

Egyptian males who have not completed compulsory military service, may not travel abroad or emigrate, although this restriction can be circumvented. Unmarried women under the age of 21 must have permission from their fathers to apply for passports; unmarried women over 21 have their applications for passports checked by the police; married women require permission from their husbands.²⁵⁵

For Fiji, Section 34 (7) of the *Constitution of the Republic of the Fiji Islands* provides:

A law may limit, or may authorize the limit of, the right of a person to freedom of movement:

- (a) in the interests of national security, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the economy of a particular area or the ecology or distinctive culture of the area;
- (c) for the purpose of imposing a restriction on the person that is caused by required to secure the fulfilment of an obligation imposed on the person by law; or
- (d) for the purpose of imposing causable restrictions on the holders of public offices as part of the terms and conditions of their employment; but only to the extent that the limit is causable and justifiable in a free and democratic society.

In Sri Lanka, Article 12(2)(3) and 13 of the *Constitution of the Republic of Sri Lanka* stipulate restriction on the RLR as following:

Article 12 Freedom of movement.

12. [...]

(2) Every person shall be free to leave the Republic.

(3) Any restrictions shall not be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security or public order or national economy or the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or for the extradition of persons from the Republic.

Article 13 Freedom to return to Sri Lanka.

²⁵⁴ “Right to Travel: the constitutional Case”, [http://www.ibike.org/cuba/ofac/law.htm\(15/11/2004\)](http://www.ibike.org/cuba/ofac/law.htm(15/11/2004)) 16 pages, page 2.

²⁵⁵ Baehr, Peter, Sadiwa, Lalaine and Smith Jacqueline (ed), *Human Right in Developing Countries 1996 Yearbook*, Kluwer Law International, the Hague, the Netherlands, 1996, page 145.

13. Every citizen shall be entitled to return to the Republic.

3.3.3 Interpretation of permissible limits

Diversity of experience, background, language, and culture of the ICCPR parties ensure that the interpretation of the RLR is not based on one system of law or set of values. The HRC, the authoritative UN body for interpreting the ICCPR, considers that the RLR should have a universal common meaning.²⁵⁶

The interpretation of Article 12(3) of the ICCPR is based on customary international law and related international conventions. Article 31 (1) of the *Vienna Convention on the Law of Treaties* 1980 provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.²⁵⁷

The “context” refers to the text itself, including its preamble and annexes, any agreements relating to the treaty, and instruments connected with the treaty. Other relevant agreements between States parties that are governed by international law should also be taken into account.²⁵⁸ As a central rule of interpretation, an instrument should be construed in accordance with its dominant purpose. In the case of the ICCPR, the purpose is to protect individuals against government excesses.

Further, ‘limit clauses’ permitting derogations from and limit of rights, should be strictly and narrowly construed.²⁵⁹ This point is widely supported. In 1999, the HRC produced a thorough

²⁵⁶ Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page viii

²⁵⁷ *Vienna Convention on the Law of Treaties, 1960* adopted 22 May 1960, entered into force 27 January 1980, UN Doc. A/CONF. 39/27.

²⁵⁸ Henkin, Louis, (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, page 293.

²⁵⁹ Quoted in Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 22.

commentary on Article 12 of the ICCPR (General Comment No.27 of the HRC on Freedom of Movement). This represents the most authoritative interpretation of the ICCPR available.²⁶⁰

According to Article 5(1) of the ICCPR, any limit must be strictly construed. It provides:

Nothing ... may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limits to a greater extent than is provided for in the present Covenant.

The EUCM concluded that restrictions of rights might not be applied so as to completely suppress the freedom, but are only necessary for preserving the values which the provision enumerates and protects. Accordingly, the Commission considered whether or not there had been an interference with the right protected and, whether or not this interference was justified in the light of the prescribed restrictions.²⁶¹ Article 29(c) of the AMR have more detailed provisions in this regard:

No provisions of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognised in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said State is a party; (c) precluding rights or guarantees which are inherent in the human personality or derived from representative democracy as a form of government; (d) excluding or limiting the effect that the *American Declaration of the Rights and Duties of Man* and other international acts of the same nature may have.

This is consistent with the objective of the limits, which is to ensure the effective enforcement of the RLR, rather than to permit an increase in State power.

3.3.4 The meaning of the terms used in the limit clauses

²⁶⁰ Paragraph 11 summary as following: “Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraph 1 and 2 may be restricted. This provision authorises the State to restrict these rights only to protect national security, public order (*order public*), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant.”

²⁶¹ *Hanydside v. UK*, App. No. 5493/72, European Court of Human Rights, Judgment of 7 December 1976, Ser. A No. 24. Quoted in Sieghart, Paul, *The International Law of Human Rights*, Oxford University Press, New York, 1983, page 91.

This subsection will consider the interpretation of limits to the RLR, according to the rules of construction discussed above. These are “provided by law”, “national security”, “public order” (*ordre public*), “public health”, “public morals”, “the rights and freedoms of others” and the “test of necessity”, and “consistent with the other rights recognised in the present Covenant”.

3.3.4.1 “Provided by law”

“Provided by law,”²⁶² suggests that an act must be authorised by specific legal provisions. It presumes that an act illegally authorised can never be justified, regardless of whether it is consistent with other rights. The terms “prescribed by law”²⁶³, “in accordance with law”²⁶⁴ and, “pursuant to law”²⁶⁵ are found in other international instruments. The former has the same meaning with “provided by law” expressed in the ICCPR. The two latter connote that the action must be satisfied by reference to general legal principles, common law, the rule of law, or accepted government authority²⁶⁶ as to provide a rational legal basis to a decision.

“Provided by law” is designed to ensure that citizens are plainly advised of any restrictions on the RLR.²⁶⁷ In contrast to Article 13, limits under Article 12(3) must be set down in law or by the judiciary.²⁶⁸ As such, the law must be accessible to the public and formulated with sufficiently certain as to enable a person to regulate their conduct and foresee the legal consequences of their action.²⁶⁹ General Comment No.27 of the HRC on Freedom of

²⁶² The term of “provided by law” was used in Article 12 (2) of the ICCPR and Article 12 (2) of the AFR

²⁶³ Article 10 (2) of the CRC; and Article 5 (2) (a) of the *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live*, 1985.

²⁶⁴ Article 2 (3) of the EHR P4.

²⁶⁵ Article 22 (3) of the AMR.

²⁶⁶ 10 GAOR Annexes, UN Doc. A/2929 1955 pages 58-59.

²⁶⁷ De, Sous La Direction (ed), *The Limit of Human Rights in Comparative constitutional Law*, Les Edition Yvon Blais Inc. Canada, 1986. Also see opposite opinion, the term of “provided by law” could be satisfied only by a statute by either national congress or provincial congress.” pages 11-12.

²⁶⁸ Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl am Rhein, Strasbourg, Arlington, Germany, 1993, page 209.

²⁶⁹ *Malone v. the UK*, App. No. 8691/79, European Court of Human Rights, Judgment of 2 August 1984, Ser. A No. 82, page 30; *Silver et al v. the UK*, App. No. 5947/72, European Court of Human Rights, Judgment of 25 March 1983, Ser. A No. 61; *Handyside v. the UK*, App. No. 5493/72, European Court of Human Rights, Judgment of 7 December

Movement stated that laws should adopt precise criteria for the application of restrictions of freedom, and may not confer unfettered administrative discretion.

‘Law’ means the domestic law of a State. Importantly, legal limits may either relate to the limit of the substantive right to leave and return or to administrative procedure. It is possible to detract from the RLR protection by erecting bureaucratic barriers that deny access to appeals against administrative decisions. The EUCT asserted that the word “law” covers not only statute law, but also unwritten law, subordinate legislation and Royal the Decrees.²⁷⁰ In *Silver v United Kingdom*, the Court held that:

A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is causable in the circumstances, the consequences which a given action may entail.²⁷¹

Mere administrative provisions are insufficient. Unfettered administrative discretion, without clear legislative directives and adequate notice to an applicant of the grounds on which a request is to be granted or denied, would not be sufficient to meet the requirement that limits be “provided by law”.²⁷² Limiting the right to leave by way of administrative act, directive or plan is only permissible when the grounds upon which the right is interfered with are sufficiently certain. It is noted that the HRC is not qualified to evaluate whether the responsible departments of a State have correctly interpreted and applied its domestic law, unless it is established that they acted in bad faith or committed an abuse of power.²⁷³

1976, Ser. A No. 24; *Pinkney v. Canada*, Communication No. 27/1978, Human Rights Committee, Annual Report, 37 UN GAOR, Supp. No. 40, 1982 page 10.

²⁷⁰ *Sunday Times v. the UK, X. v. Switzerland*, (7055/75) Report: DR 19.5; and *De Wilde, Ooms and Versyp v. Belgium* (2832/66; 2835/66; 2899/66) Judgment: 1 EHRR 373; Quoted in Sieghart, Paul, *The International Law of Human Rights*, Oxford University Press, New York, 1983, page 91-92.

²⁷¹ *Silver et al v. the UK*, App. No. 5947/72, European Court of Human Rights, Judgment of 25 March 1983, Ser. A No. 61; and *Sunday Times v. the UK*, (7055/75) Report: DR 19.5.

²⁷² Response of the representative of the Ukrainian S.S.R. to questions by members of the Human Rights Committee, UN Doc. the ICCPR/CSR. 612, 1985, page 9.

²⁷³ *Maroufidou v. Sweden* (R. 13/58) the HRC 36, 160, Quoted in Sieghart, Paul, *The International Law of Human Rights*, Oxford University Press, New York, 1983, page 92.

As a final point, one must be careful to assess what is lawful in the context of the RLR because of the complex relationship between international and domestic law. I am mindful of the words of Sam Blay and Ryszard Piotrowicz about lawfulness in the context of human rights. Their words can be cited to argue for a way to judge the lawfulness of domestic provisions related to the RLR:

It is difficult to maintain the argument, as Australia did in *A V Australia*, that the municipal law is in itself sufficient to provide the standard to assess the lawfulness of State conduct where international law seeks to reply on municipal standards and oversight, on the one hand, and national sovereignty and responsibility, on the other hand. Nevertheless, the point still remains that international obligations, particularly in the domain of human rights, if they are to be implemented in municipal law, would have little meaning if the eventual standard for compliance is the municipal law regime alone.²⁷⁴

3.3.4.2 “National security”

The “nation” is a political entity constituted by a large group of people having a common origin, language and tradition.²⁷⁵ Nationhood does not contemplate the survival of any particular government or ruling elite, whether that government has been democratically elected or imposed upon the population.²⁷⁶ In the context of international law, “security” should be consistently interpreted with the *Charter of the United Nations*, in which means political independence and territorial integrity,²⁷⁷ including the ongoing existence of a State.²⁷⁸

National security is generally understood to mean protection of a State from espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on its

²⁷⁴ Blay, Sam and Piotrowicz, Ryszard, “the Awfulness of Lawfulness: Some Reflections on the Tension between International and Domestic Law”, in Charlesworth, Hilary, McCorquodale, Robert etc (ed), *The Australian Year Book of International Law Volume 21*, the Centre of International and Public Law, Faculty of Law, Australian National University, 2001, page 19.

²⁷⁵ Garner, Bryan A., (Editor in Chief), *Black’s Law Dictionary*, 7th edition, West Group, St. Paul, Minn., 1999

²⁷⁶ Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 28.

²⁷⁷ Kiss, *Permissible Limits on Rights*, in Henkin, Quoted in Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 28.

²⁷⁸ Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 28.

defence installations, and from acts of foreign interference.²⁷⁹ National security could be invoked as a justification for limiting human rights.²⁸⁰ Article 4 of the 1986 Strasbourg Declaration on the RLR provides that:

A restriction based on “national security” may be invoked only in situations where the exercise of the right poses a clear, imminent and serious danger to the State. When this restriction is invoked on the ground that an individual acquired military secrets, the restriction shall be applicable only for a limited time, appropriate to the specific circumstances, which should not be more than five years after the individual acquired such secrets.

The EUCT does not require the declaration of a state of war or national emergency as a precondition to the imposition on limiting the RLR. Limits can be imposed in peacetime to prevent activities such as espionage or to protect military secrets.²⁸¹ Under the ICCPR, an individual cannot be prevented from leaving a country merely on the grounds that he or she holds of State secrets,²⁸² other than in times of war or national emergency.²⁸³

According to Ingles view, a person’s activities should only be deemed prejudicial to national security if such activities are criminal, and criminal prosecution would be the best safeguard against the arbitrary denial of the right to leave any country on the grounds of national security. A threat to national security is not established on the grounds of political opinion, religious

²⁷⁹ Nygh, Peter E and Butt, Peter (ed), *Butterworths Australian Legal Dictionary*, Butterworths Australia, page 774.

²⁸⁰ Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 38; and Human Rights Committee, cited in Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 400; However, Kiss, Alexandre Charles opposed this opinion. “A threat to territorial integrity or economic well-being is not in itself sufficient to constitute a threat to national security.” Henkin, Louis, (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, page 296.

²⁸¹ Henkin, Louis, (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, page 292.

²⁸² Paragraph 5 of General Comment No.27 of the HRC on Freedom of Movement (Article 12)

²⁸³ Ingles, Jose D, *1963 Ingles’ Study on RLR*, the UN Publication Sales No.: 64. XIV. 2 New York, 1963, page 40.

belief, or if the person is specially trained.²⁸⁴ Terrorist activities are widely accepted as providing a threat to national security.

Acts constituting threats to national security have been enumerated In Article 4 of the *Law of State Security* 1993 (PRC) as follows:

An act committed by institutions, organizations or individuals outside the territory of the People's Republic of China, or by other persons under the instigation or financial support of the afore-mentioned institutions, organisations or individuals, or by organisations or individuals within the territory in collusion with institutions, organisations or individuals outside the territory:

- (1) plotting to subvert the government, dismember the State or overthrow the socialist system;
- (2) joining an espionage organisation or accepting a mission assigned by espionage organisation or by its agent;
- (3) stealing, secretly gathering, buying, or unlawfully providing State secrets;
- (4) instigating, luring or bribing a State functionary to turn traitor; and,
- (5) committing any other act of sabotage endangering State security.”

National security assessments are often made by the executive government, with minimal judicial review. Joseph and Schultz observe that:

If executive governments are unprepared to reveal evidence grounding national security decisions to their own judiciary, they are extremely unlikely to reveal such evidence to an international body such as [the HRC].²⁸⁵

3.3.4.3 “Public order (*ordre public*)”

Public order is an ambiguous term that lacks a uniform meaning across jurisdictions. The term generally relates to orderly or peaceful behaviour in public places. “Public order (*ordre public*)” provides a basis for restricting the RLR in order to promote the efficient functioning of the public institutions. Article 4(e) of the 1986 Strasbourg Declaration on the RLR explains:

²⁸⁴ *Kent v. Dulles*, 357 the USA 116 (1958); *Aptheker v. Secretary of State*, 378 the USA 500 (1964); *Zemel v. Rusk*, 381 the USA 1 (1965); Henkin, Louis, (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, page 178.

²⁸⁵ Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 274.

A restriction based on “public order (*order public*)” shall be directly related to the specific interest which is sought to be protected. “Public order (*order public*)” means the universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based.

Loss of public order could cause instability or administrative confusion, affecting society as a whole. Criminal laws provide for a number of public order offences, such as riot and affray, offensive, indecent or obscene conduct, and damage of property.²⁸⁶ Public law also regulates activities such as change of name.

The addition of the French concept of *ordre public* may broaden the concept of “public order”. *Ordre public* applies to the sphere of private law, whereas the common law notion of “public order” relates to the public arena.²⁸⁷ The concepts of public order and *ordre public* form an overarching principle designed to protect a minimum level of public interest and social organisation, consistent not only with the values of the individual society but with universal social norms.

Nowak has questioned, in respect of civil law obligations, whether an individual’s freedom to leave the country might be restricted on account of private legal obligations, or to secure payment of a tax liability where there is no accompanying criminal allegation. Article 11 of the ICCPR prohibits imprisonment for private contractual breaches or financial obligations owed to the State or to private entities. Unpaid tax has recently been acknowledged as an acceptable limit on the right to leave. In the Peltonen Case, the HRC concluded that non-performance of a national obligation justifies deprivation of the RLR.²⁸⁸ This principle applies to States that require the performance of military service.

²⁸⁶ Nygh, Peter E and Butt, Peter (ed), *Butterworths Australian Legal Dictionary*, Butterworths, Australia, page 955.

²⁸⁷ Lockwood, B. Jr., Finn, J. and Jubinsky, G., *Working Paper for the Committee of Experts on Limit Provisions*, 7 HRQ 35, 1985. *Order public may be used to negate private law contacts* “in the interest of higher imperatives”; “public order” is not used in the same way in common law jurisdictions.

²⁸⁸ Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights:: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 252.

3.3.4.4 “Public health”

Limiting the RLR on the grounds of public health, especially through the imposition of quarantine laws, can be regarded as a measure to preserve public order. Henkin points out that psychiatric evaluations cannot be used to deny the RLR.²⁸⁹ However, the quarantining of geographic areas following an outbreak of disease or other acute health risks, such as in the vicinity of a nuclear power plant, is permissible. Temporary restrictions on movement to prevent the breakdown of sanitation services are also acceptable.²⁹⁰ Support for limiting the RLR on the basis of public health can be adduced from Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which provides that:

1. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

In addition, public health is expressly protected in Article 11 of the ESC and the ESC (*Revised*) 1996. Under these instruments, such measures can be taken to remove of the causes of ill health and prevention of epidemic, endemic and other disease.²⁹¹ The Additional Protocol to the *American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* 1988, recognises health as a public good and broadens its terms to include “the enjoyment of the highest level of physical, mental and social well-being”. States Parties are obliged to adopt

²⁸⁹ Henkin, Louis, (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, page 179.

²⁹⁰ Jagerskiold, *The Freedom of Movement*, in Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N. P. Engel, Publisher, Kehl am Rhein · Strasbourg · Arlington, 1993, page 215.

²⁹¹ Brownlie, Ian and Goodwin-Gill, Guy S. (ed), *Basic Documents on Human Rights*, 4th edition, Oxford, the UK, 2002, pages 428, 461 and 462.

measures to provide universal immunisation against the principal infectious diseases and, prevent and treat endemic, occupational and other diseases.²⁹²

During the Severe Acute Respiratory Syndrome (SARS) epidemic, unaffected countries adopted temporary measures including limiting the freedom of movement and imposing quarantine restrictions, to prevent its proliferation,²⁹³ in April 2003, 94 countries had imposed travel restrictions on Chinese nationals.²⁹⁴ For example, Australia enacted laws to permit the cancellation of a visa where its holder was suspected of SARS infection. SARS affected countries, such as China, adopted temporary measures to limit persons leaving the territory, whether the person was a national or an alien. The Entry and Exit inspection Service and Quarantine Bureau, China, advised people within the territory to postpone overseas travel if SARS symptoms appeared, and to seek diagnosis and treatment.²⁹⁵

It is uncertain whether a State must prohibit an individual who presents a health risk from travelling abroad, or may only recommend an individual not travel abroad. If a person must be prohibited from leaving on public health grounds, given that the permissible limits are not applicable to the right to return to one's own country, there is a potential for inconsistency between the right to exercise the permissible limits and the right to return. The situation demonstrates that the right to leave and the right to return can never be entirely separated, despite assertions to the contrary. To overcome this possibility, international co-operation during times of disease outbreak is important.

²⁹² Article 10 of *Additional Protocol to the AMR in the Area of Economic, Social and Cultural Rights, 1988*, Ermacora, Felix, Nowak, Manfred and Tretter, Hannes (ed), *International Human Rights: Documents and Introductory Notes*, Law Books in Europe, Vienna, Austria, 1993, page 320.

²⁹³ “Zhang, Qiyue, Foreign Ministry Spokeswoman, China Understands Travel Restrictions on Nationals”, http://www.service.china.org.cn/link/wcm/Show_Text?info_id=64522&p_qry=enry (20-05-2003)

²⁹⁴ “The country list of restricting Chinese Travel Nationals” (Buzhun Zhongguo Gongmin Rujing De Guojia) http://www.cnd.org/my/modules/newbb/viewtopic.php%3Ftopic_id=7362&forum=6 (02-05 2003).

²⁹⁵ Xinhua News Agency, “Proposals on the Health for Exit and Entry, Proclamation: Strengthen Medical Examination for Exit and Entry, Prevent SARS from Spreading worldwide (15-04-2003)”, <http://news.21cn.com/domestic/guoshi/2003-04-15/1008114.html> (23-07-2003).

3.3.4.5 “Public morals”

Public morality is derived from social, philosophical and religious traditions. Limits on the RLR on the grounds of protecting public morals should reflect a pluralist view of society rather than the dominant culture. The HRC has acknowledged, in *Hertzberg et al v Finland*, that public morals differ widely. There is no universally applicable common standard. Consequently, a margin of discretion must be accorded to the responsible national authorities.²⁹⁶ The “margin” seems to mirror the “margin of appreciation” conferred on States Parties to the EHR P4. The margin of appreciation confers the benefit of the doubt with respect to a State compliance with the provisions of the EHR P4. The European Court of Justice (ECJ), in *Handyside v. UK*, indicated that it was not possible to find a uniform European conception of morals in the domestic law of the various European States.²⁹⁷

3.3.4.6 “The rights and freedoms of others”

The permissible limits on the RLR to protect the rights and freedoms of others are potentially somewhat of a catchall. The HRC has never commented on its outer limits. It is hoped that “rights” refers to other human rights, though unnecessarily in the ICCPR.²⁹⁸ Others are certainly obliged not to interfere with the RLR. Paragraph 6 of General Comment No.27 of the HRC on Freedom of Movement regulates that the State must ensure that the RLR is protected from public and private interference.²⁹⁹ Family members (other than parents of minors), employers or other persons may not prevent the departure of any persons from the State.³⁰⁰ the RLR should not be inhibited by a husband in relation to one’s legal or de facto wife, by parents of adult daughters, or by the State in relation to the movement of women generally.³⁰¹ Restrictions may

²⁹⁶ Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 393.

²⁹⁷ *Handyside v. the UK*, App. No. 5493/72, European Court of Human Rights, Judgment of 7 December 1976, Ser. A No. 24.

²⁹⁸ Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 407.

²⁹⁹ Paragraph 6 of General Comment No.27 of the HRC on Freedom of Movement (Article 12)

³⁰⁰ Article 4 (f) of *Strasbourg Declaration on the Right to Leave and Return*, adopted by Experts on the Right to Leave and Return on 26 November 1986.

³⁰¹ Paragraph 16 of General Comment No.27 of the HRC on Freedom of Movement (Article 12)

be imposed to avert avoidance of an individual's duty to support their children; but it is otherwise difficult to deny the RLR unless the right of another will be adversely affected.³⁰²

3.3.4.7 “The test of necessity”

the RLR can be limited if it is “necessary” to do so. The ICCPR refers only to “necessary”, Article 22(3) of the AMR and Article 2 of the EHR P4 qualify the term with the expression “in a democratic society”. Neither term is used in Article 12 (2) of the AFR or Articles 18 and 19 of the ESC.

The absence of the words ‘in a democratic society’ in the ICCPR seems to stem from the understanding that the concept of democracy might be interpreted differently in various countries. However, a democratic society could be characterised by its respect for the principles of numerous human rights conventions. Paragraph 16 of General Comment No.27 of the HRC on Freedom of Movement plainly requires a restriction of the RLR on the grounds of necessity to be based on clear legal grounds and be proportionate to the circumstances of the case. Finally, paragraph 12 of General Comment No.27 of the HRC on Freedom of Movement accepts that permissible restrictions must be necessary in a democratic society.

The term “necessary” infers that the act is essential or unavoidable.³⁰³ P K McWilliams argues that an act is necessary if performed in “an emergency to causeably protect health, life or property” and “there is no alternative”. Where an act “interferes with the interests of another for the purpose of preventing harm to self or others”, “imminent peril must exist.”³⁰⁴ Paul Sieghart argues that the notion “necessary” implies the existence of a “pressing social need” which may include a “clear and present danger,” determined by the circumstances of a given case.³⁰⁵

³⁰² Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 43.

³⁰³ Hornby, A. S., *Oxford Advanced Learner's English- Chinese Dictionary*, 4th edition, The Commercial Press and Oxford University Press, Hong Kong and Beijing, 1997, page 983.

³⁰⁴ McWilliams, P.K., *Canadian Criminal Evidence*, 3rd edition, Canada Law Book, Aurora, 1988, pages 4-11.

³⁰⁵ *Arrowsmith v. the UK* (7050/75) Report : DR 19.5; *Golder v. the UK* (4451/70) Judgment: 1 EHRR 524; *James, Young and Webster v. the UK*; *Sunday Times v. the UK*, (7055/75) Report: DR 19.5; *Handyside v. the UK*, App. No.

The application of the justification of necessity involves balancing the rights of the individual and the utilitarian 'greater good'. The State should attach priority to the rights of individuals when restricting the RLR. The HRC has indicated that the mere assertion by a State that an individual was engaged in 'subversive activities' is not sufficient to discharge the burden of showing that detention of that individual was "necessary" within the meaning of Article 19 (3) of the ICCPR. Article 4(c) of the 1986 Strasbourg Declaration on the RLR defines a restriction as 'necessary', "only if it responds to a pressing public and social need, pursues a legitimate aim and is proportionate to that aim." The requirement of necessity underscores the principle that restrictions on the RLR are always the exception, not the rule.

3.3.4.8 "Consistent with the other rights recognised in the present Covenant"

The phrase "consistent with the other rights recognised in the present Covenant" concedes that a person's the RLR may be inconsistent with other rights or freedoms recognised in international conventions. the RLR cannot be used to interfere with other rights or freedoms. To overcome an inconsistency under international law, domestic laws must be "consistent with the other rights recognised" in the ICCPR. Whether States are to conform to the permissible scope of limits on human rights is a question of international law. It is questionable that States are capable of determining the permissible limits of the RLR. It is therefore vital to create an appropriate international supervisory body to supervise State acts, and determine whether international standards have been complied with.

3.3.5 The principle of proportionality

The principle of proportionality is used to clarify the requirement of necessity. A limitation will only be proportionate to the circumstances that gives rise to the necessity if (i) the measures are carefully designed and rationally connected to achieve the objective; (ii) the right or freedom at issue is minimally impaired; (iii) a proportion exists between the effect of the measures which

5493/72, EUCT, Judgment of 7 December 1976, Ser. A No. 24. Quoted in Sieghart, Paul, *The International Law of Human Rights*, Oxford University Press, New York, 1983, page 93.

limit the right and the objective.³⁰⁶ The HRC has endorsed the need for proportionality between the restriction of individual rights and the objective.³⁰⁷ Thus, the severity, duration and, geographic scope of any limits on the RLR are justified only to the extent that they are strictly necessary and proportionate to achieve the objects of protecting national security, public order, public health and morals, and the rights and freedoms of others.

3.4 The right to leave the country

Grotius characterised the right to leave as the most specific and unimpeachable axiom of the law of nations.³⁰⁸ According to Article 12(2) of the ICCPR, the right to leave implies the right to leave a country at one's own will, whether the country of nationality, residence or any other country in which an individual finds oneself.

The right to leave is expressly recognised in the Constitutions of numerous States, diverse in their geographical locations, legal traditions and political inspirations.³⁰⁹ Some of the more rigorous rules have operated in France, which once required exit visas and China, which has required various forms of exit passes or certificates for its nationals³¹⁰ and aliens.³¹¹ In practice,

³⁰⁶ Dukelow, Daphne A. *The Dictionary of Canadian Law*, A Carswell Publication, Barrie, Ontario, Canada, 1991, page 835.

³⁰⁷ Paragraphs 14-15 of General Comment No.27 of the HRC on Freedom of Movement (Article 12). Also see paragraph 6 of *General Comment No.31 [80]: the Nature of the General Legal Obligations Imposed on the States Parties to the Covenant*, "Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant right."

³⁰⁸ Plender, Richard, *International Migration Law*, Revised 2nd edition, 1988, Martinus Nijhoff Publishers, the Netherlands, page 96.

³⁰⁹ Plender, Richard, *International Migration Law*, Revised 2nd edition, 1988, Martinus Nijhoff Publishers, the Netherlands, page 95.

³¹⁰ Article 2, the *Provisional Measures on the Exit and Entry National Border of Overseas Chinese* 1951 (PRC), promulgated by the Ministry of Public Security.

³¹¹ Exit certificates for aliens required under Article 4, the *Provisional Measures on Exit of Aliens in China* 1954 (PRC), promulgated by the Ministry of Public Security; Exit visas for aliens required under Article 7, *Regulations on the Administration of Entry, Exit, Transit, Residence and Travel of Aliens in China* 1964 (PRC), promulgated by the State Council; Exit registration cards for aliens, see: Mao, Fengping, (ed), *Chujing Rujing Falv Fagui Sijie Yu Xiangying Fagui Zhaibian (The Explanation of the Law and Regulations Governing exit and entry and the Collections of Related Regulations)*, the Publishing House of Jilin Renmin, Changchun, China 1994, page 77.

a State might violate the right to leave. The most extreme example is that of Cuba, which is party to *inter-American Convention on Asylum* and the ICCPR. Nevertheless, Cuban nationals have been imprisoned or executed for attempting to leave the territory. This was graphically illustrated in October 1994, when over 40 men, women and children were killed for attempting to flee the island.³¹²

This section will firstly analyse who may exercise the right to leave. Recognised grounds for limiting the right to leave and bureaucratic barriers of the right to leave will then be discussed in detail. Finally, this section explores the loss of technical expertise from the State through emigration.

3.4.1 Who may exercise the right to leave?

International human rights instruments attribute the right to leave to “everyone”,³¹³ “every person”³¹⁴ and “every individual”.³¹⁵ The right to leave is based on citizenship.³¹⁶ Citizens’ right to leave cannot be discriminated against on the grounds of social status, occupation, age, gender, religion, ownership of property, race or colour, or political opinion. An example of impermissible discrimination can be found in North Korea, where ordinary people are not allowed to travel abroad, unlike diplomats or members of the department of Foreign Affairs.³¹⁷ The status of a dual national’s right to leave is determined by the law of their country of residence, rather than by the law of their State of nationality. For the purpose of establishing the right to leave of dual nationals, the test of effective nationality is applied.³¹⁸

³¹² Section 2 (18) of the *Act of Cuban Liberated and Democratic Solidarity*, 1996 (the USA), H.R.927, One Hundred Fourth Congress of the United States of America, http://usinfo.State.gov/usa/infousa/laws/majorlaw/h927_enr.htm (4/09/2003)

³¹³ Article 13 (2) of the UDHR; Article 12 (2) of the ICCPR; Article 2 (2) the EHR P4

³¹⁴ Article VIII of *American Declaration of the Rights and Duties of Man*, Article 22 (1) the AMR;

³¹⁵ Article 12 (2) of the AFR.

³¹⁶ Rubenstein, Kim, *Australian Citizenship Law in Context*, Lawbook Co., Pyrmont, Australia, 2002, page 285

³¹⁷ Young, Song Ji, “The Invisible Refugees: North Korean Asylum Seekers in China”, http://iso.hrichina.org/iso/article.adp?article_id=4248&subcategory_id=287 (18/05/2003), 8 pages, page 2.

³¹⁸ Weis, P., *Nationality and Statelessness in International Law*, 2nd revised editions, Sijthoff & Noordhodd International Publishers B. V., Alphen aan den Rijn, the Netherlands 1979, page 202.

The right to leave is available to aliens in the territory of a State,³¹⁹ even those unlawfully in the country.³²⁰ Stateless persons within a State are thus entitled to leave the territory. No provisions in international migration law deny the right of stateless person to leave the country. “Everyone”, “every person” or “every individual” implies the inclusion of stateless person. It can also be supported by the principle of non-discrimination on the grounds of race, religion or country of origin.

3.4.2 Recognised grounds for limiting the right to leave

States should give effect to the right to leave by enacting legislation or by other means. Conditions cannot be imposed on the right, such as insisting that the right is used for a prescribed purpose, limiting the destination of individuals, or limiting the period of time that a person may remain overseas.³²¹ However, the right to leave one country does not mean that a person has the right to enter another, nor does it guarantee the right of return to a country other than the national State. The right to leave can only be limited under the recognised grounds.

Criminal cases

According to the AMCM, the right to leave is deniable if the individual is accused or has been convicted of a crime. The restriction may also apply to the RLR.³²² The extent to which the right is denied varies between States. For instance, German law permits the denial of a passport to a person who is accused of any offence.³²³ In China, people who are suspected of any crime by the public security department, “persons undergoing rehabilitation through labour,” and people who have been convicted of a crime and are serving a sentence are denied the right to

³¹⁹ Article 13 of the ICCPR; Article 22 (6) of the AMR; Article 12(4) *the AFR*.

³²⁰ Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 250; and also see paragraph 8 of General Comment No.27 of the HRC on Freedom of Movement (Article 12).

³²¹ Paragraph 8 of *General Comment No.27 of the HRC on Freedom of Movement* (Article 12).

³²² Inter-American Commission on Human Rights, *Sixth Report on the Situation of Political Prisoners in Cuba*, 1979, O.A.S Doc. No. OEA/Ser. L/V/II 48; doc. 7, page 9.

³²³ Section 7 (1) *Passport Law of Germany* 1952, *Quoted in* Plender, Richard, *International Migration Law*, Revised 2nd ed, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988, page 114.

leave.³²⁴ By contrast, Japanese legislation imposes fewer limits. A Japanese national will only have their passport confiscated if they are subject to prosecution for criminal offences that are punishable by a term of imprisonment of not less than two years, or if a warrant for the persons arrest has been issued.³²⁵

Civil cases

It is unclear whether a pending civil suit justifies denial of the right to leave. In Australia, Belgium, Brazil, Ghana, the Netherlands, Poland and the USA,³²⁶ the right can be denied if the person is liable for an outstanding debt. In China, permission to leave is denied if the person is party to an unresolved civil dispute.³²⁷ Under German law, an alien may be prevented from leaving if the person is liable to provide maintenance.³²⁸ However, denial of the right on the grounds of debt is strongly opposed by the international community. At its most extreme, debt bondage, such as that found in India,³²⁹ can result in the forcible return of a person to their creditor, effectively resulting in a form of constructive imprisonment.

Performance of public service

The right to leave can be limited in order to ensure that a person performs a compulsory public service, such as national military service.³³⁰ The restrictions of the right to leave of individuals who have not yet performed their military service are in principle to be considered necessary for

³²⁴ Article 6 Paragraph 2 of the *Suggestions of the Ministry of Public Security on Some Issues Concerning the Execution of Law on the Control of Exit and Entry of Citizens 1985 (PRC) and its Detailed Rules of the Implementation 1987 (PRC)*

³²⁵ Kenkyusho, Buraku Kaiho, *Human Rights in Japan, 1984*, Quoted in Plender, Richard, *International Migration Law*, Revised 2nd ed, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988, page 113.

³²⁶ Tiburcio, Carmen, *The Human Rights of Aliens under International and Comparative Law*, Kluwer Law International, 2001, page 233.

³²⁷ Article 8(2) the *Law on the Control of Exit and Entry of Citizens 1985 (PRC)*.

³²⁸ German *Aliens Law 1965* s 19(2).

³²⁹ Bradley, Catherine, *What Do We Mean by Human Rights: Freedom of Movement*, Franklin Watts, London, 2002, page 39.

³³⁰ Reid, Karen, *A Practitioner's Guide to the European Convention on Human Rights*, Sweet & Maxwell, London, 1998 page 246; see German *Aliens Law 1965* s 19(2).

the protection of national security and public order.³³¹ The people having the obligation to perform public service can be extended to the people who conduct scientific experiments on specific sites.³³² If an individual was prevented from leaving a country merely on the grounds that he or she is the holder of ‘state secrets’, or if an individual was prevented from travelling internationally within a specific permit, the basic grounds do not meet the test of necessity and requirements of proportionality.³³³ Despite this, some countries, such as China, restrict people leaving the country who hold national secrets, or have been discharged from active service related to secrets before the known secrets expire.³³⁴

Aliens

If aliens violate the law of their residence State, limits may be imposed on their right to leave that are different to those affecting nationals. Each State may determine the extent of those limits. In China, aliens are unable to leave if he or she is (i) a criminal defendant or suspect; (ii) is party to an unresolved civil dispute; (iii) is awaiting decision for any violation of Chinese law and whose case, in the opinion of the responsible department, calls for investigation.³³⁵

By contrast, Japanese law will only refuse to allow an alien to leave (i) if the person is subject to criminal proceedings for an offence punishable by imprisonment for a minimum of two years, or if a warrant has been issued for their arrest; (ii) if the person has been sentenced to a term of

³³¹ Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 255.

³³² Bradley, Catherine, *What Do We Mean by Human Rights: Freedom of Movement*, Franklin Watts, London, 2002, page 21.

³³³ Paragraph 16 of General Comment No.27 of the HRC on Freedom of Movement (Article 12)

³³⁴ According to Article 8 (5) of the *Law on the Control of Exit and Entry of Citizens* 1985 (PRC), if persons who exit from the territory will be harmful to State security or cause a major loss to national interests, approval to exit China shall not be granted to them. Article 6 Clause 3 and 4 of the *Explanations of Sixth Bureau of Ministry of Public Security on Issues of Providing Comments of Employed The organisation where the applicant is services of Citizens Exiting Abroad* 1989 (PRC) further provides that persons who exit from the territory will be harmful to State security or cause a major loss to national interests, meaning the persons who hold important political, military, economic and technological secrets of the Communist Party of China and the State. After known secrets expire, involved persons may be granted exit of China.

³³⁵ Article 23 of the *Detailed Rules for the Implementation of the Law on the Control of Exit and Entry of Aliens* 1985 (PRC).

penal servitude and the person has not yet served the sentence; (iii) if a warrant for the provisional confinement of the person has been issued for the purpose of extradition.³³⁶

3.4.3 Bureaucratic barriers

According to *Oxford Advanced Learner's English-Chinese Dictionary* (OALD), 'bureaucracy' means "excessive or complicated official routine, esp. because of too many departments and offices".³³⁷ The bureaucratic barrier to exercising the right to leave usually occurs when procedures are complex, difficult to obtain information about, when the responsible department cannot be readily accessed, or when there is a delay in processing applications. Procedures for issuing passports should be expeditious, and the applicant should be informed in writing of the cause for a refusal or revocation of the document.³³⁸ In *Gonzalez del Rio v Peru*, the HRC accepted that pending judicial proceedings justified delaying the issue of a passport.³³⁹ However, if the proceedings are unduly delayed, the right to leave the territory cannot be denied. In that case, the applicant had not been permitted to leave Peru for seven years, pending trial. His right to leave had been unjustifiably denied by cause of an undue administrative delay.

The imposition of high administrative costs may adversely affect the right to leave. The cost of applying to leave must be causable.³⁴⁰ "Cost" refers both to administrative service fees and taxes.³⁴¹ "Causable cost" has been narrowly construed to mean "nominal fees" by Article 13 of

³³⁶ I.e., *Surrender of a Fugitive from Justice Law*, No. 68 of 1953, Quoted in Plender, Richard, *International Migration Law*, Revised 2nd ed, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988, page 113.

³³⁷ Hornby, A. S., *Oxford Advanced Learner's English-Chinese Dictionary* (*Niujin Gaoji Yinghan Shuangjie Cidian*), 4th edition, The Commercial Press and Oxford University Press, Hong Kong and Beijing, 1997, page 181

³³⁸ Article 10 (d) (e) of the 1986 Strasbourg Declaration on RLR.

³³⁹ *Gonzalez Del Rio v Peru* (263/87) 28/10/1992, Human Rights Committee, cited in Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*., Oxford University Press, New York, 2000, page 252

³⁴⁰ Henkin, Louis, (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981 page 380; Article IV (a) of the 1963 Ingles Draft Principles on RLR, adopted by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Res. 2B (XV), UN Doc. E/CN. 41846 (1963), page 40.

³⁴¹ Article IV (c), the 1963 UN Draft Principles on RLR.

the 1972 Uppsala Declaration on the RLR,³⁴² and Article 4(g) of the 1986 Strasbourg Declaration on the RLR sets the inspirational target that travel documents should be issued free of charge, or subject only to nominal fees. In 1997, the UN criticised the former Iraqi government for the high administrative costs associated with the issuing of passports to its nationals.³⁴³

A further bureaucratic barrier to the right to leave is imposed by the requirement of a deposit or return ticket. Chinese residents cannot travel abroad in a group unless a bond is paid. The bond ranges from US\$4,000 to \$6,000. This represents a significant sum of money for an ordinary person, in a country where per capita GDP was US\$1,058 in 2003.³⁴⁴ Further, according to the CPDPM, a national should not be required to pay a deposit or provide any other form of guarantee of their return to the State.³⁴⁵

According to customary international law, a person should not be denied the right to leave on the grounds that they lack authority to enter another State,³⁴⁶ or cannot provide a letter of invitation from a foreigner, letter of approval from an employer or family member, or detailed travel route. Were it necessary to obtain the approval of an employer or family member, the individual's right to leave could be subverted by the interests of a third party. Restrictions on families travelling as a group, harassment of applicants by administrators, or refusing an application to leave on the basis that the applicant may damage the reputation of the State present impermissible limits on the right to leave.

3.4.4 Loss of technical expertise from the State through emigration: the “brain drain”

³⁴² “...Such documents or permits shall be subjected only to nominal fees.” See Article 13 of the 1972 Uppsala Declaration on RLR

³⁴³ *Concluding Comments on Iraq (1997)*, the UN Doc. the ICCPR/C/79/Add. 84, paragraph. 14

³⁴⁴ Market Information and Analysis Section, Department of Foreign Affairs and Trade, Australia, *China: the Fact Sheet*, using the latest data from the ABS, the IMF and various international sources, October 2003

³⁴⁵ Article I (e) of the 1963 UN Draft Principles on RLR.

³⁴⁶ Article 10 (c) of the 1986 Strasbourg Declaration on RLR

The loss of technical expertise from a State through emigration is one of most important issues connected with the right to leave. The three aspects for discussion here are (i) the development of skilled emigration; (ii) the impacts of this type of emigration on original and host countries; and (iii) the debates about depriving the right to leave based on the ‘brain drain’ or loss of intellectual talent; and (iv) resolving issues related to skilled emigration in migration law.

3.4.4.1 The development of skilled emigration

The term ‘brain drain’ was coined in the UK in the 1960s to describe the loss of skilled workers and their technical expertise through emigration to States seeking technological development, especially the USA and the former USSR.³⁴⁷ This pattern of migration was regarded as a very serious problem by OECD countries during this period,³⁴⁸ on the grounds that, in relation to the UK, the loss of its “most talented and highly trained citizens” would cause “incalculable damage” to the British economy.³⁴⁹

The notion of the ‘brain drain’ of skilled emigration has since acquired a connotation of people moving from developing countries to the industrialised West, especially the USA.³⁵⁰ The international Monetary Fund (IMF) has estimated that Iran loses 25% of its professionals through emigration, South Korea loses 15%, the Philippines lose 10%, and India and China lose 3%.³⁵¹ In order to avoid the possible loss caused by the ‘brain drain’, the GDR and Czechoslovakia, the former Warsaw Pact Countries require that emigrating citizens of working age pay back to the State the costs of their education.

³⁴⁷ Simanovsky, et al., 1996, Quoted in Iredale, Robyn, “The need to Import Skilled Personnel: Factors Favouring and Hindering its International Mobility”, *International Migration* Vol. 37(1) 1999, 89-114, page 92.

³⁴⁸ Fabian, Y. Muzart, G. and Young, A., “International Movements of Scientists and Engineers in the 1960s as An Aspect of the Mobility of Highly Qualified Manpower” in Friborg, Coran (ed), *Brain Drain Statistics: Empirical Evidence and Guidelines, Report on International Expert Meeting in Stockholm 1973 and Guidelines for Future Studies*, offset originals i Sundt offset, Stockholm, 1975, page 107.

³⁴⁹ Hogg, Quinton, *The Brain Drain*, CPC Outline Series No. 1, the Conservative Political Centre, London, 1967, page 3.

³⁵⁰ Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers 1987 Dordrecht, the Netherlands, page 35.

³⁵¹ Stalker, Peter, *The No-Nonsense Guild to International Migration*, New Internationalist Publications Ltd, Oxford, the UK, 2001, page 104.

The causes of skilled emigration include more career opportunities and higher incomes in destination countries, and concerns about political and economic stability in the national State. In the 1960's Quinton Hogg first rejected the idea of “levelling down” — the pursuit of a crude form of egalitarianism, as a way of promoting talent at home and dissuading skilled people from emigrating.³⁵²

Skilled emigration has been promoted by the immigration policies of developed countries, which are keen to attract qualified immigrants and students. Globalisation is, in part, a product of this pattern of migration. The USA, Canada, Australia, and New Zealand have implemented “skill selective” and “wealth selective” immigration policies to help highly skilled or professional people relocate.³⁵³

3.4.4.2 The effects of skilled emigration on original and host countries

Original country

Peter Stalker has mindfully identified five principle effects of skilled emigration, namely:

(i) a reduction in the country's capacity for long-term economic growth and human development; (ii) deprivation of many urgently needed skills; (iii) the loss of investment dollars for higher education, as university graduates and skilled workers take their qualifications elsewhere; (iv) the social cost borne of family separation as one spouse emigrates, generally a young man, as to place extra burdens on the shoulders of women who have to maintain the household; and (v) the cultural cost of emigration, as young men, who have few opportunities at home have come to regard emigration as a rite of passage.³⁵⁴

However, skilled emigration is not necessarily detrimental to the country of origin. Many developing countries have more graduates than they need; and as Graeme Hugo has identified,

³⁵² Hogg, Quinton, *The Brain Drain*, CPC Outline Series No. 1, the Conservative Political Centre, London, 1967, at 7.

³⁵³ Findlay, A.M., Li, F.L., et. al., “Doctors diagnose their destination: an analysis of the length of employment abroad for Hong Kong doctors”, *Environment and Planning*, Vol. 26 1994, 1605-1624

³⁵⁴ Stalker, Peter, *The No-Nonsense Guild to International Migration*, New Internationalist Publications Ltd, Oxford, the UK, 2001, page 106-107.

highly skilled graduates can contribute more to the development of their home country by working abroad than by staying home.³⁵⁵ This emigration pattern means that emigration States need to regard overseas remittance from ex-patriots as a source of national income. On balance, the effect of skilled emigration is negative, despite long-term economic benefits.

Host country

Both Rachel Freidberg and Jennifer Hunt comment that the effect of immigration on the labour market of host countries is small, and that the impact of immigration on the earnings of the local population depends upon the quality of the immigrants in terms of representing “human capital”.³⁵⁶ Host countries need to balance the benefit of receiving skilled immigrants who can supplement local shortages, while finding a way to maximise the gain from skilled immigration, without creating additional domestic pressures. They need to maintain a balance between permanent and temporary skilled immigration, facilitate the entry of skilled immigrants, and ensure that the immigrants satisfactorily integrate into the labour market.

3.4.4.3 The debates about depriving the right to leave based on the ‘brain drain’

Whether the ‘brain drain’ caused by skilled emigration is an acceptable cause of depriving an individual of the right to leave is controversial. Jose D Ingles³⁵⁷, J Bhagwati³⁵⁸ and Richard Plender³⁵⁹ independently contend that it is acceptable to impose limits on skilled emigration from developing countries, because the community has some legal claim on the skills and

³⁵⁵ Hugo, Graeme, Rudd, Dianne and Harris, Kevin, *Emigration from Australia: Economic Implications*, Second report on an ARC SPIRT grant CEDA Information Paper No. 77, June 2001, Adelaide University Australia, page 39.

³⁵⁶ Friedberg, Rachel M. and Hunt, Jennifer, “The Impact of Immigrants on Host Country Wages, Employment and Growth”, *Journal of Economical Perspectives*, Volume 9, Number 2, Spring 1995, pages 23-44, page 42.

³⁵⁷ “Such restrictions are understandable in the case of developing countries which find it necessary to prohibit the departure of persons having specified skills in order to prevent their limited supply of skilled manpower from being drained away by the better conditions offered in industrialized countries”, Ingles, Jose D, *1963 Ingles’ Study on RLR*, the UN Publication Sales No.: 64. XIV. 2, New York, 1963, pages 44-45.

³⁵⁸ “Developing countries should levy a tax on the earnings of professional, technical and kindred persons who emigrate from less developed countries to developed countries.” Bhagwati, J. (ed) in *Taxing the Brain Drain: A Proposal* (Vol. I) and *The Brain Drain and Taxation*, (Vol II), *Quoted in* Plender, Richard, *International Migration Law*, Revised 2nd ed, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988, page 301.

³⁵⁹ Plender, Richard, *International Migration Law*, Revised 2nd ed, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988, page 101.

talents developed by its members at the community's expense. They have also argued that it is justified for those States to impose a "return of service" obligation on people who have been trained at public expense.

Louis Henkin asserts that many countries have more skilled professionals than they can use and can afford to have them to emigrate. Even if there were a shortage of skilled labour, he concludes that States should not prohibit emigration, because to do so would violate the ICCPR.³⁶⁰ Carmen Tiburcio agrees with Henkin on the point that deprivation of the right to emigrate would unjustifiably contravene the ICCPR. Moreover, she suggests that the skills of an individual belong to that individual, "not to the community where he or she was educated" and as such, the person cannot be denied the right to leave on the grounds of "owing" their community for their education.³⁶¹ Henkin and Tiburcio's arguments seem more persuasive.

3.4.4.4 Solving skilled emigration in migration law

Although the most direct way of stemming the loss of skilled nationals is by prohibiting their emigration, there are less drastic means of discouraging skilled emigration, or encouraging skilled repatriation. The UN has found that family connections heavily effect a person's decision to repatriate.³⁶² The imposition of income tax on the income of an ex-patriot could be used as a restraint on the right to leave. However, the RLR experts agree that citizenship is not a proper foundation for the imposition of taxes, and such taxes would be difficult to enforce without the co-operation of the immigration States.³⁶³

³⁶⁰ Henkin, Louis, (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, page 378-179.

³⁶¹ Tiburcio, Carmen, *The Human Rights of Aliens under International and Comparative Law*, Kluwer Law International, 2001, pages 319-320.

³⁶² Glaser, William A., *The Brain Drain: Emigration and Return, Findings of a UNITAR Multinational Comparative Survey of Professional Personnel of Developing Countries who Study Abroad*, Pergamon Press, London, 1978, page XXV.

³⁶³ Hufbauer, Gary Clyde, "The State, the individual, and the Taxation of Economic Migration", in Bhagwati, Jagdish N. and Wilson (ed), John Douglas, *Income Taxation and International Mobility*, the Massachusetts Institute of Technology, Massachusetts, the USA, 1989, page 93.

Robyn Iredale has addressed the need for a co-ordinated international response to deal with the effects of skilled migration.³⁶⁴ A global strategy founded on co-operation, which includes the payment of compensation by immigration States to the original States, through a series of bi-lateral agreements, is needed. Compensatory measures could include the provision of increased training within, and technology transfer to, developing emigration States.

On the domestic plane, governments need to encourage skilled workers to stay at home, and implement migration policies designed to encourage the return of skilled nationals. In the 1960's Quinton Hogg, during the run-up to a general election in the UK asserted that the government should:

Provide an environment in which the pursuit of excellence in every department could flourish. Talent would be encouraged and hard work and distinguished qualifications, unlike virtue, would not have to be their own reward.³⁶⁵

India encourages professionals to return home by offering five years of tax-free employment and providing incentives to set up a business. The HKSAR has developed home ownership projects and has mooted the idea of double passport provisions.³⁶⁶

3.4.5 The right to enter another State

In order to enjoy the right to leave, there must be another country to which a person can enter.³⁶⁷ However the right to enter does not form part of the RLR under international conventions. According to *Havana Convention on the Status of Aliens* 1928, States are free to determine, through legislation, the conditions of entry and residence of aliens in their territory.³⁶⁸

³⁶⁴ Iredale, Robyn, "The need to Import Skilled Personnel: Factors Favouring and Hindering its International Mobility", *International Migration* Vol. 37(1) 1999, 89-114, page 310.

³⁶⁵ Hogg, Quinton, *The Brain Drain*, CPC Outline Series No. 1, the Conservative Political Centre, London, 1967, page 7.

³⁶⁶ Iredale, Robyn, "The need to Import Skilled Personnel: Factors Favouring and Hindering its International Mobility", *International Migration* Vol. 37(1) 1999, 89-114, page 308.

³⁶⁷ Baubock, Rainer, *Transnational Citizenship: Membership and Rights in International Migration*, Edward Elgar, the UK, 1994, page 326.

³⁶⁸ Article 1 of *Havana Convention on the Status of Aliens* 1928 "states have the right to establish by means of laws the conditions under which foreigners may enter reside in their territory."

Historically, aliens have never been entitled to enter another country. Blackstone has asserted, “No member of one society has a right to intrude into another.”³⁶⁹ The right to enter, similar to the right to leave, touches on the self-interest of States, and it is common to find the view expressed that these are matters pre-eminently within the reserved domain of domestic jurisdiction. It is thus understandable that the State enjoys an absolute and uncontrolled discretion, or sovereign power, to determine whether, and on what conditions, it will permit the entry of aliens

States generally require aliens to possess identity documents, such as a passport and a visa. In 2000, approximately 190 States required aliens to obtain an entry visa.³⁷⁰ Some States discriminate in their treatment of visa applicants, pursuant to the States national interest.³⁷¹ An alien should be admitted once they have been issued with a visa. Justifications for refusal need be on the grounds of upholding public security, public order, public health or morality, or the rights and freedoms of others.

3.4.6 Procedural right against expulsion

Nobody can be forced to leave any country, including one’s own, without justified causes.³⁷² Article 9 of the UDHR provides “no one shall be subjected to arbitrary exile”. Article 13 of the ICCPR further provides that:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where

³⁶⁹ Henriques, H. S. Q., *The Law of Aliens and Naturalisation including the Text of the Aliens Act, 1905*, Butterworth & Co., London, 1906, page 9.

³⁷⁰ Martin, Philip and Widgren, Jonas, *International Migration: Facing the Challenge*, Population Reference Bureau, Washington D.C., 2002, pages 39, page 4.

³⁷¹ For example, in relation to the granting of student visas, Australia classifies countries into five groups. The applicant will be treated differently, depending on the group into which their country has been classified. Following September 11, the USA amended its immigration regulations such as to require applicants from Arab States to meet additional requirements.

³⁷² There are three different expressions, “free” or “freely” or “has the right” relating to the act of the right to leave in international instruments. What they claim in nature is the way in which everyone is entitled to the right to leave in the line with one’s own will, rather than government or others’ will. Based on the right to leave, nobody can be forced to leave any country including one’s own, without justified causes.

compelling causes of national security otherwise require, be allowed to submit the causes against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 13 regulates only the procedure and not the substantive grounds for or against expulsion.³⁷³ It thus does not strictly protect an alien from expulsion, so long as procedural guarantees to expulsion are available. Adherence to procedural safeguards helps ensure that the State Party's substantive law regarding expulsion is not being administered in an arbitrary manner.³⁷⁴

"Lawful aliens"

the RLR protected by Article 12 of the ICCPR is subject to the condition that everyone is "lawfully within the territory of a State".³⁷⁵ Without the words "an alien lawfully within the territory of a State" the national authorities would be prohibited from expelling an alien who has managed to enter the country legally. The words not only express non-interference with the admission policy of national authorities in regards to aliens, but confine the eligibility of aliens under the procedural right against expulsion. In this context, an alien includes stateless persons.

The provisions do not cover illegal entrants and aliens who have stayed longer than the law or their permits allow. An alien is only lawfully within the territory if they comply with the conditions of their admission³⁷⁶ and hold a valid visa.³⁷⁷ The domestic law of the State concerned determines "lawfulness". This means that national law regarding the requirements for entry and stay must be considered in determining the scope of the procedural right against

³⁷³ Paragraph 10 of General Comment No.15 of the HRC on the Rights of Aliens.

³⁷⁴ Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 268.

³⁷⁵ *Celepli v. Sweden* (456/91) 18/07/1994, Human Rights Committee, cited in Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 247.

³⁷⁶ 14102/88 Sweden, (Dec.) October 9, 1989, 63 D.R. 195; 12068/86 Germany, December 1, 1986, 51 D. R. 237, Quoted in Reid, Karen, *A Practitioner's Guide to the European Convention on Human Rights*, Sweet & Maxwell, London, 1998, page 247.

³⁷⁷ 21069/92 S. Mar., (Dec.) July 9, 1993, 75 D.R. 245, Quoted in Reid, Karen, *A Practitioner's Guide to the European Convention on Human Rights*, Sweet & Maxwell, London, 1998, page 271.

expulsion. If the legality of an alien's entry or presence in the territory is in dispute, any decision on this point leading to expulsion or deportation ought to be taken in accordance with Article 13 of the ICCPR.³⁷⁸ Article 13 protects lawful aliens against being arbitrarily expelled, regardless of the content of the domestic law of a State party. Causes for the expulsion of an unlawful alien must be given if the decision is based on public interest.³⁷⁹

*"In pursuance of a decision reached in accordance with law"*³⁸⁰

The phrase "in pursuance of a decision reached in accordance with law" means that a decision must be made lawfully and in a manner that is procedurally fair and free from discrimination.³⁸¹

The HRC has comprehensively explained the meaning of the term in *Maroufidou v. Sweden*, which is worth reproducing:

The reference to "law" is to the domestic law of the State party concerned, though of course the relevant provisions of domestic law must in themselves be compatible with the provisions of the ICCPR. ... The interpretation of domestic law in the context of protecting aliens against arbitrary expulsion is essentially a matter for the courts and authorities of the State party concerned. It is not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly in the case before it under the Optional Protocol, unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power.³⁸²

Generally, the HRC will not overturn a State's decision in the absence of clear procedural defects.

Procedural guarantees

Article 13 of the ICCPR establishes certain procedural guarantees to protect aliens against arbitrary expulsion. Domestic law determines the nature and content of procedural rights against

³⁷⁸ Paragraph 9 of General Comment No.15 of the HRC on the Rights of Aliens.

³⁷⁹ Plender, Richard, *International Migration Law*, Revised 2nd ed, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988 page 475; also for example, A western scholar, who had advised a Chinese dissident, was arrested and expelled from China in 1992. The cause given was that his actions were "incompatible with his status as a tourist." See Decision of 1992, "3 Asian Yearbook of International Law", pages 344-345 (1993).

³⁸⁰ For more details of the word of the term 'law', see part 3.3.4.1 "provided by law" of this thesis

³⁸¹ Article 26 of the ICCPR.

³⁸² No. 58/1979, § 10.1 Cf. also de Zayas & Moller, 1986 NJIL page 387 f.

expulsion. However, for review of the grounds upon which the person is to be expelled, a decision by a competent tribunal is the minimum requirement. As a feature of procedural fairness, an alien must be allowed to make submissions and be represented to resist expulsion.

The phrase “to have his case reviewed” supports this interpretation. Paragraph 10 of General Comment No.15 of the HRC on the Rights of Aliens, provides that the principle of Article 13 is related to not only the entitlement to review, but to appeal against expulsion. Article 13 also introduces the requirement of a hearing, although less settled is the question of whether a hearing must be permitted to the alien.³⁸³ In general, the alien should be afforded an oral hearing, although written submissions may suffice. In the cases of *Hammel v. Madagascar*, *Giry v. the Dominican Republic* and *Canon Garcia v. Ecuador*, the HRC found that the right against expulsion had been violated because the affected person had been denied an opportunity to appeal against the decision.³⁸⁴

The term “be represented” means the right to represent oneself, or to appoint suitably qualified counsel. In *Chahal v. United Kingdom*, the EUCT found a decision made by an advisory panel was invalid because there were insufficient procedural safeguards. In that case, the details of the case against the applicant had not been disclosed, and legal representation had not been allowed.³⁸⁵ The HRC noted with concern, “that adequate legal representation is not available for asylum-seekers effectively to challenge administrative decisions”.³⁸⁶

“*Compelling causes of national security*”³⁸⁷

An alien must be given an effective opportunity to pursue a remedy against expulsion. Those opportunities cannot be granted in a discriminatory manner.³⁸⁸ The right against expulsion can

³⁸³ Goodwin-gill, Guy S., *International Law and the Movement of Persons Between States*, Oxford University Press, Oxford, 1978, pages 263-265.

³⁸⁴ Nos. 155/1983, 193/1985, 319/1988, Quoted in Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: the ICCPR Commentary*, N. P. Engel, Publisher, Kehl am Rhein · Strasbourg · Arlington, 1993, page 229.

³⁸⁵ November 15 1996, R.J.D., 1996-II, No. 22 Quoted in Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: the ICCPR Commentary*, N. P. Engel, Publisher, Kehl am Rhein · Strasbourg · Arlington, 1993, page 283.

³⁸⁶ The UN doc. the ICCPR/C/79/Add. 55 (1995), paragraph.16.

³⁸⁷ For more details about the term ‘national security’, please see part 3.3.4.2 of this thesis.

only be departed from where there are “compelling causes of national security”. The HRC held the view in *V.M.R.B v Canada* that the term “compelling” contained in Article 13 of the ICCPR means that States must provide persuasive evidence of serious national security threats if the person remains in the territory.³⁸⁹ Based on the word “compelling” in Article 13 of the ICCPR, States Parties are required to furnish persuasive evidence of serious national security danger.³⁹⁰

Obviously, the above widely accepted interpretation of ‘compelling’ is still too ambiguous to fundamentally reduce the possibility for the State to consider not applying the procedural guarantees against expulsion. A similar issue occurs in the words ‘competent authority,’ which might well be the same body that has taken the original decision, and there could, therefore, be no right of impartiality. Both of the above weakness may severely reduce the effectiveness of the procedural right against expulsion.

The practice in Europe needs to be noted because Europe rejected the proposal of inserting certain procedural rights against expulsion to the HER P4 in favour of aliens about to be expelled.

The grounds were that to limit rights to those of a procedural nature, was insufficient — it was better to have no provision at all. Firstly, the guarantees would not apply where the State ‘considers’ compelling reasons other required. Secondly, the ‘competent authority’ might well be the same body which had taken the original decision, and there could, therefore, be no guarantee of impartiality.³⁹¹

3.5 The right to return to one’s country

3.5.1 The general considerations of the right to return to one’s country

³⁸⁸ Quoted in Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, pages 268-276.

³⁸⁹ *V.M.R.B v Canada* (236/87), See Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 274.

³⁹⁰ Jagerskiold, S., “Freedom of Movement” Henkin, L. (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, page 184.

³⁹¹ Goodwin-gill, Guy S., *International Law and the Movement of Persons Between States*, Oxford University Press, Oxford, 1978, page 291.

The right to return to one's country includes the right to remain in one's own country, the right to return after having left one's own country, and the right to enter the country for the first time if he or she was born outside the country. It also includes the right of return for refugees, and the prohibitions enforced population transfers to other countries.³⁹²

The right to return is expressly recognised in Article 13 (2) of the UDHR and Article 12 (4) of the ICCPR, which provides that "No one shall be arbitrarily deprived of the right to enter his own country". It is also recognised in Article 3 (2) of the EHR P4, Article 22 (5) of the AMR, Article 12 (2) of the AFR, and other international and regional human rights instruments. These instruments place no restrictions on the right to return, and is guaranteed to nationals in the Constitutions of many countries.³⁹³ Paragraph 13 of the Schedule to the CSR entitles a stateless person to whom a travel document has been issued according to Article 28 to re-enter the territory of the issuing State at any time during the period of passport validity. Thus the right to return is accepted so widely that its existence as a rule of law is virtually beyond dispute.

Without being admitted to return freely, exiled nationals have to continually move around — nobody obviously would like to be subjected to that. Without the right to return, an individual may be subject to political repression, prevented from observing their religion, from obtaining an education or a job of their choice, or may be frustrated in efforts to enjoy family life. If a person cannot return to his or her State of nationality, the person will be stateless.

³⁹² Paragraph 19 of General Comment No.27 of the HRC on Freedom of Movement (Article 12)

³⁹³ Article 11.1 of *German Constitution* 1949; Article 44 of *Algerian Constitution* 1976; Article 50.1 of *Cape Verdian Constitution* 1992; Article 22 of *Congolese Constitution* 1992; Article 22 of *Congolese Constitution* 1992; Article 22 of *Costa Rican Constitution* 1949; Article 19 of *Spanish Constitution* 1978; Article 19.1.d of *Indian Constitution* 1950; Section 6.b of *Israel Constitution (Basic Law 13, 1992)*; Section 6.b of *Israel Constitution (Basic Law 13, 1992)*; Article 16.1 of *Italian Constitution* 1987; Article 31 of *Nicaraguan Constitution* 1987; Article 8 of *Swedish Constitution* 1975; Article 10 of the *Constitution of the ROC* 1978; Article 8.1 of *Antiguan Constitution* 1981; Article 14 of *Argentinean Constitution* 1853; Article 10.1 of *Belizean Constitution* 1981; Article 10.1 of *Belizean Constitution* 1981; Article 5, XV of *Brazilian Constitution* 1988; Article 19.7 a of *Chilean Constitution* 1980; Article 19.7 a of *Chilean Constitution* 1980; Article 81 of *Honduran Constitution* 1982; Article 81 of *Honduran Constitution* 1982; Article 58.1 of *Hungarian Constitution* 1949; Article 13. a of *Liberian Constitution* 1984; Article 11 of *Mexican Constitution* 1917; Article 56 of *Paraguayan Constitution* 1967; Article 2.11 of *Peruvian Constitution* 1993; Article 52.1 of *Polish Constitution* 1997; Section 36 of *Thai Constitution* 1997; Article 23 of *Turkish Constitution* 1982.

Different opinions about the meaning of the terms “one’s own country” and “arbitrarily” hamper the complete enforcement of the right to return in the world. Violations of the right to return emerge from time to time, especially not to accept expelled nationals and to exile nationals. Considering the above issues, this section will analyse (i) consequences of violating the right to return; (ii) the term “one’s own country”; (iii) the meaning of “arbitrarily”; (iv) the duty to accept expelled nationals and the duty not to expel nationals.

The right to return is fundamental because exile is a fundamental deprivation of one’s homeland, a deprivation that goes to the heart of those immutable characteristics that comprise our personal and collective identities.³⁹⁴ It is unacceptable to deprive any person of close contact with one’s family, friends, or the series of relationships that form one’s social environment. As Van P. Panhuys has contended, “the duty to admit nationals is considered so important a consequence of nationality that it is almost equated with it.”³⁹⁵

3.5.2 “One’s own country”

Customary international law provides that an individual outside his/her country cannot be arbitrarily denied the right to return to it.³⁹⁶ Nevertheless, the precise meanings of “one’s own country” and “arbitrarily” are disputed and in some respects obscure. An individual must prove that the State in which they wish to enter is their “own country” before being entitled to the right to return to that country. Article 12 (4) of the ICCPR promulgated that “no one shall be arbitrarily deprived of the right to enter his own country”, it does not distinguish between nationals, stateless persons and aliens. Thus, it is only possible to identify the persons who are entitled to exercise this right by interpreting “one’s own country”.³⁹⁷

³⁹⁴ Rosand, Eric, *The right to Return under International Law following Mass Dislocation: the Bosnia Precedent?* Summer 1998 19 *Michigan Journal of International Law* 1091, page 11.

³⁹⁵ Panhuys, P. Van, *The Roles of Nationality in International Law: An Outline*, 1959, A. W. Sythoff, Leyden, the Netherlands, page 56.

³⁹⁶ Rosand, Eric, “The right to Return under International Law following Mass Dislocation: the Bosnia Precedent?”, Summer 1998 19 *Michigan Journal of International Law* 1091, page 11. Also see 1974] ECR 11337, page 1351.

³⁹⁷ Paragraph 20 of General Comment No.27 of the HRC on Freedom of Movement (Article 12)

Compared with “the right to enter his own country” in the ICCPR, “the right to enter the State of which he is a national” was used in the EHR³⁹⁸ and the AMR³⁹⁹, “the right to return to his country” was used in 13 (2) of the UDHR⁴⁰⁰ and Article 12 (2) of the AFR⁴⁰¹. Obviously, the meaning of the former term is more narrow than “the State of which he is a national” and to “his country”.

This term of “one’s own country” was initially chosen in favour of “country of nationality” and “country of one’s permanent home”. This means that individuals who have never lived in their country of citizenship can “enter” the State, although, since they have never resided there, cannot “return”.⁴⁰² The intention of having a broader and more precise meaning can be supported by the preparatory work on Article 12 (4) of the ICCPR. Marc J. Bossuyt summarised the preparatory work as following after an overview of the three important international sessions regarding the draft of the ICCPR, Commission on Human Rights, 5th Session (1949), 6th Session (1950) and 8th Session (1952).

Difficulties arose in connection with this provision connecting the right to enter one’s own country for States in which the right to return to one’s country was governed, not by rules of nationality or citizens, but by the idea of a permanent home. The early drafts dealt only with the right of nationals to “enter” their country. It is intended to cover cases such as those of persons born abroad who have never been to the country of their nationality. Such a formula was not satisfactory for a State which granted the right of “return” to persons who were not nationals but who had established their home in the country. A compromise was reached, based on Article 13, paragraph 2, of the UDHR, by replacing the reference to “country of which he is a national” by the words: “his own country”. The right to “enter” the country was retained.⁴⁰³

³⁹⁸ Article 3 (2) of the HER P4 regulated “no one shall be deprived of the right to enter the territory of the State of which he is a national.”

³⁹⁹ Article 22 (5) of the AMR regulated “no one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it.”

⁴⁰⁰ Article 13 (2) of the UDHR promulgated “Everyone has the right to ... return to his country.”

⁴⁰¹ Article 12 (2) of the AFR promulgated “Every individual shall have the right to ... return to his country ...”

⁴⁰² Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 56.

⁴⁰³ Bossuyt, Marc J., *Guide to the Travaux Préparatoires’ of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 261.

However, Jose Ingles and Richard Plender supported the narrow interpretation. Ingles referred to “[t]he right of a national to return” throughout his study and incorporated the expression in his draft principles. The Ingles Draft Principles on the RLR II (b) provides that “[n]o one shall be arbitrarily deprived of [their] nationality, or forced to renounce [their] nationality, as a means of divesting [them] of the right to return to country.”⁴⁰⁴ This was adopted by the CPDPM in 1971. Plender asserted that “every State must admit its own nationals to its territory” and that “each State has the right to deny admission to aliens.”⁴⁰⁵

Above interpretation was then broadened to include permanent residents by the 1972 Uppsala Declaration on the RLR and the 1986 Strasbourg Declaration on the RLR. Articles 9 and 10 of the 1972 Uppsala Declaration on the RLR affirm that “every person is entitled to return to the country of which [they are] a national,” and that “no person shall be deprived of [their] nationality for the purpose of divesting [them] of the right to return to [their] country.” Article 12 of the 1972 Uppsala Declaration on the RLR affirms “the re-entry of long-term residents who are not nationals, including stateless persons, maybe refused only in the most exceptional circumstances”. Articles 6(b) and 7 of the 1986 Strasbourg Declaration on the RLR expanded the interpretation of “one’s own country” in, where is it provided:

Article 6(b): No person shall be deprived of nationality or citizenship in order to exile or to prevent that person from exercising the right to enter his or her country.

Article 7: Permanent legal residents who temporarily leave their country of residence shall not be arbitrarily denied the right to return to that country.

Hurst Hannum, Jagerskiold, Knisbacher, and Mazzawi are supporters of the broadened interpretation. Hannum noted “a newly independent State, might create a right of entry for large numbers of previously stateless persons or even those who held another nationality at one time.”⁴⁰⁶

⁴⁰⁴ Ingles, Jose D, *1963 Ingles’ Study on RLR*, the UN Publication Sales No.: 64. XIV. 2 New York, 1963

⁴⁰⁵ Plender, Richard, *International Migration Law*, Revised 2nd ed., Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988, page 133.

⁴⁰⁶ Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, pages 59-60.

In 1999, the HRC ruled that the scope of “one’s own country” is broader than the concept “country of one’s nationality”. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who because of his or her “special” ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, for nationals of a country who have been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated into or transferred to another national entity, whose nationality is being denied them.⁴⁰⁷

In order to claim rights under Article 12(4) of the ICCPR, the person must either be a national of the relevant State, or has been stripped of his or her nationality by that State, or denied nationality by that State in violation of international law, where the country of nationality has been incorporated into or transferred to another State whose nationality has being denied to them.⁴⁰⁸ Individuals who do not claim rights under Article 12(4) of the ICCPR are deemed to have elected to remain as aliens in the country of residence.

Sarah Joseph, Jenny Schultz and Castan envisaged that it was open to an alien to show that there are well-established links with a State, and that he or she is entitled to claim the protection of Article 12 (4) of the ICCPR. However, this broad interpretation does not appear to be widely accepted or easily implemented. Article 12 (4) of the ICCPR permits an interpretation that might embrace other categories of long-term residents, including stateless persons arbitrarily deprived of the right to acquire the nationality of the country of residence.⁴⁰⁹ The HRC stated that “his own country” as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not “aliens’ within

⁴⁰⁷ Paragraph 20 of General Comment No.27 of the HRC on Freedom of Movement (Article 12).

⁴⁰⁸ *Stewart v Canada (538/93) 1/11/1996*, Quoted in Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 264.

⁴⁰⁹ Paragraph 20 of General Comment No.27 of the HRC on Freedom of Movement (Article 12).

the meaning of Article 13, although they may be considered as aliens for other purposes.⁴¹⁰ This inclusive interpretation provides protection for those who have a special connection with a country. If a person, after entering a foreign country, loses his citizenship in one country, without acquiring citizenship in another, then the State of earlier citizenship is bound to readmit the person at the request of the State in which the person is residing.⁴¹¹

Lawrence M. Friedman has observed that the *Scott Act* 1888 (USA) prohibited 20,000 Chinese immigrants, who had temporarily left the USA, from returning.⁴¹² Current international instruments endeavour to prohibit similar violations of the RLR in the future. Under the ICCPR, the right to return does not depend on a person's refugee status. Human Rights Watch contended that every individual who has maintained "genuine and effective links" with a territory in question should enjoy the right to return to their own country, regardless of whether he or she is a refugee.⁴¹³

"A genuine and effective link" was defined in the *Nottebohm* decision of the ICJ. According to the ICJ, "a genuine and effective link to one's own country" can be constituted from various factors, including language, long-term residence, cultural identity, participation in public life, and family ties. The relative importance of each factor depends on the circumstances of the case.⁴¹⁴ On this basis, a genuine and effective link could diminish over time. However, this would be rare in the case of those who fled from persecution. A determination should not be made in respect of people who have fled until they have had the opportunity to exercise the right to return over a reasonable period of time, have chosen not to exercise the right, or have taken

⁴¹⁰ *Stewart v Canada* (538/93) 1/11/1996, Quoted in Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 262.

⁴¹¹ Weis, P., *Nationality and Statelessness in International Law*, 2nd revised editions, Sijthoff & Noordhodd International Publishers B. V., Alphen aan den Rijn, the Netherlands 1979, page 55.

⁴¹² Friedman, Lawrence M., *A History of American Law*, Simon and Schuster, New York, 1973, page 444.

⁴¹³ Human Rights Watch, "Human Rights Watch Policy on the Right to Return: Relevant Background, the International Covenant on Civil and Political Rights 1966", [https://nadaaily.com/cgi-bin/nph-proxyb.cgi/010000A/http/www.hrw.org---](https://nadaaily.com/cgi-bin/nph-proxyb.cgi/010000A/http/www.hrw.org--- (05-07-2003)) (05-07-2003), page 2.

⁴¹⁴ *Liechtenstein v. Guatemala* (Nottebohm Case) Second Phase, Judgement, *International Court Journal Reports* 1955, Rep 4.

steps to cut the link.⁴¹⁵ The right to return is not restricted to nationality or permanent residency status.

In other words, the right to return to the country of one's habituated residence is acceptable. Principle 22 of *Concluding Document of the Vienna Meeting* of January 15, 1989 provides that, "[the States parties] will allow all refugees who so desire to return in safety to their homes." However, the meeting failed to clarify the conditions under which the refugees would be admitted. This has resulted in some practical problems.⁴¹⁶

Many Palestinian refugees were born in Egypt, Lebanon and other Middle East countries, where they have lived for more than 50 years. However, these countries have not afforded them the right to return, despite the international obligation to "take the necessary measures" to guarantee Palestinians full freedom of movement between Arab countries in accordance with *Protocol for the Treatment of Palestinians in Arab States* 1965. In 1960, Palestinians were entitled to receive Egyptian travel documents. However, these documents "did not grant the bearer the right to enter Egypt unless a visa is obtained from the Egyptian consulates abroad".⁴¹⁷ Thus, holders of such documents who were born in Egypt or who had lived there for most of their lives had no right to re-enter Egypt. Egyptian consulates have reportedly refused to grant a re-entry visa to Palestinians born in Egypt, without providing reasons.⁴¹⁸

⁴¹⁵ Human Rights Watch, "Human Rights Watch Policy on the Right to Return: Relevant Background: The Human Rights Committee General Comment on Article 12 of the International Covenant on Civil and Political Rights, 1966" [https://nadaily.com/cgi-bin/nph-proxyb.cgi/010000A/http/www.hrw.org---](https://nadaily.com/cgi-bin/nph-proxyb.cgi/010000A/http/www.hrw.org--- (05-07-2003)) (05-07-2003), page 2.

⁴¹⁶ For example, negotiations between the governments of Nepal and Bhutan to resolve the Bhutanese refugee crisis have failed to find a solution. The governments have been unable to guarantee that Bhutanese refugees would be able to return to their homes, or enjoy basic human rights, or gain access to social services such as education. These factors are critical to achieving a sustainable outcome for the returning refugees. See Human Rights Watch, *Nepal/Bhutan: Bilateral Talks Fail to Solve Refugee Crisis International Community Should Take Concerned Action*, 28 October 2003, <http://www.hrw.org/press/2003/10/nepal-bhutan102803.htm> <15/04/2004>

⁴¹⁷ Abdul Khader Yassin, *The Palestinians in Egypt*, Shaml, 1996

⁴¹⁸ Human Rights Watch, "Human Rights Watch Policy on the Right to Return: Relevant Background: Treatment and Rights in Arab Host States" [https://nadaily.com/cgi-bin/nph-proxyb.cgi/010000A/http/www.hrw.org---](https://nadaily.com/cgi-bin/nph-proxyb.cgi/010000A/http/www.hrw.org--- (05-07-2003)) (05-07-2003).

In relation to the problems facing Palestinian refugees, “one’s own country” should mean a country with which the person has a causable connection through a combination of race, religion, language, ancestry, birth and prolonged domicile. Governments come and go, but political fluctuation should not affect the right to return to one’s own country and to have a homeland.

3.5.3 “Arbitrarily”

During the drafting the ICCPR, a provision prohibiting arbitrary exile was inserted into Article 12 (4), based on two grounds. The first is Article 9 of the UDHR, which affirms, “no one shall be subjected to arbitrary arrest, detention or exile”. The second was the fact that, while in most countries exile no longer existed as a penalty, in some circumstances it might be more humane to exile a person than to inflict on him or her more severe punishment.⁴¹⁹ Some delegations submitted that the term “arbitrary” was equivalent to “unlawful”, but it is clear that this narrow definition is not appropriate — despite the possible preference of the drafters for “deliberate ambiguity” in this area.⁴²⁰

According to *Black’s Law Dictionary*, an arbitrary decision is one that “depend[s] on individual discretion; specifically determined by a judge rather than fixed rules, or law; found on prejudice or preference rather than on cause or fact.”⁴²¹ Paragraph 21 of General Comment No.27 of the HRC on Freedom of Movement (Article 12) provides that:

The reference to the concept of arbitrariness in this context is intended to emphasise that it applies to all State actions, legislative, administrative and judicial. It guarantees that interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, causable in the particular circumstances.

⁴¹⁹ Bossuyt, Marc J., *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 260.

⁴²⁰ Pechota, *The Development of the Convention on Civil and Political Rights*, in Henkin, L. (ed), *The International Bill of Rights: the Covenant of Civil and Political Rights*, Columbia University Press, New York, 1981, pages 32 and 57.

⁴²¹ Garner, Bryan A., (Editor in Chief), *Black’s Law Dictionary*, 7th edition, West Group, St. Paul, Minn., 1999, page 100.

According to the HRC, there are few, if any, circumstances in which deprivation of the right to enter one's own country could be causable. A State party must not arbitrarily prevent a person from returning to his or her own country, by stripping that person of nationality or by expelling an individual to a third country.⁴²² A country can only derogate from their responsibilities under Article 12(4) of the ICCPR during the extreme circumstances described in Article 4. Article 4 refers to time of national emergency, such as a state of war or a threat of war,⁴²³ a terrorist emergency, internal political instability, or natural disaster. Paragraph 2 of *General Comment 29, States of Emergency (article 4)* provides that before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed.⁴²⁴ Even in these situations, States should ensure that their actions are not inconsistent with their other duties under international law, and that they do not involve discrimination on the ground of race, language, religion or ethnicity.⁴²⁵

For Article 12(4) to apply, the whole population must be affected by a public emergency.⁴²⁶ Paris Standard 1(b) provides that "public emergency" means an exceptional situation of crisis or public change, actual or imminent, which affects the whole population, or the whole population of the area to which the declaration applies, and constitutes a threat to the organisation of the community life of the State. The declaration of a State of emergency may cover the entire territory of the State or any part thereof, depending upon the areas actually affected by the circumstances motivating the declaration. This will not prevent the extension of emergency

⁴²² Paragraph 21 of General Comment No.27 of the HRC on Freedom of Movement (Article 12).

⁴²³ According to *Canada War Measures Act*, civil liberties were severely restricted by regulations during the First World War, the Second World War and the "October crisis" of 1970. See Hogg, P.W., *Constitution Law of Canada*, 2nd edition. 1985, pages 324-325.

⁴²⁴ Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), <http://wwwserver.law.wits.ac.za/humanrts/gencomm/hrc29.html> (07/07/2005)

⁴²⁵ Human Rights Watch, "Human Rights Watch Policy on the Right to Return: Relevant Background", <https://nadaaily.com/cgi-bin/nph-proxyb.cgi/010000A/http/www.hrw.org---> (05-07-2003), page 1.

⁴²⁶ Ghandhi, P. R., "The Human Rights Committee and Derogation in Public Emergencies", 1989, 32 *German Yearbook of International Law* 323, page 326.

measures to other parts of the country whenever necessary, nor the exclusion of those parts where such circumstances no longer prevail.⁴²⁷ The Paris Standards considered that States with large territorial areas such as Canada, China or the USA, should be allowed to derogate from the terms of Article 12(4) in proportion to the geographical area that is affected by the public emergency, rather than requiring the whole population to be affected.

While exercising emergency powers, States need ensure that the fundamental functions of the legislature remain intact, despite the relative expansion of the authority of the executive. Thus, the legislature should provide general guidelines to regulate executive discretion; and legislative prerogatives, immunities and privileges should remain intact.⁴²⁸

A State could prohibit its citizens from returning by refusing to issue a passport or refusing to prolong its validity, or by depriving the person of their nationality. In either event, procedural fairness should be guaranteed so that the decision is not arbitrary. Article II (b) of the 1963 UN Draft Principles on the RLR provide “No one shall be arbitrarily deprived of [their] nationality or forced to renounce [their] nationality as a means of divesting [them] of the right to return to [their] countries.” Similar provisions are found in Article 15 (2) of the UDHR, Article 9 of the 1972 Uppsala Declaration on the RLR and Article 6 (b) of the 1986 Strasbourg Declaration on the RLR.

In *Marcos v. Manglapus*, former President Marcos, his family and supporters were in Hawaii and requested travel documents to return to the Philippines. President Aquino refused the application. The Supreme Court found that the President had not acted arbitrarily because the return of the ousted president threatened the national interest.⁴²⁹ If an applicant who has been

⁴²⁷ Quoted in Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 625.

⁴²⁸ (B) 3 of Paris Standard, Quoted in Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2000, page 629.

⁴²⁹ *Marcos et al. v. Manglapus et al.*, 177 SCRA (1989), reproduced in 4 *Asian Yearbook of International Law* pages 298-299 (1994), page 225.

refused permission to enter the territory attempts to do so, the person may be detained, investigated, and possibly deported to the country from which they have departed.

3.5.4 The duty not to exile nationals and to accept expelled nationals

The corollary of requiring a State to permit the entry of a national is that it may not expel a national. In Concluding Comments on the Dominican Republic, the HRC has noted that punishment by exile is inconsistent with the terms of the ICCPR.⁴³⁰ Withdrawal of nationality for the purpose of expulsion would be considered arbitrary in light of the UDHR.⁴³¹ The AMR guarantees a right to nationality and prohibits any arbitrary deprivation of that right.⁴³² The EHR provides that arbitrary expulsion would occur if a State refused to confer nationality for the purpose of expulsion from the territory.⁴³³

In ancient Athens, perpetual exile was the only means of avoiding capital punishment.⁴³⁴ In some countries, it may be regarded as an alternative to other forms of punishment, such as lifetime imprisonment. There is a reluctance to sanction exile as a form of punishment.⁴³⁵ In socialist countries, the issue of expelling nationals mainly concerns the expulsion of political dissidents. Expulsion was used by the former Eastern European socialist regimes as a way of removing political opposition, where imprisonment within the State was undesirable.⁴³⁶ Socialist States are also reluctant to allow expelled nationals to return to the territory. For

⁴³⁰ (1993) UN doc. CCPR/C/790/Add. 18, paragraph 6. See Joseph, Sarah and Schultz, Jenny et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* Oxford University Press, New York, 2000, page 259.

⁴³¹ Article 15 of UDHR provides “Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor deprived the right to change his nationality.”

⁴³² Article 20 (3) of the AMR provides “No one shall be arbitrarily deprived of his nationality or of the right to change it.”

⁴³³ Jacobs, F. “European Convention on Human Rights”. Quoted in Henkin, Louis, (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, page 183

⁴³⁴ Vinogradoff, Paul, *Outlines of Historical Jurisprudence, Volume Two, The Jurisprudence of the Greek City*, Oxford University Press, Oxford, the UK 1922, page 179.

⁴³⁵ Henkin, Louis, (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, page 181

⁴³⁶ Foldesi, Tamas, *The Right to Move and Its Achilles’ Hell, The Right to Asylum*, spring 1993 8 Conn. J.. Int’l L. 289, page 6.

example, Chinese authorities granted many political prisoners passports or exit permits to allow them to leave the State in response to sustained diplomatic pressure by the USA in relation to China's most favoured nation status. However, these people were placed on a black list and barred from re-entry.⁴³⁷

It should be emphasised that the right to return is — apart from the exception of punishment provided by law — guaranteed without restriction to all nationals, and to stateless persons and aliens who have established a permanent home in the territory of the State into which they wish to enter. It is permissible for States to require proof of nationality or a “genuine and effective link” with the territory. The reduction of statelessness by international agreement may positively moderate the possibility of being exiled. Article 7 1. (a) of *Convention on the Reduction of Statelessness 1961* prescribes that if the law of a Contracting State entails loss or renunciation of nationality, such renunciation shall not result in loss of nationality unless the person concerned possesses or acquires another nationality. Article 7 1. (a) further regulates that the provisions of subparagraph (a) of this paragraph shall not apply where their application would be inconsistent with the principles stated in articles 13 (the RLR) of the UDHR.

By contrast, a host country may expel aliens from the territory. This right produces a duty of the country of origin to permit the re-entry of those people. An individual, who is the national of one State, but who resides and is ultimately expelled from another State, has the guaranteed right to return to the State of nationality. This is important because if an individual becomes stateless, the State of nationality is obliged to receive him or her.⁴³⁸

An alien may be returned to their country of origin if no other country is prepared to accept them.⁴³⁹ States cannot deprive a person of their citizenship in order to prevent that person from

⁴³⁷ Human Rights Watch/Asia and Human Rights in China, *China: Enforced Exile of Dissidents: Government “Re-entry Blacklist” Revealed*, Vol.7 No.1, January 1995, page 1.

⁴³⁸ Tiburcio, Carmen, *The Human Rights of Aliens under International and Comparative Law*, Kluwer Law International, 2001, page 215.

⁴³⁹ Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl am Rhein, Strasbourg, Arlington, Germany, 1993, page 228.

exercising the right to return. Currently, States do not directly denaturalise citizens (as was the case in the 1920s and 1930s). Indirect methods are adopted to deprive citizens of the right to return, such as rejecting an application to return on the grounds of an infringement of the host countries' laws or a national law. The cause that implicitly supports this decision is that there will be an unacceptable financial burden placed on the State in relation to dealing with the offence, if the person returns.

3.6 Conclusions

The RLR has been affirmed as a fundamental human right in several international instruments and the Constitutions of many States. While retaining its character as a fundamental human right, each State also has the sovereign right to regulate the RLR in accordance with its own laws. The regulation of the RLR however is not only an attribute of sovereignty but an issue with important political, economic and security implications for the State. Limits are thus imposed on the RLR. Given its significance it is understandable and indeed desirable that States regulate or limit the RLR. The regulation or limitation of the RLR must however take account of both the interests of the State and the human rights dimension of the RLR. In other words, only permissible limits are acceptable. The analysis in this chapter will basically correspond to the analysis, from chapters eight to thirteen, dealing with the current issues of the RLR in China.

Chapter Four

The RLR in Selected States and Regions' Practice

Introduction

The purpose of this chapter is to provide examples of the way in which the RLR has been implemented in other States and regions in order to assist the Chinese government to determine its reform strategy. Vietnam, Taiwan and the USA have been selected for analysis. Vietnam has been chosen because it represents one of the countries with communist political systems in the world, and the current political and economic climate of reform is similar to that of China. Taiwan has been chosen because it shares the same traditional culture, language and ethnicity of Mainland China, and because there has been a strong migratory interaction between Taiwan and Mainland China since 1949. The USA has been included to illustrate the operation of the RLR in developed countries, for the purpose of assisting China to move forward in its the RLR reform. The structures of each section are similar to that of Chapter three.

4.1 Vietnam

4.1.1 The context in which the RLR exists

Driving factors of the RLR

Four factors limit the international movement of Vietnamese. For economics, even though Vietnam has had a remarkable development record since 1986, in which the economic reform process (*Doi moi*) officially started with a focus on a gradual shift from traditional central planning to a market-oriented economy,⁴⁴⁰ it remains one of the poorest countries in the world

⁴⁴⁰ The GDP growth rate was over 8 percent per year during the period 1990-1995, and has averaged nearly 7 percent since then. Real per capital GDP has roughly tripled since 1990 and the share of the population living below the international poverty line has fallen from 58 percent in the early 1990s to 28 percent in 2003. See Kokko, Ari and Sjöholm, Fredrik, Stockholm School of Economics, *The Internationalisation of Vietnamese SMEs*, draft version: 3 April 2004.

as one of results of many years of war until 1975.⁴⁴¹ Another basic character of Vietnam is overpopulation. In mid-2002, the population of Vietnam was 80.6 million, one of the largest and densest in Asia. Its population growth rate is 1.3 per 1,000 people.⁴⁴² It has only 0.09 hectares of farmland per head of population, compared with 0.42 in Thailand, and 0.27 in Malaysia.⁴⁴³ Vietnam's underdevelopment and overpopulation have created a marked push for its people to go abroad.

In the case of politics, the Communist Party of Vietnam (CPV) has been a leading force of the State and society. It ended political reform after witnessing the Tiananmen Square event in 1989.⁴⁴⁴ No essential human rights reform has been undertaken since then. The persistence of a Confucian heritage in Vietnam, where people have been governed by ethics rather than by law, and exhorted not to leave home, is quite significant.⁴⁴⁵ Lastly, freedom of movement within the territory, and convertibility of the *Dong* are not guaranteed.⁴⁴⁶

Vietnamese international migration and its official attitude

Vietnamese migration increased with the relaxation of limits on the RLR. The current number of

⁴⁴¹ According to the World Bank, 51% of Vietnamese people earn less than US \$100 per annum, and 25% of Vietnamese people are food-poor. See World Bank, *Vietnam – Poverty Assessment and Strategy*, Report No. 13442-VN, World Bank, Washington, D.C. the USA, 1995.

⁴⁴² Population Division, Department of Economic and Social Affairs, the UN, "Population and Development indicators for Asia and the Pacific, 2002" at *International Migration Report 2002*, the UN, 2002, <http://www.un.org/esa/population/publications/ittmig2002/locations/900.htm> (23/05/2003).

⁴⁴³ The UN, *Poverty Elimination in Vietnam*, the UN, Hanoi, 1995 Quoted in, Nguyen, D.T. and Bandara, J.S., *Emigration Pressure and Structural Change: Vietnam*, A report prepared under UNDP Technical Support Services 1, ILO East Asia Multidisciplinary Advisory Team (ILO/EASMAT) and ILO Regional office for Asia and the Pacific, Unpublished document issued without formal editing by ILO, Bangkok 1996 35 pp, pages 18-19.

⁴⁴⁴ Le, Long, "Vietnamese Communist Party not Interested on "Real Reform", at *The Washington Times*, Sunday, 8th September 2002, <http://www.fva.org/200209/story01.htm> (29/11/2004).

⁴⁴⁵ Thayer, Carlyle A. and Marr David G. (ed), *Vietnam and the Rule of Law*, Department of Political and Social Change, Research School of Pacific Studies, Australian National University, Canberra, 1993, page 83.

⁴⁴⁶ The freedom to movement within territory was subject to certain limits established by law for causes of security and public order. Such limits are applied against, "persons considered as a peril to public order and security". See Andreassen, Bard-anders and Swinchart, Theresa, *Human Rights in Developing Countries Yearbook 1992*, Nordic Human Rights Publications and the Norwegian Institute of Human Rights, Oslo, Norway, 1993, page 356.

Vietnamese emigrants is 250,000,⁴⁴⁷ which represents 0.02815% of the population. This is well below the average migration stock (percentage population) of the least developed countries, which is 1.57%; or of the global average, which is 2.9%.⁴⁴⁸ The above figures demonstrate that on the one hand Vietnam's emigration rate has considerable potential to increase in future, and on the other hand, there are some issues impeding the protection of the RLR in Vietnam, which will be discussed in next six sub-sections. Fortunately, the Vietnamese government has realised a need to bridge or narrow the current gap between Vietnam and the rest of the world. According to the UN, Vietnam accepted that its emigration level is 'too low' and would like to raise it.⁴⁴⁹

The legislation governing the RLR, and its evaluation

Vietnam has incorporated the RLR into its Constitution and has improved the laws governing exit and entry. The *Vietnamese Constitution 1992* and *Independent Declaration* affirm that human rights are respected.⁴⁵⁰ Article 68 and 82 of the Constitution affirms that citizens shall enjoy the freedom to "freely travel abroad and return home from abroad in accordance with the provisions of the law"; and to afford asylum to refugees.⁴⁵¹ In 2000, Laws with respect to the

⁴⁴⁷ Among 250,000, 50,000 contract workers, 50,000 permanent emigrants and 150,000 informal and illegal emigrants. It will soon reach 300,000. See Nguyen, D.T. and Bandara, J.S., *Emigration Pressure and Structural Change: Vietnam*, A report prepared under UNDP Technical Support Services 1, ILO East Asia Multidisciplinary Advisory Team (ILO/EASMAT) and ILO Regional office for Asia and the Pacific, Unpublished document issued without formal editing by ILO, Bangkok, 1996, 35 pages, pages 3-4.

⁴⁴⁸ The migration stock was calculated from the data of the Population Division Department of Economic and Social Affairs, *International Migration Report 2002*, the UN Secretariat, 2002, ST/ESA/SER.A/220, the UN, New York, 2002, 62 pages, attached table.

⁴⁴⁹ Population Division Department of Economic and Social Affairs, *International Migration Report 2002*, the UN Secretariat, 2002, ST/ESA/SER.A/220, the UN, New York, 2002, 62 pages, attached table.

⁴⁵⁰ In *Vietnam Independence Declaration*, former President Ho Chi Minh repeated the civil rights in declaration of the bourgeois (capitalist) revolutions of France and the United States, which read: "Men are created equal. The creator gives them the inalienable rights of right to life, to liberty and to pursuit of happiness. By the liberation of the country, the Vietnamese people turned from slaves into free men." Also see Article 50 of the *Constitution of Vietnam 1992*, "In the Socialist Republic of Vietnam, human rights in all aspects, political, civil, economic, cultural and social, are respected. They are embodied in the rights of the citizens and provided by the Constitution and the Law."

⁴⁵¹ Under Article 82 of the *Vietnamese Constitution 1992*, Vietnam shall consider granting asylum to foreigners struggling for freedom, national independence, socialism, democracy and peace, or if they are persecuted because of their scientific work.

entry and exit of Vietnamese citizens, previously contained in separate instruments, were unified by the *Decision No. 210/QĐ-TTg of 27 October 1999 on the Policy Towards Vietnamese Living Abroad, the Decree on Exit and Entry of Vietnamese Citizens*.⁴⁵² The main relevant regulations were strengthened by the *Decree on Exit and Entry of Vietnamese Citizens 2000* and the *Ordinance on Entry, Exit, Residence and Travel of Foreigners in Vietnam 1993*.

The significance of the incorporation of the RLR into the Constitution and the improvement of legislation is of marginal significance. The constitutional provision for the RLR has more meaning from the perspective of ideal desire, than from the perspective of criteria that needed in judging detailed cases. Additionally, the freedom of movement confirmed in the *Civil Code of Vietnam 1995* is limited to movement within the territory.⁴⁵³ The unification of regulations do not give effect to the RLR, but merely create favourable conditions for the residence and travel of Vietnamese citizens, and relate to national security, social order and safety.⁴⁵⁴ The creation of favourable conditions for residence and travel of citizens forms only part of the RLR. Moreover,

⁴⁵² Prior regulations include that (1) the *Provisions on Exit and Entry of Vietnamese Citizens 1997*;
(2) the *Regulations on exit and entry of Vietnamese citizens and provisions on the exit, entry, residence and travel of overseas Vietnamese bearing Vietnamese passports in the Government's the Decree No.76/CP of November 6, 1995 amending and supplementing a number of Articles of the Decree No.24/CP of March 24, 1995 on the exit and entry procedures*;
(3) the *Regulations on exit and entry of Vietnamese citizens and provisions on the exit, entry, residence and travel of overseas Vietnamese bearing Vietnamese passports in the Government's the Decree No.24/CP of March 24, 1995 on the exit and entry procedures*;
(4) the *Government's the Decree No.48/CP of July 8, 1993 on passports and visas*;
(5) the *regulations on management of exit and entry of Vietnamese citizens and overseas Vietnamese bearing Vietnamese passports who are on exit, entry, residence and travel as prescribed in the Regulation on management of Vietnamese delegations going abroad and foreign delegations visiting Vietnam, issued together with the Government's the Decree No.12/CP of December 1st, 1992*.

⁴⁵³ The *Civil Code of Vietnam 1995* creates legal basis for furthering the liberalisation of all productive activities, strengthening democracy, and ensuring social equality and the civil rights of human beings. Article 44 right to free movement and residence provides that "An individual has the right to freedom of movement and residence in accordance with the provisions of law. The movement and selection of place of residence of an individual are decided by the individual in conformity with his/her own needs, capacity and situation. The right of an individual to freedom of movement and place of residence shall only be restricted by a decision of the competent State authorities and in accordance with the orders and procedures provided for by law."

⁴⁵⁴ Article I 3 of *Joint Circular Guiding the Granting of General Passports and Laissez-Passers to Vietnamese Nationals Overseas According to the Government's the Decree No. 05/2000ND-CP of March 3, 2000 on Exit and Entry of Vietnamese Citizens 2002*, No.03/2002/TTLT/BCA-BNG.

the absence of detailed complaint provisions hampers the ability for an individual to seek remedy for a violation of the RLR. Even though Article 22 (2) of the *Decree on Exit and Entry of Vietnamese Citizens* 2000 provides, “Vietnamese citizens may lodge complaints [...] when their passport applications are rejected [...] or they are not yet permitted to leave the country.” Yet the detailed procedural provisions are lacking.

Therefore, the RLR in Vietnam is not strong enough to remove limits imposed, despite the significant advances the country has made towards establishing a more sophisticated legal framework since 1987.⁴⁵⁵ From the international perspective, Vietnam has acceded to the ICCPR (1982), the CERD (1982), and the CRC (1990).⁴⁵⁶ Vietnam is obligated to harmonise national law with its international obligations. The government seems determined to introduce reform at its own pace — “in the light of the historical, social and cultural conditions of the country”.⁴⁵⁷ The special conditions are easily cited to delay the process of harmonisation. Consequently, in the words of the HRC, there are limits upon the RLR, which are incompatible with the requirements of international human rights treaties to which Vietnam is a party.⁴⁵⁸

4.1.2 The right to be granted passport

Vietnamese nationals are entitled to a passport under Articles 2 and 3 of the *Decree on Exit and Entry of Vietnamese Citizens* 2000 and do not require a visa for exit or entry into the territory. The passport is the only valid foreign travel document in Vietnam. A passport is valid for five years, can be renewed once for a maximum of three years, which is much shorter than the usual period of validity for passports elsewhere in the world of ten years.⁴⁵⁹

In 2003, the US State Department reported that although the Vietnamese government no longer

⁴⁵⁵ “Legal Environment”, <http://members.iinet.net.au/~vembassy> (17/11/2003)

⁴⁵⁶ International Service for Human Rights, “The Ratification Status of the Main Human Rights Treaties”, (02-2002) <http://www.ishr.ch/About%20UN/Ratification/Ratification%20-%20Human%20Rights%20treaties.htm> (18-05-2003).

⁴⁵⁷ “Criminal law revised for better child protection”, *Vietnam News. The English Daily*, 22 December 1996, page 5.

⁴⁵⁸ Andreassen, Bard-anders and Swinchart, Theresa, *Human Rights in Developing Countries Yearbook 1992*, Nordic Human Rights Publications and the Norwegian Institute of Human Rights, Oslo, Norway, 1993, page 349.

⁴⁵⁹ Article 5 (3) of the *Decree on Exit and Entry of Vietnamese Citizens* 2000.

requires citizens travelling abroad to obtain exit or re-entry visas, nationals may be prevented from leaving by being denied a passport. Nationals with a passport marked “*Dinh cu*” or “resettlement” apparently needed a permit to re-enter. Additionally, “persons who publicly or privately expressed critical opinions on religious or political issues” were sometimes prohibited from travelling abroad.⁴⁶⁰

Under Article 9 (1) (a) of the *Decree on Exit and Entry of Vietnamese Citizens 2000*, general passport shall be granted to State officials, public servants, employees of State enterprises, military and police personnel, and people dispatched by State agencies to work in social, private economic, or foreign organisations. They must supply a photograph sealed and certified by head of the agency or unit directly managing him/her, and documents issued by the person competent to send or permit people to go abroad. The documents requirement may mean that an individual dismisses the idea of applying for a passport if they believe that the suitable person will not support their application, or that they stand to lose their job or opportunities for promotion. Moreover, these additional requirements discriminate between public officials and the general public.⁴⁶¹

⁴⁶⁰ Bureau of Democracy, Human Rights and Labour, U.S. Department of State, *Vietnam Country Reports on Human Rights Practices: 2002*, Washington D.C., 2003, 26 pages, page 16.

⁴⁶¹ Under Article 15 of the *Decree on Exit and Entry of Vietnamese Citizens 2000*, “The competence to send or permit officials, public employees and staff members of the State agencies, organizations or enterprises to go abroad is stipulated as follows:

- (1). The Prime Minister shall decide the exit of the ministers, the heads of the ministerial-level agencies, the heads of the agencies attached to the Government, the presidents of the People’s Committees of the provinces and centrally-run cities (hereinafter referred to as the ministerial or provincial heads); the chairmen of the managing boards and the general directors of the corporations directly under the Prime Minister.
- (2). The ministerial or provincial heads shall decide the sending or permitting of officials, public employees and staff members of the State agencies, organizations or enterprises (including people working under Labour contracts with a term of 1 year or more) under their direct management competence, to go abroad for public missions or private business.
- (3). The ministerial or provincial heads may authorise the heads of the General Departments, Departments or Institutes under their respective ministries; or the heads of the provincial services, boards or branches in their respective provinces to decide the sending or permitting of officials, public employees and staff members under their management (including people working under Labour contracts with a term of 1 year or more) to go abroad. The ministerial or provincial heads shall have to notify in writing the said authorisation, and at the same time introduce the authorisation scope, seals and signatures of the authorised to the Ministry of Public Security and the Ministry for Foreign Affairs.

Limiting the right of public officials to be granted a passport is consistent with the communist political system, but it is scarcely convincing that the same limits are imposed on citizens employed by foreign-owned enterprises. Nevertheless, Article 9 (1) (b) of the *Decree on Exit and Entry of Vietnamese Citizens 2000* establishes similar limits for this group as appear under Article 9(1)(a).⁴⁶² A possible justification for the limits imposed by Article 9(1)(b) is to prevent a loss of skilled labour through emigration. Most employees working in foreign enterprises are highly educated. The head of the enterprise may decide not to consent to the issuance of a passport, in order to retain valuable staff. From the legal perspective, it is unacceptable that private organisations can exercise public power in order to advance their own interests when they are inconsistent with those of their employees

The absence of regulations governing the criteria against which a passport can be refused, or governing time limits on the processing of applications, means that a decision may be based on irrelevant considerations, or made in pursuit of an improper purpose. Citizens' access to passports is also sometimes constrained by factors outside the law, such as by bribery and corruption.⁴⁶³

4.1.3 The right to leave

The right of Vietnamese citizens to leave

A Vietnamese citizen can be prevented from leaving if they fall into one of the following cases

(4). The sending of officials, public employees and staff members under the management of such bodies as the Party, the National Assembly, the State President, the Supreme People's Court, the Supreme People's Procuracy, socio-political organizations and other organizations, to go abroad for public missions or the permission of such people to go abroad for private business shall comply with the regulations of the Political Bureau and the regulation on management of officials, public employees and staff members of such agencies and organisations.”

⁴⁶² Article 9 (1)(b) of the *Decree on Exit and Entry of Vietnamese Citizens 2000* provide: “For employees working in enterprises with 100% foreign-owned capital or joint-venture enterprises, the passport application dossier shall comprise: declaration for passport granting, stuck with the applicant's photograph sealed and certified by the chief police of the ward or commune where the applicant registers his/her permanent residence or long-term temporary residence; the document on sending him/her abroad for a public mission or permitting him/her to go abroad for private business, issued by the head of the enterprise.”

⁴⁶³ Bureau of Democracy, Human Rights and Labour, the USA Department of State, *Vietnam Country Reports on Human Rights Practices: 2002*, Washington D.C., 2003 26 pages, page 16.

in accordance with Article 14(1) of the *Decree on Exit and Entry of Vietnamese Citizens* 2000, which provides that:

- a. Persons who are examined for penal liability, obliged to serve penal sentences or are neither permitted to leave the country nor granted passports at the request of the investigation agency in service of the criminal investigation.
- b. Persons who are obliged to serve their sentences; awaiting the settlement of civil, economic or administrative disputes; awaiting to serve the administrative-sanction decisions; obliged to pay taxes or perform other financial obligations as prescribed by Vietnamese law, except for cases where they make monetary or property deposits or property guarantees or take other security measures for the performance of such obligations.
- c. Persons who have violated the regulation on exit and entry and been imposed with administrative warning or more severe sanctions, shall not be permitted to leave the country for 1 to 5 years after their violations are handled.
- d. Persons who have been expelled by foreign countries for their violations of the laws of such host countries, if their acts are serious and detrimental to the interests and prestige of Vietnam, they shall not be permitted to leave the country for 1 to 5 years after their return to Vietnam.
- e. Persons who are not permitted to leave the country at the Ministry of Health's requests for medical causes.
- f. Other cases for causes of safeguarding the national security⁴⁶⁴ and social order and safety.

In practice, some religious leaders and former political prisoners have been denied the right to leave, such as Nguyen Dan Que, a prominent dissident, Thich Tue Sy, a member of the banned Unified Buddhist Church of Vietnam, and Thich Thai Hoa, a leader of the Buddhist order in Hue.⁴⁶⁵ In fact, an absence of access to public records makes it difficult to know just how many people have not been granted permission to leave Vietnam. It does seem clear however that the cases are not isolated. A person who breaches an overseas recruitment contract shall not be recruited overseas again,⁴⁶⁶ and administrative officials within the central government are not

⁴⁶⁴ The lack of definitions of national security may result in arbitrariness. See Stokke, Hugo, Suhrke, Astri and Todtersen, Arne (ed), *Human Rights in Developing Countries Yearbook 1997*, Kluwer Law International Nordic Human Rights Publications, the Hague, the Netherlands, 1998, page 342.

⁴⁶⁵ Human Rights Watch, "Human Rights Watch Report 2001: Vietnam: Human Rights Development", www.hrw.org/wr2k1/asia/vietnam.html (4/12/2003), page 2.

⁴⁶⁶ Article 9 (2) (c) "Vietnam Provisionally Stipulating a Number of Measures to Prevent and Handle Violations in the Field of Sending Labourers and Experts to Work Abroad, 1999", <http://asemconnectvietnam.gov.vn/laws/la.asp?idlaw=213> (17/11/2003).

eligible to work abroad.⁴⁶⁷ It is impermissible to exercise administrative power to prevent a person from leaving on the grounds of a contractual breach, because contractual remedies exist to compensate the affected party. The right to leave should only be restricted if the contractual breach threatens national security, social order or public safety.

Additionally, Vietnamese citizens are required to pay a deposit prior to leaving the territory. Labourers, skilled nationals or students who are travelling to the Republic of Korea, Japan or Taiwan are required to pay the equivalent of a one-way airfare and one month's wages. People who are sent to work in any country, other than the Republic of Korea, Japan or Taiwan, are required to pay the equivalent of a one-way airfare.⁴⁶⁸ The deposit is forfeited if the person does not return to Vietnam.⁴⁶⁹ The deposit requirement interferes with the RLR, particularly as many people need to borrow the money to make the payment.

The right of foreigners to leave

Foreigners are not restricted from leaving Vietnam. Exit visas, entry-exit visas and exit-entry visas were abolished in 2000 under the *Ordinance on Entry, Exit, Residence and Travel of Foreigners in Vietnam*. The departure of a foreigner may only be delayed if they are currently:

1. the subject of a criminal investigation for criminal responsibility, or is the defendant in a civil, economic or labour dispute;
2. obliged to serve a criminal sentence;
3. obliged to perform a civil, economic or labour order;
4. obliged to perform a decision or pay a fine for an administrative breach, or a tax or other financial obligation.⁴⁷⁰

⁴⁶⁷ Article 2 Clause (a) of the *Circular Providing Guidance on the Implementation of the Decree No.07/CP dated 20 January 1995 of the Government, on Sending Vietnamese Labourers Abroad to Work for a Limited Period of Time 1995, The Ministry of Labour, War Invalids and Social Affairs No. 20/LD TBXH-TT.*

⁴⁶⁸ Article 4 of *Joint Circular Guiding the Amendments and Supplements to Joint Circular No. 16/2000/tlt-btc-bldtbxh of February 28, 2000 on Financial Regime for Vietnamese Labourers and Specialists Sent Abroad to Work for Definite Periods of Time 2001, The Ministry of Finance and the Ministry of Labour, War Invalids and Social Affairs No.33/2001/TTLT-BTC-BLDTBXH.*

⁴⁶⁹ Article IV Clause 2 (a) of the *Circular Providing Guidance on the Implementation of the Decree No.07/CP dated 20 January 1995 of the Government, on Sending Vietnamese Labourers Abroad to Work for a Limited Period of Time 1995, The Ministry of Labour, War Invalids and Social Affairs No. 20/LD TBXH-TT.*

⁴⁷⁰ Article 9 the *Ordinance on Entry, Exit, Residence and Travel of Foreigners in Vietnam 2000.*

However, political causes can hamper the right of foreigners to leave. The 1992 and 2000 *Ordinances on Entry, Exit, Residence and Travel of Foreigners in Vietnam* aim to create favourable conditions for the exit of foreigners within the legal framework.⁴⁷¹ The 2000 Ordinance emphasises that it is to:

Contribute towards the implementation of State policies on the development of friendly relations and cooperation with foreign countries, and to protect the interests and sovereignty of the nation.⁴⁷²

“Friendly relations and cooperation with foreign countries” is not a legal notion but a political one. The meaning is ambiguous and elastic and may vary over time. This raises doubt as to the extent to which the right of foreigners to leave is protected by law. The 2000 Ordinance requires foreigners exiting Vietnam to respect traditions, customs and habits of the Vietnamese people.⁴⁷³ This presupposes that foreigners understand Vietnamese traditions, which is not necessarily the case. Thus, this provision is impractical and likely to be difficult to implement.

Government departments, private organisations and individuals may apply to the immigration authority to delay the exit of a foreigner on the grounds of criminal, civil or administrative liability.⁴⁷⁴ To ensure that these measures are not applied abusively or in relation to small economic claims, exit may be permitted if the foreigner provides a guarantee of money or property, or there is some other measure to ensure fulfilment of the obligation under Vietnamese law.⁴⁷⁵ Alternatively, an applicant who requests that the foreigner’s right to leave is interfered with, must compensate the foreigner if the claim is unfounded or if it causes them material loss.⁴⁷⁶ The Immigration Department may suspend the visa or direct security officials stationed at ports to prevent the foreigner’s exit. There are no regulations governing either the suspension or the direction.

⁴⁷¹ Article 2 (1) of the *Ordinance on Entry, Exit, Residence and Travel of Foreigners in Vietnam* 1992, the Decree No.04-CP date 18 January 1993; and Article 1 (1) of the *Ordinance on Entry, Exit, Residence and Travel of Foreigners in Vietnam* 2000.

⁴⁷² Preamble of the *Ordinances on Entry, Exit, Residence and Travel of Foreigners in Vietnam* 2000.

⁴⁷³ Article 1 (2) of the *Ordinance on Entry, Exit, Residence and Travel of Foreigners in Vietnam* 2000.

⁴⁷⁴ Pursuant to Chapter 1 of the *Circular on Entry, Exit, Residence and Travel of Foreigners in Vietnam* 1993.

⁴⁷⁵ Article 9 (2) of the *Ordinance on Entry, Exit, Residence and Travel of Foreigners in Vietnam* 2000.

⁴⁷⁶ Article 9 (5) of the *Ordinance on Entry, Exit, Residence and Travel of Foreigners in Vietnam* 2000.

According to the US State Department, the Vietnamese government seized the passports of foreigners to prevent their departure in cases of commercial dispute, and hotels commonly retain the passports of their guests until checkout.⁴⁷⁷ In fact, the seizure or retention of a foreigner's passport is not a solution to prevent the exit of foreigners, because their government may issue a new passport to them. On the contrary, the practice is likely only to exacerbate inconvenience to foreigners.

A distinction is drawn between foreigners with and without Vietnamese permanent residency. The former must apply to the Immigration office of Provincial Public Security Department to leave.⁴⁷⁸ The office determines whether the foreigner's departure should be delayed⁴⁷⁹ and withdraws the applicants Certificate of Permanent Residence. It is inconsistent with the norms that permanent residency allows travel between the States of residence and nationality.

The limits on the right to access foreign exchange

Under Article 14 of the *Decree on Foreign Exchange Management 1998*, Vietnamese citizens who have a demand for foreign currencies to transfer abroad for allowance and/or inheritance to their families and/or relatives or to pay the costs of tourism, study, work, visits, medical treatment, membership fees and other fees to foreign countries, shall be allowed to buy, transfer or bring foreign currencies abroad. In practices, strict limits are imposed on the right to access foreign exchange, especially that of citizens.

The scope of the right to access foreign exchange is too narrow to fully enjoy the right. The purposes of remitting and/or carrying abroad foreign currency are limited to travel, study, overseas employment, visitation of relatives, medical treatment, payment of membership fees or

⁴⁷⁷ Bureau of Consular Affairs, US Department of State, "Consular Information Sheet: Vietnam", <http://travel.State.gov/vietnam.html> (17/11/2003), at 9.

⁴⁷⁸ Chapter 1(2)[1] the *Circular on Entry, Exit, Residence and Travel of Foreigners in Vietnam 1993*.

⁴⁷⁹ Chapter I 2 Par. 3 of the *Circular on Entry, Exit, Residence and Travel Providing Guidelines on the Implementation of the Decree No. 04/CP of the Government dated 18 January 1993 Stipulating in Detail the Implementation of the Ordinance on Entry, Exit, Residence and Travel of Foreigners in Vietnam 1992*.

allowances, or to permit family members to inherit funds.⁴⁸⁰ Recipients of remitted funds are limited to parents, children, spouses and siblings.⁴⁸¹ Furthermore, individuals are not permitted to obtain foreign currency for the purpose of individual overseas investment.⁴⁸²

The level of access to foreign exchange is not enough and is ambiguous. For the purpose of allowances for family and relatives living abroad, no more than US \$5,000 can be remitted per year. In the case of inheritances, the maximum is US \$10,000.⁴⁸³ Additionally, Vietnamese nationals must be licensed to carry foreign currency out of Vietnam in accordance with a formula.⁴⁸⁴ The approval process is generally very slow, and even often terminated because the applicants must spend a great deal of time gaining required documents, while their demand for foreign currency, especially in relation to the payment of an allowance, may be pressing.

4.1.4 The right to return

The right to return is limited by four principal measures. First of all, the passport of a Vietnamese national who is overseas can be revoked, suspended, not extended, or not renewed, on the grounds of national security, social order and safety; or if the person permits another person to buy, borrow or use their passport, or the passport is intentionally damaged.⁴⁸⁵ Next, nationals who are residing in a foreign country as refugees may be refused the right to return. While accurate data is difficult to obtain, some estimates suggest that the total number of

⁴⁸⁰ Part III Chapter IV Item 1 Article 1 of the *Circular Providing Guidelines on the Implementation of Governmental the Decree No.63/ND-CP Dated August 17, 1998, on Foreign Exchange Management* 1999.

⁴⁸¹ Part III Chapter IV Item 1 Article 1 (a) (5) of the *Circular Providing Guidelines on the Implementation of Governmental the Decree No.63/ND-CP Dated August 17, 1998, on Foreign Exchange Management* 1999.

⁴⁸² *Circular No.05/2001/TT/BKH*, the Ministry of Planning and Investment, quoted in Vietnam Business Forum, *Sub-Working Group on Administrative Reform Review of Licenses/Permits and Related Issues*, 2002.

⁴⁸³ Part III Chapter IV Item 1 Article 1 (b) (3) and (4) of the *Circular Providing Guidelines on the Implementation of Governmental the Decree No.63/ND-CP Dated August 17, 1998, on Foreign Exchange Management* 1999.

⁴⁸⁴ Part III Chapter IV Item 1 (1) (c) Par 1 of the *Circular Providing Guidelines on the Implementation of Governmental the Decree No.63/ND-CP Dated August 17, 1998*.

⁴⁸⁵ Article III of *Joint Circular Guiding the Granting of General Passports and Laissez-Passers to Vietnamese Nationals Overseas According to the Government's the Decree No. 05/2000ND-CP of March 3, 2000 on Exit and Entry of Vietnamese Citizens* 2002, No.03/2002/TTLT/BCA-BNG.

Vietnamese refugees and asylum seekers in foreign countries could be as high as 1 million.⁴⁸⁶ Some of them are not allowed to return.⁴⁸⁷

Thirdly, Vietnamese nationals who have emigrated are generally permitted to return only temporarily. In theory, this group are regarded as nationals for the purpose of being subject to the obligations of citizens, even if they have become dual nationals, unless their former renunciation of Vietnamese citizenship was approved by the President of Vietnam. In practice, expatriates are usually treated as aliens and as having the nationality of their adopted country.⁴⁸⁸ If overseas-based Vietnamese nationals intend to invest or become employed in Vietnam, or are sponsored by relatives, they may be considered for resettlement. According to inter-Ministerial Circular No. 06/TT/LT *Guidelines on Decision No. 875/TT 1997*, these applicants must satisfy certain preconditions, including being able to demonstrate economic self-reliance, as well as submitting to a formal application process. These conditions interfere with the right of Vietnamese nationals to return.

Lastly, and notably, expatriates may be forced to return if they breach an overseas employment contract, or abscond upon its completion. If this is the case, the individual is made to bear the cost of their return, forfeit their pre-departure deposit, and forego the opportunity to work overseas in the future.⁴⁸⁹

⁴⁸⁶ Nguyen, D.T. and Bandara, J.S., *Emigration Pressure and Structural Change: Vietnam*, A report prepared under UNDP Technical Support Services 1, ILO East Asia Multidisciplinary Advisory Team (ILO/EASMAT) and ILO Regional office for Asia and the Pacific, Unpublished document issued without formal editing by ILO, Bangkok 1996, 35 pages, page 13.

⁴⁸⁷ Nguyen Van Thuan, a well-known Catholic priest in exile in the Vatican, was not allowed to return to Vietnam, despite the Vatican's request. See Andreassen, Bard-anders and Swinchart, Theresa, *Human Rights in Developing Countries Yearbook 1992*, Nordic Human Rights Publications and the Norwegian Institute of Human Rights, Oslo, Norway, 1993, page 358.

⁴⁸⁸ Bureau of Democracy, Human Rights and Labour, US State Department, *Vietnam Country Reports on Human Rights Practices: 2002*, Washington D.C., 2003, 26 pages, page 16.

⁴⁸⁹ Article 9 (2) (a) and 9 (2) (d) of *Vietnam Provisionally Stipulating a Number of Measures to Prevent and Handle Violations in the Field of Sending Labourers and Experts to Work Abroad, 1999*, <http://asemconnectvietnam.gov.vn/laws/la.asp?idlaw=213> (17/11/2003).

4.1.5 Administration of overseas recruitment services

Given the fact that 20% of Vietnamese emigrants are contract workers, it is necessary to analyse the management of overseas recruitment services. Their management is characterised by the regime of an operation permit and license to execute contracts and control by State monopoly. Permitted and licensed enterprises need to coordinate with labour-receiving organisations in managing and training labourers, and handling problems that arise overseas during the term of the contract⁴⁹⁰ mainly through the appointment of the government's own overseas officials.⁴⁹¹

Without the permission to operate, and a license to execute contracts granted by the Ministry of Labour, War Invalids and Social Affairs (MLWS), enterprises may not offer overseas recruitment services. The conditions and procedures for issuing operation permits and licenses to execute contracts are rigorous⁴⁹² and complicated.⁴⁹³ The State monopoly over recruitment has been a key feature since workers were first sent overseas in 1980. By contrast, government recruitment represents no more than 2% of the total in the Philippines, Bangladesh, India, or

⁴⁹⁰ Article 4 (1) of *Vietnam Provisionally Stipulating a Number of Measures to Prevent and Handle Violations in the Field of Sending Labourers and Experts to Work Abroad, 1999*, <http://asemconnectvietnam.gov.vn/laws/la.asp?idlaw=213> (17/11/2003).

⁴⁹¹ Article 4 (2) of *Vietnam Provisionally Stipulating a Number of Measures to Prevent and Handle Violations in the Field of Sending Labourers and Experts to Work Abroad, 1999*, <http://asemconnectvietnam.gov.vn/laws/la.asp?idlaw=213> (17/11/2003)

⁴⁹² Any economic organizations wanting to obtain an operation permit must (i) be a State owned enterprise and have the function to send workers abroad; (ii) have a capital base of at least 1 billion VN dong (approximately US\$71,000); (iii) ensure that at least two-thirds of its managers and 50% of its professional cadres are college graduates, and ensure that it has enough cadres with proficient English; and (iv) be knowledgeable about the labour market, labour law, immigration law and international law. See Article III Clause 1 (b) of *Circular Providing Guidance on the Implementation of the Decree No.07/CP* (20 January 1995) of *Sending Vietnamese Labourers Abroad to Work for a Limited Period of Time 1995*.

⁴⁹³ The operation permits are valid for three years. The license to execute contracts can only be granted to an economic organization having an operation permit. The scope of the license is determined by the nature of the proposed contracts, but cannot exceed 6 months from the date of issue. In order to obtain a license, the applicant must have a contract from a foreign employer to send a Vietnamese worker abroad; or a contract of an individual worker who wants to execute it through an economic organization. See Article III Clause 2 (b) of *Circular Providing Guidance on the Implementation of the Decree No.07/CP* (20 January 1995) of *The Vietnamese governments, on Sending Vietnamese Labourers Abroad to Work for a Limited Period of Time 1995*.

Thailand.⁴⁹⁴ State organisation can cause inefficiency in delivery of overseas recruitment services. Kuala Lumpur observed that, “The heavy administrative characteristics of Vietnam’s labour co-operation system with other countries [are] a grave shortcoming.”⁴⁹⁵

Acknowledging the shortcoming of State-owned overseas recruiting agencies, the Vietnamese government requires recruitment enterprises to publicise (i) the number of workers needed; (ii) the criteria for employment; (iii) a job description; (iv) the location of the employment and its working and living conditions; (v) details of wages;⁴⁹⁶ (vi) medical and social insurance; (vii) and the terms of the contract.⁴⁹⁷ In addition, the terms of contracts are regulated by the relevant ministries⁴⁹⁸ and the contract must be explained to the worker and strictly complied with.⁴⁹⁹ Nevertheless, as Clare Waddington points out, these measures do not address the issue of competition in the recruitment services sector.⁵⁰⁰ Therefore, it would be interesting to re-examine the role played by State agencies in the recruitment process and consider whether foreign recruitment operations should be transferred to the private sector, as in other

⁴⁹⁴ Nguyen, D.T. and Bandara, J.S., *Emigration Pressure and Structural Change: Vietnam*, A report prepared under UNDP Technical Support Services 1, ILO East Asia Multidisciplinary Advisory Team (ILO/EASMAT) and ILO Regional office for Asia and the Pacific, Unpublished document issued without formal editing by ILO, Bangkok 1996, 35 pages, pages 11-12.

⁴⁹⁵ Lumpur, Kuala, *Reality of Labour Migration of Vietnam and Her Policies*, Paper presented at a Meeting on the Implications of Changing Patterns of Asian Labour Migration, 1991.

⁴⁹⁶ Article 3 of *Vietnam Provisionally Stipulating a Number of Measures to Prevent and Handle Violations in the Field of Sending Labourers and Experts to Work Abroad, 1999*,
<http://asemconnectvietnam.gov.vn/laws/la.asp?idlaw=213> (17/11/2003).

⁴⁹⁷ Article 1 (1) of *Vietnam Provisionally Stipulating a Number of Measures to Prevent and Handle Violations in the Field of Sending Labourers and Experts to Work Abroad, 1999*,
<http://asemconnectvietnam.gov.vn/laws/la.asp?idlaw=213> (17/11/2003).

⁴⁹⁸ Article 2 of *Vietnam Provisionally Stipulating a Number of Measures to Prevent and Handle Violations in the Field of Sending Labourers and Experts to Work Abroad, 1999*,
<http://asemconnectvietnam.gov.vn/laws/la.asp?idlaw=213> (17/11/2003).

⁴⁹⁹ Article 5 of *Vietnam Provisionally Stipulating a Number of Measures to Prevent and Handle Violations in the Field of Sending Labourers and Experts to Work Abroad, 1999*,
<http://asemconnectvietnam.gov.vn/laws/la.asp?idlaw=213> (17/11/2003).

⁵⁰⁰ Waddington, Clare, *International Migration Policies in Asia: A Synthesis of ILO and other Literature on Policies Seeking to Manage the Recruitment and Protection of Migrants, and Facilitate Remittances and Their Investment*, Paper presented at Regional Conference on Migration, Development and Pro-Poor Policy Choices in Asia 2003, 21 pages, www.livelihoods.org, (05/12/2003), at i.

labour-exporting countries. Alternatively, it may be commercially viable and economically efficient to privatise State owned recruitment businesses.⁵⁰¹

4.1.6 The exit and entry administrative system

In contrast to Western States in which a sole authority is usually responsible for exit and entry administration, in Vietnam various ministries are together responsible. The Ministry of Public Security is the prime authority responsible for exercising exit and entry control over citizens⁵⁰² and foreigners.⁵⁰³ Its jurisdiction covers the processing of general passport applications, including the power to extend or revoke a passport, border protection and punishment of breaches.⁵⁰⁴

The Ministry of Public Security coordinates with the Ministry of Foreign Affairs and the Ministry of Defence (with respect to border protection) to control exit and entry of Vietnamese citizens. Diplomatic missions and consular offices are responsible for the administration of passports for overseas Vietnamese citizens pursuant to Article IV 4 of *Joint Circular Guiding the Granting of General Passports and Laissez-Passers to Overseas Vietnamese*. This function is conducted with the advice of the Ministry of Public Security via the Ministry of Foreign Affairs.⁵⁰⁵

The Department for Management of Labour Cooperation with Foreign Countries under the MLWS is responsible for implementing overseas employment agreements and issuing licenses

⁵⁰¹ Nguyen, D.T. and Bandara, J.S., *Emigration Pressure and Structural Change: Vietnam*, A report prepared under UNDP Technical Support Services 1, ILO East Asia Multidisciplinary Advisory Team (ILO/EASMAT) and ILO Regional office for Asia and the Pacific, Unpublished document issued without formal editing by ILO, Bangkok 1996, 35 pages, page 25.

⁵⁰² Article 17 of the *Decree on Exit and Entry of Vietnamese Citizens 2000*.

⁵⁰³ Article 19(1) of *Circular on Entry, Exit, Residence and Travel of Foreigners in Vietnam 2000* and The deportation of foreigners is administered by the Ministry of the Interior, under Chapter IV of *the Circular on Entry, Exit, Residence and Travel of Foreigners in Vietnam 1993*.

⁵⁰⁴ Article 17(1) [5] – [6] of the *Decree on Exit and Entry of Vietnamese Citizens 2000*.

⁵⁰⁵ Article 17 (1) [4] of the *Decree on Exit and Entry of Vietnamese Citizens 2000*.

to organizations which operate as recruitment agencies,⁵⁰⁶ and for addressing violations of relevant regulations.⁵⁰⁷ The Ministry of Justice is responsible for verifying the accuracy of information contained in applications for non-Vietnamese Nationality Certificates of foreigners, and requesting the President of the relevant provincial or municipal People's Committee to consider the application.⁵⁰⁸ By contrast, Australian immigration authorities have the power to process and grant non-nationality certificates with consultation of the foreign affairs department.

4.2 Taiwan (Republic of China)⁵⁰⁹

4.2.1 Historical development of regulatory framework governing the RLR in Taiwan

Taiwan (the Republic of China (ROC)) has officially been a local administrative area of China since 1683, apart from a brief period of Japanese occupation between 1885 and 1945. Taiwan has inherited most of China's socio-economic and cultural values. During the Cold War, exit and entry of Taiwanese nationals was strictly controlled, but since the end of that time, Taiwan's the RLR policy has been relaxed in comparison to that of China.

Even though the freedom of movement is provided in Article 10 of the *Constitution of Republic of China* 1946,⁵¹⁰ exit and entry were restricted in Taiwan until 1987. Based on an emergency regime,⁵¹¹ the *Regulations of the Taiwan Province on the Registration of the Exit of the*

⁵⁰⁶ Article 8 (2) *Vietnam Provisionally Stipulating a Number of Measures to Prevent and Handle Violations in the Field of Sending Labourers and Experts to Work Abroad*, 1999, <http://asemconnectvietnam.gov.vn/laws/la.asp?idlaw=213> (17/11/2003).

⁵⁰⁷ Pursuant to Article 12 of *Vietnam Provisionally Stipulating a Number of Measures to Prevent and Handle Violations in the Field of Sending Labourers and Experts to Work Abroad* 1999.

⁵⁰⁸ Pursuant to Article 4 (a) of the *Circular on Guiding the Granting of Non-Vietnamese Nationality Certificates* 1999.

⁵⁰⁹ Since 1949, at which time the national government moved to Taipei due to the failure in Civil War between the National Party and Communist Party during the period of 1946-1949, the dominated areas of the ROC are limited to Taiwan areas.

⁵¹⁰ Article 10 of the *Constitution of ROC* 1946 provides: "people have the freedom of residence and movement."

⁵¹¹ When promulgating a democratic Constitution, the Kuomintang also established an emergency regime in Taiwan. On May 10, 1948, ROC government promulgated in the mainland *Provisional Amendments for the Period of Mobilisation of the Suppression of Communist Rebellion*, Commonly known as the temporary provision. These provisions, designed as supplements to the constitution, were subsequently extended to Taiwan. Moreover, President Chiang Kaishek in January 1950 issued an emergency decree that applied the 1934 martial law to Taiwan. The

Servicemen, Government Employees, Teachers and Travellers of the Taiwan Province 1949 (ROC) suspended Article 10. The Regulations were designed to avert communist attempts to invade Taiwan⁵¹² and prevent Taiwanese nationals from leaving the territory. This marked the beginning of the exit and entry control system of Taiwan. Originally, the system was administered by the Travel office of the Taiwanese Provincial Police, which was responsible for government officials and civilians, and the Taiwanese Provincial Garrison Command, which was responsible for military personnel. In 1952, these entities merged to form the Military-Civilian Joint Entry and Exit Application Division.

The legislation was amended to the *Regulations on the Entry and Exit in Taiwan during the Rebellion Suppression Period 1957* (ROC), because of increased political stability. In 1958, the Military-Civilian Joint Entry and Exit Application Division was replaced by the Entry and Exit Service Division, under the control of the Taiwanese General Garrison Headquarters. By 1972, continued economic growth⁵¹³ and an awareness of democratic principles and human rights⁵¹⁴ necessitated a transfer of the exit and entry administration from the military to a civilian agency. As such, the Immigration office National Police Agency within the Ministry for the Interior was established.

authorities justified these two emergency measures on the grounds that China's civil war remained technically unfinished; Taiwan was to be treated as combat area. The temporary provisions and the martial law literally turned the ROC on Taiwan into an emergency regime. The martial law and other attached laws severely restricted civil rights and liberties as protected by the constitution. See Simon, Denis Fred and Kau, Michael, Y. M., *Taiwan: Beyond the Economic Miracle*, M. E. Sharpe, Inc., New York, 1992, page 7.

⁵¹² Based on Article 11 (9) of the *Martial Act of the ROC*.

⁵¹³ Over the period from 1965 to 1990, annual growth in real GNP per capita averaged around 9 per cent. See Stahl, Charles, "Asia and the Pacific", in Stahl, Charles, Ball, Rochelle, Inglis, Christine and Gutman, Pamela, *Global Population Movements and Their Implications for Australia*, Australian Government Publishing Service, Canberra, Australia 1993, page 43.

⁵¹⁴ Taiwan has a western-style democratic, market-orientated system. The checks and balances in a political system of legislation, executive jurisdiction, examination and supervision is established in the *Constitution of the ROC 1946*. The awareness of human rights is rooted in the ROC. A representative of ROC attended the drafting of the UDHR. Also, the Kuomintang was never a monopoly. Local elections were held even during the 1950s and 1960s. Nonparty candidates were permitted to participate in the elections. See Simon, Denis Fred and Kau, Michael, Y. M., *Taiwan: Beyond the Economic Miracle*, M. E. Sharpe, Inc., New York, 1992, page 5.

Following the suspension of martial law in 1987, restrictions on exit and entry began to be relaxed. Since 1996, Taiwan has implemented the general direct election of the President of the ROC, and the democratic political system has significantly improved.⁵¹⁵ The *Immigration Law of the ROC* (the 1999 Act) was finally enacted to unify exit and entry control, safeguard national security, regulate immigration and implement immigration guidelines. Under Article 5, from May 2000 nationals with registered permanent residence could enter or exit the State without permission. The government promised to assist nationals who sought to emigrate by providing consultation services, and skills training.⁵¹⁶ The government nevertheless dissuaded emigration to countries or regions where wars or epidemics were ongoing, or where Chinese nationals are refused entry.⁵¹⁷ Following the 1999 Act, a raft of other legislation has been enacted or amended⁵¹⁸ to produce an advanced and comprehensive system of migration law. The codification of immigration law symbolised the start of protection of the RLR in Taiwan. Significantly, from a population of 23 million, 7.1 million persons exited or entered Taiwan in 1988, compared with 19.8 million in 2001.⁵¹⁹

4.2.2 The right to leave

⁵¹⁵ Wu, Wenxin, “Honestly Review the Functions and Significances of Overseas Chinese Affairs Committee” (Zhengshi Qiaoweihui De G, ngneng Yu Jiazhi), *Microview Weekly, the ROC*, at Domestic News, Volume 493, 5 May 2004.

⁵¹⁶ Article 42 of the *Immigration Law of the ROC* 1999.

⁵¹⁷ Article 43 of the *Immigration Law of the ROC* 1999.

⁵¹⁸ 1. *Enforcement Regulations of Immigration Law* 1999 (ROC); 2. the *Regulations on Guidance and Management on Migration Service Organizations and Their Employees* 1999 (ROC); 3. the *Regulations Governing Visiting, Residence and Permanent Residence of Aliens* 1999 (ROC); 4. the *Regulations on Passport (Amendment)* 2000 (ROC); 5. The *Regulations on the Exit and Entry Means of Nationals with Registered Permanent Residence and Hong Kong or Macau Permanent Residence* 2001(ROC); 6. *Enforcement Rules of the Nationality Law* 2001 (ROC); 7. *The Regulations on the Exit of the People having been Waiting Conscription* 2001 (ROC); 8. *Enforcement Rules of the Implementation of Regulations on Passport (Amendment)* 2002 (ROC); 9. *The Regulations on Permission of Hong Kong Permanent Residents Enter into and Permanently Resident in Taiwan area (Amendment)* 2002 (ROC); 10. *The Regulations on the Entry Permission of Mainland Permanent Residents to Taiwan area (Amendment)* 2002 (ROC); 10. *The Regulations on the Entry Permission of Taiwan Residents to Mainland Regions (Amendment)* 2002 (ROC); 11. *The Regulations on the Certificate of Overseas Chinese Identity* 2002 (ROC); 12. *The Law of National Security Protection* 2003 (ROC); 13. *The Regulations on Permission of Exit and Entry of Nationals (Amendment)* 2003 (ROC).

⁵¹⁹ “The Report of Improving Service Quality of the Immigration office National Police Agency of the Ministry of Interior of the ROC 2001”, <http://www.immigration.gov.tw>, (26/11/2003) 15, page 1.

Prior to 1999, Taiwan nationals could be provided with a passport⁵²⁰ upon presentation of a reference from either two employed Taiwanese nationals or a company whose registered capital exceeded T\$10,000.⁵²¹ The acceptable forms of reference were set out by a Taiwanese delegate in the Uppsala Conference in 1972.⁵²² These requirements obviously interfered with exercising the right to leave. Holding a passport did not imply that a person could leave Taiwan at any time, as the passport could only be used once.⁵²³ If a national holding a passport wanted to exit Taiwan within six months of returning, he or she had to additionally apply for an exit certificate.⁵²⁴ The issuance of passports to family members was strictly controlled. For example, a passport would not be granted to the family member of an overseas student, or if a relative of the applicant had lived overseas for more than two years.⁵²⁵ Where one spouse had a passport, the other would only be issued with the same if he or she provided the favourable reference from a foreign embassy or consular office.

These restrictions were abolished by the 1999 Act and its regulations. Pursuant to Articles 9 and 11, passports are now valid for ten years, and form the sole travel document. Citizens only need to fill in an application form and provide some identification, rather than providing references.

⁵²⁰ Article 9 of *Enforcement Rules of the Implementation of Regulations on Passports Abroad* 1952 (ROC).

⁵²¹ Article 13 of *Enforcement Rules of the Implementation of Regulations on Passports Abroad* 1952 (ROC).

⁵²² 1. in the case of returned overseas Chinese and their family members as well as impersonators, such references are delivered by Chinese Overseas offices; 2. in the case of teaching staff employed by overseas Chinese schools, such references are delivered by Chinese embassies or general consulates; 3. in the case of businessmen, such references are delivered by the Ministry of Economy; 4. in the case of personnel of the banking industry, such references are delivered by the Ministry of Treasury; 5. in the case of personnel of the transportation industry and seafarers, such references are delivered by the Ministry of Transportation; 6. in the case of personnel of the journalism industry, personnel of public institutions, doctors, pharmacists and patients, such references are delivered by the Ministry of Internal Affairs; 7. in the case of academic staff of higher education institutions and students, such references are delivered by the Ministry of Education; 8. in the case of personnel employed by foreign embassies or general consulates, such references are delivered by foreign embassies or general consulates. See "ROC – Taiwan" at Vasak, Karel and Liskofsky, Sidney, (ed), *the Right to Leave and Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976, page 386.

⁵²³ Article 4 of *Enforcement Rules of the Implementation of Regulations on Passport Abroad*, 1952 (ROC).

⁵²⁴ Article 18 (1) and (6) of *Enforcement Rules of the Implementation of Regulations on Passport Abroad*, 1952 (ROC).

⁵²⁵ Article 9 of *Enforcement Rules of the Implementation of Regulations on Passport Abroad*, 1952 (ROC).

These reforms mean that the formal requirements for applications in Taiwan are almost as simple as in many Western States.

Like many States, Taiwan imposes some restrictions on the right to leave. Nationals are prohibited from leaving if they fit within a class of persons prescribed by Article 6 Clause 1 of the 1999 Act.⁵²⁶ However, Article 6 clauses 2–5 of the 1999 Act guarantee various procedural rights if an application is refused. The grounds for restricting the right to leave are consistent with those permitted by the UHRD, the ICCPR, and other international human rights instruments.

Nationals who do not permanently reside in Taiwan, that is those who have lived abroad for more than two years,⁵²⁷ need to apply for permission to enter and exit the territory.⁵²⁸ The difference in treatment of nationals who reside or do not reside in Taiwan can be accounted for on the grounds of Taiwan's indirect dual nationality policy.

⁵²⁶ Article 6 of *Immigration Law* 1999 (ROC) provides “Nationals shall be denied or banned from exiting the State if they

Have been sentenced to punishments of imprisonment or greater after exhaustion of their appellate rights and have not served or have not completed the term of sentence; or

Have been wanted or have been restricted from exiting the State at the request of the civilian or military judicial authorities; or

Have been strongly suspected, on the basis of sufficient factual evidence, to endanger national security or social stability; or

Have been strongly suspected to be involved in rebellion or to cause it and have been restricted from exiting the State at the request of the authorities concerned; or

Have been strongly suspected to be involved in major economic crimes or major criminal cases and have been restricted from exiting the State at the request of the authorities concerned; or

Have been waiting for conscription or have not completely fulfilled their military services obligation except if permitted to exit the State in accordance with law; or

Have used a passport, flight crew ID, seaman service book, or entry and exit permit that has been illegally acquired, counterfeited, or tampered with, or that belongs to another persons; or

Have failed to have their passports, flights crew IDs, seaman service books; or entry and exit permits inspected in accordance with Article 4; or

Have been restricted or banned from exiting the State by other laws.”

⁵²⁷ Article 7 of *Operation Points of Population Circular of Nationals Who Exited Two Years Ago and Re-entry* 2000 (ROC)

⁵²⁸ Article 7 of the *Regulations on Permission of Exit and Entry of Nationals (Amendment)* 2003 (ROC)

Aliens can be prevented from leaving Taiwan upon the request of the Courts or taxation authority; or if the subject of lawful investigation. The alien is entitled to be notified in writing of the cause for the decision to refuse their application to leave.⁵²⁹ Criminal sanctions are imposed on people who unlawfully enter or exit the territory under Article 54 of the 1999 Act. Penalties include imprisonment for up to three years, or a fine of up to T\$90,000.

4.2.3 The right to return

Like the right to leave, the right to return under Taiwanese law was strictly controlled until 1999. Currently, nationals who permanently reside in Taiwan enjoy an unlimited right to return.

Prior to 1999, a Taiwanese national needed to apply to re-enter the territory at the same time as they applied to leave. The Ministry of Foreign Affairs would endorse the applicant's passport with a return certificate, following approval by the Taiwan Province Peace Preservation Commander office.⁵³⁰ Servicemen and government employees wanting to enter the territory for private purposes needed to submit a written pledge with their application from two senior colleagues.⁵³¹ The procedure for returning students was simpler than for many others, as part of the government's policy to encourage repatriation of skilled nationals.⁵³² Nevertheless, returning students needed to submit a written reference with their application from either a Taiwanese company with registered capital in excess of T\$5,000 or an employed Taiwanese national. These references could be submitted within a month of returning if the applicant did not have a relative who was living in the territory.⁵³³

Under Article 5 of the 1999 Act, Taiwanese nationals who do not permanently reside in the

⁵²⁹ Article 20 of *Immigration Law 1999* (ROC).

⁵³⁰ Bao, Dazhang, *The Explanation of Regulations and Procedures Governing exit and entry in Taiwan* (Taiwan *Diqu Chujing Rujing Faling Shouxu Xiangjie*), Bao Da Zhang, Taipei, China 1957, page 45.

⁵³¹ Article 12 (1) of the *Regulations on the Entry and Exit in Taiwan during the Rebellion Suppression Period 1957* (ROC).

⁵³² Bao, Dazhang, *The Explanation of Regulations and Procedures Governing exit and entry in Taiwan* (Taiwan *Diqu Chujing Rujing Faling Shouxu Xiangjie*), Bao Da Zhang, Taipei, China 1957, page 15.

⁵³³ Article 10 (4) of the *Regulations on the Entry and Exit in Taiwan during the Rebellion Suppression Period 1957* (ROC).

territory must obtain permission to enter. The duration of permission to remain in the territory depends on the applicant's qualification, and may vary from six months to ten years. Permission to enter may be granted on a multiple or single entry basis. Under Article 4 of the *Regulations on Permission of Exit and Entry of Nationals (Amendment) 2003 (ROC)*, these nationals who wish to return to Taiwan must apply to Taiwanese overseas immigration authorities. Article 13 of above regulations provides that temporary permission with the same period of passport may be granted, if the applicant has a immediate relative who permanently resides in the territory, has been studying overseas, has made a contribution to Chinese affairs, has been approved to invest in Taiwan, represented China overseas, or worked for an international organisation.⁵³⁴

Under Article 7 and 17 of the 1999 Act, Taiwanese nationals who hold dual citizenship and have never resided in Taiwan are treated as aliens for the purpose of entry.⁵³⁵ The reason for this is to protect the interests of nationals who permanently reside in Taiwan.

The nature of Taiwan's return policy influences the chance of repatriation of skilled nationals. During the 1970s and 1980s, an estimated 20 percent of Taiwanese graduates emigrated for the purpose of undertaking further study. In 1979, the peak of the 'brain drain', only 8% of students who studied abroad returned to Taiwan. This rate has climbed to 33% in recent years.⁵³⁶ Data from Mainland China indicates the rate was 90% in 2003.⁵³⁷ This increased rate of repatriation can mainly be attributed to Taiwan's economic growth and democratisation. A focus on facilitating the return of skilled nationals is also a factor that cannot be ignored.

⁵³⁴ Article 11,12 and 13 of the *Regulations on Permission of Exit and Entry of Nationals (Amendment) 2003 (ROC)*.

⁵³⁵ According to Article 7 of *Immigration law 1999 (ROC)*, if they: have joined a rebellious organisation or its activities; or have joined a violent or terrorist organization or its activities; or have been strongly suspected to be involved in rebellion or to cause it; or have been suspected to be involved in major crimes or to be habitual criminals; or have used a passport or entry permit that is illegally acquired, counterfeited, or tampered with, or that belongs to another person.

⁵³⁶ O'Neil, Kevin, "Brain Drain and Gain: The Case of Taiwan", <http://www.migrationinformation.org/Feature/display.cfm?ID=155> (03/09/2003).

⁵³⁷ Xie, Xiuying, "The Economical Analysis on Overseas Study at Their Own Expense and the trend of Junior Age of the Age of Students(Zifei Chuguo Liuxue Re Jiqi Dilinghua Qushi De Jingjixue Fengxi)", in Vol. 16 No. 1 of *Journal of Shanxi Youth Managerial Cadres Institution (Shanxi Qingnian Guanli Ganbu Xueyuan Xuebao)*, pages 24-26

4.2.4 Exit and entry between Taiwan and Mainland China

Although the exit and entry between Taiwan and other countries has been liberalised, the control over travelling to or from Mainland China remains restrictive because hostilities between two sides have not been resolved.

Residents in Taiwan must apply for a Certificate of Exit and Entry from Taiwan authorities prior to entering Mainland China under Article 9 (1) of the *Regulations on the Relationship between Residents in Taiwan and Mainland China* 1992 (ROC). Failure to obtain permission is an offence under Article 91 of the Regulations, punishable by a fine of between T\$20,000 and T\$100,000. The *Regulations on the Entry Permission of Taiwan Permanent Residents to Mainland China (Amendment)* 2002 (ROC) reiterate the requirements for permission to travel to or from the Mainland. Ordinary Taiwanese residents who do not have a passport must fill in an exit and entry application form and provide relevant certificates. Ordinary residents who have a passport may either fill in an entry into Mainland China application form and provide relevant certificates for themselves, or arrange their travel through a travel agency.

Overseas staff of the ministries and personnel who are employed without the status of civil servants in the Bureau of National Security, Ministry of National defence, the Bureau of investigation under the Ministry of Justice, are prohibited from travelling to Mainland China. Government affairs personnel and individuals working in areas relating to Taiwanese national security and development are prohibited from entering Mainland China, unless granted permission by the Examination Committee.⁵³⁸ Civil servants are also prohibited from entering Mainland China, unless to visit Mainland relatives of the first degree of kinship, stepparents, parents-in-law and spouses, or when sent by the authorities.⁵³⁹

Activities endangering the national security or interests of Taiwan in Mainland China are strictly

⁵³⁸ Article 4 of the *Regulations on the Entry Permission of Taiwan Permanent Residents to Mainland Chinas (Amendment)* 2002 (ROC).

⁵³⁹ Articles 4-10 of the *Regulations on the Entry Permission of Taiwan Permanent Residents to Mainland Chinas (Amendment)* 2002 (ROC).

prohibited.⁵⁴⁰ Article 13 of the *Regulations on the Entry Permission of Taiwan Permanent Residents to Mainland China (Amendment) 2002* (ROC) prohibits Taiwanese civil servants from entering into any agreements or releasing any joint declaration with legal entities in Mainland China. These activities are punishable with a term of imprisonment of not less than five years or a maximum fine of T\$1 million.⁵⁴¹

The term of entry into China is limited to two years,⁵⁴² compared to the 10-year term attached to travel to other countries. The definition of a resident of “Mainland China” has been extended to include residents of Hong Kong and Macao, and permanent residents of Taiwan who have continuously settled in China for more than four years.⁵⁴³ The widening of the definition has the practical effect of narrowing the meaning of “Taiwanese resident” and a loss of rights enjoyed by people with that status.

Exit and entry laws between Taiwan and Mainland China can be criticised on the grounds that a person can enter China through a third State, in which case it would be difficult to enforce the restrictions. As to the status of civil servants and individuals in relation to Taiwanese national security and development, it is possible to disguise one’s real occupation so as to avoid detection, since identity cards, driver licenses and household certificates do not include that information. Additionally, both Taiwan and Mainland China acknowledge the trend toward globalisation, which demands greater freedom to travel between regions. Further reforms are urgently needed to simplify administrative processes.

Opinion is divided as to whether the current restrictions are necessary. Xie Lixian a Taiwanese scholar has questioned whether the current system of regulating travel between Taiwan and

⁵⁴⁰ Article 9 (2) of the *Regulations on the Relationship between Residents in Taiwan and Mainland Chinas (Amendment) 2002* (ROC).

⁵⁴¹ Article 5 (1) of the *Law of National Security* (ROC).

⁵⁴² Article 18(1) of the *Regulations on the Entry Permission of Taiwan Permanent Residents to Mainland Areas (Amendment) 2002* (ROC).

⁵⁴³ Article 18(1) the *Regulations between Residents in Taiwan and Mainland China (Amendments) 2002* (ROC).

China is still needed as relations between two sides improve.⁵⁴⁴ By contrast, Tan Zhimin has argued that the system should remain in place but should be improve.⁵⁴⁵ The issue of controlling travel between Taiwan and Mainland China is as much a legal one as it is political. It is not practicable to fully ease the restrictions against a background of hostility between two sides.

4.2.5 Administration of migration service organization

Before 1999, Taiwan did not have legalised migration service firms. Private companies that provided services to assist people to move abroad were technically breaking the law. Since the Introduction of the 1999 Act, private migration services were legalised and regulated.⁵⁴⁶ Taiwan has subsequently established an advanced administrative system governing the migration services organisation from the following five perspectives.

Firstly, migration service firms must be registered under company law and licensed. Following international practice, natural⁵⁴⁷ or legal person can establish a migration service in Taiwan. Foreign-owned companies that want to provide migration services in Taiwan must apply for a permit from the relevant department and be approved under company law.⁵⁴⁸ Although migration service providers must be companies, registered under the Company Act, an exception is made for lawyers. The quality of migration services was strengthened with the relaxation of the restrictions concerning those who can provide services.

⁵⁴⁴ Tan, Zhimin, “The Discuss on Current Permission System of Entry into Mainland Area of Residents in Taiwan Area” (*Taiwan Diqu Renming Jingru Dalu Diqu Xianxing Xukezhi Zhi Tanta*) (12 October 1998), www.immigraiton.gov.tw (28/11/2003).

⁵⁴⁵ Tan, Zhimin, “The Discuss on Current Permission System of Entry into Mainland Area of Residents in Taiwan Area” (*Taiwan Diqu Renming Jingru Dalu Diqu Xianxing Xukezhi Zhi Tanta*) (12 October 1998), www.immigraiton.gov.tw (28/11/2003).

⁵⁴⁶ The *Regulations on Guidance and Management on Migration Service Organization and Their Employees* 1999 (ROC) (Yimin Yewu Jigou Jiqi Congye Renyuan Fudao Guanli Banfa). Taiwan drafted a proposal on *Regulations Governing Companies That Provide Immigration services 1990*, see “Emigration Services Firms”, *The Free China Journal*, 11 October 1990, <http://global.factiva.com/en/arch/display.asp> (25/07/2003).

⁵⁴⁷ Article 10 of the *Regulations on Guidance and Management on Migration Service Organizations and Their Employees* 1999 (ROC).

⁵⁴⁸ Article 46 (2) of *Immigration Law* 1999 (ROC).

Migration services cannot be established unless the organisation holds at least T\$5 million in capital, and has deposited T\$1.5 million as security in an approved financial institution.⁵⁴⁹ The Taiwanese government has emphasised that the requirements are calculated according to the range of services provided by an individual business. A migration service that provides investment advice must hold T\$8 million capital, and lodge a security of T\$2.5 million. The purpose of the requirements is to improve the quality of migration services. Security deposits are used to pay compensation in the event of a dispute and are refunded when the business is wound up.⁵⁵⁰

Thirdly, the government supervises migration service firms that provide investment advice and brokerage services. They must first provide evidence that they have negotiated 100 successful migration applications.⁵⁵¹ Further, approval from the Finance Ministry must be obtained under Article 47(2) of the 1999 Act. Migration service firms that provide investment advice, cannot act as agents to conduct securities investment or receive investment funds.⁵⁵² There must be a contract between the migration service and the client detailing the rights and obligations of each party and the manner in which funds will be managed.⁵⁵³ Details of each investment-involved case must be provided to the government.⁵⁵⁴ The purpose of these regulations is to protect investors and the Taiwanese economy generally, by ensuring that investment advisors are skilled and honest in their dealings.

⁵⁴⁹ Article 48 *Immigration Law* 1999 (ROC); and Article 4 and 6 of the *Regulations on Guidance and Management on Migration Service Organizations and Their Employees* 1999 (ROC).

⁵⁵⁰ Article 7 and 8 of the *Regulations on Guidance and Management on Migration Service Organizations and Their Employees* 1999 (ROC).

⁵⁵¹ Article 9 of the *Regulations on Guidance and Management on Migration Service Organizations and Their Employees* 1999 (ROC).

⁵⁵² Article 47 (3) of *Immigration Law* 1999 (ROC).

⁵⁵³ Article 11 (1) of the *Regulations on Guidance and Management on Migration Service Organizations and Their Employees* 1999 (ROC).

⁵⁵⁴ Article 16 (1) of the *Regulations on Guidance and Management on Migration Service Organizations and Their Employees* 1999 (ROC).

Migration services must employ at least three qualified specialists.⁵⁵⁵ Qualifications must be obtained from the migration institute. The institute must verify who has completed its training and examinations to the government.⁵⁵⁶ Specialists must attend further training and pass an examination every three years. Their qualifications can be revoked if the exams are failed twice.⁵⁵⁷

Lastly, a migration service can be fined between T\$200,000 and T\$1 million if it operates without a license.⁵⁵⁸ The severity of the penalties helps law enforcement and protect the interests of clients. Licenses can be revoked or cancelled under Article 50 of the 1999 Act if the migration service has:

- been convicted of submitting false information, or assisting their client to submit false information to migration authorities;
- embezzled funds in relation to a migration matter;
- permitted third parties to use their license;
- been ordered to suspend their operation;
- violated any law concerned with migration services.

4.2.6 The exit and entry administrative system

With the liberalisation of exit and entry, the exit and entry administrative system has been greatly improved.

Administrative authorities

The matters of visa applications, visa overstay, applications for residency and addressing illegal entry, are dealt with by separate administrative processes under Article 2(2) of the 1999 Act, by

⁵⁵⁵ Article 5 (1) of the *Regulations on Guidance and Management on Migration Service Organizations and Their Employees* 1999 (ROC).

⁵⁵⁶ Article 5 (2) and (3) of the *Regulations on Guidance and Management on Migration Service Organizations and Their Employees* 1999 (ROC).

⁵⁵⁷ Article 22 of the *Regulations on Guidance and Management on Migration Service Organizations and Their Employees* 1999 (ROC).

⁵⁵⁸ Article 55 of *Immigration Law* 1999 (ROC).

the Bureau of Immigration and the National Police Administration. Control over exit and entry by a civil authority is consistent with international practice. The separation of these functions means that administrative service provision is improved, violations of migration laws more easily identified, and power is not concentrated in any particular group of administrators.

Administrative responsibility for migration is shared between the Ministry of the Interior, local Household offices, and the Ministry of Foreign Affairs. The Ministry of the Interior is responsible for accepting an application and issuing a certificate of nationality;⁵⁵⁹ local household offices receive passport applications and have the responsibility of forwarding them to Ministry of Foreign Affairs;⁵⁶⁰ and Ministry of Foreign Affairs receives and processes those applications.⁵⁶¹ Prior to the establishment of the Bureau of Migration, the Household offices and the Ministry of the Interior were also responsible for the management of migrations service organisations.⁵⁶² According to Article 12 of the *Regulations on the Entry Permission of Mainland Permanent Residents to Taiwan of the Republic of China (Amendment) 2002* (ROC), the Ministry of Foreign Affairs is responsible for deciding if residents with a registered permanent residence in Mainland China hold a special status with respect to an application.

Independent committees

The Review Committee of Non-permission and Banning from Exit and Entry, of the Ministry of the Interior⁵⁶³ is an independent review panel, constituted by impartial members of the public under the 1999 Act. Its functions are to:

1. Review a decision to prevent an individual from leaving the territory when that person is strongly suspected to endanger national security or social stability, or be involved in rebellion or to cause it, and;⁵⁶⁴

⁵⁵⁹ Pursuant to Article 21 *Nationality Law* 2000 (ROC).

⁵⁶⁰ Pursuant to Article 2 of *Enforcement Regulations of the Law of Nationality* (ROC).

⁵⁶¹ Pursuant to Article 2 of *Enforcement Rules of the Regulations on Passport* 2002 (ROC).

⁵⁶² Article 29 of the *Regulations on Guidance and Management on Migration Service Organizations and Their Employees* 1999 (ROC).

⁵⁶³ Article 10 of *Key Points of Establishment of Review Committee of Non-permission and Banning from Exit and Entry, the Ministry of Interior (Amendment) 2000* (ROC).

⁵⁶⁴ Article 6 (1) (b) –(c) of *Immigration Law* 1999 (ROC).

2. Review a decision to prevent an alien from entering the territory on the grounds that the person is believed to endanger national interest, public security, public order, or the good customs of the State;⁵⁶⁵

The Immigration office organises a review committee to check and examine if permanent residency needs to be granted to aliens who have not satisfied the formal requirements for permanent residency, but have made an exceptional contribution to the State, or possess technical skills needed by the State.⁵⁶⁶ The mechanism of an independent review committee was developed to overcome departmental shortcomings with respect to the absence of timely and fair decision-making, and to reduce the frequency of complaints about administrative processes.

The Examination Committee of the Ministry of the Interior is responsible for examining applications for the entry into China of senior public servants and national security personnel. The Examination Committee is composed of individuals from the Ministry of the Interior, the State Security Bureau, the Ministry of Justice, and the Mainland Committee of the Executive Yuan.⁵⁶⁷

It may seem that the jurisdiction of the various migration authorities is limited by reason of the separation of administrative functions between departments and independent committees. The arrangement is consistent with customary international law, and was designed to impose order on migration administration. The current system improves the quality of services and protects the rights of individuals who wish to emigrate.

The services of the Immigration office

The government argues that the administrative structure provides services to all people and

⁵⁶⁵ Article 17 (1) (m) of *Immigration Law* 1999 (ROC).

⁵⁶⁶ Article 23 (3) of *Immigration Law* 1999 (ROC).

⁵⁶⁷ Article 8 (4) of the *Regulations on the Permission of Short-stay, Residency and Registered Permanent Residency of Hong Kong and Macao Residents in Taiwan* 2002 (ROC).

secures the national borders. According to the Immigration office, its goal is to facilitate the exit and entry of the people by providing sincere service, and to simplify exit and entry requirements,⁵⁶⁸ to give effect to the concept of service marketing (*Yinyong Fuwu Xingxiao Lilian*), to enlarge the scope of government services (*Kuoda Zhengfu Fuwu Shiye*), and to provide the best quality service (*Zhanxian Zuoyue Fuwu Pingzhi*).⁵⁶⁹ The Immigration office has formulated a series of detailed measures to implement its service ideals.⁵⁷⁰ These measures provide an encouraging safeguard for the quality of exit and entry administration. An advanced administrative system has been established in Taiwan, which undoubtedly plays a significant role in protecting the RLR.

4.3 The USA

The USA is a typical example of a developed country with a market economy. China is endeavouring to develop its market economy in a similar direction to that of the USA. Analysis of the RLR in the USA will assist in rationally thinking about the future of the RLR in China. Many aspects of the RLR in the USA need to be noted. This section has selected some aspects

⁵⁶⁸ Immigration office National Police Agency of the Ministry of Interior of ROC, “Manual of Service for the People, Immigration office” (*Ruchujing Guanliju Weimin Fuwu Shouce*), September 2002, www.immigraition.gov.tw (28/11/2003) page 1; further explained in *Enforcement Plan of Upgrading Service Quality all Round (2002)*.

⁵⁶⁹ Immigration office National Police Agency of the Ministry of Interior of ROC, “Enforcement Plan of Upgrading Service Quality all the Round in 2002” (*Neizhengbu Jingzhengshu Ruushujing Guanliju Jiushiyi Niandu Quanmian Tisheng Fuwu Pingzhi Zhixing Jihuashu*), www.immigraition.gov.tw (28/11/2003), page 1.

⁵⁷⁰ Firstly, the office is looking to the private sector to identify measures to improve performance, for example, invite managers and scholars to introduce the ideals and practices of business management. Secondly, formal administrative processes are being reformed to reduce waiting time. These include setting up counter service in its offices, regularly updating service manuals, establishing internal and external supervisory mechanisms, and introducing online and facsimile-based systems for some categories of applications. Thirdly, the office is attempting to create a customer service environment by improving equipment, training its staff, developing mobile services, permitting some public scrutiny of facilities, and implementing a regular and random performance audit process. Fourthly, the office has attempted to improve communication with the public by inviting experts to give seminars on customer service, developing websites to publicise migration regulations, government white papers and performance reports. Lastly, the office has joined with travel agents, the Red Cross, the [Taiwan] Strait Funds Association and Chinese groups located overseas to assist in developing its service. See Immigration office National Police Agency of the Ministry of Interior of ROC, “Enforcement Plan of Upgrading Service Quality all the Round in 2002 (ROC)” (*Neizhengbu Jingzhengshu Ruushujing Guanliju Jiushiyi Niandu Quanmian Tisheng Fuwu Pingzhi Zhixing Jihuashu*), www.immigraition.gov.tw (28/11/2003), pages 2-7.

for review, which are significant to compare with the RLR in China, including the legal status of the RLR, passport administration, the limits on the right to be granted passport, and the extent of restrictions placed on international travel. Foreign the RLR policy will also be analysed to examine the relationship between the RLR policy in the USA and the RLR policy in other States such as China.

4.3.1 Legal status of the RLR in the USA

Under *International Migration Report 2002*, the USA is the country with the largest international migrant stock of 34,988,000. The migration stock rate (percent of population) in USA in 2002 was 12.353%, which is much higher than the 8.739% average rate in more developed countries.⁵⁷¹ The USA government has a satisfactory emigration outlook. In *Measures of Legal and Political Rights in 31 Countries 2002*, it scored highest in relation to the right to emigration.⁵⁷²

Influenced by English law, the USA has recognised its citizens' the RLR without government permission in times of peace, as a matter both of law and policy.⁵⁷³ The laws governing the RLR are contained in the Constitution, in the *USA Code of Federal Regulations*, the *Passport Act 1926*, various presidential proclamations and cases in law.⁵⁷⁴ the RLR in the USA has been inferred from the Fifth Amendment's due process clause and the equal protection clause of the Fourteenth Amendment of US Constitution.⁵⁷⁵ Courts did not expressly interpret the

⁵⁷¹ The population of the USA was 283,230,000. Compared with 8.739% of average migration stock in more developed regions, calculated from data in Population Division Department of Economic and Social Affairs, *International Migration Report 2002*, the UN Secretariat, 2002, ST/ESA/SER.A/220, the UN, New York, 2002, 62 pages, attached table.

⁵⁷² Janoski, Thomas and Gran, Brian "Political Citizenship: Foundations of Rights' in Isin, Engin F. and Turner, Bryan S. (ed), *Handbook of Citizenship Studies*, Sage Publications, London, 2002 pages 31-33.

⁵⁷³ Ennis, Edward, "The United States of America", at Vasak, Karel and Liskofsky, Sidney, (ed), *the Right to Leave and Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976, page 232.

⁵⁷⁴ This proclamation was codified in the *Passport Act 1926*, and the *Presidential Executive Order 7856* of March 31, 1938. These are now found in Part 51 of the *USA Code of Federal Regulations*.

⁵⁷⁵ Nowak, J., Rotunda, R. and Young, J.N. *constitutional Law*, 2nd edition, West Publishers, St. Paul, 1983, pages 802-816.

constitutional the RLR in respect of the RLR until World War One.⁵⁷⁶ the RLR was first clearly affirmed in *Bauer v Acheson* (1952) decided by the Federal District Court of Columbia, which held that the freedom to travel outside the USA was an aspect of personal liberty. In *Kent v Dulles* (1958), the US Supreme Court declared that:

The right to travel is part of the “liberty” of which the citizen cannot be deprived without due process of law ... Freedom of movement across frontiers in either direction ... is a part of our heritage. Travel abroad ... may be necessary for livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads ... ⁵⁷⁷

The USA ratified the ICCPR in 1992, later than many Western States, such as the UK (1976), Japan (1979), Germany (1973) and France (1980). The USA ratified the CERD in 1994,⁵⁷⁸ *Protocol Relating to the Status of Refugees 1967* in 1968, but did not ratify the CSR, and the *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* 1990 until 2002.⁵⁷⁹ Ratification of international human rights conventions partly changed the USA’s image as a State that adhered to virtually no important human rights covenants.

4.3.2 Sole departmental authority for passport administration

Since a presidential proclamation in 1918, a US citizen must hold a passport to travel abroad or re-enter the USA.⁵⁸⁰ The Secretary of State is sole departmental authority responsible for

⁵⁷⁶ Ennis, Edward, “The United States of America”, at Vasak, Karel and Liskofsky, Sidney, (ed), *the Right to Leave and Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976, page 233.

⁵⁷⁷ Quoted in Freedman, Warren, *The Right to Travel: A Right or A Privilege? Work Paper of Sao Paulo Conference on the Law of the World*, the World Peace Through Law Centre, Washington, the USA, 1981, page 9.

⁵⁷⁸ International Service for Human Rights, “The Ratification Status of the Main Human Rights Treaties”, (02-2002) <http://www.ishr.ch/About%20UN/Ratification/Ratification/Ratification%20-%20Human%20Rights20treaties.htm> (18-05-2003).

⁵⁷⁹ Population Division Department of Economic and Social Affairs, *International Migration Report 2002*, the UN Secretariat, 2002, ST/ESA/SER.A/220, the UN, New York, 2002, 62 pages, attached tables.

⁵⁸⁰ HR Rep No.485, 65th Congress, 2nd Sess. Quoted in, Freedman, Warren, *The Right to Travel: A Right or A Privilege? Work Paper of Sao Paulo Conference on the Law of the World*, the World Peace Through Law Centre, Washington, the USA, 1981, page 7.

passport administration. Before 1856, state governors and local officials also issued passports.⁵⁸¹

The system of sole departmental authority was established by *Passport Act 1926*, which provides that:

The Secretary of State may grant and issue passports, and cause passports to be granted, issued and verified in foreign countries by diplomatic representatives of the United States [...] under such rules as the President shall designate and prescribe for persons on behalf of the United States, and no other person shall grant, issue, or verify such passports.

4.3.3 Limits on the right to be granted a passport

Even in States such as the USA, which generally favours a policy of free travel, restrictions have been imposed against a limited number of citizens on grounds of national security or foreign policy. A passport, except for direct return to the USA, shall not be issued in any case in which:

- 1) The applicant is the subject of an outstanding federal arrest warrant for a felony, including a warrant issued under the *Federal Fugitive Felon Act*;
- 2) The applicant is subject to a court order, condition of parole, or condition of probation which forbids departure from USA;
- 3) The applicant is subject to a court order committing him or her to a psychiatric facility.⁵⁸²

A passport application may be refused in any case in which:

- 1) The applicant has not repaid a loan received from USA to effectuate his return from a foreign country in the course of travel abroad;
- 2) The applicant has been legally declared incompetent unless accompanied in his travel abroad by the guardian or other person responsible for the applicant's custody and wellbeing;
- 3) The applicant is under the age of 18 years, unmarried and not in the military service of USA, unless a person having legal custody of such a person authorizes issuance of the passport and agrees to reimburse the United States for any monies advanced by the United States for the minor's to return to USA;
- 4) The Secretary determines that the applicant's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of USA;

⁵⁸¹ Ennis, Edward, "The United States of America", at Vasak, Karel and Liskofsky, Sidney, (ed), *the Right to Leave and Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976, page 233.

⁵⁸² §51.70 (a) of *the USA Code of Federal Regulations Title 22 – Foreign Relations*.

- 5) The applicant has been the subject of a prior adverse action under *the Passport Act*, and has not shown that a change in circumstances since the adverse action warrants issuance of a passport;
- 6) The applicant is subject to an order of restraint or apprehension issued by an appropriate officer of USA military, pursuant to *the United States Code*.⁵⁸³

A passport shall cease to be valid for travel into or through restricted countries or areas. A country is restricted if it is:

- 1) A country with which USA is at war;
- 2) A country or area where armed hostilities are in progress;
- 3) A country or area to which travel must be restricted in the national interest because such travel would seriously impair the conduct of US foreign affairs.⁵⁸⁴

Although the right to due process must be respected,⁵⁸⁵ a passport may be denied if the Secretary of State has causable grounds for believing that the activities of an applicant would interfere with the national security of the USA by:

- 1) transmitting without proper authority security information;
- 2) inciting hostilities or conflicts which might involve USA;
- 3) inciting attacks by force upon USA; or
- 4) inciting attempts to overthrow the government by force or violence.⁵⁸⁶

The US government takes measures to ensure that the limits imposed on passports do not interfere with the right to procedural fairness and due process. Any person whose passport application has been denied, or who has otherwise been subject to an adverse administrative decision with respect to their right to receive or use a passport, is entitled to written notice of the decision. The notice must set out the procedure for review of the decision. Additionally, the administrative decision may be judicially appealed.

⁵⁸³ §51.70 (b) of *the USA Code of Federal Regulations Title 22 – Foreign Relations*.

⁵⁸⁴ §51.72 Passports invalid for travel into or through restricted countries or areas, *the USA Code of Federal Regulations Title 22 – Foreign Relations*.

⁵⁸⁵ Hannum, Hurst, *The right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1987, page 85.

⁵⁸⁶ Freedman, Warren, *The Right to Travel: A Right or A Privilege? Work Paper of Sao Paulo Conference on the Law of the World*, the World Peace Through Law Centre, Washington, the USA, 1981, page 9.

4.3.4 The extent of restrictions placed on international travel

The US government usually limits the so-called “export of services” in relation to countries that endanger the national security of the USA. Foreign travel of US citizens, in Edward Ennis’ view, is in effect a large hidden export of services from the USA.⁵⁸⁷ The current George W. Bush administration shares this view. However the positive economic influence of the “export of services’ is limited to developing countries. The same positive economic effects are not apparent in a developed country like the USA.

In practice, the restricted countries or areas are either Communist countries or non-Christian countries, with different political systems to the USA. US citizens were restricted from travelling to China, Iran and Cuba in the 1970’s and 1980’s other than with special permission.⁵⁸⁸ Since 1963, US citizens have not been permitted to travel to Cuba, on the grounds that the US has not approved Cuba’s communist regime.⁵⁸⁹ Any person who violates this restriction may be fined up to US\$250,000 or be imprisoned for up to ten years. The restrictions on travelling to certain countries are thus based on the political rather than economic grounds.

In October 2003, George W. Bush stated that the USA would strengthen the restriction on travel to Cuba in order to promote a change of government on the island. The rationale for this restriction was that the Cuban economy would suffer if US travel dollars were withdrawn. However, the US Senate passed a bill in late 2003, providing that the USA will cancel travel

⁵⁸⁷ Ennis, Edward, “The United States of America”, at Vasak, Karel and Liskofsky, Sidney, (ed), *the Right to Leave and Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-21 June 1972*, The American Jewish Committee, Arbour, the USA, 1976, page 243

⁵⁸⁸ If the applicant is considered to be in the national interest of the USA, the application may be approved. See §51.73 Special Validation of Passport for Travel to Restricted Countries and Areas, Subpart E Limit on Issuance or Extension of Passports, Part 51 Passport, *the USA Code of Federal Regulations Title 22 – Foreign Relations*.

⁵⁸⁹ Bradley, Catherine, *What Do We Mean by Human Rights: Freedom of Movement*, Franklin Watts, London, 2002, page 21.

restrictions to Cuba.⁵⁹⁰ Current debates in Congress tend to be in favour of cancellation of the restriction.

4.3.5 Foreign the RLR policy

The USA has tried with mixed results to bring economic and political pressure to bear upon States to secure compliance with Article 13(2) of the UDHR and Article 12(2) of the ICCPR. For example, *Jackson-Vanik Amendment to the Trade Reform Act 1974* prohibits the granting of most-favoured nation (MFN) status to countries without free market economies and which violate the RLR.⁵⁹¹ The USA releases *Country Reports on Human Rights Practices* and *Supporting Human Rights and Democracy: USA Record* every year, to detail the attitudes and measures taken by countries towards human rights.⁵⁹² The measures imposing economic and political pressure spring from human rights ideals and national interest. The administration tirelessly works to promote democratic structures and respect for human rights in every region of the world, on the basis that freedom and the rule of law may prevent human rights abuses and terrorism. This combination of idealism and policy implementation has become a hallmark of

⁵⁹⁰ China Xinhua News Agency, “The Foreign Affairs Committee Agree to cancel the restrictions on Travelling to Cuba” (*Mei Canyiyuan Waiweihui Tongyi Jiechu Dui Guba Lvxing Xianzhi*), *Australian Chinese Daily*, at International News (8, 9 November 2003).

⁵⁹¹ The Jackson-Vanik Amendment was enacted primarily in response to ban erected by the Soviet Union to emigrate. Those bars particularly affected members of several groups anxious to leave, including principally Soviet Jews by stating “To assure the continued dedication of the United States to fundamental human rights... products from any non-market economy country shall not be eligible to receive non-discriminatory treatment (most-favoured-nation treatment) ... during the period beginning with the date on which the President determines that such country (1) denies its citizens the right or opportunity to emigrate; (2) imposes more than a nominal tax on emigration ...; or (3) imposes more than a normal tax ... or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice” See [full reference missing] *and Materials*, 2nd edition, Oxford University Press, New York, 2000, pages 1109-1110.

⁵⁹² Powell, Colin L. “Preface”, at *Supporting Human Rights and Democracy: The USA Record 2002-2003*, the Bureau of Democracy, Human Rights, and Labour, 2003 <http://www.state.gov/g/drl/rls/shrd/2002/21763.htm> (05-07-2003).

USA foreign policy.⁵⁹³ Unfortunately, this initiative has received little supports from other States.⁵⁹⁴

Former President Jimmy Carter thought that human rights were “the soul” of US foreign policy. He extended diplomatic recognition to China in December 1978, boosting the Chinese Communists reputation. Chinese leaders however characterised the extension of diplomatic recognition as a “hypocritical farce”.⁵⁹⁵ The Chinese government did not believe that the USA intended to take serious measures to assist China to address its human rights record, but merely sought to bolster US interests by drawing political attention to the issues in China.

Like many Western countries that are strong on human rights rhetoric, the US is reluctant to take action against China with its rapidly growing economy, offering fresh markets and new trading opportunities. The Jackson-Vanik Amendment allows the President to waive the emigration requirement only when it would substantially promote the goals of the Amendment and the President has received assurance that the country’s emigration practices will lead substantially to such objectives. From 1980 to 2000, three presidents have used the waiver method to grant most favoured nation status to China.

US foreign policy has moved from prioritising human rights⁵⁹⁶ to encouraging trade,⁵⁹⁷ and safeguarding national security. This is evidenced by US reluctance to accept migrants from countries with poor the RLR records, and the USA Visitor and Immigration Status Indication Technology System (USVISIT) aimed at tracking all those coming to the USA to work, study

⁵⁹³ Colin L. Powell, “Preface”, in *Supporting Human Rights and Democracy: The the USA Record 2002-2003*, the Bureau of Democracy, Human Rights, and Labour, 2003 <http://www.state.gov/g/drl/rls/shrd/2002/21763.htm> (05-07-2003).

⁵⁹⁴ Meron, Theodor, (ed), *Human Rights in International Law: Legal and Policy Issues, Volume I*, Clarendon Press, Oxford, the UK, 1984, page 152.

⁵⁹⁵ Wu, Yuanli et al, *Human Rights in the People’s Republic of China*, Westview Press, Boulder, Colorado, the USA, 1988, page 5.

⁵⁹⁶ “Bottom line for the USA and China: no Kowtows ‘Human Rights’ *The New York Times*, New York, 27 March 1994.

⁵⁹⁷ “Clinton U-turn as He Defends links with China” *The Daily Telegraphy*, New York, 25 October 1997, page 11; “America Retreats from Human Rights Motion against China” *The Times*, 16 March 1998, page 13.

and visit. From April 2003, undocumented immigrants can be detained indefinitely, without bond, if the government provides evidence that their release might threaten national security.⁵⁹⁸

US migration policy aims to select the people who can best contribute either through their existing connections within the USA, or through potential economic contribution. The USA will only respond to economic and political pressure from developing countries with poor human rights records if it is consistent with its national interests. The government has shown that it will cease providing international aid if an inconsistency between American national interest and economic and political interests of another State emerges.

4.4 Conclusions

For Vietnam, the background of the protection of the RLR is remarkably similar to that of the RLR in China. This means that the overall trends and features in Vietnam's policies on the RLR are likely to emerge in China as well. There has been a clear trend that liberalisation of the RLR is increasing. Vietnam will not have growth in the long run until individual rights are respected.⁵⁹⁹ Incorporating the RLR into the Constitution was an epoch-making start, followed by many legislative changes related to the RLR. This means unprecedented freedom for individuals. Furthermore, limited by public ownership of the means of production, which is still the basis of the socialist economic system,⁶⁰⁰ underdevelopment and the Confucian tradition,

⁵⁹⁸ Jachimowicz, Maia and McKay, Ramah, "Justice, Homeland Security Departments Announce Changes", <http://www.migrationinformation.org/Usfocus/display.cfm?ID=120>, (05/06/2003).

⁵⁹⁹ Le, Long, "Vietnamese Communist Party not Interested on "Real Reform", at *The Washington Times*, Sunday, 8 September 2002, <http://www.fva.org/200209/story01.htm> (29/11/2004).

⁶⁰⁰ Article 19 of the *Constitution of the Socialist Republic of Vietnam* 1992 prescribe "The State sector shall be consolidated and developed, especially in key branches and areas, and play the leading role in the national economy." Article 17 of the Constitution sets forth "The land, forests, rivers and lakes, water supplies, wealth lying underground or coming from the sea, the continental shelf and the air, the funds and property invested by the State in enterprises and works in all branches and fields - the economy, culture, society, science, technology, external relations, national defence, security - and all other property determined by law as belonging to the State, come under ownership by the entire people." Article 15 of the Constitution regulates "The State promotes a multi-component commodity economy functioning in accordance with market mechanisms under the management of the State and following a socialist orientation. The multi-component economic structure with various forms of organization of production and trading is based on a system of ownership by the entire people, by collectives, and by private individuals, of which ownership by the entire people and by collectives constitutes the foundation."

the RLR cannot be fully and practically realised. Vietnam has difficulties in accommodating the RLR concerns even if legislative and judicial efforts are made, because the role of the Communist party cannot be challenged. There are considerable vested interests in the present system of exit and entry control that involve the CPV, such as possible social instability caused by the exodus of party members.

In the case of Taiwan, mainly for the purposes of national security, Taiwan has had restrictive limits on the RLR for a half century. Economic development and democratisation greatly stimulated the movement of people across its borders. The 1999 Act, focussing on the protection of the RLR was then implemented. Outstanding achievements have since occurred in regard to the RLR. Almost all prior restrictive limits have been lifted. Meanwhile, some limits on exit and entry between Taiwan and Mainland China remain, even though prohibitions on travelling to or from Taiwan have been partially cancelled. Restrictions mainly due to unchanged hostility between the two sides across the Taiwan Strait. Generally speaking, the RLR enjoyed in today's Taiwan is not less than the RLR enjoyed in other Western countries. Mainland China is on the similar course as that so far experienced by Taiwan. It is believed that the today of Taiwan will be the tomorrow of Mainland China, if no sudden change occurs in the current political situation.

Leaving aside the clear fact that USA has established an advanced regime to protect the RLR within the territory, based on a developed economy and mature political system, the US the RLR policy has been characterised, first and foremost, by ambivalence, a mood manifested in measures that both welcome and restrict the RLR. On the one hand, the US spared little effort to promote the RLR in USA and other States for "the non-negotiable demands of human dignity".⁶⁰¹ On the other hand, the US imposed limits on nationals' travelling to designated States, and aliens' travelling to the territory, so that it serves the national interest. The adoption of the National Security Entry-Exit Registration Program and the USVISIT after 11 September are convincing examples. How these conflicting policies are to be reconciled remains to be seen.

⁶⁰¹ Amnesty International, "Despite Releases, Guantanamo Remains an Affront to the Rule of Law", AI Index: the AMR 51/041/2004, <http://256.com/qrav/kerry/web.amnesty.org/library/Index> (15/11/2004).

The history of the RLR in the USA demonstrates that the assertion of the RLR has a tendency to be under the umbrella of national interest. So long as the State sense national security as being far from fully safeguarded, the tendency to limit the RLR will remain.

Four common points could be drawn from the foregoing cases studies. Firstly, the relaxation of the limits on the RLR has been instrumental as a protective measure. This has enabled the entry and exit administration to formulate law and policy that strongly protects the RLR. Secondly, express constitutional and statutory recognition of the RLR is a very important, but not necessarily indispensable, factor for the protection of the RLR. For example, the RLR is not constitutionally protected in the USA in precise terms, but is nevertheless well protected. In contrast, the Vietnamese Constitution acknowledges the RLR, but the RLR is restrictive. Thirdly, the political system and economic circumstances of a State play a vital role in improving the RLR. The more democratic the political system and the better developed the economy, the better the protection of the RLR. This is persuasively supported by the experiences of Taiwan and the USA. Lastly, it was observed that the safeguarding of national interests takes priority over pursuing of the RLR when there is an inconsistency between such interests and the pursuance of ideals.

Chapter Five

Driving factors of the RLR in China

Introduction

To systematically explain the RLR, as it exists in China, it is necessary to first analyse the motivations, or driving factors, behind the RLR in China. This chapter concentrates on the common factors of politics, economics, culture and law. The political and legal factors are the foremost and most direct factors affecting the RLR in China. The four perspectives are further divided into a host of subsidiary aspects. These include the one party system, it being one member of former communist bloc, basic economic facts, public ownership, interaction between economic development and laws governing exit and entry, the community orientated culture, loyalty (*Zhong*) and filial piety (*Xiao*), the duty orientated culture, sublation (*Yangqi*), agrarian society and geographical isolation, absence of the Constitutional foundation of the protection of the RLR, the nature of law, the aim of law, and the research on the RLR in China. The analysis here will lay a basis for understanding the development and specific issues of the RLR to be explored in the next eight chapters.

5.1 Politics

While migration can provide wide-ranging benefits, it also imposes costs. One major problem with evaluating the costs of migration in China is the way in which it affects different groups in different ways; some gain significantly, others marginally, while yet others lose. The different groups have different degrees of solidarity and political power. Thus, it needs to be remembered that it is often political power that shapes migration policy. Migration policy is related to the perceptions of those with the power to dictate policy.⁶⁰²

The Chinese political system is the communist system. Simply speaking, it determines what

⁶⁰² For example, the absence of the remedies for RLR in public affairs is consonant with the interests of government and the CPC who might control the movement of subordinates and solidify their privileges.

power and rights people can enjoy, and how they can be enjoyed. The communist political system has operated in China since 1949, when the People's Republic of China was established. This provides theoretical and political basis of the transitional market economy and Marxist legal theory and significantly affects the changing of traditional Confucian culture. Accordingly, the communist political system decides issues of the RLR in China. This first section will be divided into two parts to first consider one party reign and then consider China as one member of the former communist bloc.

5.1.1 One party reign (*Yidangzhi*)

The most marked feature of the Chinese communist political system is the one party reign of the Communist Party of China (CPC). China is ruled and controlled by the CPC. The system has been legalised in the Constitution⁶⁰³ and reiterated in important national documents.⁶⁰⁴ The State organ and armed forces⁶⁰⁵ are subordinate to the CPC; whose role is to implement the party's policies.⁶⁰⁶ The CPC's constitutionally-mandated leadership and of its having almost all top positions of the State organ or apparatus and armed forces occupied by party members,

⁶⁰³ Preamble Paragraph 7 of the *Constitution of the PRC (Amendment) 2004* stipulates "under the leadership of the Communist Party of China and guidance of Marxism-Leninism...the Chinese people of all nationalities will continue to...build China into a strong, prosperous culturally advanced, democratic socialist nation."

⁶⁰⁴ Jiang, Zemin, the former president of China, stated in his report of the 16th CPC National Congress in November 2002, that the practices of the 13 years between 1989 and 2002 demonstrates that China must adhere to the leadership of the CPC and persevere in the CPC's absolute leadership over the Army. See Jiang, Zemin, the President of the PRC, "Build a Well-off Society in an All-Round Way and Create a New Situation in Building Socialism with Chinese Characteristics: Report page 16th China Communist Party Congress (8/11/2002)", <http://www.fmprc.gov.cn/eng/37816.html> (19/07/2003).

⁶⁰⁵ State organ in China means the organ that carries out State power and runs State affairs, including organ of State power, organ of administration, judicial organ, procuratorial organ, military armies, etc, e.g. National People's Congress (NPC), the Chinese People's Political Consultative Conference (CPPCC), the State Council, the people's congresses at all levels, the people's governments at all levels, the people's Courts at all levels, the people's Procuratorates at all levels, the public security organs at all levels. See Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, *The Contemporary Chinese Dictionary (Chinese-English edition)*, Foreign Language Teaching and Research Press, Beijing, 2002, page 741. According to Article of 93 and 94 of the *Constitution of the PRC (Amendment) 2004*, the President of the PRC is also a part of the State organ.

⁶⁰⁶ Political "redness" has been used as the chief criterion for appointing cadres into the leading positions of judicial authority. See "Judiciary in Line With International Norms", *Beijing Review*, No. 49 (5-11 December 1994), pages 5-6, Quoted in Teather, David C. B. and Yee, Herbert S. (ed), *China in Transition*, Macmillan Press Ltd. London and St. Martin's Press Inc., New York, 1999, page 76.

ensures the primacy of Party Politburo guidelines and has enabled the CPC to set the broad parameters of national policy.⁶⁰⁷ The structure of Chinese State organisations is listed in Appendix 1 of this thesis.

The situation of one party reign discussed above results in the established fact that CPC vests most of interests in China. Although Article 33 Clause 2 of the *Constitution of the PRC (Amendment) 2004* set forth “all citizens of the People’s Republic of China are equal before the law”, the absolute leadership of the CPC means that, in practice, citizens’ social and political status is not independent and equal. Because the CPC is fully integrated into the State organ and important enterprises and institutions, the status of party member becomes the basic qualification to be one of ruling elite. High status within the CPC translates as having high social and political status. The Secretary-General of CPC’s Central Committee is the highest-ranking person in the central State organ, and can also be, as for example with Jiang Zemin or Hu Jintao, the President of the People’s Republic of China and chairman of the Central Military Committee. The secretary of the CPC’s provincial branch is the highest-ranking individual in the provincial State organ. It is logically accepted that the members of the CPC, especially the cadres of the CPC will further vest economic interests in China.

While too little reform creates social change and instability that might challenge those interests, too much reform can do the same. In regard to the reform relevant to the RLR, Compared with the relaxation of the restriction on the non-member of the CPC, it is acceptable that the limits over exit and entry of all party members, especial cadres of the CPC are much strict. Given the number and status of party members,⁶⁰⁸ the limits on their exit and entry equates to limits on exit and entry of the elite of Chinese society. The strict control over exit and entry of all party members is thus the foremost reason or basis for a number of issues to be discussed in later chapters of this thesis. Issues of exit and entry within public affairs will be discussed in part 8.2;

⁶⁰⁷ US Department of State, “China (Including Hong Kong and Macao): Country Reports on Human Rights Practices 2002”, <http://www.state.gov/g/frl/rls/hrrpt/2002/eap/684.htm> (2/02/2004), page 1.

⁶⁰⁸ Up to the end of 2003, the amount of members of CPC is over 68.2 million, which accounts 5.2% of the whole population in China. See “Number of CPC members in China Exceeds 68 Million”, http://english.peopledaily.com.cn/200407/01/eng20040701_148214.html (02/07/2004).

prerequisite certificates from the departments in which the applicants are employed in parts 9.3, 11.1.3 and 11.2.2 of this thesis; retention of passports by designed departments in part 8.3.3; and the right of nationals not to be exiled in part 10.4. These issues have not been subject to the reform of laws governing exit and entry, which will be discussed in chapters six and seven.

Secondly, one party reign can effectively undermine the independence of the State organ and armed forces. The absolute leadership of the CPC means that the acts of the CPC can be seen as synonymous with acts of the State organ. This may lead departments of the State organ applying CPC policy as the criteria for the practical exercise of discretionary power, and to enact regulations and rules based on CPC policy. Some relevant issues from this, to be discussed in part 9.1.2 of this thesis, concern the legitimacy of acts of the CPC in cases when public security departments are instructed to prevent individuals with knowledge of important political, military, technological, or economic secrets from exiting China.

A further influence of one party reign is that, by conformity to CPC norms, and aspirations to social status, it can reduce an individual's urge or motivation to acquire the RLR. It follows that the acquisition of a high position within the CPC is an important life goal. As a result, no effort will be spared by the individual in dealing with CPC affairs in a manner that will please more senior members, even when this means that an individuals' potential to have personal rights and freedoms is greatly reduced.

Moreover, there are no independent political powers opposing the Communist Party in China. Article 35 of the *Constitution of the PRC (Amendment) 2004* provides that the citizens enjoy freedom of association. However, the government restricts this right in practice. According to 2001 *Human Rights Report of China* released by the US State Department, the formation of truly autonomous politics, human rights, religious, environment, labour, and youth organisations that directly challenge government authority is prevented.⁶⁰⁹ The opposition party is illegal.⁶¹⁰

⁶⁰⁹ US Department of State, "China (Including Hong Kong and Macao) Country Report on Human Rights Practices for 2001", <http://www.State.gov/g/frl/rls/hrrpt/2001/eap/8289.htm> (2/02/2004), page 18.

In this circumstance, no social and political association may legally strive for the RLR on behalf of Chinese citizens. Without the support and assistance of truly autonomous social and political associations, it is very hard to produce satisfactory results in the pursuit of the RLR for citizens. The absence of independent political powers may reliably explain why the government, rather than other sources, initiate all changes of the RLR in China.

One party reign in China makes the research of the RLR from a non-Marxist perspective a sensitive topic. Citizens who seek to express openly dissenting political views continue to live in an environment of repression. Critical analysis of the RLR in China is generally prohibited. Few academic scholars in China are willing to risk their future by conducting in-depth research in relation to the RLR. It is difficult, therefore, to objectively, fairly or comprehensively understand the realities of the RLR in China. Many of the issues concerning the RLR, argued in chapters eight to thirteen, have had very little attention from academics and have been ignored by government. For that reason, the materials to support the arguments made in this thesis are in general derived from legislative provisions, reports and news items, rather than from the work of academics.

In recent years, the CPC has gradually reduced its formal involvement in government operations. This has allowed the government to exercise significant discretion in implementing policy. The CPC has continued to strengthen the capacity of members of the National People's Congress (NPC) and to reform the bureaucracy. The congresses at all levels play an increasingly independent role as a forum for local and provincial concerns, particularly as critics of local and national corruption and inefficiency.⁶¹¹ Rural and village people have been learning about the practice of local elections.⁶¹²

⁶¹⁰ The CPPCC is a key institution for multi-party cooperation and political consultations under the leadership of the CPC, a Chinese people's patriotic united front organization, and a major channel for promoting socialist democracy. See "CPPCC Annual Session Opens (03/03/2002)", <http://www.fmprc.gov.cn/eng/26138.html> (19/07/2003).

⁶¹¹ "Chinese President Calls For Developing Socialist Democracy", http://english.peole.com.cn/200409/21/eng20040921_157751.html (22/09/2004).

⁶¹² "China to Further Promote Grass-roots Democracy", http://english.peopledaily.com.cn/200405/29/eng20040529_144736/html (31/05/2004).

Although these reforms touch on an important and sensitive issue in China — of political democracy — the CPC unfortunately fails to provide a valid answer to the question of democracy. This is because all democratic reforms are based on one party reign that, on the one hand can help reformers to popularise limited reform measures, so to safeguard the long-term interests of the CPC but, on the other hand, do not allow comprehensive reform from the perspective of the State rather than the Party which could undermine the status of the CPC.⁶¹³ For this reason, the absolute leadership of the CPC over the State organ and armed forces will not be changed in the near future. One party reign will continue to be a fundamental factor which restricts the improvement of the RLR in China.

5.1.2 China as a member of the former communist bloc

Despite of the collapse of the USSR and Eastern European communist countries in 1989, and China's commencement of the transition from a planned economy to a free market economy, we still find that the former socialist bloc casts dark shadows over Chinese exit and entry laws. C. P. Fitzgerald has suggested that the impression the USSR made on China was immense.⁶¹⁴ Some exploration of the former socialist bloc may help to understand why the starting point and theme of exit and entry administration are designed to control, rather than to ensure that citizens enjoy the RLR.

Historically, all newly established communist regimes imposed strict emigration controls, which were kept in place until drastic political and economic changes occurred. Migration from communist countries to countries with established market economies was practically forbidden. Migration between communist countries occurred on a very limited scale and was usually not described as migration, but as temporary transfers of manpower for the coordinated use of the

⁶¹³ As Zhu, Rongji, the then premier stressed in his *Report on the Work of the Government 2002*, “the remarkable achievements in China’s economic and social development in 2001...are attributed to the correct policy decisions and timely measures taken by CPC Central Committee...” See Zhu, Rongji, Premier of the State Council, “Report on the Work of the Government 2002 (16/03/2002)”, <http://www.fmprc.gov.cn/eng/26804.html> (19/07/2003).

⁶¹⁴ Fitzgerald, C.P., *The Chinese View of their Place in the World*, Oxford University Press, Amen House, London, E.C.4 1964, page 44.

productive resources of friendly countries.⁶¹⁵ Although the former USSR recognised the RLR in its Constitution and ratified the ICCPR and the CERD in 1973 and 1979, it actually imposed numerous superfluous requirements on those applying for exit and entry.⁶¹⁶

After the civil war from 1946 to 1949, which destroyed the Republic of China on the Mainland, and as a new socialist system was being built, China faced enormous economic problems and sought foreign help. The former USSR, Bulgaria, Romania, Hungary, North Korea and Poland successively established diplomatic relationships with and offered assistance to the new People's Republic of China, all within just six days of its establishment⁶¹⁷ The Western countries that had imposed sanctions on the PRC during the 1950s and 1960s.⁶¹⁸ Chinese people were called upon to follow in the footsteps of established communist countries, especially the former USSR. Mao Zedong exhorted that, "the Communists of the USSR are our best teachers, so we must learn from them".⁶¹⁹ Although China tried to relax its hostile relationships with Western nations during this period, diplomatic ties were not improved until

⁶¹⁵ The United Nations, *International Migration Policies and Programs: A World Survey*. Sales No. E.82.XIII.4, page 35.

⁶¹⁶ (1) Having close relatives abroad is almost a prerequisite for obtaining permission to leave the USSR. The applicant will typically be asked to supply an invitation from close relatives, although the degree of closeness is not clearly defined. The relative, in return, must see that the invitation-called a *vyzov* is properly notarised; sometimes, OVIR also requires authentication of notarised invitation, which means the relative must get the original notarisation certified by government officials. (See Washington: Government Printing office, *Senate Hearings on Soviet Pentecostals Residing in the U.S. Embassy in Moscow*, 19 November 1981, ser. J-97-82, page 125); (2) Applicants are required to fill out long questionnaires asking for all sorts of information, such as whether they belong to the Communist Party; (3) Applicant must present references/a certificate of good character from their place of employment, signed by the director of the institution, the local party secretary, and the secretary of the trade union. (Chalidze, Valery, *To Defend These Rights*, Random House, New York, 1974 page 98-99); (4) Persons not intending to return must also present a document showing their parents' attitude toward the requested departure and, if the spouse is staying behind, an affidavit of spousal agreement. (See Magstadt, Thomas M., *Emigration and Citizenship: Implications for Soviet-American Relations*, page 6.

⁶¹⁷ "The Lists of the Countries having Diplomatic Relationship with the PRC" (*Yu Zhongguo Jianjiao Guojia Yilanbiao*), <http://www.fmprc.gov.cn> (2/02/2004).

⁶¹⁸ The USA Congressional –Executive Commission on China, "The People's Republic of China", <http://www.cecc.gov/pages/virtual/Acad/his/prc.php> (04/01/2005)

⁶¹⁹ Shen, Chen, "Language and Culture: Two Goals of Foreign Language Teaching in China, Lessons from History and Perspectives for the future", *Australia Review of Applied Linguistic* 12 / 2, 1989, page 51.

the 1970s, when Italy, the UK, Japan, Germany, Australia and the USA recognised the PRC.⁶²⁰

For a time, Soviet culture was the only foreign culture that impacted on China. In the 1950s laws of the former USSR governing exit and entry were followed when the PRC devised its own laws. Enemies of the State were allegedly so pervasive and menacing that security could only be achieved through State-enforced unity, order, solidarity, and discipline. The collective imperatives of internal order and national defence took precedence over individual freedom. Hence, the RLR is practically denied in China, which imposed repressive migration policies similar to all communist countries. By 1958, diplomatic relations between the PRC and the USSR had cooled. Even though Chinese jurists at that time tried to break away from Soviet influences, no essential changes were made.

By the late 1980s and early 1990s, the Cold War had ended, drastic political and economic changes occurred in Eastern Europe and the former USSR, and the communist bloc had disintegrated. The hostile relationship between communist and Western countries had greatly eased. Some former Eastern European communist States have become members of the European Union (EU) and North Atlantic Treaty Organisation (NATO). Since the late 1980s, some communist countries began to soften their grip on the foreign travel of their citizens, or became more lenient to the demands of members of certain ethnic groups to emigrate. The UN summarised in *International Migration from Countries with Economies in Transition: 1980-1999*, that in the late 1980s and early 1990s, “most legal restrictions to migration were lifted and became practically non-existent.”⁶²¹

However, with no drastic political change in China having occurred, improvements of the RLR in China have been considerably less effective than those in former communist countries. After the death of Deng Xiaoping in 1997, Jiang Zemin announced that he would continue with

⁶²⁰ “The Lists of the Countries having Diplomatic Relationship with the PRC” (*Yu Zhongguo Jianjiao Guojia Yilanbiao*), <http://www.fmprc.gov.cn> (2/02/2004).

⁶²¹ Population Division, Department of Economic and Social Affairs, United Nations Secretariat, *International Migration from Countries with Economies in Transition: 1980-1999*, ESA/P/WP.176, New York, 2002, 123 pages, page 5.

Deng's reforms, including the reform of the political structure. However, as the Australian Department of Foreign Affairs and Trade stated in 2003, "there was little evidence of political liberalisation."⁶²² Compared with the historical development of former communist countries' laws governing exit and entry of citizens, there is a long way to go before the RLR in China moves from the strict repression of the past to full liberalisation.

5.2 Economics

5.2.1 Basic economic factors

The Chinese economy is complex, unique and difficult for foreigners to understand. The largest population, economic underdevelopment and regional economic disparities are basic economic factors that China must face. In 2002, the Chinese population was approximately 1.3 billion, or 21 percent of the world's population.⁶²³ Premier Wen Jiabao explained that problems caused by China's vast population as being that:

Any small individual shortage, if multiplied by 1.3 billion, becomes a big, big problem. Any considerable amount of financial and material resources, if divided by 1.3 billion, becomes a very low per capital level.⁶²⁴

China's per capital GDP stood at a mere US\$911 in 2001, a far cry from developed countries, such as Japan, where the per capita GDP was US\$32,535.⁶²⁵ Of the 129 countries covered by the World Development Report, China ranked 76th on per capital GDP.⁶²⁶ According to official

⁶²² Australian Foreign Affairs and Foreign Trade Ministry, "the People's Republic of China: Country Information," http://www.dfat.gov.au/geo/china/cb_background.html (22/10/2003).

⁶²³ "Population and Development Indicators for Asia and the Pacific, 2002", http://www.unescap.org/pop/data_sheet/2002/tab1.htm (23-05-2003).

⁶²⁴ "The Premier of Wen, Jiabao Accepted the Interview of the Chief-editor of *Washington Post*" (*Wenjiabao Zongli Jieshou Huashendun Youbao Zhubian Caifang*), 23 November 2003, <http://www.fmprc.gov.cn/chn/zxxx/t44934.htm> (04/12/2003).

⁶²⁵ World Bank calculations based on purchasing power parity reckon that China's per capital GDP in 2004 equals Japan's level in 1950. See "Analysis: Will China's Growth Sustain 30 More Years?" http://english.people.com.cn/200411/08/eng20041108_163104.html (15/11/2004).

⁶²⁶ Quoted in Kwan, Chi Hung, "China in Transition: How Far is Coastal Behind the Industrialized Countries? An Analysis Based on Purchasing Power Parity (August 2002)", <http://www.rieti.go.jp/en/china/02080901.html> (2/02/2004).

Chinese statistics:

There are still 30 million farmers lacking food and clothing, 23 million city-dwellers living on a subsistence allowance, and 60 million disabled and handicapped people in need of social security aid.⁶²⁷

At the same time, economic growth differs from region to region.⁶²⁸ In 2000, the per capita GDP for China was US\$849,⁶²⁹ whereas in Shanghai it was US\$4,180,⁶³⁰ and urban per capita income was 2.7 times that of rural per capita income.⁶³¹ In 2001 the US State Department reported that the economic disparity between coastal and inland regions, and between urban and rural areas continued to widen.⁶³² Premier Wen Jiabao predicted that China's economy would deteriorate unless this disparity could be resolved.⁶³³

In the light of these three basic economic factors, the Chinese government has been concerned with instability caused by extensive reform. Jiang Zemin has pointed out that “stability is a prerequisite for reform and development,” and that reform and development should occur “amidst social stability”.⁶³⁴ In order to avoid or reduce the possibility of instability, the government has seldom embarked on sweeping reforms over a short period. The gradual nature

⁶²⁷ Wen, Jiabao, the Premier of the State Council, “Turning Yours Eyes to China”, Speech at Harvard University on 11th December 2003, <http://www.fmprc.gov.cn/eng/zxxx/t56076.htm> (19/12/2003).

⁶²⁸ “Foreign Ministry Spokesman’s Press Conference on September 3 2002”, <http://www.china-botschaft.de/ger/34525.html> (17/11/2003).

⁶²⁹ “Shanghai Per Capita GDP Exceeds US 4,000 dollars, 1st January 2001”, *The People’s Daily*, http://fpeng.peopledaily.com.cn/200101/01/eng20010101_59339.html (2/02/2004).

⁶³⁰ “China’s GDP Predicted to Top US\$1 Trillion: SIC, 2 November 2000”, *The People’s Daily*, http://fpeng.peopledaily.com.cn/200011/02/eng20001102_54181.html (2/02/2004).

⁶³¹ US Department of State, “China: Country Report on Human Rights Practices 2001”, <http://www.State.gov/g/frl/rls/hrrpt/2001/eap/684.htm> (2/02/2004), page 1.

⁶³² US Department of State, “China: Country Report on Human Rights Practices 2001”, <http://www.State.gov/g/frl/rls/hrrpt/2001/eap/684.htm> (2/02/2004), page 1.

⁶³³ “The Premier of Wen, Jiabao Accepted the Interview of the Chief-editor of Washington Post” (*Wenjiabao Zongli Jieshou Huashendun Youbao Zhubian Caifang*), 23 November 2003, <http://www.fmprc.gov.cn/chn/zxxx/t44934.htm> (04/12/2003).

⁶³⁴ Jiang, Zemin, the President of the PRC, “Build a Well-off Society in an All-Round Way and Create a New Situation in Building Socialism with Chinese Characteristics: Report page 16th China Communist Party Congress (8/11/2002)”, <http://www.fmprc.gov.cn/eng/37816.html> (19/07/2003).

of reform is also obvious in relation to the reform of exit and entry laws and administration. The biggest overhaul will be gradually implemented between 2002 and 2005. Pilot reform projects were initially carried out in relatively developed areas, such as Guangdong, where some limits on the RLR were eased for the purpose of a trial. The introduction of this process into all medium and large cities will be discussed in part 7.2.2 of this thesis.

Regional economic disparities relate especially to exit and entry administration of the HKSAR and MSAR, and to the emigration intermediary agencies. Only residents in Guangdong, Shanghai and Beijing, of all 33 provincial administrative areas, can freely travel to and from the HKSAR and MSAR. In various provincial administrative areas, the requirements for the application for exit can vary, which will be discussed in part 7.2.3 of this thesis. The establishment and operation of the emigration intermediary agencies is explained and analysed in part 12.3.2 of this thesis.

The size of China's population also affects the administration of permanent residency. According to an OECD report in 2001, when compared to other countries where foreigners are granted permanent residency to fill labour shortfalls, China has a large labour force and low labour costs.⁶³⁵ China, in protecting its own workforce, has therefore not sought to attract external labourers. China's policies with respect to the return of overseas Chinese citizens are addressed in parts 10.1, 10.2 and 10.3 of this thesis, in which it is noted that financial independence, rather than nationality is the key determinant in granting permission to resettle.

5.2.2 Socialist public ownership of the means of production and a transitional economy

Article 6 of the *Constitution of the PRC (Amendment)* 2004 stipulates:

The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.

⁶³⁵ Chapter 4. China, the OECD, *Migration and the Labour Market in Asia: Recent Trends and Policies*, the OECD, Paris 2001.

Socialist public ownership of the means of production is also called State ownership. In theory, everyone is the owner of social resources. The task of China's parliamentarians is not to decide what resources the government should own, but how the government utilises those resources effectively.⁶³⁶ Under this system, individuals and private businesses are not completely independent participants in the economic interests of China.

Before reform and opening up, the 'binding net' between individuals and working units (*gongzuo danwei*) was the most important channel through which individuals could participate and co-operate in social activities. Individuals did not have the right to own or deal with resources. Every working urban resident belonged to a public working unit, since the State owned all working units. These working units provided their employees with cradle-to-grave welfare guarantees and pensions. In turn, the working units approved almost all acts of their employees, including their employees' applications to go abroad. These 'binding nets' effectively turned employees into *de facto* appendages to their working unit. The approval requirements constituted a general violation of individual rights by the State, and controlled personal mobility. There was little ground to challenge the extensive exercise of public power by working units during this period, in relation to private affairs. Consequently, it is not meaningful to discuss the RLR or other rights during this period. Because exit and entry policies were those of the working units, this partially explains why there were so few laws governing the processing of the applications for exit and entry between 1949 and 1985, which will be discussed in parts 6.3 and 6.4 of this thesis.

China officially embraced market economics and abandoned the planned economy after the constitutional amendment of 1993. Foreign industries were legal in 1979 when the *Law on Chinese and Foreign Equity Joint Ventures* was promulgated, and private industries were legal after the constitutional amendments of 1988.⁶³⁷ After that time private industries and the

⁶³⁶ Shih, Chih-yu, *Collective Democracy Political and Legal Reform in China*, The Chinese University Press, 1999, page 54.

⁶³⁷ "Citizens' legal private property is inviolable" was inserted as Article 13 Clause 1 when the Constitution was further amended in 2004.

extent of foreign investment greatly developed. In 2002, “the non-State sector accounted for more than 70 percent of China’s gross industrial output”.⁶³⁸ As of December 2003, 80 million persons were employed in private industry. Private firms contributed 23 percent of yearly GDP growth, and 65 percent of exported products were made by enterprises supported by foreign investment.⁶³⁹

The flourishing non-State sector has cultivated a new workforce beyond the working unit framework. Restructuring of the State sectors, including the streamlining of government offices and mass lay-offs from State enterprises, has left a great number of people without a working unit. Working units no longer form a binding net that covers all working people. The development of non-State industry provides an economic basis upon which to cancel the requirement of working unit approval for an application to leave China, which will be discussed from different angles in parts 9.3, 10.1.2, 11.1.3 and 11.2.2 of this thesis. A goal of the reform strategy is to enable a person to access a passport on demand. This will become more feasible if the structure of the working unit is further weakened.

Extensive development of private industry has fostered awareness among employees of their rights and interests. More Chinese people are growing rich, and are no longer dependent on the State. They will have increasing control over their own lives, particularly as they can enjoy private ownership. Increasing public awareness of individual legal rights and interests will cause people to doubt the legitimacy of their working units’ control over intrinsically personal affairs which in effect limit the RLR, which will be discussed in part 9.3 of this thesis.

5.2.3 Interaction between economic development and laws governing exit and entry

Three key events have made China increasingly open to the world: the 1978 new policy of reform; the establishment of a socialist market economy as the goal of reform in 1992; and

⁶³⁸ Australian Foreign Affairs and Foreign Trade Ministry, *The People’s Republic of China: Country Information*, http://www.dfat.gov.au/geo/china/cb_background.html (22/10/2003).

⁶³⁹ “The Premier of Wen, Jiabao Accepted the Interview of the Chief-editor of *Washington Post*” (*Wenjiabao Zongli Jiashou Huashendun Youbao Zhubian Caifang*), 23 November 2003, <http://www.fmprc.gov.cn/chn/zxxx/t44934.htm> (04/12/2003).

China's entry into the World Trade Organisation (WTO) in 2001. China achieved an average annual GDP growth of above 9 percent from 1978 to 2003, a stunning record worldwide.⁶⁴⁰ These economic achievements have created suitable conditions for the advancement of the RLR in China, and had a profound effect on the extent to which the right operates.

1978 reform policy

The economic boom in China started with the implementation of Deng Xiaoping's economic reform policy in 1978. The demand for international integration has followed from the pattern of sustained economic development since then. The *Law on the Control of Exit and Entry of Citizens* (PRC), the *Law on the control of Exit and Entry of Aliens* (PRC) and their detailed rules of the implementation, were introduced in 1985 and 1986 to aid in the assessment of the numerous applications to leave China. Article 1 of the *Law on the Control of Exit and Entry of Citizens* 1985 (PRC) provides that "this law is formulated with a view ... to promote international exchange." Article 1 of the *Law on the Control of Exit and Entry of Aliens* 1985 (PRC) sought to "facilitate international exchange" as one of its three legislative purposes.

The establishment of a socialist market economy as the goal of reform in 1992

Learning from the lessons of the drastic political and economic changes in Eastern Europe and the former USSR, in 1992 the CPC opted to establish a socialist market economy. Its establishment consolidated close links between China and the rest of the world and resulted in a doubling of the number of Chinese people leaving China. The number of emigration intermediary agencies mushroomed in response to demand. At the same time, the dramatic growth in the number of people wishing to exit and exit the territory raised a great number of issues. The laws governing exit and entry and the RLR began to be improved after 1994, "In order to be suitable for reform and opening up and the development of [the] socialist market

⁶⁴⁰ "Analysis: Will China's Growth Sustain 30 More Years?"

http://english.people.com.cn/200411/08/eng20041108_163104.html (15/11/2004).

economy.”⁶⁴¹ Laws governing intermediary agencies were hastily enacted.

The entry to the WTO in 2001

With membership of the WTO in 2001, China reached a new phase in its embrace of the global economy.⁶⁴² It now needed both talented people from overseas to enter, and its own citizens to go abroad — the reforms of exit and entry served this purpose exactly. In November 2001, ten days after China joined the WTO, the biggest overhaul in the history of Chinese migration law was announced, which will be discussed in part 7.1 of this thesis. The reforms, just as China promised to open its market to the outside world, helped China to open its door for its own people.

5.2.4 Impacts of the limits of the movement within the territory on the RLR

Under the household registration system established in 1958, to be discussed in part 6.3.1 of this thesis, movement within China is prohibited. It has been accepted that if an individual could not freely move within China, he or she seldom considered overseas travel. This was particularly true for residents in remote areas in China who may have had feelings of trepidation about leaving China. The household registration system led to the prohibition of non-registered resident area applications, which will be discussed in part 8.3.1 of this thesis. The requirements of household registration after returning to China, will be discussed in part 10.1.3, and the requirements of household deregistration before leaving China, will be discussed in part 9.4 of this thesis.

Undoubtedly, the outdated household registration system became a barrier to the free-flow of human resources needed by a market economy and globalisation. As Cai Fang, director of the

⁶⁴¹ Article 1 Clause 1 of the *Explanation of the Enforcement of the Amendment of Two Detailed Rules of the Implementation 1995* (PRC) (Zhixing Liangge Shishi Xize Xiuding Neirong De Shuoming), promulgated by the Ministry of Public Affairs on 13th February 1995 and effective on the same day. See also the *Detailed Rules of the Implementation of Law on the Control of Exit and Entry of Citizens 1985* (PRC) and the *Detailed Rules of the Implementation of Law on the Control of Exit and Entry of Aliens 1985* (PRC) which were separately revised in 1994.

⁶⁴² Zhu, Rongji, the Former Premier of the State Council, “Report on the Work of the Government 2002 (16/03/2002)”, <http://www.fmprc.gov.cn/eng/26804.html> (19/07/2003), page 16.

Population institute of the Chinese Academy of Social Sciences, has argued, the outdated household registration system had long been blamed for the inefficient distribution of human resources, resulting in an excessive concentration of people in urban areas and a ‘brain drain’ from developing areas.⁶⁴³ For this reason, a new household registration system was implemented in 2001 under the *Circular of the State Council on Transmitting the Opinions of the Ministry of Public Security Concerning the Expedition of the Small Town Registered Residence Management System Reform*. This allowed all rural residents and non-natives, (who have a legal and static dwelling place, a stable occupation and source of income) and their families, to apply for permanent residence in urban area towns where they work and live. By the end of 2001, several provinces, such as Jilin, Hunan, Guangdong, Fujian and Liaoning, had abolished the division between agricultural and non-agricultural household categories.⁶⁴⁴

The right to freely move within China will create the conditions for the individual awareness and enjoyment of the RLR. The relaxation of the prohibition of non-registered resident area applications is discussed in part 7.2.3 of this thesis, alongside the cancellation of the deregistration of individuals who have been abroad for more than one year,⁶⁴⁵ and the establishment of a mutual information network that combines exit and entry information and household registration management during 2005.⁶⁴⁶ However, as Bao Suixian, deputy director of the Public Security Bureau of the MPS, emphasised in 2002, the registered residence management system will continue to exist for a long time, as it is an important component of China’s administrative management.⁶⁴⁷ Restrictions on the RLR related to household registration can be predicted to remain in the near future.

⁶⁴³ Quoted in “Residence System Reform Speeds up Human Resources Flow,” 31 October 2001, *The People’s Daily*, http://english.peopledaily.com.cn/200110/31/eng20011031_836216.html (30/12/2003).

⁶⁴⁴ “China to Cut Limits on Population Mobility,” 26 February 2002, *The People’s Daily*, http://english.peopledaily.com.cn/200202/26/eng20020226_909816.shtml (30/12/2003).

⁶⁴⁵ “Reforms Make Life and Travel Much Easier”, 8 August 2003, *The China Daily*, http://www1.chinadaily.com.cn/en/doc/2003-08/08/content_252954 (19/12/2003).

⁶⁴⁶ “State to Simplify Entry-exit Rules”, 11/22/2002, *The China Daily*, <http://www1.chinadaily.com.cn/news/2001-11-22/44711.html> (18-04-2003).

⁶⁴⁷ “MPS: China’s Registered Residence Management System Will Not Be Abolished”, 26 February 2002, *The People’s Daily*, http://english.peopledaily.com.cn/200202/26/eng20020226_91010.shtml (30/12/2003).

5.3 Culture

Apart from political and economic factors, the RLR in China is widely influenced by culture. Without doubt, the very heart of Chinese culture is Confucianism. Confucianism has existed for more than 2,500 years.⁶⁴⁸ Although countless dynasties and governments have changed hands, the reverence paid to Confucianism has never waned. In Confucianism, the position of the individual in the society is relative independent in comparison with the in Christianity. A man in Confucianism must pay more loyalty to the State and his/her family than in Christianity. Confucianism pays more attention to the duty than right. Confucianism's attitude to the foreign cultures is sublating (from Hegelian philosophy, to put aside but not wholly dispense with). The existence and influences cannot be divorced from Chinese agricultural civilisations, its geographical environment. An analysis of the influences of Confucianism on the RLR in China might be achieved by above main elements.

5.3.1 The community-orientated culture

Western democratic systems stress individuality, privacy, diversity, and protection of the individual from undue outside interference. A person should have freedom of movement, and then ask under what circumstances this freedom may be restricted. The traditional Chinese approach has been quite different.

Chinese traditional social mores have revolved around Confucian philosophical norms and ideals. Confucianism advocates the rule of rites and traditional ethics. Everyone forms part of a patriarchal social network, and has a node in the broader homogeneous structure. All nodes, which consist of the three cardinal rules (*Sangang*) and the five cardinal virtues (*Wuchang*), are inextricably interrelated by a number of threads. The three cardinal rules are that a monarch rules over the subjects (*Junjun chenchen*), a father rules over his child (*Fufu zizi*), and a husband rules over his wife (*Fufu qiqi*). The five cardinal virtues are benevolence (*Ren*), dutifulness (*Yi*), decency (*Li*), knowledge (*Zhi*), and faithfulness (*Xin*). Everyone must obey their fixed social

⁶⁴⁸ "In China, Confucius started in about 520. B.C. to disseminate knowledge of benevolence (*ren*) and decency (*Li*), and persists for decades." Yu, Shutong and Wen, Jia (ed), *A New Chinese-English Law Dictionary (Xin Hanying Faxue Cidian)*, Publishing House of Law, Beijing, 1998, page 1250.

position within the three cardinal rules and the five cardinal virtues. This position cannot be altered. Individuals, who are closely intertwined in this structure, are taught that it is their duty to suffer their treatments.

Chinese culture appreciates the importance of individuals but places greater emphasis on how a person functions within the context of a larger group.⁶⁴⁹ In the Chinese language, the term for ‘individuals’ (*Geren*) has the same meaning as ‘oneself’ (*Ziwuo*).⁶⁵⁰ The term for ‘oneself’ often connotes selfishness (*Zisi*), and is frequently used as a contrast to the term ‘public’ (*Gong*) and ‘collective’ (*Jiti*), which implies the ‘common’ (*Gonggong*).⁶⁵¹ Preference for the larger collective unit over the individual continues into the present day, although there are certainly groups in China who are defined by loyalties other than kinship and hold to Communist rather than Confucian ideology. As Sun Changjiang has stated:

In this social order, neither man nor one’s personality is free. There is no true respect towards people, since one cannot speak of man’s independence when there is no independent individual.⁶⁵²

The Australian Human Rights Centre has observed that the core of Confucianism puts the emphasis on community. Within such an environment, a code of ethics has evolved which places a duty on the individual to uphold group harmony, even if this necessitates suppression or subordination of individual claims and grievances.⁶⁵³ In this context, the RLR based on the independence of individual, is hardly to be recognised by the society.

⁶⁴⁹ Li, Victor, “Human Rights in a Chinese Context”, in Lee, Tahirih V. (ed), *Law, the State and Society in China*, Garland Publishing Inc., New York, 1997, page 226.

⁶⁵⁰ Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, *The Contemporary Chinese Dictionary (Chinese-English edition)*, Foreign Language Teaching and Research Press, Beijing, 2002, page 656.

⁶⁵¹ Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, *The Contemporary Chinese Dictionary (Chinese-English edition)*, Foreign Language Teaching and Research Press, Beijing, 2002, pages 667 and 668.

⁶⁵² Sun, Changjiang “Chinese Society, Chinese Confucianism, and the Modernisation of China”, at Krieger, Silke and Trauzettel, Rolf (ed), *Confucianism and the Modernization of China*, v. Hase & Koehler Verlag, Mainz, Eschwege, Germany, 1991, pages 393.

⁶⁵³ Australian Human Rights Centre, “Human Rights in Taiwan: Issues for the 21st Century”, http://www.ahrcentre.org/reports/Human_Rights_in_Taiwan.htm (04/09/2003).

5.3.2 Loyalty (*Zhong*) and filial piety (*Xiao*)

Loyalty and filial piety, which link the principle of benevolence and the action, are the two most important concepts of traditional Confucian ethics. Loyalty is the root of social morality, and usually interpreted as meaning sincerity, conscientiousness, or the exhaustion of one's self in the performance of one's moral duties. Those who ignored the country's interests but instead keenly pursued individual wealth and blindly obeyed the orders of the monarch were considered 'traitors'.⁶⁵⁴ Travel might expose Chinese inhabitants to other ideas and wider horizons, which may challenge the established social and ideological structures. Chinese leaders routinely punish political dissidents by imprisonment or exile on the grounds that dissent and disloyalty are indistinguishable.

Filial piety is the foundation of familial ethics, and should be a desire of one's innermost heart and practiced with respect and sincerity to one's parents. According to *Analects*, the bible of Confucianism, a child should keep oneself at one's parents' side at all possible times and try one's best to refrain from distant travels, in order to relieve their anxiety. Confucius said, "While his parents are alive, the son may not go abroad to a distance. If he does go abroad, he must have a fixed place to which he goes."⁶⁵⁵

The doctrines of loyalty and filial piety have been important factors in maintaining the stability of Chinese government and family. These doctrines provided good reasons to persuade people never to move away from the State or one's ancestral home, in other words to deny the RLR. Seeking settlement elsewhere was unwelcome. The act of an individual leaving home voluntarily was one of disloyalty (*Buzhong*) to the monarch and one of filial non-piety (*Buxiao*) to the parents. Any voluntary departure amounted to rejection of the family; and life as an exile from home was a serious form of punishment. Migration was simply not an option, only sojourning on official duty, or as a trader, was permissible.

⁶⁵⁴ Lee, Cheuk-yin, "the Dichotomy of loyalty and Filial Piety in Confucianism: Historical Development and Modern Significance", at Krieger, Silke and Trauzettel, Rolf (ed), *Confucianism and the Modernization of China*, v. Hase & Koehler Verlag, Mainz, Eschwege, Germany, 1991, page 99.

⁶⁵⁵ *Analects*, Chapter XIX, quoted at Chen, Lifu, *The Confucian Way: A New and Systematic Study of "the Four Books"*, translated from the Chinese by Liu, Shih Shun, KPI Limited, London, 1986, page 382.

As a consequence, “China is a country without a tradition of voluntary migration.”⁶⁵⁶ *Yimin* which today translates to “migrant” and literally means “moving people” comes from two phrases, “moving” (*Yi*) and “people” (*Min*), which imply an official decision to have people moved — either to strengthen defences on the border or to respond to changing economic demands. Chinese regarded their emigration as a temporary sojourn (*Qiao*),⁶⁵⁷ or as the beginning of the idea of ‘overseas Chinese’ (*Huaqiao*), and would generally leave his wife and children at home to reaffirm his links with the village.⁶⁵⁸ Chinese people believe that people residing elsewhere will finally return to their ancestral home (*Yeluo Guigen*).⁶⁵⁹ If they did not, officials and even members of the family would treat them as vagabonds, outlaws, or a threat to social order. The term ‘overseas Chinese’ become politically loaded in order to encourage the Chinese so described to be loyal and patriotic to China.⁶⁶⁰

5.3.3 The duty orientated culture

Western culture has nurtured the concept of inherent and sacred individual rights. The Confucian code of ethics, which places emphasis on duty, does not mean that there is no the conception of right in China. However, the concept of a ‘right’ in China is different to the Western notion. The Chinese term that corresponds to the concept of a right is *quanli*. The Chinese character ‘*quan*’ seems to have the meaning ‘just’, when it is used as a standard for the measurement of affairs and things. The traditional use of the term *quanli* relates to authority, power and profit, rather than the modern sense of ‘rights’.⁶⁶¹ The modern term *quanli*, by which

⁶⁵⁶ Wang, Gungwu, *Don't Leave Home: Migration and The Chinese*, Times Academic Press, Singapore, 2001, pages 8-9.

⁶⁵⁷ Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, *The Contemporary Chinese Dictionary (Chinese-English edition)*, Foreign Language Teaching and Research Press, Beijing, 2002, page 1549.

⁶⁵⁸ Buggy, T.P., *Chinese Immigration and the Emergence of an Australian Image of China 1848-1861*, the thesis of Master of Arts Macquarie University, 1978, pages 19-20.

⁶⁵⁹ Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, *The Contemporary Chinese Dictionary (Chinese-English edition)*, Foreign Language Teaching and Research Press, Beijing, 2002, page 2239.

⁶⁶⁰ Wang, Gungwu, *Don't Leave Home: Migration and The Chinese*, Times Academic Press, Singapore, 2001, pages 38 and 144.

⁶⁶¹ Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, *The Contemporary Chinese Dictionary (Chinese-English edition)*, Foreign Language Teaching and Research Press, Beijing, 2002, page 1595.

the modern concept of rights is expressed,⁶⁶² seems to be relatively recent creation.

Rights and obligations in Confucianism are reciprocally preconditioned, yet arise from a different relation to both culture and the natural world. Confucian culture focused on obligation (*Quanli Yiwuhua*). Confucianism gives rise to the assumption that man is born with the virtue (*Renzhichu, Xingbenshan*). Virtue obliges one to respect fellow members of the human race and all other living things in the natural world. Rights are relative and conditioned by circumstances. The Confucian concept of rights and obligations can only be seen by examining how, when, where and with what presupposed conditions they function in relation to social relationships as a whole. Dr. Sun Longji, an American professor in history has a quite brilliant exposition regarding the relationship between the parents and the kids in Western culture. He found that the Western people focused on the independence of the kids, the relationship between the parents and the kids is a equal friend relationship. Granting special consideration to one's parents is from one's love rather than one's obligations.⁶⁶³ Instead the Confucian focused on the duty of the son to grant his father special consideration. Article 21 (1) of Marriage Law 2001 (PRC) expressly regulates that children shall have the duty to support and assist their parents.

The emphasis of Chinese tradition was duty.⁶⁶⁴ Kim Hyung discussed this in *Fundamental Legal Concepts of China and the West: A Comparative Study*, concluding that:

While the Western tradition in the modern period emphasised the sphere of "rights" possessed by a person, traditional Chinese thought transposed the sphere of "rights" to the sphere of "duty", that is, the right act for one to do in virtue of the right of the other person. This is the reason why the Chinese tradition appears to be without a definite concept of rights and only with an emphasis on duty. The relationship between "right" and "duty" is so intimately related in Chinese tradition that one may often be puzzled and left without a clear concept of right in the area of the rights of

⁶⁶² Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, *The Contemporary Chinese Dictionary (Chinese-English edition)*, Foreign Language Teaching and Research Press, Beijing, 2002, page 1596.

⁶⁶³ Sun, Longji, *The Deep Structure of Chinese Culture*, The Publishing House of Guangxi Normal University, Guilin, China, 2004

⁶⁶⁴ Li, Victor, "Human Rights in a Chinese Context", in Lee, Tahirih V. (edit), *Law, the State and Society in China*, Garland Publishing Inc., New York, 1997, page 226.

persons.⁶⁶⁵

The idea that rights and obligations are reciprocally preconditioned still dominates philosophical thinking in contemporary China. According to the *Contemporary Chinese Dictionary (Chinese-English Edition)*, *quanli* is defined as a “right to be performed by a citizen or juristic person and the interests he enjoys, opposed to ‘obligation’”.⁶⁶⁶ At the 58th Session of the UN Commission of Human Rights, Wang Guangya, then Vice Foreign Minister, stated that China was not in favour of the Western approach to human rights or its processes in realising human rights. He said, “While protecting individual rights, we also advocate fulfilment of social responsibilities.”⁶⁶⁷ Under such circumstance, individuals seldom question the reasonableness of the exhortation not to leave home and do not have the incentive to struggle for the RLR.

5.3.4 Sublating (*Yangqi*)

It is widely accepted that there are big differences between existing Chinese law governing exit and entry, the migration laws of the Western countries, and international norms, which are duly discussed in this thesis. The *attitude* of Chinese culture toward the migration laws of the Western countries and international norms helps to understand the motivation for, and pattern of Chinese legislative reform in this area.

The philosophy of sublating (*Yangqi*) dominates any investigation of foreign culture in contemporary China. According to the authoritative Chinese dictionary, ‘sublating’ means to, “(in metabolism (*Xinchen Daixie*)) develop what is positive and discard what is negative.”⁶⁶⁸

⁶⁶⁵ Kim, Hyung I, *Fundamental Legal Concepts of China and the West: A Comparative Study*, Kennikat Press Corp. Port Washington, the USA 1981, page 121.

⁶⁶⁶ Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, *The Contemporary Chinese Dictionary (Chinese-English Edition)*, Foreign Language Teaching and Research Press, Beijing, 2002, page 1596.

⁶⁶⁷ Wang, Guangya, “Statement by H. E. Vice Foreign Minister WANG Guangya at the 58th Session of the United Nations Commission on Human Rights, Geneva, 2 April 2002, United Nations High Commissioner For Human Rights”, <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/3D9E089928BFD46AC> (04/09/2003)

⁶⁶⁸ Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, *The Contemporary Chinese Dictionary (Chinese-English Edition)*, Foreign Language Teaching and Research Press, Beijing, 2002, page 2218.

Western scholars refer to ‘sublating’ as ‘critical inheritance’.⁶⁶⁹ ‘Sublating’ or ‘critical inheritance’ stresses the doctrine of using the foreign to serve China (*Yangwei Zhongyong*).

In modern society, the nature of migration has undergone profound changes.⁶⁷⁰ The migration laws have been changed accordingly. For instance, there has been a recent shift in emphasis from migrants with rare skills to those who are trained and educated in interchangeable skills. Although the existing legislation has been reformed to take the requirements of a modern legal system into account, it is apparent that political and administrative factors still shape the interpretation and application of existing entry and exit legislation. Without doubt, it is necessary to accept a new Western doctrine to replace the inadequate Confucian teachings and Marxist legal theory, in order to meet the need of migration law reform.

Guided by the doctrine of sublating, China selects from foreign migration laws and international norms for its own purposes. Local Chinese legal cultures, which concentrate on instrumentalism, determine the selection and influences of international norms. Chinese governments generally select laws that facilitate the control over exit and entry, rather than protect the RLR. Accordingly, although China has ratified some international conventions concerning the RLR such as the UDHR, ICESCR, CERD, CEDAW, CSR, and CRC, and acceded to the ICCPR, these conventions and foreign migration laws have had little effect on the basic normative premise underlying China’s migration law system. Existing entry and exit law remains an instrument of the CPC-led model of governance, the typical example is the denial of Western skilled migration in 1995, which will be discussed in part 12.2.2 of this thesis.

A changing tide in social attitudes has not negated the cultural norms engrained in China from centuries of Confucianism. In spite of increased public awareness of the RLR, the cultural bias has manifested a general lack of real understanding of the right in everyday life.

⁶⁶⁹ Chang, King-yuh, “Confucianism in the Republic of China and its Role in Mainland China’s Reform”, at Krieger, Silke and Trauzettel, Rolf (ed), *Confucianism and the Modernization of China*, v. Hase & Koehler Verlag, Mainz, Eschwege, Germany, 1991, page 237.

⁶⁷⁰ OECD *the Future of Migration* The secretary-general of the OECD 1986, pages 28, 33 and 34.

5.3.5 Agrarian civilisation and geographical isolation

To exhort agricultural workers not to leave home was probably common to all agricultural civilisations, as mentioned in part 2.2.3 of this thesis, because of the labour loss caused to the family and the community in rural societies. It is also not generally necessary to make contact outside in a self-sufficient society.

The discouragement from leaving home in Chinese agricultural society permeates much more deeply than in the West, because China has four millennia of agrarian history,⁶⁷¹ much longer than the history of Western agriculture societies. The agricultural population and output in China still accounts for a large proportion of overall population and national economy. According to the data released by the State Bureau of Statistics, China (SBS) in 2002, there were 782 million rural residents, accounting for 60.9% of the overall population, agriculture contributed US\$180 billion to the economy and accounted for 14.5% of GDP.⁶⁷² China is at the stage of industrialisation rather than post-industrialisation.⁶⁷³ In this context, the recognition and improvement of the RLR cannot be high on the Chinese government's agenda.⁶⁷⁴

China's geography has favoured the development of a civilisation with little or no foreign contacts. The term "China" (*Zhongguo*), which derives from two phrases, "centre" (*Zhong*) and "Kingdom" (*Guo*), means the central kingdom in the world. The traditional view was that China was the centre of the world, the sole upholder of true civilisation, and the lawgiver to the

⁶⁷¹ The first dynasty, Xia Dynasty started in 2070 BC. See Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, *The Contemporary Chinese Dictionary (Chinese-English edition)*, Foreign Language Teaching and Research Press, Beijing, 2002, page 2069.

⁶⁷² State Bureau of the Statistics, "Statistics Gazette of the People's Republic of China on 2002 National Economy and Social Development" (*Zhonghua Renmin Gongheguo 2002 Guomin Jingji he Shehui Tongji Gongbao*), 28 February 2003, <http://www.stats.gov.cn/tjgb/ndtjgb/qgndtjgb/1200302280214.htm> (30/12/2003).

⁶⁷³ "Analysis: Will China's Growth Sustain 30 More Years?" http://english.people.com.cn/200411/08/eng20041108_163104.html (15/11/2004).

⁶⁷⁴ The government affirmed in 2000, that it would "continue to put the safeguarding and promotion of the people's rights to subsistence and development on the top of its agenda, and spare no effort to develop the economy, enhance the comprehensive national strength and improve the people's access to subsistence and development" and that "[w]hile improv[ing] the people's living standards across the board, the Chinese government has attached great importance to ensuring that poverty-stricken people have enough to eat and wear." See Information office of the State Council of the PRC, *Human Rights in China 2000, White Paper of Human Rights*, Beijing, 2000, pages 1 and 3.

barbarians. This worldview facilitated the notion that China neither needed foreign allies, nor that any neighbour was worthy of being an ally. This view has not fundamentally changed. It has been adjusted to take account of the modern world, but China retains its central importance in relation to other countries.⁶⁷⁵ In light of all these cultural and demographic factors, it has been difficult to raise awareness of leaving China and settling abroad.

5.4 Law

Compared to political, economic and cultural factors, law has the most direct impact on the RLR in China. In this section, the impact of law on the RLR will be considered by considering (i) the absence of a constitutional foundation to protect the RLR; (ii) the nature of law governing exit and entry as the ‘ruling tool’ to control exit and entry; and (iii) the aim of law governing exit and entry: to control exit and entry (iv) the conflicts of laws regarding exit and entry; and (v) legal research of the RLR in China.⁶⁷⁶

5.4.1 Absence of a constitutional foundation to protect the RLR

A Constitution is a good starting point for studying the extent to which international human rights standards have been implemented by a State, because it represents a negotiated consensus of at least some dominant groups in a society on basic political questions. There are no regulations relevant to the RLR in the *Constitution of the PRC* 1982 and its four amendments.

Although Article 33 Clause 4 of the *Constitution of the PRC (Amendment)* 2004 stipulates “the State respects and safeguards human rights”, it is doubtful that the reference to “human rights” includes the RLR. The Chinese government’s understanding of right, as discussed in part 5.3.3 of this thesis, and human rights will be discussed in part 14.1.1 of this thesis, is generally different from understandings in the West. In Western society, the RLR is part of an individual’s

⁶⁷⁵ Fitzgerald, C.P., *The Chinese View of their Place in the World*, Oxford University Press, Amen House, London, E.C.4 1964, pages 2 and 52.

⁶⁷⁶ Lack of advanced legislative technique and lax law enforcement are two important issues in Chinese migration law. However they are also common issues in other Chinese branch law. The studies on these will not be the centre of RLR study. Given the length, this thesis excludes these two topics.

political rights. By contrast, the Chinese government has appealed to the international community to put more emphasis on economic, social and cultural rights and the right to development.⁶⁷⁷

If the Chinese government is inclined to recognise the RLR as an indispensable aspect of human rights, Article 33 (4) of the Constitution then raises the issue of how to interpret “respect and safeguard.” In Western societies, restrictions on the RLR must be provided by law, must be necessary for the protection of a democratic society, and must be consistent with all other rights recognised in the ICCPR, which was discussed in part 3.3 of this thesis. The Chinese government has stressed the indivisibility of rights and duties and the special characteristics of measures used to protect Chinese society.⁶⁷⁸ In March 2000, Tang Jiaxuan, the then Foreign Minister said, that “the international community should respect the measures countries take to promote and protect human rights according to their particular situation and reality”.⁶⁷⁹ The lack of constitutional recognition and protection of the RLR clearly hinders the reform of the Chinese regulatory regime governing the RLR.

5.4.2 The nature of law governing exit and entry as the ‘ruling tool’ (*Tongzhi Gongju*) to control exit and entry

The Chinese communist regime rejected the legal codes along Western lines drawn up after the fall of imperial rule and, after a brief hesitation, repudiated the Soviet communist model. The Chinese communist model has afforded a very narrow place for the law.⁶⁸⁰ From the official and popular Chinese perspective, law or juristic method is:

[A] code of conduct formulated by a legislative body, whose enforcement is guaranteed by State

⁶⁷⁷ Sha, Zukang, Chinese Ambassador of the United Nations, “China Calls for Cooperation in Human Rights Field 03/04/2003”, <http://www.cctv.com/special/1016/1/2.html> (20/05/2003).

⁶⁷⁸ Under Article 33 Clause 3 of *Constitution of the PRC (Amendment) 2004*, “every citizen is entitled to the rights, and at the same time must perform the duties, prescribed by the Constitution and the law.”

⁶⁷⁹ “Chinese FM Meets Russian Human Rights Representative (16/03/2000)”, www.fmprc.gov.cn/eng/4020.html (1/07/2003).

⁶⁸⁰ David, Rene and Brierley, John E. C., *Major Legal System in the World Today: An Introduction to the Comparative Study of Law*, 3rd edition, Stevens & Sons, 1985, page 30.

power, which embodies the will of the ruling class, and serves as one of the ruling tools.⁶⁸¹

Laws are intended to be instruments of policy enforcement to achieve the immediate policy objectives of the regime. According to Pittman B. Potter:

[Chinese] law is not a limit on State power; rather, it is a mechanism by which State power is exercised, as the legal forms and institutions that comprise the Chinese legal system are established and operate to protect the CPC and State's political power.⁶⁸²

Chinese constitutional and legal arrangements must conform to China's special circumstances, which in turn sets the conditions for policy enforcement and the justification for China's departure from international or Western legal norms.⁶⁸³

Based on above analysis, the existing exit and entry laws serve as the principle instrument of the CPC and the government to control exit and entry in China (*Xianxing Churujing Guanli Fa Shi Dang He Zhengfu Guanli Churujing De Gongju*). The discretionary powers of the exit and entry administration are hence overly broad, which will be discussed in part 13.2.1 of this thesis. Yet more seriously, the enforcement and reforms of existing laws are confined to the discourse of 'politico-legal work', in which the CPC leadership continues as a dominant player. Chen Yaotao underlined the notion that "public security organisations shall control exit and entry of aliens in accordance with the way and policy of the CPC".⁶⁸⁴ Without CPC consent, some applications for exiting China are not granted, which will be discussed in part 9.1.2 of this thesis. In analysing the relationship between research of the exit and entry administration and the CPC,

⁶⁸¹ Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, *The Contemporary Chinese Dictionary (Chinese-English Edition)*, Foreign Language Teaching and Research Press, Beijing, 2002, page 527.

⁶⁸² Potter, Pitman B., *The Chinese Legal System: Globalisation and Local Legal Culture*, Routledge, London and New York, 2001, page 10.

⁶⁸³ Zhang, Youyu, "A Constitution that Reflects the Special Characteristics of China in the Present Stage" (Yibu Juyou Xianjieduan Zhongguo Tese De Xianfa), *Chinese Jurisprudence (Zhongguo Faxue)*, 1988, No. 2, pages 36-40, Quoted in Potter, Pitman B., *The Chinese Legal System: Globalisation and Local Legal Culture*, Routledge, London and New York, 2001, page 10.

⁶⁸⁴ Chen, Yuetao, *The Writing on the Documents of the Exit and Entry Administration of Public Security Organs (Gongan Churujing Guanli Wenshu Xiezu)*, Series of the Applicable Writing of Public Security Organs (*Gongan Yingyong Xiezu Congshu*), Interior Published within Public Security Organs (*Gongan Jiguan Neibu Faxing*), the Publishing House of China University of People's Public Security, Beijing, 1999, page 7.

Wang Guoliang has observed that “research of the exit and entry administration [...] provides [...] constructive suggestions [for] reform of [the] administration of exit and entry with the CPC and the State”.⁶⁸⁵

5.4.3 The aim of law governing exit and entry: to control exit and entry

The emphasis of laws regarding exit and entry administration is control, rather than the protection of the RLR. The legal theory, together with the traditional culture, make the theme of the development of the RLR in China, discussed in chapters six and seven, inclined towards easing restrictions on the RLR rather than to protect those rights.

The *Law on the Control of Exit and Entry of Citizens* 1985 (PRC) is the most important of laws germane to the RLR in China. Article 1 of the Law provides that “this law is formulated with a view to safeguarding the legitimate rights and interests of Chinese citizens with respect to their exit from and entry into China’s territory....” There are distinctions between the RLR and ‘legitimate’ rights and interests. Article 1 permits the government to interpret the scope of the RLR in the context of “legitimate”. The opinion of Mao Fengping is representative; he has proposed that ‘legitimate rights and interests’ implies that Chinese citizens have the right to apply to exit China, provided that there is a good reason for doing so and that there are no circumstances prohibiting their exit.⁶⁸⁶ Thus, the purpose of this law is not to recognise and protect the RLR — at most, the *Law on the Control of Exit and Entry of Citizens* 1985 (PRC) could be construed as affording partial recognition and protection of the RLR.

The aims of other three most important laws regarding exit and entry, the *Law on the Control of Exit and Entry of Aliens* 1985 (PRC), the *Provisional Measures on the Control over Chinese*

⁶⁸⁵ Wang, Guoliang and Zhu, Lin, *The Administration on Exit and Entry, one of Planning Textbooks of Higher Education of People’s Police (Renmin Jingcha Gaodeng Jiaoyu Guihua Jiaocha: Churujing Guanlixue)*, Interior Published within Public Security Organs (*Gongan Jiguan Neibu Faxing*), the Publishing House of China University of People’s Public Security, Beijing, 2002, page 10.

⁶⁸⁶ Mao, Fengping, (ed), *The Explanation of the Law and Regulations Governing exit and entry and the Collections of Related Regulations (Chujing Rujing Falv Fagui Sijie Yu Xiangying Fagui Zhaibian)*, the Publishing House of Jilin Renmin, Changchun, China 1994, pages 76-77.

Citizens Travelling for Private Affairs to or from the Regions of Hong Kong or Macao 1986 (PRC), and the *Measures on the Control over Chinese Citizens Travelling to or from the Region of Taiwan* 1992 (PRC) have neglected the RLR.⁶⁸⁷ Eight Articles of the *Law on the Control exit and entry of citizens* 1985 (PRC), which accounts for 40% of all Articles of the statute and 61.5% of its substantive content, effectively limit the RLR, by using terms such as “apply to”, “approve” “certificate” or “complete the relevant procedures”. Fourteen Articles of the *Detailed Rules of the Implementation of the Law on the Control of Exit and Entry of Citizens (Amendment)* 1994 (PRC), which accounts for 57% of all Articles, and 63.6% of substantive content, limit the RLR as well. Limiting the RLR is the most simple and direct means to control the exit form and entry into China.

5.4.4 The conflict of laws regarding exit and entry

5.4.4.1 The Chinese exit and entry legislative system

It is necessary to explain the legislative system before discussing the conflict of exit and entry laws. As a first principle of difference, the sources of the RLR are multiple in China, which is inconsistent with Western norms that there is usually only one source of the RLR and administrative discretion.⁶⁸⁸

The supreme legislative authority in China is the National People’s Congress (NPC). It enacts legislation, called “*Fa Lv*” (law),⁶⁸⁹ in much the same manner as other legislatures in modern bureaucratic States. the RLR is referred to by ordinary statute. These include the *Law on the*

⁶⁸⁷ Article 1 of the *Law on the Control of Exit and Entry of Aliens* 1985 (PRC) provides “the present law is enacted for the purpose of safeguarding the sovereignty and maintaining the security and public order of the PRC and facilitating international exchanges.” Article 1 of the *Measures on the Control over Chinese Citizens Travelling for Private Affairs to or from the Regions of Taiwan* 1992 (PRC) regulates “the present measures is enacted for the purposes of safeguarding the communication of the people in the two sides of the Taiwan Straits and facilitating various sides exchanges and maintaining the social order.” There are not the provisions of legislative aim in the *Interim Measures on the Control over Chinese Citizens Travelling for Private Affairs to or from the Regions of Hong Kong or Macao* 1986 (PRC).

⁶⁸⁸ For example, in Australia, s 4(2) *Migration Act* 1958 (Commonwealth) “provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.”

⁶⁸⁹ Article 7 and 8 of the *Law of Legislation* 2000 (PRC).

Control of Exit and Entry of Citizens 1985 (PRC) and the *Law on the Control of Exit and Entry of Aliens* 1985 (PRC) which are *Fa Lv*, promulgated by the Standing Committee of the NPC.

The highest executive authority in China is the State Council. The State Council has the power to make rules, which are also regarded as a form of legislation. They are called “*Xingzheng Fagui*” (administrative provisions) as opposed to the *Fa Lv* of the People’s Congress.⁶⁹⁰ The Bureau of Legislative Affairs drafts some *Fa Gui*. Other *Fa Gui* are drafted by the individual ministries that are under the State Council’s jurisdiction, and then submitted to the Council for enactment. The *Provisional Measures on the Control over Chinese Citizens Travelling for Private Affairs to or from the Regions of Hong Kong or Macao* 1986 (PRC), and the *Measures on the Control over Chinese Citizens Travelling to or from the Region of Taiwan* 1992 (PRC) are *Xingzheng Fagui*.

Individual ministries have the power to issue various orders, directives, notifications, circulars, measures, detailed implementation rules and subsidiary rules, which are called “*Xingzheng Guizhang*” (administrative rules or regulations). The matters governed by rules are related to the enforcement of laws or the administrative regulations, decisions or orders of the State Council.⁶⁹¹ the RLR is mainly realised and improved through ministerial-level implementing of provisions, discussed in part 13.1 of this thesis, such as the *Detailed Rules for the Implementation of Law on the Control of Exit and Entry of Citizens (Amendment) 1994 (PRC)*, the *Detailed Rules for the Implementation of Law on the Control of Exit and Entry of Aliens (Amendment) 1994 (PRC)* and the *Measures for the Implementation on Preventing Defaulting Taxpayer from Exiting Abroad* 1997 (PRC).

The People's Congresses, their standing committees and the governments of provinces, autonomous regions and municipalities directly under the Central Government may, according to the specific situations and needs of their administrative regions, enact “*Difang Fagui*” (local

⁶⁹⁰ Article 56 of the *Law of Legislation* 2000 (PRC).

⁶⁹¹ Article 71 of the *Law of Legislation* 2000 (PRC).

regulations) which do not contravene the Constitution, laws and administrative regulations,⁶⁹² for example *Implementation Opinion of Shanghai Municipality on Provisional Regulations of the Establishment and Administration of Sino-Foreign Equity or Cooperative Joint Venture Employment Agency 2002* (Shanghai).

The above mentioned two *Fa Lv* should take precedence over hundreds of *Xingzheng Guizhang*; but in practice, *Xingzheng Guizhang* and *Difang Fagui* form the basis of assessing entry and exit applications and may take precedence over *Fa Lv* and *Fa Gui*. The policy contained in *Fa Lv* and *Fa Gui* only operates superficially and is therefore doomed to failure, because it can be overridden and made obsolete by implementing *Guizhang*.

Moreover, frequent updating is a distinctive feature of migration laws, while the two *Fa Lv* have not been amended since their enactment in 1985. Conflict within China's exit and entry laws is a major problem bewildering the exit and entry law community, and which creates an opportunity for government officials to become corrupt, or degenerate or abuse power for personal gain.

5.4.4.2 The conflict of laws regarding exit and entry

The conflicts of laws regarding exit and entry are serious and obvious. One example of a conflict between exit and entry laws and other Chinese laws is in the laws regarding the limits on emigration intermediary agencies. Article 14 (2) of the *Law on Administrative License 2003* (PRC) provides that:

When necessary the State Council may establish administrative license by issuing decisions. After implementation of administrative license (excluding temporary administrative license items), the State Council shall timely ask the National People's Congress and its standing committee to enact relevant laws or formulate administrative laws and regulations by itself.

Article 15 (2) the *Law on Administrative License 2003* (PRC) further provides that:

Local regulations and provincial governments' regulations shall create the administrative license of the qualification of citizens, legal persons or other organisations that should be determined by the

⁶⁹² Article 63 (1) and 73 (1) of the *Law of Legislation 2000* (PRC).

State, or administrative license or proposed administrative license of the registration of establishment of the enterprises or other organisations. The administrative license established thereby shall neither prevent the individuals or enterprises of other areas from carrying out production and operation and providing services in the local area nor prevent the commodities of other areas from entering local market.

Under the above provisions of the *Law on Administrative License* 2003 (PRC), the legal validity of the legislations governing administrative license for the establishment of emigration intermediary agencies which were promulgated by ministerial or local government regulations, will be analysed in details in Chapter 12 of this thesis, is doubtful. Nonetheless, administrative license for the establishment of emigration intermediary agencies still remain.

The other example relates to laws placing limits on the exit of individuals from China on the grounds of public order. Under *Regulations on Conscription* 2002 (Beijing), which was promulgated by the Standing Committee of the Beijing Municipal People's Congress, individuals who avoid compulsory military service shall be prohibited from exiting China for two years. Surely, the question of avoidance of military service would be a national nor a local matter. According to Article 19 of the *Law on the Control of Exit and Entry of Citizens* 1985 (PRC) and Article 27 of the *Detailed Rules of the Implementation Law on the Control of Exit and Entry of Citizens (Amendment)* 1994 (PRC), local congress is not empowered to promulgate interpretative law prohibiting the right to leave. The legal validity of the *Regulations on Conscription* 2002 (Beijing) is therefore questionable, although it plays a conspicuous role in protecting public order, and would be regarded as permissible by international standards.

The conflicts of laws regarding merits review of exit and entry administrative decisions and external remedies of violating the RLR are considerable. The legislation referred to in Appendix 2 of this thesis post dates the provisions in appendices 11 and 12, and by contrast is more sophisticated because certain elements are derived from Western States. The external remedies listed in Appendix 2 hence complement internal remedies listed in appendices 11 and 12. Article 13 and 14 of the *Law on the Control of Exit and Entry of Citizens* 1985 (PRC), for example, provides that the passport and travel certificate could be cancelled by the original issuing

authority or their authorised agencies, or declared invalid, and any person who violates that law may be given a disciplinary warning, however, under Article 15 of the same law the affected person cannot appeal against the cancellation, invalidation or disciplinary warning in either an administrative or judicial forum. Instead, Article 6 Clause 1 (1) of the *Law on Administrative Review* 1999 (PRC) and Article 6 of the *Law of Administrative Penalty* 1996 (PRC) entitles penalised persons to appeal in either an administrative or judicial forum.

Although the legislation referred to in Appendix 2 partially resolves issues, which will be discussed in parts 13.3.1 to 13.3.3 below, as regards merits review of administrative decisions and external remedies, there is a measure of inconsistency between the two forms of relief for violations of the RLR. The inconsistency is serious enough to affect the remedies for the RLR. The provisions regarding the restriction of personal freedom and an order of deportation are two typical examples.

Article 9(2) of the *Law of Administrative Review* 1999 (PRC) provides “administrative penalties involving the restriction of personal freedom shall only be created by law,” however there are many exit and entry administrative provisions restricting personal freedom, such as Articles 48 and 49 of the *Detailed Rules for the Implementation of the Law on the Control of Entry and Exit of Aliens (Amendment)* 1994 (PRC), Articles 24 and 25 of the *Detailed Rules for the Implementation of the Law on the Control of Entry and Exit of Chinese Citizens (Amendment)* 1994 (PRC), Article 26 to 28 of the *Interim Measures on the Control over Chinese Citizens Travelling for Private Affairs to or from the Regions of Hong Kong or Macao* 1986 (PRC), and Article 35 of the *Measures on the Control over Chinese Citizens Travelling to or from the Region of Taiwan* 1992 (PRC). These have been enacted by the MPS, or jointly promulgated by the MPS and MFA, or the MPS, MFA and Ministry of Communication.

According to Article 42 of the *Law of Administrative Review* 1999 (PRC), this law prevails over any other earlier inconsistent legislation. As a result, the law referred to in the preceding paragraph should be invalid. Despite this, individual departments sometimes apply the earlier inconsistent law. According to *The People’s Daily*, Chinese police detained a Japanese national,

who allegedly assisted two North Koreans and Chinese national to leave China illegally, under Article 49 of the *Detailed Rules for the Implementation of the Law on the Control of Entry and Exit of Aliens (Amendment)* 1994 (PRC).⁶⁹³ The practice of giving priority to earlier inconsistent legislation was also officially reaffirmed in 2002.⁶⁹⁴ This apparent disregard for valid and current law can affect the extent to which the RLR is realised in China.

5.4.4.3 Resolving conflicts of exit and entry laws

The issues mentioned above can be partially attributed to the inefficient resolution of conflicts between exit and entry laws. Article 5(2) and (3) of the *Constitution of the PRC (Amendment)* 2004 provides that, “the State upholds the uniformity and dignity of the socialist legal system. No laws, administrative or local rules, or regulations may contravene the Constitution”. This provision is too obscure to be practically enforced because there is a lack of attached detailed legislation.

This situation was improved by the *Law of Administrative Review* 1999 (PRC), of which Article 7 provides:

If citizens, legal persons or other organisations consider the following provisions (which the administrative departments take as the basis for their specific administrative acts) to be illegal, they may apply for examination of these provisions when applying for administrative review:

- (1) provisions formulated by departments under the State Council;
- (2) provisions formulated by local people’s governments at or above the county level and the department under them; and
- (3) provisions formulated by a township or town people’s governments.

The provisions listed in the preceding paragraph do not include rules and regulations formulated by the ministries and commissions under the State Council, and by local people’s governments. The examination of rules and regulations shall be carried out in accordance with laws and administrative regulations.

⁶⁹³ “Japanese Detained for Helping Koreans to Flee”, 14 January 2004, *People’s Daily Online*, http://english.peopledaily.com.cn/200401/14/eng20040114_132570.shtml (15/01/2004).

⁶⁹⁴ Wang, Guoliang and Zhu, Lin, *The Administration on Exit and Entry, one of Planning Textbooks of Higher education of People’s Police (Renmin Jingcha Gaodeng Jiaoyu Guihua Jiaocha: Churujing Guanlixue)*, Interior Published within Public Security Organs (*Gongan Jiguan Neibu Faxing*), the Publishing House of China University of People’s Public Security, Beijing, 2002, page 299.

On the one hand, it is questionable as to whether these provisions could ensure the independence of the examination, because administrative review is conducted by legal departments within the relevant departments, as will be discussed in part 13.3.3 below. On the other hand, the right to apply for administrative review of subordinate legislation is greatly limited. Rules and regulations formulated by the ministries and commissions under the State Council, and by local governments — which are the most commonly used provisions in China — are excluded from the *Law of Administrative review* 1999 (PRC). Approximately 90% of the provisions quoted in this thesis fit into those categories. Consequently, these provisions and policies promulgated by the CPC and other ministerial level authorities cannot be reconsidered.

Responding to a number of issues raised by legislative conflicts, the *Law of Legislation* 2000 (PRC), the *Regulations on the Procedure for Formulation of Rules* 2001 (PRC), the *Regulations on the Record-keeping for Regulations and Rules* 2001 (PRC), the *Measures of Beijing Municipal People's Government on Formulation of Rules and Regulations* 2002 (Beijing), and the *Measures of Taiyuan Municipal People's Government on Legislation* 2002 (Taiyuan), were enacted to clarify the national legislative system. Articles 78 to 84 of the *Law of Legislation* 2000 (PRC) provide the principal means to reconcile conflicts between inconsistent laws.⁶⁹⁵

⁶⁹⁵ Article 78: “the Constitution has the highest legal authority. All laws, administrative regulations, local regulations, autonomous regulations and separate regulations shall not contravene the Constitution.” Article 79: “The authority of laws is higher than administrative regulations, local regulations and rules. The authority of administrative regulations is higher than that of local regulations and rules.” Article 80: “The authority of local regulations is higher than that of the rules enacted by the local governments of the same or lower level. The authority of rules by the people's governments of provinces and autonomous regions are higher than that of those by the people's governments of the large cities of the same administrative regions.” Article 81: “Autonomous regulations and separate regulations which have made adjustments to the laws, administrative regulations and local regulations shall apply within the relevant autonomous regions. Regulations adopted by the Special Economic Zones, which have made adjustments to the laws, administrative regulations and local regulations shall apply within the relevant Special Economic Zones.” Article 82: “Departmental rules by different departments shall have the same authority. The departmental rules and local rules shall have the same authority. They shall apply within the scope of the authority of the respective departments or local governments.” Article 83: “For the laws, administrative regulations, local regulations, autonomous regulations and separate regulations promulgated by the same authority, the special provisions shall prevail in case the special provisions are inconsistent with the general provisions. The new provisions shall prevail in case the new provisions are inconsistent with the previous provisions.” Article 84: “All laws, administrative regulations, local regulations, autonomous regulations, separate regulations and rules other than those which are enacted for the better protection of the rights and interests of citizens, legal persons and other organizations shall not have retrospective effect.”

Despite of all these resolutions, conflicting laws in China are still a major problem, because there is neither an independent responsible authority nor due process to make the necessary changes.

According to Articles 85 to 89 of the *Law of Legislation* 2000 (PRC), the responsible authorities include the NPC, the Standing Committee of the NPC, the State Council, the people's congress of provinces, autonomous regions and municipalities directly under the Central Government, the standing committees of the local people's congresses, the people's governments of provinces and autonomous regions, the enacting authority, and the delegating authority. The subject and procedure of submitting a written suggestion to review the laws are regulated in Articles 90 and 91 of the *Law of Legislation* 2000 (PRC).⁶⁹⁶

Besides the issues discussed earlier, the *Law of Administrative Review* 1999 (PRC) does not fully entitle persons affected by an administrative decision to seek judicial review of the subordinate legislation upon which the determination was based. The recent enactment of new exit and entry laws, which fail to include remedies for violations of the RLR, provide more scope for individuals' the RLR to be violated by administrative authorities. As a consequence,

⁶⁹⁶ Article 90 of the *Law of Legislation* 2000 (PRC) provides "The State Council, the Central Military Commission, the Supreme Peoples' Court, the Supreme Peoples' Procuratorate and the standing committees of peoples' congresses of provinces, autonomous regions and municipalities directly under the Central Government which are of the opinion that certain administrative regulations, local regulations, autonomous regulations or separate regulations contravene the Constitution or the laws, may make a written suggestion (*Jianyi*) to the Standing Committee of [NPC] for review. The working organ of the Standing Committee shall examine the matter and, when necessary, forward the matter to the special committees concerned for examination and comment. Other government bodies or social organizations, enterprises, institutions and citizens not mentioned in the previous paragraph who are of the opinion that certain administrative regulations, local regulations, autonomous regulations or separate regulations contravene the Constitution or the laws may make a written suggestion to the Standing Committee of the [NPC] for review. The working organ of the Standing Committee shall examine the matter and shall, when necessary, forward the matter to the special committees concerned for examination and comment." Article 91 prescribes that "Where the special committees of [NPC] are, after examination, of the opinion that the administrative regulations, local regulations, autonomous regulations or separate regulations contravene the Constitution or the laws, they may give a written opinion to the enacting authority; the Law Committee and the relevant special committees may convene a joint examination and ask the enacting authority to explain the situation at the examination before giving a written opinion of the examination to the enacting authority. The enacting authority shall within two months decide whether to make any amendment and report to the Law Committee and the special committees concerned..."

disputed regulations that adversely affect the RLR, continue to be unlawfully applied. Conflicting laws continue to be an obstacle for Courts when they apply laws in specific cases.

The scope of the right to appeal against the contravention of laws is greatly narrowed. According to Article 90 of the *Law of Legislation* 2000 (PRC), Article 35 of the *Regulations on the Procedure for Formulation of Rules* 2001 (PRC),⁶⁹⁷ Article 9 of the *Regulations on the Record-keeping for Regulations and Rules* 2001 (PRC),⁶⁹⁸ and Article 39 of the *Measures of Beijing Municipal People's Government on Formulation of Rules and Regulations* 2002 (Beijing),⁶⁹⁹ government bodies or social organisations, enterprises, institutions and citizens is entitled to “make a written suggestion” rather than to initiate an “appeal” and “review”. That means the relevant authorities are not legally bound to process this application, or initiate the examination. Meanwhile, there are no detailed rules to regulate the procedure how to “make a written suggestion”.

The terms of “when necessary” of Article 90 of the *Law of Legislation* 2000 (PRC), “study and handle” of Article 39 of the *Measures of Beijing Municipal People's Government on*

⁶⁹⁷ Article 35 of the *Regulations on the Procedure for Formulation of Rules* 2001 (PRC) provides “Any state organ, social organization, enterprise and institution or citizen, who deems the rules contravene the laws and administrative regulations, may make written suggestions to the State Council for examination, and the legal affairs agency under the State Council shall handle such matter after investigation. Any state organ, social organization, enterprise and institution or citizen, who deems the rules of the people's government of a major city contravene the laws and administrative regulations or the provisions of other superior laws, may make written suggestions to the people's government of their respective province or autonomous region for examination, and the legal affairs agency of the said government concerned shall handle this matter after investigation.”

⁶⁹⁸ Article 9 of the *Regulations on the Record-keeping for Regulations and Rules* 2001 (PRC) provides “The State Organs, mass organizations, enterprise and institutional organizations, and citizens who consider local regulations contradict administrative regulations, or consider that rules and other generally binding administrative decisions and orders promulgated by the various State Council departments and the people's governments of provinces, autonomous regions, municipalities directly under the Central People's Government and comparatively large municipalities contradict laws and administrative laws may submit written opinions for examination to the State Council. The legislative affairs institutions under the State Council shall study the opinions, make disposal proposals, and settle the differences according to specified procedures.”

⁶⁹⁹ Article 39 of the *Measures of Beijing Municipal People's Government on Formulation of Rules and Regulations* 2002 (Beijing) provides “the government agencies, organizations, and individuals who are of the opinion that the administrative measures contradict with laws, regulations, and rules may introduce remarks to the Municipal People's Government, and the Legal office of the Municipal People's Government shall study and handle them.”

Formulation of Rules and Regulations 2002 (Beijing), and “handle this suggestions after investigation” of Article 35 of the *Regulations on the Record-keeping for Regulations and Rules* 2001 (PRC), further narrow the scope of the right to appeal against the contravention of laws, because the meaning of “necessary”, “study”, “handle” and “investigation” are not clear enough. It is thus possible for relevant authorities to abuse their discretion so to deny the suggestions of other government bodies or social organisations, enterprises, institutions and citizens. It will therefore fall to the person in power’s discretion to decide when they should or should not be applied.⁷⁰⁰ It is perhaps not unsurprising to find that it has not yet been relied upon.

According to international norms, the supervisory mechanism of subordinate legislation plays an irreplaceable role in remedying violations of the RLR. The establishment of a supervisory mechanism in China must account for and define the relationship between the subject matter of the law, the administration and the community. How to establish such a mechanism is mainly a topic in legislative science and beyond the scope of this thesis.

5.4.5 Legal research on the RLR in China

Almost all the literature on the RLR is focused on the West, especially traditional immigration nations. Very little has been written about the RLR in China. This sub-section is to explore the reasons why the sum and depth of legal research on the RLR in China is unusually low.

The Chinese official view, cited in instances below, is that the RLR, like many other human rights, is too sensitive to be studied in China. The Chinese government thinks that the theory of human rights overriding sovereignty should be adamantly rejected,⁷⁰¹ China should be allowed to establish its own human rights models, in line with their own circumstances, and the so-called “Country Report” on human rights issued by the USA, has made groundless accusations against China’s human rights situation. The Chinese side expresses its strong indignation and firm

⁷⁰⁰ Cheng, Jie, “Conflict of Laws in China”, <http://www.qis.net/chinalaw/lawtran1.htm> (08/05/2003).

⁷⁰¹ “Chinese FM Meets Russian Human Rights Representative (16/03/2000)”, www.fmprc.gov.cn/eng/4020.html (1/07/2003).

opposition.⁷⁰² Beijing has stressed that the “rampant” practice of political confrontation in the name of human rights, is the biggest problem in the area of human rights.⁷⁰³ Any research on the RLR from a Western perspective risks raising questions as to the politics and patriotism of the researcher. Consequently, the RLR in China are usually discussed from the perspective of administrative law,⁷⁰⁴ international law⁷⁰⁵ or the exit and entry administration.⁷⁰⁶

To avoid risk, legal education and research institutions in China shed little light on the RLR. It is sometimes not even discussed in works on exit and entry administration.⁷⁰⁷ Law schools teach nationality law as part of their international law curriculum and exit and entry administration is offered as an elective course in police higher education institutions, while the limited research on exit and entry administration is mainly focused on practical issues rather than theory.⁷⁰⁸ Very few legal education and research institutions in China provided a degree course with a major in Chinese migration law, and there is no special department for the study

⁷⁰² “Spokesperson Zhang Qiyue’s Remarks on the Country Report on Human Rights Issued by the US (26/02/2004)”, <http://www.fmprc.gov.cn/eng/xwfw/2510/t69782.htm> (02/03/2004).

⁷⁰³ Sha, Zukang, ‘Chinese Ambassador of the United Nations, China Call for Cooperation in Human Rights Field 03-04-2003’, <http://www.cctv.com/special/1016-1/2.html> (20-05-2003).

⁷⁰⁴ Chen, Yuetao, *The Writing on the Documents of the Exit and Entry Administration of Public Security Organs (Gongan Churujing Guanli Wenshu Xiezu)*, Series of the Applicable Writing of Public Security Organs (*Gongan Yingyong Xiezu Congshu*), Interior Published within Public Security Organs (*Gongan Jiguan Neibu Faxing*), the Publishing House of China University of People’s Public Security, Beijing, 1999, page 9.

⁷⁰⁵ Wong, Li, *International Immigration Law and the Practices (Guoji Yiminfa Lilun Yu Shijian)*, the Publishing House of Law, Beijing, China, 2001, page 25.

⁷⁰⁶ Wang, Guoliang and Zhu, Lin, *The Administration on Exit and Entry, one of Planning Textbooks of Higher Education of People’s Police (Renmin Jingcha Gaodeng Jiaoyu Guihua Jiaocha: Churujing Guanlixue)*, Interior Published within Public Security Organs (*Gongan Jiguan Neibu Faxing*), the Publishing House of China University of People’s Public Security, Beijing, 2002 page 93; also see Department of Politics under the Ministry of Public Security, *Frontier Defense and Exit and Entry Administration, the Series of Basic Textbook of People’s Police Operation: (Bianfang Yu Churu Jing Guanli, Renmin Jingcha Gongan Yewu Jichu Jiaocai)*, examined by Committee of Textbook Editing and Examination of the Ministry of Public Security, the Publishing House of Qunzhong, Internal Publication within Public Security Organs (*Gongan Jiguan Neibu Faxing*), Beijing, 1999, page 276.

⁷⁰⁷ Mo, Qibo, (ed), *The Administration of Citizen’s Exit and Entry (Gongmin Churu Jing Guanli)*, the Publishing House of Guangxi Minzu, Nanling, China 1997.

⁷⁰⁸ Yu, Huaying and Gong, Yu, *The Legal Study on Exit, Entry and International Trade (Churu Jing Yu Guoji Jingmao Falv Wenti Yanjiu)*, the Publishing House of Xinan Normal University, Chongqing, China 1997, pages 7-8.

of migration law.⁷⁰⁹

From a commercial perspective, Chinese legal scholars are not very interested in the research of migration law, but pay more attention to business law and other branches of law more closely aligned to daily life and the economy. As China establishes a socialist market-oriented economic system, there is financial support available to academics involved with the drafting and amendment of laws related to this field. The Legal Papers Database of *China Persecution Daily* demonstrates that between 1993 and 2001, only one academic legal paper focused on the RLR was published in a national legal journal in Mainland China.⁷¹⁰ Meanwhile, Chinese migration consultants spare little effort to study the existing exit and entry legislation. The foremost business of the emigration intermediary agencies is to assist in visa applications. As such, agencies are inclined to spend their time becoming familiar with foreign immigration laws and ensuring that they maintain a high success rate for visa applications.

In practice, police higher education institutions and public security authorities are mainly responsible for the research into exit and entry legislation. Most of the researchers graduated from police colleges or police universities, or retired from active military services. Few have formal legal qualifications and their research methodology is questionable. The main collections of papers related to the RLR in China are the *Collection of Papers on the Control of Exit and Entry (III)*,⁷¹¹ the *Collection of Papers on the Control of Exit and Entry (II)*,⁷¹² which were edited in 1999 and 2001, and the *Review of the control of exit and entry: the Collection of Papers on the Control of Exit and Entry of Shanghai Public Security Organisations*, edited by

⁷⁰⁹ Yu, Shutong and Wen, Jia (Chief editors), *A New Chinese-English Law Dictionary (Xin Hanying Faxue Cidian)*, Publishing House of Law, Beijing, 1998, pages 1164-1174. The situation was improved recently. Zhejiang University provided the course of LLM with the direction of international migration in 2004.

⁷¹⁰ Legal Papers Database of *Prosecution Daily (Jiancha Ribao)*, “The Search of Keyword of Immigration”, <http://review.jcrb.com.cn/lw/yimin.htm> (18/04/2002)

⁷¹¹ Committee of Exit and Entry Administration under Chinese Association of Police, (edit), *The Collection of Papers on the Control of Exit and Entry (III) (Churujing Guanli Lunwenxuan (san))*, Interior Published within Public Security Organs (*Gongan Jiguan Neibu Faxing*), the Publishing House of Qunzhong, Beijing China, 2001.

⁷¹² Committee of Exit and Entry Administration under Chinese Association of Police, (edit), *The Collection of Papers on the Control of Exit and Entry (II) (Churujing Guanli Lunwenxuan (er))*, Interior Published within Public Security Organs (*Gongan Jiguan Neibu Faxing*), the Publishing House of Qunzhong, Beijing China, 1999.

Li Wenyan, the Director of Shanghai Exit and Entry Administration in 1999. Unfortunately, none of the 120 papers forming these collections were footnoted,⁷¹³ which means that the quality of the research is compromised because their primary and secondary sources cannot be traced.⁷¹⁴

5.5 Conclusions

The factors driving the RLR in China exposes what is certainly the complex situation of China. For politics, one party reign colours the RLR with the protection of vested interests of the CPC, which dominates society in China. The origin of restrictions on exit and entry are easily traced to China's experience as a member of the former communist bloc.

Given the largest population, underdevelopment and considerable regional economic disparities, it is understandable for China to gradually reform exit and entry administration, to avoid the possible instability. A further depth of reform is however inevitable with economic development — past interactions between the development of the economy and laws governing exit and entry also prove this point. Meanwhile, it is hard to break through the restriction on persons employed in State-owned industry, because the public ownership of the means of production is still the basis of the economic system. The adverse impacts on the RLR of limits on the right to move within China must also not be underestimated.

An analysis of the culture of Confucianism reveals that there is a long way to go before an awareness of the RLR in China is fully fostered. Individuals, under Confucianism, are inclined to integration into the society, innately obliged to respect fellow members of the human race, and pay loyalty to China and filial piety to one's parents. Chinese culture is therefore a culture orientated toward duty, in which the RLR is not easily recognised and the exhortation not to

⁷¹³ Li, Wenyan, *Review of the Control of Exit and Entry: the Collection of Papers on the Control of Exit and Entry of Shanghai Public Security Organs (Churujing Guanli Zongheng: Shanghai Gong'an Churujing Guanli Lunwenji)*, internal publication (*Neibu Faxing*), the Publishing House of Police Education, Beijing, 1998.

⁷¹⁴“Referencing Using the Note System”, the Faculty of Law of the University of Technology, Sydney, Australia, <http://www.science.uts.edu.au/research/Thesis.pdf> (13/04/2003).

leave home is embraced. The philosophy of sublating, namely the subjective selection of foreign cultural aspects, isolates Chinese culture from other rights-oriented cultures. Agrarian society, from which Confucianism was born, is still an important part of the cultural fabric of China, with a proportionately large agrarian population and output.

Compared with politics, economics and culture, legal factors most directly affect the RLR in China. If the laws governing exit and entry are accepted as one of the ruling tools of a ruling elite, it is not surprising to find that the law mainly facilitates the *control* of exit from and entry into China, rather than to protect the RLR. The bias is to the community and not to the individual. Meanwhile, conflict within China's exit and entry laws is a major problem, bewildering exit and entry law community, and which creates opportunities for government officials to act degenerately or abuse exit and entry discretion for personal gain. The dispute of the constitutional foundation of the RLR has produced ambiguity in regard to the protection of the RLR.

Resolving conflicts of laws regarding exit and entry is important because it relates to the internal functioning of the administrative arms of government, their interpretation of the rights and obligations and penalties in primary legislation, and perhaps more deeply, the ethical and social foundation of the whole field of law. Neither the Constitution nor relevant laws provide practicable remedies for violations of the RLR by legislative acts. The mechanism for resolution of conflicts of laws regarding the administration of exit and entry is far from efficient.

Chapter Six

Historical Development of Chinese Regulatory Framework Governing the RLR

Introduction

With ratification of the ICCPR by 152 countries, international concern on the RLR appears to have passed its peak,⁷¹⁵ and yet remains problematic for China. In the *Handbook of Citizenship Studies* on the right to emigrate, for instance, China scored zero out of a possible 100 points.⁷¹⁶ A careful and well-coordinated immigration strategy with a well-defined the RLR focus has the potential to enhance China's economic progress and to improve its international human rights image. Such a strategy would demand careful evaluation of China's the RLR policies, with the view to making them consistent with international law and practice. There are many issues pertaining to the protection of the RLR in China that demand prompt solutions. A critical analysis of the realities and issues of the RLR in China in the context of international norms has never been undertaken.

The notions of 'the RLR' and 'Chinese migration law' have only a very short history in China; the terms are mainly used by Chinese scholars.⁷¹⁷ There are no recorded attempts to precisely stipulate the RLR and draw up a distinct code governing migration matters. Planned reforms (2001-2005) of the exit and entry administration do not introduce the specific notions of 'the

⁷¹⁵ International Services for Human Rights, "The Ratification Status of the Main Human Rights Treaties", ishr-06-2004, <http://www.ishr.ch/About%20UN/Ratification/Ratification%20-%20Human%20Rights%20treaties.htm> (18/05/2003).

⁷¹⁶ Janoski, Thomas and Gran, Brian "Political Citizenship: Foundations of Rights", in Isin, Engin F. and Turner, Bryan S. (ed), *Handbook of Citizenship Studies*, Sage Publications, London, 2002, pages 31-33.

⁷¹⁷ Xiang, Dang, the *Guide to the Law of Exit and Entry in China and Foreign Countries (Zhongwai Churujing Falv Zhinan)*, the Publishing House of China University of People's Public Security, Beijing, 1998, page 1; Wong, Li, *International Immigration Law and the Practices (Guoji Yiminfa Lilun Yu Shijian)*, the Publishing House of Law, Beijing, China, 2001, page 28; also see Wang, Leiming, "Citizens May Exit Abroad for Private Purpose Easier and Faster" (*Woguo Gongmin Yinsi Chuguo Gengjia Bianjie*), <http://www.sina.com.cn> (26/12/2002), quoted in Xinhua News Agency, 18/04/2003; and "Exiting Abroad is Becoming the Individual Needs of Chinese Citizens", 28 December 2003, Xunahuanet, <http://news.sdingo.net/72350064130916352/20031228/1233069.shtml> (30/12/2003).

RLR' and 'Chinese migration law'. The substance of the RLR and Chinese migration law are mainly regulated in statutes governing exit and entry.⁷¹⁸

To better understand the issues, and appreciate the political, social and legal complexities of the RLR in China, to then make valid observations about current reforms and future trends, it is important to first trace its historical development. The greatest emigration in Chinese history occurred in the Qing dynasty (1611-1911). The ancestry of many current overseas Chinese can be traced to these emigrants. The Qing government's exit and entry policies are therefore a logical starting point for analysis, to be followed by an analysis of the policies of the Republic of China (ROC) on the Mainland (1911-1949). This section will focus primarily on development since 1978, but will briefly consider the period between 1949 and 1958 to provide an essential backdrop against which the reform strategy can be viewed.

6.1 The Qing dynasty: from complete prohibition to practical relaxation

The Qing government for most of its reign did not accept that their subjects had the RLR. Decrees to forbid overseas trade and emigration were passed in 1712 and 1724.⁷¹⁹ The decrees were primarily meant to prevent any remaining forces of the Ming dynasty (1368-1644) from emigrating and establishing a financial and political base overseas that could threaten the stability of the incumbent government. Local officials and citizens, in the interests of trade, frequently disregarded the prohibition, and many Chinese, particularly those from Guangdong and Fujian provinces, established themselves as merchants throughout South Eastern Asia during the 17th and 18th centuries.⁷²⁰

After the first Opium War (1840-1842), the prohibition on emigration was partially broken

⁷¹⁸ Yu, Huaying and Gong, Yu, the *Legal Study on Exit, Entry and International Trade (Churu Jing Yu Guoji Jingmao Falv Wenti Yanjiu)*, the Publishing House of Xinan Normal University, Chongqing, China, 1997, pages 3-8.

⁷¹⁹ Buggy, T.P., *Chinese Immigration and the Emergence of an Australian Image of China, 1848-1861*, the thesis of Master of Arts Macquarie University, Australia, 1978, page 128.

⁷²⁰ Purcell, Victor, the *Chinese in South East Asia*, London, 1965, pages 24 and 29.

down and coolie emigration began. The *Treaty of Nanking 1842* gave Britain extraterritorial rights in five treaty ports,⁷²¹ but gave nothing to China in return. This provided Britain with the infrastructure and opportunity to develop the trade in unskilled labourers, or Coolies.⁷²² After the second Opium War in 1860, the restrictions on emigration were virtually lifted. The *Peking Convention 1860* and the Burlingame Treaty with the USA in 1868 included clauses allowing Chinese to live abroad. Some Coolies left China as free migrants and paid their own way. Many more left as indentured or contracted labourers, enlisted directly by governments or labour recruiters. Others left on the “credit-ticket” system where their travel expenses were paid by employer and they were expected to repay the sum after working in the destination States.⁷²³ Additionally, emigration agencies operated by Western States were established in Guangdong, Shantou and other coastal cities, with the approval of the Chinese authorities. Chinese who wished to obtain employment in foreign countries were invited to register at these agencies and sign a labour contract.⁷²⁴

The following years saw migration increase. According to UK statistics, before the destruction of the Qing government in 1911, 4.2 million Chinese people had emigrated,⁷²⁵ the majority of whom went to Southeast Asia. Chinese emigrants established large and fairly stable communities in Spanish America, the Caribbean, the Pacific Islands, South Africa, North America and Australasia. This migration pattern and the establishment of trans-national community ties would greatly affect future migration policies.

⁷²¹ Five treaty ports are Amoy, Canton, Foochow, Ningpo and Shanghai.

⁷²² According to the *Treaty of Nanking*, Chinese citizens had the right to settle in any part of the British Empire and were free to enter into arrangements with British subjects for that purpose, as well as being allowed to board any British vessel in one of the Treaty ports. Chinese people were able to emigrate opportunistically with the arrival of some European powers. However, Chinese people knew almost nothing about the British Empire and the outside world after about 200 years of closed policy. Thus in practice, they were usually sold as commodities.

⁷²³ Sinn, Elizabeth, “Emigration from Hong Kong Before 1941: Organisation and Impact” in Skeldon, Ronald (ed.) *Emigration from Hong Kong: Tendencies and Impacts*, the Chinese University Press, Hong Kong, 1995, page 37.

⁷²⁴ Wang, Sing-wu, the *Organisation of Chinese Emigration 1848-1888 with Special Reference to Chinese Emigration to Australia*, Chinese Materials Centre Inc. San Francisco, 1978, pages 47-58.

⁷²⁵ The *Collection of the Branch Committee of Royal Asian Arts Committee (Huangjia Yazhou Wenhui Beihua Fenhui Jikan)*, in Chen, Haoshen (ed), *the Collection of Historical Materials on Overseas Labour Exiting Abroad (Huagong Chuguo Siliao Hybian)*, the Publishing House of China, Beijing, 1985, page 5.

With the increase of emigration, protection of Coolies and migrants formed a significant part of late Qing policy towards its overseas subjects. Reports of abuses in the coolie trade in Cuba led to the dispatch of a Commission headed by Chen Lan-ping, who later negotiated an immigration treaty with Spain in 1877, to improve the circumstances of Chinese coolies in Cuba.⁷²⁶ In trying to come terms with the Coolie issue, the Qing government was compelled to question its traditional policy towards overseas subjects and the issue of emigration in general. It began to establish Chinese embassies and consulates in the places of overseas Chinese residence, to protect its subjects against discrimination.⁷²⁷

However, in this the government was constrained by the old prohibitive edicts that considered free emigrants undeserving to be protected because they were not within the government-sponsored program. In the late 19th century, the Qing government began to look upon overseas Chinese as assets to China. There had long been an awareness of the importance of their remittances to the economies of Fujian and Guangdong. In 1893, the Imperial Court finally repealed prohibitive edicts that criminalised those who ventured abroad. In other words, this liberalisation of going abroad was finally legalised.

6.2 1912 to 1949: limits and encouragement

The second significant period is in the 38 years from the foundation of the Republic of China in 1912 and its movement into Taiwan in 1949. This period was marked by continual civil and foreign wars. The substitution of a monarchy with a republic provided many opportunities for the realisation of the RLR. The nationalist government enacted a series of laws governing passports, overseas study, overseas employment and administrative structures, as well as adopting measures to promote communication with the outside world. Unfortunately, due to the economic depression in the capitalist world and the disruption caused by continuous wars, these laws were not completely implemented.

⁷²⁶ Buggy, T.P., *Chinese Immigration and the Emergence of an Australian Image of China, 1848-1861*, the thesis of Master of Arts, Macquarie University, Australia, 1978, page 128-129.

⁷²⁷ Wichberg, Wdgar, "The Chinese as Overseas Migrants" in Brown, Judith M. & Foot, Rosemary *Migration: the Asian Experience*, 1994 the Macmillan Press Ltd., London, page 32.

The first set of measures to protect the RLR in China was the system of exit visas and exit registration. Citizens did not need to apply for an exit visa if they were going abroad for the first time. An exit visa and a valid passport were only required for subsequent overseas travel. After 1935, citizens were banned from exiting without an exit registration certificate (*Chuguo Dengji Zheng*). They could either personally apply for an exit registration certificate or appoint an agent.

The second set of measures was to encourage and welcome the return of overseas Chinese. The Committee of Overseas Chinese Affairs was established to be responsible for the exit and entry administration. Overseas Chinese could apply for an overseas Chinese registration certificate to affirm their overseas Chinese status. This allowed them to apply for a passport and diplomatic protection. The nationalist government also encouraged the founding of overseas Chinese schools and provided financial and curriculum aid, especially during the 1920s and 1930s.⁷²⁸

The third set of measures regulated the emigration of the labour force. In order to cover the serious scarcity of human resources caused by World War One, the UK, France, Russia and other Western countries between 1916 and 1918 recruited approximately 230,000 labourers from China. The *Regulations on Chinese Labour Exiting China 1918 (Qiaogong Cuyang Tiaoli)*, the *Outline of Chinese Labour Contract 1918 (Qiaogong Hetong Gangyao)* and the *Regulations on Labour Exiting China 1935 (Gongren Chuguo Tiaoli)* were promulgated soon after. Under their provisions, labour needed to apply for exit permission, accompanied by a signed labour contract with one's employers and a guarantee from the Chinese embassy or general consulate at the destination country.

Fourthly, the selection and administration of overseas students were improved. The nationalist government, in its quest for modernisation and appropriate skilled individuals, sent substantial numbers of students to Japan and the West for higher education. Many families in China saw

⁷²⁸ Wichberg, Wdgar, "The Chinese as Overseas Migrants in Brown", in Brown, Judith M. & Foot, Rosemary (ed), *Migration: the Asian Experience*, the Macmillan Press Ltd., London, 1994, page 32.

overseas education as a new kind of migration opportunity and family strategy.⁷²⁹ The government enacted the *Rules of Administration of Overseas Students in the USA* (*Guanli Liumei Xuesheng Shiwu Guicheng*) and the *Measures on Dispatching Overseas Students at One's Own Expense* (*Zifei Liuxuesheng Paiqian Banfa*) among other statutes during this period.⁷³⁰

Because of the shortage of foreign exchange after continuous wars, the number of students sent overseas during this period was small.⁷³¹ Chinese migration was also limited by the immigration policies of destination countries. America and Canada attempted to limit Chinese immigration by legislation and practice. Sometimes discrimination uniquely targeted the Chinese. In Canada, between 1903 and 1923, only Chinese immigrants were required to pay a \$500 tax to be admitted to the country. From 1923 to 1947, Chinese people were the only people prohibited by law from immigrating to Canada.⁷³²

The nationalist Republican government adopted many active measures to promote communication with the outside world. Restricted by an unstable political climate, poorly developed economy and unwillingness to afford individual human rights, the RLR was severely limited in practice. Nonetheless, migration law made great progress and was objectively beneficial to the improvement of the RLR in China.

6.3 1949 to 1978: the return of the prohibition policy of the

⁷²⁹ Wichberg, Wdgar, "The Chinese as Overseas Migrants in Brown", in Brown, Judith M. & Foot, Rosemary (ed), *Migration: the Asian Experience*, the Macmillan Press Ltd., London, 1994, page 15.

⁷³⁰ Also see *Provisional Measures of Restriction on Studying Abroad 1938* (ROC); *Provisional Measures of Restriction on Studying Abroad 1939 (Amendment)* (ROC); the *Program of Ministry of Education of Education of Studying Abroad 1943* (ROC) and *Measures of Ministry of Education of Sending of Overseas Students 1943* (ROC).

⁷³¹ In the harsh environment of the 1937 – 1945 War of Resistance against Japan, 1,566 students were sent abroad. These students were mainly enrolled in engineering and science, in order to enable China to develop the skill base for the period of post-war State reconstruction; according to the statistic of Ministry of Education of ROC files, which were stored in the Second History Archive of China. The number of overseas students between 1937 and 1945 did not include 246 persons who were invited to lecture abroad.

⁷³² Wichberg, Wdgar, "The Chinese as Overseas Migrants in Brown", Judith, M. & Foot, Rosemary (ed), *Migration: the Asian Experience*, 1994, the Macmillan Press Ltd., London, page 24.

Qing Dynasty

The period from 1949 to 1978 marks the start of the People's Republic of China (PRC), through to the introduction of significant reforms and the 'opening up' of China in 1978. During this period, as discussed and analysed elsewhere in this thesis, going abroad was subject to strict scrutiny.⁷³³ Even though its population swelled in the same period from 400 million in 1949 to 1 billion in 1978, China only approved about 7,000 annual exits abroad for private affairs in that time.⁷³⁴

6.3.1 1949 to 1958: the establishment of the restrictive framework governing the RLR

In the period from 1949 to 1958 China's door to the outside world was basically closed because the consolidation of the new government was deemed the most important priority of State reconstruction, however the RLR was respected, and the legal system governing exit and entry was gradually established. Most notably, freedom of movement was recognised in the *Constitution of PRC* 1954. The legalisation of freedom of movement stimulated the exit and entry. According to the Ministry of Public Security (MPS) statistics, 379,505 persons exited or entered China in 1951, approximately 7.7 times that of 1950.⁷³⁵

The policy to encourage overseas Chinese to return

Encouraging overseas Chinese to return to China to assist in the State's reconstruction was a foremost legislative purpose during this period. Under Article 2 and 3 of the *Provisional Measures on Exit and Entry National Border of Overseas Chinese* 1951 (PRC);

Overseas Chinese may exit and enter with a valid passport and visa. Where they do not hold a valid passport and visa, as they are from the countries without a diplomatic relationship with the PRC,

⁷³³ Mr. Ren, Yingchao, Director of the Entry and Exit Administration of the MPS, Quoted in Wu, Inner, "Passport Gain Wider Currency in China", China Central Television, 15:10:23 17/10/2002, English Channel <http://www.cctv.com/news/China/FinanceABusiness/20021017/100400/html> (18/04/2003).

⁷³⁴ Wang, leiming, "Citizens May Exit Abroad for Private Purpose Easier and Faster" (*Woguo Gongmin Yinsi Chuguo Gengjia Bianjie*), <http://www.sina.com.cn> 19/09/2002 quoted in Xinhua News Agency, 18/04/2003

⁷³⁵ Department of Exit and Entry under the Ministry of Public Security & Department of Border Security Checking and Administration, *Great Change over the Last 50 years: the Analysis of the Data of Exit and Entry of Individuals (Fenyun Bianhuan Wushi Nian: Cong Churujing Renyuan Tongji Shuju Kan Jianguo Yilai De Jubian)*, No. 22 (1999) of *People's Public Security (Renmin Gongan)*.

[they] must apply for an Overseas Chinese certificate (*Guiguo Huaqiao Zhengmingshu*) to ensure their overseas status when arriving in China. The government will look after them if necessary.

In addition, where a destination country hindered an overseas Chinese person from returning, they could indirectly return to China through Hong Kong or Macao. Simultaneously, unyielding efforts were made to negotiate with the West, especially with the USA, to permit overseas Chinese return to China. The *Treaty on the Issues Regarding to Civilian Returning to China between the PRC and the USA* was reached in 1955.

The control of return from Hong Kong or Macao was more extensive. Article 2 Clause 2 of the *Proclamation of the Ministry of Public Security, the Central People's Government Concerning the Control over Passengers Travelling to and from the Regions of Hong Kong and Macao* 1951 (PRC) provided that “the passengers who leave for the Mainland from Hong Kong or Macao must apply for the exit and entry pass (*Churu Tongxingzheng*) to the Public Security authority [in their] ancestral hometown or destination county or city”. Given the physical distance and the underdeveloped state of communications, this process was lengthy and difficult.

The right to leave

Chinese citizens needed to apply for exit permission. Under Article 4 of *Provisional Measures on the Exit and Entry National Border of Overseas Chinese* 1951, “overseas Chinese exiting the country must apply for an overseas Chinese exit permit (*Huaqiao Chujing Tongxingzheng*) upon the authority of the document of proof prescribed by township government”. Passengers exiting to Hong Kong or Macao, in accordance with Article 2 Clause 1 of the *Proclamation on the Ministry of Public Security, the Central People's Government Concerning the Control over Passengers Travelling to and from the Regions of Hong Kong and Macao* 1951 (PRC), needed to “apply for an exit and entry pass from the Public Security authorities of resident county or city upon the authority of a household certificate or written certificate prescribed by the township government”.

More detailed restrictions were adapted to control aliens leaving China. According to Articles 2

and 4 of the *Provisional Measures on Exit of Aliens in China* 1954 (PRC), “aliens exiting the country must lodge an exit application in person to the public security departments of the municipality or county in which their residence is registered”. After examining the prescribed document of proof, the provincial public security departments would issue an exit visa (*Chujing Qianzheng*) to aliens whose country had a diplomatic relationship with China, and exit permission (*Chujingzheng*) to aliens whose country had no diplomatic relationship with China. Article 3 of the *Provisional Measures on the Exit of Aliens in China* 1954 (PRC) further set forth, “where an alien is party of a civil or criminal case, he or she has the duty to pay debt or tax, and will therefore be banned from exiting”.

Administrative system

From 1957, the MPS and various public security departments were wholly responsible for the administration of exit and entry. In accordance with the Preface and Article 1 of the *Circular of the State Council on the Unified Responsibility of Ministry of Public Security Regarding the Administration of the Exit and Entry for Private Affairs of Citizens* 1956 (PRC), the administration on citizens’ exit and entry, passports and visas, previously the responsibility of the Ministry of Foreign Affairs (MFA) and local foreign offices, were devolved to the MPS and local public security authorities. Specifically, the Bureau of Public Order within the MPS was responsible. Article 3 of the above Circular prescribed how local exit and entry administrative organs were to be established.⁷³⁶ A national exit and entry administrative authority based around provincial departments was established.

Events that influenced the RLR

Events, such as the land reform, after the establishment of the PRC had a far greater influence on Chinese migration than those of the period 1911-1949. The influence is best summed up by C. Y. Choi who has asserted that:

⁷³⁶ For example, Guangdong and Fujian Provinces were permitted to establish a special team in each provincial-, municipal-, or county-level public security department, to be responsible for the administration of exit and entry of citizens for private affairs. By contrast, other provinces could only appoint a full or part-time cadre for the same function.

...[A]mong these events, the Land Reform of 1950-1953 probably had the most far reaching effect because it greatly weakened the binding strength of the community due to the elimination of the ownership of large land holdings, especially clan land, and confiscation of land owned by overseas families. As the lineages began to disintegrate, loyalty among Chinese emigrants towards their families and lineages started to lose its basic foundation.⁷³⁷

Persecution, harassment and discrimination also encouraged emigration. Many Chinese left the Mainland once the Communists assumed power in 1949.⁷³⁸ Against an unfavourable backdrop at home, Chinese migrants began to settle permanently abroad, and tried to bring their family to join them overseas. There began a mushrooming outflow of wealthy Chinese people seeking to avoid being persecuted as landlords and capitalists. This partially accounts for the imposition of stricter controls on migration.

Household registration

Household registration (*Hukou*) is closely linked to the RLR. The initial goal of establishing household registration system in 1951 was to maintain public security and freedom of residence and movement.⁷³⁹ Only persons residing in urban areas were subject to control.⁷⁴⁰ It was intended to be temporary and imposed no limits on the movement within the territory. However, in 1955, the scope of registration was extended to the whole country including rural areas, and the system made permanent. Chinese still enjoyed the freedom of movement within territory at that time.⁷⁴¹

Driven by rapid industrial development and the establishment of a planned central economy, the legislative goal of “safeguard[ing] people’s freedom of movement” was repealed by the *Regulations on Household Registration* 1958 (PRC). This regulation essentially set out the

⁷³⁷ Choi, C.Y., *Chinese Migration and Settlement in Australia*, Sydney University Press, 1975, pages 57-58.

⁷³⁸ Brown, Judith M. & Foot, Rosemary *Migration: the Asian Experience*, the Macmillan Press Ltd., London, 1994, page 5.

⁷³⁹ Article 1 of the *Provisional Regulations on Administration of Urban Household* 1951 (PRC) (*Chengshi Hukou Guanli Zanxing Tiaoli*).

⁷⁴⁰ Article 2 of the *Provisional Regulations on Administration of Urban Household* 1951 (PRC) (*Chengshi Hukou Guanli Zanxing Tiaoli*).

⁷⁴¹ The *Directive of the State Council on Establishing Regular Household Registration System* 1955 (*Guowuyuan Guanyu Jianli Jingchang Huikou Dengji Zhidu De Zhishi*).

limits of freedom of movement. Article 10, Clauses 2 and 3, prohibited citizens from permanently moving from rural areas to urban areas unless formally varying their household registration. In order to register elsewhere, the applicant needed to produce an employment certificate issued by an urban labour department, or a letter of offer from a higher education institution, or proof document of movement permission issued by an urban household registration organ. Temporary movement for over three months was also prohibited under Article 16 of the *Regulations on Household Registration* 1958 (PRC). From the perspective of the RLR, Chinese could not apply for exit permission or a passport at the public security departments in which their residence was not registered.

Simplistic style of regulations

Statutes promulgated during this period were very general and simple in form. One regulation was usually no longer than 100 to 200 Chinese characters. From the legal point of view, these might be regarded as directions rather than laws.

In conclusion, the development of the exit and entry legal system during this period was encouraging, because freedom of movement was recognised in the statutes, though exit permission was the prerequisite of leaving. Limits and general regulations on entry and exit were primarily established to facilitate the entry and exit of overseas Chinese, to control travel to or from Hong Kong and Macao, and strictly manage aliens exiting China. The effect of restricting limits, household registration and a simplistic form of regulations on the RLR remains to date. The regime established in this period laid the foundation and direction for later exit and entry administration.

6.3.2 1958 and 1978: the development of the restrictive framework governing the RLR

Regretfully, China's communist policies, poor economic conditions, political instability and hostility towards foreign countries brought an end to the encouraging trends in the development of regulatory framework governing the RLR.

From 1958, the Chinese government introduced policies to suppress right-wing political

opposition. Many of the opponents were Chinese people who had been educated abroad and may have had family members overseas. They were sent to labour camps in remote rural areas and seriously restricted from leaving China. Anyone who wanted to leave China generally remained silent, out of fear of being regarded as right wing.

China adopted a highly concentrated emigration system, which adversely affected the RLR. In April 1959, the MPS announced further restrictions on exit and entry. The *Rules for the Administration on Citizens Exit and Entry for Private Affairs* 1958 (PRC) were repealed. In 1964, the State Council promulgated the *Regulations on the Administration of Entry, Exit, Transit, Residence and Travel of Aliens in China* 1964 (PRC), Article 7 required all aliens to apply for a visa for the purposes of entry, internal travel and exit.

During the Cultural Revolution between 1966 and 1976, the RLR was seriously abused. The provisions regarding the freedom of movement were deleted from the Constitution in 1974. Any person who applied to leave China was regarded as being dissatisfied with the Chinese socialist system, and suspected of having colluded with a foreign country to carry out illicit activities against China. This meant that many citizens and overseas Chinese refrained from applying to enter or exit the State.⁷⁴² In 1974, 1.6 million people exited and entered China for private affairs and public affairs, 26% less than in 1966.⁷⁴³

Hostility towards China by many countries initially motivated China's restrictive migration policy. This was especially true of the Western countries, such as the USA and Australia, where the governments of the time were suspicious of communist sympathisers; in Malaya after the 1948-1960 'emergency'; and in India after the 1962 Sino-Indian War. China was still sanctioned

⁷⁴² Wong, Li the *Theory and Practice of International Immigration Law*, Law Press, Beijing, 2001, page 77.

⁷⁴³ Department of Exit and Entry under Ministry of Public Security & Department of Border Security Checking and Administration, *Great Change over the Last 50 years: the Analysis of the Data of Exit and Entry of Individuals* (*Fenyun Bianhuan Wushi Nian: Cong Churujing Renyuan Tongji Shuju Kan Jianguo Yilai De jubian*), No. 22 (1999) of *People's Public Security* (*Renmin Gongan*).

under the decree of the UN.⁷⁴⁴ A ‘one nationality’ policy was introduced during this period. It was designed to encourage overseas Chinese to assimilate into their local foreign community and to abandon their Chinese nationality. This policy remains in force.

The draconian exit restrictions were politically indefensible then and still are. China was probably concerned that the disgruntled element within the emigrant population would form foreign counterpart groups for subversive movements within China. In such circumstances, there was almost no demand for the exit and entry for private affairs. For the others, political instability and danger in Mainland China during the Cultural Revolution of 1966-1976 encouraged irregular emigration, mostly in the form of refugees.

6.4 1979 to 1985: the start of the reform of the restrictive framework governing the RLR

Since 1978, China has adhered to the policy of reform and opening-up, with the focus on economic reconstruction and the establishment of a socialist market economy. This has resulted in great economic achievements. Nevertheless, special laws regarding exit and entry were not promulgated until 1985. During this period, the Chinese government began to reform the exit and entry administration and started to relax restrictions on the RLR.

Recognition of the right to leave: a very advanced form of legislative thinking

Limits were primarily eased on the right to leave of overseas Chinese and their families who had re-entered the country. Encouragement of overseas Chinese to return is a traditional Chinese custom, and stood to attract overseas investment. In June 1978, the State Council approved and transmitted the *Suggestions of the Ministry of Public Security, the Ministry of Foreign Affairs and Overseas Chinese Office of the State Council on Relaxing and Improving Exit abroad Examining and Approving for Returned Overseas Chinese and Their Family Members 1978* (PRC).

⁷⁴⁴ The USA Congressional – Executive-Commission on China, “The People’s Republic of China”, <http://www.cecc.gov/pages/virtualAcad/his/prc.php> (04/01/2005)

Most significantly, exiting was firstly recognised as a legitimate right of citizens in China, even though the prerequisite of “legitimate” may offer opportunities to demolish the legal recognition.⁷⁴⁵ Additionally, the government commenced the first overhaul of the exit and entry administration in 35 years with the publication of the *Suggestions of the Ministry of Public Security on Relaxing the Conditions of Examination and Approval of Exiting China for Private Affairs* 1984 (PRC). Unfortunately, influenced by leftist policy, many local administrative authorities ignored the reforms and legal recognition of the RLR.⁷⁴⁶ In order to redress the problem, the *Circular of the Ministry of Public Security on Seriously Carrying out the File of Gongfa (Jing) [84] 59 and Further Relaxing Exiting China for Private Affairs (Abstract)* 1984 (PRC) was published. Both instruments dramatically relaxed the limits on exit and entry of Chinese citizens and relatively relaxed limits applied to aliens.

Article 1 of the later instrument underlined that administrative authorities had to respect and safeguard the lawful rights and interests of Chinese citizens wanting to exit China, to encourage and assist them to travel abroad, and to better consider the perspective of the applicant when processing their application. This was a very advanced form of legislative thinking, even in comparison to the 2001 amendments. Unfortunately, these advanced ideas were not enforced in practice, demonstrating that the communist ideology is deeply ingrained in administrative processes.

⁷⁴⁵ Article 1 of the *Suggestions of the Ministry of Public Security on Relaxing the Conditions of Examination and Approval of Exiting from China for Private Affairs* 1984 (PRC); and the *Circular of the Ministry of Public Security on Seriously Carrying out the File of Gongfa (Jing) [84] 59 and Further Relaxing Exiting from China for Private Affairs (Abstract)* 1984 (PRC) creatively provided that “application for exiting from China is a legitimate right and interests of Chinese Citizens.” and that [E]xcepting Chinese citizens prohibited from exiting from China, the application for self funded exit from China for permanent residence, visiting relatives and friends, marriage, inheriting property, medical treatment, employment and tourism, without distinction to social class or origin, political thinking or family situation, should be granted if the visa of destination countries is possibly granted.

⁷⁴⁶ As Hu Yaobang, the former General Secretary of the Central Committee of Communist Party of China (CPC) of that time pointed out, Some of our comrades have a very serious left leaning thinking in this regard, the strict limits on exiting from China have not been relaxed from the bottom despite the reiteration of the Central Committee. These issues must be solved quickly. See Preface of the *Circular of the Ministry of Public Security on Seriously Carrying out the File of Gongfa (Jing) [84] 59 and Further Relaxing Exiting Abroad for Private Affairs (Abstract)* 1984 (PRC) (*Gonganbu Guanyu Renzhen Guance Zhixing Gongfa (Jing) 59 Hao Wenjian Jinyibu Fangkuang Yisi Chuguo De Tongzhi*), promulgated by the Ministry of Public Security on 22 November 1984.

Passport application and passport administration

Even though Article 8 of the *Regulations on Passport and Visa* 1980 (PRC) confers a right on all Chinese citizens to obtain a passport, in practice, only individuals with specific qualifications could apply.⁷⁴⁷ Individuals exiting China for public affairs had to submit documents alongside the application form, undertake strict examination and hand in their passport for unified administration.⁷⁴⁸ In fact, these limits on exit for public affairs had the effect of limiting almost all individuals likely to exit the State, given that only people employed by the government or a State owned enterprise could afford to travel abroad.⁷⁴⁹ Additionally, lack of provisions for the processing of passport applications, resulted in the exercise of unfettered administrative discretion and arbitrary decision-making.

Notably, it was more difficult to obtain a passport if the applicant was a member of the Communist Party of China (CPC). Under Article 1 of the *Rules of Personal Department of Central Committee of Chinese Communist Party on Some Issues Regarding Party Members Exiting China, Hong Kong or Macao Areas for Private Affairs* 1981, a “member of Chinese Communist Party exiting abroad for private affairs must lodge the application [with the] work unit’s Party Committee and local public security authority”. After approval was obtained from both of these ‘authorities’, the “application [was] reported to senior Party Committee”. An

⁷⁴⁷ Article 8 of the *Regulations on Passport and Visa* 1980 (PRC) set forth “An ordinary passport is to be issued to the following persons: the ordinary passport for public affairs is issued to postgraduates, individuals attending advanced studies, overseas students, labourers and seamen employed by foreign companies; the ordinary passport for private affairs is issued to Chinese citizens exiting from China for private affairs and Chinese citizens residing overseas; other individuals for whom it is necessary to be granted an ordinary passport under the consideration of the issuing passport authority.”

⁷⁴⁸ Article 3 clauses 1 and 2 the *Circular of Application for Passport and Visa for Individuals Exiting from China Temporarily for Public Affairs* 1983 (PRC) required individuals to be provided with an exit abroad task document and political examination document with a leader’s instruction. Article 6 Clause 2 and 4 required that individuals exiting from China immediately hand in their passport (whether diplomatic, business or ordinary) to public affairs [meaning unclear here] to work unit upon return to China. If the person needed to exit China again, they would need to apply for a certificate issued by bureau-level work unit.

⁷⁴⁹ According to official Chinese statistics, in 1985 the average annual per capita income for a rural person was C ¥574.31 (US\$66.18), whereas the average annual per capita income in urban areas was C ¥748.92 (US\$90.56). See “Per Capita GDP from 1952 to 2002” (*1952 Nian – 2002 Nian Renjun Guomin Shengchan Zongzhi*), <http://www.menet.com.cn/shuju/gmjj/gmjj-rjgdp.htm> (15/04/2004).

ordinary passport could then be granted. Given that Party members occupied all senior government positions and most positions in State-owned enterprises and institutions, these limits effectively restricted the exit of China's elite.

Exit visa

In 1980, the exit visa system was established. Under Article 2 of the *Regulations on Passport and Visa* 1980 (PRC) the exit visa is a permission document that would permit Chinese citizens and aliens to exit the Chinese border. Article 9 required Chinese citizens, overseas returnees and aliens must apply for a visa if they exit China.⁷⁵⁰ Multiple entry and exit visas could be obtained if the applicant was involved in setting up a factory or other investments, or had bought a house and lived in the province for extended periods. This system was obviously outdated by international standards.

Single nationality

Also in 1980, the *Law of Nationality* (PRC) was enacted. It summarised the nationality policy that had operated since 1949. In particular, Article 3 expressly refused to recognise dual nationality. This policy had been introduced to avoid diplomatic issues with countries in which a Chinese national was resident and also a citizen. However, the policy significantly undermined the ability of overseas Chinese to maintain close links with China, as they needed to apply for a visa to enter, transit, settle or exit the country. This adversely affected their living, employment and educational opportunities.

The Bureau of Administration of Exit and Entry of Aliens under the MPS was established in 1983, creating a dedicated exit and entry administrative body. Furthermore, limits on overseas Chinese exiting China were eased. Economic development and reform measures outlined saw a

⁷⁵⁰ The exit visa system was also contained in other regulations such as Article 3 Clause 1 of the *Interim Provisions of the Special Economic Zones in Guangdong Province for the Control of Personnel Entering and Leaving China*, 1981 (Guangdong, the PRC). That provision required foreigners and overseas Chinese to comply with entry and exit procedures and to obtain a visa.

marked increase in the number of people entering and exiting China.⁷⁵¹ China approved approximately 50,000 individual applications to exit for private affairs each year between 1979 and 1985.⁷⁵²

Looking back, the liberalisation of exit and entry during this period was very limited, while some improvements were made to exit and entry administration. The advanced legislative thinking in the regard of exit and entry administration was not carefully executed. Outdated passport administration and nationality administration continue to be a dominant theme.

6.5 1985 and 2001: the development of the reform of the restrictive framework governing the RLR

From 1985 to 2001, over 400 statutes paved the way for comprehensive governance of exit and entry, mainly through the MPS. These laws gradually lifted the restrictions placed on Chinese citizens exiting China, encouraged the return of overseas Chinese, eased the restrictions on the entry and permanent residence of aliens, and established emigration intermediary agencies. Although the development did not extend to constitutional protection of the RLR, or the liberalisation of exit and entry contained in ordinary statutes, it further improved the RLR in China.

The return of legal recognition of citizen's the RLR

Legal recognition of citizens' the RLR was resumed in February 1986, when the *Law on the Control of Exit and Entry of Citizens* 1985 (PRC) came into force. Article 1 was:

...formulated with a view to safeguarding the legitimate rights and interests of Chinese citizens

⁷⁵¹ In 1978, 1.88 million people passed across China's borders, compared to 12.8 million by 1984. of this, the number of aliens travelling into and out of China in 1978 was 450,000, compared to 3 million in 1984. Committee of Textbook Editing and Examination of the Ministry of Public Security, *Renmin Jingcha Gong'an Yewu Jichu Jiaocai: Bianfang Yu Churu Jing Guanli (Frontier Defence and Exit and Entry Administration, the Series of Basic Textbook of People's Police Operation)*, the Publishing House of Qunzhong, Internal Publication within Public Security Organs (*Gongan Jiguan Neibu Faxing*), Beijing, 1999, page 281.

⁷⁵² Wang, leiming, "Citizens May Exit Abroad for Private Purpose Easier and Faster" (*Woguo Gongmin Yinsi Chuguo Gengjia Bianjie*), <http://www.sina.com.cn> 19/09/2002 quoted in Xinhua News Agency, 18/04/2003.

with respect to their exit from and entry into China's territory and to promoting international exchange.

the RLR was respected in qualified terms. The right was precondition upon being "legitimate". This excluded the possibility of full or unqualified protection of the RLR and suggested that in-depth issues regarding the RLR and Chinese migration law could not be resolved through non-essential migration law reform. But the lack of express recognition of alien's the RLR was not changed. According to Article 1 of the *Law on the Control of Entry and Exit of Aliens* 1985 (PRC) "for the purpose of safeguarding the sovereignty and maintaining the security and public order of the PRC and facilitating international exchanges".

Legislation of the exit and entry

Although the provisions of these two laws provide for the formulation of later relevant laws, their contents were generalised and ambiguous. The enactment of the *Detailed Rules for the Implementation of the Law on the Control of Entry and Exit of Citizens* 1986 (PRC) and the *Detailed Rules for the Implementation of the Law on the Control of Entry and Exit of Aliens* 1986 (PRC) did not resolve the issue of ambiguity. The degree of ambiguity fostered the enactment of a large number of subsidiary orders, directives, rules and circulars.⁷⁵³ Based on the incomplete collection of the Bureau of Party and Government Foreign Affairs Cadre, under the Organisation Department of the Central Committee of the CPC, 42 ministries, committees, State bureaus, Courts and banks promulgated 235 orders, directives, subsidiary rules and official documents and letters during the period between May 1980 and July 1994.⁷⁵⁴

⁷⁵³ The major regulations include the *Provisional Measures Concerning the Control over Chinese Citizens Travelling on Private Affairs to or from the Regions of Hong Kong or Macao* 1986 (PRC), the *Circular of the General office of the State Council on the Measures for Receiving Compatriots from Taiwan Coming to the Mainland to Visit Their Relatives or as Tourists* 1987 (PRC), the *Circular of the General office of the State Council on Students Studying Abroad* 1992 (PRC), the *Provisional Measures on Procedures for Contract Workers Sent Abroad Leaving the Country* 1996 (PRC), the *Provisional Measures on the Administration of Chinese Citizens' Tours Abroad at Their Own Expense* 1997 (PRC) and the *Law of the Rights and Interests of Returned Overseas Chinese and the Family Members of Overseas Chinese (Amendment)* 2001 (PRC).

⁷⁵⁴ Calculated according to the Bureau of Party, Government Foreign Affairs Carder under Department of Personal of Central Committee of Chinese Communist Party, the table of content of the *Collection of Popular official Documents and Letters, Regulations and Laws Governing Examination and Administration of Exiting Abroad*

These subsidiary regulations suggest that during this period, the legislative process was not unified. This model can be attributed to the influence of a planned central economy, in which individual ministries were separately responsible for managing different sections of the national economy and national development, in which competition did not play a key role. Each ministry had the power to enact regulations in a relatively autocratic manner, which led to the inconsistencies and disputes that arose within the body of legislation. The *Regulations on the Administrative Legislation Procedure* (PRC) 1989 that governed the rule-making activities of the State Council and its ministries was widely regarded by Chinese authorities as unsatisfactory.⁷⁵⁵

The public had little access to government policies and rules because there was no freedom of information legislation. The Bureau of Party and Government Foreign Affairs Cadre, under the Organisation Department of the Central Committee of the CPC, stated in the *Collection of Popular Official Documents, Regulations and Laws Governing Examination and Administration of Exiting China* that:

Most of the collections in this book are internal official documents and must be safely kept. They are banned from being copied, publicly released, or cited unless publicly released.⁷⁵⁶

Consequently, a large number of unpublished official documents formed a bureaucratic barrier to the RLR.

Formalities associated with passport applications and obtaining permission to exit China

(*Chuguoqing Shenpi Ji Guanli Gongzuo Changyong Wenjian Fagui Xuanbian*), the Publishing House of Danjian Duwu, Interior Publication (*Neibu Faxing*), Beijing, 1994, pages 1-33.

⁷⁵⁵ Rubin, Edward L. "Administrative Law and the Complexity of Culture", in Seidman, Ann, Seidman, Robert B. and Payne, Janice (ed.), *Legislative Drafting for Market Reform: Some Lessons from China*, Macmillan Press Ltd., London, 1997 and St. Martin's Press, Inc. New York, 1997, page 91.

⁷⁵⁶ The Bureau of Party, Government Foreign Affairs Carder under the Department of Personal of Central Committee of Chinese Communist Party, the *Collection of Popular official Documents and Letters, Regulations and Laws Governing Examination and Administration of Exiting Abroad* (*Chuguoqing Shenpi Ji Guanli Gongzuo Changyong Wenjian Fagui Xuanbian*), the Publishing House of Danjian Duwu, Internal Publication (*Neibu Faxing*), Beijing, 1994, in "the Introduction of the editor".

A Chinese citizen needed to go through complicated formalities when applying for a passport, including approval from one's work unit, producing household registration documents, an invitation letter from overseas, as well as the financial guarantee for the duration of the visit. Having close relatives abroad was almost a prerequisite for obtaining permission to travel abroad. the RLR was further restricted by the controls placed on access to foreign exchange. As Bard-Anders Andreassen and Theresa Swinehart observed in *Human Right in Developing Countries Yearbook 1990*, "foreign travel for private affairs is severely restricted [in China]."⁷⁵⁷ In 1994, Mary Shi noted in *Human Right in Developing Countries Yearbook 1994* that:

Freedom to leave and enter [China] remains under government control. Citizens who have not shown any sign of improper political attitude, however, will more easily be granted permission to study abroad than before. The time needed to obtain a passport will rather depend on the amount of contacts (*Guanxi*) one has within the bureaucracy of local authorities, the work unit or the neighbourhood committee, than on the relevant Ministry.⁷⁵⁸

No one knows how many Chinese wanting to go abroad were discouraged from applying because they are aware of the complications and, more importantly, because they may have feared reprisals against themselves and their families. Fortunately, the restrictive framework governing the RLR was experiencing further reform. In 1986, the first round of reforms characterised the effectiveness of the *Law on the Control of Exit and Entry of Citizens 1985* (PRC) and the *Law on the Control of Entry and Exit of Aliens 1985* (PRC). The system of entry-exit visas for citizens⁷⁵⁹ was accordingly replaced with an exit registration card,⁷⁶⁰ and

⁷⁵⁷ "China" at Andreassen, Bard-Anders and Swinehart, Theresa (ed), Human Rights Institutes in Norway, Denmark, the Netherlands, Finland and Sweden (Compilation), *Human Right in Developing Countries Yearbook 1990*, N. P. Engel, Publisher, Kehl, Strasbourg and Arlington, 1991, page 125.

⁷⁵⁸ Shi, Mary, "China" at Baehr, Peter, Hey, Hilde, Smith Jacqueline and Swinehart, Theresa (ed), *Human Right in Developing Countries 1994 Yearbook*, N. P. Engel, Publisher, Kehl, Strasbourg and Arlington, 1995, page 180.

⁷⁵⁹ "Chinese citizens may leave or enter the country with valid passports or other valid certificates issued by the competent department of the State Council or other departments authorised by them. They shall not be required to apply for visas." Article 2 of the *Law on the Control of Exit and Entry of Citizens 1985* (PRC)

⁷⁶⁰ "The Chinese passport, together with the exit registration card, shall be issued by the entry-exit control department of the public security organ to the citizens residing in China whose exit applications have been approved." Article 6 of the *Detailed Rules for Implementing the Law of Exit and Entry of Citizens 1985* (PRC) made pursuant to the *Law of Exit and Entry of Citizens 1985* (PRC) promulgated by the MPS, MFA and Ministry of Communications, and approved by the State Council.

aliens exit visa was abolished.⁷⁶¹

The second round of reforms took place in 1992. After 1991, China set up the goal of establishing a socialist market economy. The demand for the RLR was more pressing than ever. At this time, the registration card for exiting a second or subsequent time was abolished.⁷⁶² In addition, the MPS simplified the procedure for exiting China for private affairs for intermediate and senior science and technology personnel. This group no longer needed to provide a certificate of approval from a provincial, regional and municipal level of government with their application.⁷⁶³

The third and fourth round of reforms occurred in 1996 and 2000. At the third, partial Chinese and overseas Chinese who had returned to China; as well as their families, no longer needed to submit a foreign letter of invitation with their application to leave.⁷⁶⁴ The fourth permitted citizens to apply for a passport upon evidence of a foreign exchange deposit, rather than a certificate from the work unit.

Occurrence of political and economic exile from 1980

After 1980, especially the Tiananmen crackdown in 1989, the number of Mainland Chinese

⁷⁶¹ “For exit from China, aliens shall present their valid passports or any other valid certificates.” Article 22 of the *Law on the Control of Exit and Entry of Aliens* 1985 (PRC).

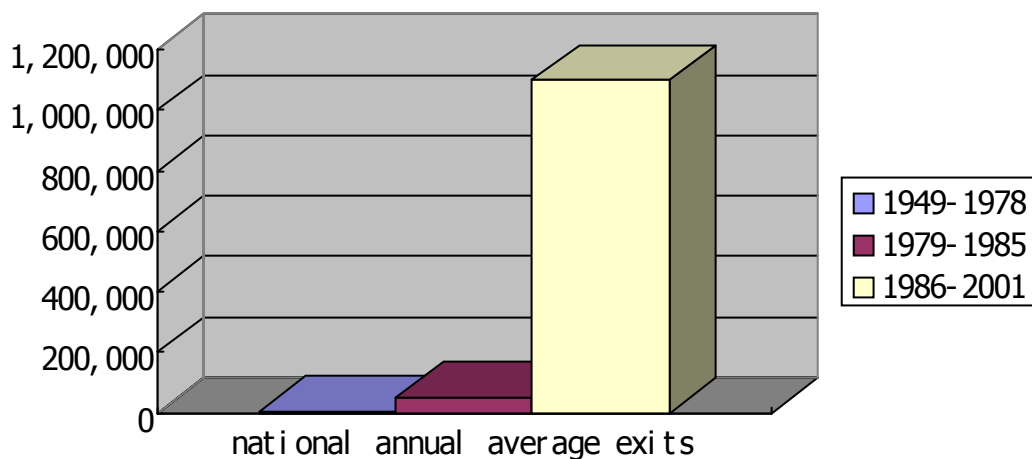
⁷⁶² Article 1 of the *Circular of Sixth Bureau of the Ministry of Public Security on Simplifying the Formality of Citizens Exiting from China again for Private Affairs* 1992 (PRC) provided that an “[o]rdinary passport holder desiring to exit abroad again after returning to China need not apply for exit registration card again No matter how long the individuals stayed after returning to China, whether the causes for exiting from China have changed or not, as well as whether the destination country has changed.”

⁷⁶³ The exit application of a research assistant, lecturer, engineer, medical practitioner and other intermediate and senior scientific and technical personnel will be processed pursuant to the *Law on the Control of Exit and Entry of Citizens* 1985 (PRC). Article 1 of the *Circular of the Ministry of Public Security on Simplifying the Formality of Intermediate and Senior Science and Technology Personals Exiting Abroad for Private Affairs* 1992 (PRC) (*Gonganbu Guanyu Jianhua Zhongji Gaoji Keji Renyuan Yinsi Chujing Shouxu De Tongzhi*), promulgated by the Ministry of Public Security on 27 August 1992.

⁷⁶⁴ *Operational Norms of Application, Examination and Approval of Exiting from China and Passport For Private Affairs of Citizens* 1996 (PRC).

students in Western universities who became political or economic exiles swelled.⁷⁶⁵ It represented the biggest wave of Chinese migration since the gold rush of nineteenth century.⁷⁶⁶ The expansion of the overseas Chinese network ensures the feasibility of further development of the RLR in China in the near future.

Effects of reforms of legislation governing exit and entry on the levels of exit and entry



Graph 1: Average National Annual Exits in Three Migration Legislative Stages. Source: the Ministry of Public Security (MPS), China 2002

The above graph dramatically shows average annual exit numbers in three different legislative stages. From 1949 to 1978, China had operated under a planned central economic system. The average number of exits each year was 7,000. From 1979 to 1986, China initiated its policy of reform and opening up but did not enact entry and exit laws. The average number of exits was

⁷⁶⁵ Wichberg, Wdgar, “The Chinese as Overseas Migrants in Brown”, Judith, M. & Foot, Rosemary (ed), *Migration: the Asian Experience*, 1994, the Macmillan Press Ltd., London, page 16.

⁷⁶⁶ For example, more than 42,000 Chinese students were granted permanent visas in Australia following the 1989 events in Beijing. This number grew to 100,000 when the students were allowed to bring their families to Australia to be reunited. That number accounts for 70.42% of all Chinese mainlanders who now live in Australia. See Banham, Cynthia, “Children of the revolution”, the *Sydney Morning Herald*, Australia, Christmas Weekend Edition, pages 26-28, December 2003.

50,000 per year. From 1987 to 2001, the legal system of exit and entry was established and China began to integrate into the rest of the world. Limits on external travel were gradually lifted. The annual average increased to 1.1 million.

At present, more than 10,000 passports are issued daily by the MPS, the daily number is more than the yearly total issued during the 1950s through to the 1970s.⁷⁶⁷ Dating from 1989, when the first national conference on exit and entry administration was held, 1.334 billion entries and exits have been recorded by China's exit and entry administration, an annual growth of 27.91%.⁷⁶⁸ In 1990, Chinese migration stock was 380,000, and 513,000 in 2000.⁷⁶⁹ The above graph and figures demonstrate that legal reform played a positive role of promoting the realisation of the RLR.

Emigration intermediary services

The rapid growth in the number of people exiting China has resulted in the development of an emigration intermediary service market, the formation of which, as a result of complex economic and socio-ideological causes, has been chaotic. The *Provisions on the Administration for Overseas Employment Intermediary Agencies* 1992 (PRC), the *Regulations on the Administration for Travel Agencies* 1996 (PRC) and the *Regulations for the Administrative on Intermediary Agencies for Self-funded Studying Abroad* 1999 (PRC) were enacted to regulate the industry. The new regulations developed a system of reserve funds related to overseas employment and overseas study intermediary agencies, and overseas travel agencies.

Final remarks

By 2001, some important achievements were reached in the protection of the RLR, despite its motley historical record. Nevertheless, restrictions on the RLR are still severe, and issues fundamental to the system of migration control remain. For example, most reform measures

⁷⁶⁷ Wang, Chuyan, "Passport Gain Wider Currency in China", China Central Television, 18 October 2002, <http://www.cctv.com/english/news/TVNews/MorningNews/20021018/100241/html> (19/06/2003).

⁷⁶⁸ "China to Reform Exit-Entry Administration", http://www1.chinadaily.com.cn/en/doc/2001-12/21/content_99065.htm (19/12/2003).

⁷⁶⁹ Population Division, Department of Economic and Social Affairs, *International Migration Report 2002*, United Nations Secretariat, 2002, ST/ESA/SER.A/220, the United Nations, New York, 2002, 62 pages, attached table.

failed to integrate new policies into the *Law on the Control of Exit and Entry of Citizens* 1985 (PRC), and the *Law on the Control of Entry and Exit of Aliens* 1985 (PRC) and its detailed rules of implementation. Consequently, the achievements are perhaps unstable in the sense that their legal validity is in dispute.

6.6 Conclusions

Rich and complex experiences of historical development are two sides of a coin for China today. China can play a catalytic role in helping protect the RLR, or place a heavy burden on and hamper the improvement of the RLR. The Chinese government needs thus to objectively discriminate its position in relation to the RLR by reference to international human rights ethics, rather than exclusively to Chinese national experience or tradition.

Given the long years of war and abnormal relations with Western countries, it is understandable that a relaxation of limits has only been intermittent; restriction has been a dominant theme. Issues of the RLR in China are not only the issues of today but also those accumulated over time. That history cannot be cited as an excuse not to solve the current issues of the RLR.

As a rule, inertia of historical development can be affected and overcome by outside force, though such change is often reactionary and overly sudden. With the RLR in China, the dominant theme of restriction will remain until the legislation governing exit and entry is reformed. In respect of the complexity underlying a history of accumulated issues in China, a well-designed reform strategy focused on the RLR needs to be gradual.

In the development of rights in China, the RLR is a very new issue, the discussion and conception of which is mainly provided by contemporary scholars. Government authorities have not yet completely accepted the idea of the RLR. In Chinese society all electronic and print media are controlled by the CPC, hence there is little ground for building awareness of the existence and the need to improve upon the RLR of individuals. This lack of awareness of the RLR in the public domain hinders the complete execution of laws to enhance exit and entry and may also, if overlooked, hinder the design of an advanced reform strategy to solve the issues of

the RLR in China.

Chapter Seven

Planned Reform Strategy and Measures for the Exit and Entry Administration

Introduction

In principle, China has acknowledged the importance of protecting the RLR, and has taken steps to have its practices conform to international norms. Restrictions on the RLR in China will be gradually relaxed from 2002 to 2005. Procedures will be greatly simplified.⁷⁷⁰ According to the official media, this round of reforms will be the biggest overhaul of Chinese migration law in history.⁷⁷¹ This chapter will discuss (i) the context of the reforms; (ii) the contents of the reform strategy and its implementation, including the sub-round reform measures from 2002 to 2004 and local governments reform measures; and (iii) the impacts, deficiencies and nature of the reforms, with some forecast of the RLR and migration law in China in the near-future.

7.1 The context of the reforms

The fundamental reason for reforming exit and entry administration is that strict controls are incompatible with China's economic and social development. The then President Jiang Zemin argued in 2002 that, "reform and opening up have yielded substantial results. The socialist market economy has taken shape initially."⁷⁷² Meanwhile, an absence of corresponding reform of exit and entry administration has diluted China's ability to develop and integrate into the world. By international standards, since 1949 the Chinese government has exercised too much power over migration and the RLR, yet this has received less attention than other aspects of the reform.

⁷⁷⁰ "Simplifying Exit-entry Procedures, a Vital Step for China", 23 November 2001, *The People's Daily*, http://english.peopledaily.com.cn/200111/23/eng20011123_85161.shtml (18/04/2003).

⁷⁷¹ "State to Simplify Entry-exit Rules", 11/22/2002, *The China Daily*, <http://www1.chinadaily.com.cn/news/2001-11-22/44711.html> (18-04-2003).

⁷⁷² Jiang, Zemin, the President of the People's Republic of China, Part I Par 4 of "Build a Well-off Society in an All-Round Way and Create a New Situation in Building Socialism with Chinese Characteristics: Report at 16th China Communist Party Congress (8/11/2002)", <http://www.fmprc.gov.cn/eng/37815.html> (19/07/2003).

China's accession to membership of the World Trade Organisation (WTO) sparked exit and entry administration reform. The government widely recognised the need to simplify procedures. The then Prime Minister Zhu, Rongji said in 2002 "China's accession to the WTO benefits its reform and opening up and its economic development as a whole."⁷⁷³ Further, that "We need to actively participate in international economic cooperation and competition on a broader scale and in greater depth."⁷⁷⁴ The then minister of the MPS Jia Chunwang, said in 2001:

China's entry into the WTO will ensure the country participates in international cooperation in a more comprehensive manner, while these measures will deepen the reforms and serve the economic construction.⁷⁷⁵

Chinese society was in favour of these opinions. China Radio International, the most authoritative multi-language State-owned radio station, announced that a flood of tourists and businessmen were expected to enter and exit the country after China's entry into the WTO.⁷⁷⁶ *The China Daily*, the leading authoritative English newspaper owned by the State said "a far-reaching overhaul of border administration is to be kick started following China's entry to the WTO to cope with the expected deluge of tourists and businessmen".⁷⁷⁷ Ten days after accession, the 2002 national annual meeting on exit-entry administration was held in Beijing in which the reform strategy was announced.

7.2 The content of the reform strategy and its implementation

The content of the reform strategy and its implementation provide the basis for analysing the influences, deficiencies and nature of the reforms —an analysis not previously undertaken.

⁷⁷³ Zhu, Rongji, the Premier of the State Council, Par. 1 of Part II of "the Report on the Work of the Government (16/03/2002)", <http://www.fmprc.gov.cn/eng/26804.html> (19/07/2003).

⁷⁷⁴ Zhu, Rongji, the Premier of the State Council, Par 1 of Part IV of "the Report on the Work of the Government (16/03/2002)", <http://www.fmprc.gov.cn/eng/26804.html> (19/07/2003).

⁷⁷⁵ Quoted in "Simplifying Exit-Entry Procedures, A Vital Step for China", *The People's Daily* 23-11-2001 http://english.peopledaily.com.cn/200111/23/eng20011123_85161.shtml (18 April 2003).

⁷⁷⁶ Wang, Ling, "China Simplifies Entry-exit Rules", November 2001, China Radio International, <http://english.cri.com.cn/english/2001/Nov/36826.htm> (18/04/2003).

⁷⁷⁷ "State to Simplify Entry-exit Rules", 11/22/2002, *The China Daily*, <http://www1.chinadaily.com.cn/news/2001-11-22/44711.html> (18-04-2003).

7.2.1 Reform goals

Six reform goals were announced at the annual national meeting on exit-entry administration in November 2001. With the exception of two goals related to the simplification of Chinese tourist group visas and permanent resident visa applications, the four remaining reform goals announced were pertinent to the RLR. The “passport on demand” policy is the centre of the reforms. By 2005, Chinese citizens in large and medium-sized cities will be able to obtain a passport merely by presenting their identity cards and household registration documents to the appropriate authorities.⁷⁷⁸ Jia Chunwang, in 2001, explained that the reform was aimed at gradually supplying passports to those who required them.⁷⁷⁹ The key to this measure is that applicants are no longer needed present written permission from work units; thereby better protecting individual privacy. Clearly, the policy of passport on demand advantages the urban population rather than people living in small towns and rural areas. It was adopted after the experience of Zhongshan in Guangdong Province, where a passport on demand policy was initiated in April 2001.⁷⁸⁰ The other three reform goals are:

- The cancellation of the requirement of providing invitation letters when applying for passport;
- The establishment of special channels at the airports for Chinese citizens; and
- The relaxation of restriction on travelling to the HKSAR or MSAR.

By the end of 2002, Chinese citizens no longer needed to provide invitation letters from the foreign country of destination when applying for a passport; and authorities no longer issued the exit registration card attached to the passports of citizens residing in China whose exit application had been approved.⁷⁸¹ During 2002, special channels for Chinese citizens were set up at ten airports in Nanjing, Kunming, Shenyang and other parts of China, as is currently being

⁷⁷⁸ “Simplifying Exit-Entry Procedures, A Vital Step for China”, *The People’s Daily* 23-11-2001
http://english.peopledaily.com.cn/200111/23/eng20011123_85161.shtml (18/04/2003).

⁷⁷⁹ Quoted in *China Simplifies Entry-exit Rules*, November 2001, China Radio International,
<http://english.cri.com.cn/english/2001/Nov/36826.htm> (18/04/2003).

⁷⁸⁰ “Guangdong Residents May Apply for Passport with ID and Resident Cards within 2003”, 6 March 2003, Southern Net, <http://travel.21cn.com/news/focus/2003-03-06/958982.html> (23/07/2003).

⁷⁸¹ “China Simplifies Entry-exit Rules”, November 2001, China Radio International,
<http://english.cri.com.cn/english/2001/Nov/36826.htm> (18/04/2003).

practiced in the Capital Airport and Shanghai-based Pudong Airport.⁷⁸² From September 2002, Mainland Chinese residents have been allowed to travel to the HKSAR and MSAR on business for up to three years before their visas expire. Those who stay for less than three months are now able to obtain a visa without the need to fulfil extra requirements on taxation or foreign exchange; and the number of travellers to these places is no longer limited. These measures were to accommodate increasing business travel to or from the HKSAR and MSAR.⁷⁸³

7.2.2 Three rounds of national reform measures in 2002, 2003 and 2004

To reduce the social disruption that may have been caused by the reforms, the measures were gradually introduced in three rounds in 2002, 2003 and 2004. The 2002 reform measures focused on the pilot programs and trial implementation of reform strategy. The 2003 and 2004 reform measures aimed to deepen and extend the 2002 reform.

2002: the pilot programs and trial implementation of reform strategy

In 2002 measures emphasising pilot programs and trial implementation were adopted. The first was related to passport on demand. Twelve cities were selected for this pilot of program in the first half of 2002⁷⁸⁴ and passport applications in these cities increased by over 40%.⁷⁸⁵ By the end of 2002, the policy had been introduced into 24 large and medium-sized cities including, Shanghai, Nanjing, Qindao and Xiamen, whereupon passport applications increased by 30 to

⁷⁸² “Simplifying Exit-Entry Procedures, A Vital Step for China”, the *People’s Daily*, Vol 18 April 2003
http://english.peopledaily.com.cn/200111/23/eng20011123_85161.shtml (18/04/2003)

⁷⁸³ MPS’s Bureau of Exit and Entry Administration revealed that, in 2001, more than 2.46 million Mainland citizens entered and left the HKSAR and MSAR, three times the number in 1997. Quoted in Jiang, Zhuqing, “Mainland SAR Visa Procedures Simplified”, 30 May 2002, *The China Daily*.
http://www3.chinadaily.com.cn/en/doc/2002/05/30/content_121719.htm (05/08/2003).

⁷⁸⁴ The 12 cities are Zhongshan, Shunde, Jiangmen, Fushan, Huizhou, Shantou, Shenzhen, Zhuhai, Guangzhou, Fushun, Qionghai and Zibo. See “Trial of New Passport Application Procedure Goes Smoothly: Shanghai will become China’s Thirteen City to Try Out a Simplified Procedure for Passport Applications”, August 2002,
<http://english.cri.com.cn/english/2002/Aug/69224.htm> (18/04/2003).

⁷⁸⁵ “Trial of New Passport Application Procedure Goes Smoothly: Shanghai will become China’s Thirteen City to Try out a Simplified Procedure for Passport Applications”, August 2002,
<http://english.cri.com.cn/english/2002/Aug/69224.htm> (18/04/2003).

50%.⁷⁸⁶

According to the *Circular of the Ministry of Public Security on Simplifying the Formalities of Mainlanders Short-term Exiting and Entry the Areas of HKSAR and MSAR 2002* (PRC), the MPS adopted seven reforms for Mainland citizens' short-term visits to the HKSAR and MSAR from June 2002:

1. The types of visas available to entry into the HKSAR and MSAR were extended from family visits and tourist visas (as at 1997) to include visas for business, training, work and study.
2. The scope of visiting relatives was extended.⁷⁸⁷
3. The terms of business visas were expanded and their formalities simplified.⁷⁸⁸
4. Tourist visas were given to people aged over 60 or under 14. Applications could be made at the local exit-entry administration bureau even if applicants were members of transient households.
5. Other visas will be issued to those who need to deal with property, attend court or be present at a migration interview.
6. Overseas Chinese who have returned to the Mainland can apply for passes or visas for the HKSAR and MSAR at exit-entry authorities of the city or county in which their residence is registered, or where they are employed.⁷⁸⁹

⁷⁸⁶ Wang, leiming, "Citizens May Exit Abroad for Private Purpose Easier and Faster" (*Woguo Gongmin Yinsi Chuguo Gengjia Bianjie*), <http://www.sina.com.cn> 19/09/2002 quoted in Xinhua News Agency, 18/04/2003

⁷⁸⁷ A visa is available to visit a relative who is living, studying or working in the HKSAR or MSAR. The definition of "relative" has been extended to include a spouse, parents or parents in law, children, grandparents, grandchildren, siblings, aunts and uncles, and nieces and nephews and their spouses. Visas can be issued to allow entry once a month, once in three months, or three-month multi-entry visa. A visa to visit a spouse will generally be a three-month multi-entry visa.

⁷⁸⁸ A business visa may be granted on the basis of being used once a fortnight, as a three months multiple-entry, a one-year multi-entry visa, or three-year multi-entry visa. The first two categories are issued on demand. Prior tax and foreign exchange requirements have been cancelled. It is no longer necessary to provide documentary evidence when applying for a one-year multi-entry visa. Further, if two different public security administrations operate on the applicant's permanent resident area and work unit, the applicant may apply to the public security authorities of the city or county in which their residence is registered.

⁷⁸⁹ Jiang, Zhuqing, "Mainland SAR Visa Procedures Simplified", 30 May 2002, *The China Daily*, http://www3.chinadaily.com.cn/en/doc/2002/05/30/content_121719.htm (05/08/2003).

7. A certificate from the applicant's work unit or a police station is not required under certain circumstances.⁷⁹⁰

Lastly, the Chinese government has attempted to improve ordinary passports for public affairs.⁷⁹¹ According to Article 1 and 2 of the *Circular of Ministries of Education, Public Security and Foreign Affairs on Some Affairs Regarding Fulltime Students Exit China Short-term with Ordinary Passport for Private Affairs 2002* (PRC), since February 2002, fulltime students have, in principle, been allowed to exit China with an ordinary passport for private affairs.⁷⁹² A representative of the MOE stated that the student-related reforms, "will play a proactive role for China to foster talent and enhance China's reputation in the educational fields".⁷⁹³ However, in an objective sense, the improvements outlined above concerning ordinary passports for public affairs still fall short of international norms, such as in the continued requirement of documentary evidence from a school or educational institution.

2003: extension of 2002 reforms

Based on the experience of 2002, with emphasis on the results of the pilot program in Guangdong province, the MPS introduced three new rulings in August 2003 designed to facilitate the daily life of ordinary people in regard to exit and entry.⁷⁹⁴ These rulings were intended to enhance the 2002 reforms. With respect to passport applications, residents in 100 designated large- and medium-sized cities, accounting for one third of all Chinese cities, were

⁷⁹⁰ Where Mainlanders holding valid passports are applying for subsequent exit and entry to HKSAR and MSAR, or overseas Chinese who have returned to the Mainland are applying for exit and entry to HKSAR and MSAR.

⁷⁹¹ Part 8.1 and 8.2 will analyse ordinary passport for public affairs in details.

⁷⁹² According to the *Circular of Ministries of Education, Public Security and Foreign Affairs on Some Affairs Regarding Fulltime Students Exit China Short-term with Ordinary Passport for Private Affairs 2002* (PRC), students need to provide documentary evidence from their school or institution with their passport application. The student, or the school acting on the student's behalf, can make applications to the relevant foreign embassy or consulate in China. Previously, an application had to be made for a public affairs passport to attend short-time governmental exchanges, international conferences, undertake cooperative research, attend study tours, training, international competitions, or other exchange activities.

⁷⁹³ Quoted in "Student Can Go Abroad with Private Passport February 1 on, 4 March 2002", Xinhuanet, <http://www.edu.cn/20020304/3021674.shtml> (19/12/2003).

⁷⁹⁴ "New Rulings to Bring a Freer Life", /1208//2003 *China Business Weekly*, http://ww1.chinadaily.com.cn/en/doc/2003-08/12/content_255194.htm (19/12/2003).

allowed to directly apply for a passport on demand, using their identity card and residence booklets.⁷⁹⁵ Since September 2003, working citizens no longer require approval of their work unit in order to apply for a passport, unless they are serving government officials, intermediate or senior management in State-owned enterprises or a member of the CPC.

Furthermore, from 2003, residents from Guangzhou, Shenzhen and Zhuhai, Shanghai and Beijing may apply for travel permission to the HKSAR and MSAR on an individual basis by showing their identity card and resident's booklets. These visitors are not allowed to stay for more than seven days, but can apply an unlimited number of times. Residents in the 100 designated cities can travel to the HKSAR and MSAR and Taiwan and do not have to present a letter of approval from the employers or from their public security offices. Lastly, for Chinese who have gone abroad and who have lived overseas for more than one year, the stipulation that their household registration be cancelled, was rescinded.⁷⁹⁶

2004: further deepening of the reforms

2004 was a crucial year for the conclusions of the reform goals.⁷⁹⁷ Four measures were undertaken to further deepen the reforms. First, the passport on demand policy was expanded to 80% of large and medium sized cities, mainly in the central area. The remaining 20% of the country's large and medium sized cities will adopt this measure in 2005. Next, a long awaited "green card" system was introduced to grant aliens with permanent residence permits in August 2004.⁷⁹⁸ Thirdly, the issuance and management of credentials for Mainlanders to conduct short-term travel to the HKSAR and MSAR was further improved. Researchers at the MPS are

⁷⁹⁵ "Reforms Make Life and Travel Much Easier", 8 August 2003, *The China Daily*, http://www1.chinadaily.com.cn/en/doc/2003-08/08/content_252954 (19/12/2003).

⁷⁹⁶ "New Rulings to Bring a Freer Life", /1208//2003 *China Business Weekly*, http://www1.chinadaily.com.cn/en/doc/2003-08/12/content_255194.htm (19/12/2003).

⁷⁹⁷ Quoted in "China to Further Relax Entry and Exit Control", 25 December 2003, Xinhuanet, http://news.xinhuanet.com/english/2003-12/25/content_1247315.htm (30/12/2003).

⁷⁹⁸ "China Begins to Implement its own 'Green Card' System", http://english.people.com.cn/20040820/eng20040820_153939.html (23/08/2004). Also see the provisions of *Regulations on Examination and Approval of Permanent Residence of Aliens in China, 2004*.

identifying technologies for automatic passage systems at some Chinese ports.⁷⁹⁹ Lastly, procedures for travelling to and from Taiwan were further simplified.⁸⁰⁰

7.2.3 Provincial reforms

Provincial reforms are an indispensable part of the efforts to reform exit and entry administration. Under the MPS reform strategy, provincial governments may implement different reform measures according to individual needs. The provincial reforms are intended to compliment the national strategy and may not be inconsistent with it. Guangdong, Shanghai and Beijing have been selected for review because they are the most economically developed areas in China and their laws are more advanced than in other parts of China.

Guangdong

Guangdong has attracted the most attention from governments and scholars, not only because it has the widest networks with overseas Chinese, and the closest relationship with the HKSAR and MSAR, but has always implemented pilot reform programs, and provided examples for other parts of China. Guangdong's reforms have therefore gone further towards fully implementing the national strategy than other parts of China.

Materials from the National Symposium on Passport on Demand Pilot Program indicate that prior to March 2003, 9 cities of Guangdong⁸⁰¹ and the Guangdong Province Exit and Entry Administration had implemented the passport on demand policy. This policy was extended to the whole of Guangdong during 2003.⁸⁰² In addition, the reforms allowed an individual to apply for a passport in Guangdong, even though such individual was not a registered resident of the province, provided that he or she has been continuously employed in Guangdong for a

⁷⁹⁹ "Exit and Entry of Citizens Will be More Easier Next Year" (*Mingnian Gongmin Churujing Jiang Geng Bianli*), <http://www.cnradio.com.cn/news/200312240292.html> (30/12/2004).

⁸⁰⁰ Zhang, Tao, "Relax the Restrictions Travelling to and from Taiwan, Chongqing Publish Series of Measures to Facilitate Exit and Entry of Resident" (*Wanglai Taiwan Fangkuan Xianzhi Congqing Tuichu Xilie Churujing Bianmin Cuoshi*), http://www.cq.xinhuanet/news/2004-03/17/content_1797126.htm (20/08/2004).

⁸⁰¹ The nine cities are Shunde, Zhuhai, Jiangmen, Foshan, Yangjian, Shenzhen, Dongwan, Huizhou and Guangzhou.

⁸⁰² "Guangdong Residents May Apply for Passport with ID and Resident Cards within 2003", 6 March 2003, Southern Net, <http://travel.21cn.com/news/focus/2003-03-06/958982.html> (23/07/2003).

minimum of six months, had a certificate of temporary residency, and could demonstrate that the purpose of their travel was business.⁸⁰³

Moreover, all Guangdong residents, since January 2004, have been able to apply for up to nine exit and entry certificates by internet or telephone. Applications for individual and package tours to the HKSAR and MSAR and individual passports are covered by these services.⁸⁰⁴ Finally, a series of measures to simplify exit and entry into the HKSAR and MSAR had been adopted in October 2002.⁸⁰⁵ The requirements to allow locals to reunite with family members in the HKSAR or MSAR had been relaxed in November 2002.⁸⁰⁶ From July 2003, residents in four cities of Guangdong could apply for permission to travel to the HKSAR and MSAR on an individual basis, as against the prior group travel basis.⁸⁰⁷

⁸⁰³ Exit and Entry Administration of Guangdong Public Security Department, "The Passport Application for Other Provinces (Municipalities) Residents with the Certificate of Temporary Residence in Shanghai" (*Waishen(Shi) Zaizhu Renyuan Shenban Huzhao*), <http://www.gdcj.com/zggmccg/wsjjy/default.htm> (19/06/2003).

⁸⁰⁴ Liu, Weifeng, "New measures cut bureaucracy", 15 October 2003, *The China Daily*, http://www1.chinadaily.com.cn/en/doc/2003-10/15/content_22068.htm (30/12/2003).

⁸⁰⁵ 1. The scope of the HKSAR and MSAR business visas was extended from businesspeople and Chinese staff employed by foreign enterprises, to staff employed in education institutions, research institutions, hospitals, law firms, and accountancy firms; 2. Individuals holding exit and entry passes for the HKSAR and MSAR no longer need to repeatedly apply for visas every time they travel to and from the HKSAR and MSAR; 3. Excluding individuals with special status, an applicant no longer needs to provide a certificate from a police station and work unit when applying for a pass and visa for the HKSAR and MSAR; 4. Limits on the size of travel groups have been abolished; Since 2003, Guangdong residents who want to participate in group travel to the HKSAR and MSAR have been able to obtain a visa merely by presenting their identity cards and household registration documents to the proper authorities; 5. Express Mail Services (EMS) service for passport delivery has gradually been extended across the whole province. See "Guangdong Resident Will Much Easier Exit Abroad" (*Wosheng Gongmin Jinhou Chuguo Chujing Jiang Gengjia Fangbian*), quoted in *Guangdong Public Security Daily*, http://www.gdcj.com/news/t20021104_1406.htm (19/06/2003).

⁸⁰⁶ People who applied before the end of 1994 for single-journey permits to the HKSAR to reunite with their husbands or wives received their permits before 1 January 2003. More than 5,000 Guangdong women travelled to the HKSAR to be reunited with their husbands after receiving a permit in January 2003. See "Spouse Reunion Requirements Relaxed" http://www3.chinadaily.com.cn/en/doc/2002-12/11/content_147494.htm (05/08/2003).

⁸⁰⁷ Four cities are Zhongshan, Dongwan, Jiangmen and Foshan. "Four Cities of Guangdong Province Tried Individual SARS Travel, Re-permission processing is Finished in 10 Seconds" (*Guangdong Sishi Shibao Geren Fu Gangao Yao, 10 Miao Nei Wancheng Xuqian*), 18 July 2003, <http://news.21cn.com/domestic/2003-07-18/1112023.html> (23/07/2003).

Shanghai

Being the most populous municipality and the economic capital of China, Shanghai's reform measures cannot be ignored. Following Guangdong, the passport on demand policy was launched in Shanghai in September 2002.⁸⁰⁸ Passport application in non-household registration regions was also relaxed. People from other provinces who lived in Shanghai and had worked there for more than one year in a Sino-foreign joint venture cooperative business, foreign-owned enterprises in Shanghai, or in the Shanghai office of an overseas institution, could apply for a passport in Shanghai if they were leaving the country in the course of their employment.⁸⁰⁹ Applicants needed to present an identity card, certificate of temporary residence in Shanghai, the business license of their employer, and a letter from their employer stating that the applicant is travelling for a business-related purpose.⁸¹⁰

Beijing

One year after Shanghai, Beijing adopted a series of similar reforms to greatly simplify passport application.⁸¹¹ Residents could now apply for a passport upon presentation of their identity card, household registration book, and by filling in a form in person or by a courier.⁸¹² Passports were generally issued within 10 working days after checking the required documents.⁸¹³ Two exit and entry administration offices were opened in Haidian and Chaoyang districts, in addition to

⁸⁰⁸ According to the Introduction of Hao Zhiyong, the director of the minister's exit and entry administration told a press conference held on 30 August 2002, that by presenting the ID cards or residence booklets, citizens in Shanghai could go to 100 post offices throughout the city for applications as well as police stations, increasing convenience for busy folk. Applicants were expected to receive passports within 10 working days. Shanghai also adopted some measures to improve non-registered resident application.

⁸⁰⁹ "Passport Application Reform to Undergo Testing", 30 August 2003, *The China Daily*, http://www1.chinadaily.com.cn/en/doc/2002-08/30/content_134255.htm (19/12/2003).

⁸¹⁰ Bureau of Shanghai Public Security, "Applying for the Passport, 08 2002", http://gaj.sh.gov.cn/shpolice/zixun/crjgl/item2002_08/5043.shtml (26/11/2003).

⁸¹¹ Quoted in Xiao, Xin, "Passport Application Simplified", 21 August 2003, *The China Daily*, http://www1.chinadaily.com.cn/en/doc/2003-08/21/content_256754.htm (19/12/2003).

⁸¹² The form that people are required to fill in can be download from the Bureau's website or picked up at one of the three offices. Before that, the form could be only got when applicant present ID card to the officer of the exit and entry administration.

⁸¹³ In the past, people had to provide approvals from their employers in additional to ID card and household registration book. It used to usually take 14 working days.

the existing office in Dongcheng District, to improve the processing of applications. Secondly, people from other provinces who lived in Beijing and worked for foreign businesses, joint ventures or firms in the private sector for more than one year were also entitled to apply for a passport in Beijing. The administration is currently creating a database of people who will be restricted from accessing the new system. Lastly, in July 2003 Beijing implemented detailed reform measures to facilitate Mainlander's work and study in the HKSAR and MSAR.⁸¹⁴

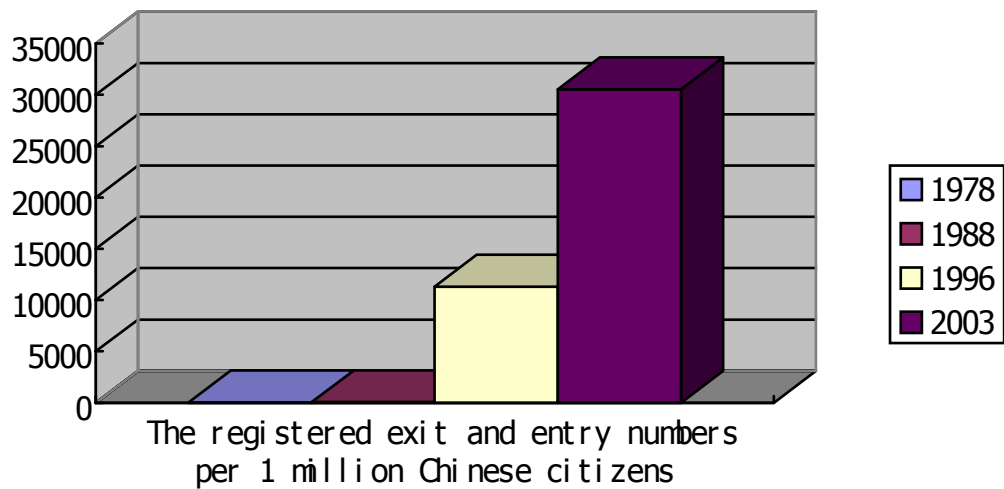
Fujian and Zhejiang

While residents in Guangdong, Shanghai and Beijing find it easier and much more convenient to obtain an ordinary passport for private affairs, Fujian and Zhejiang provinces, the main source of Chinese irregular migrants, still impose strict restrictions on the passport process. Passports cannot be issued unless a deposit of foreign exchange (e.g. US\$ 5,000) is made with the Bank of China; and women under the age of 35 are prohibited from holding an ordinary passport.

7.3 Effects of the reforms

Reform measures are recent and still evolving. They have recorded improvement of exit abroad applications in China. Before examining the effects of current reforms, it is useful to re-examine the impact of prior reforms on average national exits between 1949 and 2001.

⁸¹⁴ The spokesperson of the Beijing Public Security Bureau announced that Beijing residents could apply for exit and entry passes and visa for the HKSAR and MSAR for work and study purposes from 15 July 2003 if they have been approved to work, study and train by the Immigration Department of the HKSAR SAR, are the spouse of individual who is located in the HKSAR or MSAR, or has received a letter of offer from a MSAR high education institution. See Su, Qiang and Li, Xu, "Detailed Measures of Beijing on Facilitating Mainland Talents Exiting SARS Work and Study, 11 June 2003", Xinhuanet, <http://news.21cn.com/domestic/2003-07-11/1104534.html> (23/07/2003).



Graph 2: Registered Exit and Entry Numbers Per One Million Chinese Citizens in 1978, 1988, 1996, and 2003. Source: the Research on Population Issues in the Period of Reform and Opening-up⁸¹⁵ and the MPS⁸¹⁶

Graph 2 depicts the number of registered exits and entries per one million Chinese citizens over five typical years.

- In 1978, at the start of China’s reform and reintegration with the world, there were 14 per million exits and entries.
- In 1988, two years after the enactment of exit and entry laws, there were 62 per million.
- In 1996, the figure stood at 11,321 per million. This was the time at which the first regulations associated with applications, examination and approvals for exits were formulated, and passports for private affairs were made available to all citizens.
- In 2003, the second year of the reforms, the number of exits and entries was 30,538 per million, despite the SARS outbreak in the first half of that year. This figure represented a 20% increase on the number of citizens crossing China’s borders in 2002.

⁸¹⁵ Sa, Jicai and Cao, Jingcun, the *Research on Population Issues in the Period of Reform and Opening-up*, the Publishing House of Beijing University, Beijing, 1994, pages 229-232, Quoted in Huang, Ruilong, Bao, Sidun, Liu, Ling, *Overseas New Migrants over Last One Decade (Jin Shinian Woguo Dalu Haiwai Xin Yimin)*, No.1 [1998] the Journal of Population & Economics (*Renkou Yu Jingji*).

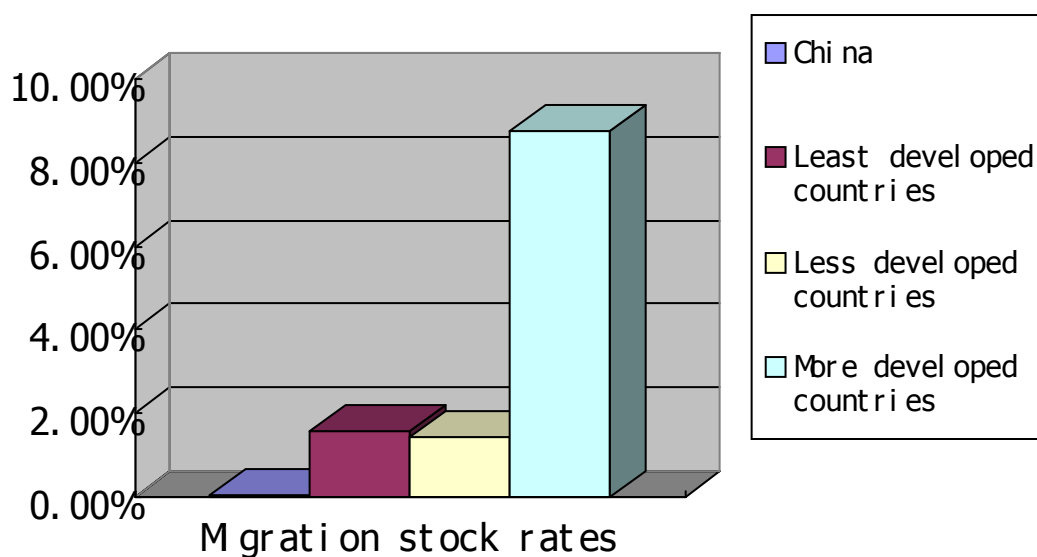
⁸¹⁶ Calculated according to the date quoted in “China Sees Unusual Fall in Exit-entry Numbers in 2003”, 12 January 2004 *People Daily Online*, http://english.peopledaily.com.cb/200401/12/eng20040112_13262.shtml (13/01/2004).

The next figures illustrate the effects of the current reform measures on international migration flow. One is from national perspective; the other two are from provincial perspectives. At the end of 2001, the Chinese government instituted the biggest process of exit and entry reform. One year later, the number of exits increased from 3,080,000 of 2001 to 4,010,000 of 2002. This suggests that the reforms were integral to promoting overseas travel of Chinese nationals.

The number of passports issued to Guangdong residents increased from 376,923 in 2001 to 490,000 in 2002. These figures are more significant in light of the fact that only 30 million people (34.71%) of Guangdong's total population⁸¹⁷ can take advantage of the passport on demand policy. Since August 2003, Shanghai residents have been able to apply for the travel permission on an individual basis to the HKSAR and MSAR. Dao Shuming, Vice-Director of the Shanghai Travel Administration Committee, forecast that the number of people to travel to the HKSAR would exceed 300,000 after one year of the policy's implementation. According to statistics from the Shanghai Travel Administration Committee, the number of exits to the HKSAR was 136,000 in 2002. 89,000 of this number were tourists. It demonstrates that the policy to permit individual travel to the HKSAR and MSAR stimulated applications to travel to the HKSAR.⁸¹⁸

⁸¹⁷ The population of Guangdong Province is 86.42 million in March 2001. "Guangdong Province", *The People's Daily*, <http://english.peopledaily.com.cn/data/province/guangdong.html> (30/12/2003).

⁸¹⁸ "Shanghai Residents May Apply for the Travel Permission on an Individual Basis to SARS very Easily, It Only Take 5 Minutes" (*Shanghairen Qingsong Ban Geren Gangao You, Quanguocheng Hua 5 Fengzhong*), 2 September 2003, Xinhuanet, <http://news.21cn.com/dushi/csts/2003/09/02/1252195.shtml> (02/09/2003).



Graph 3: Comparison of international migration stock rates Source: *International Migration 2002*, the IOM

As discussed in part 1.2 of this thesis, international migrants in China are still considerably lower than that in the rest of the world.⁸¹⁹ In 2000, 0.04 percent of the Chinese population were international migrants. The average rates in more developed regions, less developed regions and least developed countries are 8.739 percent, 1.452 percent and 1.566 percent respectively. This shows that with the development of China, international migrants will be further increased, and that issues in the protection of the RLR in China follow.

It is perhaps premature to conclude what influence the reform of exit and entry administration has had, because the reform strategy and measures are incomplete. For this reason, the influence so far analysed only pertains to the reform measures in place, along with an element of prediction with respect to future measures. Generally speaking, the future effects of the reform

⁸¹⁹ According to *International Migration 2002*, the Department of Economic and Social Affairs, Population Division, the United Nations, October 2002, different countries and regions migration stock rates have been calculated by the author as following: Egypt (0.29 percent), India (0.62 percent), Indonesia (0.19 percent), Romania (1.4.19 percent), Russian Federation (9.11 percent), Hungary (2.97 percent), Cuba (0.73 percent), Brazil (0.32 percent), Japan (1.27 percent), Republic of Korea (1.27 percent), Singapore (33.65 percent), United Kingdom (6.78 percent), France (10.59 percent), USA (11.35 percent), Australia (21.4.58 percent) and New Zealand (22.50 percent). Migration stock rate is just a little higher in China than the same rate in Vietnam (0.028 percent).

of exit and entry procedure on the Chinese economy and society, and on Chinese global integration, are subtle and lasting rather than instantaneous and short-term.

The reforms may foster an awareness of, and desire to protect the RLR, among individuals and governments. The impressive response of the Chinese people to the opening up of the country in 1978 demonstrates a compelling need to communicate with the world. The reforms have triggered a high demand to exit China, and have changed the way in which applications to exit are processed. Simplifying passport applications and processing may challenge some old thinking. It may begin to be thought that applying to exit China is exerting a right, rather than just performing a duty, and that the process itself is designed to protect that right, rather than simply to control exit and entry.

The reforms have revealed shortcomings in exit and entry administration and the underdevelopment of migration laws. Residents outside Guangdong, Shanghai and Beijing are aware that the administrative practices governing their applications are relatively more restrictive, and may question this. The exit and entry administration in the pilot program cities are perhaps faced with mounting paperwork in light of the rising number exit applications and number of people entering China. This has created a pressing demand to perfect relevant legislation and reduce the bureaucracy. Arguably, China must relax exit and entry restrictions further and give effect to essential reform measures, before it can achieve the goal of realising the RLR.

It must be accepted that the reforms only benefit a small number of Chinese people, because public officials, or those involved in public affairs, as discussed earlier in this thesis, are not subject to the reforms. Among the people covered by the reforms, only those who can or will travel abroad will be practically affected. Given China's vast population and the notion that lives on of a central empire, the rate of people who actually can or will keep in touch with people in other nations is very small. In the absence of the RLR and with low incomes of many Chinese people, these reforms are not relevant to many ordinary citizens.

7.4 Deficiencies in the reforms

Although the reform strategy and measures have stimulated the remarkable increase of passport applications, four key deficiencies must be kept in mind. In the first place, as above, reforms are limited to private individuals not involved in public affairs. The reforms relate only to applications for ordinary passports for private affairs. Other passport categories, especially ordinary passports for public affairs, have been excluded. This means that about 653 million people are unable to take advantage of the reforms. The scope and adverse influence of reforms to applying to the application for ordinary passports for public affairs will be discussed in part 8.2 of this thesis.

Secondly, the reform strategy does not apply to the whole system of application for ordinary passports for private affairs, not all private affairs passports are included. People with special status, such as some government officials and managers of large and medium-sized State-owned enterprises and institutions, must still obtain permission from their work units when applying for passports.⁸²⁰ According to statistics from the Exit and Entry Administration of Hainan Public Security Department, 1% of the population, or 13 million people, fall into this category.⁸²¹ Not only does that account for a large number of people, but the people affected make up China's elite. It is well known that the Chinese people residing in rural areas are usually poor and lower educated. According to *Chinese Industry and Business Times*, the income of the rural residents, which comprise 60% of the whole population, is 20% of the national income. So, the influences of residents of rural areas are less than the influences of residents of urban areas. Limits on these individuals are more significant than on residents of rural areas.

Moreover, the laws and the reforms do not correspond the reform policies. Prior laws and regulations were not amended upon announcement of the reform measures. As such, there are

⁸²⁰ "Passport More Accessible for Beijingers, 1 September 2003",

http://www1.chinadaily.com.cn/en/doc/2003-09/01/content_260238.htm (19/12/2003).

⁸²¹ "Extension: Residents in Four Districts of Hainan Province May Apply for Passport Simpler" (*Fanwei Kuoda: Hainan Si Diqu Ke Jianhua Shenling Chuguo Huzhao Shouxu*) 21 October 2003, Xinhuanet, <http://news.21cn.com/domestic/guoshi/2003/10/21/1309848.shtml> (15/11/2003).

many vital contradictions between valid laws and statutes and the effective reform measures. For example, in pursuance of the reform strategy and measures, exit registration cards are no longer attached to passports. However, under Article 5 of the *Detailed Rules of the Implementation of the Law on the Control of Exit and Entry of Citizens (Amendment) 1994* (PRC), the entry and exit administration of the public security organ shall attach a registration card. The 1994 rules were approved by the State Council and jointly promulgated by the MPS, MOE and Ministry of Communication. Within the Chinese legal system, the 1994 rules prevail over the 2001/2002 policies. The later policy is invalid in theory, but is executed in practice.

Only retrospective amendment of the 1994 rules could overcome the problem. The MPS has stressed that the legal system of exit and entry administration needs to be improved.⁸²² In November 2001, Jia Chunwang acknowledged this problem and announced that the MPS would speed up the legal process of entry-exit management to ensure that it is fair, open, and conforms to relevant laws and regulations.⁸²³ However, the relevant amendments were not adopted for another three years. The inconsistency between laws and reform policy will undermine the authority of the law, and undermine public confidence that the administration will act in accordance with the law. The inconsistency also violates Article 5 Clause 2 of the *Constitution of the PRC (Amendment) 2004*, which require the State to uphold the uniformity and dignity of the socialist legal system.

Finally, these reform arrangements have affected the relationship between the central authority and local authorities, undermining central authority. The Central government is vested with the power to control the exit and entry by the Constitution. Article 89 Clause 1(9) of the *Constitution of the PRC (Amendment) 2004* provides that the State Council exercises the functions and powers to conduct foreign affairs. Exit and entry administration is one of foreign

⁸²² Zhu, Daqiang, “Summarisation: China Ensure the Direction of Exit and Entry Administration after Access to the WTO, 23 November 2001”, China News Agency, <http://review.jcfr.com.cn/ournews/asp/readNews.asp?id=63921> (18/04/2003).

⁸²³ Quoted in Wang, Ling, “China Simplifies Entry-exit Rules, November 2001”, China Radio International, <http://english.cri.com.cn/english/2001/Nov/36826.htm> (18/04/2003).

affairs.⁸²⁴ Even so, provincial governments often promulgate local regulations and reform measures which actually amend national laws and regulations. As Lin Yicong, an officer of Guangdong Public Security Bureau argued in 2001:

The infringement by provincial governments upon the central government powers became a way of meeting regional or individual interests. It invades the applicants' rights and interests as well as violates the central government's power.⁸²⁵

With the development of Guangdong, Shanghai and Beijing local legislation and implementation of local reform measures, central government power is further eroded.

7.5 The nature of the reforms

It is vital that the nature of current reforms be seen more clearly so that we can better understand the future evolution of the RLR in China. The official media has accepted that the reform strategy aims to simplify exit and entry procedures. More precisely, it is the simplification of procedures governing the exit of citizens, and the permanent residence of aliens. According to *The People's Daily*, the newspaper of the Central Committee of the CPC, the reforms will “greatly simplify procedures and are viewed as an important step for the Chinese people to further join the international community”.⁸²⁶ *The China Daily* reported that the core of the new reform drive is the simplification of entry and exit procedures for people seeking to invest or travel in the country.⁸²⁷ In May 2003, the Ministry's Bureau of Exit and Entry Administration (BEEA), with respect to the reforms for travelling to the HKSAR or MSAR, stated that:

⁸²⁴ The website of the Chinese police states that foreign affairs policemen are responsible for supervising the exit, settlement, residence, tour and entry of Chinese citizens and aliens. See “The People's Republic of China Department of Public Safety Police Specific Set-up”, <http://www.chinesecop.com/CNPO1.html> (19/12/2003).

⁸²⁵ Lin, Yicong, “The Review on the Amendment Principle of Amending Current Exit and Entry Laws”, in Committee of Exit and Entry Administration, Chinese Association of Police (ed), the *Collection of Papers on the Control of Exit and Entry (III)* Interior Published within Public Security Organs (*Gongan Jiguan Neibu Faxing*), the Publishing House of Qunzhong, Beijing China, 2001, pages 20-21.

⁸²⁶ “Simplifying Exit-Entry Procedures, A Vital Step for China”, *The People's Daily* 23-11-2001 http://english.peopledaily.com.cn/200111/23/eng20011123_85161.shtml (18/04/2003).

⁸²⁷ “State to Simplify Entry-exit Rules”, 11/22/2002, *The China Daily*, <http://www1.chinadaily.com.cn/news/2001-11-22/44711.html> (18-04-2003).

The reason for the change in procedure is to meet the needs resulting from the increasing demand for economic, cultural and personnel exchanges between the Mainland and the HKSAR and MSAR.⁸²⁸

In addition to the simplification of procedures, some scholars have asserted that the reform strategy could play a catalytic role on the realisation of the RLR. Meng Yanhong, a leading Chinese historian, contended that the simplification of exit and entry rules was an irreversible trend. He argued that if China's entry into the WTO was considered as a milestone, for its reform and opening up, such measures could be viewed as "natural outcomes" of the drive.⁸²⁹ A Shanghai analyst has said, "the change in issuing passports was dramatic. I have a strong feeling that Chinese people are enjoying more freedom and China is becoming more open to the outside world."⁸³⁰ Professor Xu Xianming, the President of China University of Politics and Law, has argued, "Freely leaving and returning on demand is a vital symbol of the realisation of more citizens' freedom."⁸³¹

It is accepted that simplifying exit and entry procedure helps to protect the RLR. However the simplification should merely be the means by which reform is achieved, not the nature of reform it. The current approach – which regards administrative simplification as the nature of reform — attends to trifles and neglects the essential needs of citizens. With the deepening of the reform measures, the awareness of the passport as a symbol of prestige may dilute, and the awareness of the RLR will increase. More limitations will be seen in the reforms orientated towards simplifying exit and entry procedure.

7.6 Conclusions

⁸²⁸ Quoted in Jiang, Zhuqing, "Mainland SAR Visa Procedures Simplified", 30 May 2002, *The China Daily*, http://www3.chinadaily.com.cn/en/doc/2002/05/30/content_121719.htm (05/08/2003).

⁸²⁹ Quoted in "Simplified Exit-entry Rules Seen as Vital to China", 23/11/2001, *The China Daily*, http://www1.chinadaily.com.cn/en/doc/2001-11/23/content_94971.htm (19/12/2003).

⁸³⁰ Quoted in "Shanghai Simplifies Passport Application Procedure", 3 September 2002, *The China Daily*, <http://www1.chinadaily.com.cn/English/2002/Aug/69192.htm> (19/12/2002).

⁸³¹ "Exiting Abroad is Becoming the Individual Needs of Chinese Citizens", 28 December 2003, Xunahuanet, <http://news.sdinfo.net/72350064130916352/20031228/1233069.shtml> (30/12/2003).

A more liberalised the RLR meets the need to enhance economic progress and integration into the world. China's accession to the WTO sparked the biggest overhaul of Chinese migration law in history. The reforms are characterised by the simplification of the procedures for exit and entry, with a focus on passports on demand. They have not brought the country's administrative procedures for exit and entry into line with international standards. The reforms are superficial, and it is not surprising to find serious deficiencies in them. The scope of reform is too limited to cover the right to return and the right to leave for public affairs, the right to leave of citizens employed by governments, State-owned enterprises and institutions and members of the CPC for private affairs and the RLR of aliens. As such, the nature and content of the reforms benefit only some of the population. The issues of the infringement by provincial governments upon central government powers regarding exit and entry administration remain untouched. Even the integration between prior laws and new policies has been technically ignored.

The deficiencies do not completely undermine the significance of the reforms. The reforms will exert subtle and lasting positive impacts on the social and economic development of China and the country's integration into the world. Encouragingly, the reforms foster the awareness of the RLR among individuals and governments. Given the fact that Chinese international migration stock rate is only 0.46% of average international migration stock in the world,⁸³² it is understandable that the number of entries and exits increased considerably due to the relaxation of severe restrictions.

⁸³² Calculated according to data quoted in Population Division, Department of Economic and Social Affairs, *International Migration Report 2002*, United Nations Secretariat, 2002, ST/ESA/SER.A/220, the United Nations, New York, 2002, 62 pages, attached table.