Human Rights in Asia

A comparative legal study of twelve Asian jurisdictions, France and the USA

Edited by
Randall Peerenboom, Carole J. Petersen and Albert H. Y. Chen

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Human Rights in Asia

This book analyzes how human rights are viewed and implemented in Asia. Specialists from fourteen countries and jurisdictions examine personal integrity, civil and political, social and economic, and cultural rights. Each chapter provides a general introduction to rights theory and practice, discussion of the relevant case law for each type of right, and concluding remarks that situate a country's performance within a broader comparative context. The chapters on France and the USA provide a benchmark for assessing how human rights have emerged and been implemented in a civil law and a common law jurisdiction. These are then followed by twelve chapters on the major countries of East Asia and India, each of which follows a common template to consider the context of the legal system, black-letter law, legal discussions and debates, and controversial issues concerning human rights. This book will be of interest to scholars, government officials, NGOs and others seeking to promote human rights, democracy, rule of law, and law and development. The volume is well suited for undergraduate and graduate courses in a wide variety of fields, including political science, law, and sociology.

Randall Peerenboom is a Professor of Law at the UCLA School of Law, where he teaches courses in Chinese law, international human rights, and legal theory. He often serves as an expert witness on PRC legal issues, and has been a consultant to the Ford Foundation and the Asian Development Bank on legal reforms and rule of law in China. He is the author of several books and more than sixty articles on Chinese law and philosophy.

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Contents

Notes on contributors vii
Preface x
Acknowledgements xii

1 An empirical overview of rights performance in Asia, France, and the USA: The dominance of wealth in the interplay of economics, culture, law, and governance 1
RANDALL PEERENBOOM

2 The protection of human rights in France: A comparative perspective 65
GUY SCOFFONI

3 Uncovering rights in the USA: Gauging the gap between the Bill of Rights and human rights 83
DINUSHA PANDITARATNE

4 The protection of "fundamental human rights" in Japan 121
SHIGENORI MATSUI

5 Taking rights seriously? Human rights law in Singapore 158
LI-ANN THIO

6 Human rights in Malaysia 191
H. P. LEE

7 From British colony to special administrative region of China: Embracing human rights in Hong Kong 224
CAROLE J. PETERSEN

8 Human rights in Korea 265
HAHM CHAIHARK

9 The implementation of human rights law in Taiwan 298
FREDERICK CHAO-CHUN LIN

10 Human rights in the era of "Thailand Inc." 320
VITIT MUNTARBHORN

11 The Philippines: The persistence of rights discourse vis-à-vis substantive social claims 346
RAUL C. PANGALANGAN

12 Human rights in Indonesia 364
HIKMAHANTO JUWANA

13 Protection of human rights and production of human rightlessness in India 384
UPENDRA BAXI

14 Human rights in China 413
RANDALL PEERENBOOM

15 Evolving concepts of human rights in Vietnam 452
JOHN GILLESPIE

16 Conclusion: comparative reflections on human rights in Asia 487
ALBERT H. Y. CHEN

Index 517

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Preface

This volume on human rights is part of a larger project consisting of a series of volumes that compare the legal systems in several Asian countries, European Union countries and the USA across a wide range of issues.

Specifically, the project seeks to examine legal system development and rule of law in Asia, using the legal systems of the USA (a common law country) and France or Germany (civil law countries) as comparison points. Given the great diversity among legal systems, the purpose is to understand how rule of law is conceived and implemented, and to explore the role of law and the legal system with respect to economic growth, political reform and democratization, the protection of human rights, geopolitical stability, and the engagement of Asian countries with other countries in the international arena.

The project will also address the Euro-American centricism of comparative law by replacing outdated stereotypes with empirically grounded, in-depth and up-to-date analyses of Asian legal systems across a wide range of issues and areas of law.

In addition, the project, and this volume on human rights in particular, provides a much needed empirical foundation to what has hitherto been an excessively abstract and overly politicized debate about "Asian values," or its more recent, politically correct reformulation "values in Asia."

In terms of methodology, each volume involves specialists in the relevant area of law from twelve different Asian countries or jurisdictions (Japan, the Philippines, South Korea, China, Taiwan, Hong Kong, Singapore, Thailand, Malaysia, Indonesia, Vietnam, and India) along with specialists from the USA and France or Germany.

The first volume – *Asian Discourses of Rule of Law* (RoutledgeCurzon, 2004) – set the stage for later volumes by providing a general overview of the dominant conceptions of law, organized around the theme of rule of law, and the institutional framework. Subsequent volumes examine specific areas of law or topics in law to determine: (a) whether there are differences/similarities between the countries with respect to legal rules; (b) outcomes in particular cases (or the way events are handled if they are not subject to formal legal resolution); and (c) the justifications/explanations for such

outcomes (legal reasons, cultural/philosophical explanations, or economic, political, and institutional explanations).

Future topics include: public law (administrative and constitutional law); criminal law; law and morality; family law; corporate law; international law; and a concluding volume that addresses larger issues about the relation of law, economic growth, politics, and geopolitical stability.

Randall Peerenboom
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1 An empirical overview of rights performance in Asia, France, and the USA

The dominance of wealth in the interplay of economics, culture, law, and governance

Randall Peerenboom

In recent decades, Asia has emerged as one of the most contested sites for the increasingly powerful international human rights movement. Most notably, the Asian values debate called into question the universal pretensions of the international human rights regime. More fundamentally, the experiences of Asian states over the last five decades challenged two widely held if somewhat inconsistent views: first, that democracy was the key to economic growth, or, reversing the causal direction, that economic growth would inevitably lead to political reforms, democratization and better protection of human rights. Many Asian states experienced their periods of rapid growth under authoritarian governments, including South Korea, Taiwan, Singapore, Indonesia, Malaysia, and still today China. Moreover, while some Asian states have made the transition to multiple-party, competitive-election democracy, others have not, including China, Hong Kong, Vietnam, and Myanmar. Still others, including Singapore, Malaysia, and Cambodia, exist in a limbo state variously described as soft authoritarianism, semi-dictatorships, semi-democracy or illiberal electoral democracy. Even those states that have most fully embraced democracy, including South Korea, Taiwan, Japan, Thailand, and more recently Indonesia continue to interpret and implement human rights in ways that differ in important respects from some Western liberal democracies, thus calling into question the extent to which they should be described as *liberal* democracies.

In addition, the international human rights community has focused on several Asian states because of their poor records, especially in the area of civil and political rights, and in China's case, also because of its size and geopolitical importance. Since the terrorist attacks of September 9, 2001, Asian states, several with large Islamic populations, have come under scrutiny as the US-led war on terrorism has renewed concern that some states would reinstate or make greater use of broad national security laws to undermine the civil liberties of not only suspected terrorists but political dissidents and even ordinary citizens.

Unfortunately, discussions about human rights in Asia in general and "Asian values" in particular have often been heavily politicized. Clearly, some authoritarian regimes have at times used the rhetoric of Asian values for self-serving ends, playing the cultural card to deny citizens their rights and then to fend off foreign criticism. Just as clearly there are many different voices within Asia, and anyone professing to speak for all Asians or of Asian values runs the danger of discounting these voices.

On the other hand, we must resist the temptation to dismiss the evolving debates over values in Asia as merely a cynical strategy seized on by authoritarian regimes to deny Asian citizens their rights. More sophisticated philosophical, sociological, and legal accounts have demonstrated there are legitimate differences in values and other contingent factors that affect the protection and implementation of human rights not just in Asia but in all countries.[1] Although the term "Asian values" is not often invoked these days, concerns about differences in values and other circumstances continue to surface in ongoing discussions about democratization, rule of law, and human rights in ways that belie the confident assertions that Asian values existed solely in the minds of authoritarian government leaders.[2]

Past discussions about human rights and values in Asia have been hampered by the lack of detailed empirical studies on specific issues to back up the strong theoretical, and in some cases polemical, claims being made on both sides about the differences or lack thereof in fundamental values. To be sure, numerous multiple-country quantitative studies have demonstrated significant regional effects with respect to democratization,[3] labor/employment rights,[4] women's rights,[5] personal integrity rights,[6] freedom from government intrusions, rule of law and good governance,[7] and cultural values[8] that in turn affect rights performance.[9] Although invaluable in locating Asian countries within a larger comparative context, the studies generally define Asia very broadly and deal with rights in a very general way.[10] They generally do not measure the degree of variance in rights performance *within* Asia, or attempt to explain the variation within Asia or why Asia as a region might differ from other regions.

This volume begins to address the need for a more detailed empirical record.[11] Country specialists examine personal integrity, civil and political, social and economic, and cultural rights in twelve Asian countries, using France and the USA as comparison points. The authors then explore the reasons for differences within Asia, and between Asian countries and France and the USA.

First, however, I review the ever-expanding general empirical literature on human rights in order to situate this study within the broader literature and to clarify the methodological advantages and disadvantages of our case-centered approach.

Quantitative and qualitative empirical studies of human rights

There has been an explosion in the last two decades in quantitative and qualitative studies of human rights. The two approaches are complementary

as there are strengths and weaknesses to each. By including a large number of countries, quantitative studies are able to measure compliance across a number of different regions and identify exceptions to general patterns. They can also test factors that may help explain compliance or noncompliance in a controlled way. By using time series data, they are able to detect patterns over time, and thus are useful for predictive purposes.[12]

Quantitative studies have shown that the protection of rights is influenced by, among other things, and in roughly descending order of importance: economic development, with a higher level of development associated with better protection of rights; international or civil wars, with war leading to more violations of rights; political regime type, with democracies protecting rights better than authoritarian or military regimes; regional effects, with Northern Europe and North America outperforming other regions, and with "region" often serving as a proxy for religion and culture; population size, with larger populations leading to higher rates of violation; and colonial history, with British colonialism linked to better rights protection.[13] Interestingly, ratification of treaties does not translate into better protection for human rights, and may even have a negative effect, at least in the short term.[14]

Despite their many virtues, quantitative studies have their shortcomings.[15] Setting aside philosophical and normative concerns about such studies,[16] choosing, operationalizing and measuring the dependent variable (rights) and the independent variables (democracy, culture, institutional features such as judicial independence, etc.) have all proven challenging. Attempts to develop a composite measure to rank countries for human rights performance have failed because countries generally protect some rights better than others and because of the controversial normative judgements inherent in prioritizing rights: how does one compare the arrest of a person advocating democracy with the lack of medical care for AIDS victims or children being sold into sexual slavery?

Most studies therefore attempt to measure one or more distinct type of right. Some types of rights, however, are more difficult to measure than others, either because of problems operationalizing the right or because of lack of data.[17] In part because of such methodological concerns and in part because of normative bias, many studies have focused on a limited range of rights. Personal integrity rights (political prisoners, disappearances, torture and arbitrary detention) and a somewhat broader range of civil and political rights have received the most attention. The over-emphasis on civil and political rights is particularly problematic in that Asian governments often claim that they do better when judged by economic and social rights and measures that indicate a high quality of life such as effective governance, political stability and low crime rates. Fortunately, in recent years, researchers have begun to explore other rights, including women's rights, labor/employment rights and economic rights, thus making it possible to test some of these claims. However, each category of rights contains a number

of different rights, which can be further subdivided. Labor/employment rights, for example, include the right to collective bargaining, to establish and join unions, to strike, to work in a safe environment and arguably the right to paid vacations. Thus, studies of the same category of right using the same data set may still reach conflicting results depending on which subset of rights they choose as their dependent variable.

Because rights may be subject to various limitations by law, and are implemented to varying degrees in practice, rights must be scored along a continuum. Different researchers, however, operationalize the same right in different ways, relying on a number of different factors to produce a composite score. In producing a composite score, they inevitably rely on debatable assumptions about the relationship between the various factors and how they should be weighted and aggregated.[18] Similar problems exist with respect to some of the most common independent variables. Democracy, for example, has been defined and measured in a variety of ways.[19] And while studies showing strong regional differences in rights performance suggest that cultural factors may be important, culture is seldom specified and quantified in more meaningful ways than the limited attempts to control for religion and ethnicity, with one notable exception that relied on a broad composite measure of rights.[20]

Perhaps the biggest drawback to most quantitative studies is that they are of limited use to policy-makers. Many studies, because of their generality, do not provide information that policy-makers can act on. Informing policy-makers that war is a major threat to human rights will not help them in preventing or ending wars. Wealth may be highly correlated with better human rights performance, but economists have long been stumped as to how to ensure sustainable economic growth.

The inconsistency of results among empirical studies, especially when more specific variables are introduced, further reduces their practical utility. In response to criticisms of excessive generality, researchers have attempted to test the impact of more specific variables on a wider range of more specific rights. The proliferation of studies has led to inconsistent and counterintuitive results. For instance, studies of the effect of foreign direct investment (FDI) on human rights performance have been inconclusive: some have found that there is no significant relationship, others have found that FDI is weakly or in some cases strongly associated with better protection of rights, and some have found that increased FDI has a negative impact on rights protection.[21] Surprisingly, one study found that higher national income levels are *not* associated with better labor/employment rights records,[22] while another found that greater competitiveness in executive recruitment was associated with *higher* levels of repression.[23] Perhaps over time some of the inconsistencies may be cleared up as studies with larger sample sizes are conducted, statistical techniques are improved or new ones developed, and better data sets become available. But it is also possible that significant inconsistencies will continue to plague policy-makers. Studies using a wide variety of techniques

and data sets to measure the general relationship between political regime type and economic growth have been inconclusive.[24]

Policy-makers are also likely to be troubled by the normatively unappealing implications of many quantitative studies. What, for example, is a rights-inclined policymaker to do with the studies showing Islam to be negatively correlated with democracy and human rights protection? Should the goal be to repress Islam, and if so how? Other studies have found that higher levels of debt and equity flows are associated with fewer personal integrity rights, but that external debt and trade openness may result in greater violations[25] of labor/employment rights. Should policy-makers trade off labor/employment rights for personal integrity rights? The very fact that such tradeoffs may be required further calls into question the often repeated but empirically false and theoretically unsustainable notion that all rights are indivisible and inevitably realized together, while supporting the realist arguments of Asian governments that there is no way to avoid prioritizing rights.

Moreover, the complicated relationship between the various factors tested and other contingent circumstances in any given country frequently makes it difficult if not impossible to implement the policy recommendations that flow from the study in a straightforward way. Policy-makers interested in constitutional design will not be aided by studies that show that constitutional limitations on the declaration of a state of emergency and derogation of rights hurt in some circumstances and help in others if they are not able to predict which scenario is the more likely in their case.[26]

On the whole, quantitative studies are useful in demonstrating general patterns, but there are always exceptions to the general rules. How the various factors will play out in a given country at a given time often requires a more detailed qualitative study of that particular state.

Qualitative studies are able to provide a deeper and more nuanced account of economic, political and legal reforms and their relation to human rights protection. As a result, they may provide a better sense of what the main obstacles are to better rights performance in a particular context, and thus offer more useful policy guidance. In addition, qualitative studies may discover factors that were not considered by designers of quantitative studies, which can then be built into future models.

Qualitative studies have their drawbacks of course. They may turn up factors that are not generalizable or turn up too many variables to draw firm conclusions based on the limited sample size of the countries studied. Comparative studies of only a few countries may suffer from selection bias. Some studies, for example, have focused only on former authoritarian states that have successfully made the transition to democracy while ignoring the others. Some qualitative multi-country studies also suffer from a lack of focus. This is especially true of edited volumes, where the authors approach the subject from a variety of different angles, thereby making it difficult to draw meaningful comparisons.

The rationale for our legal-case-centered approach

Although our approach is primarily qualitative, we have sought to remedy some of the defects of qualitative studies by providing in this introductory chapter general empirical information about each country's performance across a wide range of rights and an overview of the main factors associated with better rights protection. We also provide data on other indicators of human wellbeing, thus responding to charges of normative bias inherent in the focus on civil and political rights and to assertions that rights discourse must be complemented if not replaced by discourses of capabilities, needs or wants. In addition, we have facilitated comparisons by asking each author to respond to the same template of issues.

While our focus is Asia,[27] we have included the USA and France as comparison points to show that there are differences even within economically advanced liberal democracies on a range of specific rights issues and to avoid over-idealization of rights performance in Western countries. Although the USA and France score higher on many rights indicators than many other Western countries, and thus are not representative of the region as a whole, they are far from perfect in many areas, especially when it comes to economic, social and cultural rights. Furthermore, to the extent that legal institutions matter to the protection of rights, the USA (a common law country) and France (a civil law country) differ in significant ways, including with respect to constitutional review, and both have been influential as sources of legal transplants. Several of the legal systems in Asia were modeled on the French civil law system. Meanwhile, the USA has exerted considerable influence on the legal systems of Japan and the Philippines, and has attempted to exert influence more broadly across the region, albeit with limited success, through an aggressive human rights foreign policy.

We concentrate on legal cases to ground what has been an excessively abstract debate between advocates of universal human rights and those who question just how universal rights are. Legal cases show most clearly where societies draw lines on controversial issues that involve the rights and interests of individuals versus the rights and interests of the group or state. Although often portrayed as a battle between Asian communitarians and Western liberals, it is a truly universal issue that everyone of whatever persuasion must face. As it is certainly possible that the majority of Asians or the majority within particular countries in Asia might prefer a different balance than the majority of citizens in Western countries, we need more detailed case studies that examine differences in practice across a wide range of specific issues.

Of course, simply noting a majority preference one way or the other will not end the debates – those in the minority can continue to claim that they are right.[28] But before we can take up such normative arguments we do well to have a better sense of the differences and the reasons for them.

The systematic empirical study of specific cases in each country presented in this volume clarifies the range of diversity with respect to rights issues.

The case-centered approach also sheds light on how potentially significant factors known to affect rights performance interact to determine outcomes on key rights issues in particular places at a particular time. Asian governments that challenge the universality of human rights argue that there are many reasons why different countries might reasonably differ on outcomes in particular cases. In several countries, rebel insurgents, terrorists, or aggressive neighbors have forced governments to declare a state of emergency and derogate from certain civil and political rights. China's history of religious organizations destabilizing dynasties contributes to the current regime's restrictive policies toward Falun Gong and other cults, while India's history of insurgency has left a lasting imprint on state powers in times of emergency. Just as a legacy of Nazism may make Germans more sensitive to the dangers of hate speech, ethnic diversity and tensions in some Asian countries lead to different outcomes in cases involving free speech or minority rights, and even affect political rights such as the right to stand for election in systems where some groups are guaranteed a percentage of seats in parliament. Clearly, the lack of wealth in some countries results in lower levels of medical care. Legal factors such as the influence of prior case law in common law systems, or the limited powers of courts to make new law in civil systems, may also lead to different outcomes in factually similar cases. Culture in the sense of differences in fundamental values is still another factor.

Nowadays, rights are increasingly the medium through which different factions struggle for power. Highlighting legal cases reveals much about who has power within a society. At the same time, legal cases generally result in legal opinions, scholarly articles and coverage in the media that can be used to understand the rationales and justifications for reaching the particular decisions and to provide some sense of the diversity of views within a country.

Studying a line of cases also shows how values change over time. Until recently even wealthy liberal democratic countries regularly denied claimants many of the rights by which other countries are now measured, including in the area of free speech and criminal procedure. All too often the historical dimension of the bitterly contested struggle for rights is glossed over in favour of a revisionist history that ignores the repeated denial of rights claims in Western countries as well as the widespread violation of rights by the colonial powers in other countries. Indeed, many of the harsh, illiberal laws found in Asian countries were enacted by colonial powers.

Overview of contents of each chapter

Each chapter consists of three parts. First comes a brief general introduction to rights theory and practice in the country, which further contextualizes the individual country studies beyond what is offered in this chapter. Next follows a discussion of the legal rules, leading cases and relevant government policies and statistical data for each of the selected issues in the various categories of rights. The third section consists of concluding remarks that

draw comparisons to other countries in the study and point out key issues and themes. Albert Chen's concluding chapter elaborates on the main themes and important lessons.

The introduction provides a general overview of political murders, extrajudicial killings, torture and arbitrary arrest and detention – so-called physical integrity rights – for each country. The individual chapters then take up in more detail derogation of civil and political rights in times of crisis. Under what circumstances may states declare a state of emergency or martial law? What are the procedures for doing so? Who has the authority to make the decision? Is there judicial review of the decision? Which rights may be restricted during a state of emergency? Have military tribunals been used? How often and for what reasons have rights been derogated?[29]

The relative performance of countries on civil and political rights is roughly captured by an aggregate measure – the World Bank's Voice and Accountability Index. The country chapters then take up a number of discrete issues. Is there a state orthodoxy – Islam, socialism, Confucianism? Does the state attempt to promote particular substantive views and limit others, and if so, how? Are there content-based restrictions on religious groups – i.e., can the government ban religious groups, as compared to banning or restricting certain practices based on generally applicable laws? Are there other restrictions, such as registration requirements for religious groups?

Free-speech cases raise a number of thorny issues. In what circumstances is criticism of the government prohibited or limited? If the restrictions are based on laws governing sedition, treason, state secrets, terrorism, or national security, how are the laws applied? Is the media owned or controlled by the state? Are defamation laws used to harass opponents? We then look at freedom of assembly. Is registration required for social groups, and if so what kind? Are content-based prohibitions or limitations allowed? Are there time, place and manner restrictions, and how are they implemented in practice?

The section on economic and social rights discusses the justiciability of such rights, focusing in particular on the rights to medical care and education. Because social and economic rights are often not justiciable, at least directly, we also consider government policies that effect the provision of the benefits or protect the interests covered by such rights.

One of the most important cultural rights is the right to self-determination. Are there minority groups that are claiming the right to self-determination? If there are groups demanding the right to secede, how are they treated? Has the government created special autonomous zones, and if so what are the rights and powers of groups within such zones? Has the state adopted affirmative action laws to promote minority groups? Are certain groups given a particular percentage of seats in congress? Are cultural practices of groups subsidized by the state? Are there special customary laws that apply to particular cultural groups? If so, how are cases handled that involve a conflict between a particular cultural tradition and a generally applicable law?

A profile of twelve Asian countries, France and the USA across different types of rights

The tables at the end of this chapter provide a snapshot summary of performance on a variety of rights and other indicators of wellbeing for the region as a whole as well as the countries in this study (where available) and other selected countries from around the world as comparison points. The studies define variables in different ways, use different data sets, rely on data from different years, are subject to wide margins of error, and so on. Thus, the tables are no substitute for more in-depth studies. Nevertheless, they are useful in providing a general sense of the range of difference within Asia on rights issues, and also in showing how Asian states compare to other states in other parts of the world at similar stages of economic, political and legal development.

Physical or personal integrity rights

Physical or personal integrity rights are among the most basic of rights. They tend to be subject to wide variation by year in a particular country because wars and political crisis may arise or end suddenly. Despite thousands of complaints of torture and police brutality every year,[30] the USA had one of the best records in 1996, enjoying a level-1 ranking, indicating a country under a secure rule of law, where people are not imprisoned for their views, and torture or political murders are rare or exceptional. However, it has since been demoted to level 2 because of the detentions of suspected terrorists in Guatanamo Bay, Iraq and Afghanistan and the secret arrests of more than 1,300 persons in the USA, many of them Muslims,[31] which constitute arbitrary detention under the International Covenant on Civil and Political Rights (ICCPR).[32] Level 2 indicates a limited amount of imprisonment for non-violent political activity. However, few persons are affected, and torture and beatings are exceptional. Political murder is rare. Whether the USA will drop further as a result of the torture of Iraqis and others captured in the war on terror remains to be seen.

Notwithstanding ups and downs within countries, there has been no improvement globally in recent decades.[33]

As expected, in the Asian region, there are more violations of personal integrity rights where there is political instability, rebel insurgencies and terrorism, as Figure 1.1 shows.[34] At level 4, India remains a major trouble spot, due in large part to ethnic and religious tensions.[35] China scores poorly because of the high incidence of torture, arbitrary detentions and the arrests of democracy advocates, labor/employment unionists and others who oppose government policies. Indonesia, even after democratization, continues to experience widespread personal integrity violations, consistent with the efforts to restore order in Aceh, Papua and Maluku provinces and to prevent terrorism in the country.

South Korea performed surprisingly poorly in the mid-1990s, due apparently to violent protests by students and labor/employment organizations. At level 3, it is on par with Malaysia, which was ranked higher in 1996 but which has suffered in recent years under the threat of terrorism and rising Islamic fundamentalism.

Vietnam scores higher than might be expected. Vietnam and Thailand both received a level-2 rating based on Amnesty International reports and a level-3 rating based on US State Department reports. Thailand however has recently experienced violent clashes between the government and Islamic groups in some Muslim-dominated southern provinces.

Singapore merits a level-2 rating, reflecting the use of defamation laws to rein in high-profile opposition figures and the reliance on tough national security laws and other non-liberal laws to crack down on terrorists, people inciting ethnic conflict, drug traffickers and other criminals. Only Taiwan receives the highest level-1 score.

Civil and political rights

The World Bank's Voice and Accountability Index incorporates a number of indicators measuring various aspects of the political process, civil liberties and political rights, including the right to participate in the selection of government representatives and the independence of the media.[36] The East Asia region falls squarely in the middle among all regions as shown in Table 1.5. However, there is a considerable range within the Asian region as indicated in Figure 1.2. Japan and Taiwan score reasonably well, though not as high as the USA and France, whereas Vietnam and China are in the lowest 10 percent.

As suggested by Figure 1.4 and confirmed by other studies discussed below, civil and political rights are closely related to wealth. Nevertheless, East Asian countries with a Confucian influence, even if democratic, tend to do poorly relative to income level. Japan, Taiwan, Singapore, Malaysia, Hong Kong, China, and Vietnam all underperform relative to income. In contrast, South Korea, India, the Philippines, Thailand and recently Indonesia outperform the average in their income class.

Social and economic rights and other indicia of quality of life: poverty, infant mortality, life expectancy, primary-school enrolment, expenditure on education, health and military as percentage of GDP

China and other Asian governments have attacked the bias of the international rights community in emphasizing civil and political rights over the right to subsistence, economic rights and the right to development. How well do Asian states do on these other dimensions?

Figure 1.3 presents the UNDP rankings for social and economic rights in 2002 as measured by the Human Development Index (HDI). The HDI

measures the average achievement in a country in three basic dimensions: a long and healthy life based on life expectancy at birth; education and knowledge measured by adult literacy and combined primary, second and tertiary enrolments; and a decent standard of living as measured by GDP per capita ($PPP: purchasing power parity). As one would expect, wealthier countries everywhere, including in Asia, generally have lower (i.e. better) HDI scores, with wealth constituting a more important factor than the nature of the political regime.

However, the general composite measure fails to tell the whole story. Higher levels of economic development and riches for some are consistent with an impoverished life for many others. Asia as a region has been relatively successful over the last decade in reducing poverty, defined as the admittedly minimalist standard of living on less than $1/day. In contrast, poverty in other regions has increased or remained more or less the same.

The performance of the East Asian region is somewhat deceptive in that the results are skewed by the remarkable performance of China, which lifted 150 million, 12 percent of the population, out of poverty in just nine years. To be sure, even within China, poverty remains an issue in some regions, with some 16 percent still living on less than $1/day, and there are signs that some people may be slipping back into poverty. Moreover, the income gap is growing, between urban and rural residents, and also between those urban residents with the education and skills needed to succeed in a market economy and those without them.

Table 1.1 shows three ways of measuring human poverty. One approach measures the percentage of the population below the national poverty line defined as what that society considers necessary to satisfy basic needs. Because countries will set the poverty line at different levels, a wealthier, welfare-conscious country may have a high percentage living in poverty and appear poorer. The second approach measures the percentage of the population below uniform poverty lines of $1 and $2 per day. Even when adjusted for PPP, this income-based approach cannot fully capture actual differences in the standard of living of poor people. While the first two approaches measure consumption and income, a third approach measures the impact of poverty directly. The Human Poverty Index (HPI) quantifies poverty in terms of life expectancy, access to food and water, and education as measured by literacy rates.

Ultimately, it pays to look at the three measures concurrently. For example, nearly half of the Chinese population lives on less than $2 per day. But the actual standard of living in China, as measured by the HPI, exceeds countries with higher income such as Iran and South Africa.

Asian countries vary dramatically in levels of poverty. India is by far the worst, though poverty remains a problem in Vietnam, Indonesia, the Philippines, China, and Thailand. However, some countries are doing fairly well in reducing poverty relative to the number of people with very low incomes, including China, the Philippines, and Vietnam. Others have been doing poorly, especially Thailand but also Indonesia, although Thailand has improved

recently as a result of economic growth and a strong ruling party which, while democratic, has followed the lead of other successful Asian states in focusing on economic rights even if at the expense of civil and political rights.

Of course, relative and even absolute poverty remains an issue in developed countries as well. About 9 percent of the population lives on less than $2/day in middle-income Malaysia. Surprisingly given the communitarian rhetoric of Lee Kuan Yew, Singapore's poverty ranking is out of line with its income level and HDI ranking. The USA has the highest rate of poverty at 15.3 percent when measured by the UNDP's higher HPI-2 standards for developed countries. More than 17 percent of the population in the USA is income-poor, with the poverty line set at 50 percent of the median adjusted household disposable income.[37] While GNP reached a historic high in the USA in 1990, having grown over 25 percent in a decade, child poverty increased by 21 percent to where one in five American children lived in poverty.[38] Almost 30 percent of the poor had no medical insurance in 1991, and somewhere between five and ten million Americans experienced homelessness in the late 1980s.

Infant mortality, life expectancy and education

Table 1.2 on infant mortality, life expectancy and education demonstrates that wealth and war matter, with richer and less war-prone Asian countries outperforming many African countries. Interestingly, Japan, Hong Kong and Singapore outperform the significantly wealthier USA in terms of infant mortality and life expectancy.

Vietnam and China, which score poorly on civil and political rights, do well on primary-school education, reaching levels comparable to that in the USA. The Philippines and Indonesia, torn by domestic strife and affected by the Asian financial crisis, which increased poverty particularly in rural areas, suffer from relatively high rates of children who do not receive a primary-school education. Perhaps for similar reasons, Thailand also performs poorly on this measure.

As Table 1.3 shows, Asian nations vary in the amount they spend on education, health and military as a percentage of GDP. On the whole, Asian states spend more on education than health, usually considerably more, with the exception of Japan. In contrast, France, the USA and Japan spend more on health than education, reflecting higher medical costs but also greater wealth. No OECD (Organization for Economic Cooperation and Development) country spends less than 5 percent of GDP on health, whereas most developing countries spend only 2 percent to 3 percent. Given differences in the size of the economies, the actual amount spent varies widely. The WHO estimates that $30 to $40 per person is the bare minimum needed to provide basic health services. However, in 1997 the least-developed countries spent on average $6/person and low-income countries $13, compared to $125 in upper-middle-income countries and $1,356 in high-income

countries. Making matters even worse in poor countries, rural residents and those in the bottom 20 percent of income usually receive a disproportionately small share of the medical services.[39]

The USA spends the most on the military in absolute terms, though at 3.1 percent of GDP, it trails Singapore at a high 5.0 percent. Only Singapore spends more on military than education and health combined, reflecting its security concerns as a small city state surrounded by larger states from which ethnic and religious tensions might spill over into Singapore. Japan has the highest ratio of combined education and health to military spending at 9.5 to 1. France, Thailand, and the Philippines spend more than five times as much on education and health as on the military, the USA more than three times, South Korea more than two and a half times, India twice as much, and China slightly less than twice as much. Military expenditures may be offset by arms sales. The USA claims 41 percent of the market in conventional weapons sales, compared to 9 percent for France and 1.7 percent for China.

Income inequality and wealth distribution

While wealth undoubtedly affects the ability of governments to provide education and health services to their citizens, how the government chooses to spend its money and how wealth is distributed among the members of society are also crucial factors in the quality of life of citizens, especially the most vulnerable in society. As Table 1.4 shows, Asian countries differ in terms of income distribution.[40] However, they all are more equitable than some of the worst offenders in Africa and Latin America. Indonesia, a low-income country long associated with crony capitalism under Soeharto, fares surprisingly well. Meanwhile Malaysia, a middle-income country often linked with Indonesia in the Asian values debates, fares rather poorly. The Philippines not only suffers from low income but also extreme income inequality.

Among the high-income countries, Hong Kong, with its *laissez-faire* economic policies and colonial past, is the least equitable, though Singapore and the USA are not far behind. Conversely, Japan once again scores best, with South Korea and France also doing relatively well.

The numbers may be deceptive in that they do not indicate long-term trends. China, once relatively egalitarian, is now rapidly becoming more polarized. Similarly, Malaysia reduced the spread in the 1980s only to see the gap widen rapidly in the 1990s.

Quality of governance

Asian governments that supported Asian values often unapologetically defended their heavy-handed paternalistic ways by arguing that what mattered was the bottom line: economic growth, good governance, clean and effective civil servants. Table 1.5 shows that the Asian region on the whole scores relatively high on measures of good governance, including political stability,

government effectiveness, regulatory quality, rule of law and control of corruption, with the exception of voice and accountability where it ranked in the fiftieth percentile.

"Political stability and absence of violence" combines several indicators that measure the likelihood that the government will be overthrown or destabilized by unconstitutional or violent means, including terrorism. It is included as a good-governance measure because political instability and violence not only affect the ability of the ruling regime to govern but deprive citizens of the ability to select and replace those in power peacefully. "Government effectiveness" measures the provision of public services, the quality of the bureaucracy, the competence and independence of civil servants, and the credibility of the government's policy commitments. Whereas government effectiveness focuses on the institutional inputs required to implement policies effectively, "regulatory quality" focuses on the policies themselves. It includes measures of market-unfriendly policies such as price controls or inadequate bank supervision, as well as perceptions of excessive regulation of foreign trade and business development, reflecting a bias toward neo-liberal economic policies. "Rule of law" measures the extent to which people have confidence in and abide by the rules of society, how fair and predictable the rules are, and how well property rights are protected. The indicators include perceptions of incidence of crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts. "Control of corruption" measures perceptions of corruption, the effects of corruption on business, and "grand corruption" in the political arena.

Again, there is wide variation within the region, largely consistent with levels of economic development, as indicated in Table 1.6. In the high-income weight class, Singapore wins the gold in the four main categories of good governance: government effectiveness, regulatory quality, rule of law and control of corruption. It also outperforms the region in terms of voice and accountability and political stability, and the others in the high-income category for the latter but not the former. The USA takes the silver, with France and Hong Kong vying for the bronze. Although Japan scored well on infant mortality, life expectancy, income equality and other quality of life measures, its scores on government effectiveness and regulatory quality leave something to be desired. While it ranks relatively high in rule of law, it fares relatively poorly on the corruption scale mainly because of grand political corruption.

While Taiwan outperformed the region on every measure, it underperformed relative to others in its income group on every measure. However, if classified as an upper-middle-income country, as in the UNDP rankings, then it would do quite well relative to others in its income class. South Korea consistently outperforms the regional average. Moreover, relative to other countries in its upper-middle-income bracket, it outperforms in the four main categories, although it lags behind in voice and accountability and political stability. Malaysia outperforms the regional average on the four main

indicators of good governance and political stability, though it underperforms on voice and accountability. It outperforms others in its group on government effectiveness and slightly on regulatory control, rule of law, and control of corruption, although it falls far short on voice and accountability.

Thailand, a middle-income country according to UNDP standards but classified as lower middle by the World Bank, outperforms the region and the average in the lower-middle-income class by a wide margin on every dimension. China outperforms lower-middle-income countries in political stability, government effectiveness, and rule of law; it does slightly better in control of corruption, and is about average in regulatory quality. However, it scores much lower on voice and accountability. The Philippines, also in the lower-middle-income category, scores high on voice and accountability, low on political stability, outperforms the income average on government effectiveness and regulatory quality, but lags slightly behind on rule of law and corruption.

In the low-income category, India outperforms others in all dimensions except political stability. Indonesia lags behind the regional averages and other low-income countries on political stability, rule of law and control of corruption, but outperforms others at its income level in voice and accountability, government effectiveness and slightly in regulatory quality. Vietnam lags behind the region in all categories except political stability, but outperforms others in its income class in political stability, government effectiveness, rule of law and control of corruption, though it lags far behind in voice and accountability.

Law and order and social stability: crime rates, drug rates, suicides, divorces and young mothers

Lee Kuan Yew and other Asian leaders have often been critical of the high crime rates, rampant drug use and social disorder in economically advanced Western liberal democracies. Rather, they champion family and communitarian values, social stability and law and order. Tables 1.7 and 1.8 demonstrate that there are significant differences in crime rates and other indicators of social order.

Crimes rates must be used with caution because of differences in the way crimes are defined, data-reporting practices, wide fluctuations from year to year, and differences in the level of economic development and demographic variables such as the percentage of rural population and youths. Notwithstanding such qualifications, the results are striking: Asian countries, especially in the higher-income brackets, tend to have much lower crime rates relative to their level of economic development, industrialization and urbanization. For instance, the total crime rates for high-income countries France and the USA are two to six times the rates in Japan, Singapore, and Hong Kong. The much higher crime rates hold across the board for property offenses such as theft and burglary, violent crimes such as murder (which

are generally considered to suffer from fewer problems in reporting and data collection) and drug offenses. The USA suffers from particularly high levels of violent crime, especially rape. South Korean crime rates are also two to six times lower than fellow upper-middle-income countries South Africa and Poland.

The lower-income countries such as China, the Philippines, Indonesia, India, and Vietnam have lower crime rates than the wealthier countries. Data collection is particularly problematic in low-income countries, making comparisons more difficult. However, it would appear that crime and social disorder is a greater problem in India, the Philippines, and Indonesia than in China, Vietnam, and Thailand, although Thailand, which has low overall crime rates, has a surprisingly high murder rate.

Countries vary widely in how they deal with criminals. The USA also has the dubious distinction of the highest rate of incarceration in the world, as well as some of the most severe punishments. In contrast, France and Japan have low rates of incarceration relative to their crime rates, and tend to place more emphasis on non-custodial sanctions and in Japan's case on rehabilitation. In general, however, Asian states with the exception of Japan rely on heavy punishments.

Other indicators of social order such as suicide, divorce and young-mother rates produce more mixed results, less clearly tied to levels of wealth, as indicated in Table 1.11. Suicide rates are very high in Japan, followed by France, and then a cluster of countries including South Korea, China and Hong Kong, followed by the USA and India. Thailand and the Philippines, perhaps because of religious influences, have very low rates. National suicides rates may disguise significant regional and gender disparities: for example, the suicide rate among rural Chinese women is alarmingly high.

The USA has a much higher divorce rate than other countries. The next country, South Korea, with a surprisingly high rate, is still only half of that of the USA. Singapore's divorce rate is relatively low. The birth rates to young mothers vary widely, with Indonesia, India and the Philippines leading the pack, followed by the USA and Vietnam. In contrast, there are very few such births in France and the East Asian countries Singapore, Hong Kong, Japan, South Korea or China.

Provisional summary

The following represent what we have so far considered.

- There is a wide variation within Asia in terms of human rights performance and other measures of quality of life.
- Asian countries, especially East Asian countries, tend to do poorly on civil and political rights relative to others in their income group. Moreover, even the most democratic regimes in the region score somewhat lower than the more liberal USA and France.

- However, Asian countries tend to do much better, both relative to civil and political rights and also to other countries in their income group, on economic rights and other quality of life indicators such as education, infant mortality, life expectancy, law and order and social stability.
- Asian governments also tend to outperform other countries in their income group on good governance measures.
- Each country does better in some respects than others. By selecting particular measures, one can present either a positive or negative image of any country.
- Rampant rights violations, grinding poverty, appalling misery and suffering, and daily assaults to human dignity continue to exist in all countries. Each and every country could do better, and is morally and legally obligated to do better, in countless ways.

Accounting for performance: an overview of the most common explanatory factors

What accounts for the difference in rights performance in the Asian region? In this section, I review some of the most common factors linked in empirical studies to better human rights protection, including: political stability and war, economic development and growth, the nature of the political regime, culture and religion, population size, and colonial history.

Political stability: war, civil strife, ethnic unrest and terrorism

There are no international wars involving the Asian countries in this study at present. However, in the past two decades, there have been skirmishes in the Korean peninsula, an invasion by Vietnam of Cambodia, border conflicts between Vietnam and China, skirmishes in the Taiwan straits, several conflicts between India and its neighbors, including Pakistan and China, and violence in Indonesia and East Timor. Meanwhile, the USA has been involved in some forty military actions, including wars in Iraq, Afghanistan, Yugoslavia, regime-changing invasions in Grenada, Panama, and Haiti, military assistance to rebel groups in Angola, El Salvador, and Nicaragua, and missile attacks on Lebanon, Libya, Yemen, and Sudan.[41]

In the near future, North Korea, having declared its intention to pursue the development of nuclear weapons, remains an area of concern. The Taiwan independence issue could also be explosive. Chen Shuibian's playing of the referendum card to boost his flagging chances for re-election and his commitment to a constitutional overhaul have increased tensions considerably. In addition, there continue to be a number of border disputes in the region. The signing of a multi-party agreement regarding the Spratly Islands in 2000 has eased tensions, although recent moves by China to develop natural gas and by Vietnam to use the islands for tourism have once again raised

concerns. The strengthening of ASEAN may also help defuse conflict in the region as Member States become more economically interdependent.

The main sources of instability in the region are domestic. Nepal and the Philippines continue to battle rebel insurgents. Indonesia and East Timor are struggling to maintain stability in the wake of East Timor's declaration of independence and the downfall of Soeharto. The rise of terrorism and Islamic fundamentalism in Indonesia has further challenged the newly formed democratic regime's ability to maintain social order. India remains one of the least stable countries in the region, in part because of potential international conflicts with its neighbors but also because of domestic threats arising from ethnic strife, terrorism, and general discontent associated with poverty and an ineffectual government.

China remains relatively stable, although the potential for instability should not be dismissed lightly. Sources of instability include terrorist threats by radical groups in Xinjiang as well as a broader group of Xinjiangese and Tibetans who desire independence or at least greater autonomy. Frequent massive demonstrations by disgruntled farmers, laid-off urban workers, and pensioners who are unable to obtain their retirement benefits from moribund state-owned enterprises or poorly funded welfare programmes also have the government on edge. In addition, China's impressive economic run over the last twenty-five years is threatened by a high percentage of bad loans that could undermine the banking system. Judging from the harshness of the crackdown, the ruling regime also perceives advocates of democracy, certain religious groups such as Falun Gong and other social groups as potentially destabilizing.

The USA received a relatively poor political stability rating in the World Bank 2002 study, ranking just higher than China and lower than South Korea. The lower-ranking reflects the rise of terrorism and the possibility of retaliation for the aggressive US militarily policies in Afghanistan, Iraq and elsewhere in the world.

In addition to the threat from North Korea, South Korea has experienced ongoing violent clashes with students and workers. As a result, its political stability rating is the same as that of Vietnam and lower than the regional average and the average for its income class. Vietnam's political stability rating appears to reflect the concern that the authoritarian socialist system is simply not sustainable, and yet the regime may not be able to manage political transition to a more stable form of government.

Malaysia has been relatively stable. However, the threat of terrorism and the rise of Islamic fundamentalism, as well as concerns about the transition of power now that Mahathir has stepped down, have given rise to worries about political stability. Nevertheless, it remains relatively stable, as does Thailand. While Thailand has a history of coups, and the military remains strong, it has emerged as one of the more stable democracies in the region. Although terrorists have been captured in Thailand, terrorist activities are primarily oriented toward other states. The authorities have clashed with

Islamic separatist in southern provinces, however, resulting in more than one hundred deaths.

Hong Kong remains stable, despite a demonstration by more than 500,000 in July 2003 to protest against the ineffectual rule of Tung Chee-hwa, an economic recession, and proposed national security legislation required under the Basic Law. The pace of democratization in China remains an issue, and there will inevitably be tensions between Beijing and Hong Kong under the novel one-country, two-systems approach. Nevertheless, there is little chance of political instability given Hong Kong's politically cautious, business-minded citizenry and the fundamental reality that Hong Kong is part of the PRC.

Japan, France and Singapore all rank high on political stability. However, Japan's sending of soldiers to Iraq has created tensions at home, with many citizens concerned that Japan's increasing presence in UN peacekeeping and nation-building operations runs afoul of constitutional limits on the military.

More generally, the war on terrorism has resulted in threats to civil liberties in all countries. In addition to passing a series of anti-terrorist laws hurriedly, the USA has pressured other countries in Asia to beef up their national security laws, often dangling the bait of bilateral trade benefits as an inducement. Ironically, prior to 9–11, the US State Department and Western rights organizations routinely criticized Asian countries for cracking down on dissidents, insurgents, terrorists, and others who threaten social order on the ground that the life of the nation was not at stake as literally required under Article 4 of the ICCPR to justify the derogation of civil and political rights. Yet surely the threats faced by many Asian countries have been and continue to be more serious than the threats currently faced by the USA. After all, it stretches credulity to suggest that isolated acts of terrorism, deplorable as they may be, could bring the world's mightiest military power to its knees. In any event, rights advocates worry that US pressure will set the clock back in societies that have fought to eliminate or restrict the use of national security laws to harass political opponents.

Economic development

Some Asian governments have cited their economic record in defending the need to rule with a strong hand. On the whole the Asian region has done extremely well in achieving economic growth, particularly compared to other regions. However, the level of development varies widely in Asia.

In terms of our study, the United States leads the pack with GDP/capita (PPP) of US $34,320, as indicated in Table 1.9. Also in the high-income category are Japan, Hong Kong, France and Singapore in the $22,000 to $25,000 range. South Korea and Taiwan are in the upper-middle category, with PPP levels at slightly less than half of the USA and about two-thirds that of the high-income Asian countries. Malaysia and Thailand are in the

middle, with PPP levels about one-fifth to one-fourth that of the USA, and one-third of that of rich Asian countries. China and the Philippines are in the lower-middle group, with one-eighth of the per capita wealth of the USA and one-sixth of rich Asian countries. Indonesia, India and Vietnam fall into the low-income category.

As the scatterplots in Figure 1.4 graphically portray, level of development is clearly related to better protection of human rights. The correlations in Table 1.10 demonstrate that the relationship between wealth and human development and good governance is extremely strong.[42] The relationship for voice and accountability is also strong, and statistically significant. Although statistically significant, the relationship between personal integrity rights globally and GDP is weaker. This is due to police violence and other acts classified as torture even in rich countries, and because rich countries also react to war, terrorism and political stability by limiting civil and political rights and detaining suspects in ways that are considered arbitrary detention under international human rights standards.[43]

Wealth appears to explain most of variation in human rights performance around the world,[44] strongly supporting the arguments calling for greater emphasis on the right to development and more assistance from wealthy Western liberal democracies. Of course wealth is not the only factor or the most determinative for all rights in all cases. Some countries in each income group beat expectations while others fall far short.

There are also strong regional differences that weaken the correlation between wealth and civil and political rights. East Asian states with a Confucian heritage and Middle East states with an Islamic tradition are less supportive of civil and political rights even if wealthy. Latin American states, with a history of corporatism, patron–client relationships, corruption and large income gaps, and African countries, with traditions of collectivism, tribal affinities and more recently dysfunctional and corrupt leadership, are also less supportive of civil and political rights.

Cultural factors play a role in some contexts and with respect to some rights.[45] To be sure, cultural traits are also closely correlated with wealth, as well as such demographic factors as age, education, rural–urban ratios and occupation.[46] Moreover, the relationship between wealth and human rights performance in Asia and the Middle East is consistently strong except with respect to civil and political rights. This supports the view that there is a culturally based antipathy to liberal values that explains the variance. In contrast, the relationship between wealth and all types of rights is consistently weak in Latin America and Africa, suggesting that the culprits are corrupt and dysfunctional governments that serve the rich, if they serve anyone, at the expense of the general populace.

Finally, it bears noting that the rights performance of any country may deteriorate rapidly because of war, economic stagnation, natural disasters or problems like HIV/AIDS, though again poor countries are likely to suffer disproportionately.

Whereas most studies use GDP as the independent variable, some studies have found that economic growth rates are also important to protection of rights. Again, there is significant difference in terms of long-term growth rates in the region. Only six – Japan, South Korea, Taiwan, Hong Kong, Singapore and China – experienced sustained growth over 5 percent for the period from 1965 until 1995.[47] Thailand, Malaysia and Indonesia grew more slowly, at around 3.5 percent per year. Seven countries, namely, North Korea, Mongolia, Vietnam, Cambodia, Laos, the Philippines and Myanmar, averaged less than 2 percent growth. Growth rates in Thailand, Malaysia, Indonesia and Vietnam increased during the 1980s and 1990s up until the financial crisis.

Several points bear noting, which are considered below.

1. The period of rapid growth generally occurred under an authoritarian regime. However, not all of the authoritarian regimes in the region have succeeded in achieving high growth rates (e.g., Myanmar, North Korea). Nor have all the democracies (e.g., the Philippines, India). Regime type is not as important as the stability of the regime and variations within regimes.[48] In particular, regimes that are market oriented, dominated by technocrats, and relatively free from corruption are more likely to be successful.
2. Of the Asian countries that have experienced sustained growth, most have enjoyed legal systems that comply with the standards of rule of law at least in their handling of commercial matters. Although the political regimes may not have been democratic and the legal system may not have provided much protection for civil and political rights in some cases, the Asian countries that experienced economic growth generally scored highly with respect to the legal protection of economic interests. A survey of economic freedoms in 102 countries between 1993 and 1995 found that seven of the top twenty countries were in Asia.[49] Economic freedoms include protection of the value of money, free exchange of property, a fair judiciary, few trade restrictions, labor market freedoms and freedom from economic coercion by political opponents. With the possible exception of China, the legal systems of the six countries that have achieved highest economic growth measure up favorably in terms of economic freedoms and rule of law, particularly with respect to commercial matters. In contrast, the legal systems of the lowest-performing countries are among the weakest in the region. The data for Asian countries are consistent with the general evidence from other countries that demonstrates that rule of law is necessary if not sufficient in most cases for sustained economic development.[50]
3. All else being equal, authoritarian regimes tend to outperform democratic regimes at relatively low levels of economic development.[51] Thus, promoting democracy in very poor countries may be putting the cart before the horse.

4 Some Asian countries, including China, may not yet have reached the level of development that makes it likely that there will be a transition to democracy, and even if there were, that democracy would be sustainable.[52] While democracy proponents often claim that authoritarian regimes are particularly vulnerable to economic downturns, so are democracies, at least at relatively low levels of growth.[53]
5 When the conditions for a durable or stable democracy are not present, the transition to democracy often impedes economic development, at least in the short term.
6 Economic development is not sufficient for political reform and the emergence of democracy. Countries may develop economically and not become liberal democracies, at least for a considerable period. Hong Kong and Singapore are good examples.
7 Higher levels of prosperity and economic development are likely to lead to a growing demand for democracy – Taiwan, South Korea, Thailand, Indonesia and Hong Kong are good examples. Whether or not economic development is the cause of democratization, in the long term, economically advanced countries are likely to be, and to remain, democracies.
8 As discussed in the next section, democratization does not necessarily lead to an improvement in human rights.

As for the relation of growth to rights rather than to democracy, high growth rates may in the long term lead to better protection of rights as a society becomes wealthier, and may in the short term diminish popular discontent and opposition to government policies, thus reducing the need to suppress political dissents or take harsh actions to curb social protests. But higher growth rates are also consistent with rising inequality and political oppression, as the experience of several Asian countries demonstrates. As indicated in Table 1.11, China and Vietnam have enjoyed the highest growth rates in recent years, explaining to some extent the legitimacy of the authoritarian governments and the relative political stability despite severe restrictions on civil and political rights. Similarly, Taiwan, Singapore, Hong Kong, South Korea, and Malaysia enjoyed high growth rates during their authoritarian years, although growth rates have tapered off in recent years as the size of the economy has grown and because of other factors such as the effect of the Asian financial crisis. India's growth rate has been relatively high, though only half of that of China. Asia's other developing country democracy, the Philippines, has struggled economically, posting some of the lowest rates in the region.

In addition to levels of development and growth rates, researchers have studied the effect of FDI and foreign assistance on human rights. Unfortunately, such studies have been inconclusive.[54] Taking a look at the region, China clearly receives the most FDI, and indeed was the leading destination in the world for FDI in 2002. In terms of FDI as percentage of GDP however, the countries ranked as follows in 2001: Hong Kong 14.1, Singapore

10.1, Vietnam 4.0, France 4.0, China 3.8, Thailand 3.3, USA 1.3, South Korea 0.8, India 0.7, Malaysia 0.6 and Indonesia −2.4.[55]

Consistent with the general studies, it is difficult to draw any firm conclusions from these figures for the Asian region. In most cases, foreign businesses pursue their own economic interests. While there may be some diffusion of norms, in some cases the relatively wealthy employees working in foreign enterprises tend to be conservative defenders of the status quo.[56] Moreover, foreign investors themselves have very different records on labor/employment rights issues. In China, large multinational companies from the USA, Europe and Japan generally aim to provide similar treatment to employees as in their own country. However, investors from other countries in the region often engage in abusive practices.[57]

While FDI may stimulate growth and provide much needed jobs, it can also contribute to financial crisis. The Asian financial crisis clearly resulted in a deterioration in living standards in many Asian countries. In Thailand, poverty levels jumped from 8 percent in 1996 to 20 percent in 1998 as a result of the financial crisis, eliminating much of the progress made in last twenty years. Some 800,000 schoolchildren and college students were forced to drop out of school; social problems such as alcoholism, depression and suicide increased; immigrants were no longer welcome; and trafficking in children and prostitution increased.[58]

Although studies have reached different conclusions about the impact of foreign aid on human rights, the impact seems to be limited in most cases.[59] What is abundantly clear from such studies is that aid is more often determined by the strategic, commercial, and political concerns of the donor rather than given out of pure altruism. At minimum, it is safe to say that the human rights record of the recipient is rarely the determining factor, and that there is a significant gap between a rhetorical commitment to democracy and human rights, and the delivery of aid and the pursuit of other goals that undermine democracy and human rights.[60] Looking at the amount of Overseas Development Aid (ODA) received (US millions) and the rate per capita in the region, India clearly leads in the total amount of aid received, although Vietnam, Indonesia and the Philippines have higher rates per capita: India 1,705/1.7, Indonesia 1,500/7.0, China 1,460/1.1, Vietnam 1,439/18.1, the Philippines 577/7.5, Thailand 281/4.6, Malaysia 27/1.1, Hong Kong 3.6/0.2, and Singapore 1.0/0.5. Again, no straightforward conclusions seem to flow from these numbers, although the relatively poor civil and political rights records of Vietnam, China and Indonesia suggest that aid alone is not an effective lever for changing government policies in that area.

Political regime: democracy and authoritarianism, and their mixed offspring

Many studies using a variety of methods and definitions find that democracy reduces human rights violations.[61] However, the studies tend to assume

a linear relationship: marginal improvement in democratization leads to a similar improvement in protection of human rights. Yet many qualitative studies have found that democratization has not led to better protection of human rights in the countries studied.[62] Despite the much vaunted third wave of democratization in the 1980s and 1990s, regimes that combined meaningful democratic elections with authoritarian features outnumbered liberal democracies in developing countries during the 1990s.[63]

A number of quantitative studies support the disconcerting results of the qualitative studies by showing that the third wave has not led to a decrease in political repression, with some studies showing that political terror and violations of personal integrity rights actually increased in the 1980s.[64] Other studies have found that there are non-linear effects to democratization: transitional or illiberal democracies increase repressive action. Fein described this phenomenon as "more murder in the middle" – as political space opens, the ruling regime is subject to greater threats to its power and so resorts to violence.[65] More recent studies have also concluded that the level of democracy matters: below a certain level democratic regimes oppress as much as non-democratic regimes.[66]

Democracy consists of different elements or dimensions, and thus most studies use a composite index. The Polity IV measure increasingly favored by researchers is a 21-point scale made up of five components: competitiveness of executive recruitment, competitiveness of participation, executive constraints, openness of executive recruitment, and regulation of participation. Other composite measures of democracy include civil liberties, freedom of press, minority protection, and so on. Which elements matter the most for the protection of human rights?[67] Is there a sequencing effect that would recommend increasing political participation before increasing constraints on executive, or vice versa? De Mesquita *et al.* found that political participation and limits on executive authority are more significant than other aspects, but that there is no human rights benefit at all until the very highest levels of political participation and executive constraints are achieved. However, these levels require moderate progress on each of the other subdimensions. In short, "there is no significant increase in human rights with an incremental increase in the level of democracy until we reach the point where executive constraints are greatest and where multiple parties compete regularly in elections and there has been at least one peaceful exchange of power between the parties . . . Put more starkly, human rights progress only reliably appears toward the end of the democratization process."[68]

Policy-makers are again faced with morally ambiguous results. Democracy appears to be related to both economic growth and human rights, but the human rights benefits of democracy may occur only once democracy is consolidated. Moreover, all else being equal, authoritarian regimes tend to outperform democratic regimes at relatively low levels of economic development, while democracies are unstable at low levels of development and susceptible to collapse when economic performance suffers.[69] This supports

the views of several Asian leaders who argue that economic growth should come before democratic reforms. On the other hand, advocates of a growth-first approach may be troubled by studies showing that IMF and World Bank structural adjustment programs lead to more repression, at least in the short term, although the long-term results are variable.[70] At minimum, policy-makers should strive to avoid sacrificing the short-term interests of the poorest members of society at the altar of long-term growth by adopting relief measures to protect the most vulnerable.

The experiences of Asian countries with democratization are largely consistent with the findings of these multiple country studies. In Indonesia, there have been numerous human rights violations after the fall of Soeharto, most notably with respect to ethnic violence, the tragedy in East Timor and the violence that marred the 1999 elections. Similarly, Amnesty International reported in 1993 that the human rights situation had not substantially improved under the democratic regime in South Korea.[71] Even today, Kim Dae Jung has been unwilling or unable to do away with the strict National Security Law despite his campaign promises. Although Cambodia held elections in 1993 and 1998, the period was marked by battles between government armed forces and the Khmer Rouge, resulting in continued human rights violations including murder, rape, hostage-taking, and secret detention.[72] The government offered an amnesty to key leaders and supporters of the Khmer Rouge, much to the dismay of many rights advocates. Nevertheless, stability remained an issue with a pre-emptive coup by Hun Sen in 1997 in which more than fifty people were killed, many of them shot in the back of the head after arrest. In the Philippines, democracy has not resolved pressing socio-economic problems. Under Ramos, the percentage living in poverty was reduced, but the gap between rich and poor grew. There have also been numerous rights violations, including disappearances, extrajudicial killings, arbitrary arrests, and prolonged detention, as the government continues to struggle against insurgents. Consistent with popular views in other countries threatened by terrorism and insurgents, most Filipino citizens apparently do not consider the government's tough treatment of terrorists as human rights violations. Preoccupied with fighting terrorists, the government has been too weak to deal with corruption and violence, and democracy has been driven by cronyism, family networks in the countryside, and personalities.

Moreover, a large number of citizens in Taiwan and South Korea continue to harbor serious doubts about democracy. Taiwan and South Korea have generally been considered success stories in that they have achieved relatively mature democracies, although the violence and allegations of impropriety in the recent presidential election in Taiwan have tarnished Taiwan's image. With a 2.0 ranking on Freedom House's political rights and civil liberties scale, they are considered to be "liberal democracies," despite shortcomings in rule of law and restraints on executive power. Nevertheless, "support for democracy lags well behind the levels detected in other emerging and established democracies. And on some dimensions of belief, the two

publics exhibit a residual preference for authoritarian or nondemocratic principles, akin to the portrait of traditional or 'Asian values' ".[73] Global studies suggest that democracy becomes stable when 70 percent of the populace insists on democracy as the best form of government. However, only slightly more than half of citizens in South Korean and Taiwan believe that democracy is the best form of government, while 30 percent of Koreans and 12 percent of Taiwanese maintain that an authoritarian government is sometimes preferable. Support for democracy has even declined in South Korea after the financial crisis and the scandals in the presidency of Kim Young Sam presidency, including one involving his son. Moreover, some 65 percent of Koreans claim economic development is more important than democracy, while only 1 out of 7 chose democracy – a view shared by impoverished Latin Americans who have rapidly become disillusioned with the third wave of democracy.[74] Numerous polls throughout the region show similar majoritarian support for economic development and social stability over democracy and civil and political rights.[75]

Even when many Asians prefer democracy, they may prefer majoritarian or non-liberal variants to liberal democracy. Nearly two-thirds of Koreans agreed with the statement that "If we have political leaders who are morally upright, we can let them decide everything", 40 percent believed that "the government should decide whether certain ideas should be allowed to be discussed in society," while 47 percent believe that "if people have too many different ways of thinking, society will be chaotic."[76] In contrast to South Koreans and Taiwanese, there is overwhelming support for democracy among Thais, with an astounding 90 percent satisfied with the way democracy works in Thailand and 85 percent maintaining that democracy is always preferable to authoritarianism. Nevertheless, half of Thais still rank economic development as more important than democracy. Moreover, Thais remain distrustful of political parties, while 75 percent view diversity of political and social views as threatening, and 45 percent are unwilling to tolerate minority viewpoints. Nor is there a very deep commitment to rule of law and separation of powers. A majority would accept government control over the judiciary or even parliament to promote the wellbeing of the nation.[77]

That some Asian citizens would harbor doubts about the most recent wave of democratization is understandable given the disappointing results of earlier experiments with democracy in Asia and the lackluster performance of many recently democratized states in other parts of the world that has led to a reversion to authoritarianism in several. Indonesia tried democracy just after independence from the Dutch between 1950 and 1957. The experiment ended when Sukarno declared martial law. Thailand has gone through numerous cycles of democratic elections followed by military-led coups – since 1932, there have been some seventeen coups attempts.[78] South Korea held elections in the 1960s and early 1970s before returning to authoritarian rule. The less-than-successful experiments with democracy in the Philippines

from 1935 led to the declaration of martial law by Marcos in 1972. More generally, many recent third-wave democracies have failed to generate economic growth or to deliver on human rights promises, leading to massive discontent on the part of the citizenry, calls to cut back on liberal rights in favor of a harsher law-and-order agenda, and in some cases reversion to authoritarian governments.[79]

Culture and religion

As critics of Asian values have pointed out, the Asian region clearly boasts a wide diversity of religious systems and cultural practices. The wide diversity prevents simplistic conclusions based on stereotypes about Confucians or Muslims or Asian communitarians. Nevertheless, as the various surveys cited herein and the following chapters show, differences in values continue to affect the outcome across a wide range of rights issues.

Cultural factors would seem to explain in part the relatively greater restrictions on free speech and the media in both democratic and non-democratic states.[80] The restrictions are most apparent in North Korea and Myanmar, although Singapore, Malaysia, China and Vietnam are also known for tight limits on the press.[81] But even the more democratic countries in the region keep a short leash on the press and expression. South Korean President Roh has declared that the government will take legal action against any news organization that publishes editorials containing false information regarding government policy or personnel. In 2003, Roh personally brought a libel suit against four major newspapers who allegedly defamed him and his family by publishing falsehoods about his fund-raising activities and real-estate transactions. In Indonesia, after a period of expansive freedom of speech and the press during the Habibe and Wahid years, the Megawati government, supported by a public increasingly wary of unfettered expression, pushed through a law that imposed several restrictions on freedom of expression, assembly and the press. The former editor of a daily paper was found guilty of insulting the chairman of the Golkar party currently serving as speaker of legislature, while another editor was prosecuted for insulting Megawati. Meanwhile, in Thailand, television and radio stations remain publicly owned, and the government has used the leverage gained from licensing and advertisements to influence press coverage, resulting in self-censorhip and the sacking of editors critical of the government. Thailand was therefore demoted from "free" to "partly free" status by Freedom House.[82] Despite a liberal press, India continues to prosecute people who criticize the judiciary, while libel cases remain common. Even in Japan, a broad ban on incitement of illegal activities, permit requirements for demonstrations and other restrictions allow the government considerable room to restrict free speech in the name of public order.

Religion also remains a crucial and often divisive factor in several states, leading to broad state powers to restrict religious practice in the name of

social order and harmony. Governments in the region are extremely wary of the volatile mix of religion and politics. At one extreme, Islamic fundamentalism has fueled insurgency and separatist movements in Thailand, Indonesia, and China, and raised concerns in multi-ethnic Malaysia and Singapore. China is also wary of Tibetan Buddhists' support for the Dalai Lama. Apart from fueling separatism, religious conflicts have resulted in bloody conflicts in India, Indonesia, and elsewhere. Counter-measures in these countries have ranged from violent repression and the imposition of martial law and derogation of rights, to registration requirements for religious organizations, limits on venues of worship, restrictions on or prohibitions of religious education, and various other measures to limit freedom of religious practice. In China, members of the five official churches are allowed to practise without undue restrictions. However, members of unapproved house churches who have sought to unite with the Pope and advocated religious-based practices that are at odds with the government policies on contraception and abortion have been harassed and prosecuted. With a regulatory regime much like China's, Vietnam tolerates and even encourages religious practice provided the religion does not become a source of opposition to government policies or undermine efforts to establish the "Great Unity" of Vietnamese society. In Singapore, religious leaders who challenge state policies or become involved in political issues have run afoul of government policies that try to confine religious groups to educational, social and charitable work, rather than "radical social action."

Drawing a balance between freedom of religion and political stability has proved especially difficult with respect to new religions or cults. Aware that religious groups have destabilized dynasties in the past, China imposes content-based restrictions on "cults" and "abnormal" religious beliefs and practices.[83] The crackdown on Falun Gong has received the most attention abroad, although the group considers itself a breathing-exercise group rather than a religion. The government has also outlawed a number of other sects and defended its policies by citing similar restrictions on cults in other countries, including France and Belgium. In the Asian region, Japan's Supreme Court upheld the ban on Aum Shinrikyo after its leaders were arrested for releasing poisonous gas in the subway in Tokyo. Singapore has also banned Jehovah Witnesses for refusing to serve in the military. South Korea, faced with a similar problem, refused to recognize Jehovah Witnesses as conscientious objectors.

Unfortunately, international law provides little useful guidance in distinguishing normal from abnormal religious activities and legitimate groups from cults.[84] More generally, the potential for religious authority to challenge and undermine state authority has led to a wavering and incoherent doctrine both internationally and in many countries with respect to such issues as separation of church and state and reasonable restrictions on religious practice.[85] Within Asia alone, freedom of religion exists side by side with state-endorsed atheism in China and Vietnam, and Islam as the official state

religion in Malaysia. Meanwhile, in the Philippines, Catholicism is privileged in numerous ways, including constitutional provisions on abortion and divorce that reflect Catholic religious principles; in Japan, Shinto remains favored, with courts reluctant to hold visits by state leaders to Shinto shrines to be a violation of the principle of separation of state and church; and in Thailand, Buddhism is so dominant as to constitute implicitly the official religion.

Legal institutions

Empirical studies have only begun to explore the relationship between legal institutions and protection of different types of rights.[86] While promising, this approach is likely to produce inconsistent results because of the wide variation among countries on key legal institutions and practices such as separation of powers, constitutional review, judicial review of executive power, judicial independence and the way judges are appointed, and so on. Asian legal systems are no exception, differing widely in institutions, practices and conceptions of rule of law.[87] Moreover, legal institutions that function well in one context may produce very different outcomes in other contexts, as the following chapters demonstrate.

What does seem clear from the broad empirical studies as well as the experiences of Asian countries to date is that judicial independence is generally important if not sufficient for the protection of rights, particularly civil and political rights. The regimes with the least independent courts have some of the worst records in protecting civil and political rights, including China, Vietnam, Myanmar and North Korea. On the whole, democratization has resulted in increased independence of the courts and a more active role in protecting rights, most notably in South Korea, Taiwan and Indonesia.

However, judicial independence alone does not ensure that the courts will play an active role in protecting rights. Judicial activism varies tremendously in the region. At one extreme, despite a conception of fundamental rights as inherent or natural rights of all human beings and explicit constitutional references to such open-ended notions as unenumerated rights and human dignity, Japanese courts have exercised their powers of judicial review sparingly in the service of rights, interpreting public welfare limitations on rights broadly and generally deferring to the legislature. Courts in Singapore and Malaysia also continue to interpret rights narrowly, relying on a positivist rather than a purposive or natural-law-based method of interpretation. At the other extreme are the Indian, Taiwanese, and Filipino courts. The Indian Supreme Court and the Grand Justices of Taiwan have even struck down constitutional amendments. In the Philippines, the court has aggressively engaged in social and economic policy-making by interpreting “directive principles” in the constitution. To be sure, activist does not necessarily mean liberal. In Thailand, the courts have shown a conservative inclination to side

with entrenched interest groups.[88] Similarly, although Indian courts have come to the aid of the disenfranchised in a variety of ways, the courts remain organs of the state and judges are inclined by personal circumstances and professional training towards moderate rather than radical solutions.[89]

The aggressiveness of the courts also varies by category of right. National laws frequently prohibit or limit judicial review of many national security decisions. But even when judicial review is possible, Asian courts have been reluctant to challenge executive and parliamentary decisions involving national security.

Similarly, the role of courts is limited in China, Vietnam, Malaysia, Singapore, Japan, Hong Kong and South Korea with respect to many social and economic rights by the traditional view that such rights are generally not justiciable or that they involve resource allocation decisions best left to the legislature. Nevertheless, even where such rights are considered non-justiciable, Asian governments generally have taken seriously their obligations to provide the necessary minimal conditions for human flourishing, subject to resource constraints largely in line with GDP levels, as the empirical studies indicate. The conceptualization however is not so much in terms of rights as traditional paternalistic beliefs that rulers are obligated to ensure the material and spiritual wellbeing of the people. For instance, in China, the new leadership of Hu and Wen has shown sensitivity to issues of social justice, implementing a number of policies to ease the hardships of those who have lost out in the transition to a more competitive capitalist economic system. In so doing, they are able to draw on a rich tradition of “people as the basis” stretching back to Mencius. While such traditions are grounded in a non-liberal paternalistic worldview, they nonetheless provide a normative basis for social, economic, cultural and collective rights claims today.[90]

On the other hand, several Asian countries have developed an active jurisprudence of economic and social rights, in keeping with a redistributive, developmental model of rule of law that emphasizes redistribution of wealth and social justice issues domestically, and the right of development, debt forgiveness and the obligation of the North/developed countries to aid the South/developing countries internationally.[91] The Indonesian constitution contains a long list of social and economic rights, while Indian and Filipino courts have blurred or overcome the distinction between justiciable and non-justiciable rights through interpretation of constitutional references to programmatic goals and directive principles. The involvement of the judiciary in these complex social and economic policy issues has naturally been controversial, and challenged both in terms of the merits of the decisions and the competence of and proper role of the judiciary.[92]

A particularly pressing issue is whether well-intentioned reformers who push for the incorporation of such a broad array of positive rights in the constitutions of countries at relatively low levels of economic development are not setting the government up for failure by promising citizens more than the government can possibly deliver. In India, the Bharatiya Janata

Party (BJP) government was voted out of office despite an 8 percent growth rate. The vote reflected a deep dissatisfaction with gaping income disparities and widespread poverty amid the growing wealth of some segments of society. The BJP's campaign slogan of "India Shining" only highlighted the discrepancies between the haves and the have-nots. By way of comparison, in wealthy South Korea, which has not made social rights justiciable, the government only this year made good on its promise to provide an equal education for all by providing nine years of compulsory education free of charge.

Indonesia offers another cautionary tale. After the fall of Soeharto, reformers, flush with optimism, wrote into the Indonesian constitution some of the most forward-leaning ideas of the human rights movement. Accordingly, the constitution now provides that each person has the right to physical and spiritual welfare, to have a home, to have a good and healthy living environment and to obtain health services. Reflecting the "capabilities" approach, each person is entitled to assistance and special treatment to gain the same opportunities and benefits in the attainment of equality and justice. Needless to say, the Megawat government in low-income Indonesia was not able to live up to such broad commitments or even to deal with terrorism and rising crime rates effectively, which may explain in part the support for former general Yudhoyono. Supporters believe that he will restore law and order while ensuring economic growth, although rights activists fear that they will fall back on the strong-arm governing methods of Soeharto to do so. Thailand may be experiencing a similar dynamic. Now that Thailand has democratized, the government is struggling to improve the standards of living for citizens. Thaksin Shinawatra's ruling party has acted in many ways like a traditional Asian government, with a strong executive pushing through policies aimed at ensuring economic development and a better standard of living for the majority. As a result, the economy has recovered, and the deterioration in quality of life as measured by the UNDP HDI index has reversed. Yet non-governmental organizations (NGOs) and rights activists remain critical of government policies, pointing out how notwithstanding considerable progress problems remain with respect to disadvantaged hilltribe peoples and socially vulnerable individuals, and how economic development has come at the expense of transparency and political participation. To be sure, the Thailand constitution has incorporated broad ideals such as "human dignity," and NGO critics raise legitimate concerns. But governments in middle-income countries such as Thailand will inevitably have difficulty living up to such idealistic standards. The broad public seems more tolerant and supportive of the government efforts to address issues within the limits of available resources.

Although judicial independence is generally important to the protection of rights, relying on courts alone is clearly not sufficient to protect rights adequately. Courts are limited by political constraints, restrictive laws, interpretative traditions, and their inability to control financial resources and

enforce their own decisions. A variety of other institutions have arisen to assist courts in protecting rights, including national human rights commissions, ombudsmen and a vast network of NGOs.

Several states have established national human rights commissions, including Thailand, Indonesia, India, the Philippines, and Sri Lanka. On the whole, the commissions have mixed records. Many rights advocates were skeptical about Malaysia's human rights commission Suhakam, fearing that it would end up serving as a mouthpiece for the government. Suhakam's inclusion in the foreign ministry, headed by a foreign minister who objected to the liberal biases of the human rights movement and argued that Malaysia should not be judged based on international conventions, suggested that the main purpose was to better defend the government against foreign criticism.[93] However, the commission has interpreted its mandate broadly to include social and economic rights, pushed for ratification of international treaties and issued reports critical of the government, including calling for the amendment or repeal of the Internal Security Act. At the same time, Suhakam has been reluctant to take sides in Malaysia's complicated cultural and racial issues. This selective approach may in part reflect the indeterminacy of international human rights laws in these areas, and the problems of applying abstract and general principles to local contexts. Suhakam may also have been acting strategically, however, trying to gain a foothold and build up a certain amount of popular support and legitimacy in an environment where government support remains equivocal, by avoiding issues that are deeply divisive within Malaysian society and likely to upset the majority whose support is crucial for the commission's survival.

In Indonesia, the human rights commission enjoyed popular support during the Soeharto era, when the majority was united in opposition to Soeharto. However, the commission has been less influential after democratization.[94] Conflicts between more liberal activists members of the commission and conservatives with closer ties to the administration have limited the commission's effectiveness.[95] Realizing that writing rights into the constitution does not ensure the resources necessary for their implementation, the general populace seems to have become wary of the utopian promises of human rights organizations and their constant criticisms of the government, which all too clearly lacks the means to deliver on such promises.

Human rights commissions have experienced conflicts with the courts as well as the executive branch. In the Philippines, the Supreme Court ruled in a series of cases that the commission had no power to provide remedies, but was limited to conducting investigations and issuing reports. In addition to concerns about inconsistency, the court seemed eager to defend its turf and its role in the post-authoritarian polity as the main defender of rights and protector of the people.

Apart from national human rights commissions and independent courts, regional rights systems have played an instrumental role in facilitating the development of rights norms, jurisprudence and implementation, especially

in Europe. Unlike the Americas, Europe, and Africa, in Asia there is no regional rights system. One possible explanation is that there is a greater diversity of values, political systems and conceptions of rights in Asia. A more likely explanation is that Asian governments have been reluctant to establish a regional rights body out of traditional sovereignty concerns that it is not appropriate for other countries or a regional body to intervene in how other countries handle human rights issues except in circumstances where there are widespread and systematic violations of rights. In addition, Asian governments have on the whole emphasized economic development and political stability. However, the need for a regional entity to promote economic development and geopolitical stability is already filled by the increasingly robust Association of Southeast Asian Nations (ASEAN).

Population size and ethnic diversity

Larger populations are associated with more rights violations in absolute terms and per capita, perhaps because there is likely to be greater conflict among different interest or ethnic groups in society or the government is more willing to resort to force to curtail potential threats to social order given the larger number of people that would be affected by social chaos. In any event, populations run the gamut from China at 1.3 billion to Singapore at 4 million. The populations of the other countries are: India 1.03 billion, USA 288 million, Indonesia 214 million, Japan 127 million, Vietnam 79 million, the Philippines 77 million, Thailand 66 million, France 59 million, South Korea 47 million, Malaysia 23 million, and Hong Kong 7 million.

Population does help explain rights performance in some cases, particularly for China and India. Most obviously, limited resources must be spread over large numbers, resulting in lower HDI scores and other quality of life measures. Second, as elsewhere, population size is also a proxy for ethnic diversity. Ethnic diversity has led to conflicts with the state as some groups push for greater independence. It has also led to conflicts with the majority Hans in China as minority groups assert claims for a larger share of resources, for affirmative action, preferential tax benefits, and exemptions from the one-child policy and other generally applicable laws and regulations, and with the majority Hindus in India. Diversity has also in some cases led to conflicts between different minority groups. The response to such conflicts in China has included both carrots and sticks. Carrots include the establishment of special autonomous zones, affirmative action policies and the allocation of additional resources to stimulate economic growth and alleviate poverty in ethnic areas. Sticks include restrictions on civil and political rights in the name of national security, public order, and social harmony. Third, both India and China also score poorly on the PTS scale in part because the sheer size of the population results in a "large" number of violations of physical integrity rights and civil and political rights, even though per capita the number of violations is small. Finally, the size of the

population makes control more difficult, instability more likely and the expected danger value calculated by the multiplying the likelihood of instability by the consequences of chaos higher, thus justifying more restrictions on rights.

As the experiences of China and India suggest, the degree of ethnic diversity is arguably as important as the mere size of the population.[96] The ethnic diversity of several Asian countries has affected human rights protection both directly, through a variety of complicated schemes that balance affirmative action and non-discrimination, and indirectly, by adding to civil tensions that have resulted in harsh crackdowns and limitations on civil and political liberties. As pointed out by Upendra Baxi, Indian constitutional history and the broad powers granted to the government to order preventive detention cannot be understood without reference to India's struggle for independence from Britain, the legacy of ethnic-based tensions resulting from the attempt to divide the territory into Hindu India and Muslim Pakistan, and the continuing pressure of ethnic and religious-based secessionist movements and tensions that often erupt into violent clashes. Ethnic diversity has also been invoked to support broad state powers and tough national security laws in Singapore, Malaysia, Indonesia and China, while an upsurge in Islamic fundamentalism has led to martial law in parts of Indonesia and Thailand.

Asian countries have adopted a variety of approaches to cultural rights in response to ethnic and religious diversity from a melting-pot approach that emphasizes assimilation, to a "salad bowl" approach that seeks to celebrate different traditions and cultures rather than assimilation, to a pragmatic approach that steers a middle course and emphasizes social stability and harmony. Some, including Malaysia and India, have adopted a group-rights approach, whereas others such as Singapore seek to protect groups by protecting the rights of the individuals that make up the group.

India has opted for the salad-bowl approach. The Indian constitution provides strong protections for religious and cultural minorities. Problems arise however when religious and cultural practices are at odds with international rights. For example, Muslim personal law may disadvantage women, while traditional Hindu beliefs discriminate against untouchables. In response, the government has adopted a complicated two-track system that emphasizes reform to certain Hindu practices system while leaving other ethnic and religious issues to be sorted out over time.

Malaysia has adopted a group-based approach that recognizes Islam as the state religion and affords special privileges to the dominant but historically economically weak Malay population, including electoral laws that ensure Malay control, designation of Malay as the national language, prominent displays of Malayan culture in official ceremonies and on television programs and economic policies aimed at improving the lot of Malays. Naturally, the large Chinese minority has resented such affirmative action policies. After the race riots in 1969, the government passed an emergency security law that

provided police wide powers of preventive detention. The government has also passed laws to prohibit speech or actions that would promote feelings of ill-will, enmity, hatred, disharmony or disunity, or which question the special position of Malays.

In keeping with the rejection of group rights in favor of an individual-rights approach, Singapore rejects affirmative action based on group membership. The government also seeks to instil a national identity without trying to eradicate more particularistic cultural identities. Notwithstanding its commitment to meritocracy, the government recognizes the need to protect racial and religious minorities. Accordingly, it has recognized the distinctive cultural and economic needs of indigenous Malays, most of whom are Muslim.

Religious education is a divisive issue in several states due to the potential use of religious education to foster demands for political autonomy and independence, greater political representation or a greater share of resources. Accordingly, some states, including Vietnam, China, India and Thailand impose various restrictions on religious education. Singapore allows religious education but requires that students be able to meet generally applicable standards in certain basic subjects.

Bilingual education is another sensitive issue in Asia as elsewhere. While the right to be educated in one's mother tongue may be central to one's cultural identity, failure to speak the language of the majority may also limit one's opportunities for development.

Colonial history

Every country in the region except Thailand has experienced colonialism, often by several different powers, sometimes at the same time. Although the results of studies are somewhat inconsistent, on the whole they tend to show that a history of British colonialism is associated with better human rights protection, whereas Japanese colonialism and French colonialism may be associated with worse human rights records.[97] It is however impossible to draw any hard-and-fast conclusions from the colonial experiences of countries in Asia. In some cases, British colonialism has been instrumental in laying the foundations for a rule-of-law compliant legal system. However, British rule was hardly democratic or liberal, and citizens of countries ruled by the British did not enjoy full civil and political liberties. Indeed, many illiberal state security laws were first put in place by the British, as in the case of Malaysia's Internal Security Act and Hong Kong's laws on sedition.

What is clear is that the colonial experience has left a bitter taste in the mouths of many Asian citizens, and made them disinclined to welcome what they take to be the hypocritical, self-righteous preaching of former Western oppressors who regularly violated the civil and political rights of Asians when it was in their political and economic interest to do so. In the eyes of

many Asians, the current human rights policies of Western powers and the international human rights regime are just one more example of power politics, the latest variant in a long history of imperialism and hegemony in which the West seeks to impose its way of life on the rest.

Although Singapore and Malaysia were most vocal in their criticism of the liberal biases and hypocrisies of the Western-dominated human rights movement, hostility and suspicion run much deeper throughout the region. China has long argued, with some truth, that it is subject to double standards.[98] There is also a strong current of nationalism in China that has fed popular discontent with the way China is portrayed in the media on rights issues. A broader current of nationalism is rising in various countries in the region. In Thailand, anger at the International Monetary Fund (IMF) and its role in the Asian financial crisis has fanned a general distrust of international institutions, including the UN, as captured in the slogan "the UN is not my father." As noted, both in Thailand and Indonesia, public support for international rights NGOs and domestic rights commissions has weakened. In South Korea, rising nationalism is manifest in a tendency to emphasize the "uniqueness" of Korea and Korean people; in the growing assertion of sovereignty and independence in foreign relations, particularly with the USA; and in opposition to the economic offshoots of globalization such as free-trade agreements, the opening of the service sector in education and law, and policies to foster increased labor market flexibility. International NGOs, which are highly critical of North Korea, have also clashed with domestic rights groups who favor reconciliation and rapprochement with North Korea.[99]

Local opposition to universal human rights is not limited to Asia. Western countries as well have struggled with how best to reconcile a commitment to universal principles with the complex reality of local contingencies. However, at least for economically advanced Western liberal democracies, the norms reflected in the international human rights corpus are largely consistent with, and indeed the outgrowth of, their own values and experiences. As politically stable consolidated democracies, they do not face the same pressures as many Asian states that are still struggling to consolidate democracy or to ensure political stability in the face of separatist movements and other threats. As wealthy countries, they also have the resources to establish institutions capable of implementing rule of law, and, were they so inclined, to make good on the promises of social and economic rights. The "Asian values" movement in part was an attempt for geopolitically weaker Asian states to forge a common basis so that Asian countries could demand the same kind of margin of appreciation on human rights issues as extended to Western countries.[100] At the heart of the argument was the claim that the interpretation and implementation of rights does and should depend to some degree on local circumstances, including not just values, but levels of economic development, political institutions and beliefs, legal institutions,

doctrines and practices, ethnic diversity, the presence of terrorists and other such factors.

Conclusion

Asian countries vary widely in their rights performances generally, on specific rights, and in the factors that influence the protection of rights and the outcomes of specific cases. The level of economic development is clearly a – and usually the – most significant factor. While money may not be able to buy happiness, it does seem to buy a longer life, better education, more health care, and even civil and political rights. The nature of the political regime is also important, but economics generally comes first, especially at low levels. Given the importance of wealth to rights performance, comparisons are best made between countries in the same income categories. Comparing a low-middle-income country like China to a rich country like the USA is like comparing a piano to a duck.

What then does this overview tell us about values in Asia? Asia is obviously a big place, with tremendous diversity that makes it impossible to identify a singular set of "Asian values" shared by everyone in Asia. On the other hand, a pluralism of Asian values is still Asian values. There is nothing inherently contradictory in noting a diversity of values and still claiming that they are Asian. Nor need each country within Asia share every single feature. There may still be dominant patterns within Asia. The "West" and "liberalism" also encompass a tremendous diversity of views. Nevertheless, there are still dominant trends in Western thought. "Liberalism" clearly has a stronger hold than "communitarianism" in the West, for example, whereas the opposite seems to be true in much of Asia, although perhaps collectivism is a more apt description than communitarianism.

Asian values are by definition the dominant values that exist in Asia. They form a value cluster with hierarchies and intensities that allow them to be compared to other value clusters. The individual values that make up the cluster do not have to be unique to Asia, provided the cluster of values as a whole, including the relative ranking and weighting of values within the cluster, is distinguishable from the value clusters of other regions. Nor do Asian values have to be shared by all people within Asia or to exist to the same degree or intensity or be ranked in the same order in all Asian countries, provided however that if there are no statistically significant shared values between a country and the region at large then the country should be identified as an outlier. There is obvious variation within countries/cultures, so some people will have values that are in a minority in their own society but perhaps dominant in others. Nor does it matter that the current distribution of values is due more to factors such as economic growth or demographic factors like higher rural–urban ratios rather than "cultural" explanations such as philosophical traditions or religious beliefs. Nor is

it the case that the current distribution will forever remain the same. For the moment, however, the distribution is what it is, whatever the various causes.

Whether focusing on regions, countries, subnational units or individuals is useful depends on one's project. Any comparative project must begin by constructing categories that highlight certain features and thus simplify to some extent quotidian reality. The problem has not been that the East and West, Asian values and Western values are constructs, but that they have been overly simple constructs that lacked a firm empirical foundation. On the other hand, the shortcoming of the many multiple country studies that find greater "collectivism" and acceptance of hierarchy in Asia is not that they fail to identify real differences along the individualism versus collectivism or hierarchy versus egalitarianism continuums. Rather, the problem is that individualism versus collectivism and hierarchy versus egalitarianism are often underdetermining in predicting the outcomes on many specific issues. Accordingly, the broad studies are less useful in demonstrating the effects of such differences on a range of specific issues and in sorting out the interplay of cultural factors and other factors in explaining differences in outcomes. For that, we need more detailed studies.[101]

This overview and the following chapters suggest that there are some general patterns on a range of specific issues, particularly in East Asia, and that values are one of the important factors in determining the outcomes. One can see a family of resemblances across a range of issues: in the higher priority assigned to social stability and economic development over civil and political rights; in the greater willingness to accept limits on free speech; in the emphasis on education and the use of education to promote national goals;[102] in the superior performance on good-governance measures relative to other countries at similar income levels; in the relatively successful efforts to maintain social order and fight crime; in the opposition to Western colonialism and emergence of a strong nationalist discourse or the attempts to interpret human rights principles in terms of local values and circumstances. To be sure, there clearly has been and will continue to be change within the region largely due to greater wealth, urbanization and modernization. Nevertheless, core values continue to persist and Asian countries and the Asian region as a whole continue to exhibit *relative* differences with other countries and regions on dimensions such as individualism versus collectivism and hierarchy versus egalitarianism even controlling for wealth and other factors. Accordingly, we are likely to see signs of convergence and divergence on human rights issues in the future, both interregionally and intraregionally.

Analysis of particular cases in various Asian countries demonstrates that there are differences both in terms of legal rules and outcomes in similar cases, often even when the laws are similar. While wealth explains much of the variation within Asia and elsewhere, the outcomes in specific cases are often driven by complex patterns of generally applicable and locally specific

variables. Broad similarities in doctrine and principles are juxtaposed with subtle differences in local circumstances that shape outcomes in particular cases and bring to the forefront certain issues rather than others within a particular right category. As a result, what may seem like a pragmatic or overlapping consensus quickly breaks down once one moves beyond discussions about the desirability of the broad wish list of rights contained in human rights documents to the difficult issues of the justifications for such rights and how they are interpreted and implemented in actual cases in practice.

Whether one focuses on regional, country or subnational studies, the results are worrisome for advocates of universal human rights. Supporters of universal human rights have sought to discredit the notion of Asian values by pointing to the tremendous diversity within the region. However, if such diversity precludes the possibility of common values *within the Asian region*, then it also precludes *a fortiori* the possibility of *universal values*.[103] Alternatively, one could claim that there are common values within the Asian region but they are not distinctive. However, what common values do exist are so abstract and so “thin” that they lead to widely divergent outcomes on specific issues, many of which are not consistent with current human standards as interpreted by the ICCPR Human Rights Committee and liberal rights activists. The regional studies and more specific country studies both suggest that the secular liberalism that provides the thicker ideological basis for the human rights movement today is not widely accepted within Asian countries.

Drawing broad policy implications from this study is complicated by the specifity of each country’s circumstances and the wide diversity within Asia. Economic growth, rule of law, social and political stability, and – at least at moderate to high-income levels – democracy, are generally desirable and associated with better rights performance, all else being equal. Nevertheless, none of them individually guarantees, nor do all of them collectively guarantee, realization of all types of rights across the board. Given the wide variation in legal institutions and other factors that influence rights performance, the international human rights community should be wary of one-size-fits-all solutions. In light of the diversity of values within Asia and in comparison to other countries and regions, Asian countries should enjoy a “margin of appreciation” like that provided to European countries by the European Court of Human Rights. Acknowledging the diversity on moral issues within Europe, the ECHR has tolerated differences in outcomes particularly in cases involving national security, sex, sexual orientation and religion. At minimum, every attempt should be made to involve groups with knowledge of the local circumstances in identifying areas for change and in devising feasible plans. Perhaps most fundamentally, more attention should be paid to economic development and poverty reduction because of the devastating effects of poverty and the importance of economic development to the realization of all categories of rights.

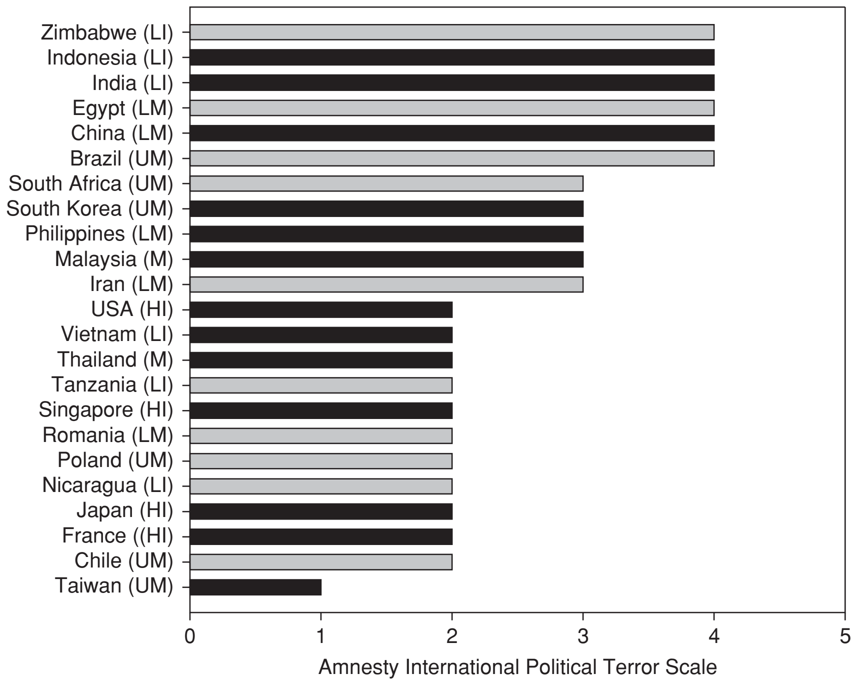

Figure 1.1 Physical integrity rights, 2002

Key
LI refers to lower-income countries
LM to lower-middle income
M to middle income
UM to upper-middle income
HI to high income

Source: Gibney, M., *Political Terror Scale Scores* (at: www.unca.edu/politicalscience/faculty-staff/gibney_docs/pts.xls).

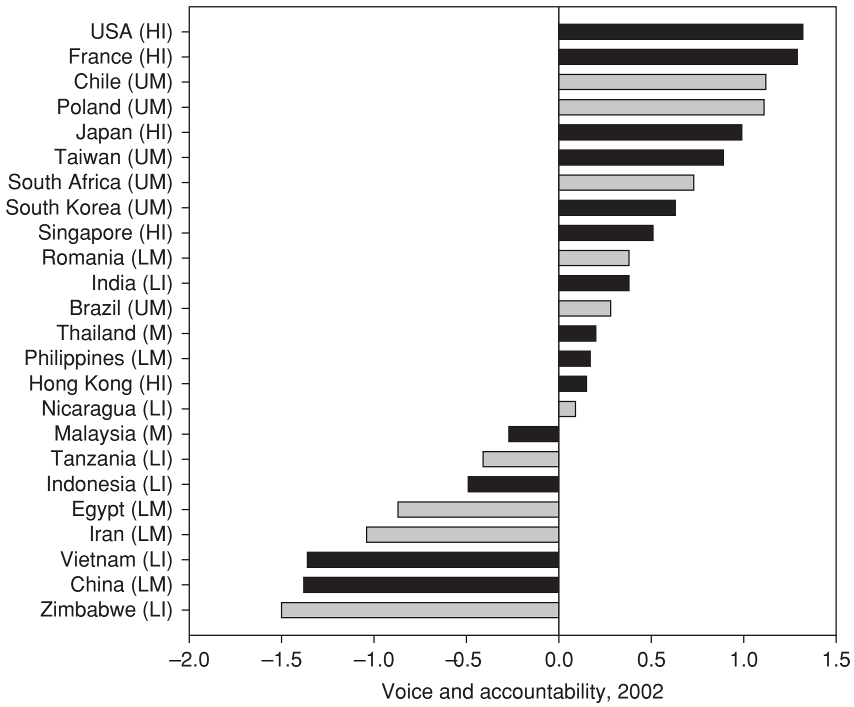

Figure 1.2 Civil and political rights: voice and accountability, 2002

Source: World Bank (2003) *Governance Matters III: Governance Indicators for 1996–2002* (at: www.worldbank.org/wbi/governance/govdata2002; accessed April 15, 2004).

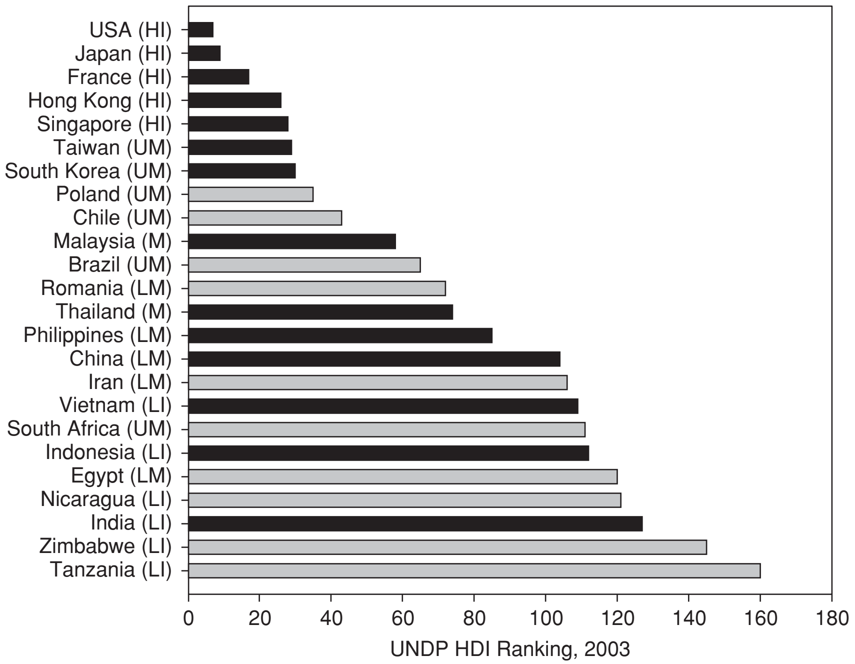

Figure 1.3 Social economic rights: UNDP HDI Ranking, 2003

Source: UNDP (2003) *Human Development Indicators* (at: http://hdr.undp.org/reports/global/2003/indicator/index.html; accessed April 15, 2004).

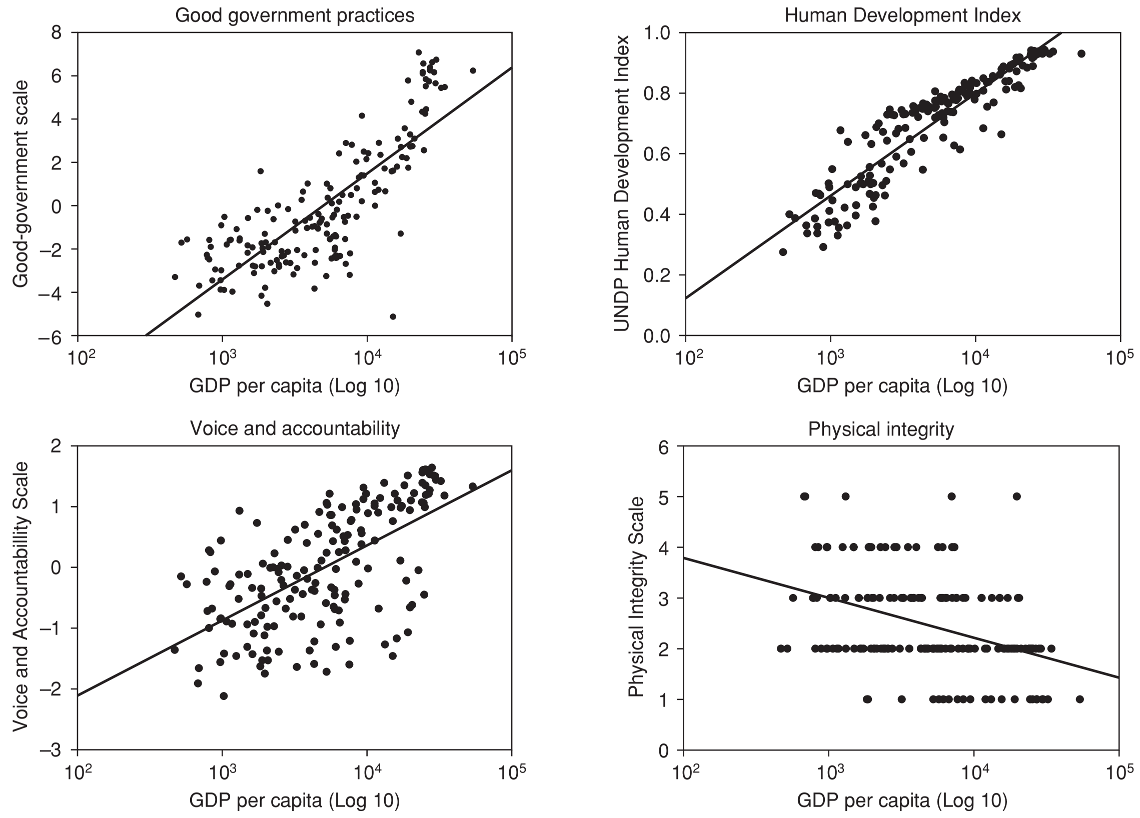

Figure 1.4 Wealth effect (GDP) on rights performance

Table 1.1 Poverty index

Country and Human Development Indicator Rank		*Human Poverty Index (HPI-1)*		*Population below income poverty line (%)*			*HPI-1 rank minus income poverty rank*
		Rank	*Value (%)*	*$1 a day, 1990–01*	*$2 a day, 1990–01*	*National poverty line, 1987–00*	
26	**Hong Kong (HI)**	–	–	–	–	–	–
30	**South Korea (UM)**	–	–	<2	<2	–	–
58	**Malaysia (M)**	–	–	<2	9.3	–	–
43	Chile (UM)	3	4.1	<2	8.7	17.0	1
28	**Singapore (HI)**	6	6.3	–	–	–	–
65	Brazil (UM)	18	11.4	9.9	23.7	–	–8
74	**Thailand (M)**	24	12.9	<2	32.5	13.1	16
104	**China (LM)**	26	14.2	16.1	47.3	4.6	–13
85	**Philippines (LM)**	28	14.8	14.6	46.4	36.8	–6
106	Iran (LM)	31	16.4	<2	7.3	–	21
112	**Indonesia (LI)**	33	17.9	7.2	55.4	27.1	7
109	**Vietnam (LI)**	39	19.9	17.7	63.7	–	–4
121	Nicaragua (LI)	44	24.3	82.3	94.5	47.9	–34
120	Egypt (LM)	47	30.5	3.1	43.9	16.7	20
111	South Africa (UM)	49	31.7	<2	14.5	–	34
127	**India (LI)**	53	33.1	34.7	79.9	28.6	–9
59	Tanzania (LI)	59	36.2	19.9	59.7	41.6	6
145	Zimbabwe (LI)	90	52.0	36.0	64.2	34.9	14

Source: Columns 3 to 5: World Bank, *World Development Indicators, 2003*, CD-ROM, Washington, DC. The final column is calculated on the basis of ranking data in columns 1 and PPP$1 data in column 3. A positive final column figure indicates that the country performs better in income poverty than in human poverty, a negative figure the opposite.

Note
HPI rank is determined on the basis of the HPI-1 values. The HPI value is a composite score based on standard of living measurements including life expectancy (probability of death before age 40), education level (adult illiteracy rate), access to water (population without sustainable access to water) and access to food (children underweight for age). The aggregation rule is specified in Technical Rule 1 of the UNDP 2003 report.

Table 1.2 Infant mortality, life expectancy, and primary school enrollment

Infant mortality rate (per 1,000 live births), 2001		*Life expectancy at birth (years), 2001*		*Net primary school enrollment rate (% eligible age children), 2001*	
Hong Kong (HI)	3	**Japan (HI)**	81.3	**Japan (HI)**	100
Japan (HI)	3	**Hong Kong (HI)**	79.7	**France (HI)**	100
Singapore (HI)	3	**France (HI)**	78.7	**Hong Kong (HI)**	99
France (HI)	4	**Singapore (HI)**	77.8	**Taiwan (UM)**	99
South Korea (UM)	5	**USA (HI)**	76.9	**South Korea (UM)**	99
Taiwan (UM)	6	Chile (UM)	75.8	Poland (UM)	98
USA (HI)	7	**Taiwan (UM)**	75.6	**Malaysia (M)**	98
Poland (UM)	8	**South Korea (UM)**	75.2	Brazil (UM)	97
Malaysia (M)	8	Poland (UM)	73.6	**USA (HI)**	95
Chile (UM)	10	**Malaysia (M)**	72.8	**Vietnam (LI)**	95
Romania (LM)	19	**China (LM)**	70.6	**Singapore (HI)**	94
Thailand (M)	24	Romania (LM)	70.5	Romania (LM)	93
Philippines (LM)	29	Iran (LM)	69.8	**Philippines (LM)**	93
Vietnam (LI)	30	**Philippines (LM)**	69.5	**China (LM)**	93
Brazil (UM)	31	Nicaragua (LI)	69.1	Egypt (LM)	93
China (LM)	31	**Thailand (M)**	68.9	**Indonesia (LI)**	92
Indonesia (LI)	33	**Vietnam (LI)**	68.6	Chile (UM)	89
Iran (LM)	35	Egypt (LM)	68.3	South Africa (UM)	89
Egypt (LM)	35	Brazil (UM)	67.8	**India (LI)**	86
Nicaragua (LI)	36	**Indonesia (LI)**	66.2	**Thailand (M)**	85
South Africa (UM)	56	**India (LI)**	63.3	Nicaragua (LI)	81
India (LI)	67	South Africa (UM)	50.9	Zimbabwe (LI)	80
Zimbabwe (LI)	76	Tanzania (LI)	44	Iran (LM)	74
Tanzania (LI)	104	Zimbabwe (LI)	35.4	Tanzania (LI)	47

Sources: Column 1: UNICEF, *The State of the World's Children 2003*, New York: Oxford University Press, 2003; Column 2: *UN World Population Prospects 1950–2050: The 2002 Revision*, Database, Department of Economic and Social Affairs, Population Division, New York, 2003; Column 3: UNESCO Institute for Statistics (United Nations Educational, Scientific and Cultural Organization), correspondence on adult and youth literacy rates, January, 2003, Montreal. Taiwan data are based on statistics compiled by the Taiwan Statistics Bureau (at: www.dgbas.gov.tw/dgbas03/bs2/92chy/catalog.htm).

Table 1.3 Public spending priorities (% GDP)

Country and Human Development Indicator Rank		*Public expenditure on education, 1998–2000*	*Public expenditure on health, 2000*	*Military expenditure, 2000*
145	Zimbabwe (LI)	10.4	3.1	3.2
58	**Malaysia (M)**	6.2	1.5	2.2
17	**France (HI)**	5.8	7.2	2.5
111	South Africa (UM)	5.5	3.7	1.6
29	**Taiwan (UM)**	5.5	0.4	1.5
74	**Thailand (M)**	5.4	2.1	1.4
35	Poland (UM)	5.0	4.2	1.9
121	Nicaragua (LI)	5.0	2.3	1.1
26	**Hong Kong (HI)**	4.9*	1.6	–
7	**USA (HI)**	4.8	5.8	3.1
65	Brazil (UM)	4.7	3.4	1.5
106	Iran (LM)	4.4	2.5	4.8
43	Chile (UM)	4.2	3.1	2.9
85	**Philippines (LM)**	4.2	1.6	1.0
127	**India (LI)**	4.1	0.9	2.5
30	**South Korea (UM)**	3.8	2.6	2.8
120	Egypt (LM)	3.7	1.8	2.6
28	**Singapore (HI)**	3.7	1.2	5.0
9	**Japan (HI)**	3.5	6.0	1.0
72	Romania (LM)	3.5	1.9	2.5
160	Tanzania (LI)	2.1	2.8	1.3
104	**China (LM)**	2.1	1.9	2.3
112	**Indonesia (LI)**	1.0	0.6	1.1
109	**Vietnam (LI)**	–	1.3	7.9

Sources: Column 1: UNESCO Institute for Statistics (United Nations Educational, Scientific, and Cultural Organization), correspondence on education expenditure, February, 2003, Montreal; Column 2: World Bank, *World Development Indicators, 2003*, CD-ROM, Washington, DC; Column 3: SIPRI (Stockholm International Peace Research Institute), correspondence on military expenditure data, March 2003, Stockholm.
Taiwan data are based on statistics compiled by the Taiwan Statistics Bureau (at: www.dgbas.gov.tw/dgbas03/bs2/92chy/catalog.htm).

Note
*Hong Kong education figure from report to ICESCR Committee.

Table 1.4 Income inequality

Country and Human Development Indicator Rank		*Share of income or consumption (%), 1990–01*		*Richest 20% to poorest 20%, 1990–01*	*Gini Index (%), 1990–01*
		Poorest 20%	*Richest 20%*		
9	**Japan (HI)**	10.6	35.7	3.4	24.9
72	Romania (LM)	8.2	38.4	4.7	30.3
112	**Indonesia (LI)**	8.4	43.3	5.2	30.3
30	**South Korea (UM)**	7.9	37.5	4.7	31.6
35	Poland (UM)	7.8	39.7	5.1	31.6
17	**France (HI)**	7.2	40.2	5.6	32.7
29	**Taiwan (UM)**	6.7	41.1	6.2	34.5
120	Egypt (LM)	8.6	43.6	5.1	34.4
109	**Vietnam (LI)**	8.0	44.5	5.6	36.1
127	**India (LI)**	8.1	46.1	5.7	37.8
160	Tanzania (LI)	6.8	45.5	6.7	38.2
104	**China (LM)**	5.9	46.6	8.0	40.3
7	**USA (HI)**	5.2	46.4	9.0	40.8
28	**Singapore (HI)**	5.0	49.0	9.7	42.5
106	Iran (LM)	5.1	49.9	9.7	43.0
74	**Thailand (M)**	6.1	50.0	8.3	43.2
26	**Hong Kong (HI)**	5.3	50.7	9.7	43.4
85	**Philippines (LM)**	5.4	52.3	9.7	46.1
58	**Malaysia (M)**	4.4	54.3	12.4	49.2
145	Zimbabwe (LI)	4.6	55.7	12.0	56.8
43	Chile (UM)	3.2	61.3	19.3	57.5
111	South Africa (UM)	2.0	66.5	33.6	59.3
121	Nicaragua (LI)	2.3	63.6	27.9	60.3
65	Brazil (UM)	2.2	64.1	29.7	60.7

Sources: World Bank, *World Development Indicators 2003*, CD-ROM, Washington, DC; for Taiwan data see *Report on the Survey of Family Income and Expenditure in Taiwan Area, Republic of China* (at: www129.tpg.gov.tw/mbas/doc4/eng/conte91.htm). Taiwan HDI rank is an estimate.

Table 1.5 Regional governance indicators (percentile rank, 2002)

Country and Human Development Indicator Rank	*Voice and accountability*	*Political stability*	*Government effectiveness*	*Regulatory quality*	*Rule of law*	*Control of corruption*
OECD	91.3	87.2	91.6	91.9	91.6	91.3
Eastern Europe	65.0	60.5	57.7	63.2	56.5	54.7
Latin America and Caribbean	61.2	51.2	53.3	58.4	53.2	54.9
East Asia	50.3	54.6	50.5	42.8	47.5	44.4
Middle East and North Africa	28.6	40.1	49.9	44.9	54.2	54.7
South Asia	29.6	32.4	48.1	35.3	42.1	41.5
Sub-Saharan Africa	31.0	34.8	28.9	30.6	30.5	32.4
Former Soviet Union	22.7	31.1	21.7	25.4	20.4	16.8

Source: World Bank, *Governance Matters III: Governance Indicators for 1996–2002* (2003) (at: www.worldbank.org/wbi/governance/govdata2002).

Table 1.6 Quality of governance (percentile rank, 2002)

Country and Human Development Indicator Rank	*Voice and accountability*	*Political stability*	*Government effectiveness*	*Regulatory quality*	*Rule of law*	*Control of corruption*
7 **USA (HI)**	90.9	56.2	91.2	91.2	91.8	92.3
9 **Japan (HI)**	79.3	90.3	84.5	78.9	88.7	85.1
17 **France (HI)**	88.4	70.8	90.7	85.6	87.6	89.2
26 **Hong Kong (HI)**	53.5	85.4	88.7	90.7	86.6	90.2
28 **Singapore (HI)**	65.7	91.9	100.0	99.5	93.3	99.5
29 **Taiwan (UM)**	74.2	70.3	82.5	80.9	80.9	77.3
30 **South Korea (UM)**	67.7	60.5	79.4	76.3	77.8	66.5
35 Poland (UM)	83.3	69.7	71.1	71.1	70.6	69.1
43 Chile (UM)	84.3	85.9	86.6	90.2	87.1	90.7
58 **Malaysia (M)**	42.4	61.6	80.9	68.6	69.6	68.0
65 Brazil (UM)	58.1	48.1	50.0	63.4	50.0	56.7
74 **Thailand (M)**	57.1	62.7	64.9	65.5	62.4	53.6
72 Romania (LM)	61.1	58.4	46.4	55.7	54.1	45.4
85 **Philippines (LM)**	54.0	29.7	55.7	57.7	38.1	37.6
104 **China (LM)**	10.1	51.4	63.4	40.2	51.5	42.3
106 Iran (LM)	18.2	25.9	39.2	8.2	33.5	44.3
109 **Vietnam (LI)**	10.6	61.1	48.5	25.3	44.8	33.0
111 South Africa (UM)	70.7	42.7	69.1	69.1	59.8	67.5
112 **Indonesia (LI)**	34.8	12.4	34.0	26.3	23.2	6.7
127 **India (LI)**	60.6	22.2	54.1	43.8	57.2	49.5
120 Egypt (LM)	22.2	34.1	46.9	38.1	57.7	47.9
121 Nicaragua (LI)	52.0	47.6	17.5	39.7	32.0	39.7
145 Zimbabwe (LI)	7.1	8.6	22.2	4.1	5.7	6.2
160 Tanzania (LI)	37.9	35.7	36.1	33.5	38.7	15.5

Source: World Bank, *Governance Matters III: Governance Indicators for 1996–2002* (2003) (at: www.worldbank.org/wbi/governance/govdata2002).

Table 1.7 Crime statistics (rate per 100,000), 1997–02

Country and Human Development Indicator Rank		*Total crime*	*Murder*	*Rape*	*Theft*	*Drug offense*	*Incarceration*
7	**USA (HI)**	4,160.51	5.61	31.77	3,804.58	539.92	701
9	**Japan (HI)**	2,300.77	1.1	1.85	1,871.13	21.68	54
17	**France (HI)**	6,932.26	4.07	17.63	4,224.57	182.19	93
26	**Hong Kong (HI)**	1,085.64	1.03	1.41	623.16	36.77	184
28	**Singapore (HI)**	703.84	0.8	2.81	415.5	85.08	388
29	**Taiwan (UM)**	2,179.03	5.13	10.16	1,473.03	111.13	250
30	**South Korea (UM)**	1,664.06	2.18	4.29	386.31	8.97	125
35	Poland (UM)	3,634.84	3.15	6.09	1,727.46	93.65	211
43	Chile (UM)	1,496.92	4.54	9.97	705.66	16.68	204
58	**Malaysia (M)**	729.71	2.1	5.78	581.43	78.95	161
65	Brazil (UM)	927.41	22.98	8.5	–	46.29	160
72	Romania (LM)	2,207.05	7.44	8.34	1,028.33	2.04	199
74	**Thailand (M)**	245.53	8.07	6.17	90	438.13	401
85	**Philippines (LM)**	–	7.85	4.21	10.21	14.53	94
104	**China (LM)**	133.82	2.16	–	87.75	3.92	184
106	Iran (LM)	–	–	–	–	–	226
109	**Vietnam (LI)**	83.56	1.08	–	31.41	11.26	71
111	South Africa (UM)	8,176.04	114.84	121.13	3,565.81	111.85	402
112	**Indonesia (LI)**	63.48	0.8	0.73	45.26	3.77	38
120	Egypt (LM)	–	–	–	–	–	121
121	Nicaragua (LI)	1,372.27	24.03	26.03	579.97	22.79	143
127	**India (LI)**	671.2	3.93	1.6	44.01	2.25	29
145	Zimbabwe (LI)	6,560.61	10.15	38.38	1,958.11	57.03	160
160	Tanzania (LI)	1,647.98	7.95	10.05	194.11	13.39	120

Sources: Columns 1–5: Interpol, *International Crime Statistics: Country Report* (at: www.interpol.int/Public/Statistics/ICS/); Column 6: International Center for Prison Studies, School of Law at King's College of the University of London, *World Prison Brief* (at: www.prisonstudies.org/). Some Taiwan, US, and Singapore data came from compilations by national statistics offices. Taiwan HDI rank is an estimate.

Table 1.8 Social order: divorce rates, suicide rates, young mothers

Country and Human Development Indicator Rank		*Divorce rate (per 1,000), 1996–00*	*Suicide rates (per 100,000), 1991–02*	*Births by mothers aged 15–19 (per 1,000 population), 1995–00*
7	**USA (HI)**	4.19	10.85	9.14
9	**Japan (HI)**	1.98	25.3	0.70
17	**France (HI)**	1.98	17.75	1.58
26	**Hong Kong (HI)**	1.95	13.25	1.08
28	**Singapore (HI)**	1.20	9.45	1.07
29	**Taiwan (UM)**	–	13.59	0.50
30	**South Korea (UM)**	2.52	13.55	0.63
35	Poland (UM)	1.09	15.4	4.12
43	Chile (UM)	0.42	5.8	10.19
58	**Malaysia (M)**	–	–	4.06
65	Brazil (UM)	0.60	4.2	19.05
72	Romania (LM)	1.40	12.35	7.93
74	**Thailand (M)**	–	4	12.41
85	**Philippines (LM)**	–	2.1	11.80
104	**China (LM)**	1.9	13.9	0.97
106	Iran (LM)	0.81	0.2	13.86
109	**Vietnam (LI)**	–	–	6.52
111	South Africa (UM)	0.83	–	21.34
112	**Indonesia (LI)**	–	–	15.10
120	Egypt (LM)	1.17	0.05	14.36
121	Nicaragua (LI)	–	3.45	45.06
127	**India (LI)**	–	10.65	12.52
145	Zimbabwe (LI)	–	7.9	31.34
160	Tanzania (LI)	–	–	39.37

Sources: Column 1: United Nations, *Demographic Yearbook 2000*, 590 (2002); Column 2: World Health Organization, Suicide Rates (Table) (at: www.who.lint/mental_health/prevention/suicide/suiciderates/en/); Column 3: United Nations Population Division, *World Population Prospects: The 2002 Revision*, Population Database (at: http://esa.un.org/unpp/); Taiwan HDI rank is an estimate. China's divorce rate is for 1999, and is from the State Commission on Population and Family Planning, (at: www.sfpc.gov.cn), based on the *2000 Yearbook of China Statistics*, published by the State Statistics Bureau.

Table 1.9 GDP with and without PPP adjustment, 2001

Country and Human Development Indicator Rank		*GDP (US$ billions)*	*GDP (PPP US$ billions)*	*GDP per capita (US$)*	*GDP per capita (PPP US$)*
7	**USA (HI)**	10,065.3	9,792.5	35,277	34,320
9	**Japan (HI)**	4,141.4	3,193.0	32,601	25,130
26	**Hong Kong (HI)**	161.9	167.1	24,074	24,850
17	**France (HI)**	1,309.8	1,420.0	22,129	23,990
28	**Singapore (HI)**	85.6	93.7	20,733	22,680
29	**Taiwan (UM)**	281.2	401.0	12,621	18,000
30	**South Korea (UM)**	422.2	714.2	8,917	15,090
111	South Africa (UM)	113.3	488.2	2,620	11,290
35	Poland (UM)	176.3	365.3	4,561	9,450
43	Chile (UM)	66.5	141.6	4,314	9,190
58	**Malaysia (M)**	88.0	208.3	3,699	8,750
65	Brazil (UM)	502.5	1,268.6	2,915	7,360
74	**Thailand (M)**	114.7	391.7	1,874	6,400
106	Iran (LM)	114.1	387.2	1,767	6,000
72	Romania (LM)	38.7	130.7	1,728	5,830
104	**China (LM)**	1,159.0	5,111.2	911.0	4,020
85	**Philippines (LM)**	71.4	301.1	912.0	3,840
120	Egypt (LM)	98.5	229.4	1,511.0	3,520
112	**Indonesia (LI)**	145.3	615.2	695.0	2,940
127	**India (LI)**	477.3	2,930.0	462.0	2,840
145	Zimbabwe (LI)	9.1	29.3	706.0	2,800
121	Nicaragua (LI)	4.0	11.7	754.7	2,200
109	**Vietnam (LI)**	32.7	164.5	411.0	2,070
160	Tanzania (LI)	9.3	18.0	271.0	520

Sources: Columns 1–2 and 4: World Bank, 2003, *World Development Indicators 2003*, CD-ROM, Washington, DC; aggregates calculated for the Human Development Report Office by the World Bank; Column 3: calculated on the basis of GDP and population data from World Bank, 2003, *World Development Indicators, 2003*, CD-ROM, Washington, DC; aggregates calculated for the Human Development Report Office by the World Bank.

Table 1.10 Correlation of wealth, human rights, and measures of development

Measure	*All*	*Region*							
		Africa	*Asia*	*Australia and Pacific*	*Caribbean*	*Former Soviet influence*	*Latin America*	*Middle East*	*Western Europe*
HDI 2001	0.92**	0.88**	0.93**	0.97**	0.86**	0.97**	0.88**	0.93**	0.94**
Rule of law	0.82**	0.58**	0.91**	0.95**	0.90**	0.81**	0.64**	0.89**	0.92**
Government effectiveness	0.77**	0.49**	0.90**	0.98**	0.92**	0.85**	0.69**	0.78**	0.91**
Control of corruption	0.76**	0.55**	0.88**	0.96**	0.81**	0.83**	0.67**	0.77**	0.86**
Voice and accountability	0.62**	0.29	0.50*	0.94**	0.75*	0.73**	0.34	0.18	0.85**
PTS 2002 (AI & State)	–0.40**	–0.22	–0.42	–0.74	–0.71*	–0.21	0.10	–0.25	–0.48*
N	174	41	19	6	10	20	20	15	23

Cell entries are Pearson's R coefficients. Dependent variable is natural log of GDP per capita
*p < .05, **p < .01

Note
Table 1.10 illustrates the relationship between per capita GDP and various measures of development, across all countries and within regions. Across all countries the relationship is highly significant ($p < .01$), but the strength of the correlation varies. The UNDP Human Development Index (HDI) is correlated strongly with per capita GDP ($r = .92$), but physical integrity (PTS) bears a relatively weak correlation ($r = –.40$). If we square these coefficients to compute r-square (as in regression), we can say that per capita GDP explains 85 percent of the variance in HDI across countries, but only 16 percent of the variance in physical integrity. The same calculation can be made for the other measures of development, which are ranked in declining order for all countries. Analysis of these variables within regions indicates variation in the relationship between wealth and development, but the same pattern is still largely evident. Where no relationship exists (e.g., voice and accountability in the Middle East) it is due to the lack of variance within the region.

Table 1.11 GDP per capita growth rate

Country and Human Development Indicator Rank		*Annual growth rate GDP per capita (%)*	
		1975–01	*1990–01*
104	**China (LM)**	8.2	8.8
109	**Vietnam (LI)**	4.9	6.0
29	**Taiwan (UM)**	8.9	5.6
30	**South Korea (UM)**	6.2	4.7
43	Chile (UM)	4.1	4.7
28	**Singapore (HI)**	5.1	4.4
35	Poland (UM)	–	4.4
127	**India (LI)**	3.2	4.0
58	**Malaysia (M)**	4.1	3.9
74	**Thailand (M)**	5.4	3.0
120	Egypt (LM)	2.8	2.5
112	**Indonesia (LI)**	4.3	2.3
26	**Hong Kong (HI)**	4.5	2.1
7	**USA (HI)**	2.0	2.1
106	Iran (LM)	−0.6	2.0
17	**France (HI)**	1.7	1.5
65	Brazil (UM)	0.8	1.4
9	**Japan (HI)**	2.6	1.0
85	**Philippines (LM)**	0.1	1.0
160	Tanzania (LI)	0.3	0.4
111	South Africa (UM)	−0.7	0.2
72	Romania (LM)	−1.3	−0.1
121	Nicaragua (LI)	−4.0	−0.1
145	Zimbabwe (LI)	0.2	−0.2

Sources: World Bank, 2003, correspondence on GDP per capita annual growth rates, March, Washington, DC; aggregates calculated for the Human Development Report Office by the World Bank.

Notes

1 For an overview of the debates, see Randall Peerenboom, "Beyond universalism and relativism: the evolving debates over 'values in Asia'," *Indiana International and Comparative Law Review*, vol. 14, 2003, pp. 1–85. See also Michael D. Barr, *Cultural Politics and Asian Values: The Tepid War*, London, New York: Routledge, 2002 (providing an excellent overview from a political, historical and religious perspective, while arguing that the debates about Asian values are far from over as Asian countries attempt to negotiate their own form of modernity); Michael Jacobsen and Ole Bruun, eds, *Human Rights and Asian Values*, Richmond: Surrey, Curzon, 2000.

2 Larry Diamond, *How People View Democracy: Findings from Public Opinion Surveys in Four Regions*, <http://www.stanford.edu/~ldiamond/papers/howPeopleViewDem.pdf> (noting that democracy does not always work, and that democratic consolidation depends on values for which there are regional differences and most importantly on good governance and economic growth); Randall Peerenboom, "Varieties of rule of law," in Randall Peerenboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.*, New York: Routledge, 2004.

3 Steven Levitsky and Lucan Way, *Autocracy by Democratic Rules: The Dynamics of Competitive Authoritarianism in the Post-Cold War Era* (2002), <http://apsaproceedings.cup.org/Site/papers/045/045008WayLucan.pdf>.

4 Layna Mosley and Saika Uno, *Racing to the Bottom or Climbing to the Top? Foreign Direct Investment and Human Rights* (2002), <http://apsaproceedings.cup.org/Site/papers/046/046005MosleyLayn.pdf> (finding that the Asian and Pacific regions were not as protective of labor rights as Western Europe, Central and Eastern Europe, although they were more protective than the Middle East, North Africa and Latin America and on par with Sub-Saharan Africa).

5 Clair Apodaca, "Measuring women's economic and social rights achievement," *Human Rights Quarterly*, vol. 20, no. 1, February 1998, pp. 139–72 (finding that regional coefficients play a larger role than GNP in the achievement of women's economic and social rights, although the regional identification of Asian and African explains less variation than the Middle East regional designation).

6 Steven C. Poe *et al.*, "Personal integrity rights and democratization: regional perspectives," paper presented at the Comparative Human Rights and Repression Conference at the University of Colorado, Boulder, June 20–21, 1997; David Reilly, "Diffusing human rights" (2003), paper presented at the Annual Meeting of the American Political Science Association (APSA), Philadelphia, August 28–31, 2003, <http://archive.allacademic.com/publication/browse.php?PHPSESSID=ed4efe7422efce9eb3baf60fd886f9aa>. All references to APSA papers for 2003 are available at this cite, hereinafter APSA 2003.

7 Amir Licht, Chanan Goldschmidt, and Shalom Schwartz, "Culture rules: the foundations of rule of law and other norms of governance" (June 9, 2002) (unpublished manuscript, on file with author).

8 See, generally, Peter B. Smith *et al.*, "Cultural values, sources of guidance, and their relevance to managerial behavior – A 47-nation study," *Journal of Cross-Cultural Psychology*, vol. 33, no. 2, March 2002, pp. 188–208 (summarizing various multiple country studies that find similarities on various dimensions of values within the Asian region, particularly along the dimension of individualism versus collectivism, autonomy versus social embeddedness, and hierarchy versus egalitarianism).

9 Frank B. Cross, "International determinants of human rights and welfare: law, wealth or culture," *Indian International & Comparative Law Review*, vol. 7, 1997,

pp. 265–78 (finding that cultural values are important determinants of rights and that Western nations have a higher level of freedom from government intrusion even after controlling for GDP and other factors).

10 For example, the World Bank's good-governance study includes in the East Asian region Brunei, Cambodia, China, East Timor, Fiji, Hong Kong, Indonesia, Kiribati, North and South Korea, Laos, Macao, Malaysia, Marshall Islands, Mongolia, Myanmar, Nauru, Papua New Guinea, the Philippines, Samoa, Singapore, Salomon Islands, Taiwan, Thailand, Tonga, Tuvalu, Vanuatu and Vietnam. It includes in the South Asian region Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka. Fortunately, the interactive database does provide information on individual countries and allows one to select up to twenty countries for comparison. See Daniel Kaufmann *et al.*, *Governance Matters*, 2003 World Bank Working Paper.

11 We do not address the rights of the criminally accused, which will be covered in a separate volume in the series. Nor do we focus directly on labor/employment rights, rights of women or environmental rights. For a discussion of labor issues in Asia, see Sean Cooney *et al.*, eds, *Labour Law and Market Regulation in Asia*, London: Routledge, 2002. For women's rights, *see* the UNDP Gender-related Development Index and Gender Empowerment Measures. The UNDP database also includes information on ratification of environmental treaties, use of energy, and other environment-related data.

12 See, generally, Todd Landman, "Comparative politics and human rights," *Human Rights Quarterly*, vol. 24, no. 4, November 2002, pp. 896–7.

13 See generally, Steven Poe *et al.*, "Repression of the human right to personal integrity revisited: a global cross-national study covering the years 1976–1993," *International Studies Quarterly*, vol. 43, 1999, p. 310; Linda Camp Keith, "Constitutional provisions for individual human rights (1997–1996): are they more than mere 'window dressing'," *Political Research Quarterly*, vol. 55, no. 1, 2002, pp. 111–43 (war is more important than GDP for personal integrity rights).

14 Linda Camp Keith, "The United Nations International Covenant on civil and political rights: does it make a difference in human rights behavior?," *Journal of Peace Research*, vol. 36, no. 1, January, 1999, pp. 95–118; Oona A. Hathaway, "Do human rights treaties make a difference?", *Yale Law Journal*, vol. 111, June 2002, pp. 1,935, 1,941, 1,978. Nevertheless, a country's ratification of a human rights treaty generally strengthens the hand of domestic and international rights advocates and may therefore contribute to norm change over time. Thus in the long term the human rights situation may improve.

15 See generally, Kenneth Bollen, "Political rights and political liberties in nations: an evaluation of human rights measures, 1950–1984," *Human Rights Quarterly*, vol. 8, no. 4, November 1986, pp. 567–91.

16 The philosopher Alastair MacIntrye has argued that differences in cultural narratives and the contingent circumstances of countries preclude a science of universal human rights. See Alasdair MacIntrye, "Is a science of comparative politics possible?," in *Against the Self-Images of the Age*, New York: Schocken Books, 1971, pp. 260–79. Other critics argue that human rights attach to individuals, and aggregating violations and ranking countries on a scale of better to worse may cause us to lose sight of individuals and the fact that any violation is morally significant. See John McCamant, "A critique of present measures of human rights development and an alternative," in Ved. P. Nanda *et al.*, eds, *Global Human Rights: Public Policies, Comparative Measures, and NGO Strategies*, Boulder: Westview Press, 1981. Another concern has been that quantitative studies, reflecting the normative biases of the Western-dominated human rights regime, have focused excessively on civil and political rights to the detriment of other rights. This concern is echoed by those who argue that "rights talk" is

itself impoverished, and that rights must be complemented if not supplanted by discourses of duties, needs, wants, and/or capabilities. For a useful discussion of rights and needs, see Jeremy Waldron, "Rights and needs: the myth of disjunction," in Austin Sarat and Thomas R. Kearns, eds, *Legal Rights: Historical and Philosophical Perspectives*, Ann Arbor: University of Michigan Press, 1996, pp. 87–109. For capabilities, see Amartya Sen, "Capability and well-being," in Martha Nussbaum and Amartya Sen, eds, *The Quality of Life*, Oxford: Clarendon Press, 1993; and Martha C. Nussbaum, "Capabilities and human rights," *Fordham Law Review*, vol. 66, November 1997, pp. 273–300.

17 In the end, quantitative studies are only as good as the data. Unfortunately, data on human rights compliance are far from ideal. Many countries do not keep accurate records of human rights violations. The coding of data often involves considerable subjective judgement, and in some cases has been politically biased, especially in US State Department reports that are less critical of allies than non-allies. Given the time-consuming nature of collecting and coding data, researchers have relied heavily on a relatively small number of data sources. For an overview of various data sets and approaches, see Michael Haas, "Empirical dimensions of human rights," *Policy Studies and Developing Nations*, vol. 4, 1996, pp. 43–72.

18 One of the most popular measures of civil and political rights, the Freedom House measure, has been described as "no more than an estimate by a person who has collected a lot of seemingly relevant information on all countries." McCamant, *supra* note 16.

19 See Kenneth Bollen, "Issues in the comparative measurement of political democracy," *American Sociological Review*, vol. 45, no. 2, 1980, pp. 370–90; Gerardo Munck and Jay Verkuilen, "Conceptualizing and measuring democracy: evaluating alternative indices," *Comparative Political Studies*, vol. 35, no. 1, 2002, pp. 5–34. See also Christian Davenport and David Armstrong, *Democracy and the Violation of Human Rights: A Statistical Analysis of the Third Wave* (2002), <http://apsaproceedings.cup.org/Site/abstracts/011/011002ArmstrongD.htms>.

20 Hofstede examined the effects of cultural values identified by his study on human rights in fifty-two countries as measured by Humana's 1992 world human rights ratings. The ratings were derived from responses to forty questions based on the Universal Declaration of Human Rights. He found that GDP explained most of the variance (r = .71), and that cultural values were not significant. However, when he considered only wealthy countries, he found that individualism (as opposed to collectivism) was strongly correlated with higher human rights ratings (r = .73), more spending on health and education and less on the military. The other cultural values identified were not significant. Interestingly, while individualism has been shown to be strongly correlated with wealth in many studies (r = .84 for Hofstede), rich East Asian countries score lower on individualism and higher on collectivism relative to other countries at their income category. Geert Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions and Organizations Across Nations*, Thousand Oaks: Sage Publications, 2001, pp. 248, 251. Relying on more specific rights rather than an aggregate score, Cross, *supra* note 9, found cultural values were a significant determining factor even controlling for wealth.

21 See Mosley and Uno, *supra* note 4.

22 See Mosley and Uno, *supra* note 4.

23 Bruce Bueno de Mesquita *et al.*, *Thinking Inside the Box: A Closer Look at Democracy and Human Rights* (2003), at APSA 2003, *supra* note 6.

24 See Adam Przeworski and Fernando Limongi, "Political regimes and economic growth," *Journal of Economic Perspectives*, vol. 7, no. 3, 1993, pp. 51–69 (noting that of twenty-one studies, eight found in favor of democracy, eight in favor

of authoritarianism and the rest were inconclusive). Although inconclusive on the general issue of the relationship between regime type and growth, Przeworski and Limongi do proceed to draw conclusions with respect to more particular issues.

25 See Mosley and Uno, *supra* note 4.

26 Linda Camp Keith and Steven Poe, "Personal integrity abuse during domestic crises," paper presented at Annual Meeting of the APSA, Boston, August 29–September 1, 2002, <http://apsaproceedings.cup.org/Site/papers/046/046004PoeSteven0.pdf>.

27 The twelve Asian countries include low-, middle- and high-income states; a wide range of political-regime types; countries whose rights records vary widely; and countries from East and Southeast Asia. Nevertheless, the group is biased toward East Asia, does not include former Soviet republics, and does not include the countries with the worst legal systems or human rights records such as Laos, Cambodia, or Myanmar.

28 For a discussion of the epistemological and justification problems that undermine moral realism and universalist accounts of human rights, and a defense of a more pragmatic approach, see Peerenboom, *supra* note 1.

29 See also Colm Campbell and Avril McDonald, "Practice to theory: states of emergency and human rights protection in Asia," in *Human Rights and Asian Values*, *supra* note 1, pp. 249–79.

30 Amnesty International, *United States of America: Rights for All*, London: Amnesty International Publications, 1998, pp. 17, 19, 26, 43 ("Police officers have beaten and shot unresisting suspects; they have misused batons, chemical sprays and electro-shock weapons; they have injured or killed people by placing them in dangerous restraint holds . . . Common forms of ill-treatment are repeated kicks, punches or blows with batons or other weapons, sometimes after a suspect has already been restrained or rendered helpless. There are also complaints involving various types of restraint hold, pepper (OC) spray, electro-shock weapons and firearms . . . Victims include not only criminal suspects but also bystanders and people who questioned police actions or were involved in minor disputes or confrontations.").

31 Thomas Blanton, "National security and open government in the United States: beyond the balancing test," in Campbell Public Affairs Institute, ed., *National Security and Open Government: Striking the Right Balance*, Syracuse: Campbell Public Affairs Institute, 2003, p. 59.

32 Jordan J. Paust, "Antiterrorism military commissions: the ad hoc DOD Rules of Procedure," *Michigan Journal of International Law*, vol. 23, 2002, pp. 677–95.

33 See *infra* note 64.

34 Keith and Poe, *supra* note 26 (past studies found that civil war and then violent rebellion lead to more violations of personal integrity rights).

35 Level 3 indicates extensive political imprisonment, or a recent history of such imprisonment. Execution or other political murders and brutality may be common. Unlimited detention, with or without a trial, for political views is accepted. At level 4 the practices of level 3 are expanded to larger numbers. Murders, disappearances, and torture are a common part of life. In spite of its generality, on this level terror affects those who interest themselves in politics or ideas. At level 5, the terrors of level 4 are expanded to the whole population. The leaders place no limits on the means or thoroughness with which they pursue personal or ideological goals.

36 The following data are obtained from Kaufmann *et al.*, *supra* note 10, available in various formats at <http://info.worldbank.org/governance/kkz2002> (hereafter WB Good Governance).

37 United Nations Development Program, *Human Development Report 2000: Human Rights and Human Development*, <http://hdr.undp.org/reports/global/

2000/en/pdf/hdr_2000_back1.pdf> (also noting that more than one in five adults in the US is functionally illiterate).

38 John Gledhill, "Liberalism, socio-economic rights and the politics of identity: from moral economy to indigenous rights," in Richard Wilson, ed., *Human Rights, Culture and Context*, London and Chicago: Pluto Press, 1997, pp. 72–3.

39 United Nations Development Program, *Human Development Report 2003, Millennium Development Goals: A Compact Among Nations to End Poverty*, <http://www.undp.org/hdr2003/pdf/hdr03_overview.pdf>.

40 Because the underlying household surveys differ in method and in the type of data collected, the distribution data are not strictly comparable across countries. The Gini Index measures inequality over the entire distribution of income or consumption. A value of 0 represents perfect equality, and a value of 100 perfect inequality.

41 Zoltan Grossman, "From wounded knee to Haiti: a century of U.S. military interventions," <http://www.uwec.edu/grossmzc/interventions.html>.

42 Three variables (rule of law, government effectiveness, and control of corruption) are so highly correlated (Pearson r > .91) that they appear to measure the same thing. Reliability analysis confirms this (alpha = .97), and so the variables have been standardized and combined into a single scale.

43 Keith, *supra* note 13 (citing eight studies and concluding that "empirical evidence has consistently shown that higher levels of economic development reduce political repression," but finding that the factors affecting personal integrity were, in order of importance: a large population, civil war, a change in democracy from lowest to highest level, international war, provisions for fair trials, GDP, and provisions for public trials). See also Christian Davenport, " 'Constitutional promises' and repressive reality: a cross-national time-series investigation of why political and civil liberties are suppressed," *Journal of Politics*, vol. 58, no. 3, 1996, pp. 627–54 (impact of economic development minimal in his study and three others); Conway Henderson, "Conditions affecting use of political repression," *Journal of Conflict Research*, vol. 35, 1991, p. 129 (democracy, inequality and economic growth were statistically significant predictors of political repression, though level of economic development was not). Economic growth might be an important indicator for personal integrity rights because people are less likely to take to the streets when their material standards are improving. In contrast, economic downturns, particularly at low levels of development, frequently result in regime change. Adam Prezowski and Fernando Limongi, "Modernization: theories and facts," *World Politics*, vol. 49, no. 2, 1997, pp. 155–83.

44 See also, William Henry Meyer, "Human rights and MNCs: theory versus quantitative analysis," *Human Rights Quarterly*, vol. 18, no. 2, May 1996, pp. 368–97 (GDP correlated with better protection of civil, political and economic rights).

45 Notwithstanding the clear correlation between wealth and good governance, at least one study has found that cultural values are more predictive than GDP: Licht *et al.*, *supra* note 7. The study found countries that emphasized autonomy and egalitarianism had higher levels of rule of law, accountability and less corruption, whereas countries that emphasized embeddedness and hierarchy had a lower level of rule of law, accountability, and worse corruption. In short, English-speaking countries and Western Europe scored significantly higher than other regions. The authors suggest that cultural orientation in East Asia may make it more difficult to implement rule of law, restrict corruption, and increase accountability, or that "good governance" in Asia may differ in some respects from "good governance" in liberal democratic Western countries. Good governance in Asian countries no doubt differs in significant respects from good governance in rich, liberal democratic Western countries once one examines in

more detail the broad variables of rule of law, accountability, and corruption. Nevertheless, Asian states have outperformed other regions in terms of rule of law on the same World Bank good-governance scales used by the Licht *et al.*, suggesting that culture may not be as important, at least in Asia, as the authors suggest. More generally, the study suffers from a relatively small number of countries (N = 45 to 53), the dubious reliance on urban schoolteachers and IBM employees as the source of cultural values for the nation, and dated data, with some of the data from 1968 to 1972 and the rest from 1993 to 1998. More generally, Hofstede, relying on the same IBM data, found that wealth was the main factor affecting rights compliance, although individualism mattered in rich countries. See *supra* note 20.

46 See Hofstede, *supra* note 20 (wealth is the biggest factor with respect to individualism versus collectivism, the power distance index which measures the extent to which less powerful members of society accept that power is distributed unequally, and uncertainty avoidance which measures the extent to which people are comfortable in unstructured situations); Hofstede and M. H. Bond, "The confucius connection: from cultural roots to economic growth," *Organizational Dynamics*, vol. 16, 1988, pp. 4–21 (Confucian work dynamism related to economic growth); Smith and Schwartz, *supra* note 8, pp. 77, 107 (GDP strongly correlated with autonomy versus conservatism, and egalitarianism versus hierarchy). Ronald Inglehart, "Modernization and postmodernization: cultural, economic and political change," *Societies*, vol. 43, 1997 (GNP/capita strongly correlated with both wellbeing versus survival, and secular-rational versus traditional authority).

47 Henry Rowen, "The political and social foundations of the rise of East Asia," in Henry S. Rowen, ed., *Behind East Asian Growth*, New York: Routledge, 1998.

48 See Przeworski and Limongi, *supra* note 24.

49 Rowen, *supra* note 47, p. 7.

50 See Randall Peerenboom, *China's Long March toward Rule of Law*, Cambridge, UK and New York: Cambridge University Press, 2002, ch. 10.

51 Robert Barro, "Democracy: a recipe for growth?," in M. G. Quibria and J. Malcolm Dowling, eds, *Current Issues in Economic Development: An Asian Perspective*, Hong Kong and New York: Oxford University Press, 1996, pp. 67–106.

52 See Peerenboom, *supra* note 50, pp. 521–2.

53 Prezowski and Limongi, *supra* note 43.

54 Mosley and Uno, *supra* note 4.

55 UNDP *2003 Human Development Indicators*, <http://hdr.undp.org/reports/global/2003/indicator/indic_151_1_1.html>.

56 Peerenboom, *supra* note 50, pp. 529–30.

57 Anita Chan, *China's Workers Under Assault: Exploitation and Abuse in a Globalizing Economy*, Armonk, NY: M. E. Sharpe, 2001.

58 Kenneth Christie and Denny Roy, *The Politics of Human Rights in East Asia*, London and Sterling, VA: Pluto Press, 2001, p. 166.

59 Patrick Regan, "US economic aid and political repression: an empirical evaluation of US foreign policy," *Political Research Quarterly*, vol. 48, 1995, pp. 613–28.

60 Bethany Barratt, "Aiding whom? Competing explanations of middle-power foreign aid decisions," at APSA 2003, *supra* note 6 (UK and Canada aid not dependent on human rights of recipients); see also Steven Poe, "Human rights and US foreign aid: a review of quantitative studies and suggestions for future research," *Human Rights Quarterly*, vol. 12, 1990, pp. 499–512.

61 See generally Davenport and Armstrong, *supra* note 19; Todd Landman, "Norms and rights: a non-recursive model of human rights protection," at APSA 2003, *supra* note 6.

62 Davenport and Armstrong, *supra* note 19.
63 Levitsky and Way, *supra* note 3.
64 James A. McCann and Mark Gibney, "An overview of political terror in the developing world, 1980–1991," *Policy Studies and Developing Countries*, vol. 4, 1996, pp. 23–4 (noting that political terror increased in the developing world in the 1980s and finding that democracy does not by itself ensure low levels of terror); see also Reilly, *supra* note 6 (over the period from 1976–1996, the number of countries with the best score actually decreased, countries with the worst score increased, while the mean remained about the same); Landman, *supra* note 63 (noting increase in violations of personal integrity and torture between 1985 and 1993).
65 Helen Fein, "More murder in the middle: life-integrity violations and democracy in the world, 1987," *Human Rights Quarterly*, vol. 17, no. 1, 1995, pp. 170–91.
66 de Mesquita *et al.*, *supra* note 23. See also Davenport and Armstrong, *supra* note 19; Keith, "Constitutional provisions," *supra* note 13 at 129 (democracy has only minor impact on personal integrity rights although transition from lowest level to highest level produces a more substantial impact). Another study found that democracy leads to improvement in human rights performance within the first year of holding elections, but repression increases in following years. On the other hand, while repression increases in the year of a regime change from democracy to authoritarianism, repression then decreases in the first year after the authoritarian regime takes over power and in subsequent years. Moreover, the study distinguished between democracies, authoritarian regimes and mixed regimes, i.e. those regimes that score in the middle of the Polity III index, as most new democracies are likely to do. Transitions from an authoritarian regime to a mixed regime lead to more repression in the year of change, a decrease in the first year, and then an increase in the second year. In sum, the results are consistent with the argument that human rights improvements are consistently obtained only in full democracies. See S. C. Zanger, "A global analysis of the effect of regime changes on life integrity violations, 1977–1993," *Journal of Peace Research*, vol. 37, no. 2, March 2000, pp. 213–33.
67 As de Mesquita notes, *supra* note 23, one of the disadvantages of using composite measures of democracy is that it is not clear how democracy promotes human rights. The factors measured by studies of democracy are only loosely tied to theories about why democracy protects human rights.
68 de Mesquita, *supra* note 23.
69 Barro, *supra* note 51, and Prezowski and Limongi, *supra* note 43.
70 M. Rodwan Abourharb and David Congranelli, "Money talks? The impact of World Bank structural adjustment lending on human rights, 1981–2000," at APSA 2003, *supra* note 6.
71 Amnesty International, *Amnesty International Report 1993*, New York: Amnesty International USA, 1993.
72 One can, of course, challenge whether Cambodia or Singapore or Malaysia are democracies in the relevant sense.
73 Yun-han Chu, Larry Diamond and Doh Chull Shin, "Halting progress in Korea and Taiwan," *Journal of Democracy*, vol. 12, January 2001, p. 124.
74 Comisión de Promoción del Perú, "Latinobarometer: public opinion in Latin America, 2002," Lima, Peru: Prom Peru, 2002 (more than twice as many people would choose development over democracy, while 50 percent agreed or strongly agreed with the statement that they would not mind having a non-democratic government if it could solve economic problems).
75 See Susan Sim, "Human rights: bridging the gulf," *Straits Times* (Singapore), 21 October 1995, p. 32. A survey of academics, think-tank experts, officials, businesspeople, journalists, and religious and cultural leaders found significant

differences between Asians and Americans. The former chose an orderly society, harmony, and accountability of public values, in descending order, as the three most important societal values. In contrast, the Americans chose freedom of expression, personal freedom, and the rights of the individual. See also Bridget Welsh, "Attitudes toward democracy in Malaysia," *Asian Survey*, vol. 36, no. 9, September 1996, pp. 882–903 (reporting that a survey of Malaysians in 1994 found that the majority were willing to limit democracy, particularly when social order was threatened, and that fears of instability and Asian values led to limited support for democracy; also noting that respondents were willing to sacrifice freedom of speech in the face of threats to social order, and that only 40 percent thought the press should be free to discuss sensitive issues, while only 52 percent thought it should be free to criticize the government, with many of those favoring constructive criticism). For several studies that show the high value assigned to order in China and limited demand for democracy, see Peerenboom, *supra* note 50.

76 See Chong-min Park and Doh Chull Shin, "Do Asian values deter popular support for democracy? The case of South Korea," paper prepared for Association for Asian Studies Annual Meeting, March 4–7, 2004, San Diego.

77 Robert Albritton and Thawilwadee Bureekul, "Impacts of Asian values on support for democracy in Thailand," paper presented at Association for Asian Studies Annual Meeting, March 4–7, 2004, San Diego.

78 See Christie and Roy, *supra* note 58, at 161.

79 Between 1996 and 2000, only 27 percent to 37 percent of Latin Americans expressed satisfaction with democracy. See Chu *et al.*, *supra* note 73, at 129. Support for democracy in 2002 was lower in all but four countries than in 1996. According to the Latinobarometer, *supra* note 74, Latin Americans have lost confidence in democracy because of the lack of economic growth, the deterioration of public services, the rise of crime, and the persistence of widespread corruption. As a result, there is little trust in democratic institutions, including political parties (19 percent), parliaments (22 percent) and the judiciary (26 percent). Nevertheless, Latin Americans are reluctant to return to the recent past of authoritarian military regimes. Only in Paraguay do the majority believe authoritarian government to be preferable to democracy. In contrast, several authoritarian regimes in Asia have been successful in providing growth, improving public services, ensuring stability and curtailing corruption. Thus, whereas Latin Americans see no alternative to democracy, many Asians see some form of soft authoritarianism or non-liberal democracy as viable options.

80 For polling data, see Sim, *supra* note 75; Welsh *supra* note 75; Peerenboom, *supra* note 50; Park and Shin, *supra* note 76; Albritton and Bureekul, *supra* note 77.

81 As John Gillespie notes in this volume, the current restrictions reflect in part the realization by the ruling regime that free speech and media destabilized the former colonial regime.

82 Agence France Press, "Asia's media have few reasons to celebrate World Press Freedom Day," May 2, 2004, <http://www.worldrevolution.org/article/1293> (also noting that the Philippines was demoted from free to partly free for failure to protect journalists or to prosecute those who murder journalists).

83 See Anne S. Y. Cheung, "In search of a theory of cult and freedom of religion in China: the case of Falun Gong," *Pacific Rim Law and Policy Journal*, vol. 13, January 2004, pp. 13–17; Carol Evans, "Chinese law and the international protection of religious freedom," *Journal of Church and State*, vol. 44, 2002, pp. 749–74.

84 Peerenboom, *supra* note 50, pp. 95–6. Evans, *supra* note 83.

85 Theo van Boven, "Advances and obstacles in building understanding and respect between people of diverse religions and beliefs," *Human Rights Quarterly*, vol. 13,

1991, p. 442 (estimating that in the 1980s, twenty-five regional or civil wars were based to a significant degree on disputes stemming in part from religious beliefs).

86 Frank B. Cross, "The relevance of law in human rights protection," *International Review of Law and Economics*, vol. 19, no. 1, March 1999, p. 93 (finding that judicial independence is significant with respect to the protection of political rights and search and seizure even after controlling for wealth and other factors, but finding that federalism and separation of powers were not significant and the presence of constitutional provisions regarding search and seizure seems to have no real-world significance). Clair Apodaca, "The rule of law and human rights" (on file with author) (finding that rule of law and judicial independence were instrumental in securing both economic and physical integrity rights, although rule of law frequently gives way even in rich countries with well-developed legal systems during times of international or domestic conflict). See also Keith and Poe, *supra* note 26.

87 See Peerenboom, *supra* note 2.

88 Vitit Muntabhorn, "Rule of law and aspects of human rights in Thailand: from conceptualization to implementation?," in Peerenboom, ed., *supra* note 2.

89 Upendra Baxi, "Rule of law in India," in Peerenboom, *supra* note 2 (noting that Indian activists "know rather well the 'one-step-forward, two-steps-backward' nature of judicial activism. Even as they engage activist judiciary in the tasks of Indian democratic renewal, their politics of hope remains moderated by the acknowledgement of the brute institutional fact that Courts and Justices remain, at the end of the day, State-bound and permeated."); Jamie Cassels, "Judicial activism and public interest litigation in India: attempting the impossible?," *American Journal of Comparative Law*, vol. 37, 1989, pp. 495, 515 (warning that India's activist judges have been criticized for violating rule of law, and that not all judicial decisions have favored the oppressed and less fortunate).

90 Policies as well as underlying philosophies in the area of social or welfare rights vary considerably from country to country in terms of the required or appropriate role for government. China and Vietnam have little problem reconciling broad welfare policies with state socialism. In contrast, Singapore emphasizes the need to avoid welfare dependency while providing individuals the opportunities and resources to become self-sustaining, as captured in the slogan: give me a fish, and I eat for a day; teach me to fish and I eat for a lifetime. Nevertheless, the government provides subsidized housing, schooling and medical care. Hong Kong, despite its commitment to *laissez faire* economic principles, also provides subsidized housing, schooling, and medical care.

91 See Peerenboom, "Varieties of rule of law," in Peerenboom, *supra* note 2, pp. 29–31.

92 See, e.g., Raul C. Pangalangan, "The Philippine 'people power' constitution, rule of law, and the limits of liberal constitutionalism," in Peerenboom, *supra* note 2.

93 Amanda Whiting, "Situating Suhakam: human rights debates and Malaysia's National Human Rights Commission," *Stanford Journal of International Law*, vol. 39, 2003, pp. 59–98.

94 See Juwana's chapter in this volume (Chapter 12).

95 In Thailand as well, the government has taken steps to rein in the Human Rights Commission and human rights NGOs. See Muntabhorn's chapter in this volume (Chapter 10).

96 Scott Walker and Steven Poe, "Does cultural diversity affect countries' respect for human rights?," *Human Rights Quarterly*, vol. 24, no. 1, 2002, pp. 237–63 (finding that realization of rights is more difficult in ethnically diverse societies, that low to medium diversity appears to be necessary although not sufficient for the highest level of civil rights, and that more diversity leads to worse performance

with respect to political rights, subsistence rights, civil rights, and the social and economic equality of women, though the relationships are statistically significant only for civil rights and social and economic equality for women).

97 Poe *et al.*, *supra* note 6. Compare Reilly, *supra* note 6 (finding that British colonialization was not statistically significant, although Spanish-Portuguese colonial legacy was statistically significant, with French colonial legacy associated with higher repression, but not reaching statistically significant levels).

98 See Randall Peerenboom, "Assessing human rights in China: why the double standard?", *Cornell International Law Journal*, vol. 38, 2005, pp. 71–172.

99 See Chaihark Hahm's chapter in this volume (Chapter 8).

100 See Peerenboom, *supra* note 1.

101 An excellent example of one such study is Anthony Milner and Mary Quilty, eds, *Australia in Asia: Comparing Cultures*, Melbourne and New York: Oxford University Press, 1996. Focusing on a variety of practical issues, the various chapters repeatedly demonstrate four points. First, there is significant diversity within Asia. Second, the contrast between liberal emphasis on the individual and the emphasis on the collective cuts across many issues from business ethics to human rights, conceptions of democracy, labor relations, national security, the media, citizenship and governance. (See, e.g., p. 11: "The liberal ideological package – a tradition of debate, freedom and individualism, a stress on equality, and abhorrence of a too vigorous official nationalism – seems to be more, not less, influential when Australia is contrasted with Asian countries.") Third, the greater emphasis on collectivism does not preclude diversity in any of these areas as a result of differences in geography, population, language, religion, cultural narratives, and level of economic development. Fourth, while some convergence with Western liberal democracies is to be expected as Asian countries modernize, the factors just mentioned will also lead to significant and persisting divergence.

102 *Ibid.*, at 98 (noting differences in such fundamental matters as the authority of the teacher and the process by which knowledge is transferred from teacher to student).

103 Because the phrase "Asian values" has been tainted from misuse by politically oppressive regimes, one common suggestion is to replace it with "values in Asia." This change has the salutary effect of signaling a desire to move away from the overtly political use of the term toward a more sophisticated approach sensitive to the pluralism within Asia. But eliminating references to "Asian values" and replacing it with "values in Asia" will not put an end to substantive debates about the universality of rights or shed any light whatsoever on how rights are to be interpreted or implemented in particular contexts in Asia. At best, it simply shifts the focus to a less grand level, whether that be country by country, area of law by area of law, or issue by issue.

2 The protection of human rights in France

A comparative perspective

Guy Scoffoni

The concept of human rights, in the French and international context, refers to a series of rights and freedoms deemed essential to a person or to a group of persons. The rights are therefore protected at an elevated normative level by higher or specific courts, such as constitutional courts. These norms, whether set out in a constitution and legislation or in treaties, and these judges can be located either at the national level or at the international level, or have a transnational dimension, such as the specific European legal orders of the European Union and of the European Convention of Human Rights (ECHR). Apart from the international systems in the United Nations or specific international tribunals, France, as a member of the European legal order, offers three levels of protection of rights and freedoms:

1. The national systems of protection, using national constitutional or legal norms before national constitutional and ordinary courts.
2. The European Union's system of protection, using, in particular, the provisions of the treaties or general principles of community law with the perspectives of development of the European Charter of Fundamental Rights adopted in Nice in 2000, under the jurisdiction of the European Court of Justice in Luxembourg.
3. The European Convention of Human Rights system referring to the provisions of the Convention as interpreted and enforced by the European Court of Human Rights located in Strasbourg.

France, like all other Member States of the European Union, has recourse to a comprehensive system of human rights protection. This unique situation of providing at least three levels of protection of rights and freedoms might appear to be the basis of maximum protection and a source of sophisticated interactions between systems, and almost a luxury on a global basis, but it can also sometimes cause acute legal complexities.

In order to distinguish between the various systems of protection and their legal impact, the term "human rights" is reserved to the international dimension or European Convention of Human Rights sphere, and the term "fundamental rights" is used in the national context or in the more

"integrated" European Union legal system. I will refer in this chapter, which is mainly based on a national approach, to the notion of "fundamental rights" instead of "human rights," although this terminology does not affect the content of the protected rights.

The general characteristics of the French system of protection of fundamental rights

The evolution of the notion and status of fundamental rights in France

The sources of fundamental rights may be found in Christian principles, especially through the concept of human dignity and the idea of the limitations of public authority in the name of religious beliefs and respect for God. Natural law and the theories of "social contract" espoused by Locke and Rousseau also played a part in the recognition of fundamental rights in France and Europe, reinforced by the influence of the American Bill of Rights of the eighteenth century. The main reference in France is our own Bill of Rights of August 26, 1789, the *Déclaration des droits de l'Homme et du Citoyen*. This text solemnly reaffirms natural, inalienable, and sacred rights set in a universal perspective. Article 1 proclaims in particular that "All men are born and remain free and equal in their rights" and Article 2 that "the aim of all political associations shall be to preserve men's natural and imprescriptible rights. These comprise the right to liberty, property, security and the right to resist oppression."[1] This revolutionary conception of rights is influenced by individualism and liberal theory: the rights proclaimed belong only to the civil and political rights category.

A century and a half later, the Preamble of the Constitution of October 27, 1946, after reaffirming the first generation of rights, focused on new principles "necessary to our social and economic rights." The current Constitution of October 4, 1958 refers in its Preamble to the two main categories of rights, as proclaimed in 1789 and 1946. These references paved the way for the recognition of the full constitutional value of these sets of rights, finally explicitly affirmed by the French constitutional court (hereinafter, the Constitutional Council), in its landmark case of July 16, 1971 regarding freedom of association.[2] In fact, before our *Marbury* v. *Madison* 1971 case, both the civil and political, and the social and economic rights appeared to be more philosophical or ideological principles than legal norms. Until then, France had a system of protection of rights and freedoms but only on a legislative – and not a constitutional – basis, as Parliament was able at times to limit or undermine these rights.

Two lessons can be drawn at this point from the French experience: first, the effective protection of fundamental rights depends on their recognition at a constitutional level. Second, such recognition is not sufficient without an effective system of judicial review allowing full enforcement of the constitutional norm. From that point of view, the effective protection of

fundamental rights has only been in operation in France in the last three decades, with the development of the rule of law by an active constitutional judge.[3] Moral authority, constitutional qualification, and sanction by a judge characterize and explain the evolution of fundamental rights in France and their influence on all branches of the law.

International and transnational instruments of protection

Despite its historical and political value, the Universal Declaration of Human Rights, published in France in the "National Register," is not regarded as a Treaty and cannot be invoked in front of the courts.[4] France has also ratified the main international treaties in the field of human rights but the weakness of the sanctions means that in France they are considered to be ineffective.

France ratified the International Covenant on Civil and Political Rights on November 4, 1980, but with reservations on the jurisdiction of the Human Rights Committee of Article 41. The official reason was that France wanted to give priority to the European mechanism of enforcement of fundamental rights. Indeed, the European transnational instruments have a strong impact in terms of rights on the domestic order, and the French system in particular has been deeply affected in public law and private law matters by the enforcement of fundamental rights at the European level. In the European Union sphere, which has twenty-five Member States, the norms enforced by the European Court of Justice in Luxembourg have a direct effect. Second, the innovation of the system of the European Convention of Human Rights, which has forty-five Member States, is that for the first time in international law individual rights form a legal order, and there is a procedure of sanction in the European Court of Human Rights in Strasbourg to guarantee compliance by every state.[5] The prospective adoption of a European Union constitutional treaty including the European Charter of Fundamental Rights could soon reinforce the impact of these transnational mechanisms.

Current debates

Among the more recent and long-lived debates and doctrinal controversies that characterize the field of the protection of fundamental rights, is the question of the interplay between constitutional rights and European fundamental rights. There is undoubtedly a certain complementarity between "national constitutional" norms of protection and the European instruments of protection. Nonetheless, due to the absence of an effective constitution at the pan-European level, there is currently no consensus on the hierarchy of these different norms, or on the hierarchy of the constitutional and European courts. The question of how to resolve any contradiction in the different case law regarding fundamental rights enforcement therefore remains open.

Second, the question of concrete and effective rights has been raised regarding, in particular, the impact of social or economic rights such as the

right to work or the right to fair housing. In France, although other social rights are protected at the highest level (see below), these two rights are not considered enforceable as fundamental rights. Their nature is more "programmatic," which implies that Parliament may legislate on certain elements of these rights but courts may not enforce them as effective constitutional rights against the government.[6]

Another debate concerns the distinction between fundamental rights and fundamental values, and the notion of human dignity which carries more moral than legal value. If considered a fundamental right in itself, this notion could generate some kind of right, placing positive obligations on the state. The principle of human dignity has been recognized in France at the constitutional level but its scope has been limited to the bioethics domain.[7] For instance, based on the principle of human dignity, the French constitutional court decided that Parliament can regulate sperm banks and prohibit the selling of human organs.

Another ongoing debate concerns the horizontal effects of fundamental rights. Fundamental rights are traditionally intended to protect the individual from acts of public authorities or government (the vertical effect) but could they also apply to the legal relationship between individuals, such as in the execution of contracts (the horizontal effect)? A direct horizontal effect is generally not acknowledged in France or Germany, but an indirect effect through general clauses of civil or contract law, such as the good faith clause for instance, is becoming more accepted.

More recently, a controversy regarding the requirements of public order and the scope of the derogations to fundamental rights in exceptional circumstances has arisen in the context of the fight against terrorism. This issue will be developed in the following section around the analysis of the main protected rights.

The protection of fundamental rights in the French system

All categories of rights presented in this section apply to individuals as well as groups and to nationals as well as foreigners, on the condition that they have a legal status in their country of residence. This large field of beneficiaries is characteristic of the expansive notion of fundamental rights, as developed by the French constitutional court or by ordinary private or administrative courts.

Four categories of fundamental rights will be analysed: physical integrity rights, civil and political rights, social and economic rights, and cultural rights.

Physical integrity rights

The physical integrity of the person is protected in France by the notions of "*sûreté*" (individual security) and "*liberté individuelle*" (freedom of the person). These traditional concepts date back to the Revolution, and illustrate

the reaction against the "*ancien régime*" and its practice of arbitrary detention. Influenced by the Anglo-Saxon guarantees of *habeus corpus*, these rights have been expanded through case law and legislation that underscore their current importance in the French system.

The protection of "individual security"

Mentioned in Article 2 of the 1789 Declaration, the right of "*sûreté*" is detailed in Article 7: "No individual may be accused, arrested or detained except in the cases defined by the law." It is also one of the rare liberties to be included in the 1958 Constitution itself; Article 66 states that "no one may be arbitrarily detained. As the guardian of individual liberty, the judiciary shall ensure respect for this principle within the conditions provided for by legislation." The Constitutional Council has referred to both sources.[8] Constitutional case law therefore protects the right against arbitrary arrest or detention. In order to reconcile public order requirements and individual freedoms, a balanced system of preliminary detention, police powers, identification inspection,[9] and psychiatric or administrative internment has been established, especially in the case of illegal aliens placed in a transit area prior to deportation only under the safeguard of a judicial order.[10]

The limitation of physical integrity rights in emergency situations

Due to terrorist threats and an increasing crime rate, Parliament has enacted legislation in the last three decades to set some limitations on fundamental rights. The Constitutional Council once again had to strike a balance between conflicting interests in specific circumstances. Two series of cases illustrate this process. In the mid-1980s, the Constitutional Council validated the extension of detention before charge for police investigations by up to 96 hours, so long as it was ordered by a judge, limited to terrorism cases, and not extended to other crimes against the state.[11]

Legislation extending police powers against "organized crime" was recently under review. The legislation of March 2004 includes preliminary detention of up to four days, night searches, wire-tapping, and the use of cameras in private places. The Constitutional Council validated these provisions on the condition that the new procedures would only be used in serious cases, and would be reviewed by a judge.[12] The first related case law will be decisive to show how the courts will interpret the "seriousness" provision.

Article 16 of the 1958 Constitution gives emergency powers to the President of the Republic. This article has only been invoked once, by General De Gaulle, after the military coup in Algiers in 1961, leading in particular to the operation for five months of a special military tribunal with criminal jurisdiction. This military tribunal made no distinction between defendants according to their nationality and as an "*ad hoc* emergency tribunal," did not adopt the regular standards of procedural protection. France has not

established a similar court since then, but such an institution may still be valid, according to the requirements of the European Convention on Human Rights. Article 15 of the Convention indicates that "in time of war or other emergency threatening the life of the nation, a State may take steps to derogate from Convention obligations." Due to the fight against terrorism in these last decades, the European Court of Human Rights now allows the Member States a wide margin of appreciation as to the validation of national derogations to the convention.[13]

The protection of civil and political rights

Freedom of thought and religion

Freedom of thought, conscience, and religion were first protected by Article 10 of the Declaration of the Rights of Man of 1789: "No one shall be troubled on account of his opinions, be they on religious matters, as long as their expression does not disturb the peace." The Preamble of the 1946 Constitution, the second main source of fundamental rights in France, also provides that "in the course of his employment or work, no one shall be disadvantaged because of his origins, opinions, or beliefs." Finally, Article 1 of the 1958 Constitution provides that "France shall ensure the equality of its citizens before the law, without any distinction based on race or religion. All needs shall be respected." These deeply founded rights include freedom of conscience, the freedom to have or change a religion, and the freedom to manifest one's religion or beliefs.

No criminal offense can be instituted on the basis of an opinion of any sort. The freedoms of opinion and conscience are protected against the government and public administration. The public service must be unbiased and no discrimination can be made on the basis of opinions.[14] The main component of the freedom of conscience, freedom of religion, was protected by legislation in 1905. The law provides that no religion or belief shall have a preferred status and that public authorities of the state should not intervene in religious matters. Freedom of conscience is also guaranteed, with constitutional force, in specific fields such as the "conscience clause" for medical doctors who may refuse to practice an abortion,[15] or for the public servants whose religious beliefs cannot be mentioned in their files.

Two aspects of religious freedom are currently particularly controversial in France. First, although the existence of sects who abide by the law may appear to be guaranteed by the freedom principles, in recent years the law has become stricter regarding the operation of sects and the requirements of openness. An observatory of sects has been instituted to monitor their activities, and a law passed in June 2001 increased the state's control over sects. The second area of contention concerns the reconciliation of the principle of secularization (laïcité) and the protection of religious freedoms, especially in public schools. Until 2004, administrative rules managed to

strike a simple balance between the two interests, by permitting the use of religious symbols or clothing unless they appeared to be an act of provocation or propaganda that could damage public order.[16] Legislation adopted in March 2004, however, prohibits the use of "conspicuous" religious elements such as large crosses, the Jewish kippa and, most controversially, the Islamic veil. The prohibition illustrates a radical change in the French legal framework, putting the emphasis on prohibition instead of freedom, and still leaving public schools with the difficult task of determining which religious signs are "conspicuous" or not.

Freedom of speech and freedom of assembly

In Europe, and in France in particular, freedom of expression has traditionally been held in high esteem, and there is a general prohibition on pre-censorship.[17] The protection of the freedom is related to the principle of pluralism, affirmed by the freedom of the press. The French Constitutional Council recognized that the free communication of ideas and opinions, guaranteed by Article 11 of the Declaration of the Right of Man of 1789, can only be effective if readers can exercise free choice of publications without having public or private authorities substituting their own decisions.[18]

As protected in the case law of the European Court of Human Rights (Article 10, ECHR), the right of publishers to publish is complemented by the right of the public to receive information. The French constitutional system also protects the freedom of journalists, by requiring an editorial team carrying a professional card to guarantee the autonomy of the production of a newspaper, conditions of transparency, and pluralism – and therefore freedom.[19]

Specific principles frame the freedom of expression in the audio-visual media. Although communication is free in principle, the constitutional court has upheld a requirement that broadcasts gain prior authorization by an administrative agency. An administrative agency has been instituted by law to regulate the system and issue licenses for televisions or radio companies. In the main constitutional case of 1984 regarding freedom of communication, the Constitutional Council validated, as adequate provisions for pluralism in the public sector, the broadcasting of party political statements during elections, and a right to reply to any government statements. It also upheld the broadcasting of religious programs by the major religions in France on Sunday morning.

Of course, like most fundamental rights, freedom of speech has to be limited to be compatible with the right to privacy, the freedom of others, and public order requirements. The restrictions on the publication of obscene material are one example. The new criminal code, remodeled in 1994, entrenches the notion of good morals (Article 624-2) to regulate the expression of "indecent messages."[20] It does not prohibit pornography but

guarantees that people will not be exposed in public places to offensive or sexually aggressive images. This provision is used in particular to eliminate provocative advertising. Generally, all messages of a violent character or affecting human dignity may be criminalized. Hate speech or racist speech can also be limited or punished. In 1990, Parliament enacted a law criminalizing racist or "negationist" speech that denies the existence of the Holocaust. This consensual legislation has not been judicially reviewed by the Constitutional Council, and ordinary courts declared it compatible with the freedom of expression provisions of the ECHR (Article 10). This solution undoubtedly takes a different approach to the more absolute American protection of free speech and the First Amendment case law.[21]

The French constitutional court, in its first "activist" decision in 1971 affirmed the constitutional protection of the freedom of association, in the form of an unwritten fundamental principle, based on a republican tradition established after 1901 legislation related to the formation of associations.[22]

Social and economic rights

A wide variety of social and economic rights are recognized as constitutional by the French system, including the right to education, the right to health, the right to minimal subsistence, and the right to social allocations or unemployment compensation. Most of these social and economic rights are protected by the provisions of the Preamble of the 1946 Constitution, as referred to in the text of the current 1958 Constitution, as well as the many international conventions France has ratified, in particular the European Social Charter of 1961, elaborated within the system of the Council of Europe.

The following three main categories of social and economic rights cover the majority of the cases of fundamental rights litigation.

The right to education and professional training

These rights are part of the "republican" tradition developed in France since the end of the nineteenth century and are proclaimed as such in the Preamble of the 1946 Constitution, integrated today into France's Constitutional Charter. The Preamble indicates that "The Nation guarantees equal access for children and adults to education, professional training, and culture. The State has a duty to organize free and secular education at all levels."[23] Such a provision may be understood as going beyond the scope of "social rights," but these rights remain connected to the "social and economic" category since they are the conditions for access to work. They are part of the constitutional task of the public service, and imply positive obligations upon the state to concretely and effectively organize the public service to guarantee their enforcement.

The rights to minimum means of subsistence and to health care

The 1946 Preamble provides that "The Nation shall guarantee to all, notably children, mothers and aged workers, health care, material security, rest and leisure. Any human being who, by reason of age, mental or physical state or economic situation is incapable of working, has the right to obtain means of subsistence from the community."[24] The Constitutional Council has interpreted this provision to be the legal basis for various allocations to the child, the unemployed, the elderly, the handicapped and, more generally, the family. The sophisticated French social security system is also based on the same constitutional grounds.[25]

The right to join or organize a union and the right to strike and collective bargaining

The first two rights were affirmed in French constitutional case law during the 1970s and are well enforced today, although union participation rate is in constant decline. Although the right to strike is effectively regulated and protected by different pieces of legislation, the right to collective bargaining does not receive the same attention it enjoys in countries such as Germany, where it originated. The Council of State considers the right to collective bargaining as a general principle of law but with legislative instead of constitutional force.[26]

The right to work is also recognized, but only as a "constitutional objective." It cannot, therefore, be considered to be effectively guaranteed, but the other social and economic rights have acquired solid foundations and effectiveness, especially in the last twenty-five years. The only controversial social right guaranteed in France at the legislative but not the constitutional level is the right to fair housing.[27] This right is only a "constitutional objective" and therefore cannot be effectively protected as an individual right. This can be explained by the difficulty with reconciling the right to fair housing and property rights, and the impracticability of imposing on the state the obligation to find housing for the two million homeless people in France.[28]

The protection of social and economic rights in France on a constitutional basis goes well beyond that available through the ECHR, as the Convention only marginally includes such rights in its sphere of protection.

The protection of cultural rights and minority rights

As an old nation-state, France has its own minorities: regional, cultural, and religious. But France also includes groups of foreign minorities, particularly those who have come from Africa. Like most liberal states, France has chosen a gradual approach, a policy of assimilation. This policy is based on two fundamental principles of democracy: the majority principle and the equality principle, interpreted in the most direct way. The numerical majority decides and the law is the same for all, even if it reflects only the majority interests.

The concept of the nation created the concept of a national minority lying outside this "community of destiny," the dominant national group. The interests of minorities cannot, therefore, be taken into consideration by the state institutions which impose the dominant cultural values. In other words, France has given priority to the values of national unity, seeking to marginalize the cultural minority values in order to offer these groups a new identity within the national community. This policy is legally expressed through the concept of constitutional equality and the anti-discrimination principle: a guarantee of rights for minority groups – at least on a constitutional basis.

Constitutional equality and the rights of the "individual citizen"

The French Revolution contributed greatly to the development of the model of the nation-state which, by transferring sovereignty from the monarch to the people, created the myth of the unity of the people and the state. The theories of Jean-Jacques Rousseau and the anti-group ideologies explain, therefore, the consecration at the end of the eighteenth century of the principles of equality, unity, and indivisibility, which are the source of the French constitutional order. Unlike the USA, the risk of disunion was a great concern in France in the revolutionary era; and the exclusive recognition in law and in constitutional theory of the individual citizen in the eighteenth and nineteenth centuries derives from the historical necessity to preserve the country's unity. What, then, are the bases of the protection of the individual citizen and what meaning and implications does the concept have?

The conception of equality which prevailed during the Revolution derived directly from the image of a united and homogeneous national community. At the time this was only a principle of political theory. Later, the equality principle became an effective rule of law through the jurisprudence of the Council of State and especially of the Constitutional Council.

According to the case law that has been developed by these two judicial bodies, there are now three main bases to the protection of the individual citizen. The concept of equality first appears in the Declaration of the Rights of Man and of the Citizen in 1789. In Article 1 there is specific reference to the equal rights of man from birth. But the Declaration does not define equality; nor does it proscribe discrimination according to race, ethnic origin, or any other grounds. But what the French call the "Philosophie des Lumières" (or the ideas of the Enlightenment in general) would not have allowed such discrimination. The equality of man and citizen is not based on geographical or ethnic origin, but rather on that which creates unity, namely the common possession of natural rights: equality, freedom, property and security rights, and the right to resist oppression. The 1789 Declaration of the Rights of Man and of the Citizen established, therefore, a dual conception of constitutional equality: equality of the law, which is a principle imposed on all legislators; and equality under the law, which is a duty imposed on those who enforce the law.

The second source for the principle of the protection of the individual citizen can be found in the Preamble to the Constitution of October 27, 1946, which was adopted shortly after the liberation from, and victory over, totalitarianism. It was in this context that the first sentence of the Preamble was drafted to state that the French people reasserted that "every human being, without distinction of race, religion, or belief, possesses inalienable and sacred rights." In this way, the Preamble to the 1946 Constitution added to the 1789 Declaration by enumerating social and economic rights dealing with work, health, and education. The very terms used ("every human being", "every worker") make clear that the enjoyment of the rights cannot be limited by any kind of discrimination based upon ethnic or national origin.

The third source for the principle of the protection of the individual citizen derives from the French Constitution of October 4, 1958. Article 1 of the Constitution states that France is an indivisible, secular, democratic, and social republic, and Article 2 guarantees equality under the law to all citizens without distinction on the grounds of origin, race, or religion.

As interpreted classically, equal-protection principles oppose any discrimination between individuals. But in case of *differences*, the law must evolve. Equality is not an absolute principle of identity. While the equality principle relates mainly to individual rights, the Constitutional Council has enlarged the scope of the principle. First, it has been established that the right to equality is independent of the sex of the individual. The Preamble to the 1946 Constitution laid down that "in all areas" women were to enjoy equal rights with men; and this principle has been explicitly enunciated by the Constitutional Council in its decision of December 1980 concerning the equality of the sexes in judicial sentencing.

Moreover, a foreigner can also invoke the equality principle, not only to enjoy equality before the courts but also in gaining access to social rights. In a judgment delivered in January 1990,[29] the Constitutional Council ruled that constitutional liberties and fundamental rights extend to all residents of the republic. It referred for the first time to equal rights between French citizens and foreigners by stating that all foreigners legally settled in France are entitled to the same specific benefits as French citizens. This was an important decision, considering that, at that time, certain political movements wanted to establish a so-called "national preference" in France. It follows from the Council's decision that the nationality of an individual cannot be used as a general criterion for discrimination. This decision can be compared to the jurisprudence of the US Supreme Court when it invalidated, on the basis of the Fifth and Fourteenth Amendments and after a "strict scrutiny" control, discrimination practiced by a state towards permanent yet legal foreign residents. If foreigners were, in the eyes of the US Supreme Court, a minority to protect, the French Constitutional Council has guaranteed the same protection by virtue of the fundamental equality possessed by all people. Through such a decision equality becomes more

than a citizen's right. It becomes a human right – though with the exception that the right to vote is still defined by citizenship and nationality.

Lastly, the Constitutional Council held in a number of decisions that legal bodies or corporate entities as well as individuals are within the protection of the equality principle. Thus all manner of associations, trade unions, private companies, local communities, and political parties have become the beneficiary of this principle.

Equality implies similar situations. It does not mean that the laws must be identical for all, but only that they cannot be different for people placed in the same situation. Equality not only prohibits discrimination based on such grounds as race and religion; it also implies a right to benefit from identical rules. On the other hand, when there is a difference of situation, law-makers can choose between identical rules for all or specific rules applying to each category. Law-makers are not bound by the equality principle; nor do they have to set specific rules because the differences between situations do not create a right to benefit from particular standards. There is no constitutional "right of difference" recognized in France. Contrary to the German constitutional court, the French Constitutional Council has never formulated the "different situation, different rules" solution. It has only stated that the law-makers may set different rules for different situations. For the German court, material equality must replace formal equality.

Constitutional equality and the rejection of minority rights

The neglect of minorities in France is a legacy of the individual conception of the law and of the "rights of man" philosophy prevailing since the Revolution. But France no longer relies entirely upon such jurisprudential individualism. Its legal system reflects the political, economic, and social evolutions characterizing French society. Apart from individual rights, some collective rights have thus been recognized for groups, but with an important qualification. These rights are recognized only for objective categories, and do not depend on cultural differences. As such, they are not real minority rights. From this point of view, equality leading to uniformity is a major obstacle to the recognition of a "right of difference." The assumption of homogeneity explains the traditional reluctance in France to take into consideration any sort of difference.

Three major recent episodes in French law are illustrative of this legal–judicial denial. In 1991, the Constitutional Council reviewed a law defining a new form of organization for Corsica. The question asked of the Council was the following: can French legislation recognize the Corsican people as a group within the French people? Such a recognition would imply a distinction inside the concept of the French people, one based on ethnic origin.[30] In its response, the Constitutional Council referred to Article 2 of the 1958 Constitution, which prohibits any discrimination based on origin or race, and declared that the Constitution recognized only one (French) people

composed of all citizens without distinction. The Constitutional Council's decision of 1991[31] confirms that, since the Revolution, France has not recognized minorities as such but only the individual citizen.

For the Council, the recognition of a Corsican people distinct from the French people appeared dangerous because it suggested the possibility of discrimination, which France had tried to ban for two centuries. The opposition in the National Assembly had, in fact, asserted that recognizing a Corsican people would undoubtedly lead to the acknowledgement of a Martinique people or a Réunion people or a Kanaka people in New Caledonia, all of which were prohibited by the anti-discrimination principle in Article 2 of the Constitution.

The French concept of equality and of the indivisibility of the Republic prevents any constitutional recognition of minorities or any distinction made on ethnic criteria. This explains the reservation made by France when it ratified the United Nations Covenant on Civil and Political Rights, Article 27 of which guarantees the identity of ethnic, religious, and linguistic minorities. Considered constitutionally indivisible, France cannot recognize the legal existence of minorities as do other occidental countries. The Canadian Constitution, for instance, authorizes specific statutes for the indigenous peoples, while Article 2 of the Spanish Constitution of 1978 recognizes the existence of nationalities ("*nacionalidades*") and regions, especially the Basque, Catalonian, and Galician communities.

Since the Revolution, constitutional equality in France has implied a homogeneous society. Unity was forged against local particularism by the denial or repression of regional and cultural claims. This struggle for unity is well illustrated by the legal status of the French language, which was imposed by François I as the official and legal language with the 1539 Ordinance of Villers-Cotterêts, then reaffirmed by the Revolution and the Third Republic as the exclusive language to be used in schools. Upon the ratification of the Maastricht Treaty in June 1992, a new, second paragraph was added to the Constitution: "the language of the Republic is French." This provision gives France the legal basis needed in the event of conflict with a regional language. At the same time, the government refused an amendment, similar to Article 3 of the 1978 Spanish Constitution, referring to the protection of the regional languages and cultures of France. In the name of the unity and indivisibility of the Republic, any recognition of minority groups and their cultures will be denounced once again. Any action in favor of regional languages, which are part of France's heritage, would have to be compatible with the unity symbolized above all by the "Language of the Republic."[32]

Although it is one of the French government's goals to wage a constant struggle against social inequality, the French state is in general opposed to preferential treatment or "reverse discrimination" for particular groups. The visceral attachment in France to formal equality explains why it has rejected the sort of affirmative-action programs found in the USA, where

the notion of minorities is not taboo. In the USA, for example, from the time of its decision in *Brown* v. *Board of Education* in 1954, the US Supreme Court has accepted the constitutionality of preferential treatment, using a dynamic interpretation of "equal protection." Affirmative-action programs have expanded despite the controversies and restrictions following the jurisprudence of the Supreme Court in such cases as *Bakke* and *Richmond* in 1978 and 1989 respectively. These controversies have never taken place in France, because the introduction of quotas has been declared contrary to strict legal equality and damaging to the homogeneity of the nation, even though everyone admits that this homogeneity is pure fiction.

The Constitutional Council has on only one occasion had the opportunity to sanction the validity of quotas, when it decided a case concerning preferential treatment for women in the political process. Quotas had been set requiring a minimum of 25 percent women on the lists of candidates for municipal elections. But the Council ruled that the quotas were unconstitutional, on the grounds that there could be no discrimination introduced between citizens who were already equal. This 1982 ruling of the Constitutional Council is open to the charge that it avoided the substance of equality in the name of certain ideals of identity.[33]

The French approach can be summarized this way: citizens are not identical because they are equal; rather they are equal because their citizenship makes them by definition identical. There is no place for differences and preferential treatment in such reasoning. The citizen must be distinguished, therefore, from the man in society ("*l'homme situé*," in G. Burdeau's phrase) who falls within to his economic, social, or family category. But this dogma of the unity and homogeneity of the citizens' community has been partly eroded today by the admission of certain differences in French law. Even so, this recognition has not yet reached the constitutional level.

Some countries protect the rights of minorities at the constitutional level. Sweden, for example, stipulates that ethnic, linguistic, and religious minorities must receive specific support. France, on the other hand, has adopted only legislative and administrative measures towards preferential treatment. The point can be illustrated by taking three cases which touch on the earlier discussion of minority rights.

First, the Overseas French Territories statute for areas such as Polynesia and New Caledonia is based on the 1958 Constitution, which authorizes a specific political structure for such territories, with an Assembly (rather like a mini-parliament) and an Executive Council quite different from the administrative authorities found in France.[34] But such arrangements did not make France a federal state. The Constitutional Council has repeated in many of its decisions the principle that the national Parliament retains the exclusive power to enact or modify each territory's structure. Although the territories have their own legal order reflecting their particular situation, the Constitutional Council has never admitted that any ethnic criteria might lie at the basis of the difference in statutory arrangements; and the territories have no rights to organize themselves and no full legislative powers.

A similar situation arises in the case of Corsica. While the Constitutional Council has disallowed the recognition of a "Corsican People," the island has been given its own specific political structure. The law of March 2, 1982 provides a unique type of regional Assembly and Executive, as well as creating a special electoral district. But in a decision in May 1991, the Council reaffirmed that this specific organization for Corsica had only an administrative – not constitutional – character.

The third example concerns Alsace-Lorraine. Here the regional law still bears a German influence which goes back to the period before the Armistice of November 1918 at the end of the First World War. This German influence informs both civil and public law; and in this way both reflect the identity of the region. But they do not constitute an autonomous legal order, since the local authorities are not entitled to create new regulations or modify the existing ones.

Beyond the linguistic unification and the official consecration of the French language in the Constitution during 1992, a relative linguistic diversity has been accepted in response to various minority claims. But the mere acceptance of diversity cannot create real linguistic pluralism; the regional languages are not fully protected by the law and, in fact, they are ignored in the Constitution itself. Different regulations recognize or protect the languages through optional educational courses or through cultural programs on the public television channels. The law of January 26, 1984 on higher education went so far as to state that universities should promote regional languages and regional cultures. But this is very different from the position in Canada, where the Supreme Court has declared that freedom of expression includes the freedom to use any chosen language. In so doing, the Canadian court has limited the possibility of the state imposing the use of a particular language for private or commercial activities.

A series of legal instruments promote minority differences in many areas. They range from specific administrative regulations concerning ritual slaughtering or kosher food to the obligations of public television channels to offer Sunday morning religious programs presented by the different denominations and sects in France. Preferential treatment is also granted to those with disabilities and to mothers of young children working in the civil service. In all such cases, these types of discrimination are of an administrative nature and based on objective and rational criteria, but stop short of the recognition of cultural minorities.

For a long time now the French government has been confronted with a dilemma: how to respond to the aspirations of minorities, to different forms of regionalism, and to claims of difference without jeopardizing the founding myths of French democracy: equality, uniformity, and unity. The combination of the distrust shown by French law to the *corps intermédiaires* ("mediating organizations"), together with the concept of formal equality as well as the permanent rejection of constitutional minority rights, could make France appear a somewhat "totalitarian" system, especially in comparison with most contemporary liberal Western systems.

It would, however, be a mistake to underestimate the positive aspects of the French system. The attachment to formal equality remains a primary source of protection against discrimination. The priority given to individual rights over group rights and the absolute right to be treated as a person without regard to any group attachment may appear to be a restriction on freedom, whereas, on the contrary, claims of difference could present risks. Such differences could become oppressive if they were essentially concerned with the identity of the person or if they were to make the individual disappear behind the group. If the nation-state collapses, there is a strong risk of a new form of oppression, as we can see in different parts of the world today. In a multicultural society though, citizenship can be built on common rights which unite people and groups, rather than on particular rights which divide them.

At the same time we can see that even in France the rejection of minority claims in a modern democratic society is becoming less and less acceptable. Even so, what we find in the French system are occasional concessions to minorities (as in New Caledonia or Corsica) but no constitutional rights or principles are accorded. Such a situation is even less understandable today, as the risks of separation are minor. The divisions in modern society depend, in fact, more and more on education, on one's profession or on one's place of residence; and these characteristics limit the effects of ethnic and cultural differences. But collective rights as well as individual rights constitute a guarantee of pluralism in society. The pluralist and affirmative dimension of equality is undoubtedly necessary today both to correct certain social inequalities in France and elsewhere and to recognize the diversity of groups within a national community.

A major constitutional amendment of July 8, 1999, introduces nonetheless certain preferential treatment regarding equality between men and women in elections and political representation. Such reform, in terms of "*parité*," represents a strong change from the French constitutional tradition and prohibition of quotas.[35]

A few lessons can be drawn from the French experience. First, it is important to consider history and tradition to explain the definition of fundamental rights. Second, there is a decisive interplay between fundamental rights and the equality principle, as well as procedural guarantees. Equal protection and traditional "due process" requirements appear as a major factor for the effectiveness of the protection of the other fundamental rights. Finally, new rights deemed fundamental may be affirmed in the near future, like the right to a fair environment or the principle of "legal stability."

Notes

1 See L. Pech, "Rule of law in France," in R. Peerenboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.*, London and New York: RoutledgeCurzon, 2004.

2 Constitutional Council (CC) July 16, 1971. *Freedom of Association*, N 71-44 DC, RJC (Recueil de Jurisprudence Constitutionnelle) I-24. In this case, the constitutional court expanded the Constitution to include unwritten principles linked to the Preamble of the 1946 Constitution. It was the first time that the court enforced unwritten constitutional rights over parliamentary legislation.

3 See L. Pech, *supra* note 1.

4 See the decision by the Council of State (French Supreme Administrative Court), November 23, 1984, Roujansky.

5 See G. Scoffoni, "The influence of the European Convention on human rights on the national law of a member state," *Journal of Chinese and Comparative Law* vol. 2, no. 2, 1998, pp. 21–37.

6 See in particular L. Favoreu *et al.*, *Droit des libertés fondamentales*, Dalloz, 2003.

7 CC, July 27, 1994, "Bioéthique," 343-44 DC.

8 CC, 1977, "Fouille des véhicules."

9 CC, August 26, 1986, "Contrôles d'identité," 86-213 DC.

10 CC, February 25, 1992, "Entrée des étrangers," 92-307 DC.

11 CC, September 3, 1986, "Loi relative à la lutte contre le terrorisme."

12 CC, March 2, 2004, "Loi Perben 2."

13 See in particular the European Court of Human Rights (ECHR) decision *Brannigan* v. *United Kingdom*, May 26, 1993, No. 258B, 17 EHRR 596.

14 Council of State, March 13, 1953, Teisser and Council of State, May 28, 1954, Barel.

15 CC, January 15, 1975 and of June 27, 2001.

16 Council of State, November 2, 1992, Kherouaa, Recueil Lebon, 389.

17 J. Morange, "La protection constitutionnelle et civile de la liberté d'expression," *Revue Internationale de Droit Comparé*, 1990, p. 774.

18 CC, October 10–11, 1984, Entreprises de Presse.

19 France has a respected code of conduct and a charter of rights of journalists which guarantees their autonomy and independence, in particular against potential interventions of the owners of a newspaper. Such a situation is considered to be an important element of the protection of freedom of the press as a whole.

20 The questions raised by "obscene expression" are also present in several systems presented in this book – see in particular the chapters on India and Singapore and the way this issue may be addressed, in this latter system, through non-legal means.

21 See L. Pech, *La liberté d'expression et sa limitation*, Librairie Générale de Droit et de Jurisprudence, 2003, pp. 390–1.

22 CC, July 16, 1971, "Liberté d'Association," N 71-44 DC, RJC I-24. In this case, the constitutional court gave constitutional protection to the freedom of association, preventing Parliament from regulating its application in a restrictive manner.

23 Constitution §13.

24 Constitution §11.

25 For constitutional case law on the right to health, see V. Saint-James, "Le droit à la santé dans la jurisprudence du Conseil Constitutionnel," *Revue du Droit Public*, 1997, p. 457. See the decision of the Constitutional Council of 1979, "Droit de grève à la radio et télédiffusion," trying to reconcile two constitutional rights: the right to strike and the principle of continuity of the public service.

26 Council of State, July 21, 1970, Droit social 7 1.112, note Venezia.

27 CC, January 19, 1995, "Diversité de l'habitat," 94-359 DC, RJC I-630. As a result of this decision, the right to fair housing, on an individual basis, may be protected in some aspects by the legislation but not by the Constitution.

28 See P. Delvolvé, "Droit de propriété et droit au logement", *Revue Administrer*, December 2001, p. 22.

29 See CC, January 22, 1990, "Egalité entre français et étrangers," 89-269 DC, RJC I-392.
30 This prompted a leading Corsican, François Giacobbi, who opposed the new instrument, to reply to the metropolitan government: "When you recognize the Corsican people inside the French people, you make a racist distinction!"
31 CC, May 9, 1991, Statut de la Corse, RJC I-438.
32 This situation cannot be brought in front of the ECHR since the Convention does not include "linguistic rights," and France has not ratified the Convention for the protection of regional languages.
33 See CC, November 18, 1982, "Quotas par sexe," RJC I-134.
34 See the Constitution of France, October 4, 1958, Titre XII: Des Collectivités Territoriales, Article 72-6.
35 Constitutional Council, January 14, 1999, "Parité Hommes-Femmes."

3 Uncovering rights in the USA

Gauging the gap between the Bill of Rights and human rights

Dinusha Panditaratne

Introduction

The USA is overtly committed to human rights, perhaps more than any other country in the world. The ideas and practice of rights permeate the history, political discourse, laws, and social cultures of the USA and increasingly, have saturated its courts. This chapter will focus on the extent to which human rights in the USA are safeguarded by law and pay particular attention to how they have been interpreted and applied by courts. However, this chapter will also venture beyond the overt and legalized commitment to rights in the USA. In particular, it aims to shed light on certain dichotomies and other factors that affect the realization of human rights in the USA.

The presence and influence of these dichotomies and historical, socio-political and economic factors will be apparent in the first sections of this chapter, which assess the extent to which certain rights are protected by the Constitution, legislation, executive governmental actions, and (especially) judicial decisions of the USA. One of the most evident dichotomies is the differential commitment to civil and political rights, on the one hand, and to economic, social and cultural rights, on the other. This divergence of practice is underpinned by two historical factors. First, the USA has historically prioritized the values of individual freedom and liberty above all other rights-based ideals. These values are commonly – if simplistically – associated with civil and political rights, rather than with economic, social, and cultural rights. Second, freedom of contract and the protection of private property have historically been viewed as concomitant with the values of individual freedom and liberty. In the capitalist paradigm that operates in the USA, economic, social, and cultural rights have struggled to be considered "rights" at all. Rather, they are apt to be viewed as benefits that accrue from the acquisition of wealth and private property in a market system. Equally, the realization of economic, social, and cultural rights through redistributive measures is perceived in many quarters as an undue interference with freedom of contract and/or an unwarranted appropriation of private property.[1]

A second dichotomy exists in the proactive approach of the government to promoting human rights globally, while being reluctant to accede to human rights treaties itself. The USA has traditionally taken an active part in setting international human rights standards and regularly chastises other nations on their human rights records – most transparently, in the annual country reports on human rights issued by its Department of State. Yet it has acceded to relatively few human rights treaties and has limited the internal effect of those treaties that it has ratified.

Third, US courts have been largely deferential to government decisions in matters of foreign policy, war, and national security.[2] Since September 11, 2001 and the onset of the "war on terror," the stakes of such judicial deference have been dramatically raised for the protection of human rights. However, in recent decisions, certain courts and judges have recognized these stakes to some extent, and have indicated a greater willingness to review government decisions that infringe human rights. It should be noted that this chapter focuses on human rights as they are applied within the USA. Accordingly, it will not delve into the human rights dimensions of the USA's tentacular foreign policy, except as it affects persons within the (explicit or implicit) jurisdiction of US courts.[3]

A few other factors affect the implementation of human rights in the USA. One is its federalist structure of government. The Constitution of the USA (hereinafter, the "Constitution") mandates a demarcation of powers between the federal government and the governments of the fifty component states. The exact dividing line between federal and state legislative powers has been subject to varied judicial interpretation over time, but nevertheless, there are two enduring consequences of the federal system of government.

First, the Washington-based arms of government have limited capacity to affect human rights outcomes in the various states because of *some* constitutional limits on its legislative powers. Second, the history of this federalist structure of government has helped inform a prevalent (but by no means universal) belief that localized governance is *prima facie* preferable to centralized government as it is less intrusive and more attuned to individual needs. The varied judicial interpretations as to the constitutionality of federal legislation, including in matters relating to human rights, can often be explained by the competing philosophies of judges on this very point. The appointment of one or two judges to the Supreme Court of the USA (hereinafter, the "Supreme Court" or the "Court") who are skeptical of any enlarged role of the federal government can tilt the Court's opinion against the constitutionality of federal human rights legislation. Indeed, it is an additional factor relevant to any understanding of human rights law in the USA that presidential appointments to the Supreme Court bench have become highly politicized, resulting in substantial swings in the opinions of the Court from time to time. Judges who are inclined to favor greater state and local autonomy over centralized government, as well as favor majority concerns over individual rights,[4] are labeled as "conservative" and generally

appointed by Republican Party presidents. Judges of the opposite inclinations tend to be described as "liberal" and are the likely appointees of Democratic Party presidents.

Aside from mandating a federal structure of government, an equally important aspect of the Constitution for the implementation of human rights is the "Bill of Rights," adopted in 1791. The Bill of Rights comprises the first ten amendments to the Constitution which each protect certain civil and political rights; freedom of speech and freedom of assembly, for example, are guaranteed by the First Amendment. Further amendments to the Constitution were made in subsequent years which also protect rights – notably, slavery was prohibited by the Thirteenth Amendment ratified in 1865 and restrictions on voting by reason of race and sex were removed by the Fifteenth and Nineteenth Amendments, ratified in 1870 and 1920, respectively.

Individual states and even localities within states have their own constitutions and laws that guarantee a multiplicity of rights, often to a greater extent than the federal Constitution or other federal laws. However, the focus of the chapter will remain squarely on federal legal guarantees of human rights and the jurisprudence of federal courts, especially of the Supreme Court.

Two final aspects should be borne in mind in any assessment of human rights laws in the USA, both of which constitute broader societal aspects. The first is the familiarity of ordinary citizens with their constitutional rights and moreover, their willingness and ability to litigate in order to exercise these rights. The decisions of the Supreme Court, especially on issues relating to the civil and political rights guaranteed in the Bill of Rights, are widely disseminated and discussed in the media and sometimes generate intense responses from the public in the form of mass mailings to the Supreme Court, demonstrations or the lobbying of government representatives to change decisions. Second, however, it is the view of some "liberal" or "leftist" commentators that certain institutional factors – most notably the dominance of the capitalist economic model in the USA and the resulting concentration of wealth and media ownership in the hands of a relative few – pose substantial obstacles to the realization of human rights in the USA.[5] These include obstacles to influencing mainstream public discourse on rights, as well as to realizing economic, social, and cultural rights.

Civil and political rights in the USA

Constitutional aspects: Bill of Rights

Reflecting libertarian ideology, the rights enumerated in the Bill of Rights are only guaranteed against *governmental* interference and are generally not guaranteed against the acts of *non-state* actors such as private individuals, clubs or associations, non-governmental organizations, corporations, or private educational establishments. Of course, as will be seen below, Congress

(the federal legislature) has extended rights-based obligations to private actors via legislation, but its ability to do so has been constrained by constitutional limitations on the types of legislation the federal government is permitted to enact and sometimes, by strict interpretations of these limitations by conservative judges.

Development of Supreme Court jurisprudence

The development of civil and political rights in the USA largely reflects the Supreme Court's unfolding interpretation of the Constitution and in particular, of the Bill of Rights and subsequent amendments to the Constitution. Three developments in the Supreme Court's jurisprudence are especially significant. First, the Supreme Court introduced the principle of judicial review of legislation in the case of *Marbury* v. *Madison* (1803).[6] Accordingly, the Court can invalidate all or part of any legislation on the ground that it contravenes the Bill of Rights or other enumerated rights in the Constitution.[7] Second, by a series of decisions throughout the twentieth century, the Supreme Court "nationalized" the rights enumerated in the Bill of Rights, by holding that the rights must be honored by *state and local* governments as well as by the federal government.[8]

The third significant development in the Supreme Court's jurisprudence on civil and political rights was its belated interpretation of the Constitution to prohibit discrimination on the grounds of race and gender. The famed "equal protection clause" of the Fourteenth Amendment to the Constitution, passed in 1868, provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Throughout the nineteenth century and the early part of the twentieth century, the Court consistently interpreted the Fourteenth Amendment and other constitutional provisions *not* to require the equal treatment of races and of men and women. Finally, in the landmark case of *Brown* v. *Board of Education* (1954), the Supreme Court declared racial segregation in government schools to be unconstitutional under the equal protection clause of the Fourteenth Amendment, rejecting the argument that facilities could be "separate but equal."[9]

In addition to its jurisprudence on the Fourteenth Amendment, the Supreme Court – when composed of more "liberal" judges – has adopted expansive interpretations of other constitutional provisions to prohibit discrimination. In *Heart of Atlanta Motel* v. *United States* (1964), the Court upheld the Civil Rights Act of 1964 which prohibited discrimination even in private hotels having more than five rooms and meeting certain other criteria.[10] The Court held that the Civil Rights Act was a valid act of Congress under its constitutional power to regulate interstate commerce, since discrimination in such facilities could have an adverse impact on commerce between states. Thus the present position is that discrimination as to the enjoyment of civil and political rights is first, when resulting from *governmental* acts, prohibited by the Constitution and second, when resulting from

private acts, prohibited by federal legislation to the extent that such legislation is permitted under the enumerated powers of the federal government in the Constitution (such as its power to regulate interstate commerce).[11]

Internationally recognized civil and political rights

More expansive judicial interpretations of civil and political rights under domestic law have generally not been mirrored by an increased commitment of the US government towards *international* laws protecting civil and political rights. The USA only ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1994, and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1994. Even so, each of these conventions was ratified subject to a number of reservations, declarations, and understandings (RUDs). The essence of these RUDs is to limit the application of the conventions to rights recognized under the laws of the USA.

For example, in its RUDs with respect to the ICCPR, the USA reserved the right to impose capital punishment on persons below 18 years of age in certain circumstances. It also stated that it considers the prohibition of "cruel, inhuman or degrading treatment or punishment" in Article 7 of the ICCPR as equivalent to prohibition of cruel and unusual treatment or punishment by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution.[12] Even more significantly, the USA in its RUDs declared each of the conventions *not* to be self-executing, thereby preventing individuals in the USA from directly enforcing its provisions in domestic courts.[13]

Aside from its extensive RUDs to the ICCPR, CAT, and CERD, the USA is not a party to several important treaties protecting civil and political rights. For example, it has signed but not ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and it is not party to either of the optional protocols to the ICCPR.

The USA's ambivalent approach to international treaties protecting civil and political rights appears to be driven by the assumption that it already has sufficiently strong domestic mechanisms for protecting such rights. This view is exemplified by the position of a leading US constitutional scholar, who asserts that international human rights treaties are designed for *other* nations, whose domestic institutions fail to adequately protect rights.[14] Yet, as many have pointed out, a number of important rights enumerated in international human rights treaties are *not* guaranteed by the Constitution or other laws of the USA, such as the prohibition on applying the death penalty to minors and several economic, social, and cultural rights.

The following sections will examine the extent to which certain civil and political rights are in fact guaranteed by the Constitution and laws of the USA, with particular reference to the jurisprudence of the Supreme Court.

Freedom of thought, consciousness, and religion

Overview

There is no officially imposed orthodoxy in the USA or in any of its component states, nor does the government directly subsidize religion or impose any registration requirement for religious, philosophical, or similar groups. Indeed, the First Amendment to the Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." This prohibition on the establishment of any religion (the so-called "establishment clause") and on preventing the free exercise of religion (the "free exercise clause") applies to all tiers of government: federal, state, and local.[15] The drafters of the First Amendment clearly intended to preclude the official imposition of religion as practiced by their British colonial rulers and to enable the religious diversity and tolerance sought by many of the first white settlers, such as the Puritans.

Yet despite the diversity of religions and beliefs in the USA today, there are three aspects of religious belief which continue to subtly influence US public life. First, compared to the populations of other Western, industrialized nations, a strikingly high proportion of Americans believe in God or otherwise describe themselves as religious. Nine out of ten Americans say that they have never doubted the existence of God[16] and a Gallup poll conducted in 2003 revealed that over 60 percent of Americans say that religion is very important in their personal lives, while an additional 24 percent say that religion is fairly important.[17] Second, the same poll found that the religious affiliation of most Americans is overwhelmingly Christian, with more than eight in ten Americans identifying their religious preference as Christian. Third, as a related aspect, Americans are divided on whether the state should be secular. A *Newsweek* poll in 2002 revealed that 45 percent of Americans believe that "the United States is a secular nation," while an exactly equal proportion believe that it is either a "Christian" or "biblical" nation.[18] These three factors continue to inform public, political, and judicial perceptions of what constitute permissible and impermissible intrusions into freedom of conscience and religion in the public sphere.

Free exercise of religion

A fundamental question the Supreme Court has grappled with is what constitutes "religion" for the purposes of the First Amendment? The initial definitions adopted by the Supreme Court were very narrow by contemporary standards. Thus in *Davis* v. *Beason* (1890), the Court defined religion as "one's view of his relations to his Creator and to the obligations they impose."[19] During the 1960s and 1970s, the Court revisited its definition of religion in the context of applying a federal statute that exempted persons from military combat for reasons of "religious training and belief." In *Welsh*

v. *United States* (1970), the Court broadened its definition of religion by applying the statutory exemption from military service to persons having "strong beliefs about . . . domestic and foreign affairs" or even conscientious objection to participation in *all* wars based to a substantial extent on "considerations of public policy."[20] It held that such beliefs were different from views that are not deeply held and rest "solely upon considerations of policy, pragmatism or expediency."[21] The *Welsh* decision concerns the interpretation of legislation rather than of the Constitution and therefore, the Court has not directly pronounced a modern definition of "religion" in the context of the First Amendment. But it would appear that a belief is now entitled to the protection of a religious belief if it is deeply, conscientiously, and consistently held.

In applying the "free exercise" clause of the First Amendment, the Supreme Court has applied two distinct tests to determine if a federal, state, or local government impermissibly prohibited the free exercise of religion. Under either test, a prior restraint on the exercise of a particular religion is void, but there are important nuances between the two. The first test was enunciated in *Sherbert* v. *Verner* (1963), in which the Court determined the constitutionality of an unemployment benefits law that effectively precluded benefits to any person who did not take their weekly rest day on Sundays.[22] The Court held that the law was discriminatory to Seventh-Day Adventists who consider Saturday as their Sabbath, reasoning that whenever a government burdens the free exercise of religion, it is subject to a two-stage test: it must show the law was advancing a compelling secular interest *and* that the law was the least restrictive means of achieving that interest. In this case, even if the government's stated interest of preventing unscrupulous claims for unemployment benefits was compelling and secular, requiring a uniform rest day was not the least restrictive means of achieving that interest.

The Court in recent years has adopted an alternative test that is generally easier for a government to satisfy when restricting the exercise of religious beliefs. The Court has shifted towards upholding a law or policy that burdens the free exercise of religion if it is a generally applicable law that is religiously neutral. This test was applied in *Employment Division, Department of Human Resources* v. *Smith* (1990). In that case, a 6:3 majority of the Court upheld a state law that criminalized the possession of peyote unless prescribed by a doctor, irrespective of the fact that peyote is widely recognized as a substance used for sacramental purposes among Native American communities.[23] Adopting a formalistic approach, the law was deemed "generally applicable" and "neutral", as it did not seek to burden Native American communities *per se*. Like the *Sherbert* test, the *Smith* test requires that the law in question is not directed at any particular religious group or groups.[24] But a law burdening a religious belief or practice is generally more likely to be upheld under the *Smith* test, not least because the *Smith* test does not require that the law be the "least restrictive means" of achieving a governmental interest.[25]

Free speech

The right to free speech in the USA is protected by the "free speech clause" of the First Amendment, which prohibits Congress or any other level of government[26] from "abridging the freedom of speech." The drafters of the Bill of Rights left no doubt that the First Amendment also protects freedom of the press, by adding the clause "or of the press" immediately following the word "speech." The jurisprudence of the Supreme Court in this area is particularly voluminous and complex and this section will provide only an overview of the right to free speech in specified contexts.

At the outset, it should be noted that several forms of "speech" are protected by the free exercise clause. The Court has recognized that the free speech clause protects not only written or spoken *words* but in addition, certain forms of *conduct* that are "sufficiently imbued with elements of communication."[27] The Court has deemed such "expressive conduct" to include picketing,[28] flag-burning,[29] wearing arm-bands in protest of a war,[30] and burning crosses.[31] Furthermore, it acknowledged silence as a form of speech, when it upheld the right of students not to recite the US pledge of allegiance at school.[32] The Court has generally held that laws regulating "expressive conduct" are subject to the same stringent level of scrutiny as laws regulating written or spoken words: such laws must be content neutral, narrowly tailored to achieve a clear and legitimate government purpose, and, absent extraordinary circumstances, must not constitute a prior restraint of such conduct or speech.[33]

Cases involving criticism of government

Persons, associations or groups criticizing the government have been subject to varying standards that have largely depended on two factors: first, the prevailing national security concerns at the time a particular case was decided and second, the "liberality" of the composition of judges on the Court at that time. Thus throughout much of the twentieth century, the Court frequently upheld convictions of persons advocating or publishing communist ideas, even though such convictions were pursuant to laws or governmental actions that targeted communist or left-wing individuals or groups and therefore were clearly not content neutral.[34] The Court reasoned that the government could restrict speech that constituted a "clear and present danger"[35] or even a "threatened danger"[36] to the existence and security of the state.

Under the stewardship of the liberal Chief Justice Earl Warren in the 1960s, the Court adopted a more circumspect view of laws restricting freedom of speech. In *New York Times* v. *Sullivan* (1964), the Court belatedly declared an eighteenth-century Sedition Act to be unconstitutional, declaring that the First Amendment prohibits the government from criminally punishing individuals who speak out against the government.[37] In *Brandenburg* v. *Ohio* (1969), the Warren Court held that the First Amendment does not

permit laws that proscribe advocacy of the use of force or violation of law except where such advocacy is "directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action."[38] Employing this test, the Court in *Brandenburg* struck down Ohio's Criminal Syndicalism Act which prohibited advocating "crime, sabotage, violence or unlawful methods of terrorism" and reversed the conviction of a member of the Ku Klux Klan who stated that "if our President, Congress, our Supreme Court, continues to suppress the white, Caucasian race . . . there might have to be some revengeance [sic] taken."[39]

Use of defamation law to limit political speech

The Supreme Court has effectively prevented the government's use of defamation law to harass opponents and thereby limit political speech. In *New York Times* v. *Sullivan* (1964), it held that plaintiffs in defamation cases who were public officials need to demonstrate that the allegedly defamatory statements: (a) contained falsehoods; (b) were damaging to the plaintiff's reputation; *and* (c) were made with actual malice (i.e. with knowledge of the falsehoods or with reckless disregard of whether the statements were false or not).[40] The Court reasoned that actual malice is a necessary component vis-à-vis public officials because a "central meaning" of the First Amendment is to guarantee a citizen's right to criticize the government.[41] A person is a "public official" if there is clear evidence of first, general fame or notoriety in the community, and second, pervasive involvement in the affairs of society. Hence, a lawyer who was active in community affairs and well known in professional circles, could not be considered a public official if none of the prospective jurors in the case had ever heard of him,[42] but elected city commissioners[43] and prominent and politically active evangelists[44] *are* public officials.

Prior restraint

As noted above, the Court is loath to permit prior restraints of free speech by individuals and groups; that is, to ban such speech even before it had been made.[45] The Court has been even more circumspect in permitting prior restraint of media publications. In *Near* v. *Minnesota* (1931), the Court struck down a state law which permitted gag orders of "malicious, scandalous, and defamatory" publications. The Court did recognize certain vital governmental interests that may justify prior restraint, including the regulation of obscenity and, significantly, the interest of national security.[46] However, the national security justification was narrowly construed in *New York Times* v. *United States* (1971).[47] In that case, the government tried to ban the publication of newspaper articles relating to the US military involvement in Vietnam based on classified government documents, on the grounds that such publication would "gravely damage" national security. The Court rejected the government's demand, holding it to be incompatible with the First

Amendment. The Court deemed that the government's national security interest was sufficiently protected by existing criminal laws protecting government property and state secrets. These laws could form the basis of criminal prosecution *following* publication, although naturally, courts would then be responsible for determining the validity and applicability of the relevant criminal laws. The Court's decision seems to suggest that the government can almost never rely on the national security exception identified in *Near* to the general rule against prior restraint.[48]

Some commentators have argued, however, that regardless of the breadth of freedom of speech and freedom of the press under *law* in the USA, a significant amount of self-censorship occurs *in practice*. Noam Chomsky, for example, has argued that there is "no . . . opposition press" in the USA and that nation's media systematically reflects governmental interests and a "business-dominated consensus."[49] Similar criticisms emerged more recently in the context of the media's reporting of the 2003 war in Iraq. The executive government employed "voluntary" mechanisms, such as a request by the Department of Defense that journalists refrain from publishing information which could harm national security. The government relied on sympathetic public opinion to ensure media compliance with a request to use "caution" in broadcasting videotapes airing the views of Osama Bin Laden or other members of A1 Qaeda.[50] The US military embedded approximately 500 journalists in their military units in Iraq and among the several broadly worded conditions of such an assignment was that "journalists 'inadvertently exposed' to 'sensitive' information will be briefed on what to avoid covering in their reports."[51] It is likely that embedded journalists (and to a lesser extent, their colleagues in news agencies and organizations) were psychologically more inclined to report from the military's point of view. A few leading journalists have given credence to this argument. Christiane Amanpour from the cable news network CNN, for example, has commented that the press "self-muzzled" in reporting the Iraq war and that her own station was intimidated by the Bush administration.[52]

It should be recalled that it may be possible for government agencies to indirectly restrict political speech by restricting *access* to, rather than publication of, information. The Freedom of Information Act[53] (FOIA) sets forth procedures whereby any member of the public may obtain access to the records of federal government agencies. Yet the FOIA also contains significant limitations, which have been heavily relied upon by federal government agencies seeking to avoid disclosure of documents connected to the "war on terror." For instance, in *Center For National Security Studies* v. *US Dept of Justice* (2003), a federal appeals court upheld the government's failure to disclose the names of hundreds of persons it detained in connection with the attacks on September 11, 2001, on the basis that FOIA does not apply when disclosure "could reasonably be expected to interfere with enforcement proceedings."[54] Similarly, the FOIA does not require disclosure of "personnel and medical files and similar files the disclosure of which would constitute a

clearly unwarranted invasion of personal privacy."[55] Presumably, the Department of Defense relies on this ground to justify its controversial policy of refusing to release photographs of coffins containing the bodies of American soldiers who died in Iraq.[56]

Freedom of assembly

The First Amendment in the Bill of Rights prevents Congress or any other level of government[57] from making any law abridging the "right of the people peaceably to assemble."

Registration requirements

As with laws abridging free speech, the Supreme Court's willingness to uphold laws requiring the registration of groups and their members has rested on: (a) prevailing national security concerns at the time the case was decided; and (b) the political or philosophical leanings of judges on the bench at that time.

During the height of the so-called "Red Scare," the Court in *Communist Party of the United States* v. *Subversive Activities Control Board* (1961) upheld a federal order that required members of the Communist Party to register with the Attorney-General.[58] The more liberal direction of the Court in later years led to more judicial scrutiny of registration requirements. Hence in *Albertson* v. *Subversive Activities Control Board* (1965), the Court invalidated a similar order requiring the registration of Communist Party members.[59]

It remains to be seen how the Court will respond to any registration requirements imposed during the present national security climate. The Patriot Act of 2001[60] does not require members of any organization to register with the government, but it contains a variety of provisions outlawing certain activities in relation to "terrorist organizations," which are organizations engaged in terrorist activities as defined in the Act *and* organizations "designated" as such by specified governmental agencies and officers. Prohibited activities in relation to terrorist organizations include soliciting persons to be members of such an organization, unless the solicitor can demonstrate that he or she did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity.

Content-based restrictions on assembly

The Court has previously held that the government may not impose content-based limitations on the freedoms of assembly and association, although it does have a limited capacity to restrict the speech or conduct of persons in the course of such assembly or association. Thus in *Brandenburg*, the Court held that a statute that "purports to punish . . . on pain of criminal punishment,

assembly with others merely to advocate [a] described type of action" violates the First Amendment, unless the advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[61]

The Court has indicated that a person cannot be charged merely by association with a person or group that engages in unlawful advocacy of the type specified in *Brandenburg*. In *De Jonge* v. *Oregon* (1937), it overturned the conviction of a member of the Communist Party, holding that De Jonge himself had not engaged in any subversive activity[62] and in *Brandenburg*, the Court overruled its decision in *Whitney* v. *California* (1927) where it had upheld the conviction of a member of the Socialist Party on the basis that she had associated with a party dedicated to overthrowing the US government.[63] These decisions would suggest that the provision in the Patriot Act prohibiting incitement to commit a terrorist activity either individually *or* "as a member of an organization" is unconstitutional.[64] But again, it is difficult to predict how the Court will construe such provisions in light of prevailing political and public concerns about national security and, furthermore, the more conservative composition of the bench.

Time, place, and manner limitations

In contrast to its general aversion to content-based limitations, the Court has upheld time, place, and manner limitations so long as they satisfy three conditions: first, the limitations serve a legitimate government interest; second, they are narrowly tailored to further that interest; and third, there are adequate procedural safeguards.

In *Edwards* v. *South Carolina* (1963), the Court held that removing peaceful protesters from the grounds of a state legislative building was unconstitutional, as there was no legitimate interest in such a limitation on the place of assembly, especially given the First Amendment's protection of the right "to petition the government for a redress of grievances."[65] By contrast, the Court has held that the government does have legitimate security interests in prohibiting protests outside jailhouses.[66] The requirement that limitations be narrowly tailored to the governmental interest was applied in *Hill* v. *Colorado* (2000) to uphold a law that prevented demonstrators outside abortion clinics and other health care facilities from approaching within eight feet of any other person without that person's consent. The Court in *Hill* held that the prohibition was narrowly tailored to achieve the government's legitimate interests in protecting privacy and access to health care facilities, as it still allowed the demonstrators to communicate at a "normal conversational level." The Court reasoned that this factor distinguished the law from a similar law mandating a fifteen foot "zone of privacy" at abortion clinics which it had struck down in an earlier case.[67]

Laws and regulations that require permits for mass gatherings have generally been upheld by the Court as valid time, place, and manner limitations.[68] However, in *Forsyth County, Georgia* v. *Nationalist Movement* (1992), the Court invalidated an ordinance that allowed an official to fix a permit

fee in an amount up to $1,000 depending on his or her estimated cost of providing sufficient security during the gathering.[69] The Court held that the ordinance lacked procedural safeguards as it granted excessive discretion to the official. Furthermore, because the exact amount of the fee depended on anticipated hostility to the gathering, the ordinance was not content neutral. Time, place, and limitations must therefore not indirectly repress the content of a message. Correspondingly, the limitations must not constitute a prior restraint. In *National Socialist Party* v. *Skokie* (1977), the Court invalidated a set of ordinances banning a planned march by a Nazi party.[70]

Physical integrity rights and derogation of civil and political rights

There are several laws and executive decisions which allow physical integrity rights to be compromised and/or for the derogation of civil and political rights. This section will first briefly consider the application of the death penalty in the USA, which is applied irrespective of national security considerations. It will then discuss three of the most controversial facets of the current "war on terror": first, the establishment of military tribunals to try suspected terrorists; second, the detention of "enemy combatants", mostly at Guantánamo Bay in Cuba; and third, the Patriot Act.

Death penalty

The use of the death penalty arguably constitutes the most pervasive violation of the right to life in the USA.[71] The Supreme Court in *Gregg* v. *Georgia* (1976) effectively restored the constitutionality of the death penalty, determining that it did *not* violate the Eighth Amendment's prohibition of "cruel and unusual punishments" when applied to persons convicted of murder in certain circumstances.[72] In the late nineteen-eighties, the Court also affirmed the constitutionality of the death penalty when applied to juvenile offenders who are at least 16 years of age when they committed murder.[73] At present, thirty-eight states permit the application of the death penalty and twenty-two states permit its application to persons who are 16 or 17 years of age.[74] Since the ruling in *Gregg*, over 850 convicted persons have been executed, including twenty-two juveniles.[75] In addition to holding that the death penalty does not violate the "cruel and unusual punishments" clause of the Eighth Amendment, the Court has also rejected arguments that the death penalty violates the "equal protection" clause of the Fourteenth Amendment, when presented with evidence that the death penalty has a heavily disproportionate impact on African-Americans.[76]

More recently, however, the Supreme Court has adopted a more circumspect approach towards the death penalty. In *Atkins* v. *Virginia* (2002), the Court determined the death penalty is unconstitutional when applied to mentally retarded persons.[77] In January 2004, the Court agreed to review the constitutionality of the death penalty for juvenile defendants during its October 2004 term.[78]

Nevertheless, public support for the death penalty, at least as applied to adults, remains high. A Gallup poll conducted in May 2003 showed that 74 percent of Americans "favor the death penalty for a person convicted of murder", compared to 66 percent of Americans in 2000.[79] In the context of such broad public support, it is unlikely that the Court will determine that the death penalty is wholly unconstitutional in the foreseeable future.

Military tribunals

President Bush issued a military order on November 13, 2001 (hereinafter, the Military Order) providing that non-citizen terrorist suspects could be tried by military tribunals for violation of the laws of war and "other applicable laws", instead of by normal, civilian courts.[80] On April 30, 2003, the Pentagon issued an "illustrative" list of crimes that could be tried by military tribunals, which include employing poison or analogous weapons, torture, rape, spying, and aiding the enemy.[81] The Military Order derogated from a number of due process rights, including the right to a public trial provided by the Sixth Amendment, the right against self-incrimination provided by the Fifth Amendment, the right to appeal the decision of the tribunal, and the right to a trial by jury. The Military Order provided that verdicts and sentencing (including the death penalty) could be made upon a two-thirds vote and furthermore, it did not specify whether defendants had a right to counsel of their own choosing.

Following vociferous criticism of the Military Order from certain quarters, the Bush administration issued revised procedures governing the tribunals on March 21, 2002,[82] which provided for greater judicial safeguards, including the requirement of a unanimous vote for the imposition of the death penalty. However, the military tribunals still lack other due process rights afforded to defendants in civilian courts, including the right of appeal. The right to counsel is compromised because defendants are only guaranteed defense by a military lawyer.[83] A more systemic concern surrounding military tribunals is that members of particular races and national backgrounds are invariably more likely to be subject to the military tribunals. This reflects the inequitable burdens similarly suffered by other minorities in US history when national security concerns were invoked to justify derogations from civil and political rights, such as during the Second World War when Americans of Japanese ancestry were singled out for internment.[84]

At the time of writing, no person has actually been tried by a military tribunal. In June 2004, the administration announced that it had established a five-member tribunal to hear charges against three detainees at Guantánamo Bay.[85]

Detention of "enemy combatants"

The prolonged detention of foreign "enemy combatants" at Guantánamo Bay constitutes another significant derogation from civil and political rights

afforded under domestic law and international law, including under international humanitarian law. The first group of detainees arrived at Guantánamo Bay from Afghanistan on January 11, 2002 and over 700 individuals, including minors, have been detained there to date.[86]

In addition, the government has designated three US citizens as "enemy combatants." The US "enemy combatants" have been detained in the USA rather than at Guantánamo Bay, but the government has nevertheless asserted that they are not entitled to normal due process rights, such as to judicial review of their detention.[87] Again, racial disparities are evident in the executive designation and treatment of enemy combatants. At least one influential commentator has noted the contrasting fates of John Walker Lindh (a white US citizen who fought for the Taliban), who hired an expensive lawyer and was sentenced to prison under a plea bargain and of another US citizen, Yaser Esam Hamdi, who languished in detention incommunicado and without access to a lawyer for almost two years, before the Department of Defense finally permitted him to obtain a lawyer in the course of an appeal to the Supreme Court.[88]

On June 28, 2004, the Supreme Court held – by a majority of 6:3 – that the detainees at Guantánamo Bay have the right to appear before US courts to challenge the legality of their detention. The Court's concurring judges adopted several lines of reasoning, but were primarily influenced by the fact that the detainees had not been afforded access to a judicial process for over two years and that Guantánamo Bay was a "territory over which the United States exercises exclusive jurisdiction and control."[89] It is possible that the judges were also (rightly) mindful of the recently published evidence of torture and ill-treatment of detainees by the US military in Iraq. The Court's judgment did not conclusively determine whether the government will be able to avert the detainees' access to regularly constituted courts by trying them before military tribunals and/or by detaining them in a location outside of its "exclusive jurisdiction and control."[90] On the same day that it issued its decision on detainees at Guantánamo Bay, the Court also held in a separate decision in *Hamdi* v. *Rumsfeld* that American citizens who are classified as "enemy combatants" are entitled to "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[91] The Court was fractured on several key issues regarding the detention and trial of American citizens, but a plurality considered that such a "neutral decisionmaker" could be "an appropriately authorized and properly constituted *military tribunal*," rather than a regular court.[92]

Patriot Act

The Patriot Act constitutes a third set of controversial executive derogations from civil and political rights. The Patriot Act grants the Attorney-General the power to detain non-citizens certified by the government as suspected terrorists for a maximum of seven days prior to charging them or initiating

immigration procedures against them, and another six months following such charge or initiation.[93]

The provisions relating to detention in the Patriot Act are actually narrower than what the Attorney-General had originally envisioned, and consequently the Bush administration has relied on the broader regulatory powers of the Immigration and Naturalization Service (INS)[94] to detain non-citizens for longer than permitted under the Patriot Act.[95] On September 20, 2001, the Department of Justice (which oversaw the functions of the INS until March 1, 2003) issued an interim regulation that authorized the detention of non-citizens without charge for forty-eight hours or an "additional reasonable time" in the event of an "emergency or other extraordinary circumstance."[96] This marked a radical departure from the previous time limit of twenty-four hours.[97] Since September 11, 2001, more than 1,200 persons[98] have been detained and over 750 of them were then held without trial for further investigation, mostly on account of minor infractions of visa conditions. The names of over 1,000 of the detained persons have been kept secret. The secrecy surrounding the detentions has made it near impossible to know the length of time suspects were detained and other conditions of detention. Even internal governmental reports, however, indicate highly abusive conditions of detention and fundamental absences of due process.[99] Most detainees appear to have been released; the last publicly available information on their detention was issued in March 2002, when around 300 remained detained without trial.[100]

The Patriot Act also significantly expands the government's ability to conduct electronic surveillance of both citizens and non-citizens, thereby narrowing their rights to privacy and to be free from unreasonable searches and seizures under the Fourth Amendment.[101] Section 215 of the Patriot Act, for example, allows the Federal Bureau of Investigation to compel any person to produce any record or document concerning themselves or others – including their clients or customers – for an investigation to protect against international terrorism or clandestine intelligence activities. Section 215 significantly oversteps the Court's long-standing interpretation of the Fourth Amendment, that searches must be conducted with a warrant based on probable cause of criminal wrongdoing, except in narrowly defined circumstances (such as where a person voluntarily consents to a search, or where a search without a warrant is necessary to ensure the safety of a law enforcement official).[102] The Supreme Court is yet to determine the constitutionality of this and other provisions of the Patriot Act.

Public opinion on government policies

The aforementioned derogations of civil and political rights have been denounced by human rights groups and other segments of US society but are implicitly supported by a significant proportion of the American public, who still live in a climate of fear following the events of September 11, 2001. In a

poll conducted in August 2003, 74 percent of respondents stated that the Bush administration either has been "about right" or has "not gone far enough" in restricting peoples' civil liberties in order to fight terrorism. Only 21 percent stated that the administration has "gone too far" in restricting people's civil liberties in order to fight terrorism.[103] The majority's complacency about the recent derogations of civil liberties appears to be partly induced by the fact that the government has so far directed the enforcement of these laws at persons of "foreign" extraction (whether American or non-American citizens).

Economic, social, and cultural rights in the USA

Despite derogations and other obstacles to implementing civil and political rights in the USA, such rights are fundamentally recognized in legal, political, and public discourse as "rights" appertaining to individuals. By contrast, there is a marked disinclination to recognize similarly economic and social rights as rights which appertain to either individuals or communities. There is a tendency among the public to identify human rights as the rights set forth in the Bill of Rights and elsewhere in the Constitution;[104] and among politicians, to view economic and social rights as entitlements advocated by socialist nations.[105] A further limitation to the nationwide realization of economic and social rights in the USA is that matters relevant to such rights, such as education and shelter, are generally considered to be within the domain of state and local governments, albeit with the aid of some federal funding. There is somewhat more political and judicial sympathy for the concept of cultural rights than for economic and social rights, but when faced with tensions between individual civil and political rights, on the one hand, and group-oriented cultural rights, on the other hand, both legislators and judges have generally prioritized the former.

The relative antipathy towards economic, social, or cultural rights in domestic law is reflected in the USA's stance towards economic, social, and cultural rights in international law. The US has signed but not ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Aside from Somalia, it is the only country that has not ratified the Convention on the Rights of the Child (CRC).[106] This lack of commitment to international treaties concerning economic, social and cultural rights cannot be explained by the same factors that undermine the USA's commitment to treaties concerning civil and political rights. The USA's ambivalence towards the ICCPR and other treaties concerning civil and political rights appears to rest on a belief that the USA already has a strong domestic commitment to civil and political rights which would not be improved – and may even be reduced – by international norms.[107] By contrast, its approach to economic, social, and cultural rights in international law appears grounded in an ideological skepticism towards accepting matters like shelter, medical treatment, or even food as "rights." Accordingly, the USA has actively discouraged, for example, recognition of a right to housing[108] and the right to development in

international law.[109] Indeed, it was the only state to vote against the Declaration on the Right to Development adopted by the General Assembly in 1986 and the lone state to vote against the declaration reaffirming the right to development in 1995.[110]

One additional factor hindering the acceptance of international human rights treaties in the USA (both economic, social, and cultural rights treaties *and* civil and political rights treaties) is a common perception that such treaties are in some measure "anti-family." This view has spurred the efforts of many conservatives (and to an extent, persons of some religious persuasions) against the CRC and CEDAW in particular, but also against other treaties that explicitly or implicitly counter the traditional conception of the family or prejudice the autonomy of individual families. Proponents of this view exhibit particular concern over provisions that recognize the rights of persons of different sexual orientations to marry and to raise children, or deem abortion to be a woman's right, or require all children be provided with the same level and type of education.

Education

An overwhelming majority of Americans complete their secondary school education and a majority also receives some tertiary education.[111] Nonetheless, issues of equity gnaw at the right to education in the USA. With respect to primary and secondary education, inequities are most apparent in the disparities among educational facilities.

The Constitution does not expressly recognize the right to an education, nor has it been interpreted to guarantee such a right. The dominant view is that primary and secondary education is a matter for state and local governments to implement. As recently as March 2004, the current Education Secretary remarked that the Bush administration is revising federal laws on education because "[e]ducation is a state responsibility, so we have to fit the law to what the states are doing."[112]

As a matter of fact, all fifty states guarantee access to a public (i.e. government-provided) education in their constitutions or legislation.[113] Yet, public primary and secondary school are primarily operated and financed at the *local* government level, rather than on a state-wide basis. Public schools receive less than 10 percent of their funding directly from the federal government and receive limited, albeit varied, amounts of state funding.[114] Public schools are largely funded by local governments with revenue received from local property taxes levied on owned residential and commercial properties within the local government's boundaries. Consequently, there are wide disparities even within a single state. Affluent localities tend to be markedly better funded and provide significantly better educational opportunities than poorer localities. It is therefore unsurprising that a 1999 Harvard University study found that 40 percent of students in Washington, DC's poorest districts fail to complete secondary school, and that 40 percent of students in Philadel-

phia's poor districts score below the fifteenth percentile on standardized tests, compared to just 6 percent from Philadelphia's wealthy districts.[115]

In *San Antonio Independent School District* v. *Rodriguez* (1973),[116] parents residing in a poorer district in Texas contended that such disparities violate the equal protection clause of the Fourteenth Amendment. In its decision, the Supreme Court acknowledged that the provision of education is one of the most important services performed by states, but it refused to deem education a "fundamental right" for the purposes of review under the equal protection clause in the federal Constitution. The Court further declared that even if some minimum level of education were guaranteed by the Constitution, this was not violated by what it characterized as "*relative* differences in spending levels" among districts.[117] For a school funding system to be even potentially unconstitutional, it must fail in an acute or even absolute sense – by failing "to provide each child with an opportunity to acquire the *basic* minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[118]

Medical treatment

Impediments to medical treatment

There are three major impediments to the right to obtain medical treatment in the United States. The first is the absence of a national health insurance program in the United States. Approximately 40 million people lack insurance to pay for medical treatment, representing 14 percent of the general population.[119] An Organization for Economic Co-operation and Development (OECD) report issued in 2002 concluded that the "uninsured population is disproportionately poor or near poor."[120] The absence of universal health insurance also has starkly disproportionate effects on other segments of the population, including on the young, on minorities and on foreigners. The 2000 Census revealed that 27.3 percent of persons aged 18–24, 32 percent of Hispanic persons, and 41.3 percent of non-citizens, lacked health insurance.

Second, expenditure on health in the USA is the highest in the world. Total spending on health in 2000 represented about 13 percent of GDP (representing an average annual expenditure of US$4,631 per person).[121] Less than half of the total health expenditure in the USA is public spending.[122] While a high level of health expenditure does not in itself impede the right to obtain medical treatment, the OECD has noted that the *prices* of medical goods and services in the USA, and especially of prescription medicines, are "significantly higher than in other countries and serve as a key determinant" of the high level of health spending.[123] In addition, there has been a shift in preference to using prescription medicines instead of preventive and other methods of treatment, partly as a result of newly permissible direct and mass-media advertising to consumers by pharmaceutical corporations, which has insulated prescription medicines from price sensitivity.[124] The high prices

of medical treatment undoubtedly impair the ability of the 40 million Americans who are uninsured to obtain medical treatment. But they have also impaired access to medical treatment by persons who do possess insurance, as insurance providers have reacted to increased medical costs by offering insurance plans with fewer benefits and more limitations; for example, with restrictions on the patient's choices of treatment and doctor. Hence approximately 60 million Americans possess a basic level of insurance but can be considered as "under-insured" or as lacking adequate insurance.[125]

The third impediment to medical treatment represents the ideological foundation of the first two impediments and more generally, of health care policy in the USA. Specifically, there is more prevalent belief in the USA than in most other industrialized nations that medical treatment is a product for private individuals to consume, rather than a right or entitlement for the government to ensure to all. This belief is reflected by the lack of any federal constitutional guarantee of the right to health or to medical treatment. Unlike with respect to education, not even state constitutions guarantee the right to health or to medical treatment.[126] The belief that medical treatment is a matter for private consumption was starkly articulated in 1993 by the then leader of the House of Representatives, Dick Armey, who commented that "[h]ealth care is just a commodity, just like bread, and just like housing and everything else."[127] Correspondingly, there is public skepticism of any expansive government role in the provision of health care. Poll results have shown that 69 percent of Americans agreed with the statement that when something is run by the government, it is usually inefficient or wasteful. Indeed, a plan by the Clinton administration to introduce a universal health insurance program collapsed ultimately because of public fears – fueled by media campaigns by conservative activists – of a looming new government bureaucracy that would ensue from a universal health care program.[128] It appears unlikely that another proposal for universal health insurance will be introduced, let alone succeed, in the foreseeable future.

Schemes facilitating access to medical treatment

Yet despite the rejection of an overarching government role in guaranteeing medial treatment, Americans do widely acknowledge, and indeed demand, a *limited* role of government in remedying impediments and inequities regarding access to medical treatment. The federal government has implemented three primary statutory schemes to address these impediments and inequities. First, the Medicare scheme provides insurance for hospital costs to almost all American citizens and permanent residents over the age of 65, regardless of their socio-economic status. However, physicians' and other outpatient services, including prescription medicines, are provided only by payment of a premium.[129] The Bush administration passed the Medicare Modernization Act in 2003, which provides subsidized premiums for coverage for prescription medicines on a sliding scale, so that persons in the lowest income

category will not have to pay any premium to obtain coverage for prescription medicines (although they will have to make limited co-payments for such medicines).

Second, Medicaid and the State Children's Health Insurance Program provide limited health insurance to indigent adults and children. Both programs are primarily funded by the federal government but permit states leeway to tighten or broaden eligibility criteria and coverage, in accordance with their own funding priorities. Persons eligible for these programs are covered for a relatively wide range of health services, including preventive screening, and certain prescription medicine benefits. Faced with the escalating costs of medical care, however, many states have tightened eligibility and reduced benefits. States have been especially prone to adopting restrictive measures during economic downturns, when greater numbers of people enroll in the programs.[130] A recent study found the eligibility criteria to be particularly harsh in fourteen states, which require that a working family of three must earn below 50 percent of the federal poverty level in order to be eligible for Medicaid.[131]

Thirdly, the Emergency Medical Treatment and Active Labor Act (EMTALA) imposes a duty on Medicare participating hospitals to medically screen a patient to determine if an emergency medical condition exists; and if there is such an emergency medical condition, to provide stabilizing emergency care regardless of whether the patient has health insurance.[132] The statute provides for penalties to be imposed on hospitals for noncompliance, in the form of fines and of revocation of licenses for repeat, egregious violations. However, several commentators have severely criticized both the interpretation of EMTALA by courts and its enforcement by the federal government, for failing to adequately protect poor and uninsured patients. Federal appeals courts have narrowed the duty to provide stabilizing emergency care in EMTALA, by holding that the duty only arises when the hospital has "*actual* knowledge" of the emergency medical condition.[133] Hence, a hospital that has *negligently* determined that there is no such emergency and fails to provide emergency care cannot be liable. Furthermore, commentators point to a lax enforcement of the penalty provisions of EMTALA. Although 153 hospitals were found to have violated EMTALA in the twelve months ending March 31, 1995, 144 of these were not penalized at all.[134]

Rights to subsistence

Poverty and hunger in the USA

According to a US Census report issued in September 2001, 31.1 million persons (representing 11.3 percent of the population) lived below the poverty line in the year 2000.[135] Reports issued by the United Nations Development Programme and OECD indicate that the incidence of poverty is markedly

higher in the USA than in other developed nations.[136] Of particular concern is data issued by the OECD in 2003 indicating that 23.2 percent of children in the USA live in households with income below the poverty line, far exceeding the OECD average of 11.7 percent.[137] Amongst the OECD countries covered by the report, only Mexico had a higher incidence of child poverty.

According to a report issued by the USA Department of Agriculture in 2003, 12.1 million households (representing 11.1 percent of all households) in the USA were "food insecure" at some point during 2002.[138] Of this number, 3.8 million households (representing 3.5 percent of all households) suffered food insecurity acute enough to be described as "food insecure with hunger." Surveyed households were asked a number of questions relating to their experiences and behaviors with regard to food. The classification of "food insecure" was ascribed to households that at "some time during the year, were uncertain of having, or unable to acquire, enough food for all their members, because they had insufficient money or resources."[139] Households categorized as being "food insecure with hunger" were households that were food insecure to the extent that one or more household members were "hungry" and specifically, involuntarily hungry as a result of not being able to afford enough food.[140]

Food insecurity disproportionately affects certain segments of the population. For example, approximately 22 percent of both black and Hispanic households were food insecure at some time during 2002, as were 32 percent of households headed by a single woman and 38.1 percent of households living below the federal poverty level.[141]

Federally funded nutrition programs include programs to provide meals to schoolchildren and to women and their infants and children.[142] The largest federal nutrition program is the Food Stamp Program, which enables indigent households to receive vouchers to purchase food at participating stores. Households are eligible if their gross income does not exceed 130 percent of the federal poverty level and their net income does not exceed 100 percent of such poverty level; the value of the food stamp allocated to a household varies according to its net income level.[143] Significantly for homeless persons, households are eligible to receive food stamps even if they have no fixed mailing address.[144] However, the Food Stamp Program appears to be considerably under-utilized, impeding its effectiveness in combating food insecurity and hunger.[145] According to the Department of Agriculture Report referred to above, only about 32 percent of surveyed households who were "food insecure with hunger" *and* had incomes below 185 percent of the federal poverty level had participated in the Food Stamp Program in the previous thirty days.

Laws on homelessness, beggars, and vagrants

Evidently, methodological constraints make it difficult to estimate the number of homeless persons. Governmental and non-governmental estimates suggest

that between 2.3 and 3.5 million people, about 40 percent of whom are children, are homeless for some time over the course of a year.[146] Of these, it appears that a large proportion may be rendered temporarily homeless due to natural disasters, house fires, or other causes unrelated to poverty or mental health. The federal government has estimated that around 200,000 people are homeless on a chronic, protracted basis; but others have criticized the government's definition of "chronic homelessness" as too narrow and contend that the number of chronically homeless is much higher.[147]

Laws relating to vagrancy and begging are largely instituted by towns, cities and other *local* governments. Because of the sheer number of local governments in the USA and the variety of local ordinances they pass, it is difficult to make generalizations on laws relating to vagrancy and begging in the USA. However, cities and towns throughout the USA commonly employ ordinances that are directly and indirectly used against the homeless.[148] At least one major non-governmental report indicates a growing trend by cities and towns across the USA towards passing ordinances that directly or indirectly target the homeless.[149]

Ordinances that directly affect the homeless include laws restricting begging, sleeping, lying down, or sitting in public places. Ordinances that are indirectly used against the homeless include trespassing laws, laws restricting loitering or other "vagrant" behavior, laws prohibiting jaywalking and littering, and laws prohibiting intoxication and spitting in public places. These indirectly restrictive laws tend to be disproportionately used against homeless persons. Ordinances that directly and indirectly affect the homeless generally punish offenders in the form of fines. Significantly, these laws often provide for the imprisonment of offenders who do not – or cannot – pay the fine.

There have been numerous legal challenges to these ordinances by homeless persons and by organizations representing their interests. Although federal and state courts have generally upheld the validity of such ordinances, they have held some ordinances to be unconstitutional, on two primary grounds. First, courts have struck down "vague" ordinances for violating the due process clause of the Fourteenth Amendment. Hence in *City of Chicago* v. *Morales* (1999), the Supreme Court struck down a city ordinance that prohibited "loitering," defined as "to remain in any one place with no apparent purpose," as unconstitutionally vague. The Court held that the ordinance failed to require adequate notice to be provided to persons who violated the ordinance, so that they could amend their behavior accordingly. In addition, the ordinance failed to establish minimal guidelines for law enforcement officers to apply the anti-loitering law and thereby provided officers with absolute (and therefore unconstitutional) discretion.[150]

Second, ordinances have been struck down when courts have found them to violate the right of free speech[151] protected by the First Amendment to the Constitution. Courts have found peaceful begging,[152] lying down on sidewalks[153] and sitting down in public places[154] to constitute expressive

conduct under the First Amendment. Where courts determine that free expression is implicated, they have held that ordinances which restrict such expression must be issued pursuant to a compelling government interest (such as public safety or santitation), be narrowly tailored to achieve that interest, be content neutral and leave open alternative channels of expression. In 1993, a federal appeals court struck down a New York statute which criminalized the conduct of persons who "loiter, remain or wander about in a public place for the purpose of begging" because it did not find any compelling governmental interest in preventing peaceful begging. The court held that even if such an interest existed, a statute that totally prohibited begging in public could not be considered narrowly tailored to achieve such an interest, and furthermore, the statute was not content neutral and left no alternative channels by which beggars could convey their messages of indigency.[155]

However, most ordinances can successfully withstand challenges of vagueness, lack of content neutrality and other invalidating factors. For example, a court has upheld an ordinance that prohibited lying down on sidewalks in prescribed localities between specific hours of the day.[156] Similarly, a federal appeals court upheld an ordinance that prohibited soliciting money in identified public places such as bus stops, outdoor dining areas and places within 50 feet of an automated teller machine.[157] In that case, the federal appeals court rejected the argument that the ordinances inequitably burdened the homeless. It held that these restrictions were narrowly tailored to achieve a significant government interest against intimidating or harassing conduct, were content neutral and left open sufficient alternative channels for communicating the solicitors' messages.

Cultural rights

Right to self-determination

To the extent that the right to self-determination encompasses the rights of *geographically* defined groups to control of their own governments, the federal structure of government the USA and the attendant ideological emphasis on state and local autonomy reflect the practice of self-determination in the USA to a significant degree. Nevertheless, while devolution of power to states and localities facilitates the self-determination of geographically defined groups, the right to self-determination is more commonly associated with the autonomy of groups of a common ethnicity, race, national origin or cultural heritage. In this regard, the right of self-determination has been exercised to the greatest extent in the USA by the American Indian and Alaska Native peoples. Indeed, it has been observed that "in the United States the principle of self-determination applies uniquely to the Indians."[158]

American Indians and Alaska Native peoples (herein together referred to as Native Americans) exercise partial self-government within the boundaries

of collectively owned territories.[159] These territories are physically known as reservations and politically referred to as Native American "nations." There are 562 separate Native American nations, which in combination own over 45.6 million acres of land in the USA.[160] Within the territorial borders of the reservations, Native Americans exercise their own criminal and civil laws through their own customary or formal judicial systems, which are respected in other parts of the USA. Thus, polygamous marriages consummated in accordance with Native American law have been recognized by federal and state governments, including for the purpose of determining succession where persons have moved outside Native American territorial borders, despite the fact that polygamous marriages by other groups (such as Mormons) are neither permitted nor recognized in the USA.[161] The Bill of Rights has only very limited application in Native American nations and the decisions of Native American courts are not subject to federal review.[162] Furthermore, any legal suits against the nations in regular US courts are subject to the doctrine of sovereign immunity.[163]

The degree of self-government enjoyed by Native American nations can nevertheless be limited by federal legislation[164] and moreover, has been interpretively narrowed by regular US courts. Judicial narrowing of the scope of self-government appears to have been driven by a desire to exempt non-Native Americans from the territorial jurisdiction of Native American nations.[165] For example, the Supreme Court has declared a *de facto* diminishment of territorial boundaries of a reservation when presented with evidence that portions of a reservation have become gradually more populated by non-Native Americans.[166] Upon a finding of *de facto* diminishment, the territorial scope of Native American self-government is reduced. In addition, the Court has also limited the jurisdictional authority of Native American nations *within* territorial boundaries. Hence the Court recently held that an Indian nation may not impose a hotel occupancy tax on guests of a hotel located on fee land within the reservation, stating that Indian nations generally lack civil authority over persons on fee lands who are not members of the nation.[167]

Despite this narrowing of territorial and jurisdictional sovereignty, Native American laws remain the only customary laws applicable to particular cultural groups in the USA. Unlike customary laws in many Asian jurisdictions, Native Americans laws are territorially limited and thus do not apply to Native Americans who domicile themselves outside the reservations, i.e. elsewhere in the USA.[168]

Affirmative action

The civil rights movement spurred a proliferation of affirmative action programs during 1960s and 1970s, primarily in the spheres of employment and education. The Supreme Court's jurisprudence has since restricted the use of affirmative action programs in employment and to a lesser extent, in

education. Although affirmative action programs have been used to remedy gender as well as race discrimination, the Supreme Court's jurisprudence has focused on the constitutionality of race-based programs.

In the 1950s and 1960s, the Court relied on the equal protection clause of the Fourteenth Amendment to strike down governmental acts that clearly discriminated against African-Americans, holding that such acts were subject to a "strict scrutiny test." For example, in 1967, the Court struck down a state law that criminalized interracial marriages, holding that racial classifications must be "subjected to the 'most rigid scrutiny' [and be] necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[169]

When faced with the different issue of the constitutionality of governmental programs *benefiting* racial minorities from the late 1970s onwards, the Court employed the strict scrutiny test to render many affirmative action programs unconstitutional. Indeed, as the composition of the Court's bench became more conservative in outlook, the Court imposed additional criteria to the strict scrutiny test, making it more difficult for any program based on racial distinctions, including affirmative action programs, to pass constitutional muster. Thus by the 1990s, the Court had altered the applicable strict scrutiny test to require that race-based classifications, including affirmative action programs: (a) serve a "compelling interest" of the government and (b) be "narrowly tailored" to further that interest.[170]

The Court has applied the altered strict scrutiny test differently in the contexts of employment and government contracts, on the one hand, and in educational contexts, on the other. The Court in *Adarand Constructors, Inc.* v. *Pena* (1995) made it extremely difficult for affirmative action programs in government employment and contracting to satisfy the strict scrutiny test.[171] The Court held that a "compelling interest" exists only when the governmental agency that institutes the program has itself persistently engaged in discriminatory practices and is seeking to remedy such discrimination.[172] Accordingly, the Court will not uphold an affirmative action program when the governmental agency is seeking to remedy the general, societal discrimination against minorities. Even if the agency surmounts the hurdle of proving a compelling interest, it must also show that the affirmative action program is "narrowly tailored." This requires that the agency considered race-neutral alternatives to increasing minority employment or business contracts prior to establishing the affirmative-action program, and has implemented measures to ensure that the program "will not last longer than the discriminatory effects it is designed to eliminate."[173]

The Court's 5:4 decision in *Adarand* reflects the intense divisions among Americans as to the importance and constitutionality of affirmative-action. Polls indicate that a bare majority of Americans think affirmative-action programs are needed today to help minorities overcome discrimination[174] and a recent affirmative-action case drew thousands of demonstrators to the

Supreme Court as well as the most *amicus curiae* briefs in the Court's history.[175] In his concurring opinion in *Adarand*, Justice Scalia condemned the notion of a "creditor or debtor race" inherent in institutionalized affirmative action programs and stated somewhat optimistically: "In the eyes of government, we are just one race here. It is American."[176] The dissenting judges, however, argued that it was precisely because there has *not* been "just one race" in American history (including in the history of the Court's jurisprudence), that the effects of racial discrimination persist today and necessitate remedial action.[177]

In the sphere of education, the Court has made it easier for educational establishments with affirmative-action programs to satisfy the "compelling interest" prong of the strict scrutiny test. In its recent decision in *Grutter* v. *Bollinger* (2003), the Court determined that the University of Michigan had a compelling interest in maintaining a diverse student body.[178] The Court's decision in *Grutter* explicitly took into account the large number of *amicus curiae* briefs filed by major American corporations, including General Motors Corporation and the Coca-Cola Company, who argued that diversity in education tangibly benefits multinational and multicultural corporations.[179] However, programs to recruit black and minority students must still be narrowly tailored to achieving this interest in student diversity. The Court has held that the use of quotas for minority students,[180] or an automatic distribution of additional points to minority applicants,[181] is not a narrowly tailored means of achieving student diversity. By contrast, universities that consider race or ethnicity as an additional "plus" factor, while applying a flexible, individualized decision-making process, can be considered as utilizing narrowly tailored means.

The modern Court has yet to rule on the test applicable to gender-based affirmative action programs. However, in 1977, the Court upheld a social security regulation favoring women, noting that women had been unfairly hindered from earning as much as men.[182] The Court held that to withstand scrutiny from an equal protection perspective, gender-based classifications "must serve important governmental objectives" and "be substantially related to achievement of those objectives."[183] It therefore appears that classifications based on gender are subject to an "intermediate scrutiny" test. This test is less onerous than the strict scrutiny test applied to race-based classifications, but more onerous than the "minimal scrutiny" test applied to all other classifications.[184]

Conclusion

A prominent US human rights scholar has commented that "in the cathedral of human rights, the United States is more like a flying buttress than a pillar – choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of that system."[185] While this single chapter

cannot afford an intricate scrutiny of human rights in the USA, it has sought to examine broadly the extent to which the USA observes certain internationally recognized rights.

Civil and political rights

Most of the civil and political rights examined in this chapter are substantially recognized in the Bill of Rights or in other constitutional provisions. Furthermore, the Supreme Court has generally protected these constitutional rights from legislative and executive encroachment. However, there are at least four caveats to this largely positive assessment of civil and political rights in the USA.

First, as with courts in Singapore, Taiwan and other jurisdictions in Asia, the Supreme Court has upheld laws which derogate from constitutionally recognized civil and political rights on the grounds of "national security." It upheld laws abridging the right of communists to free speech and assembly for much of the twentieth century, and approved the internment of Japanese-Americans during the Second World War, in derogation of constitutional guarantees to due process and equal protection. Although recent decisions have justly affirmed a detainee's right to a hearing, the Court has indicated that because of prevailing national security concerns, such a hearing could take place in a military tribunal and/or with lax rules of evidence, a more deferential standard of review of government documents and a burden of proof upon the detainee.[186]

Second, as a related matter, conservative judges on the Supreme Court have been more willing to overlook the interests of minorities, in favor of majoritarian interests as expressed by Congress or the executive arm of government. Although the Court has not sanctioned overt discrimination against minorities since it upheld segregationist laws in the pre-civil rights era and internment policies during the second World War, it has overlooked evident racial disparities in the enjoyment of civil and political rights, such as in the application of the death penalty. Pro-majoritarian inclinations also appear to underlie the Court's shift to a new test to determine the constitutionality of laws that burden the free exercise of religion, which is easier for the government to satisfy.[187]

Third, broad public approval for "tough on crime" laws appears to have contributed to the Court's narrow construction of the Eighth Amendment's prohibition on "cruel and unusual punishments," which is the closest approximation to the international human right against "cruel, inhuman or degrading treatment or punishment."[188] Aside from sanctioning the use of the death penalty in certain circumstances, the Court has recently upheld the constitutionality of controversial "three strikes and you're out" laws, which subject thrice-convicted to felons to lifetime imprisonment regardless of the gravity of each felony.[189] The Court has also upheld state laws that abridge the right of convicted criminals to vote, including those who have served

their sentences.[190] Such laws have disenfranchised approximately 3.9 million voting-age citizens, including 1.4 million black men.[191]

Fourth, the relatively unfettered free market system has led to some constraints on realizing human rights in the USA. For example, it is plausible that the concentration of mass media ownership in the hands of a relative few impedes the dissemination of disfavored viewpoints in *practice*, regardless of the fact that such dissemination is generally permitted in *law*. This concentration of media ownership most directly impacts the right to free speech, but it also limits the capacity to influence prevailing public opinion on other human rights issues, such as on economic, social, and cultural rights. The giant AOL–Time Warner merger in 2001 and the recently amended regulations issued by the Federal Communications Commission (FCC) evince a trend towards an even greater concentration of media ownership. The new FCC rules permit, *inter alia*, a single broadcast network (e.g. CBS or ABC) to own a group of television stations reaching 45 percent of the national television audience, as opposed to the previous limit of 35 percent. The free market model in the USA has also limited the right to public participation, given that wealthy individuals and groups have a greater capacity to run for public office and/or to support their preferred candidates for office. The public financing system for presidential candidates and the legislative limits on political contributions have mitigated this problem only to some extent.[192]

Social and economic rights

The dominance of the free market model and its underlying libertarian ideology has more gravely impacted social, economic, and cultural rights in the USA. This is ultimately reflected in overwhelming statistical evidence that significant proportions of the US population have inadequate access to quality education, medical treatment and housing, despite living in the wealthiest country in the world. Moreover, affected persons are unable to compel the government to provide these economic and social goods, because such goods are not recognized as constitutional rights.

Again, there are glaring disparities among racial and other socio-economic groups in the realization of economic and social rights. Given the majoritarian inclinations of many judges on the Supreme Court, the fact that a numerical majority of Americans have adequate rights to subsistence, education, and health appears to feed the Court's unwillingness to recognize social and economic goods as the constitutional entitlements of every person. Majoritarian inclinations also underlie the Court's narrowing of certain cultural rights in recent years. Thus the Court has limited the use of affirmative action rights programs in the sphere of government employment and contracting and has narrowed the scope of Native American jurisdiction over non-Native Americans (ironically, by recognizing the interests of minority non-Native Americans in territories in which Native Americans are a governing majority).

Because of the difficulties in persuading courts and legislators to recognize social and economic rights as *entitlements* within the dominant paradigmatic emphasis on individual liberty, persons advocating social and economic rights in the USA have often framed their advocacy in terms of liberal *freedoms*. This approach is epitomized by the comments of Jeremy Waldron with respect to anti-homeless laws that the "freedom that means most to someone who is exhausted is the freedom not to be prodded with a nightstick as he tries to catch a few hours sleep on a subway bench."[193] However, other commentators have demanded a systemic modification of the current liberal and/or market-driven model applied to social and economic rights in the USA, whereby certain economic and social goods are normatively placed *outside* that model. Thus one leading commentator on the right to heath care has called for the application of rights-based discourse to designate "health care as a fundamentally important social good to be considered differently from other goods and services."[194] This could lead to, for instance, a shift in the current focus on curative care based on prescription medicines to an emphasis on preventative and primary care.

Ultimately, however, the acceptance of such a paradigmatic shift away from the market-dominant model is contingent on public, political, and judicial opinion. Thus far, there has been an insufficient popular groundswell to support this shift. Some might argue that such a shift is now even more unlikely, given the greater dominance of free-market premises in the post-cold war era, both within and outside the USA, including in countries in Asia. Indeed, the traditional contrast between the prioritization of civil and political rights in the USA and the focus on economic and social rights in many Asian countries is becoming increasingly blurred. As Asian countries embrace free market ideas, their relative commitment to economic and social rights may be waning. And as the US government faces renewed national security pressures, it appears to be retreating from its avowed commitment to civil and political rights, backed by conservative members of the Supreme Court.

Notes

1 See Philip Alston, "US ratification of the Covenant on Economic, Social, and Cultural Rights: the need for an entirely new strategy," *American Journal of International Law*, vol. 84, 1990, p. 378, commenting on the view that the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) represents "a giant step toward a socialist state."

2 For a detailed exposition of how US judges habitually defer to the government's position on the merits in cases concerning international treaties, see David J. Bederman, "Part III: Deference or deception: treaty rights as political questions," *University of Colorado Law Review*, vol. 70, 1999, pp. 1439–89.

3 For a recently published account of these important dimensions, see Julie Mertus, *Bait and Switch: Human Rights and US Foreign Policy*, New York: Routledge, 2004.

4 Accordingly, the label "conservative" is also applied to judges who are inclined to construe individual rights in "formal" terms, without accounting for historical

and other real disparities of race, gender, and similar statuses. For a commentary on the competing judicial philosophies of the present bench, see John C. Domino, *Civil Rights and Civil Liberties in the 21st Century*, New York: Longman, 5th edn, 2003, pp. 343–58.

5 See, for example, Noam Chomsky, *The Culture of Terrorism*, London: Pluto Press, 1989, and Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, Cambridge, MA: Harvard University Press, 1986, especially pp. 98–9.

6 5 US 137.

7 To date, the Supreme Court has exercised its power of judicial review to invalidate around 150 acts of Congress and approximately 1,250 state laws and local ordinances: Domino, *supra* note 4, p. 8.

8 The only rights which are yet to be nationalized are the Second Amendment (right to bear arms), the Third Amendment (rights relating to the housing of soldiers), the Seventh Amendment (right to jury trial), the right to a grand jury indictment in the Fifth Amendment, and the right against excessive bail in the Eighth Amendment.

9 347 US 483.

10 379 US 241.

11 Two further observations on the public–private distinction may be made. First, the Constitution does forbid a limited range of private acts; most notably, the Thirteenth Amendment prohibits slavery anywhere in the USA and thereby, also by private persons. Second, courts have sometimes interpreted private acts to be governmental acts when there has been some degree of government involvement (e.g. a certain level of government funding), as in *Burton* v. *Wilmington Parking Authority*, 365 US 715 (1961), although the extent to which courts are prepared to do so depends on the "liberality" of their composition.

12 The full text of the USA's reservations, declarations, and understandings (hereinafter RUDs) with respect to the International Covenant on Civil and Political Rights (hereinafter ICCPR) is available at www.unhchr.ch/html/menu3/b/treaty5_asp.htm.

13 *Ibid.*, and www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm (reproducing the USA's RUDs with respect to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

14 See Jack Goldsmith, "International human rights law and the United States double standard," *The Green Bag*, vol. 1, Summer 1998, p. 367, cited by Natasha Fain, "Human rights within the United States: the erosion of confidence," *Berkeley Journal of International Law*, vol. 21, 2003, pp. 607–30, at note 47 and accompanying text.

15 The free exercise clause was nationalized by the Supreme Court in *Cantwell* v. *Connecticut*, 310 US 296 (1940) and the establishment clause was nationalized in *Everson* v. *Board of Education*, 330 US 1 (1947). For reasons of space, this chapter does not analyze the application of the establishment clause and instead focuses on the free exercise clause.

16 Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties and Justice*, Washington, DC: CQ Press, 2004, p. 105.

17 The Gallup Organization, "American public opinion about religion," www.gallup.com/poll/focus/sr040302.asp.

18 PollingReport.com, "Law and civil rights," www.pollingreport.com/civil.htm.

19 133 US 833.

20 398 US 333, 342–43. Emphasis added. See *Gillette* v. *United States*, 401 US 437 (1971).

21 *Ibid.*

22 374 US 398.

23 494 US 872.

24 See *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 US 520 (1993).
25 Although both the *Sherbert* and *Smith* tests satisfy paragraphs 1 and 2 of Article 18 of the ICCPR, the *Sherbert* test better protects paragraphs 3 and 4 thereof.
26 Although the First Amendment refers only to Congress, the right to free speech now binds state and local governments as well; per *Gitlow* v. *New York*, 268 US 652 (1925).
27 *Texas* v. *Johnson*, 491 US 397 (1989), citing *Spence* v. *State of Washington*, 418 US 405.
28 *Thornhill* v. *Alabama*, 310 US 88 (1940).
29 *Texas* v. *Johnson*, *supra* note 27.
30 *Tinker* v. *Des Moines*, 393 US 503 (1969).
31 *R.A.V.* v. *City of St. Paul, Minnesota*, 505 US 377 (1992).
32 *West Virginia State Board of Education* v. *Barnette*, 319 US 624 (1943). By contrast, laws prohibiting the burning of draft cards (*United States* v. *O'Brien*, 391 US 367 (1968)), or compelling participation in the draft (*Wayte* v. *United States*, 470 US 598 (1985)), or prohibiting nudity in public (*Barnes* v. *Glen Theatre, Inc.*, 501 US 560 (1991)) have been held to not abridge expressive conduct.
33 By contrast, laws that do not directly but only incidentally burden expression are subject to the less stringent standard set forth in *United States* v. *O'Brien*, *ibid.*: the law must further an important or substantial government interest which is unrelated to suppressing free expression and the burden must be no greater than necessary for the furtherance of that interest.
34 E.g. in *Gitlow*, *supra* note 26, the government raided only socialists and communists. Furthermore, as in *Dennis* v. *United States*, 341 US 494 (1951), the Court upheld a conviction that involved prior restraint and upheld the provisions of the Smith Act, which prohibited anyone from knowingly or willfully advocating the overthrow of the government of the USA or even of conspiring to do so.
35 *Schenck* v. *United States*, 249 US 47, 52 (1919).
36 *Gitlow*, *supra* note 26, at 669.
37 376 US 254.
38 395 US 444, at 447. Emphasis added.
39 *Ibid.*, at 446.
40 *Supra* note 37.
41 *Ibid.*, at 273.
42 *Gertz* v. *Welch*, 418 US 323 (1974).
43 *New York Times* v. *Sullivan*, *supra* note 37.
44 *Hustler Magazine* v. *Falwell*, 485 US 46 (1988).
45 See, for example, *Carroll* v. *President & Commissioners of Princess Anne*, 393 US 175 (1968) and *Organization for a Better Austin* v. *Keefe*, 402 US 415 (1971).
46 283 US 697, especially at 716: "The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government."
47 403 US 713.
48 Epstein and Walker, *supra* note 16, p. 334.
49 Chomsky, *supra* note 5, p. 7.
50 Epstein and Walker, *supra* note 16, p. 334.
51 Sarah Miskin, Laura Rayner, and Maria Lalic, *Media Under Fire: Reporting Conflict in Iraq*, Parliamentary Library, Parliament of Australia, www.aph.gov.au/library/pubs/CIB/2002-03/03cib21.htm#conflict.
52 Peter Johnson, "Amanpour: CNN practiced self-censorship," *USA Today*, September 14, 2003.
53 §552, Subchapter II, Chapter 5, Part I, Title 5 of the United States Code (as amended).

54 331 F.3d 918 (2003), citing §552(b)(7)(A), *ibid.*
55 §552(b)(6), *ibid.*
56 On the debate generated by a brief lapse in the policy, see Roger Cohen, "Images of coffins bring war home to America," *New York Times*, April 28, 2004.
57 The Supreme Court nationalized the right to assemble peaceably in *De Jonge* v. *Oregon*, 229 US 353 (1937).
58 367 US 1.
59 382 US 70.
60 Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) ACT of 2001, Pub. L. No. 107–56, 115 Stat.272 (2001) (hereinafter the "Patriot Act").
61 *Supra* note 38.
62 *Supra* note 57.
63 *Supra* note 38.
64 Patriot Act, *supra* note 60, at section 411(a)(F).
65 314 US 160.
66 *Adderly* v. *Florida*, 385 US 39 (1966).
67 *Schenck* v. *Pro-Choice Network of Western New York*, 519 US 357 (1997).
68 For example, in *Thomas* v. *Chicago Park District*, 534 US 316 (2002).
69 505 US 123.
70 432 US 43.
71 Although many Americans view the legality of abortion as the most pressing issue concerning the right to life. A *Time*/CNN Poll in January 2003 showed that 40 percent of Americans "oppose the Supreme Court ruling that women have the right to have an abortion during the first three months of their pregnancy," while 55 percent were in "favor" of the ruling: PollingReport.com, "Abortion," www.pollingreport.com/abortion.htm.
72 428 US 153.
73 *Thompson* v. *Oklahoma*, 487 US 815 (1988) and *Stanford* v. *Kentucky*, 492 US 361 (1989) (each by a plurality of opinions).
74 Amnesty International, "Death penalty facts: the death penalty gives up on juvenile offenders," www.amnestyusa.org/abolish/juveniles.html.
75 Amnesty International, "*Gregg vs Georgia*: the beginning of the modern era of America's death penalty," www.amnestyusa.org/abolish/greggvgeorgia/index.html and "Stop child executions! Ending the death penalty for child offenders," www.amnestyusa.org/children.
76 *McClesky* v. *Kemp*, 481 US 279 (1987). See the opinion of Douglas, J. in *Furman* v. *Georgia*, 408 US 238 (1972).
77 536 US 304.
78 The Supreme Court granted *certiorari* in *Roper* v. *Simmons*, 112 S.W.3d 397 (Supreme Court of Missouri, 2003) on January 26, 2004.
79 Death Penalty Information Center, "Gallup poll analysis, May 19, 2003," www.deathpenaltyinfo.org/article.php?scid=23&did=592.
80 Military Order, "Detention, treatment, and trial of certain non-citizens in the war against terrorism" (November 13, 2001), 66 Fed. Reg. 57,833 (November 16, 2001).
81 Federal Register, "Crimes and elements of trials by military commission," http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=9255365821+1+0+0&WAISaction=retrieve.
82 The final rules and procedures can be obtained at: www.access.gpo.gov/su_docs/fedreg/a030701c.html.
83 Human Rights Watch, "Above the law: executive power after September 11 in the United States," http://hrw.org/wr2k4/8.htm#_Toc58744957.

84 See *Hirabayashi* v. *United States*, 320 US 81 (1943) and *Korematsu* v. *United States*, 323 US 214 (1944).
85 CNN.com, "US preparing military tribunals," www.cnn.com/2004/LAW/06/30/guantanamo.tribunals.ap/, and BBC, "First Guantanamo tribunal formed," http://news.bbc.co.uk/2/hi/americas/3851673.stm.
86 Human Rights Watch, *supra* note 83.
87 Human Rights Watch, *ibid.*
88 Harold Hongju Koh, "Rights to remember," *The Economist*, November 1, 2003.
89 *Rasul* v. *Bush*, 542 US (2004) (not yet reported), available at http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourtus.gov/opinions/03pdf/03-334.pdf, p. 8 of the opinion of the Court (per Stevens, J.).
90 Although several judges appeared to hold the view that detainees are statutorily entitled to *habeas corpus* relief regardless of where they are detained, so long as their custodians are within the jurisdiction of a US court.
91 542 US (2004) (not yet reported), available at http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourtus.gov/opinions/03pdf/03-6696.pdf, p. 26 of the opinion of the Court (per O'Connor, J.).
92 *Ibid.*, p. 31 (emphasis added).
93 Fain, *supra* note 14, p. 619.
94 The two successor agencies to the INS are the USCIS (US Citizenship and Immigration Service) and the Directorate of Border and Transportation Security; both function within the Department of Homeland Security established after the events of September 11, 2001.
95 *Ibid.*, p. 620.
96 *Ibid.*
97 *Ibid.*, p. 619. The content of the regulation is reproduced at www.usdoj.gov/eoir/vll/fedreg/2000_2001/fr20se01R.pdf.
98 In an extraordinary statement, the Public Affairs Office of the DOJ commented that it stopped reporting the number of detainees once the figure reached 1,200 because the statistics became "confusing": www.usdoj.gov/oig/special/0306/chapter1.htm.
99 An internal governmental report by the Office of the Inspector General detailing apparent abuses in the conditions of detention is available at: www.usdoj.gov/oig/special/0306/chapter7.htm and a summary is available at www.usdoj.gov/oig/special/0306/press.pdf.
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103 USA Today, "USA TODAY/CNN/Gallup poll results," www.usatoday.com/news/polls/tables/live/0828poll.htm.
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107 *Supra* note 14 and accompanying text.

108 Scott Leckie, "The right to housing," in Asbjøn Eide, Catarina Krause, and Allan Rosas, eds, *Economic, Social, and Cultural Rights: A Textbook*, Dordrecht: Martin Nijhoff Publishers, 2nd edn, 2001, p. 164.
109 Press Release GA/9532, "General Assembly reaffirms importance of right to development as integral part of fundamental human rights," www.un.org/News/Press/docs/1998/19981209.ga9532.html.
110 United Nations General Assembly Resolutions 41/128 (1986) and 53/155 (1998), respectively.
111 R. Zemsky, D. Shapiro, M. Iannozzi, P. Cappelli, and T. Bailey, *The Transition from Initial Education to Working Life in the United States of America*, National Center for Postsecondary Improvement (NCPI) report, October 1998.
112 Sam Dillon, "US set to ease some provisions of school law," *New York Times*, March 14, 2004.
113 Kara A. Millonzi, "Education as a right of national citizenship under the Privileges and Immunities Clause of the Fourteenth Amendment," *North Carolina Law Review*, vol. 81, 2003, p. 1288. See, for example, the Constitution of the State of Maine, Article VIII, Part First, §1, which provides that the "Legislature shall require towns municipalities to support public schools."
114 *Ibid.*, p. 1290.
115 *Ibid.*, pp. 1291–2.
116 411 US 1.
117 *Ibid.*, at 37 (emphasis added).
118 *Ibid.* (emphasis added).
119 OECD, *OECD Economic Surveys 2001–2002: United States*, III. Health system reform, vol. 2002/18, November, p. 85.
120 *Ibid.*, p. 108.
121 *Ibid.*, pp. 100–1; this compares to the estimated average for all OECD countries of about 8 percent.
122 *Ibid.*, p. 102. Amongst the OECD countries, only Korea funds a lower proportion of total health expenditure through the public sector.
123 *Ibid.*, pp. 104–5.
124 It has been reported that the insulation from price-sensitivity results from a wider coverage by insurance providers for prescription medicines (*ibid.*, p. 99), but presumably the wider coverage is provided partly as a result of the shift in consumer preferences.
125 Audrey Chapman, "The defeat of comprehensive health care reform," in David Forsyth, ed., *The United States and Human Rights: Looking Inward and Outward*, Lincoln: University of Nebraska Press, 2000, p. 6.
126 At least in any direct manner comparable to the right to health care provided by Article 25 of the Universal Declaration of Human Rights. See Joseph Wronka, *Human Rights and Social Policy in the 21st Century*, Lanham, MD: University Press of America 1998, p. 172 and p. 174.
127 Chapman, *supra* note 125, p. 20. Armey's remarks reveal that many proponents of the consumerist approach to health also view other social goods recognized as rights in international law (such as food and housing) with the same, market-oriented perspective.
128 Chapman, *ibid.*, pp. 18–19.
129 *Ibid.*, p. 11 and OECD, *supra* note 119, pp. 90–1.
130 OECD, *supra* note 119, p. 93.
131 CD Publications, "More families obtain medicaid but state eligibility criteria remain stiff", www.cdpublications.com/news/chf/chf3.htm. For a family of three, the 2004 federal poverty level was an annual family income of U$15,670: see Department of Health and Human Services, "2004 HHS Federal Poverty Guidelines," aspe.os.dhhs.gov/poverty/04poverty.shtml.

132 42 USC. 1395dd. Approximately 98 percent of hospitals in the USA are participating hospitals: Lynn Healey Scaduto, "The Emergency Medical Treatment and Active Labor Act gone astray: a proposal to reclaim EMTALA for its intended beneficiaries," *UCLA Law Review*, vol. 46, 1999, p. 949.
133 *Roberts* v. *Galen*, 525 US 249 (2003). Emphasis added.
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135 Joseph Dalaker, "Poverty in the United States: 2000," www.census.gov/prod/2001pubs/p60-214.pdf. The poverty thresholds (set forth at p. 5 of the report) vary by family size and correspond broadly to the federal poverty levels issued annually by the government for the purposes of determining eligibility for Medicaid and other social welfare programs.
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139 Mark Nord, Margaret Andrews, and Steven Carlson, *Household food security in the United States 2002*. Abstract," www.ers.usda.gov/publications/fanrr35/fanrr35fm.pdf at p. 3.
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141 Mark Nord, Margaret Andrews, and Steven Carlson, *Household Food Security in the United States 2002*, "Section 1. Household food security," www.ers.usda.gov/publications/.
142 A summary of programs is provided at www.frac.org/pdf/sos2003/us.pdf.
143 National Law Center on Homelessness and Poverty, *Advocating on Behalf of Food Stamp Claimants: A Guide to Rights and Resources*, www.nlchp.org/content/pubs/Inc_FS_booklet.pdf (hereinafter Food Stamp Claimants). Also see Department of Agriculture Food and Nutrition Service, "Fact sheet on resources, income, and benefits," www.fns.usda.gov/fsp/applicant_recipients/fs_Res_Ben_Elig.htm.
144 Food Stamp Claimants, *ibid.*
145 See Virginia Hernanz, Franck Malherbet and Michele Pellizzari, "Take-up of welfare benefits in OECD countries: a review of the evidence," *OECD Social, Employment, and Migration Working Papers*, no. 17, 2004, at paras 12 and 40.
146 National Coalition for the Homeless, "How many people experience homelessness?," www.nationalhomeless.org/numbers.html and National Resource Center on Homelessness and Mental Illness, "How many people are homeless? Why?," www.nrchmi.samhsa.gov/facts/facts_question_1.asp (hereinafter NRCHMI).
147 Compare the Department of Housing and Urban Development news release of October 1, 2003, "Bush administration announces $75 million to provide permanent housing, medical care, job training and other services to chronically homeless," www.hud.gov/news/release.cfm?content=pr03-101.cfm, NRCHMI, *ibid.*, and National Coalition for the Homeless, "Questions and answers about the 'chronic homelessness initiative'," www.nationalhomeless.org/chronic/chronicqanda.html.
148 National Coalition for the Homeless and National Law Center on Homelessness and Poverty, *Illegal to be Homeless: The Criminalization of Homelessness in*

the United States, www.nationalhomeless.org/crimreport/CrimMaster.pdf, (hereinafter "*Illegal to be Homeless*").

149 National Law Center on Homelessness and Poverty, *Combating the Criminalization of Homelessness: A Guide to Understand and Prevent Legislation that Criminalizes Life-Sustaining Activities*, www.nlchp.org/FA_CivilRights/CR_crim_booklet.pdf.

150 *City of Chicago* v. *Morales*, 527 US 41 (1999). This and most other vagrancy decisions cited herein are cited in *Illegal to be Homeless, supra* note 148.

151 Or occasionally, the exercise of religion, as in the case of *Fifth Avenue Presbyterian Church et al.* v. *The City of New York et al.*, 239 F.3d 570 (2nd Cir. 2002).

152 *Loper* v. *New York City Police Department*, 999 F. 2d 699 (2nd Cir. 1993).

153 *Metropolitan Council Inc.* v. *Safir*, 99 F. Supp. 2d 438 (SDNY 2000).

154 *Berkeley Community Health Project* v. *City of Berkeley*, 902 F. Supp. 1084 (ND Cal. 1995).

155 *Loper*, *supra* note 152.

156 *Clark* v. *City of Cincinnati*, No. 1-95-448 (SD Ohio 1995).

157 *Doucette* v. *City of Santa Monica*, 955 F. Supp 1192 (CD Cal. 1997). See also *Smith* v. *City of Fort Lauderdale*, FL., 177 F.3d 954 (11th Cir. 1999).

158 Note: "Rethinking the trust doctrine in federal Indian law," *Harvard Law Review*, vol. 98, 1984, pp. 422–40, at note 58.

159 Although Native Hawaiian peoples may also be considered Native Americans, they have not been accorded the territorial sovereignty exercised by American Indians and Alaska Natives: Rebecca Tsosie, "Tribalism, constitutionalism, and cultural pluralism: where do indigenous peoples fit within civil society?," *University of Pennsylvania Journal of Constitutional Law*, vol. 5, 2003, pp. 365–6.

160 US Department of the Interior, Bureau of Indian Affairs, www.doiu.nbc.gov/orientation/bia2.cfm. The names of each of the 562 Native American self-governing groups are listed at www.doiu.nbc.gov/orientation/indian-tribes.pdf.

161 See Todd M. Gillett, "The absolution of Reynolds: the constitutionality of religious polygamy," *William and Mary Bill of Rights Journal*, vol. 8, 2000, p. 508.

162 Tsosie, *supra* note 159, pp. 358, 380, and 393.

163 Andrea M. Seielstad, "The recognition and evolution of tribal sovereign immunity under federal law: legal, historical, and normative reflections on a fundamental aspect of American Indian sovereignty," *Tulsa Law Review*, vol. 37, 2002, pp. 661–776.

164 For example, the Indian Civil Rights Act of 1968, aimed at guaranteeing certain fundamental rights to persons subjected to Native American jurisdiction: see Tsosie, *supra* note 159, p. 393.

165 Tsosie, *ibid.*, p. 380.

166 *Ibid.*, pp. 381–2.

167 *Ibid.*, p. 386, citing *Atkinson Trading Co.* v. *Shirley*, 532 US 645 (2001).

168 Patrice Kunesh-Hartman, comment: "The Indian Welfare Act of 1978: protecting essential tribal interests," 60 *University of Colorado Law Review*, vol. 60, 1989, p. 148.

169 *Loving* v. *Commonwealth of Virginia*, 388 US 1 (1967).

170 *Adarand Constructors, Inc.* v. *Pena*, 515 US 200, 235 (1995). The Court's test did not account for the objective of the Fourteenth Amendment (to eliminate racial discrimination against blacks) as the Court did in *Loving*, *ibid.* Thus it is not a mitigating factor if the racial classifications in an affirmative-action program were aimed at countering such discrimination.

171 *Adarand*, *ibid.*

172 *Ibid.*, at 237.

173 *Ibid.*, at 238, citing *Fullilove* v. *Klutznick*, 448 US 448 at 513 (1980).
174 CNN.com, "Poll questions and answers on affirmative action," cnnstudentnews.cnn.com/2003/EDUCATION/03/10/aa.poll.details.ap/.
175 Ronald Dworkin, "The court and the university," *New York Review of Books*, vol. 50, no. 8, May 15, 2003, referring to the twin cases of *Grutter* v. *Bollinger*, 539 US 306 (2003) and *Gratz* v. *Bollinger*, 539 US 244 (2003), concerning the admissions policies of the University of Michigan.
176 Domino, *supra* note 4, p. 296 and *Adarand*, *supra* note 170, at 239.
177 *Adarand*, *ibid.*, at 272.
178 *Grutter*, *supra* note 175.
179 *Ibid.*
180 *Regents of the University of California* v. *Bakke*, 438 US 265 (1978).
181 *Gratz*, *supra* note 175.
182 *Califano* v. *Webster*, 430 US 313 (1977).
183 *Ibid.*, at 316–17, citing *Craig* v. *Boren*, 429 US 190, 197 (1976).
184 The minimal scrutiny test requires that the classification (such as wealth, age, or other mutable characteristic) has a "rational basis" or advances a "legitimate" government interest.
185 Professor Louis Henkin: cited by Harold Hongju Koh, "A United States human rights policy for the 21st century," *Saint Louis University Law Journal*, vol. 46, 2002, p. 308.
186 *Hamdi* v. *Rumsfeld*, *supra* note 91, pp. 31–2.
187 *Supra* notes 23–5 and accompanying text.
188 As stated, for example, in Article 7 of the ICCPR.
189 *Ewing* v. *California*, 538 US 11 (2003).
190 *Richardson* v. *Ramirez*, 418 US 24 (1974).
191 Pamela S. Karlan, "Ballots and bullets: the exceptional history of the right to vote," *University of Cincinnati Law Review*, vol. 71, 2003, pp. 1345–72, especially p. 1364. Karlan cogently argues that disenfranchisement laws, especially when they impose a lifetime disqualification on voting, are unconstitutional under the Eighth Amendment.
192 See Federal Election Commission, "Public Funding of Presidential Elections," www.fec.gov/pages/brochures/pubfund.htm. The Bipartisan Campaign Reform Act of 2002 was passed to address loopholes in rules on political contributions set forth in the Federal Election Campaign Act of 1971, 2 USCA §434 (as amended).
193 Jeremy Waldron, "Homelessness and the issue of freedom," *UCLA Law Review*, vol. 39, 1991, p. 303.
194 Chapman, *supra* note 125, p. 19.

4 The protection of "fundamental human rights" in Japan

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Introduction

The individual rights of people are guaranteed in Japan as "fundamental human rights" under the Japanese Constitution of 1946. The Meiji Constitution of 1889, the first modern constitution of Japan, included a bill of rights but its protection was limited, so it was only after the enactment of the current Japanese Constitution that people in Japan could claim that they were entitled to true individual rights.

In the first section of this chapter, I will outline the history of human rights protection in Japan, as well as the basic conception of fundamental human rights, its variety, its nature, and its limits. In the second section of this chapter, I will examine to what extent these fundamental human rights are guaranteed in Japan in its actual administration, citing major cases of the Supreme Court of Japan. In the third section, I will evaluate human rights protection in Japan. Then I conclude with an observation on the future of human rights protection in Japan.

Overview of human rights protection in Japan

The Meiji Constitution[1]

The modern history of Japan starts with the Meiji Restoration in 1868, prior to which samurai warriors had ruled Japan for over two centuries. The government received its authority from the emperor but the political power resided with the samurai government. At that time, the relationship between the government and the public was governed by feudal obligation, and the public did not have any notion of rights against the government. In order to amend the unequal commerce treaty concluded by the government and to avoid colonization by Western countries, the opposition leaders decided to restore political power to the emperor and to build a strong modern nation. The resistance of the samurai government ultimately failed and the new Meiji Government was established based upon the political power of the emperor.

The Meiji Government strived to modernize Japanese society and to introduce Western law to Japan. The government invited distinguished Western

legal scholars to assist with the enactment of both civil and criminal law, and many translated works of law and legal theory from Western countries were published. During this process, the Japanese words for "right," "freedom," and "liberty" were invented.

The government's attempt to enact a modern law based on the French Civil Law came under attack, especially with respect to family law, from conservative critics, who condemned its individualistic features as inconsistent with Japanese traditions. Thereafter, the government turned to Germany, which was also still a monarchy. A family law was enacted with special emphasis on "*ie*," the family and its head, giving comprehensive power over the whole family to its head, to be succeeded by the first-born son. The whole of Japanese society was thought of as an extension of the family. The emperor was thus regarded as the father of all Japanese, and the public were regarded as his children. There was no respect for individuals. The public were thought to serve the emperor, and it was regarded as an honor to fight for and die for the emperor.

It was not surprising, therefore, to find that the government had no plans to enact a constitution or a bill of rights at that time. Eventually, however, it became difficult for the government to ignore the public's calls for the establishment of the Diet. The government decided to establish the Diet and to draft a constitution in order to satisfy the public's demands. Hirofumi Itoh, one of the leaders of the Meiji Government, traveled to Germany to study its constitution, and drew up a draft of the Constitution on his return. The Meiji Constitution, enacted in 1889, represented a promise by the emperor to govern Japan according to terms established by the Constitution.

Although the Meiji Constitution had the appearance of a modern constitution, its contents were highly conservative. It did contain a bill of rights, but the constitutional protection of individual rights was critically limited. First, the emperor had sovereign power under the Meiji Constitution and the people were treated as mere subjects. As a result, the rights enumerated in the Constitution were conferred upon the people as "rights of subjects" by a gracious act of the emperor. Second, rights were protected only within the confines of law. So if the Imperial Diet together with the emperor enacted laws that restricted those rights, no constitutional violation would occur. Third, the courts had no power to judicially review the constitutionality of statutes that restricted those rights.

Indeed, individual rights were widely restricted under the laws and regulations of the Meiji Government. There was no general equality right provision, except for an ambiguous mandate for equal opportunity for public servants, and the Meiji Government allowed the existence of nobles and even established a House of Peers in the Imperial Diet. The people had freedom of religion only in so far as its exercise did not conflict with their duty to the emperor. The Meiji Constitution, however, was based upon the religious authority of the emperor, deriving from Shinto, and declared that the emperor was sacred and inviolable. Shinto was thus treated differently from

other religions and its observance was regarded as a duty of the subjects to the emperor. Shinto shrines were treated as public institutions and Shinto priests were given the status of public servants. The Meiji Government spent large amounts of money in support of Shinto shrines. Shinto was therefore the *de facto* state religion under the Meiji Constitution.

As to freedom of thought, socialists were most severely oppressed because they were regarded as attempting to overthrow the Imperial Government. Later, however, all liberals faced similar oppression. Freedom of expression was severely restricted by the Newspaper Law, the Publication Law, and the Public Safety Preservation Law, and the Criminal Law contained a provision punishing insults against the emperor. The Newspaper Law and the Publication Law, for instance, required the publisher of newspapers and books or magazines to submit copies to the government at the time of publication, and allowed the government to halt their publication. They also had provisions punishing the publication of materials which could disturb public safety. The Public Safety Preservation Law also severely restricted freedom of assembly. The secret police watched over all aspects of people's personal lives, and violators could be secretly detained. The police often tortured defendants and forced them to make confessions. The police even tortured suspects who were brought into custody because of their thoughts, in order to force them to change their thoughts. Many socialists and liberals were killed inside detention rooms and in prisons.

These restrictions on individual rights were eventually discarded by the occupation government after Japan's defeat in the Pacific war. The General Headquarters of the Supreme Commander of Allied Powers (GHQ), which managed the occupation of Japan, believed that the restrictions on individual rights were among the main reasons for the rise of extreme militarism in Japan. It therefore ordered the repeal of the restrictive laws and issued the "Freedom Order," requiring the government to release political prisoners immediately. It also prohibited the government from supporting or aiding Shinto shrines. Even though the GHQ itself did not allow people to criticize the occupation government or the US government, the people of Japan first obtained broad individual rights because of this occupation policy.

The enactment of the Japanese Constitution in 1946 was the culmination of those historical developments.[2]

The Japanese Constitution

The Preamble to the Japanese Constitution clearly states that one of the document's basic principles is the protection of individual rights:

> [W]e, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again

> shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution.

The entire third chapter of the Constitution is devoted to the rights and duties of the people. Article 11 declares that "[t]he people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights." Article 12 also declares that "[t]he freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare." Article 13 provides that "[a]ll of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." The Japanese Constitution finally confirmed its commitment to the protection of human rights by providing in Article 97 under the title of "supreme law" that:

> [T]he fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

Fundamental human rights are now guaranteed, rather then being graciously granted by the emperor as under the Meiji Constitution. Under the current Constitution, the people have sovereign power and all government powers are derived from the people. The emperor is now a symbol of the state and of the nation (Article 1) and does not have any political power. As suggested by the term "fundamental human rights," those rights are inherently given to the people. Moreover, Article 13 makes clear that the protection of individual rights must be "the supreme consideration in legislation and in other governmental affairs." These rights therefore bind the Diet, and a law that unduly restricts them is precluded by the Constitution. Indeed, Article 98 confirms the supremacy of the Constitution by providing that "[t]his Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity." Finally, the Japanese Constitution has vested the power of judicial review in the courts, by providing in Article 81 that "[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." The Court is empowered to invalidate any law that is found to violate the Constitution, especially its bill of rights provisions.[3]

The conception of fundamental human rights

In Japan, individual rights are protected as "fundamental human rights." Fundamental human rights are generally defined as rights inherent to all human beings or natural rights of all human beings.[4] According to this prevailing view, fundamental human rights guaranteed by the Japanese Constitution are not conferred by the Constitution. Rather, they are natural rights that the people of Japan are entitled to even without the enactment of a Constitution. It is generally believed, therefore, that rights demand their constitutional protection and that any constitutional amendment that would undermine them would be prohibited.

The prevailing view also conceives of those fundamental human rights as deriving from human dignity. Human dignity is regarded as the basic value for supporting individual rights, especially in Germany, whose Fundamental Law, its Constitution, proclaims human dignity to be the supreme value. The Japanese Constitution nowhere provides for human dignity. Yet, the prevailing view construes Article 13 as mandating individualism, and it has therefore been construed as a guarantee of human dignity. According to this view, therefore, Article 13 is an affirmation of human dignity as the prime value and as the source of all fundamental human rights, and there is no distinction between fundamental human rights and human rights. The prevailing view therefore regards all human rights as fundamental.[5]

The protection of the welfare right presented some difficulties for some academics because the welfare right is not generally recognized by natural-rights thinkers. Traditional natural rights were freedoms that existed prior to society and the state. Yet, the prevailing view regards the welfare right also as a natural right based upon the theory that the scope of natural rights can change over time.[6] According to this view, all rights that can be derived from human dignity can be said to be natural rights, and the welfare right can therefore be called a contemporary natural right.

Because of this definition, it is generally believed that not only the Japanese but also all human beings, including foreigners, are entitled to these fundamental human rights.[7]

The nature of rights

The bill-of-rights provisions of the Japanese Constitution are elaborate and quite inclusive. Apart from the equality right, these rights can be divided into several categories.

Classic human rights are generally called negative freedoms, as they are freedoms from governmental interference. Most fundamental human rights protected under the Japanese Constitution fall into this category, and are generally divided into three different groups: mental freedoms, economic freedoms, and physical freedoms. Mental freedoms are concerned with the internal mind of human beings, and include freedom of thought, religious

freedom, freedom of expression, and academic freedom. Economic freedoms are concerned with economic activities, including the freedom to choose one's occupation and the freedom to hold property. Physical freedoms are concerned with personal integrity and freedom from detention, such as freedom of movement, freedom from search and seizure, freedom from arrest, and all procedural rights of criminal suspects and defendants.

The second category comprises rights to demand governmental action or to receive governmental service. The right of access to the court is typical of this category. The welfare right, the right to receive education, and rights of workers can also be said to fall into this second category because they all involve the right to demand governmental assistance. Yet, these rights are concerned with the social welfare of human beings and have contemporary significance. They are therefore generally distinguished from the second category and are placed in a third category, "social rights."

The fourth category is the right to participate in government, generally called a "positive right" or an "active right." The voting right is typical of this category.

According to the prevailing view, the core of fundamental human rights is the negative freedoms. As a result, it is often said that the primary purpose of the Constitution is to protect these freedoms, and it is therefore regarded as the "fundamental law of freedom."[8] According to this view, all the constitutional provisions regarding government powers and procedures are means of protecting those freedoms.[9]

The fundamental human rights that the people are entitled to are not limited to those specifically listed in the Constitution, however. In other words, there are unenumerated fundamental human rights that are generally thought that to be derived from the protection of life, liberty, and pursuit of happiness in Article 13. For instance, the right to privacy, although nowhere specifically provided for, is protected by Article 13, according to the Supreme Court.[10]

On the other hand, the constitutional guarantee of fundamental human rights is directed only against the government and local governments. The bill of rights, in other words, does not bind the conduct of private individuals. Private discrimination or private infringement of human rights is not therefore precluded by the Constitution.[11] This does not mean, however, that private discrimination or private infringement of human rights is entirely tolerated in Japan. There are some statutory provisions such as the Labor Standard Law and the Equal Employment Opportunity for Women Law that specifically prohibit private discrimination or the infringement of human rights in the private sector. Moreover, the conduct of private individuals is controlled by the Civil Law, so private conduct which violates public order or morality is void (Article 90). Unreasonable private discrimination or private infringement of human rights can therefore be invalidated by the courts. Private discrimination or private infringement of human rights can also constitute a tort, permitting those injured to seek damages. It is

generally thought that the constitutional guarantee of fundamental human rights must be considered when judging the legality of private conduct. In this sense, the bill of rights is indirectly applied to the conduct of private individuals.[12]

Limits

Even though the Japanese Constitution does not contain any explicit provision that places limits on fundamental human rights, it is generally believed that the constitutional protection of fundamental human rights is not absolute. Articles 12 and 13 have been interpreted as indicating the limits of constitutional protection. As a result, the Supreme Court has held that fundamental human rights may be restricted for the purpose of public welfare.[13]

Some academics oppose the Court's position, insisting that fundamental human rights should not be subject to restrictions for the purpose of public welfare. The concept of public welfare appears, for them, as a talisman to justify whatever restriction the legislature would like to place on fundamental human rights. They argue instead that fundamental human rights should not be restricted unless they infringe upon the rights of others. Limits set in place by the rights of others are often called "inherent limits." The main reason that these academics object to the Court's position is that once it admitted the possibility that fundamental human rights can be restricted for public welfare purposes, the Court rushed to the conclusion that the particular restriction imposed by the statute was constitutional without scrutinizing whether the statute was indeed necessary to protect public welfare.

Nevertheless, the prevailing view supports the Court by acknowledging that public welfare, as indicated in Articles 12 and 13, restricts all fundamental human rights protected under the Constitution.[14] Unlike the Court, however, the academics who subscribe to this view would demand that the courts carefully scrutinize whether a particular restriction on a fundamental human right is indeed necessary to protect the public welfare, whether the legislative end is legitimate and rational, and whether the means chosen are rationally related to the legislative end. Moreover, when the Diet attempts to restrict mental freedoms, especially freedom of expression, the Diet is attempting to undermine the very foundation of democracy. As a result, the courts must scrutinize the ends and means with a more searching standard. For example, when the Diet attempts to restrict freedom of expression, the courts should assess whether the legislative purpose is sufficiently compelling and the means chosen are tailored narrowly to achieve those ends.

International human rights

Japan has signed both the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and

Political Rights (ICCPR).[15] Japan has also signed the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. International human rights, protected by these covenants and conventions, are thus guaranteed in Japan.

In Japan, however, it is generally believed that an international treaty can be directly applied by the domestic courts only when it is self-executing. As a result, some of the rights protected by these covenants and conventions are directly applicable but others are not. Moreover, it is generally believed that the Constitution is the supreme law of the land and that the Constitution is superior to treaty, so any international treaty provisions which are contrary to the provisions of the Constitution are void. Accordingly, the government is not allowed to ratify provisions of the international human rights covenants or conventions that are contrary to the provisions of the Constitution.[16]

Many litigants have already invoked these international human rights covenants and conventions to challenge governmental conduct. Yet the bill of rights of the Japanese Constitution is fairly comprehensive and there are not many gaps for these conventions and covenants to fill. The courts have therefore been reluctant to rely on these covenants and conventions to invalidate governmental conduct.

Human rights protection in action

Physical freedom and emergency

Physical freedom[17]

The Japanese Constitution contains an elaborate bill of rights for criminal suspects and defendants. First, Article 31 provides the right of due process, stating that "[n]o person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." Although it does not say so explicitly, this provision has been construed as guaranteeing the right of due process. The Court confirmed this construction in the *Confiscation of the Third-Party-Owned-Property* case.[18] Moreover, Article 32 guarantees the right of access to the courts, by providing that "[n]o person shall be denied the right of access to the courts."

The Constitution, in addition to the guarantee in Article 31, has several specific guarantees in respect of the rights of criminal suspects: "[n]o person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, the offense being committed", (Article 33) and "[n]o person shall be arrested or detained without being at once informed of the

charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel" (Article 34). As to search and seizure, "[t]he right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33. Each search or seizure shall be made upon separate warrant issued by a competent judicial officer" (Article 35). Furthermore, the infliction of torture by any public officer is "absolutely forbidden" (Article 36). Finally, Article 38 protects the privilege against self-incrimination by providing that "[n]o person shall be compelled to testify against himself. Confession made under compulsion, torture, or threat, or after prolonged arrest or detention shall not be admitted in evidence. No person shall be convicted or punished in cases where the only proof against him is his own confession."

With respect to the rights of criminal defendants, the Constitution, again in addition to its guarantee in Article 31, provides in Article 37, that:

> [I]n all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal. He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense. At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

There are also substantive limits on the power of the Diet to impose criminal punishment. First, the Constitution mandates that "[n]o person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy" (Article 39). Second, Article 36 prohibits cruel punishment. Article 31 has also been construed as imposing substantive limits on legislative power to impose criminal punishment, by precluding the Diet from imposing criminal sanctions on private conduct that does not affect rights of others, or imposing criminal punishment disproportionate to the harm resulting from the crime. Also, crimes must be defined unambiguously, according to the doctrine of substantive due process. Finally, any person who is acquitted after he has been arrested or detained may sue the state for redress as provided by law (Article 40).

Thus, at least on the face of the Constitution, no arbitrary arrest, detention, or punishment is permissible. This does not mean, however, that actual practice in Japan is totally devoid of arbitrary punishment. The police often ask a suspect to come to the police station for voluntary questioning.[19] The police then question the suspect without the assistance of an attorney, hoping

to force him or her into a confession. The police may even make an arrest on a different petty charge in order to bring the suspect into custody for questioning in relation to a felony charge.[20] The police then place the suspect in a police cell rather than the prison detention facility. While keeping the suspect in this surrogate prison, the police interrogate the suspect every day until he or she finally confesses to a crime. The police do not allow the suspect to be accompanied by his or her attorney during the interrogation and they usually do not allow the suspect to meet his or her attorney, claiming that the meeting could prevent effective questioning.[21] The police do not keep an audiotape or videotape of interrogations. As a result, there are often reports of intimidating interrogations, and even the use of violence against the suspect.

The Supreme Court has overturned a conviction when the police used unfair tactics such as deceiving the suspect so as to solicit a confession,[22] but the Court is unwilling to overturn convictions where the suspect has claimed that the police used intimidation or violence to force confessions. The Supreme Court has upheld the constitutionality of an arrest without warrant in situations where there is urgent need to make an arrest even though such an arrest is not provided for in the Constitution.[23] The Court also upheld the constitutionality of searches incident to such an urgent arrest.[24] The Court held that the inspection of bags incident to police questioning is permissible so long as it does not constitute a search.[25] The Court also upheld the permissibility of illegally obtained evidence when the inspection did not violate the law grossly.[26] Even though Article 38 precludes confession made after prolonged arrest or detention, the Court held that a confession that was not the result of prolonged detention was not precluded.[27] And even though the Constitution provides that no person shall be convicted or punished in cases where the only proof against him is his own confession, the Court held that it was constitutional to convict the defendant based only on his confession during the court trial,[28] or on the confession of his co-defendant.[29] The double-jeopardy clause of Article 39 was held as not precluding the prosecutor from appealing a not-guilty verdict ultimately up to the Supreme Court.[30] And finally, despite the prohibition of cruel punishment, the Diet has imposed the death penalty for some serious crimes. The Court has upheld the constitutionality of this legislation.[31]

As a result, the conviction rate in Japan is more than 99 percent. This means that the defendant, once prosecuted, is almost sure to be convicted. The prosecutor, on the other hand, does not file prosecution unless he or she is convinced that he or she can get a conviction. The prosecutor is therefore said to be acting as a judge.[32] A defendant, once prosecuted, is better off if he or she shows remorse for his or her actions and asks the judges for a lenient sentence, which the judges, while strongly condemning the conduct, will usually give. If the defendant contests the prosecution, however, he or she will be rewarded with a harsher sentence. It is doubtful whether the courts are actually checking inappropriate police practices.

Emergencies

The Japanese Constitution, reflecting the unfortunate experiences of the Pacific war, made clear its sincere commitment to peace, by declaring that "[w]e, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationships, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth." Article 9 thus simply provides that "[a]spiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized."

Because of this pacifism clause, it was generally thought that Japan was not allowed to maintain any military force. The Japanese Government later established the Self-Defense Force (SDF), but many people were strongly opposed to the move. These people interpreted the Constitution as prohibiting the maintenance of military force even for the purpose of self-defense, and claimed that the establishment of the SDF was unconstitutional. As a result, the government could not knowledge that the SDF is a military force, or deploy the SDF to preserve domestic public safety. The sole purpose of the SDF has been to defend Japan against foreign attack, but humanitarian aid work or rescue missions are surely permissible uses of the force. Many people have opposed the idea of enacting emergency legislation, hampering the government's efforts to do so.

In 2003, however, the government finally succeeded in enacting emergency legislation. The Law concerning Japan's Peace and Independence and Security of the State and Its Citizen in Attack Situation, passed after heated debate, allows the government to take measures necessary for the SDF to prepare for attacks, and for the government to issue warnings, order evacuation, help those injured, repair damaged facilities or buildings, and to stabilize the market for food and other essential goods, or to distribute them. This Law defines an attack situation as "a situation when an attack on Japan by a foreign country or countries has occurred or there is imminent and clear danger of such attack" and defines an anticipated attack situation as "a situation when the conflict has become serious and attack is anticipated." The Law thus allows the Cabinet to declare an attack situation or anticipated attack situation and to order the SDF to prepare for attack or to respond to an attack. The order may be issued without the authorization of the Diet in emergency situations, but the Cabinet must seek approval from the Diet immediately, and the Cabinet must terminate all measures and call back the SDF officers if the order is disapproved by the Diet.

The Law has a provision requiring the government to respect the rights and freedoms guaranteed in the Constitution, limiting any restriction on those rights to the bare minimum essential to respond to the attack, and to follow fair and due process. Moreover, the Law specifically obliges the government to give most respect to Articles 14, 18, 19, and 21 of the Constitution.

Based on this Law, the government in 2004 introduced several bills concerning emergency situations into the Diet, including a Bill Regarding the Measures to be Taken in Attack Situation in Order to Protect the People in Emergency Situations. The Diet passed them despite strong opposition. The Law authorized the government and local governments to take measures in order to protect people in emergency situations, such as evacuation, and to request public cooperation. The government is authorized to enter into private property, use or take private property, prohibit public entry into designated areas and to take measures to stabilize the market. Designated public institutions such as broadcasting companies are also obliged to cooperate with the government in emergency situations.[33]

Civil and political freedoms

Mental freedoms

Article 19 provides that "[f]reedom of thought and conscience shall not be violated." Similarly, Article 20 provides that "[f]reedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority. No person shall be compelled to take part in any religious act, celebration, rite or practice. The State and its organs shall refrain from religious education or any other religious activity." Furthermore, Article 21, provides that "[f]reedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated." Finally, Article 23 guarantees academic freedom.

It is generally believed that freedom of thought is absolute so long as it remains inside of the mind. There can be thus no prohibition against a particular political or religious thought in Japan. There are few cases, therefore, concerning freedom of thought.[34]

The Constitution protects freedom of religion as well as freedom from participation in any religious act, celebration, rite, or practice. Anyone is free to join a religious group, and to engage in religious activities and education. There is thus no comprehensive regulation of religious groups or religious activities in Japan. Yet, religious freedom is not absolute, and can be restricted for public welfare. For instance, when a religious priest negligently killed a mentally disturbed person while ousting an evil spirit from her body, he was prosecuted for negligent manslaughter. The Supreme Court

made clear that a violation of the Criminal Law could not be justified even if it was based on a religious belief.[35]

A religious group may obtain the status of "religious corporation" under the Religious Corporation Law. The status is not essential for religious groups to be able to gather or to engage in religious activities, but it is useful for religious groups because it enables the group to own property, and to gain tax benefits. The Religious Corporation Law allows the court, however, to dissolve the religious corporation if it violates the law. The *Aum* case[36] raised the pressing question of whether the forced dissolution of a religious corporation violates the religious freedom of individual believers. In this case, the Aum, a new religion that was at one stage popular among young people, was dissolved because its leader, Chizuo Matsumoto, known as Shoukou Asahara, and his sub-leaders were all arrested and prosecuted for spreading deadly sarin gas in Matsumoto city as well as in the subways in central Tokyo, killing many people. The Aum attacked the dissolution order as an unconstitutional infringement of the religious freedom of its believers. The Court was not persuaded, holding that the dissolution would merely deprive the religion of its corporation status, and that the order would not infringe upon the religious freedom of its believers.

Articles 20 and 89 mandate the separation of church and state.[37] As stated above, under the Meiji Constitution Shinto was not treated as a religion, but it received various forms of government support and was the *de facto* state religion. The current Japanese Constitution prevents such entanglement of religion with government, but Shinto remains the prevailing religion among Japanese people. The everyday life of ordinary Japanese people is filled with traditions and customs associated with Shinto, so it is difficult to separate Shinto and the state completely. Moreover, although the GHQ took a strict position against the government's support for Shinto, after the occupation ended the Japanese Government took a more permissive attitude toward government involvement with Shinto. As a result, many instances of government involvement with Shinto were challenged before the courts.[38]

The Supreme Court's major encounter with the question of the separation of church and state came in the *Tsu Ground-breaking Ceremony* case.[39] The city of Tsu decided to construct a new public gym and invited Shinto priests to hold a ground-breaking ceremony before construction began, as was customary. One of the residents of the city filed a suit challenging the spending of public money on this ceremony. The Supreme Court held that a complete separation of church and state was impossible despite the Constitution's provisions. According to the Court, government involvement with religion is permissible so long as it does not go beyond the limits deemed to be appropriate in light of the purpose and the effect of the involvement. The Court applies the "purpose and effect test," which looks to the purpose and effect of the government's action, to see whether a violation of the separation of church and state has occurred. In this case, the Court held that the

purpose of the ground-breaking ceremony was not to promote Shinto and that it did not have the effect of promoting Shinto. The ground-breaking ceremony, the Court concluded, did not violate the separation of church and state principle.

The Court followed this *Ground-breaking Ceremony* case in later cases and upheld every instance of government involvement with Shinto,[40] except for the *Ehime Tamagushi* case.[41] In this case, the governor of Ehime Prefecture visited the Yasukuni Shrine and paid for tamagushi, a religious offering, with public money. A local resident filed a suit challenging this spending as a violation of the separation of church and state principle. Applying the purpose-and-effect test, the Court found for the first time that paying for tamagushi had the purpose of advancing Shinto and that it had the effect of advancing Shinto by giving the impression to the public that Shinto was special. The Court concluded, therefore, that using public money for tamagushi violated the separation of church and state principle, and ordered the governor to pay it back to the prefecture.

The *Ehime* case is apparently exceptional, however, as the Court has generally taken a permissive attitude towards government involvement with Shinto.[42]

Freedom of expression[43]

Article 21(1) guarantees the freedom of speech, and of the press and other forms of expression, and Article 21(2) explicitly prohibits censorship. The constitutional protection of freedom of expression is vital to a democracy, but it is nonetheless widely restricted in Japan.

For example, the advocacy of illegal action, which is typical political speech, is restricted by many statutes, such as the Anti-Subversive Activity Control Law, that have been sustained by the Court. The leading case on the ban on advocacy of illegal action is the *Emergency Food Supply Order* case.[44] The case arose against the social background of a critical food shortage shortly after the defeat in the Pacific war. The government ordered farmers to sell their food products to the government at a designated price and then distributed them among the general public in order to secure the supply of food. Many farmers were displeased by the low price set by the government. One angry farmer told an audience at a farmers' meeting that they should refuse to sell their products to the government. He was arrested and prosecuted for advocating illegal action. The defendant merely proposed that the farmers resolve not to sell their products to the government, and there was no evidence to suggest that his speech had any danger of persuading other farmers to violate the law. The Court upheld the conviction, however, stating that the advocacy of illegal action is against the public welfare and that its restriction is constitutional.[45]

Another example of a restriction is the ban on political speech by public employees in the National Public Employees Law. Breach of this ban may

lead to criminal charges. This almost total ban on political speech by public employees has been criticized as an unconstitutional infringement of the freedom of speech of public employees. In the *Sarufutsu* case,[46] however, the Court upheld it, applying the interest balancing test to conclude that the benefit of assuring political neutrality as well as securing the appearance of political neutrality of public employees outweighed the cost to individual public employees.

Defamatory speech is subject to criminal as well as civil liability. Section 230 of the Criminal Law prohibits the publication of defamatory materials regardless of whether the published materials are true or false. The punishment of the publication of true materials was questioned, however, when the Japanese Constitution was enacted. The Criminal Law was therefore amended to give immunity to those defendants who published defamatory materials if they could prove that the published materials were concerned with a matter of public interest, the publication was made for the sole purpose of advancing public interest, and that the published materials were true.[47] The provision did not, however, give immunity to those defendants who could not prove the truth of his or her statements, so the mass media demanded more protection. In response to this demand, the Court held, in the *Evening Wakayama Times* case,[48] that section 230–2 should be construed to give immunity to those defendants who published materials based on reliable sources, concerning a matter of public interest, and with the sole purpose of advancing public interest, even if they could not prove the truth of the published materials.[49] The Court has given a similar immunity to publishers of defamatory materials who were sued for damages in civil suits.

Article 21(2) specifically prohibits censorship. Censorship or prior restraint on freedom of expression is particularly dangerous and should be prohibited. Yet, in the *Customs Inspection* case,[50] the Court applied a narrow definition of censorship as prohibited in Article 21(2), and virtually nullified this provision. The case involved the Customs Law, which allows customs officers to inspect imported goods for materials prohibited under the Custom Rate Law, including those that offend morality. The plaintiff in this case tried to import pornographic pictures, but the customs office found them during an inspection. Rejecting a defense based on Article 21(2), the Court defined censorship as a comprehensive review, by an administrative agency specifically charged with such inspection, of the contents of materials prior to their publication. It held that a customs inspection that allows customs officers to review the contents of materials published in another country incidentally to their customs obligations was not prohibited censorship.

As a result, only prior restraint by an administrative agency is prohibited in Article 21(2). In the *Hoppou Journal* case[51] the magazine planned to publish an article critical of the plaintiff, who had announced his candidacy for an election in Hokkaido. The plaintiff sought an injunction against publication and distribution of this issue of the magazine. Rejecting the argument of the defendant publisher, the Court held that the judicial injunction was not

censorship as defined in Article 21(1). The Court held, however, that the injunction was a prior restraint and that it should be issued only when the published materials were apparently false and were published without any motive of advancing public interest, and if there was a danger of causing grave and irreparable harm to the defendant. Applying this standard, however, the Court found that all three conditions were fulfilled in this case. Because of this decision, it has become quite easy, even for public officials, to halt the publication of books and magazine on the grounds of defamation or invasion of privacy.

The freedom of assembly is also qualified. Local governments have enacted public peace ordinances that regulate public demonstrations on public streets. They generally require an advance permit, which may be refused when there is a danger that the gathering will disturb the public peace. In the *Niigata Public Peace Ordinance* case,[52] the Court held that these the public peace ordinances were constitutional because they only imposed a notification requirement, and prohibited a particular demonstration when there was a clear and imminent danger of disturbing the public peace under a reasonable and clear standard. This decision was generally praised by academics for its adoption of the clear-and-present-danger test in order to judge the constitutionality of public peace ordinances. Yet, in the *Tokyo Metropolitan Public Peace Ordinance* case,[53] the Court repudiated the position adopted in the *Niigata Public Peace Ordinance* case and held that even the comprehensive permit requirement was permissible if the ordinance was limited to denying permits in reasonable circumstances. According to the Court, as a public demonstration could easily turn into a riot, the local government was allowed to enact a comprehensive permit system and refuse permits if there was a danger of disturbing the public peace. As a result, it has become difficult to engage in free demonstrations in Japan.

Political rights

Article 15 guarantees the right to vote: "The people have the inalienable right to choose their public officials and to dismiss them. All public officials are servants of the whole community and not of any group thereof. Universal adult suffrage is guaranteed with regard to the election of public officials. In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made." Under the Japanese Constitution, therefore, every Japanese adult has a right to vote. No one is deprived of the right to vote, everyone has just one vote, and the value of each vote is equal. Nonetheless, some people, such as prisoners or those who violate the election laws, are deprived of the right to vote.[54]

Yet, this does not mean that there is no problem in Japan with respect to elections. Probably the biggest flaw in the Japanese election law is the complexity of and unprincipled changes to the election mechanism. The Diet is composed of the House of Representatives and the House of Councilors.

Although members of both Houses are defined as representatives of all the people, members of the House of Representatives have a shorter term of office, and the House of Representatives has superior power over the House of Councilors. Traditionally, the election method for the House of Representatives was based on a multiple-member election district with just one vote for each voter; the voter cast one vote and the multiple numbers of candidates who received the highest number of votes were elected in each election district. Under this election method, multiple candidates ran from the same political party, thus making the pork barrel, not the platform of a political party, the focus of choice. Because of this problem, the election method for the House of Representatives was changed in 1994 to a combination of single-member districts and proportional representation. It is doubtful whether the new election system is based upon any particular principle, any more than the traditional system was. Nevertheless, the Court has sustained the election system, giving broadest discretion to the Diet in designing the election system.[55]

The second serious problem is the tight regulation of election campaigning under the Public Office Election Law. The Public Office Election Law designates a short election campaigning period, prohibiting election campaigning before that election period, so the election is already over in reality when the official election period starts. It also prohibits the distribution of leaflets and other documents as well as door-to-door canvassing, two of the most typical methods of election campaigning. Because of these restrictions, it is very difficult for ordinary people to participate in election campaigning or to run for office. This is also evident from the fact that many politicians are sons of former politicians. These restrictions have been attacked by many academics as unconstitutional violations of the freedom of expression. Yet the Court has sustained them, insisting that there are reasonable grounds for justifying the ban.[56]

The third serious problem is the continuing gross malapportionment.[57] As stated above, the traditional election method for the House of Representatives was the multiple-member district. At first, the number of representatives to be chosen in each district was distributed according to the population in each district by the Public Office Election Law, and a periodic reapportionment was anticipated. Rapid urbanization followed the post-war economic growth and, as a result, the discrepancy between the apportioned number of representatives and the actual population of each district widened. The Diet, however, did not reapportion as anticipated by the law. Consequently, the gross malapportionment reached the level of maximum discrepancy: 1:5.

The Court was at first reluctant to intervene in this issue. But in 1976, the Court for the first time held that Articles 14 and 15 mandate the equal impact of each vote in an election, thus making gross malapportionment an unconstitutional infringement of the right to equal worth of each vote. Yet the Court gave considerable discretion to the Diet to design the election

methods, conceding that the population of the election district was not the sole consideration in making an apportionment, so other factors could be considered. The Court held, that it would be justified in holding the apportionment statute unconstitutional only when the discrepancy reached a level that went beyond reasonable limits, and when the Diet failed to reapportion during a reasonable period. In this case, believing that the maximum discrepancy of 1:5 was so unreasonable and that the Diet failed to make appropriate reapportionment during a reasonable period, the Court held the apportionment provision of the Public Office Election Law unconstitutional.[58]

Nevertheless, the Court has been considerably reluctant to impose strict limits upon malapportionment even after this 1976 decision. The Court in 1985 affirmed the basic principle announced in the 1976 decision and held that the maximum discrepancy of 1 to 4.4 was unconstitutional.[59] On the other hand, the Court held in 1983 that the maximum discrepancy of 1 to 3.94 was unconstitutional, but that it was still a reasonable period since the last apportionment.[60] Judging from these and other decisions, it is generally assumed that the Court would permit a maximum discrepancy of 1 to 3.

Even after the election reforms in 1994, the Diet failed to reapportion the single member district proportionately to the population of each district. As a result, the election after the reform was challenged. The Court held that the maximum discrepancy of 1 to 2.3 at the time of 1996 election had not reached an unconstitutional level.[61] Malapportionment, therefore, still remains a serious problem in Japan's election system. In short, a voter in a rural district has a vote that is three times more powerful than that of a voter in an urban district.

Economic and social rights

Economic freedoms[62]

Article 22(1) protects a person's right to choose an occupation, providing that "[e]very person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare." Article 29 protects property rights, providing that "[t]he right to own or to hold property is inviolable. Property rights shall be defined by law, in conformity with the public welfare. Private property may be taken for public use upon just compensation therefor." The right to choose an occupation has been construed as protecting the right to engage in a chosen occupation, thus making Article 22(1) the textual source for broad economic freedom.

The Japanese Constitution apparently followed the modern liberal constitutions in protecting these economic freedoms. Yet, it also made clear, by following more contemporary constitutions, that economic freedoms are subject to restrictions to accomplish the welfare state in Articles 22(1) and 29(2).

In Japan, however, economic freedoms are subject to voluminous restrictions, including a vast number of permit requirements. The Court has largely taken a deferential attitude toward the Diet when those restrictions were challenged. For instance, when the proper distance requirement for public baths was challenged in the *Public Bath* case,[63] the Court easily upheld it, viewing it as a public safety measure. Since the proper distance requirement was inserted into the Public Bath Law in order to protect existing public baths, the public safety rationale was highly dubious. But the Court did not consider the motive for the requirement. Similarly in the *Marketplace Law* case,[64] the Court upheld the proper distance requirement for public marketplaces, this time viewing it as a social welfare restriction that promoted balanced economic development.

The Court showed, however, a strikingly different attitude in the *Pharmaceutical Law* case.[65] The Pharmaceutical Law required that there be a certain distance between an existing drugstore or pharmacy store and the new drugstore or pharmacy store that was applying for a permit. The Court found that the proffered legislative end of protecting public safety and health was rational. But the Court found that the means chosen, denying a permit for a new drugstore or pharmacy store, was not rationally related to that end, because other less restrictive methods were available to achieve that end. The Court hence struck it down as unconstitutional.[66]

This decision appears to introduce a distinction between public safety and health restrictions and social welfare restrictions in judging the constitutionality of economic regulation. When the Court examines the constitutionality of social welfare restrictions, it gives utmost respect to the discretionary judgment of the Diet, especially because such social welfare legislation requires many technical and policy-based decisions. When the Court examines the constitutionality of public safety or health restrictions, however, the Court is justified in employing a more searching review because the legislation is aimed at protecting the public's safety and health by mitigating the harm caused by economic activity.

This dichotomy has been supported by many academics. But the Court's decision in the *Forest Law* case[67] suggests that the Court is not strictly abiding by it. The Forest Law involved a provision that restricted the division claim of co-owners of a forest. With respect to ordinary property, each co-owner can file a division claim, but with respect to forest land, the law prohibits a co-owner from filing a division claim unless the claimant has more than a half share of the forest. In this case, two brothers were given half shares in a forest by their father. Following a quarrel over the management of the forest, one brother filed a division claim. The court rejected the claim, however, based on the relevant provision of the Forest Law. The claimant then challenged its constitutionality. Without stating clearly whether the provision was a public safety or health restriction or a social welfare restriction, the Court held that the means chosen was ill-suited to achieve the legislative end of promoting effective forest management. Since it is

difficult to characterize the provision involved as a public safety or health restriction, most academics understood this decision as invalidating an unreasonable social welfare restriction.

The *Forest Law* case cast doubt on the supposed dichotomy between public safety or health restriction and social welfare restriction, and suggested that even social welfare legislation might be struck down by the Court. But the Court in subsequent cases refused to follow either the *Pharmaceutical Law* case or the *Forest Law* case in scrutinizing restrictions on economic freedoms, and upheld all challenged restrictions.

As a result, despite the constitutional guarantee of economic freedom, one can say that there is not much economic freedom in Japan. Professor Toshiyuki Munesue said that there is unwritten constitution in Japan which prohibits competition.[68] Indeed, academics as well as bureaucrats in Japan believe in a highly anti-market philosophy, casting doubt on the fairness of the market economy, and so they argue for the protection of weak industries. The ideal has been the sharing of prosperity and good management by bureaucrats. This anti-market philosophy has undermined the ability of the Japanese economy to compete with other nations and thus led to a long-term economic slump.

Social rights

The Japanese Constitution contains several social rights provisions. Article 25 protects the right to welfare, by providing that "[a]ll people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health." In Article 26, the Japanese Constitution protects the right to receive education, by providing that "[a]ll people shall have the right to receive an equal education correspondent to their ability, as provided by law. All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free." Furthermore, the Japanese Constitution protects rights of workers, first providing in Article 27 that "[a]ll people shall have the right and the obligation to work. Standards for wages, hours, rest and other working conditions shall be fixed by law" and that children are not to be exploited, and then by providing in Article 28 that "[t]he right of workers to organize and to bargain and act collectively is guaranteed."

The constitutional protection of the welfare right is striking because no comparable provision can be found in any western countries. Even in Germany, where the Fundamental Law mandates that the Republic of Germany is a "social state", it is generally construed as not protecting an individual right to receive welfare. It appears, therefore, to be a bald attempt to protect the welfare right as a constitutional right. Based upon this welfare right, the Diet passed the Life Assistance Law and established a

welfare assistance system. The Diet has also established a mandatory national health insurance scheme and a national pension scheme to accomplish the goals provided for by this provision.

Yet the Supreme Court has shown extreme reluctance to interfere with the judgment of the Diet when welfare law is challenged before the Court as a violation of the welfare right.[69] The *Asahi* case[70] is typical: a welfare recipient challenged the decision to reduce welfare payments as an infringement of the welfare right as protected in Article 25, arguing that the amount of payment was insufficient to maintain the minimum standards of a wholesome and cultured living. The Court rejected the challenge for technical reasons (the plaintiff died during the litigation) but gave its opinion on the constitutional issue involved, saying that there was no constitutional violation in the decision to reduce welfare payments because Article 25 was merely mandating a goal to be accomplished by the political branch. The issue of welfare, in short, should be left to the judgment of the political branches. The Court also took a deferential stance toward the Diet in the *Horiki* case.[71] In this case, the plaintiff, a disabled mother, was receiving a disability welfare pension benefit. When she divorced her husband and applied for the child support benefit for her dependant children, the governor declined her application, insisting that the Child Support Benefit Law precluded the recipient of the disability welfare pension benefit from receiving the child support benefit. The plaintiff challenged this preclusion as unconstitutional under Article 14 as well as Article 25. The Court afforded widest discretion to the Diet in designing welfare legislation and concluded that the Diet did not act arbitrarily when it decided to preclude the recipient of the disability welfare pension benefit from receiving the child support benefit, since both benefits have the same nature of supplementing insufficient income.

As to the right to receive education, the Diet has passed the Fundamental Law on Education and the School Education Law, establishing the public school system and requiring all parents to send their school-aged children to schools. Since compulsory education must be free, every child can receive free public education. This mandatory education system certainly contributed to the post-war economic development of Japan since it enabled Japanese children to acquire the necessary knowledge to sustain such development.

Yet recently, the Japanese public education system has not been free from problems. One such problem is serious bullying and violence in schools. The government in the past failed to take adequate measures to prevent such bullying or violence or to help the injured children. Because of the bullying and other issues, many children refused to go to school, but the government has failed to support them. Second, the quality of public education may also be problematic. Public elementary school classes have forty students, and it is impossible to meet the different needs of all children. In some schools, teachers simply could not manage the classes. Moreover, because of a recent policy reducing the content being taught in public schools, many parents

decided to send their children to private schools, creating more problems in the public schools. A third problem is the government's effort to control the content of education. In order to preserve the same level of education all over Japan, the Ministry of Education has established a teaching guideline. Yet, the government's effort to control the teaching materials for Japanese history classes caused the teachers' union to challenge the government's authority over the curriculum. The Court, in the *Asahikawa Testing* case,[72] while conceding that the government does have the authority to control the content of school education, limited the authority, saying that the government is not permitted to indoctrinate students or to deny the autonomy of each student. The limits of government authority are still ambiguous, and the recent efforts by the government to promote patriotism among students has raised significant issues.[73]

The Diet has passed the Labor Union Law, the Labor Standard Law, the Labor Relationship Adjustment Law, and many others to protect the rights of workers. In order to fulfill the requirements of Article 27, the government has established placement offices to offer jobs, and has set up an unemployment benefit scheme. In order to comply with Article 28, the Diet has prohibited as "unfair labor practices" the prevention of union activity, retaliation against union activity, and the refusal of negotiation. It established independent administrative agencies, called labor relation boards, to adjudicate complaints filed by labor unions. Furthermore, the Diet has given criminal as well as civil immunity to legal strikes.

Because of these provisions, workers in Japan are free to engage in union activity. Workers are not allowed, of course, to engage in violent conduct. The so-called political strike is also not allowed if the issue is unrelated to the labor conditions of the workers. Other than these general limits, the only exception to the rule is concerned with workers in public utility companies and public transportation companies. Workers in these industries, whose services are integral to the lives of the public, must notify the labor relation boards before engaging in strikes, and a special adjustment procedure is arranged for dispute resolution.

When we turn our eyes to public employees, however, we find a totally different picture. The rights of public workers are severely restricted by the National Public Workers Law, Local Public Workers Law, and the Self Defense Law. Some public workers, such as SDF officers, police officers, and firefighters, are prohibited from joining unions and also from engaging in collective action. Some others are allowed to join unions but are precluded from engaging in collective bargaining and from engaging in collective actions. These prohibitions have been challenged before the courts as infringing the rights of workers as protected in Article 28. The Supreme Court once showed some willingness to scrutinize the necessity of such a sweeping ban on collective action. In the *Tokyo All Postal Workers Union* case,[74] for instance, the Court, while upholding the constitutionality of those statutes prohibiting collective action, intimated that the criminal ban should

be limited to the minimum level necessary to maintain the public interest. In this case, the Public Sector Workers Law, as it then existed, prohibited collective action but did not impose criminal sanctions on violators. Nevertheless, the government prosecuted those violators under the Postal Law, which made it illegal to refuse to fulfill the postal duty. The Court held that, because of the absence of criminal punishment in the Public Sector Workers Law, only those violators who seriously interrupted the postal duty for a long period should be punished under the Postal Law, and remanded the case to the lower court to decide whether the defendants should be punished. In short, while conceding the constitutionality of ban on collective action by public employees, the Court limited the scope of criminal punishment in considering the significance of Article 28.

Thereafter, the Court followed this decision and gave immunity to some public workers, but this limiting construction was soon totally rejected by the Court. In the *All Forest Workers* case,[75] the Court held that the sweeping ban on collective action was justified because public workers are obliged to serve all the public and because the working conditions for public workers had to be decided by the Diet. The limiting construction intimated by the *Tokyo All Postal Workers* case and others, the Court even declared, would violate the due process clause of the Constitution. The Court thus practically overturned the *All Postal Workers* case and upheld the criminal punishment of forest workers who violated the ban on collective action. The Court has maintained this stance ever since, and later in the *Nagoya All Postal Workers* case[76] explicitly overturned the *Tokyo All Postal Workers* case. Consequently, all public workers are still deprived of their right to collective action.

Cultural rights

In Japan, the notion of "cultural rights" is not commonly discussed, so we must look to the equality right to find how cultural rights are protected in Japan. The equality right[77] is protected in Article 14, which provides that "[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. Peers and peerage shall not be recognized. No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it." The Constitution has another equality provision regarding family matters in Article 24, which provides that "[m]arriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."

Unlike under the Meiji Constitution, therefore, peers and peerage are prohibited and general equality is now constitutionally mandated. Discrimination against racial and ethnic minorities is prohibited. Yet, the Japanese Constitution says nothing about the status of the native or indigenous people of Japan. The Ainu, the native Japanese, who live mostly in the northern part of Japan, especially in Hokkaido, are an ethnic minority with their own language, culture, and traditions. The Ainu were discriminated against under the Meiji Government, which enacted the Hokkaido Former Barbarian Protection Law as it believed that the Ainu people were primitive barbarians. The Law ignored the tradition of the Ainu people and forced them to accept the notion of property rights, requiring them to cultivate individual pieces of land, practically destroying their lifestyles. Many Ainu people ended up losing their property. It was only in 1997 that this law was abolished and was replaced by the Law Concerning Protection of Ainu Culture and Promotion and Publication of Knowledge of Ainu Tradition. The new law does not give any privileges to the Ainu people, and it is commonly believed that the Constitution does not admit any special status of native or indigenous people for the Ainu people.

As in other cases, the Supreme Court has showed a deferential stance toward the Diet in dealing with discrimination, even racial or sexual discrimination. The Supreme Court has held in many decisions that the constitutional guarantee of equality is qualified and that reasonable distinction between people is permissible.[78] When a classification is challenged, therefore, the Court reviews whether the classification is justified as a rational means to accomplish rational ends. By applying this unified rationality review, the Japanese Court has deferred to the judgment of the Diet and has rejected all constitutional attacks except for just one case. For instance, the Court upheld section 733 of the Civil Law, which prohibited divorced women from remarrying until six months after the divorce. A divorced woman challenged the provision as an unreasonable sex discrimination, but the Court held that it had the legitimate purpose of statutorily presuming the identity of the father of a child born after the divorce, and that the Diet had not acted unreasonably in legislating this provision.[79] The Court also upheld section 900 of the Civil Law, which defines the statutory right to inheritance of an illegitimate child as merely one-half that of a legitimate child.[80] Since the Constitution allows statutory marriage, the Court said, it also allows the Diet to make a reasonable distinction between a legitimate child and an illegitimate child. The limitation of inheritance, the Court held, was a result of an exercise of reasonable discretion of the Diet, considering the welfare of the illegitimate child.

The Court showed even more reluctance to intervene in cases concerned with alleged discrimination in tax law or welfare law. In the *Ohshima* case,[81] the Court upheld the alleged discrimination against salaried workers in income tax law. In Japan, the company that hires an employee deducts income tax from his or her salary and pays it to the government. An individual

employee does not have a right to claim deductions even if he or she spent money for his or her work. The plaintiff challenged this system as unreasonably discriminatory, as individual shop owners could claim deductions. Yet, the Court easily rejected this attack, giving the widest discretion to the Diet in designing the tax deduction system. The Court showed a similar reluctance in the *Horiki Case*, a welfare right case, mentioned above.[82]

The only exception is the *Patricide* case,[83] which was concerned with the patricide provision of the Criminal Law. Section 200 of the Criminal Law imposed unlimited imprisonment or the death penalty for patricide whereas section 199 imposed the death penalty, unlimited imprisonment, or imprisonment for over three years for ordinary murders. Because of this difference in statutory sentences, a defendant who was prosecuted under section 200 had no chance of getting probation even if there were tremendous mitigating factors, whereas a defendant who was prosecuted under section 199 had such a chance. In the *Patricide* case, the defendant, who was raped by her father and was forced to bear his children, murdered her father when she finally fell in love with her boyfriend, as she was afraid that her father would ruin her marriage. The Supreme Court in the past rejected the constitutional attacks on section 200, but in this case the Court overturned its precedents and held that section 200 was unconstitutional because the difference in statutory penalty was so unreasonable. The Court thus invalidated section 200 and applied section 199 instead, granting probation to the defendant after considering all the mitigating factors.

Given the deferential stance of the Court, it is unlikely that any racial or sexual discrimination will be struck down.[84]

Critical evaluation

Influence of American constitutionalism

When we look at the protection of fundamental human rights in Japan, it is not surprising to see the strong influence of American constitutionalism on the Japanese Constitution. Indeed, the influence of the US Constitution, as Professor Yasuhiro Okudaira says, has been "decisive" in the field of protecting individual rights,[85] and the bill of rights provisions of the Japanese Constitution have a great deal in common with those of the US Constitution. Finding such similarity is natural, because the draft Japanese Constitution was prepared by members of the GHQ, which was mainly staffed by American officers.

Yet there are certain critical differences as well. First, the US Constitution nowhere uses the term "fundamental human rights," and its bill of rights provisions are generally viewed as protecting "individual rights" or "civil rights and civil liberties." Yet, the Japanese Constitution explicitly uses the term "fundamental human rights" to denote individual rights. Second, when we look into the text of the bill of rights, we notice that there are some

significant differences between the US Constitution and the Japanese Constitution. For instance, generally speaking, the Japanese Constitution is more detailed and elaborate than the US Constitution. In the USA, the First Amendment protects a wide range of substantive freedoms. But in Japan, freedom of thought, freedom of religion, freedom of expression, and academic freedom are all separately guaranteed. The US Constitution does not have a provision explicitly protecting property rights or economic freedoms except for the just compensation clause in the Fifth Amendment. The Japanese Constitution, however, provides a property right in Article 29 and the freedom to choose an occupation in Article 22. As for procedural rights, whereas the US Constitution explicitly guarantees the right to a jury trial, the Japanese Constitution does not. The Japanese Constitution also does not guarantee the right to an indictment by a grand jury. A further critical difference is that the US Constitution, which was enacted over two hundred years ago, contains no social rights provisions, while the Japanese Constitution, enacted after the Second World War, has many. The welfare right and its constitutional obligation on the government to maintain a minimum standard of living are foreign to the basic philosophy of the US Constitution.

Comparison with decisions of Supreme Court of the USA

Yet the mere textual similarity does not prove much, and there are critical differences between Japan and the USA in actual human rights protection. We have already seen to what extent fundamental human rights are protected by the Japanese Supreme Court. Our Supreme Court has invalidated statutes that restricted human rights only four times in its more than fifty years of its history. In the *Patricide* case, the Court invalidated section 200 of the Criminal Law under Article 14. In the *Pharmaceutical Law* case, the Court invalidated the proper distance requirement in the Pharmaceutical Law under Article 22. In the *Forest Law* case, the Court struck down a provision in the Forest Law, which restricted the division claim of co-owners of a forest. Besides these three cases, the Court struck down a provision in the Postal Law concerning liability limitation for mishandling registered mail.[86] In addition to the *Ehime Tamagushi* case and the *Confiscation of the Third-Party-Owner-Property* case, the Court struck down government conduct on only one other occasion.[87] Even if we add the two reapportionment cases, therefore, the number of unconstitutional rulings is less than ten. The US Supreme Court probably invalidates more statutes in just one term.

It is particularly striking that the Japanese Supreme Court has never struck down any statutes that restrict personal freedoms, especially freedom of expression. Of the four unconstitutional rulings on statutes, two are concerned with economic legislation. The third is concerned with Article 17 but it may be construed that it is also concerned with property rights. Of three unconstitutional rulings on governmental acts, two are apparently concerned

with property rights. It appears that the Japanese Supreme Court is somewhat more confident when ruling on the constitutionality of restrictions of non-political freedoms.

Indeed, the Japanese Supreme Court is reluctant to invalidate restrictions on political and civil rights. The only exception is the *Ehime Tamagushi* case. For sure, in the two decisions on malapportionment, the Court held that gross malapportionment violated the equality right of voters under Articles 14 and 15. Yet, the Court tolerated the maximum discrepancy of 1:3 and it allowed the Diet a grace period before reapportionment, and refused to invalidate the election even though it found that the underlying apportionment provision was unconstitutional. As a result, these decisions could be easily ignored, as they were only a warning with little substantive effect. In the end, the decisions did not have much political impact.

There are also differences between the Japanese Supreme Court and the US Supreme Court within the individual cases. For example, in the USA the advocacy of illegal action is constitutionally protected unless the advocacy itself is a direct incitement and unless the advocacy is likely to produce illegal action.[88] In Japan, however, the Court allows criminal sanctions to be applied if the advocacy is capable of producing illegal action. The US Supreme Court gives far more constitutional protection to advocacy of illegal action. The same can be said with respect to defamation. In the USA, public officials and public figures are precluded from suing the media for defamation unless they can prove that the story was false, and that the media published the story knowing it to be false or with reckless disregard.[89] In Japan, however, the media can be held liable unless they can prove that the story concerned a matter of public interest, that they published the story with justified motive, and that the story was true or at least was supported by reasonable grounds. In the USA politicians almost never win libel suits, whereas in Japan the prime minister, the chief secretary of the government, and leaders of the ruling party can easily be awarded damages. Moreover, in the USA, an injunction against publication of defamatory materials or privacy would constitute a prior restraint, and it is hardly imaginable that any court would grant such an injunction in ordinary cases.[90] But in Japan, the defamed person or the person whose privacy was violated may ask the court to issue an injunction, which the courts are quite willing to grant.[91] Moreover, the comprehensive permit requirement for public demonstrations, and all the restrictions on political speech under the Public Office Election Law that were held permissible by the Japanese Supreme Court, would probably be invalidated by the US Supreme Court. Overall, freedom of expression is far more comprehensively protected in the USA.

Similarly, with respect to the equality right, whereas the Japanese Supreme Court applies a deferential rationality review in equality right cases (except for the *Patricide* case), the US Supreme Court has used a more searching review in racial and sexual discrimination cases: strict scrutiny in racial discrimination cases and intermediate scrutiny in sexual discrimination

cases. With respect to the principle of separation of church and state, although the Japanese Supreme Court applies a test similar to that used by the US Supreme Court, the test used by the US Supreme Court is more demanding.

The existence of social rights in the Japanese Constitution, the most significant point of difference from the USA Constitution, appears to have no substantive implications since the Japanese Supreme Court has interpreted them as merely a political goal and not a judicial norm. The existence of the welfare right did contribute to the enactment of the Life Assistance Law and the establishment of mandatory national health insurance system, but the difficulty of challenging welfare law before the court indicates that decisions in this area are largely left to the wide discretion of the Diet.

In Japan, therefore, the Court is not playing a significant role in protecting individual rights, when compared with the US Supreme Court. There are perhaps institutional as well as philosophical reasons for this stance. The institutional reasons include the lack of experience of the Japanese judges in exercising the power of judicial review; the deferential attitude of the judges toward statutes, typical of positivist judges trained in the civil law tradition; and the inability of those judges to interpret the general provisions of the Constitution in order to apply them to a case before the Court. The composition of the Supreme Court is another factor, as the Supreme Court Justices are nominated or appointed by the Cabinet and, because the government has not changed since the war, almost all justices were appointed by a conservative cabinet.

The philosophical reason is the antipathy of the general public toward the assertion of rights by minorities in Japanese society. In Japan, those people who dispute the decisions of the majority are often seen as disrupters of the group harmony. The general public is not tolerant of the individual dissenter. As a result, many plaintiffs in constitutional litigation receive harassing letters and midnight calls, and sometimes threats to their lives. Many people still believe in the government and regard a suit against the government as inappropriate. In this climate, it is often difficult, practically speaking, for the Court to sustain the claim of an individual against the government.[92]

Does all of this mean that the constitutional protection of individual rights is meaningless in Japan? The answer is probably no. It is undeniable that the courts have not played a significant role in protecting fundamental human rights. Even though the power of judicial review is vested with the courts by Article 81 of the Constitution, the Supreme Court has not been willing to scrutinize the constitutionality of legislation and to strike them down.[93] Therefore, if we just look to the human rights record of the courts, then we must conclude that human rights are not effectively protected in Japan.

This does not mean, however, that the Japanese courts have no role to play. Professor Yasuhiro Okudaira notes the special devotion of many Japanese people to the phrase “human rights” and how often the charge of human rights violation is raised in everyday disputes.[94] Despite the

tremendous difficulties outlined above, a number of citizens still dare to file suits challenging the constitutionality of governmental actions. Interestingly, some of them appear not to care much about crafting their challenge in a way that would convince the courts to sustain their claim. For them, the charge that a government act violated human rights is enough to attract media attention, and to keep protesters motivated, so they are not always focused on winning the case. The courts' response could be said to encourage this attitude: even when the courts refuse to accept constitutional arguments, some judges are willing to make comments that are critical of the government. These remarks are merely *obiter dicta* and do not have any legal significance, but the media often seize upon the remarks to support their own criticism of the government. Often protesters are satisfied with these critical comments.[95]

Professor Eric A. Feldman has also vividly illustrated how Japanese citizens can utilize the court to advance their claims against the government.[96] In Japan, more than 500 hemophilia patients, who were injected with tainted unheated blood products in order to treat their illness, contracted the HIV virus and died of AIDS. Believing that the government failed to take adequate measures to prevent the use of unheated blood products even after its danger was known in other countries, the patients filed a suit against the government seeking damage awards. The suit attracted media attention and gradually the mass media began to publish comments that were critical of the government. The government strongly denied its responsibility. During the trial proceedings, however, it was revealed that government officials as well as the chief expert doctor who were studying the unheated blood products noticed the danger and that they nonetheless refused to prohibit the importation of unheated blood products. It was widely believed that the refusal was motivated by their concern with the domestic drug manufacturer that was not prepared to produce heated blood products. The district court recommended that the government settle the case and pay compensation. Under pressure from mass media as well as from the public, the health minister decided to acknowledge the responsibility of the government and apologized. The suit was settled. Those officials and the chief expert doctor were then prosecuted for their failure to take adequate measures to prevent the contraction of the HIV virus. This case illustrates that victims may use litigation effectively to influence bureaucrats and the media, ultimately forcing the government to acknowledge its responsibility. Even though the courts are not playing a significant role in protecting fundamental human rights, the constitutional guarantee of fundamental human rights and constitutional litigation nevertheless have an impact. The constitutional guarantee of fundamental human rights has political and moral implications in Japan, as the people tend to view the bill of rights as a moral imperative and not as a judicial norm. The people also tend to rely upon bureaucrats to remedy social problems, including even human rights violations, rather than the courts. Litigation is one tool for influencing the bureaucracy.[97]

One may conclude, therefore, that the Japanese people have invented a unique way of protecting fundamental human rights: human rights protection in the Japanese style. It is doubtful, however, that this Japanese style is well enough designed to protect human rights. It is no wonder, therefore, that most constitutional scholars argue for the Court to play a more active role in protecting fundamental human rights.

Conclusion

Although the human rights record under the Japanese Constitution is surely far better than that of the Meiji Constitution, it is questionable whether one can agree with the assertion that the fact that:

> [F]undamental human rights were not implanted on a defeated, sullen and resistant people has been demonstrated by the phenomenally rapid rooting of those rights in Japanese society. If Americans were responsible for introducing fundamental human rights as a basic principle of democratic constitutionalism, then it was the Japanese who in practice adopted and cultivated them and have harvested the fruits.[98]

Japan's record is not convincing when compared with Western countries. The relatively short history of human right protection in Japan may be one reason for this apparent lag, and it may be hoped that Japan will reach the same level of human rights protection in time. But, I for one am not optimistic. Conservatives have been critical of the individualism in the bill of rights ever since its enactment. During recent debates on constitutional revision and amendment, therefore, many argued that the individualism adopted by the Japanese Constitution is inappropriate for Japanese society where individual freedom and individual wishes must yield to group harmony. These critics of human rights support constitutional amendment to make clear that fundamental human rights are subject to the public welfare. Moreover, they want patriotism and an obligation on citizens to support the country to be added to the Constitution, along with more duty provisions.

It is still unclear whether these arguments are supported by the majority of people. Indeed, there are many who argue for the adoption of new constitutional rights such as, an environmental right or right to privacy. Yet the existence of conservative critics demonstrates the possibility that the fundamental human rights provisions might be radically amended in the future. It may be too early to conclude that the Japanese have truly embraced the concept of fundamental human rights.

Notes

1 Marcus B. Jansen, *The Making of Modern Japan*, Cambridge: Belknap Press, 2000, pp. 389–95; Masami Itoh, "The modern development of law and constitution

in Japan," in Lawrence W. Beer, ed., *Constitutional Systems in Late Twentieth Century in Asia*, Seattle: University of Washington Press, 1992, pp. 129–38.

2 Koseki Shoichi (translated by Ray A. Moore), *The Birth of Japan's Postwar Constitution*, Boulder, CO: Westview Press, 1998; John W. Dower, *Embracing Defeat: Japan in the Wake of World War II*, New York: Norton, 1999, pp. 346–404; Theodore MacNelly, *The Origins of Japan's Democratic Constitution*, Lanham: University Press of America, 2000.

3 The Japanese Supreme Court is composed of one Chief Justice and fourteen Associate Justices. It usually hears a case as a five-member Petty Bench and it is only in exceptional cases that it sits *en banc*, as a Grand Bench. The Supreme Court is supposed to exercise the power of judicial review only incidentally to the exercise of its judicial power, so there must be a case or controversy for the Supreme Court to review the constitutionality of a statute. The Supreme Court is not allowed, therefore, to give advisory opinions or to exercise the power of judicial review without a case.

4 Toshiyoshi Miyazawa, *Kenpou II [Constitutional Law II]*, Tokyo: Yuhikaku, new edn, 1971, pp. 77–9; Nobuyoshi Ashibe (supplemented by Kazuyuki Takahashi), *Kenpou [Constitutional Law]*, Tokyo: Iwanami Shoten, 3rd edn, 2002, pp. 78–80. For a different view, see Shigenori Matsui, *Nihonkoku Kenpou [Japanese Constitutional Law]*, Tokyo: Yuhikaku, 2nd edn, 2002, pp. 299–301 (fundamental human rights should be viewed as individual rights of citizens to participate in politics).

5 On the other hand, some academics claim that some constitutional rights are not fundamental human rights in this sense. The right to seek damage awards against the government (Article 17) and the right of the criminal defendant to seek compensation (Article 40) are often cited as such examples of constitutional rights that are not fundamental human rights. Yet over all, no clear distinction between pre-constitutional fundamental human rights and constitutional rights (fundamental human rights) is made in Japan.

6 Ashibe, *supra* note 4, p. 78.

7 *Ibid.*, p. 89. See generally Shigenori Matsui, "Aliens under the Japanese Constitution," in Shigenori Matsui and Susumu Noda, eds, *Foreign Workers Problem*, Osaka: Center for Japan–US Exchange in Humanities and Social Sciences, 1993.

8 Ashibe, *ibid.*, p. 10.

9 Yet the prevailing view also rejects a rigid distinction between negative freedoms and other rights. Rights other than negative freedoms are protected, and some of the negative freedoms protected by the Constitution must now be construed to include the right to demand government services. Freedom of expression, for instance, is now construed to include the right to access government information.

10 Judgment of December 24, 1969, Supreme Court, Grand Bench, Keishu, vol. 23, no. 12, at 1625.

11 Judgment of December 12, 1973, Supreme Court, Grand Bench, Minshu, vol. 27, no. 11, at 1536 (the *Mitsubishi* case).

12 Judgment of March 24, 1981, Supreme Court, 3rd Petty Bench, Minshu, vol. 35, no. 2, at 300 (the *Nissan Motors* case).

13 Judgment of March 13, 1957, Supreme Court, Grand Bench, Keishu, vol. 11, no. 3, at 997 (the *Lady Chatterley's Lover* case).

14 Ashibe, *supra* note 4, pp. 97–8.

15 The Second Periodic Report by the Government of Japan under Articles 16 and 17 of the International Covenant on Economic, Social, and Cultural Rights, the Fourth Periodic Report by the Government of Japan under Article 40 Paragraph 1(b) of the International Covenant on Civil and Political Rights, and the Concluding Observations of the Human Rights Committee (November 1998) are available at www.mofa.go.jp/policy/human/index.html.

16 The Japanese Government therefore placed a reservation on the provision referring to punishment of hate speech in the International Convention on the Elimination of All Forms of Racial Discrimination, because of its conflict with the freedom of expression clause in the Constitution.

17 B. J. George, “Rights of the Criminally Accused,” in Percy R. Luney, Jr. and Kazuyuki Takahashi, eds, *Japanese Constitutional Law*, Tokyo: University of Tokyo Press, 1993 (hereinafter *JCL*).

18 Judgment of November 28, 1962, Supreme Court, Grand Bench, Keishu, vol. 16, no. 11, at 1593. In this case, the Court ordered the confiscation of goods that the defendant was attempting to export illegally to Korea without permission even though the defendant did not own them. The Supreme Court overturned its precedent and held that the confiscation violated the right of the third-party owner since he was not provided an opportunity to be heard.

19 The suspect has a right to be represented by an attorney when detained. The Constitution even affords the suspect a state-appointed attorney to represent him or her, but the Court has held that no such right to a state-appointed attorney is guaranteed to the suspect before detention and that there is no constitutional obligation to notify the suspect as to this right. Judgment of April 1, 1953, Supreme Court, Grand Bench, Keishu, vol. 7, no. 4, at 713.

20 An arrest on another charge was held to be permissible so long as the arrest is not merely a pretext to force a confession to more serious crime. Judgment of August 9, 1977, Supreme Court, 2nd Petty Bench, Keishu, vol. 31, no. 5, at 821.

21 The judgment of March 24, 1999, Supreme Court, Grand Bench, Minshu, vol. 53, no. 3, at 514 upheld Article 39(3), which authorizes the police to prevent the suspect from meeting with his or her attorney, while limiting the restriction to a situation where the meeting interrupts the police interrogation, thus inviting imminent impairment to the police investigation. Before this decision, the police often refused to allow the attorney to see the suspect fearing that the meeting with attorney would prevent effective police interrogation. It is doubtful whether this decision has brought about a difference in practice.

22 Judgment of November 25, 1970, Supreme Court, Grand Bench, Keishu, vol. 24, no. 12, at 1670.

23 Judgment of December 14, 1955, Supreme Court, Grand Bench, Keishu, vol. 9, no. 13, at 2760.

24 Judgment of June 7, 1961, Supreme Court, Grand Bench, Keishu, vol. 15, no. 6, at 915.

25 Judgment of June 20, 1978, Supreme Court, 3rd Petty Bench, Keishu, vol. 32, no. 4, at 670.

26 Judgment of September 7, 1978, Supreme Court, 1st Petty Bench, Keishu, vol. 32, no. 6, at 1672.

27 Judgment of June 23, 1948, Supreme Court, Grand Bench, Keishu, vol. 2, no. 7, at 715.

28 Judgment of July 29, Supreme Court, Grand Bench, Keishu, vol. 2, no. 9, at 1012.

29 Judgment of May 28, 1958, Supreme Court, Grand Bench, Keishu, vol. 12, no. 8, at 1718.

30 Judgment of September 27, 1950, Supreme Court, Grand Bench, Keishu, vol. 4, no. 9, at 1805.

31 Judgment of March 12, 1948, Supreme Court, Grand Bench, Keishu, vol. 2, no. 3, at 191.

32 See generally Daniel H. Foote, “The benevolent paternalism of Japanese criminal justice,” *California Law Review*, vol. 80, 1992, p. 317. One of the problems is the lack of any citizen participation in criminal trials. As a part of recent judicial reform, however, a new law was enacted to allow citizens to participate in criminal

trials. This new system is expected to bring some changes to the current criminal trial procedure.

33 Article 8 of the Law directs the public to cooperate with the government when the government or local governments attempt to evacuate the public, help the injured, extinguish fires, or to assure sanitary standards. Nonetheless the public is not legally obliged, the government says, to cooperate with the government. The Law also allows the government to confiscate and use buildings, foods, medicine, and other essential goods if people refuse to turn them over without appropriate reason.

34 See, for instance, the Judgment of July 4, 1956, Supreme Court, Grand Bench, Minshu, vol. 10, no. 7, at 785 (the forced publication of an apology for defamation was held as not invading freedom of thought).

35 Judgment of May 15, 1963, Supreme Court, Grand Bench, Keishu, vol. 17, no. 4, at 302. The Court showed more willingness to protect a religious minority in the *Jehovah's Witness* case. In this case, a high school student who was a Jehovah's Witness refused to practice Kendo, Japanese fencing, for religious reasons and was refused advancement to the next grade and ultimately dismissed from school because he did the same in the next year. The student challenged the dismissal as unconstitutional, and the school attempted to justify its decision on the grounds of the separation of church and state. The Court held the dismissal illegal because the school abused its discretion when it failed to consider alternatives to Kendo practice, especially because dismissal from the school is justified only in exceptional cases and only as the ultimate penalty. The Court did not address the constitutional argument of infringement of religious freedom. Yet, the Court did hold that affording such alternative did not violate the separation of church and state principle. Judgment of March 8, 1996, Supreme Court, 2nd Petty Bench, Minshu, vol. 50, no. 3, at 469.

36 Judgment of January 30, 1996, Supreme Court, 1st Petty Bench, Minshu, vol. 50, no. 1, at 199.

37 Article 89 provides that "No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent society."

38 David O'Brien, *To Dream of Dreams: Religious Freedom and Constitutional Politics in Postwar Japan*, Honolulu: University of Hawai'i Press, 1996; Koichi Yokota, "The separation of religion and state," in *JCL*, *supra* note 17, p. 205.

39 Judgment of July 13, 1977, Supreme Court, Grand Bench, Minshu, vol. 31, no. 4, at 533.

40 Judgment of June 1, 1988, Supreme Court, Grand Bench, Minshu, vol. 42, no. 5, at 277 (the *SDF Officer Joint-Enshrinement* case); Judgment of February 16, 1993, Supreme Court, 3rd Petty Bench, Minshu, vol. 47, no. 3, at 1687 (the *Minoo Faithful Soul Memorial Stone* case).

41 Judgment of April 2, 1997, Supreme Court, Grand Bench, Minshu, vol. 51, no. 4, at 1673.

42 The Court recently affirmed this permissive attitude toward governmental involvement with Shinto in two cases concerning the Daijosai, the special enthronement ceremony for a new emperor. Judgment of July 9, 2002, Supreme Court, 3rd Petty Bench; judgment of July 11, 2002, Supreme Court, 1st Petty Bench.

43 Lawrence M. Beer, *Freedom of Expression in Japan*, Tokyo: Kodansha International, 1984; Lawrence W. Beer, "Freedom of expression: the continuing revolution," in *JCL*, *supra* note 17, p. 221; Shigenori Matsui, "Freedom of expression in Japan," *Osaka University Law Review*, vol. 38, 1991, p. 13.

44 Judgment of May 18, 1949, Supreme Court, Grand Bench, Keishu, vol. 3, no. 6, at 839.

45 The Court followed this decision in later cases. See judgment of September 28, 1990, Supreme Court, 2nd Petty Bench, Keishu, vol. 44, no. 6, at 463.
46 Judgment of November 6, 1974, Supreme Court, Grand Bench, Keishu, vol. 28, no. 9, at 393.
47 Section 230–22.
48 Judgment of June 25, 1969, Supreme Court, Grand Bench, Keishu, vol. 23, no. 7, 975.
49 In the *Monthly Pen* case, the Court held that the private life of public figures may fall into the category of a matter of public interest. Judgment of April 16, 1981, Supreme Court, 1st Petty Bench, Keishu, vol. 35, no. 3, at 84.
50 Judgment of December 12, 1984, Supreme Court, Grand Bench, Minshu, vol. 38, no. 12, at 1308.
51 Judgment of June 11, 1986, Supreme Court, Grand Bench, Minshu, vol. 40, no. 4, at 872.
52 Judgment of November 24, 1954, Supreme Court, Grand Bench, Keishu, vol. 8, no. 11, at 1866.
53 Judgment of July 20, 1960, Supreme Court, Grand Bench, Keishu, vol. 14, no. 9, at 1243.
54 The Court has upheld the disenfranchisement of those who violated the election law. Judgment of February 9, 1955, Supreme Court, Grand Bench, Keishu, vol. 9, no. 2, at 217. One vexing issue with respect to the voting right is the treatment of foreigners. The Public Office Election Law does not confer the right to vote on foreigners. In Japan, however, there are some 700,000 resident Koreans. They came to Japan when Korea was a part of Japan or came to Japan for labor. They are foreigners under the relevant law but many of them were born and raised in Japan and live just like other Japanese. There are some academics, therefore, who argue that the long-resident foreigners such as resident Koreans should be given the right to vote. The Supreme Court has held that limiting the right to vote to Japanese is not unconstitutional. Judgment of February 26, 1993, Supreme Court, 1st Petty Bench, Hanreijihou, vol. 1452, at 37; judgment of February 28, 1995, Supreme Court, 3rd Petty Bench, Minshu, vol. 49, no. 2, at 639.
55 Judgment of November 10, 1999, Supreme Court, Grand Bench, Hanreijihou, vol. 1696, at 58; judgment of November 10, 1999, Supreme Court, Grand Bench, Hanreijihou, vol. 1696, at 62.
56 Judgment of April 23, 1969, Supreme Court, Grand Bench, Keishu, vol. 23, no. 4, at 235; judgment of April 6, 1955, Supreme Court, Grand Bench, Keishu, vol. 9, no. 4, at 819; judgment of September 27, 1950, Supreme Court, Grand Bench, Keishu, vol. 4, no. 9, at 1799; judgment of June 15, 1981, Supreme Court, 2nd Petty Bench, Keishu, vol. 35, no. 4, at 205.
57 Shigenori Matsui, "The reapportionment cases in Japan: constitutional law, politics, and the Japanese Supreme Court," *Osaka University Law Review*, vol. 33, 1986, p. 17; Masami Koshiji, "Constitutional issues concerning the franchise," in Yoichi Hugichi, ed., *Five Decades of Constitutionalism in Japanese Society*, Tokyo: Tokyo University Press, 2001 (hereinafter *Five Decades*), p. 133 .
58 Judgment of April 14, 1976, Supreme Court, Grand Bench, Minshu, vol. 30, no. 3, at 223. The Court, viewing the apportionment statute unconstitutional *in toto*, refused to invalidate the election held under this unconstitutional apportionment statute, holding that invalidation would make the Diet impossible to reapportion.
59 Judgment of July 17, 1985, Supreme Court, Grand Bench, Minshu, vol. 39, no. 5, at 1100.
60 Judgment of November 7, 1983, Supreme Court, Grand Bench, Minshu, vol. 37, no. 9, at 1243.

61 Judgment of November 11, 1999, Supreme Court, Grand Bench, Minshu, vol. 53, no. 8, at 1441.
62 Mutsuo Nakamura, "Freedom of economic activities and the right to property," in *JCL*, *supra* note 17, p. 255; Kenji Yamashita, "Property rights and their *raison d'être* in the Japanese Constitution," in *Five Decades*, *supra* note 57, p. 89.
63 Judgment of January 26, 1955, Supreme Court, Grand Bench, Keishu, vol. 9, no. 1, at 89.
64 Judgment of November 22, 1972, Supreme Court, Grand Bench, Keishu, vol. 26, no. 9, at 586.
65 Judgment of April 30, 1975, Supreme Court, Grand Bench, Minshu, vol. 29, no. 4, at 572.
66 Shigenori Matsui, "*Lochner* v. *New York* in Japan: protecting economic liberties in a country governed by bureaucrats," in Philips S. C. Lewis, ed., *Law and Technology in the Pacific Community*, Boulder, CO: Westview, 1994, p. 199.
67 Judgment of April 22, 1977, Supreme Court, Grand Bench, Minshu, vol. 41, no. 3, at 408.
68 Toshiyuki Munesue, "Nihon teki Chitsujo to Mienai Kenpou no Kashika [The Japanese System and Unwritten Constitution]," in Masako Kamiya, *Nihon koku Kenpou wo Yominaosu [Another Reading of the Japanese Constitution]*, Tokyo: Nihonkeizaishinbunsha, 2000, p. 65.
69 Akira Osuka, "Welfare rights," in *JCL*, *supra* note 17, p. 269.
70 Judgment of May 2, 1967, Supreme Court, Grand Bench, Minshu, vol. 21, no. 5, at 1043.
71 Judgment of July 7, 1982, Supreme Court, Grand Bench, Minshu, vol. 36, no. 7, at 1235.
72 Judgment of May 21, 1976, Supreme Court, Grand Bench, Minshu, vol. 30, no. 5, at 615.
73 Masayuki Uchino, "The struggle for educational freedom," in *Five Decades*, *supra* note 57, p. 115. With the enactment of the National Flag and National Anthem Law, the government has directed schools to display the national flag at significant ceremonies, such as commencement ceremony, and to sing the national anthem. Those teachers who oppose the display of the national flag, or refuse to stand during the national anthem, or to sing it are now disciplined. If students are forced to salute the national flag or to stand during the national anthem or to sing it, then a serious violation of freedom of thought may be asserted.
74 Judgment of October 26, 1966, Supreme Court, Grand Bench, Keishu, vol. 20, no. 8, at 901.
75 Judgment of April 25, 1973, Supreme Court, Grand Bench, Keishu, vol. 27, no. 4, at 547.
76 Judgment of May 4, 1977, Supreme Court, Grand Bench, Keishu, vol. 31, no. 3, at 182.
77 Hidenori Tomatsu, "Equal protection of the law," in JCL, *supra* note 17, p. 187.
78 Judgment of April 4, 1973, Supreme Court, Grand Bench, Keishu, vol. 27, no. 3, at 265.
79 Judgment of December 5, 1995, Supreme Court, 3rd Petty Bench, Hanreijihou, vol. 1563, at 81.
80 Judgment of July 5, 1995, Supreme Court, Grand Bench, Minshu, vol. 49, no. 7, at 1789.
81 Judgment of March 27, 1985, Supreme Court, Grand Bench, Minshu, vol. 39, no. 2, at 247.
82 *Supra* note 71.
83 Judgment of April 4, 1973, Supreme Court, Grand Bench, Keishu, vol. 27, no. 3, at 265.

84 Many different treatments of resident Koreans have been challenged before the Supreme Court, such as the finger-print requirement for alien registration. Yet, they are discriminations against foreigners and not against Korean Japanese. A social underclass called Burakumin (village people) also used to exist. They were treated as non-human and were subject to various discriminations before the Meiji era. There is no longer any statutory discrimination against Burakumin even though private discrimination still persists with respect to employment or marriage.

85 Yasuhiro Okudaira, "Forty years of the constitution and its various influences: Japanese, American, and European," in *JCL*, *supra* note 17, pp. 1, 8.

86 Judgment of September 11, 2002, Supreme Court, Grand Bench.

87 In the *Temporary Mandatory Debt Adjustment Law* case, the Court held that application of the Temporary Mandatory Debt Adjustment Law to house rental contracts was unconstitutional under Article 32. Judgment of July 6, 1960, Supreme Court, Grand Bench, Minshu, vol. 14, no. 9, at 1657.

88 *Brandenburg* v. *Ohio* 395 US 444 (1969).

89 *New York Times Co.* v. *Sullivan* 376 US 254 (1964).

90 *Near* v. *Minnesota* 283 US 697 (1931).

91 Recently, the daughter of the former Foreign Minister, Makiko Tanaka, sought an injunction against one publisher who planned to carry a story about her divorce on the grounds that it was an invasion of her privacy. A single judge sitting in the Tokyo District Court granted one without hesitation. Upon receiving an objection, a panel of three judges in the Tokyo District Court reheard the case but ultimately affirmed its prior ruling. Even though the decision was later revoked by the Tokyo High Court (judgment of March 31, 2004, Tokyo High Court, unpublished), this incident manifestly shows the willingness of the Japanese judges to grant injunctions against the mass media.

92 Even though the Constitution protects the welfare right, therefore, some people refuse to apply for the welfare benefit and starve to death. Apparently, there is still prejudice toward welfare recipients that has precluded many possible recipients from applying for the benefit.

93 Hiroshi Itoh, *The Japanese Supreme Court: Constitutional Polities*, New York: Markus Wiener Publishing, Inc., 1989; Hidenori Tomatsu, "Judicial review in Japan: an overview of efforts to introduce US theories," in *Five Decades*, *supra* note 57, p. 251.

94 Okudaira, *supra* note 85, p. 27.

95 *Ibid.*, p. 29. Indeed, in some cases, the court, while dismissing the suit filed by the plaintiff, expressed its opinion on the merits, holding the governmental conduct unconstitutional. Since the defendant government won the case, it could not file an appeal because of this holding. The plaintiff, while technically losing the case, often refuses to file appeal in order to leave the decision unrevoked by the appellate court.

96 Eric A. Feldman, *The Ritual of Rights in Japan*, Cambridge: Cambridge University Press, 2000.

97 The reliance on bureaucrats in Japan can also be seen in the recent Human Rights Vindication Bill that was introduced into the Diet by the government. Even though the Constitution protects fundamental human rights, judicial relief for violations of fundamental human rights is quite ineffective. It takes time to settle the disputes (it often takes more than ten years before the final decision is made by the Supreme Court) and judicial relief is also costly. As a result, many human rights watchers in Japan claimed that more effective and independent remedies should be established. Moreover, because fundamental human rights protected by the Japanese Constitution are directed against the government, they cannot be asserted against private individuals. The Constitution does not constrain

private discrimination. As a result, many critics demanded the enactment of anti-discrimination legislation. The introduction of the Bill is in response to these two demands. The Bill, if enacted, would establish an independent human rights commission inside the Ministry of Justice and would enable the commission to mediate claims of human rights violation, provide assistance to the victims, and to file a suit on behalf of the victims. One of the most salient characteristics of the Bill is the reliance on bureaucrats rather than judicial courts in providing relief for human rights violations. Instead of vesting more effective remedial power in the judiciary, the proposed legislation would simply increase the power of administrative agencies and bureaucrats, thus denying any more effective relief against human rights violations by those administrative agencies and bureaucrats themselves.

98 John M. Maki, "The Constitution of Japan: pacifism, popular sovereignty, and fundamental human rights," in *JCL*, *supra* note 17, pp. 39, 49.

5 Taking rights seriously? Human rights law in Singapore

Li-ann Thio

Introduction: an undeveloped rights culture in a society under righteous rule

The contours of Singapore's legal framework and policy towards human rights are shaped by paramount national development goals prioritizing economic growth and social order: the principles of meritocracy, multi-racialism, and anti-welfarism are key cornerstones of national policy.[1] While the ideal of human rights as a means to promote human dignity and social welfare is accepted, the scope of substantive obligations this entails and the mode of interpreting and implementing human rights is qualified by reference to economic development, historical particularity, and pseudo-cultural invocations of "Asian values"[2] or Neo-Confucianism, embodied in the government-authored 1991 Shared Values White Paper,[3] consonant with paternalism secularism, communitarianism,[4] and the approach of pragmatic realism and relativism towards human rights which recognizes "continuing and no less important conflicts of interpretation" given divergences in culture, history, and stage of economic development.[5]

Since independence in 1965, the People's Action Party (PAP) has been in continuous governance within a dominant party state based on the parliamentary system, currently holding 82 of 84 elected seats. It has exercised hegemonic control over this multi-racial and multi-religious city-state of some 4.1 million people: as of June 2000, the population breakdown is Chinese (77 percent), Malay (14 percent), Indians (8 percent), and other ethnic groups (1 percent), with 86 percent of the population professing a religious faith. Social stability and maintaining racial–religious harmony is a national obsession, as political order is considered key to attracting foreign investment on which the economy heavily depends. This has heightened post September 11, with the discovery of a bomb plot and the arrest in December 2001 of fifteen suspected terrorists affiliated with *Jemaah Islamiyah* under the Internal Security Act (ISA).[6] In response to calls for greater citizen participation, the government created channels, pursuant to a non-threatening vision of consultative democracy, for example through the Nominated MP scheme,[7] offering non-elected appointees the chance to air non-partisan views in Parliament, a sop to calls for greater accountability, diffusing opposition

politics through co-optation. Similarly, the labor unions[8] are emasculated as a source of dissent and mobilization through the PAP's policy of tripartism, whereby the government facilitates labor-management cooperation through a "partnership of trust," thus preserving harmonious industrial relations. The National Trade Unions Congress (NTUC) has close ties with the PAP government, with opposition politicians arguing MPs in trade unions should "resign immediately."[9]

As an "Asian tiger," Singapore has achieved great economic success, largely legitimating PAP rule and its extensive intervention in the public and private sector. The World Bank notes Singapore is a "high income" economy,[10] with among the highest standards of living in Asia,[11] experiencing a thirty-fold growth in per capita income ($24,740) since independence.[12] Upon this "more rigorous test of practical success"[13] Singapore bases its "economics first" thesis, postulating the need for authoritarian political order during the early stages of economic growth, justifying rights limitation. Singapore considers the right to development "inalienable" but tends to equate this with economic growth *per se*, downplaying the participatory and equitable distribution values associated with this right.[14] Concern for "basic needs" does not translate into espousing justiciable socio-economic rights, the preference being to discuss socio-economic welfare in terms of government programs and successful welfare gains.

Singapore lacks a developed human rights culture in terms of rights consciousness, litigation, and activism. Part IV of the Constitution contains a Spartan list of primarily civil–political rights couched in individualist terms, which are generally subject to judicial review by which courts may strike down unconstitutional laws and provide remedies for civil rights violations. Notable absences include the right to vote, property rights, and the prohibition against torture, despite suggestions for their inclusion by the 1966 Constitutional Commission.[15] Property rights were excluded as they would preclude compulsory acquisition laws, necessary to land development and housing programs.

Compared with commercial cases, public law litigation is infrequent; this is perhaps because overwhelmingly, cases brought against the government or its officials are lost, pursuant to the pro-communitarian bias evident in case law.[16] Critics for example allege that defamation suits are used to oppress political opposition, with government plaintiffs consistently winning sizeable awards, creating a "general perception" that the judiciary reflects the ruling party's views "in politically sensitive cases."[17]

Given the limited range of constitutional rights, and the collectivist judicial ethos, judicial review plays a limited role in human rights protection and is additionally truncated by statutory ouster clauses, immunizing execution action which restricts constitutional liberties from judicial scrutiny, such as preventive detention orders under the Internal Security Act (Cap 143) and restraining orders under the Maintenance of Religious Harmony Act (Cap 167A) meant to gag politicking religionists. This is replaced with

non-judicial checks of uncertain efficacy.[18] Rights are regarded as disruptive to social harmony and many justiciable issues are never litigated, such as the inegalitarian quota on female medical students and the *tudung* controversy over suspending students wearing Muslim headscarves from attending public schools.[19] Furthermore, there is a distinct anti-institutionalism evident in refusing calls to create monitoring bodies as focal points for rights issues, like a national human rights commission, an independent election agency, a Women's Affairs Ministry to address female under-representation in public life or an equal opportunities commission for workplace issues. Citizens are advised to "trust" their governors' integrity and righteousness as honorable men (*junzi*), over placing faith in systemic checks.[20]

The government prefers informal *ad hoc*, piecemeal modes of resolving disputes, such as urging a woman denied statutory maternity rights to seek redress through MPs, unions, or the Manpower Ministry.[21] The preference for "soft" educative and persuasive measures, rather than a formalized legal sanctions-based approach, is evident in handling problems like racist advertising: the government, NTUC, and Singapore Employers Federation adopted recommendatory guidelines seeking to dissuade employers from specifying discriminatory job criteria in advertisements.[22] This was reportedly effective, as between January 1999 and October 2000 the number of racist advertisements dropped from 32 percent to 1 percent.[23]

Singapore's human rights record tends to be impugned in relation to a certain template of issues, primarily civil and political rights. Before UN Charter-based bodies like the Commission of Human Rights, Singapore has been accused of restricting free speech and assembly, using preventive detention laws to curb political dissent, discriminating against foreign nationals tried for murder, and infringing Jehovah's Witnesses (JW) religious freedom rights by penalizing refusals to perform national military service. Other NGOs like the Asian Human Rights Commission (AHRC), Human Rights Watch, and Amnesty International (AI) have alleged executive interference with the judiciary, limits on press freedom, and maltreatment of jailed opposition politicians, while local critics have berated "blatant gerrymandering" to buttress political dominance.[24] A 2004 AI report alleged Singapore had one of "the world's highest per capita execution rate, relative to its population."[25]

The government responds robustly and legalistically, rebutting critics' allegations point by point, as with AI's 2004 report, stating strict criminal laws have made Singapore among the safest places to live.[26] Further, the death penalty only applies to persons above the age of 18 committing serious crimes such as murder, drug trafficking, and firearms offenses, balancing the rights of victims and the community to live peacefully against rights of the criminally accused.[27] It has also allowed representatives from the International Commission of Jurists and AI to be observers in politically sensitive cases involving opposition politicians and has responded to their critical reports in the local press. In acceding to three human rights treaties

for the first time, Singapore has indicated a willingness to engage in international human rights discourse and allow some international scrutiny of domestic practices. In 1995, Singapore became party to the Convention on the Prevention and Punishment of the Crime of Genocide,[28] the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW),[29] and the Convention on the Rights of the Child (CRC),[30] subjecting itself to the minimal state reporting obligations under CEDAW and CRC. Singapore is also party to various International Labour Organization treaties including Convention 100 on Equal Remuneration.

Despite recommendations, Singapore has not accepted the jurisdiction of any human rights body to receive individual or group communications.[31] It continues to bristle when actors criticize its human rights policy, as when Malaysia criticized the "no *tudung*" policy, considering this interference in domestic matters.[32] It also considers that in acceding to treaties, domestic practice is largely in accordance with international norms.[33] Nevertheless, it asserts the sovereignty of domestic laws and seeks to preserve this through treaty reservations[34] designed to protect Singapore's multi-racial/religious cultural setting.[35] Singapore enacted no specific laws to give effect to these non self-executing treaties nor were specific institutional measures adopted to monitor treaty obligations aside from informal inter-ministerial networks designed to coordinate policy and consult non-government views.

Gender inegalitarian citizenship laws have been justified on patriarchical assumptions "in line with our Asian tradition where husbands are the heads of households,"[36] despite being sexist and contravening anti-discrimination human rights norms and eliciting the concern of UN Committees.[37] Previously, only overseas-born children of Singapore fathers were conferred automatic citizenship by descent. The legislation was amended and made gender neutral in 2004, but this was not pursuant to vindicating women's rights but to address the declining birth rate, serving an instrumental state purpose which coincidently was a human rights gain, although not so characterized.[38] CEDAW enjoins the government to change andro-centric cultural norms that perpetuate gender stereotypes, and indeed the government's Shared Values White Paper discards the Confucian *wulun* (hierarchical fivefold relationship) where "males take precedence over females, brothers over sisters and the first born over younger sons"[39] as "sons and daughters are increasingly treated equally."[40] Nevertheless, the male-dominated political leadership seems committed to a gradualist approach, their gender-insensitivity captured in comments that gender-biased policies might be altered "as time changes . . . perhaps one day when you have women in the Cabinet, we will discuss this again."[41] The CEDAW Committee has urged Singapore to reconsider its gender-insensitive understanding of meritocracy which, in considering women part of the mainstream and not a special interest group, focuses on equality of opportunity, not result. On this basis, the idea of legislative quotas for women to correct their political under-representation, similar to existing racial quotas for minority ethnic communities,[42] was rejected. This

approach, which "ghettoizes" women's issues rather than treating them as structural issues affecting general society,[43] fails to address indirect discrimination and ignores factually uneven playing fields.[44]

Rights theory in Singapore

A study of case law reveals both dignitarian and utilitarian conceptions of rights. In the Privy Council case *Ong Ah Chuan* v. *PP* [1981] 1 MLJ 69, Lord Diplock considered that constitutional bills of rights should be interpreted generously, not legalistically, to give individuals the full measure of fundamental liberties. Further, the constitutional principle of "fundamental principles of natural justice" was to condition rights interpretation. Karthigesu JA in *Taw Cheng Kong* v. *PP* [1998] 1 SLR 943 considered constitutional rights were "inalienable" as part of the supreme law, rather than "carrot and stick privileges" granted by the state in return for discharging community duties.

The dominant approach is utilitarian and selectively literalist, however, save where there is judicial inference of implicit statist constitutional values invoked to justify rights limitation. In *Colin Chan* v. *PP* [1994] 3 SLR 662, Yong CJ of the Singapore High Court found that rights should be subjugated to executive-determined community interests. Thus, religious freedom rights, in the form of pacifist refusals to perform military service, elevated to a "fundamental tenet," were subject to the Constitution's "paramount mandate" of preserving Singapore's "sovereignty, integrity, and unity." Legislative policy trumps rights, with Singapore recognizing no conscientious objector exemption, by no means a universally recognized aspect of religious human rights.[45] Furthermore, a positivist literalist approach to interpreting rights was adopted by the Court of Appeal in 1995, holding that any law depriving a person of life or personal liberty was valid and binding if enacted in due form, the court being unconcerned with "whether it is also fair, just and reasonable as well."[46] This comports with the executive view that legislative policy embodying national concerns trumps individual rights, that is, *de facto* parliamentary supremacy.

Right to life, liberty, and personal security and integrity

Singapore has not suffered civil conflict since independence, and the police maintain effective internal law and order. There have been no reports of arbitrary or unlawful deprivation of life or of politically motivated disappearances. Instances of police abuse have received media attention with officers subject to internal investigation and judicial sanction.[47] Foreign NGOs, like AHRC, have highlighted incidences of abuse, such as of opposition leader Chee Soon Juan during his five-week sentence.[48]

With the exception of preventive detention laws justified on grounds of necessity, Singapore's criminal justice system works under the rule of law.[49] Part XII of the Constitution provides for "Special Powers against Subversion and Emergency Powers." There has never been a proclamation of emergency

in independent Singapore under Article 150, which provides that emergency ordinances cannot violate constitutional provisions relating to "religions, citizenship, or language."[50]

Personal security and integrity: prohibition against torture and cruel and unusual punishment

Defining "torture"

The Constitution does not expressly prohibit torture, and cruel or inhuman treatment but Singapore has stated that "no one claims torture as part of their cultural heritage."[51] Torture is prohibited by Article 37(a) of the Convention on the Rights of the Child, although Singapore entered a declaration to the effect that no existing measures prescribed by domestic law for maintaining law and order or which involved the judicious use of corporal punishment was prohibited by this article.[52]

Conventionally, torture includes inflicting severe physical and mental pain and suffering by a public official, excluding suffering pursuant to lawful sanctions. Certainly, the physical maltreatment that Chee Soon Juan claims to have suffered in detention, which involved beatings, hooking detainees to electrodes, pouring urine over prisoners' heads, and naked interrogations, would certainly constitute torture.[53] Owing to the andro-centric nature of this definition, domestic violence committed by private actors is not "torture." The government also considers that female genital circumcision could be considered a Penal Code offense for violating the right to physical integrity, and possibly be an act of criminal force under section 350.[54]

Corporal punishment

The Penal Code authorizes corporal punishment by caning to a restricted class of people, essentially medically fit males between the ages of 16 to 50. This created an international ruckus in 1994 when applied to an 18-year-old US national for vandalism offenses.[55] Detractors argued that caning, done in the presence of a medical officer, constituted torture as the pain inflicted from wet rattan flaying can knock a prisoner out cold. While caning might be considered barbaric, Singapore is hardly the only country in the world to practice corporal punishment, and the debate as to whether this punishment violates human rights illustrates torture's indeterminate nature and the clash of cultural values such debates engender.[56]

Capital punishment and the death row phenomenon as torture

The Singapore courts have examined whether the death row phenomenon and death by hanging constitutes torture or cruel and inhuman treatment.[57] Despite challenges by a former judicial commissioner that the death penalty might be unconstitutional and an international illegality,[58] its constitutionality

was affirmed in *Nguyen*, as being a matter of social policy for the legislature. In both cases, recent Privy Council decisions invoking common principles of humanity were rejected as a basis for qualifying how to interpret the deprivation of life "in accordance with the law," following Article 9. The court refused to read into "law" any humane standards reflecting "standards of decency that mark the progress of a maturing society."[59] In *Nguyen*, the Court doubted that the Universal Declaration of Human Rights had attained customary international law status, noting that Article 5 did not specifically refer to hanging. Evidence of dissensus on this matter was further evident in that US case law considered that hanging does not violate constitutional protection against cruel and unusual punishments.[60]

In *Jabar*, the Court of Appeal accepted that on humanitarian grounds prisoners should not be subject to the "death row phenomenon" but as there was no constitutional prohibition against cruel and inhuman treatment, the court refused to import a transnational standard of humanity in reading Article 9 and thereby to consider the substantive merits of laws permitting mandatory death sentences. The court approved the US approach[61] that the death penalty inevitably caused mental suffering, and did not violate any constitutional rights. The US Court of Appeals noted if prolonged delay was "cruel and degrading treatment," quashing death sentences, it would privilege death row inmates successful in delaying proceedings, contrary to the equal protection clause. Thus, the Singapore and US approach in these matters contrasts with the European Court of Human Rights which views the death penalty as cruel punishment, causing severe pain and suffering.[62]

Singapore has argued before UN forums that countries have the right to determine appropriate legal penalties to effectively combat the most serious crimes, noting that Article 6(2) of the ICCPR permits the death penalty for "the most serious crimes."[63] There were "diametrically opposing views" with differences being "rooted deeply in religions, legal systems of societies and their different approaches to punishment."[64] It and forty other countries disassociated themselves from a draft resolution on the death penalty issue, authored by European states, noting that this attempt to impose a regional standard via a "diktat based on false claims of universality" should be avoided, in favour of constructively building consensus.[65] Clearly, disagreements about the scope of the "right to life" transcend simplistic West–East dichotomies.

Right to life and liberty: preventive detention laws

Post September 11, few states can boast of not having preventive detention laws in their arsenal of anti-terrorist measures. Singapore is notorious among human rights critics for its preventive detention laws which date back to the colonial era, the most well-known being the ISA which is designed to deal with terrorism and issues pertaining to human security, whether in the form of communism, criminal triads, so-called Marxist conspirators, or post 9–11 self-proclaimed Islamic fundamentalist terrorist groups like the *Jemaah Islamiyah*.[66]

The Minister may issue preventive detention orders for renewable two-year terms against persons suspected of acting in a manner prejudicial to Singapore's security. The longest-serving prisoner of conscience was Chia Thye Poh, detained for twenty-three years for allegedly being a communist insurgent.[67] After the Court of Appeal quashed a detention order on a technicality in the seminal case of *Chng Suan Tze* v. *Minister of Home Affairs*,[68] Parliament swiftly amended the constitution and the ISA within a month. This severely limited judicial review to procedural grounds.[69] The detainee is not entirely deprived of due process rights, and must be heard *in camera* before an Advisory Board staffed by at least one person qualified to be a High Court judge, although this Board does not have to disclose any information deemed contrary to national interest.[70] The ISA provides for a Board of Inspection, comprising justices of the peace and civic group volunteers who inspect detention centers and speak to detainees.[71] These onerous laws are legitimated by a "notwithstanding clause,"[72] even though they may be beyond legislative and judicial power and contrary to Articles 9, 11, 12, 13, and 14 (fundamental liberties).[73]

The most trenchant criticism directed against the draconian ISA legislation which derogate from civil–political rights is its usage to suppress political opponents and dissent, given the nebulous nature of "public security" which may be construed so broadly as to negate any meaningful content to liberty rights, and the lack of effective accountability mechanisms. Domestic[74] and international calls[75] for abolishing the ISA have been rebuffed, with the government celebrating the ISA as part of Singapore's nation-building heritage.[76] Further concerns revolve around the adequacy of safeguards, although the government insists this law has "evolved in response to our own [. . .] socio-political realities," and that "no opposition member of Parliament in Singapore today has been detained under the ISA" as it is invoked against individuals "who rejected the democratic process," resorted to force to overthrow the government, or incited religious and racial hatred.[77] Where public order is imperiled, the debate is not over the necessity of intrusive prevention detention laws but rather, the sufficiency of safeguards to prevent abuse.

Civil and political rights

Freedom of thought, conscience, and religion

State and religion and freedom of conscience

Singapore's quasi-secular[78] constitutional system differs from Malaysia's confessional constitution which enshrines Islam as the Federation's religion and privileges it by prohibiting the propagation of other religions to Muslims.[79] Article 152 enjoins the government to protect the interests of Malays as indigenous people, including their religion. Most Malays are Muslims, but Singapore does not conflate ethnicity and faith, unlike the Malaysian constitution's definition of "Malay."[80] Article 15 guarantees the right to profess,

practice, and propagate religion, with the recognition that religious affiliation is a matter of personal choice.[81] Conversely, the Malaysian courts found that their similarly drafted religious freedom clause[82] does not entail the right to renounce a religion.[83] Since Article 11 had to be construed harmoniously with other provisions on Islam, if a Muslim converts from Islam their right to change religion was not absolute but had to first comply with the relevant *syriah* laws on apostasy.[84]

Limits on religious freedom

While the government regards religion as a constructive social force and had pragmatically introduced a short-lived religious knowledge program in public schools,[85] religious liberty is curtailed by statist needs to preserve national security and religious harmony. Article 15(4) subjects this freedom to the "general law relating to public order, public health or morality." The government has deregistered religious groups under the Societies Act, pursuant to this provision. These included sects utilizing brainwashing techniques (Unification Church), groups engaging in aggressive politicking and social activism (Christian Conference of Asia)[86] and the Jehovah's Witnesses (JW) for opposing military service. JW publications are subject to a blanket prohibition order, regardless of content, under the Undesirable Publications Act, and those found in possession of banned religious literature have been fined and jailed. JWs have been arrested in police raids for attending JW prayer meetings since these constitute unlawful societies, and teachers and students in public schools have lost their jobs or been suspended for refusing to engage in "idolatry" by saluting flags or singing the national anthem.

The 2,000-strong JWs have unsuccessfully challenged the constitutionality of action taken against them.[87] The hardline stance taken against them is because their pacifist tenets are considered a threat to public order, by encouraging others not to perform national service, or undermining this by carving out a conscientious-objection exemption from what is considered integral to state security. The courts refuse to consider the effect a few conscientious objectors will have on national service,[88] and find the limits on religious freedom embodied in dissolution and prohibition orders appropriate, deferring to executive determinations of security need; further, the idea of conscientious objection is not recognized in Singapore,[89] as in South Korea, and is considered "criminal conduct."[90]

Freedom of speech, assembly, and association as aspects of democracy and the internal aspect of self-determination

General limits on free speech, association, and assembly

Although Article 14 guarantees free speech, this is curtailed by an illiberal formulation which permits "necessary or expedient" restrictions on eight stipulated grounds, including security and public morality. While striving to

be a communications hub, Singapore unabashedly rejects a *laissez-faire*, libertarian model of free speech, actively adopting legislative and administrative content-based speech restrictions regarding race, religion, and political issues and to preserve community standards of decency and morality. For example, the play *Talaq*, dealing with the issue of marital violence against females within the Indian community, was denied a license in 2000, as Singapore's highest Islamic religious body, MUIS, declared that it was offensive and "misrepresented the Indian Muslim community and Islam."[91] The premium placed on racial–religious harmony trumped any free speech interests, although not all Muslims found it objectionable.[92] Security concerns and the fear of inflaming patriarchical religious and ethnic passions were determinative.

Freedom of political speech, associational, and assembly rights are central to a functioning democratic society, but are limited by both formal and informal means. Notably, the NGOs like AWARE, which lobbies for women's rights, utilizing CEDAW standards and producing non-official, more critical "shadow" reports,[93] which adopt a low-key conciliatory approach achieve more success in terms of policy impact.[94] In contrast, the government perceives as "opponents" groups adopting an adversarial, "one-sided" approach to public justice issues, being "overly critical of the government,"[95] like the Think Centre and Open Singapore Centre (OPC), both registered as businesses.[96] The Think Centre aggressively promotes human rights, conferring human rights defenders awards on Lee Kuan Yew's *bête noire*, J. B. Jeyaretnam,[97] and staging rights awareness public exhibits. These groups face difficulty where the authorities refuse to grant licenses for public displays and forums e.g. the OPC's application to hold a forum entitled "Free Myanmar – how can Asians help" was considered "contrary to the public interest."[98]

Informal limits to legitimate political discourse: locating OB markers

The PAP as a matter of political–legal culture has been sensitive towards criticism and has established informal "OB markers"[99] to delimit the boundaries of what it considers to be legitimate political criticism,[100] including insistence that government leaders be addressed respectfully. This appears to be shifting insofar as the government is encouraging citizens to take ownership of public issues. Deputy Prime Minister (DPM) Lee has promised that within the "extreme limits" of race, language, religion or sedition, disagreement over policies is legitimate as "disagreement does not necessarily imply rebellion" where the motive is to improve policies, and not to "score political points."[101] Matters such as security, foreign policy, and tax are still off limits.

Free speech and public reputations: libel suits and the chilling effect

A chief criticism is the historical use of libel laws by government politicians against opposition politicians and newspapers to silence dissent. The former's

high success rate undoubtedly “chills” political speech; indeed no foreign publisher ever successfully defended a libel suit brought by a Singapore politician. This is compounded by the high damages awarded and the widely publicized bankruptcy of certain opposition politicians,[102] and the general sense of intimidation this engenders. Bloomberg expeditiously entered into a $550,000 settlement in 2002 for an internet article alleging the appointment of DPM Lee’s wife as executive director to a government-owned investment company was nepotistic. AI considered as innocuous comments made at an election rally by J. B. Jeyaretnam that Tang Liang Hong had placed two police reports in his hands “against, you know, Mr. Goh Chok Tong and his people.” The comments lead to successful defamation suits against these two opposition politicians.[103] Stuart Littlemore calculated that PAP politicians receive average damages awards of $450,000, twelve times above the norm, on the basis that politicians had greater reputations to defend.[104]

In the leading case of *J. B. Jeyaretnam* v. *Lee Kuan Yew* [1992] 2 SLR 310 the US public-figure doctrine, accepted in the Philippines, was rejected. This requires that politicians be more tolerant toward criticism to serve the public interest in free speech in a democracy; further, determinative weight was accorded to the public interest of maintaining public men’s reputation, lest such sensitive “honorable men” be deterred from entering politics. Several cases arose out of the 1997 and 2001 General Elections.[105] This same primacy of institutional reputation over free speech interests is evident in contempt-of-court cases involving imputations against the judiciary.[106]

Singapore has rubbished claims from quarters such as AI and the US Department of State that the commencement of libel actions were politically motivated intimidation tactics, “unnecessary and disproportionate,”[107] curtailing peaceful political activity,[108] as a “co-ordinated partisan propaganda campaign to pressure the Singapore government.”[109] Minister Jayakumar asserted that libel suits were integral to local political culture seeking “to maintain a high standard of truth and honesty in politics,”[110] and vindication before the electorate; he noted the successful pursuit of defamation suits by opposition politicians.[111] This downplays the public interest in robust political speech.

Licensing laws and regulating political speech

The Public Entertainments and Meetings Act[112] (PEMA) regulates the law on public speaking. Under it, public entertainment, defined broadly in the Schedule to include anything ranging from puppet shows to public discussions of serious topics, can only be provided in an approved place with a license.[113] Licenses may be refused where the licensing officer considers such meeting is likely to cause, for example, a breach of the peace, or to be “indecent, immoral, offensive, subversive or improper.” The decisions are subject to final ministerial appeal. It has been argued that contrary to current practice, permits should be granted as a matter of course, given the

constitutional guarantee of free expression, unless reasons for refusal can be shown by the authorities.[114]

Opposition politicians have clashed with the Public Entertainments Licensing Unit (PELU), part of the police, over refused licenses for public talks,[115] the reasons being "law and order" concerns, concerning sensitive topics or outdoor venues. Minister Ho argued that between 2001 and 2002, the police rejected five of 1,341 applications, indicating that PEMA was administered with a "light touch."[116]

Whether PEMA-licensing regulations violated free speech rights was raised in the High Court in *Chee Soon Juan* v. *Public Prosecutor* (2003) 2 SLR 445. Chee failed to get a license for a May Day 2002 rally at the Istana (presidential residence) because the police considered even press releases about this event posed a "potential disruption to public order." Chee proceeded to speak and, ignoring police warnings, was arrested, convicted, and fined $4,000 for providing public entertainment without a license, disqualifying him from running for Parliament for five years.[117] The police testified that the arrest was necessary to prevent a "law and order situation," given that 5,300 people were at the Istana. On appeal, Chee argued that PEMA was unconstitutional for infringing Article 14 rights to free speech and association. To Yong CJ, the issue was whether Chee's action constituted "public entertainment," finding it was an "address" under section 2(m) of PEMA; and that free speech in any democratic society was not absolute, but rather should be balanced against "broader societal concerns such as public peace and order." In assessing PEMA's constitutionality, Yong CJ did not consider whether PEMA terms were necessary in a democratic society but merely stated it was enacted pursuant to Article 14(2)(a). Thus, nothing in PEMA was "in any way contrary to our Constitution." This formalistic approach disregards whether these administrative restrictions on a constitutional right were "reasonable" or "fair", considering interests in personal liberty and public good. In treating legislative judgment as determinative and adopting a literalist approach, the Court declined to develop a robust guardianship role over civil liberties.

Regulating the domestic press: between running dogs and watchdogs

The Singapore Constitution contains no "free press" clause and press control is effected through annually renewable licenses under the Newspaper and Printing Presses Act (NPPA).[118] Historically, newspapers such as the *Singapore Herald* and *Eastern Sun* have had their licenses revoked and *Nanyang Siang Pau* editors have been detained for encouraging Chinese chauvinism, creating a climate of self-censorship.[119] In 1974, the NPPA was amended to stave off foreign manipulation by creating two classes of ownership shares for newspaper companies publishing in Singapore: ordinary shares, and management shares, which only citizens or approved corporations may hold. The Minister controls the transfer of management shares, which carry

two hundred times the voting power of ordinary shares. Today, government-linked companies own all Singapore media, as a mode of exercising political control over the economy. The media is co-opted through the PAP model of responsible journalism which rejects a watchdog or US-style "fourth estate" press role, which judges government leaders and champions policies; instead journalists are urged to act as constructive nation-building partners and to help forge harmony and consensus.[120] The danger is that the press may become a government propaganda outlet, or as former Chief Minister David Marshall quipped, "running dogs of the PAP."[121]

Controlling foreign media

Even though Singapore seeks to be a regional communications hub, the foreign media is subject to various controls. Aside from the deterrent of defamation suits, the foreign press and broadcasters are checked by laws penalizing them where they are found "engaging" with "domestic politics." The common understanding is that they operate in Singapore as a privilege and should afford the government a "right of reply."[122] Under the NPPA and the 1994 Broadcasting Authority Act (Cap 28),[123] the government can gazette publications[124] or channels to restrict their circulation, without impeding informational flows, and impose financial penalties.

In *Dow Jones Publishing* v. *AG* [1989] 2 MLJ 385, the High Court held that "domestic politics" related to "the multitude of issues concerning how Singapore should be governed in the interest and for the welfare of its people," including political and social–economic government policies. "Engaging in" could transcend factual reporting to "espous[ing] political ideas or causes or seek[ing] to influence public opinion." It is unclear when the "interference" threshold is reached, as the examples of a journalist actively agitating for political change or merely airing a viewpoint are both instances bearing political implications. For example, an article in *Today* by a London-based journalist[125] urging the abolition of the NPPA was considered interference in domestic politics.[126]

Freedom of association and NGOs

Amendments in 2004 to the Societies Act (Cap 311)[127] allowed groups not listed in the Schedule to be automatically registered. Previously, civil society groups like the Roundtable which discussed national policy had to wait six months to a year to be registered. Unlisted groups tend to be social welfare providers who are not viewed as security threats. Conversely, scheduled groups remain subject to the non-automatic registration process, including any society lobbying about issues relating to "religion, ethnic group, clan, nationality, or a class of persons defined by reference to their gender or sexual orientation," the use and status of any language, governance of Singapore society and societies whose object is to promote "any civil or

political right (including human rights, environmental rights, animal rights)" and "martial arts." Such matters are red-flagged as politically contentious or threatening to social stability.

Socio-economic welfare

Singapore is not party to the ICESCR. The Singapore Constitution, unlike the Indian and Philippines Constitution, contains neither socio-economic rights nor socio-welfare principles. Social welfare programs and indicia of successful gains, rather than justiciable "rights," are the preferred modes of discourse. Anti-welfarism shapes government policies. There is some external monitoring of socio-economic matters by the CRC and CEDAW committees.

Singapore as an "Asian tiger" has achieved great economic success, largely legitimating PAP rule and its development model based on "Confucian" traits like diligence, high savings, education, and active state management over democratic processes and liberties to preserve social discipline. Thus, the "demands of international capital for safe, reliable havens for export manufacturing" significantly determine Singapore's political and human rights regime.[128]

In 2003, Singapore ranked twenty-eighth out of 175 countries on the UNDP's Human Development Index,[129] spending 3.7 percent of its GDP on education (1998–2000), 1.2 percent on health (2000) and 5 percent on the military (2001).[130] Singapore scores highly on good governance measured by government effectiveness, the rule of law, and corruption control.[131] The World Bank noted Singapore has one of Asia's highest living standards.[132] In 1997, it was ranked fourth richest country in the World Bank's Development Report.[133] Official reports describe income distribution patterns as "relatively equitable"[134] although the broadening income gap is likely to render the "politics of envy"[135] more acute, especially as the Malay community tends to fall within the lower-income sector.

Virtually all Singaporeans enjoy modern sanitation, high public health standards,[136] a clean, green environment,[137] and high life expectancies.[138] Globally, it has among the lowest under-5 infant mortality rate.[139] In 2000, its total adult literacy rate was 92 percent.[140] Through foreign investment and a compulsory national savings scheme, the government has amassed huge savings and physical capital, although there is a lack of accountability regarding expenditure.[141]

Today, Singapore has developed an international level of industrial technology, is a shipping, air, and communications hub, and a regional financial services centre. Of its people, 90 percent are homeowners, with 92 percent of the population[142] living in flats built by the chief houser, the Housing and Development Board (HDB), as part of the successful public housing program the PAP introduced in 1959 pursuant to its long-term development strategy.[143] The post-independence problems of poverty, unemployment, and homelessness have been effectively dealt with, although Singapore remains

vulnerable to external and internal shocks. The post-9–11, post-SARS landscape, along with the decline in the electronics marketplace, rising unemployment rates,[144] and the effects of the Iraq war underscore the continuing need to preserve global competitiveness in pursuing a knowledge-based economy restructured in high-tech areas such as medical care and biotechnology.[145]

Anti-welfarism: social security subsidies, not rights, and a limited anti-poverty program

While promoting a hybrid capitalist system qualified by government intervention, pursuant to the cardinal principle of anti-welfarism, Singapore has a minimalist rather than comprehensive social security program. Its approach in "Helping the Needy"[146] is: "Give me a fish, I eat for a day; teach me to fish, I eat for a lifetime." Thus, social security safety nets are structured to avoid creating disincentives to work and a dependent mentality which would drain public resources, marring economic productivity; self-reliance is celebrated as ultimately, jobs best guarantee "financial independence and personal dignity."[147]

The government does expend large amounts on financial subsidies to improve certain aspects of social welfare, particularly in education, and services for children and the elderly. For example, working parents receive subsidies for using childcare centers, though these are not need-related but rather designed to encourage childbearing, a procreative incentive primarily benefiting high-income groups.[148]

Social security policies are criticized for insufficiently ministering to the needs of the poor, increasingly including the aged, and those with low education, especially women and Malays,[149] compared to other affluent societies. This is because the social security system is supplementary,[150] rests on individual effort,[151] and has strict needs criteria;[152] it is purposefully designed not to provide adequate social protection for the needy. An extremely limited public assistance scheme helps those considered genuinely in need who cannot work and have no means of subsistence. The minimal state involvement and reliance on family and community mechanisms have been criticized as resting on "an exaggerated notion of the level of communitarianism in modern Singapore," in the face of the individualism capitalism and industrialization engenders.[153]

Additionally, the government operates a self-financing Central Provident Fund (CPF), established in 1955 by the colonial government, the main retirement income program and alternative to a state pension scheme. Employers and employees pay mandatory contributions of fixed-wage percentages[154] into a government-managed savings scheme, which can be withdrawn when the recipient is 55. The scheme has evolved into a resource for approved investments and housing purchases (ordinary account), old-age disability (special account) and a health care account. By promoting

individual responsibility for health expenditure by requiring CPF members to contribute 6 percent of their monthly wages to Medisave, health care is kept affordable, limiting public health expenditure.

While the scheme allows the government to transform the income on this compulsory social savings scheme into a development fund, this surrogate pension scheme leaves several sectors vulnerable, particularly the self-employed and low or irregular wage-earners.

Privatized compassion

A second means by which national welfare needs are met is through privatizing compassion by encouraging volunteerism, aided by government subsidies, to engender a self-help ethos. Families are viewed as the main social security mechanism for the aged. The government administers a range of programs in conjunction with Voluntary Welfare Organizations and Community Development Councils,[155] providing resources for infrastructure and service development and releasing land[156] to encourage NGO involvement in meeting community needs, through delivering services for the disabled,[157] the elderly,[158] running clinics, providing tuition, helping with job placements, and legal aid.

Accountability before domestic fora

There are no formal mechanisms of accountability, although socio-economic performance issues have been raised before Parliament, in relation to the growing homeless problem, for example,[159] despite the lack of official figures on the issue. Responding to a question, the acting minister for community development reported that as of February 1994, some 1,341 destitute persons (including beggars or persons without visible means of subsistence or place of residence) were living without charge in three government houses.[160] Under the Destitute Persons Act,[161] the social welfare director is empowered to require a destitute person to reside in a welfare home and may authorize taking their photographs and fingerprints. A register of destitute persons is maintained. Such persons may be required to engage in "suitable work," such as employment training or with a view to contributing to their maintenance.[162]

The ILO criticized this Act, including its penal sanctions, as breaching the ILO Forced Labour Convention. Article 10(2) of the Constitution prohibits forced labor, excepting compulsory national service. The Act was defended as social legislation that provided shelter, care, and rehabilitation of destitute persons, with a view to societal reintegration.[163]

Monitoring by treaty-based bodies

While CRC and CEDAW conventional rights may not found a legal course of action, the treaty-monitoring committees which review state reports provide

useful yardsticks for human rights activists to expose weakness in domestic policies. The preparation of state reports also yields specific general data in relation to socio-economic indicators like health.[164]

These committees both affirm good practices and pinpoint deficiencies, recommending change. The CRC committee positively noted the "considerable efforts" to implement children's economic, social, and cultural rights, particularly regarding high-quality health services, and housing.[165] In 2000, primary education became compulsory under the Compulsory Education Act,[166] consistent with Article 13(2)(a) ICESCR and Article 28(1) CRC. While commending Singapore for high quality education services and universal availability, the CRC committee, echoing domestic voices, expressed concerns about educational stress levels[167] and rising youth suicide rates,[168] urging more counseling services to address these health issues.[169] While a considerable proportion of the national budget was spent on health and education, it was concerned that resources allocated for children fell below those provided by other countries with comparable levels of economic development.[170] These observations highlight problem areas that require attention, although the follow-up mechanism of the next periodic report is weak.

Right of culture and minorities

Minority protection, not minority rights: the constitutional framework

Article 27 of the ICCPR, as elaborated upon by the 1992 UN Minorities Declaration,[171] recognizes the right of members of minority groups to enjoy, individually or in community, rights to language, culture, and religion. The Singapore Constitution contains only individual rights, though the communal aspects of liberties such as religious association are recognized. It does not mandate affirmative action;[172] in contrast with the Malaysian *bumiputera* policy of preferential treatment, the general policy is not to grant special rights to any majority or minority community. The idea of equal individual rights (and thus, the equal treatment of all communities) is embodied in articles 12 and 16 of the Constitution, pursuant to the ideal of a Singaporean Singapore. Article 152 obliges the government to care for the interests of racial and religious minorities, creating a non-justiciable minority *protection* rather than a *rights*-based system. Article 152(2) enjoins the government to recognize the special position of the Malays as indigenous peoples and to assume a guardianship and promotional function over their "political, educational, religious, economic, social and cultural interests and the Malay language." Most ethnic Malays, constituting 14 percent of the population, are Muslim. This sits somewhat at odds with the government's declared meritocracy policy and reflects the pragmatic need to ameliorate the marginal socio-economic condition of the Malay community, important in the light of geo-political realities, of Singapore being a "small dot in a sea of green,"[173] of being a Chinese majority city-state surrounded by Muslim nations.

To ensure that minority groups are able to participate in decision-making at both the local and national level, the team MP Group Representation Constituency system was introduced in 1988.[174] By requiring that one member must belong to a stipulated minority, it guarantees minority legislative representation, though it serves a range of other objects as well.[175] In addition to guaranteeing minority representation at the national level, the GRC scheme has been merged with the Town Council and Community Development Council (CDC) schemes; the first seeks to devolve some power to residents in running their own housing estates and the CDCs seek to manage community programs and promote social cohesion. The effect of the GRC scheme has been to aid the political renewal of the PAP given that most opposition groups cannot contest more than one or two GRCs at a time owing to human resources constraints and have never won a GRC since its inception in 1988.

In addition, there is a legislative check on laws with discriminatory "differentiating measures," as defined in Article 68. If a law is proposed that is disadvantageous to a racial or religious community, the Presidential Council on Minority Rights, established in 1970, can issue an adverse report. It has never done so, however, and is considered toothless[176] and marginal, given its refusal to publicly address minority concerns relating to workplace discrimination, pro-Chinese immigration and education policy, and the restrictive Singapore Armed Forces policy against Malays.[177] Measures that accommodate cultural diversity, constituting exemptions from general laws, have not been considered "differentiating measures."[178] For example, turbaned Sikhs need not wear helmets when riding motorcycles[179] and on certain official festive occasions, weapons such as *krises* or *kirpans*, carried by Malay cultural groups and Sikhs respectively, may be lawfully carried.[180]

Integration or assimilation: melting pot or mosaic?

Within a multi-racial society, the government seeks to establish a unifying national identity while encouraging each community to nurture its distinct culture, language, and religion. The dominant political view is that "racial divides cannot be removed totally."[181] Thus, sensitive to a history of race riots and the dangers of Chinese chauvinism,[182] the government structures institutions and policies in an attempt to integrate the races and to promote tolerance for plural cultures as integral to nation-building.[183] For example, the HDB since 1989 maintains a public housing racial quota per estate to promote ethnic integration, in percentages paralleling society's ethnic mix: Chinese residents cannot own more than 84 percent of flats in a neighborhood.[184]

Rejecting the idea of a "melting pot" which submerges all races or a "salad bowl" which celebrates cultural differences separately, PM Goh used the metaphor of a "mosaic" to describe Singapore multiculturalism. Under this, "different communities" as mosaics "form a harmonious whole" while

each piece retains "its own colour and vibrancy."[185] Effectively, this recognizes a "separate domain" and a "common domain" where different ethnic groups interact. To integrate the races, English is taught as the *lingua franca*; Article 153A recognizes Malay as the national language and Malay, Mandarin, Tamil, and English are the four official languages. The educational policy of bilingualism is design to promote this "mosaic" vision without forsaking linguistic identity.[186]

It is important not to "essentialize" ethnic communities and assume homogenous views within them. For example, the Singapore Muslim community is divided over the issue of female circumcision, whether it is religiously warranted or an optional cultural practice, whether it is barbaric or a minor procedure.[187] The state leaves this to the community to handle, without requiring a mandatory reporting of female circumcision to the Health Ministry. Its report to the CRC committee states that this is not a widespread practice among the Muslim community nor is it "a major public health concern," as no related complications have ever been reported to a state clinic.[188] The issue of female circumcision as a human rights violation under CEDAW[189] has never been publicly raised in Singapore.

Protecting minority identity and cultural autonomy: administration of Muslim Law Act, treaty reservations, and legal pluralism

The common law-based Singapore legal system practices a limited form of legal pluralism, insofar as the Muslim minority is able to preserve its cultural particularities regarding personal and customary law, in matters like education, diet,[190] prayer obligations, and religious instruction, as regulated by the Administration of Muslim Law Act (AMLA).[191] This establishes the Syariah Court with jurisdiction over matrimonial and divorce matters, the power to impose penalties for Muslim-specific offenses, and to administer Muslim oaths and testamentary disposition pursuant to Muslim Law. It also establishes Majlis Ugama Islam or MUIS (Islamic Religious Council of Singapore) as a body corporate which advises the President on Islamic matters,[192] oversees Islamic schools, and administers the Mosque Building fund and Mecca pilgrimages. Critics alleged that MUIS is "severely controlled."[193]

The state's recognition of cultural autonomy buttresses patriarchical and inegalitarian religious law. For example laws preclude women from certain public posts,[194] permit polygamous marriages (although statistics indicate this is not the norm among Muslim men)[195] and apportion larger inheritance shares to males over females.[196] These gender discriminatory cultural norms contravene Singapore's obligations under, for example, CEDAW. Consequently, Singapore maintains reservations to Articles 2 and 16 in deference to minority religious and customary rights,[197] which considerably blunt the reach of CEDAW, especially in modifying sexist cultural patterns.[198] These have elicited the objections of various European countries that such reservations defeat treaty purposes, are too general and poorly defined, and contravene

the law of treaties by asserting the supremacy of domestic law to avoid international obligations.

Cultural rights and education: madrasahs *(religious schools)*

A primary goal of minority rights is to protect distinct group identity and autonomy; states are obliged to "create favourable conditions" for the development of minorities' culture, language, and religion save where specific practices violate national law and international standards.[199] The decision to make primary education compulsory in 2000 stirred concern that this would threaten the demise of the six community-funded *madrasahs* which produce religious teacher-scholars, an important facet of communal cultural identity.[200]

PERGAS (Islamic Scholars Association of Singapore), along with other groups, fought to retain the *madrasahs*, which did not teach the National Education, seen by some as "a propaganda platform for PAP." Some members of the Muslim community suspected that the government sought to control *madrasahs* in order to curb religious extremism.[201] The eventual compromise was to retain the schools' religious character while ensuring students attained minimal standards of proficiency in English, science, mathematics, and information technology, to ensure the employability of *madrasah* graduates. Thus, the Act does not fully apply to the Malay community. Currently, *madrasahs* may take in 400 primary one students annually.[202]

The national school system as "common space"

The public school system is seen as a "common space" where the commonalities among the different ethnic and religious groups can be fostered. Inter-cultural learning[203] is promoted insofar as the national Civics and Moral Education program teaches the strength of the traditions students hail from, focusing on what is common between different cultures and trying to promote respect for religious and cultural differences. While English is the common social goal, the bilingualism/mother tongue policy is believed to promote cultural identity.[204] The Committee on Strengthening Racial Harmony in school also encourages inter-racial mixing, through co-curricular activities such as interaction in sports and societies.[205]

The tudung *controversy and minority rights to culture*

This problem of religious dress in public schools is bedeviling other jurisdictions.[206] In Singapore, four primary schoolgirls were asked to leave their schools in January 2002 for flouting educational policy by wearing *tudung* (the Muslim headscarf) to school.[207] The common uniforms policy was based on the fear that wearing religious dress in public schools would heighten religious differences, fragmenting common space and undermining efforts to

build a common identity, besides inviting "competing demands from other communities to assert their own identities."[208] This was decried by their parents as infringing religious freedoms and criticized by several politicians and activists as being hostile to religious diversity.[209]

Forfeiting the constitutional rights of minorities, it was argued, was no recipe for racial–religious integration, harkening back to the hegemonic colonial mentality of homogenization, based on "obsolete historical and civilizational premises."[210] Arguably, there was no empirical evidence that allowing Muslim headscarves to be worn in schools would impede national unity. One academic, in her report to the UN Working Group on Minorities, criticized the ban as paternalistic, a form of secular fundamentalism and "an attempt to impose cultural and social conformity in schools," indicative of religious insensitivity.[211]

The matter raised important issues as to whether this policy violated religious freedom and cultural autonomy or whether, as implied by a feminist perspective that was not publicly canvassed, it liberated female Muslims from a repressive patriarchical practice.[212] From the perspective of the right to education, it was asserted that the policy threatened Muslim rights of "equal access to education,"[213] damaging community relations and preventing the parents from effectively fulfilling their Islamic rights to educate their daughters, contrary to Articles 14, 27, 29, and 30 of the CRC and Article 10 of CEDAW. Notably, nothing in Islam requires pre-pubescent girls to cover themselves and the point was made that it was unfair for the parents to make the decision without discussing it with the children.

The Mufti, Singapore's highest religious authority, considered that priority should be accorded to education over *tudung*-wearing. The children's fathers rejected this decision,[214] as did Pergas,[215] which demonstrates dissent within the Muslim community.[216] The government's rationale was not to promote gender egalitarianism but to serve the instrumental purpose of preserving a common space to foster national solidarity. Thus, national goals limit the exercise of civil liberties, including religious liberties and minority rights.[217] The US-based Muslim Women Lawyers for Human Rights stated this policy reflected one of "internal political hegemony that does not shy from infringing upon fundamental minority rights," violating democratic values and human rights norms in relation to religious freedom, education, as embodied in the CRC, CEDAW, and 1966 Covenants.[218] Despite reports that the parents would go to court to demand that "our constitutional rights be restored" in relation to religious freedom and discrimination, the issue remains unlitigated.

Conclusion

In Singapore's forty years of nation-building and transformation into a first-world city-state, rights and ideals, including human rights, have been subjugated to the rhetoric of development and pragmatism. The invocation of "Asian values" to justify government policies and programs has not

encountered broad internal resistance owing to the current government's legitimacy fueled by Singapore's economic successes. Against the *leitmotif* of Singapore's economic and non-economic vulnerability to forces within and without, is the appeal to "communitarian values" of consensus-seeking, group discipline and social harmony to maintain social cohesion and protect Singapore's global competitiveness. This has justified the construction of a legal and political regime, often criticized for unduly limiting civil and political rights, based on the declared cornerstone principles of meritocracy, multi-racialism, and religious tolerance. Given the priority accorded to the attraction of foreign investment, political stability is considered cardinal. Civil and political rights have been cabined within the context of a dominant one-party state with an emasculated opposition, domestic newspapers which are leashed to a model of responsible journalism in their nation-building role, and a subdued, highly trained workforce and largely harmonious industrial relations. The importance of cultivating strong families[219] and social morality as a bulwark against the social decline in Western liberal democracies in the form of family breakdown, violent crime, and radical individualism is also stressed.

Nevertheless, while wanting to retain the political *status quo* of a strong government with a huge parliamentary majority, there is some ambivalence towards state–society relations and political control insofar as there are greater pressures, both exogenous and endogenous, towards political liberalization to spur entrepreneurship and creativity. By embracing globalization, cosmopolitan aspirations, trade liberalization, and having a more assertive, well-educated population, Singapore will continue to be exposed to ideas of democracy, political pluralism, and human rights associated with westernization. However, this will jostle with the dominant political rhetoric of community interests, individual duties, and limiting rights through a "structure of preventive and penal laws which, although having the effect of restricting freedom of speech and expression, freedom of religion and freedom of association, ensure racial harmony in Singapore."[220] The limit of multiculturalism is informed by the recognition that "plural societies must have core values to bond the various ethnic groups" to forge the basis of an overarching national identity[221] without which "a multi-racial society will not be or become a nation."[222]

Paradoxically perhaps, Singapore's approach to human rights is not rights based,[223] and is couched in terms of programs, not entitlements, and subject to state goals. Despite observations that nationhood is "perceived primarily as a problem of human resource management" in an administrative state run along corporate lines,[224] the fact that Singapore has chosen to engage with the international community in the realm of human rights by its limited participation in the UN human rights treaty-based regime is promising. Parliamentarians and activists may use the language of human rights and refer to Singapore's international obligations in seeking legal reform,[225] an important step in developing a nascent human rights culture.

Singapore's human rights performance is, to some degree, more open to both domestic and international scrutiny, particularly through state-reporting procedures. While agreeing that a limited "core" of universal human rights exists, Singapore is wary of cultural imperialism, reserving the right to interpret and protect human rights according to state discretion. While there are instances of legitimate cultural differences in the scope and interpretation of human rights, claims of cultural relativism or other particularities can be an apology for power. Where Singapore disagrees with the substance or scope of a particular human rights norm, it either does not ratify the relevant treaty or attaches reservations and clarifying declarations. Nevertheless, while agreeing to disagree on certain issues to suit national conditions, Singapore acknowledges the need to improve and has undertaken to regularly review its reservations. Human rights in Singapore remain a "compelling ideal in an imperfect world,"[226] and much remains to be done in narrowing the gap between aspiration and actualization.

Notes

1 "'Pragmatism and realism do not mean abdication': a critical and empirical inquiry into Singapore's engagement with international human rights law," *Singapore Yearbook of International Law*, vol. 8, 2004, pp. 41–91.
2 See generally Li-ann Thio, "Implementing human rights in ASEAN countries: promises to keep and miles to go before I sleep," *Yale Human Rights and Development Law Journal*, vol. 2, 1999, pp. 13–22; Randall Peerenboom, "Beyond universalism and relativism: the evolving debate over 'values in Asia'" *Indiana International and Comparative Law Journal*, vol. 14, no. 4, 2003, p. 1.
3 Cmd 1 of 1991. This paper is reprinted in Jon TS Quah, ed., *In Search of Singapore National Values*, Singapore: Times Academic Press, 1990. These five values are collectivist in nature: nation before community and society before self; family as the basic unit of society; community support and respect for the individual; consensus, not conflict; and racial and religious harmony.
4 Lee Kuan Yew stated that in canceling the right of individual seafront owners to compensation for sea-frontage on acquired land, communitarian interests were placed over individual interests: speech, opening of the Singapore Law Academy, August 31, 1990, in *Singapore Academy of Law Journal*, vol. 2, 1999, p. 156.
5 Foreign Affairs Minister Wong Kan Seng, "The real world of human rights", June 16, 1993, Singapore Government Press Release No: 20/JUN, 09-1/93/06/16, reproduced in *Singapore Journal of Legal Studies*, 1993, p. 607 (hereinafter the Vienna Statement).
6 The Jemaah Islamiyah Arrests and the Threat of Terrorism White Paper (Cmd 2 of 2003).
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9 "DPP flays restoration of ministers' pay cuts," *Straits Times* (Singapore), June 23, 2004, p. H2.

10 World Bank, Data and Statistics, Country Groups, www.worldbank.org/data/countryclass/classgroups.htm#High_income.
11 In 1998, for every 10,000 people, there were 30 public buses, 1,140 private cars, 14 doctors, 2 dentists, 40 nurses, and 3,470 residential telephone lines: paragraph 3.1., CRC Initial Report (CRC/C/133), www.mcds.gov.sg/MCDSFiles/download/CRC_Initial_Report_Full_Report_Website.pdf.
12 Kevin Hamlin, "Remaking Singapore," *Institutional Investor*, May 2002, www.singapore-window.org/sw02/020607rs.htm.
13 Vienna Statement, *supra* note 5.
14 Declaration on the Right to Development, GA Res. 41/128, December 4, 1986.
15 *Report of the Constitutional Commission 1966*, Singapore Government Printer, 1966; reproduced in, Kevin YL Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore*, Asia: Butterworths, 1997, Appendix D.
16 See, for example, Thio Li-ann, "An i for an I: Singapore's communitarian model of constitutional adjudication," *Hong Kong Law Journal*, vol. 27, no. 2, 1997, p. 152.
17 US Department of State, "Singapore: country reports on human rights practices (2003)," www.state.gov/g/drl/rls/hrrpt/2003/27788.htm.
18 See Thio Li-ann, "The elected president and legal control of government: *quis custodiet ipsos custodes*," in *Managing Political Change in Singapore: The Elected Presidency*, Kevin Tan and Lam Peng Er, eds, New York: Routledge, 1997, pp. 115, 125–32.
19 Thio Li-ann, "Recent constitutional developments: of shadows and whips, race, rifts and rights, terror and *tudungs*, women and wrongs," *Singapore Journal of Legal Studies*, 2002, pp. 355–66.
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34 Paragraph 1.4, CRC Initial Report. The CRC committee has recommended that these be withdrawn: paragraph 7, CRC/C/15/Add.220, 2003.
35 Paragraph 3.1, CRC Initial Report.
36 Paragraph 2.4, CRC Initial Report, paragraph 2.3, and CEDAW Initial Report paragraph 10.2. The CEDAW Committee was concerned that the Asian values concept of the family would perpetuate stereotyped gender roles, paragraph 79, A/56/38.
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39 White Paper, *supra* note 3, paragraph 44.
40 *Ibid.*
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81 Paragraph 5, Religious Harmony White Paper, *supra* note 78.
82 Art 11, Federal Constitution of Malaysia.
83 *Daud bin Mamat* v. *Majlis Agama Islam* [2001] 2 MLJ 390.

84 *Lina Joy* v. *Maglis Islam Wilayah* [2004] 2 MLJ 119.
85 This caused concerns that it was inconsistent with the secular basis of government and state: Tan Cheng Bock, *Singapore Parliament Reports*, October 6, 1989, column 585. See Joseph Tamney, "The religious studies experiment," in *The Struggle over Singapore's Soul: Western Modernisation and Asian Culture*, Berlin and New York: Walter de Gruyter: 1996, Ch. 2, p. 25.
86 P. K. Ho, *Singapore Parliament Reports*, vol. 18, January 18, 1996, columns 430–2 (religious/quasi-religious organizations).
87 *Nappalli* v. *ITE* [1999] 2 SLR 569; *Liong Kok Keng* v. *PP* [1996] 3 SLR 263; *Tan Dennis* v. *PP* [1997] 1 SLR 123; *David Quak* v. *PP* [1999] 1 SLR 533; *Chan Cheow Khiang* v. *PP* [1996] 3 SLR 271.
88 *Colin Chan* v. *MITA* (1996) 1 SLR 609 at 619B-D.
89 Paragraph 13, *Pte Chai Tshun Chieh* v. *Chief Military Prosecutor*, Military Court of Appeal, No. 1 of 1989 (May 13, 1998).
90 MRHA White Paper, *supra* note 78, paragraph 26(b); Secretary-General Report, Civil and Political Rights, Question of: Conscientious Objection to Military Service, CHR 56th Session, E/CN.4/2000/55, paragraphs 1–3.
91 P. K. Ho, *Singapore Parliament Reports*, vol. 72, November 14, 2000, columns 1117–18.
92 "No go for touchy play," *Straits Times*, October 28, 2000, p. L3; "Plot thickens over Talaq," *Straits Times*, October 20, 2000, p. 3; Osman Sidek, "No Islamic law gives licence for marital rape," *Straits Times*, November 7, 2000, p. 51.
93 AWARE, "Remaking Singapore: views of half the nation," www.onlinewomeninpolitics.org/sing/aware.pdf.
94 For example, environmental interest groups successfully lobbied the government to preserve Chek Jawa: "Interest groups can flourish here, says DPM," *Straits Times*, January 7, 2004, p. H3.
95 PM Goh Chok Tong, of the Think Centre compared to the more dispassionate Roundtable: National Day Rally speech, August 19, 2001, archived at http://app.mfa.gov.sg.
96 When named political associations in 2001, both groups became ineligible for foreign funding: Political Donations Act (Cap 236): "Singapore bars two groups from foreign funding," Reuters, March 30, 2001.
97 See M. D. Barr, "J. B. Jeyaretnam: three decades as Lee Kuan Yew's *bête noir*," *Journal of Contemporary Asia*, vol. 33, no. 3, 2003, 299.
98 "JBJ given human rights defenders award," *Straits Times*, December 7, 2003.
99 Short for the golfing term "out of bound markers," used by government leaders to indicate the informal limits on free speech.
100 "Only those elected can set OB markers," *Straits Times*, February 3, 1995, p. 22.
101 "Field for debate wide open," *Straits Times*, October 5, 2000, p. 44.
102 PM Goh initiated bankruptcy proceedings against Jeyaretnam after winning a libel suit, resulting in the latter's January 2001 bankruptcy and loss of his NCMP seat.
103 PM Goh was awarded $700,000 against Tang, and Jeyaretnam was subject to a $100,000 award. "Singapore lambasts Amnesty over Report," *Hong Kong Standard*, October 18, 1997; "Singapore: JB Jeyaretnam – the use of defamation suits for political purposes," AI Index: ASA 36/004/1997, October 15, 1997, http://web.amnesty.org/library/Index/ENGASA360041997?open&of=ENG-SGP.
104 "Singapore authorities use libel laws to silence critics," *The Australian*, September 26, 2002.
105 *Tang Liang Hong* v. *Lee Kuan Yew* [1998] 1 SLR 97; *Goh Chok Tong* v. *JB Benjamin* [1998] 1 SLR 547; and *Goh Chok Tong* v. *Chee Soon Juan* [2003] SGHC 79, where PM Goh considered libelous Chee's street-electioneering tactics

in 2001 of loudly asking him about the US$10 billion loan to Indonesia. The Court considered the three defences of justification, qualified privilege, and fair comment to be bare allegations, refusing leave to defend: 56 to 57.

106 See, for example, *AG* v. *Wain* [1991] 2 MLJ 525; *AG* v. *Lingle* [1995] 1 SLR 696.

107 "Singapore: defamation suits threaten Chee Soon Juan and erode freedom of expression," AI Index: ASA 36/010/2001, November 2, 2001, http://web.amnesty.org/library/Index/ENGASA360102001?open&of=ENG-SGP.

108 "Singapore: JB Jeyaretnam – the use of defamation suits for political purposes," ASA 30/004/1997.

109 "Singapore lambasts Amnesty over Report," *supra* note 103.

110 Minister Jayakumar, "Human rights practices," *Singapore Parliament Reports*, vol. 68, April 20, 1998, column 1973. An *aide-memoire* responding to the 1997 US country report on Singapore was sent to the US Embassy on March 30, 1998.

111 Opposition politicians have sued each other and in one instance, compensatory damages of $120,000 have been awarded: *Chiam See Tong* v. *Ling How Doong* [1997] 1 SLR 97.

112 Cap 257.

113 Speaker's Corner, which many regard as a tokenistic sop, is exempted from this requirement. Even so, speaking on prohibited topics affecting matters, such as racial harmony, is subject to a fine. Chee Soon Juan was fined for speaking on the *tudung* controversy. The district judge noted the "potentially catastrophic consequences" of upsetting multi-racial and religious Singapore's "delicate equilibrium": "SDP chief fined and barred from next GE," *Straits Times*, July 31, 2002. See Li-ann Thio, "Speakers cornered? Managing political speech in Singapore and the commitment 'to build a democratic society,'" *International Journal of Constitutional Law*, vol. 3, 2003, pp. 516–24.

114 "No right is absolute, says varsity don," *Straits Times*, January 24, 1999, p. 31.

115 See "Chronicle of the Public Entertainments Act," *Straits Times*, November 18, 2000, p. 14.

116 *Singapore Parliament Reports*, vol. 75, November 26, 2002, columns 1689–91 at 1690.

117 Art 45(1)(e), Singapore Constitution.

118 Cap 206.

119 See Francis Seow, *The Media Enthralled: Singapore Revisited*, Westview Press, 1998.

120 Thio Li-ann, "Human rights and the media in Singapore," in Robert Haas, ed., *Human Rights and The Media*, Malaysia: AIDOM, 1996, pp. 69–79.

121 Marshall labeled the *Straits Times* "either PAP wallahs or bootlickers" for refusing to publish his letter challenging the mandatory death penalty, asking the *Straits Times* to start a petition urging the president to commute all death sentences to twenty-year jail terms: "David Marshall: praise as well as criticise govt," *Straits Times*, January 18, 1994, p. H17.

122 "Rules for broadcasters on politics here," *Straits Times*, April 20, 2001, p. H8. Refusing to allow the government to directly put its case to the public creates a skewed impression.

123 The number of households receiving programming can be restricted and fines up to $100,000 imposed. This guards against "incendiary" reporting which could precipitate race riots, jeopardizing stability, investor confidence, and jobs: "Singapore extends law on foreign media in politics," Reuters, April 19, 2001.

124 Previously applied to *Time*, *Asia Wall Street Journal*, *Far Eastern Economic Review*, and *Asiaweek*.

125 Michael Backman, "Is Singapore paranoid?," *Today*, October 18, 2003.

126 International Press Institute, 2003 World Press Freedom Review: Singapore, www.freemedia.at/wpfr/Asia/singapor.htm.

127 Bill No. 14/2004.

128 Melanie Chew, "Human rights in Singapore: perceptions and problems," *Asian Survey*, vol. 42, no. 11, 1994, pp. 933–48 at 940.

129 UN Development Program, "Human development indicators," Human Development Report 2003, www.undp.org/hdr2003/pdf/hdr03_HDI.pdf.

130 *Ibid.*, table 13, at 282–5. See "Singapore – human development fact sheet," hdrc.undp.org.in/hds/HDFct/Sngpr.htm.

131 World Bank Governance Research Indicator Country Snapshot (GRICS), http://info.worldbank.org/governance/kkz2002.

132 CRC Initial Report (CRC/C/133).

133 Paragraph 3.2., CRC Initial Report, CRC/C/51/Add.8.

134 *Ibid.*, paragraph 3.3.

135 On the "digital divide," see Hussin Mutalib, "The socio-economic dimension in Singapore's quest for security and stability," *Pacific Affairs*, vol. 71, no. 1, 2002; "Widening inequalities in society," *Singapore Parliament Reports*, vol. 72, August 25, 2000, column 724 ff. (Jeyaretnam calling for democratizing trade unions, free education for children with parents earning less than $2000/month, and introducing unemployment benefits, for example).

136 Public sector medical costs are heavily subsidized: paragraph 13.3, CEDAW Initial Report; on child health care, see paragraphs 4.6–4.9, CRC Initial Report; see Mohan Singh, "Health and health policy in Singapore," *ASEAN Economic Bulletin: Singapore*, vol. 16 no. 3, 1999, p. 330. In a policy U-turn, a compulsory universal health insurance scheme is currently under consideration: "Compulsory health insurance: before taking the plunge," *Straits Times*, March 20, 2004, p. 33.

137 Paragraph 4.4, CRC Initial Report.

138 In 1999, life expectancy was females: 79.6; males: 75.6 years: paragraphs 2.3–2.6, CRC Initial Report.

139 Paragraph 2.7, CRC Initial Report.

140 UNICEF, "At a glance: Singapore statistics," www.unicef.org/infobycountry/singapore.html/.

141 "Singapore government squanders savings 2000 Index of Economic Freedom Report," *New Zealand Herald*, May 18, 2002. Economist Mukul Asher found incredible the lack of official data on the returns of the $50 billion CPF fund, meant to provide for people's retirement, noting that this achieved only 1.8 percent returns between 1983–2000 when the economy was growing at 8 percent per annum. Hugo Restall, "More transparency please," *Asian Wall Street Journal*, August 8, 2000, www.singapore-window.org/sw03/030808a2.htm.

142 Paragraph 2.3, CRC Initial Report. In 2003, 93 percent of people living in HDB estates were owner-occupiers, compared to only 29 percent in 1970.

143 Paragraph 14.3, CEDAW Initial Report; Aya Gruber, "Recent development: public housing in Singapore," *Harvard International Law Journal*, vol. 38, 1997, p. 236.

144 See Statistics Singapore, "Historical data: unemployment rates," www.singstat.gov.sg/keystats/hist/unemployment.html.

145 Simon Elegant, "The lion in winter," *Time*, vol. 26, July 7, 2003, p. 161.

146 Ministry of Community Development and Sports, www.mcds.gov.sg.

147 "Measures to help jobless adequate: Eng Hen," *Straits Times*, July 1, 2003, p. H4, noting 6,799 jobless Singaporeans received interim financial assistance from Voluntary Welfare Organizations and Community Development Councils in 2002.

148 Paragraph 3.13, CRC Initial Report; M. Ramesh, "Social security in Singapore: redrawing the public–private boundary," *Asian Survey*, vol. 32, no. 1, p. 1108.

149 William Lee, "The poor in Singapore: issues and options," *Journal of Contemporary Asia*, vol. 31, 2001, p. 57.

150 In 1995, the total government expenditure on welfare-related programs was 2 percent. In 1989, only 53 percent of applications succeeded. The 1998 average monthly allowance was $200 (singles) and $570 (four person family), *ibid.*
151 The more one earns, the more one is able to save in CPF and Medisave accounts; thus income protection depends on market forces.
152 Eligibility is contingent on proof of being poor with factors like acute old age, severe disability, and lack of family as relevant factors: Ramesh, *supra* note 148, pp. 1100–1.
153 *Ibid.*, p. 1106.
154 The 1995 rates were: employers 18 percent and employees 22 percent: see William Lee, *supra* note 149.
155 On CDCs and the potential politicization in disbursing community welfare benefits, see Thio, *supra* note 7, pp. 226–9; paragraph 384, CRC Report.
156 Paragraphs 2.7, 3.12, CRC Report.
157 The government provides taxi and bus subsidies for disabled persons to get to work and special schools, CRC Report, paragraph 316. The CRC Committee was concerned disabled children were insufficiently integrated into the education system: paragraph 40–1, CRC/C/15/Add.220.
158 The Elder Care fund was established in April 2000, providing government subsidies for nursing costs for lower-income families and VWO operational subsidies: paragraph 8.7, Second CEDAW Report.
159 But see "Singapore's growing homeless problem," *New Straits Times* (Malaysia), October 11, 2003, www.singapore-window.org/sw03/031011ns.htm.
160 "1,341 destitute persons in govt homes," *Straits Times*, March 8, 1994, p. 25.
161 Cap 78.
162 Section 13(1), DPA.
163 US Department of State, "Singapore: country reports on human rights practices (1999)," www.state.gov/www/global/human_rights/1999_hrp_report/singapor.html.
164 Singapore's CRC report asserted that its health care standards were comparable to that of "advanced industrialized countries"; it currently has twelve public sector hospitals providing 80 percent of hospital beds. Paragraphs 345–6, 379, CRC Initial Report.
165 Paragraph 386, CRC Initial Report.
166 Cap 51.
167 CRC Concluding Observations CRC/C/15/Add.220; "Success drive send Singapore children to psychiatrists," Associated Foreign Press Report, March 2, 2001.
168 Paragraph 421, CRC/C/15/Add.220.
169 Paragraphs 38–9, CRC/C/15/Add.220.
170 Paragraph 14, CRC/C/15/Add.220.
171 G. A. Res. 47/136, December 18, 1992; Singapore did not sponsor this: A/C.3./47/L.66, December 1, 1992.
172 Although Member of Parliament K. Shanmugam has suggested that there ought to be ways to place more Malays in positions of power, as "successful role models offer hope," thereby diluting the appeal of militant Islam: "MP makes bold proposal to help local Muslims," Agence France Presse, January 20, 2003, archived at www.singapore-window.org/sw03/030121af.htm.
173 Former Indonesian President BJ Habibie made this derogatory reference: "President unhappy with Singapore, says AWSJ," *Straits Times*, August 5, 1998, p. 16.
174 Article 39A, Singapore Constitution. Article 2(3) of the 1992 UN Minorities Declaration provides that: "Persons belonging to minorities have the right to participate effectively in decisions on the national . . . level," which object the GRC is designed to serve.

175 In fact, the rationale of multi-racialism seems to be subsidiary as increasing the number of GRC members from three to six has meant a decline in the number of GRC constituencies and therefore, of minority candidates. While the PAP has promised to field more than one minority candidate per GRC team to prevent a reduction in minority representation, the number of total minority MPs should be constitutionally guaranteed, rather than based on a non-binding promise given by one political party. "GRC changes will not mean fewer minority MPs," *Straits Times*, October 21, 1996, p. 1. Alternatively, GRCs can be reduced to two or three members which should increase the number of minority representatives: Raymond Andrew "Legislation can ensure minority representation"; Chew Sutat, "S'poreans should not rely on promises to guarantee rights of representation," *Straits Times*, October 17, 1996, p. 46.
176 See Thio Su Mien, "The Presidential Council," *Singapore Law Review*, vol. 1, 1969, p. 2.
177 John Clammer, *Race and State in Independent Singapore 1965–1990*, London: Ashgate, 1998, p. 55.
178 For a list of statutory provisions and subsidiary legislation which do not constitute differentiating measures see Chan Sek Keong, "Cultural issues and crime," *Singapore Academy of Law Journal*, vol. 12, 2000, pp. 10–11, footnote 24.
179 Chan, *ibid*., p. 16.
180 Section 6(3)(b), Corrosive and Explosive Substances and Offensive Weapons Act (Cap. 65).
181 Chan, *supra* note 178, p. 8. Minister Yeo noted that multi-racialism requires a "realistic and practical approach" as "We have different gods . . . Our religions are not going to fuse into one." "BG Yeo: NS vital for racial peace": *Sunday Times*, August 23, 1998.
182 For example, the fears that elitist Special Assistance Plan Schools, teaching advanced Chinese, privileged the majority Chinese community: "Govt takes pains to integrate students," *Straits Times*, March 11, 1999, p. 32.
183 Chan, *supra* note 178, p. 8.
184 "No lifting of race quotas for HDB flats," *Straits Times*, November 11, 2003, p. H3.
185 "Media's role in sealing social unity," *Straits Times*, September 7, 1998, p. 1.
186 Academic Lily Rahim was criticized by a Malay youth group for her assertion that the state was practicing a policy of coercing Malays to learn Mandarin. "Academic slammed for maligning Malays," *Straits Times*, June 29, 2004, p. H2.
187 "Muslim rite is modernized," *Toronto Star*, November 16, 2002, p. L12. Competing views see the procedure as "outdated and inhumane" or alternatively, comparable to piercing one's ears.
188 Paragraph 31, 33, CRC/C/SR.909; paragraph 355, CRC Report, notes that female circumcision in Singapore is a relatively minor procedure.
189 CEDAW Committee, General Recommendation No. 14 of 1990, www.un.org/womenwatch/daw/cedaw/recomm.htm.
190 For example, Singapore Armed Forces camps maintain two kitchens: one pork-free for Muslims and the other beef-free for Chinese, an apparently rare arrangement: "BG Yeo: NS vital for racial peace," *Sunday Times*, August 23, 1998.
191 Cap 3.
192 MUIS website, www.muis.gov.sg.
193 Zulfikar Mohamad Shariff, "Malay leadership: interest, protection, and their imposition," from a conference entitled "Political Change in Singapore: What Next?", January 10–12, 2003, Melbourne, www.sfdonline.org/Link%20Pages/Link%20Folders/03Pf/Malay_leadership.html.

194 For example, the post of Kadi and Muslim Marriages Registrar: ss90(1), 91(1) and 146, AMLA; paragraphs 8.8, CEDAW Initial Report.
195 Section 96(2), AMLA. Paragraph 17.14, CEDAW Initial Report. In 1997, less than 1 percent of Muslim marriages solemnized involved polygamy. A first wife may seek a divorce from the Shariah court if unhappy about her husband's second marriage. The Qur'ān (section 4:3) permits a man to marry up to four women at one time: Muhammad Sharif Chaudhry, "Woman and polygamy," in *Women's Rights in Islam*, S. Sajid Ali, ed., Adam Publishers and Distributors, 1991, p. 83.
196 Paragraph 17.33, CEDAW Initial Report notes that the male's inheritance share is double the female's as men are responsible in Islam for maintaining their families (including wife, unmarried sisters, daughters, widowed mothers, etc.), while a woman's inheritance is for her own use.
197 Paragraph 2.2, CEDAW Initial Report.
198 Art 5, CEDAW. See generally Thio Li-ann, "The impact of internationalization on domestic governance: gender egalitarianism and the transformative potential of CEDAW," *Singapore Journal of International and Comparative Law*, vol. 1, 1997, pp. 299–305. The CEDAW Committee, while recognizing Singapore's plural society and historical sensitivity towards its communities' cultural and religious values, recommended that it study reforms in Muslim personal law, consulting the different ethnic and religious groups, including women, pursuant to eventually withdrawing these reservations: paragraph 74, A/56/38.
199 Art 4(2), Minorities Declaration.
200 Paragraph 6.10, CEDAW Second Report; "Ways to enable Islamic schools to co-exist," *Straits Times*, April 19, 2000, p. 56.
201 Shariff, *supra* note 193.
202 CRC Initial Report, paragraph 421.
203 Article 4(4) of the UN Minorities Declaration requires states to take appropriate measures in education to ensure minorities can learn about their own culture and traditions as well as giving them "adequate opportunities to gain knowledge" of society at large.
204 T. Shanmugaratnam, Inter-Racial Mixing in Schools, *Singapore Parliament Reports*, vol. 76, August 15, 2003, columns 2467, 2476.
205 *Ibid.*, column 2465.
206 In the United Kingdom, in *R (on the application of Begum)* v. *Headteacher and Governors of Denbigh High School* [2004] All ER (D) 108 (Jun); [2004] EWHC 1389 (Admin), the claimant unsuccessfully challenged a school decision requiring she wear the agreed school uniform for female Muslim students (*shalwar kameeze*), where she wanted to wear the *jilbab*.
207 Thio, *supra* note 19, pp. 355–70.
208 Hawazi Daipi, *supra* note 32.
209 For example, Fateha.com, then run by Zulfikar Mohammad Shariff. Azhar Ali of the opposition Singapore Malay National Organization indicated he would write to the school and Education Ministry requesting the ban be lifted: "Singaporean withdraws daughter from school to protest headscarf ban," Associated Press, July 1, 2003, www.hrwf.net/html/singapore_2003.html.
210 Karamah (Muslim Women Lawyers for Human Rights), Letter to Singapore Ambassador, Heng Chee Chan, April 20, 2002, www.karamah.org/press_letterto_singapore.htm.
211 Lily Zubaidah Rahim, "Minorities and the state in Malaysia and Singapore: provisions, predicaments and prospects," E/CN.4/Sub.2/AC.5/2003/WP.12, Working Group on Minorities (9th Sess.).
212 See Lama Abu-Odeh, "Post-colonial feminism and the veil: considering the differences," vol. 26, *New England Law Review*, 1992, p. 1527.

213 Rahim, *supra* note 211.
214 "Mufti puts school first," *Straits Times*, February 6, 2002.
215 Pergas is the Singapore Islamic Scholars and Religious Teachers Association. It considered that Muslims could not be complacent in the face of "such hindrance towards fulfilling the religious obligation of the modest covering of aurat": "Tudung controversy a test in art of negotiation," *Straits Times*, February 20, 2002. Pergas's stand on the Hijab issue (English version) is at www.pergas.org.sg/hijab-press2eng.html.
216 Muslims wrote letters to the press strongly supporting the government's stance, urging the fathers to send their daughters to *madrasahs* if they insisted their daughters wear *tudung*. Norita Abdullah, "Send daughter to madarasah," *Straits Times*, January 8, 2003.
217 Thio, *supra* note 19, pp. 355–66.
218 Art 18, ICCPR; Art 14, CRC; Art 29, CRC; Art 18, UDHR; Art 10, CEDAW.
219 Executive Summary, paragraph 1.2, CRC Initial Report. The government is attempting to institute more family-friendly policies such as allowing its officers to work just eleven hours a week: "Civil Service flexi-hours get more flexible," *Straits Times*, May 7, 2004, p. 3.
220 Chan, *supra* note 178, p. 23.
221 *Ibid.*
222 *Ibid.*, p. 25.
223 The CRC committee was concerned that the public were insufficiently aware of the CRC and its rights-based approach: paragraph 18–19, CRC/C/15/Add.220.
224 Lily Zubaidah Rahim, *supra* note 211.
225 For example, Charles Chong asked whether Singapore's education policy complied with Art. 10, CEDAW: 75, *Singapore Parliament Reports*, November 25, 2002, column 1519 ff.
226 Vienna Statement, *supra* note 5, p. 605.

6 Human rights in Malaysia

*H. P. Lee**

Introduction

A key feature of the constitution which provided for the birth of the Malayan Federation and for its enlargement into the Federation of Malaysia is the express embodiment of various fundamental rights. The Reid Commission which was entrusted with drawing up the new constitution was required by its terms of reference to make recommendations for "a federal form of constitution for the whole country as a single, self-governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature."[1] With these terms in mind, the Commission noted that while a federal constitution would define and guarantee the rights of the Federation and the states it was "usual" and "right" that it should also define and guarantee "certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life."[2] Although the Commission was of the view that the rights which were recommended for embodiment in the new constitution were "all firmly established" throughout the country and it would therefore seem unnecessary to give them special constitutional protection, the Commission had found "in certain quarters vague apprehensions about the future."[3] Dismissing such apprehensions as unfounded, the Commission saw no objection to providing express guarantees of the rights.

There are a number of important elements of the Malaysian constitutional and political framework which help to explain the degree of protection accorded particularly to certain civil and political rights. Since independence in 1957, the opposition parties have not once succeeded in winning control of the Federal government, although state-level government has switched hands in some states. The ruling coalition party, the Barisan Nasional, with the goal of maintaining its grip on power, has not seen fit to dismantle the panoply of statutory frameworks which burden the enjoyment of civil and political rights.

The constitution contains certain "traditional" elements.[4] The Malay sultanate system is constitutionally entrenched. Islam is declared to be the religion of the Federation but this declaration would not affect the secular nature of the Federation.[5] The Malay language is declared to be the national

language. The most important of these traditional elements is the recognition given by the constitution to the "special position of the Malays."

A concern since Independence has been the relationship of the special privileges accorded to the Malays or *Bumiputera* (literally meaning "sons of the soil") to notions of equality. Another concern was focused on the restrictions imposed by legislation on the exercise of fundamental rights (such as free speech, expression, assembly and associations) which would weaken the Barisan Nasional's grip on governmental power.

Amanda Whiting succinctly described Malaysia's participation in the international human rights regime as "limited."[6] Malaysia has not ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), or the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[7] A rather limp reason was proffered by a senior cabinet member for the refusal on the part of the Malaysian Government to ratify the two international covenants. It was said that, as the Malaysian Constitution has entrenched fundamental guarantees, it obviated the need to ratify these international instruments.[8] This was dismissed by Dato' Param Cumaraswamy, the UN Special Rapporteur on the Independence of Judges and Lawyers, as fallacious:

> Firstly, not all human rights which are provided in the Covenants are entrenched in the Malaysian Constitution. Secondly, how could something be described as being guaranteed when it can be removed or abrogated by two thirds majority in Parliament? As two thirds majority is required to amend any article of the Constitution, it cannot possibly be argued that fundamental rights are singled out for guarantee.[9]

The reality is that ratification of these instruments would lead to a greater degree of accountability to the international community in the face of complaints of infringement of the rights provided by the covenants.

There are some encouraging signs of Malaysia's willingness to participate in the international protection of human rights. The Malaysian Government has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child, "albeit with many reservations."[10] SUARAM, the leading human rights organization in Malaysia, in its 1998 report, said that their "ratification marks an important acceptance by the Malaysian government that the global community does share common standards and values on human rights, regardless of cultural and geographical origins."[11]

To avert international criticism over its human rights record, the Malaysian Government sought, particularly in the time of the former Prime Minister Mahathir, to argue that the advocacy of the universality of human rights by the Western democracies amounted to a new form of hegemony over the developing countries.[12] Calls were made for a review of the 1948 Universal Declaration of Human Rights (UDHR).[13] A controversy was generated over

the dichotomy between "Western" and "Asian" values. While some human rights were indeed universal, others, it was argued, failed to accord with "Asian" values, which place less emphasis on individual autonomy and elevate the community's interest over that of the individual.[14]

In rebutting criticisms about their human rights record the common line of argument proffered by developing countries is that the assertion of civil rights and freedom is a luxury which the Western democracies can enjoy because of their economic prosperity. In the case of developing countries it was essential to foster economic development as a key priority over the enjoyment of such rights and freedom. The enjoyment of freedom and democratic traditions cannot be sustained in the face of impoverishment. Thus the argument concludes that once the people are on the road to economic prosperity, rights and freedom will flourish. Such a view has been challenged by critics who argue that a holistic approach should be adopted and who reject the proposition championed by the advocates of "Asian" values that economic development is hampered by demands for adherence to fundamental rights and freedoms.[15]

The Malaysian position was articulated by the then Minister of Foreign Affairs (Datuk Abdullah Badawi) at the World Conference on Human Rights in Vienna in 1993 as follows:

> For us, the underlying foundation of a democratic and successful nation remains the need for strong and good governance for a disciplined and productive society, for continuing emphasis on political stability and quality economic growth with human beings at the centre of development efforts, while we continuously strive for the upholding of human dignity, and the essential worth of the human person.[16]

Professor Eva Brems construed this as meaning "individual rights are important, but order and economic growth are more important."[17]

A contemporary element in the Malaysian crucible of human rights concerns is the ever creeping significance of Islamic fundamentalism. The activities of the Islamist party PAS in Kelantan, which it controls, and Terengannu, which it previously controlled, generated deep concerns. The purported introduction of *hudud* law raised fears about its impact on fundamental rights. The Syariah Criminal Offenses (*Hudud* and *Qisas*) Enactment 2002 which was passed in Terengannu when it was controlled by PAS and which followed the 1994 example of Kelantan "raised concerns about human rights abuses and non-conformity to international accepted standards and norms."[18] Dato Rais Yatim recognizing the issue of implementation of *hudud* as a "political bombshell" for those in power added:

> The Government, which may later be handicapped by the increasing demands and threats from Muslims, especially from fundamentalists to create an Islamic State in which the *hudud* is to be implemented in full, will finally be cornered into a situation of having to accept it as a

> parallel legal system, at least for the Muslims. If this be the case, then the areas of legal conflicts will have enlarged into a proportion that may no longer be within the bounds of the conflict of laws alone. It will then emerge as a massive political problem considering the demands of multiracialism on the one hand and fundamentalist Muslims on the other.[19]

The threat of Islamic fundamentalism loomed larger when many Malay voters deserted the United Malays National Organisation (UMNO) (the dominant party in the Barisan Nasional) and shifted their support to the Islamist party PAS in the 1999 general elections. PAS, in addition to strengthening its control on Kelantan, captured Terengganu. Malay support for UMNO was drastically reduced and this gave rise to the perception that Islamic fundamentalism was on a steep rise in Malaysia. The switch of support from UMNO to PAS was largely the result of a tussle within UMNO leading to the charging, conviction, and jailing of the then Deputy Prime Minister Anwar Ibrahim. The manner in which he was treated while detained and tried led to a backlash against Prime Minister Mahathir Mohamed. Although Mahathir's retirement led to the appointment of Abdullah Badawi as Prime Minister, uncertainty still prevailed over whether the perceived increase in Islamic fundamentalism was irreversible. That uncertainty was extinguished with a surge of overwhelming support for Abdullah Badawi in the March 2004 general elections. PAS lost support in the elections for the Federal Parliament, lost control of Terengganu, and had its majority in Kelantan drastically reduced. Whether Islamic fundamentalism will rear its head again will depend on the ability of Prime Minister Abdullah Badawi to combat corruption, promote economic growth in the economically depressed Malay strongholds, and maintain racial harmony within the Federation.

Constitutional rights

Part II of the Malaysian Constitution provides for various "fundamental liberties":[20] no person shall be deprived of his life or personal liberty "save in accordance with law"; no slavery or forced labor, although Parliament may "by law provide for compulsory service for national purposes"; no "retrospective criminal laws and repeated trials"; all persons "are equal before the law and entitled to equal protection of the law." Discrimination against citizens on the ground only of religion, race, descent, gender, or place of birth is prohibited except "as expressly authorised" by the constitution. The constitution prohibits banishment of a Malaysian citizen and guarantees him freedom of movement but the guarantee is highly qualified. It is subject to "any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders." The guarantee of freedom of speech, assembly, and association is subject to a number of qualifications. Freedom of religion, rights in respect of education, and rights to property are also dealt with by the constitution.

The Reid Commission in recommending that fundamental rights should be guaranteed "subject to limited exceptions in conditions of emergency" said that the "guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise."[21]

The track record of constitutional interpretation by the courts suggests that they have not fully lived up to the expectation of the Reid Commission that the courts would function as the effective guardians of fundamental rights. The courts have pursued the path of strict legalism and have adopted a deferential approach in the face of aggressive exercises of power by the executive or the legislature. They have eschewed the "creative" approach of the Indian Supreme Court, with Indian judges being described by Ong Hock Thye CJ (Malaya) as "indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers."[22] Furthermore, the courts have adopted a "hands-off" policy whenever the government invokes a "national security" or "public order" argument.

The legal proposition underpinning the Malaysian courts' approach and which is reflective of the stand taken by the English courts was articulated by Steve Shim CJ (Sabah and Sarawak): "The executive, by virtue of its responsibilities, has to be the sole judge of what the national security requires. However, although a court will not question the executive's decision as to what national security requires, the court will nevertheless examine whether the executive's decision is in fact based on national security considerations."[23] The Malaysian courts have yet to stake out a role of being more searching in the examination of whether national security considerations existed in the face of an executive claim of national security. The role of the courts has further been circumscribed by the use of ouster clauses which are prescribed either statutorily or by the constitution. Public confidence in the courts has also been eroded as a result of a number of controversies which afflicted the courts and some of its members.[24]

Civil and political rights

Deaths in custody and police shootings

Attention in recent years has focused on the high number of deaths in custody and of deaths caused by police shootings. In October 2003 it was reported in Parliament that 425 prison inmates had died between 2002 and July 2003. Of this number, 237 died in 2002 and 188 died in the first seven months of 2003. Between 2002 and July 2003, a total of 23 people had died in police lock-ups, with 16 in 2002 and 7 in the first seven months of 2003. In contrast, 10 died in 2001 and 6 in 2000.[25]

It was also revealed in Parliament that up to October 2003, 27 persons had been shot and killed by the police. The following statistics were also

revealed: 23 deaths in 2000; 14 deaths in 2001; 54 deaths in 2002. It was also asserted that 29 deaths by police shooting occurred in 2003.[26] In the 2003 Executive Summary of its report entitled "Civil and political rights in Malaysia", SUARAM said that in most cases:

> [T]he claims by the police were similar: the suspects shot at the police, causing the police to return fire and kill them. The victims were then depicted as highly dangerous and wanted criminals. However, in many cases there were suspicious circumstances leading to doubts over claims made by the police.[27]

In December 2003, Prime Minister Dato' Seri'Abdullah Badawi announced the establishment of a Royal Commission to Enhance the Operations and Management of the Royal Malaysian Police.

Freedom of religion

By virtue of Article 3(1) of the Malaysian Constitution, Islam is declared "the religion of the Federation." It also provides that "other religions may be practised in peace and harmony in any part of the Federation." This article should be read with Article 11 which guarantees the right of every person to profess and practice his religion and to propagate it. The right to propagate is qualified as state law and in the case of federal territories, federal law, may control or restrict the propagation of any religious doctrine or belief among Muslims.

The "sensitive and complex" nature of Islam in Malaysia also has a political dimension. Under the constitution (Article 160) a Malay, is, among other things, a person who professes the religion of Islam. The identification of Malay with Islam clearly has political ramifications, especially in the context of a political arena where there are political parties contending for the Malay vote. According to SUARAM:

> Vying for the Malay majority vote for political power also, therefore, necessarily means "championing" Islam. There is a long-standing "out-Islamising" race between the opposition Pan-Malaysian Islamic Party (PAS) and the United Malay National Organisation (UMNO), the dominant party in the Barisan Nasional (National Front) ruling coalition. This jockeying to be *the* Islamic party to uphold the vision of Islam and ultimately an "Islamic-style state" has often been accompanied by a rise in policies and practices that violate international standards of human rights.[28]

Proselytizing to Muslims by other religions is an offense but not so if it is proselytizing to non-Muslims by members of the Islamic faith. The constitutional intertwining of Malay and Islam poses an almost insurmountable

obstacle for a Malay to change religion. As Faiza Tamby Chik J in *Lina Joy* v. *Majlis Agama Islam Wilayah & Anor*[29] said:

> Therefore a person as long as he/she is a Malay and by definition under art. 160 cl (2) is a Muslim, the said person cannot renounce his/her religion at all. A Malay under art. 160 (2) remains in the Islamic faith until his or her dying days . . . Even if one is a non-Malay and embraces Islam and becomes a Muslim convert (*mualaf*) and later decides to leave the Islamic faith he or she is still required to report and see the relevant State Islamic authority who will decide on her renunciation of Islam . . .[30]

The judge held in the case that as the plaintiff (who purportedly had converted to Christianity) was still a Muslim, the issue of finality of the plaintiff's decision to convert out of Islam was a matter for a Syariah Court and not the civil courts.

The capture of two of the Malaysian states by the opposition party PAS in the 1999 General Elections posed a dilemma for the Federal government. The enactment of *hudud* laws respectively in Kelantan and Terengganu has created legal and constitutional problems which have yet to be resolved. The broad parameters of Terengganu's Syariah Criminal Offenses (*Hudud* and *Qisas*) Enactment 2002 are described by SUARAM as follows:

> The enactment outlines what it terms *hudud* punishment for the crimes of theft (*sariqah*), robbery (*hirabah*) and sodomy (*liwat*); it also criminalises illicit sex (*zina*), slanderous accusations of *zina* which cannot be proved by four witnesses (*qazaf*) and consumption of alcohol or intoxicating drinks (*syurb*). The enactment also criminalises the renunciation of Islam. Muslims who want to renounce their religion can be charged for *irtidad* or *riddah* (apostasy).
>
> The *hudud* enactment also provides for capital and corporal punishment: death by stoning for *zina* committed by married persons, death plus crucifixion for armed robbery which results in the death of the victim and death for apostasy. Those found guilty of theft would have their right hand amputated for the first offence, their left foot amputated for the second offence and face a jail term, deemed fit by the court, for the third offence. Whippings feature as punishment for many offences, notably *qazaf*, *syurb* and *zina* committed by unmarried persons. The punishment for sodomy is similar to that for *zina*.[31]

Freedom of speech and expression

Freedom of speech and expression is often viewed as one of the most important attributes of a democracy. While such a freedom is guaranteed to every Malaysian citizen, it is rendered subject to such restrictions as are imposed by the Malaysian Parliament:

> as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.[32]

The Sedition Act 1948 severely restricts freedom of speech by making it an offense to utter words or to print or publish any material having a "seditious tendency" which is defined to include a tendency "to bring into hatred or contempt or to excite disaffection against any ruler or against any Government" or a tendency "to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State." Freedom of expression is curtailed by the "absolute discretion" reposed by the Printing Presses and Publications Act 1983 in the Minister in relation to the granting, refusal, or revocation of a license for a printing press or permitting to print and publish a newspaper or other publication. Judicial review of the exercise of the Minister's absolute discretion is precluded by an ouster clause inserted in the Act in 1988. The press is thus constrained by the requirement to renew annually the license or permit. As was highlighted by SUARAM, "Malaysia was ranked in the bottom fifth of a new press freedom index, ranked 110 out of 139 countries surveyed between September 2001 and October 2002 by Reporters Sans Frontières."[33] In 2003, it slightly improved its ranking to 104, with Indonesia on 110, the Philippines on 118 and Singapore on 144.[34]

In 1970, an amendment to the Sedition Act 1948, effected by an emergency ordinance,[35] removed from the realm of public discussion the following "sensitive" issues: citizenship; the national language and the languages of other communities; the special position and privileges of the Malays, the natives of Sabah and Sarawak, and the legitimate interest of other communities in Malaysia; and the sovereignty of the rulers. The Malaysian Constitution was amended in 1971 to empower Parliament to enact the restrictions imposed by the emergency ordinance into an Act of Parliament. So far the efficacy of these restrictions depends on the continuance of the lifespan of the emergency ordinance, which only ceases to have effect at the expiration of six months from the date the Proclamation of Emergency, upon which it is anchored, ceases to be in force. Prime Minister Tun Abdul Razak explained that the amendment to remove the sensitive issues from the realm of public discussion was intended to "ensure the smooth and continuing function of parliamentary democracy" in Malaysia.[36] The constitutional amendment also removed the immunity of parliamentarians, both state and federal, and rendered them liable to prosecution under the amended Sedition Act in respect of these sensitive issues. Subsequently, as a result of a confrontation between the Malay rulers and the government, the restriction on parliamentary freedom of speech was removed to enable parliamentarians to criticize the Malay rulers, short of calling for the abolition of the kingship and the position of the hereditary rulers.

The amendment to the Sedition Act came in the wake of the 1969 racial riots. Its rationale was explained by Raja Azlan Shah J (as he then was) in *Ooi Kee Saik*:[37]

> The Government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency. Any government which acts against sedition has to meet the criticism that it is seeking to protect itself and to keep itself in power.[38]

Raja Azlan Shah J also remarked: "Our sedition law would not necessarily be apt for other people but we ought always to remember that it is a law which suits our temperament."[39] This approach was affirmed by Lee Hun Hoe CJ in *Fan Yew Teng*:[40]

> In another country the speech may not be thought to have exceeded the limits of comments or criticism. We are not, however, concerned with any other country. We have to remember in our country we have a plural society. Within that society there are differences in origin, culture, religion and so forth. We have built a country out of diversities. It is in diversities that we try to achieve unity. Therefore, anything done or said to dislocate that unity cannot be taken lightly.[41]

Criticisms of the amended Sedition Act in its early days were not intense as the government was perceived to be evenhanded in the application of the Act,[42] although the narrow and strict interpretation of the Sedition Act left the courts with virtually no role to play whenever a defendant sought the intervention of the courts. Dato Rais Yatim in 1995 commented:

> The strictness with which the courts interpreted provisions of the Sedition Act 1948 as amended in 1970 is in retrospect understandable in view of the adverse preceding state of affairs of inter-ethnic groups relations in the country but to continue having such strictures in operation at this point in time of the country's history is anachronistic, to say the least.[43]

In recent times the Sedition Act has taken on a new lease of life but not so much in the context of protecting inter-ethnic relations. Provisions of the Act, other than those introduced by the emergency ordinance, have been deployed in a manner allegedly "to silence the Bar"[44] or "anyone who criticises the legal system." This impression has been reinforced by the reported cases of *Param Cumaraswamy*[45] and *Lim Guan Eng*[46], and the prosecution of Karpal Singh.[47]

Dato' Param Cumaraswamy was prosecuted after, in his capacity as the Vice President of the Malaysian Bar, he had made an appeal in an open letter urging a reconsideration by the Pardons Board of a petition of an applicant for his death sentence to be commuted. Dato' Cumaraswamy

highlighted what could be perceived to be discrimination by contrasting the case with another in which a death sentence had been commuted. His action, according to the charge, infringed the Sedition Act for its tendency "to raise discontent or disaffection" among the subjects of the King. Karpal Singh was prosecuted for statements he made in court in his capacity as the defense lawyer for Anwar Ibrahim. The statements suggested a possible involvement of highly placed officials in plans to get rid of Anwar Ibrahim, "to the extent of murder." Dato Cumaraswamy was eventually acquitted by the court; the action against Karpal Singh was subsequently discontinued.

Despite what appeared to be favorable outcomes for the defendants, the initiation of the prosecution could be construed as designed to intimidate. The use of such legal weapons can cause high-profile critics to be burdened with protracted litigation.

An international joint mission to Malaysia in 1999 was clearly troubled by the case of Lim Guan Eng which left it "with a number of deep concerns." It said that the "case has left us with relatively harsh laws which censor public opinion about the working of the legal and judicial system and which merit re-examination."[48]

Lim Guan Eng was a Member of Parliament and Deputy Secretary General of the opposition Democratic Action Party who in 1995 was charged under the Sedition Act for exciting disaffection against the administration of justice. The accused had publicly criticized the Attorney-General's handling of a statutory rape case involving a 15-year-old schoolgirl and the Former Chief Minister of Malacca, Tan Sri Rahim Tamby Chik, and the decision of a court to place the alleged rape victim in "protective custody." The accused was also charged under the Printing Presses and Publications Act 1984 "with publishing false information by referring to the girl as 'imprisoned victim.'" The trial judge, in convicting the accused, sentenced him to a fine of RM5,000 under the Sedition Act and RM10,000 under the Printing Presses and Publications Act. On appeal, the Court of Appeal raised the sentence to a concurrent imprisonment term of eighteen months on each charge. The accused lost his appeal to the Federal Court. His petition to the Governor of Malacca for a pardon was rejected. His petition to the King for a lifting of his disqualification from Parliament was also rejected. In consequence, he was unable to stand for election for a period of five years.[49]

The trial saga of Lim Guan Eng demonstrates "that anyone who dares to criticise the legal or judicial process may have to pay a very high price."[50] The Inter-Parliamentary Union, by resolution, reiterated "its firm belief that political considerations underlay the proceedings against Mr Lim Guan Eng for public statements made in the exercise of his parliamentary mandate and his subsequent sentencing to a heavy prison term leading to loss of his parliamentary mandate, suspension of his right to stand for election for the next five years and a ban on exercising his profession."[51] ARTICLE 19 has listed a number of other instances which showed the broad reach of the Sedition Act. These instances included the following:

- The police detained National Justice Party (Parti Keadilan Nasional) Supreme Council member N. Gopala Krishnan under the Sedition Act on the basis of his comments about the brutal treatment of Indian detainees.
- Marina Yusoff, former Vice President of the National Justice Party (Parti Keadilan Nasional), was arrested on January 12, 2000, for "provoking racial discord" in violation of section 14(1)(b) of the Sedition Act when in a speech on September 29, 1999, Yusoff allegedly told a mostly Chinese audience not to vote for UMNO (United Malay National Organisation) because it started the massacres of Chinese during the 13 May 1969 race riots.
- Zulkifli Sulong, editor of the opposition newspaper *Harakah*, and Chia Lim Thye, who held the permit for *Harakah*'s printing company, were charged under the Sedition Act in January 2000 for an article relating to the Anwar Ibrahim sodomy trial allegedly written by Chandra Muzaffar, Deputy President of the National Justice Party (Parti Keadilan Nasional). The article alleged that there was a government conspiracy against Anwar.
- In January 2003, the authorities raided the office of Malaysiakini, an Internet site which was a major source of independent news and information on Malaysia, and ordered it shut down under the Sedition Act after it published a letter from an anonymous reader criticizing Malay rights and likening the youth wing of one of the ruling coalition parties to the Ku Klux Klan.[52]

Given the "chilling effect" of the Sedition Act on open, democratic debate, the Inter-Parliamentary Union called for immediate steps to be taken to repeal the Act.

Section 8A(1) of the Printing Presses and Publications Act 1983 (as amended in 1988) provides that where there is "maliciously published any false news" in any publication, the printer, publisher, editor, and the writer shall be guilty of an offense. The penalty upon conviction is imprisonment of up to three years and/or a fine of up to $20,000. It is further provided in section 8A(2) that "malice shall be presumed in default of evidence showing that prior to publication, the accused took reasonable measures to verify the truth of the news." Section 8A, when its validity was challenged, withstood judicial scrutiny in *Public Prosecutor* v. *Pung Chen Choon.*[53] In October 2003, Irene Fernandez, a human rights activist, was convicted under this section and sentenced to twelve months' imprisonment for releasing at a press conference a report called "Memorandum on Abuse, Torture, Dehumanized Treatment and Deaths of Migrant Workers at Detention Camps."[54] Her conviction took place more than seven years after she was first arrested and charged. It was reported that she made over 150 court appearances and that her trial was the longest in Malaysian legal history.

The Official Secrets Act 1972 (OSA) acts as a severe dampener on free speech and according to its critics has been deployed in recent times as "a

convenient tool to cover up scandals of government." The Act which was extensively amended in 1983 left it completely to the executive to determine what information would be classified as official secrets. Sultan Azlan Shah said:

> The scope of the Malaysian Act and the absolute discretion given thereunder to the executive to determine what may amount to an official secret is indeed very wide and far reaching. It is in fact, so widely drafted that little leeway is even given to the courts to check any excessive exercise of these powers by the government.[55]

In *Public Prosecutor* v. *Lim Kit Siang*,[56] the defendant, a Member of Parliament and the Leader of the Opposition, was convicted by the High Court of various offenses under the OSA, in relation to certain secret official information he had received. The information concerned tenders in relation to the purchase of four Swedish fast-strike crafts for the Royal Malaysian Navy. The disclosure of the information created "a controversy which prompted allegations within and outside parliament of excessive expenditure and possible misuse of public funds." On appeal, the Federal Court reduced the fine imposed by the trial judge to less than RM2,000 for each offense, which meant that Lim Kit Siang was not automatically disqualified from Parliament.[57]

In 1985, prosecutions under the OSA were launched against a *New Straits Times* journalist for reporting a story on "alleged irregularities in military aircraft purchases," two *Asian Wall Street Journal* journalists for "their investigation into a public controversy involving the Finance Minister Daim Zainuddin's alleged personal gains through the sale of bank shares to a state agency, Pernas" and a foreign correspondent from the *Far Eastern Economic Review* for citing "an allegedly confidential cabinet document, the essence of which Prime Minister Mahathir had revealed in an earlier press conference, in a review of trade relations between Malaysia and China." All were convicted and fined by the courts.[58]

In April 2004, Justice K. N. Segara of the High Court upheld an appeal by Ezam Mohamed Noor from the opposition Keadilan Party against his conviction under the OSA and the two-year sentence imposed upon him. Ezam had been prosecuted after he had called a news conference to release two reports pertaining to alleged corruption involving two senior government figures. In his judgment, Justice Segara found section 16(A) of the OSA to be "meaningless, obnoxious, draconian and inconsistent . . . in the interpretation of official secrets."[59]

In a 1999 report, Amnesty International noted that, while the OSA had been applied infrequently since 1986, its "intimidatory effects on media and on civil society have been maintained through periodic threats of prosecutions." It also noted that in April 1999 the then Deputy Prime Minister (Abdullah Badawi) had said that he would issue guidelines to government

media officers to clarify that "the OSA should not be used by officials to suppress information from the public."[60]

Freedom of assembly and association

Article 10(1)(b) guarantees the right of every citizen to assemble peaceably and without arms subject to such restrictions as may be imposed by law as are deemed necessary or expedient in the interest of security or by public order. In *Pendakwa Raya* v. *Cheah Beng Poh & Ors*,[61] Hashim Yeop A. Sani FJ said that what "the court must ensure is only that any such restrictions may not amount to a total prohibition of the basic right so as to nullify or render meaningless the right guaranteed by the Constitution."[62]

It has been observed elsewhere that:

> The decision to grant a permit theoretically rests with the district police officer; however, in practice senior police officials and political leaders influence the grant or denial of some permits. Police grant permits routinely to government and ruling coalition supporters; however, they use a more restrictive policy with government critics, although the police did grant permits for many opposition meetings.[63]

Article 10(1)(c) guarantees the right to form associations, subject to restrictions relating to security of the country, public order or morality. This right is regulated mainly by the Societies Act 1966 which requires an association consisting of seven or more persons to be registered as a society. The minister is conferred an absolute discretion to declare unlawful a society in the interest of the security of the Federation, public order, or morality. The registrar is empowered to refuse or cancel the registration of a society. Amnesty International said:

> The Societies Act provides the Executive with means to block or impede the formation of any organisation which it considers to be undesirable. While prosecutions under the Act have rarely been pursued, the Act's intimidating effect, along with the potentially onerous bureaucratic requirements of the Registrar who can delay any decision indefinitely without explanation, have a negative impact on the development of independent civil society.[64]

Another piece of legislation which curbs the rights of students to freedom of association and freedom of expression is the Universities and University Colleges Act 1971. A university student is not allowed to associate with, or have any affiliation with, or express support, sympathy or opposition to, any political party or trade union. Furthermore, university staff are restricted in engaging in political activity.[65]

Preventive detention

The Internal Security Act 1960 (ISA) has been described by Dato Rais Yatim as "an anti-human rights legislation that ignores the rule of law."[66] The Act had been enacted with the main aim of combating communism and subversion. Despite the defeat of the communist threat, the ISA continues to be at the forefront of a broad spectrum of draconian laws which cut across a number of fundamental rights provided by the constitution. Apart from the ISA, powers of preventive detention are provided by the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) and the Dangerous Drugs (Special Preventive Measures) Act 1985 (DDSPMA).

In addition, the Restricted Residence Act 1933 empowers the minister to order a person "to reside in a particular area, not to enter a particular area, or to be under police supervision for a period of up to five years."[67]

The validity of the ISA is protected from judicial invalidation once it adopts a recital as specified in Article 149. The Act of Parliament must thus recite:

> That action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:
>
> (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
> (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
> (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
> (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof.[68]

In the face of such a recital, any challenge to the validity of any provision of the law designed to stop or prevent that action is precluded even though the provision may contradict the guarantees pertaining to liberty of the person (Article 5), prohibition of banishment and freedom of movement (Article 9), freedom of speech, assembly and association (Article 10) and rights to property (Article 13). The ISA is thus constitutionally sheltered under the broad umbrella of Article 149.

Under the ISA, the power is reposed in the police to detain a person for up to 60 days[69] while the power to detain for up to two years (renewable) is vested in the minister.[70] Under section 73(1) of the ISA a police officer may without warrant arrest and detain pending enquiries:

> Any person in respect of whom he has reason to believe – (a) that there are grounds which would justify his detention under section 8; and (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

In the case of a ministerial order of detention, section 8(1) of the ISA provides:

> If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or the economic life thereof, he may make an order . . . directing that that person be detained for any period not exceeding two years.

When cases came before the courts which questioned the validity of detention orders, the courts used to draw comfort and authoritative support from the pronouncements of the majority judges in the House of Lords' decision in *Liversidge* v. *Anderson*.[71] Over the years, the powerful dissenting judgment of Lord Atkin, which was construed as mocking the majority judges for being "more executive-minded than the executive,"[72] began to achieve ascendancy over the majority view. Lord Atkin was not prepared to relinquish judicial control by construing the discretion of the Secretary of State in that case in a subjective manner. The tussle between an "objective" and a "subjective" test manifested itself in a number of cases post-*Liversidge* which ultimately led to the rejection of the majority view in *Liversidge*. The continuing reluctance by the Malaysian courts to embrace Lord Atkin's enlightened approach would have undermined the standing of the courts, especially when across the causeway the Singapore Supreme Court signaled its support for Lord Atkin's approach. The matter was taken out of the hands of the Malaysian courts by a swift amendment to the ISA in 1989 which effectively ousted judicial review from the preventive detention arena.[73]

The ability of the courts to manoeuvre in cases involving a challenge to the legality of preventive detention orders is highly constricted. Where there is clear violation of "mandatory" procedural requirements (as opposed to "directory" ones), the courts are able to assert their supremacy. Even then the glow of judicial victory is dimmed fairly rapidly by the almost immediate arrest and detention of the freed detainee effected by means of another preventive detention order as he leaves the court. The potential for abuse of the power of preventive detention has been enlarged by the insertion of an ouster clause in the ISA. That clause provides that:

> [T]here shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of

> their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

A slight flexing of judicial muscle was nonetheless displayed in *Mohamed Ezam bin Mohd Noor* v. *Ketua Polis Negara*[74] wherein it was held, *inter alia*, by the Federal Court, that the appellants' detention was *mala fide* as it was made with an ulterior or collateral purpose unconnected with the issue of national security.[75] Mohamed Dzaiddin CJ said:

> My first observation is that despite the press statement of the respondent that the appellants were detained because they were a threat to national security, it is surprising to note from the appellants' affidavits that they were not interrogated on the militant actions and neither were they questioned about getting explosives materials and weapons. Clearly, from the affidavits which I highlighted above, the questions that were asked were more on the appellants' political activities and for intelligence gathering. I find that there is much force in the contention of learned counsel for the appellants that the detentions were for their ulterior purpose and unconnected with national security.[76]

Of the five detainees in the case who had been detained for allegedly trying to topple the government through militant means one had been released before the first sixty days had lapsed. The Federal Court in invalidating the detention by the police under section 73(1) of the ISA did not order the release of the other four detainees because they had been served an order issued by the Minister to extend their detention to two years under section 8(1) of the ISA. It was thus necessary for them to file separate *habeas corpus* applications to challenge their detention under the ministerial orders which in any event were not subject to judicial review. The enlightened approach taken by the Federal Court to apply an "objective" test to the opinion of the police was dimmed by the finding that section 8(1) was not necessarily interlinked with section 73.

The decision of the Federal Court left it in an unenviable position. On the evidence proffered to the Court, it was able to establish the existence of *mala fide*. Even if *mala fide* ran through the ministerial detention order, the Court was unable to provide relief because of the ouster of jurisdiction by the privative clause. As long as this situation remains, the courts would be held up to mockery unless they are prepared to invalidate such privative clauses, a move which is fraught with danger in the face of an intransigent executive.

It is clear that the ISA, without effective safeguards, can be deployed for political purposes. Thus, Dr Rais Yatim said that "it is not unknown for the ISA to be politically used to silence the opposition."[77] In his 1995 book, he added that by looking at the number of opposition leaders, academics, and

Table 6.1 Arrests under the ISA from 1960 to 2001

Year	*Arrests*	*Detention orders*	*Restricted orders*
1960–9	1,605	1,119	351
1970–9	6,328	1,713	1,389
1980–9	1,346	559	280
1990–9	1,066	680	32
2000–1	159	70	8
Total	10,504	4,218	2,061

activists who had been detained in the past decade, especially under Operation Lallang, such an allegation appeared to be irrebuttable.[78]

"Operation Lallang" was an internal security operation effected under the ISA in October 1987 when 106 persons, including "Lim Kit Siang, Leader of the Opposition, Dr. Chandra Muzaffar, a prominent human rights activist, university lecturers, businessmen and some members of the United Malays National Organisation (UMNO) who were also critical of the government"[79] were arrested and detained.

The number of arrests under the ISA from 1960 to 5 September 2001 as published in the 2002 *Human Rights Report* of SUARAM[80] is as detailed in Table 6.1.

According to a written response by the police to a SUARAM inquiry, in 2002 fifty-two persons were arrested under the ISA, of which forty-two were placed under two-year detention orders, four under restricted orders and six released unconditionally.[81] In 2003, a majority of ISA detainees "consisted of alleged religious extremists/militants from Jemaah Islamiah (JI), Kumpulan Militan/Mujahiddin Malaysia (KMM) and al-Ma'unah."[82] Out of 192 JI members as identified by the police, sixty have been placed under detention orders and three have been placed under restricted orders.[83] According to the Annual Report 2003 of SUHAKAM, up to 31 December 2003, ninety-seven people were still being detained under the ISA.[84]

Calls for repeal of, or at the minimum, reform of, the ISA have been ignored by the government.[85] The Malaysian Bar, in a memorandum to the government, urged it to repeal laws relating to detention without trial. The memorandum reflected a resolution adopted unanimously by some 2,480 lawyers at a general meeting held on October 10, 1998.[86] The Human Rights Commission of Malaysia (SUHAKAM) in a review of the ISA in 2003 recommended the repeal of the ISA and "that a new comprehensive legislation that takes a tough stand on threats to national security (including terrorism) but which at the same time is in line with human rights principles be enacted."[87] The government, despite some tantalizing comments, has to date not shown any inclination to review the various preventive detention laws. On the contrary, the September 11 attack on the USA "has provided a new impetus to the use of the ISA in cracking down on alleged terrorist and

militant actions in Malaysia."[88] The government's resolve to retain the ISA has been stiffened by the plethora of anti-terrorism legislation in a number of countries including the USA and the UK. The government has invoked the ISA to detain a number of persons alleged to be "terrorist linked" or to have "Islamic/ideological" connections with other groups in other countries.[89]

Emergency powers

According to Dr Abdul Aziz Bari, the case law underlined "the reality that although in theory the constitution is supreme, in practice it may not be so significant."[90] In truth, the downgrading in status of the constitution can also be attributed to the provision of express derogations from the constitutional guarantees of fundamental rights.

The most significant derogation is provided by Article 150 which had been progressively amended to confer extremely wide powers upon the executive.[91] This article enables a state of emergency to be proclaimed by the King, acting on advice of the Cabinet, if he is "satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any party thereof is threatened." Once such a proclamation is made, overriding powers are exercisable by the executive arm of the government. Cases which have involved the interpretation of the emergency provisions of the constitution have led to the following aspects which are regarded as settled propositions:

1. The power to declare a state of emergency is extremely wide. It is not confined to an actual state of circumstances which justify an invocation of emergency. An emergency can be proclaimed in anticipation of potential threats.
2. There is very little oversight by Parliament over a proclamation of emergency. A state of emergency remains as long as it is not earlier revoked by the King or annulled by Parliament, a position brought about by removing the requirement that a proclamation should have a sunset clause and be subjected to renewal by consent of Parliament.
3. Judicial oversight is virtually non-existent. This has been reinforced by a constitutionally entrenched ouster clause.

Apart from the express constitutional qualifications to the express guarantees, the courts have virtually conceded a blank cheque to the executive in its invocation of the emergency powers. A key issue was the ability of the courts to review the validity of a proclamation of emergency. If the facts constituting the substratum upon which the proclamation is based no longer exists, should the courts permit emergency rule to continue? The proclamation provides the keystone to a broad range of draconian measures which enable the executive to curb the exercise of fundamental rights by the people of Malaysia.

Article 150 has been invoked on four occasions: 1964 (when President Sukarno of Indonesia launched his "confrontation" against Malaysia because of his opposition to the formation of Malaysia); 1966 (to cope with a political deadlock in the State of Sarawak); 1969 (to cope with communal riots which flared up in Kuala Lumpur); and 1977 (to deal with a political crisis in the State of Kelantan). Of these crises, it would appear that the 1977 proclamation is the only one which has been expressly revoked.[92] A proclamation of emergency which still continues to provide the basis for emergency laws was the proclamation to deal with communal riots on May 13, 1969. It is, as a foreign delegation to Malaysia noted, hard to see how there is justification for the continuing operation of the emergency proclamation when the mission was impressed by the tranquility of the places it visited.[93] Thus it is a case of a state of emergency which is more illusionary than real. The Privy Council when presented with the opportunity shied away from giving an authoritative pronouncement. It simply stated that the issue was one of far-reaching importance which on the present state of the authorities remains an unsettled and a debatable issue.[94] The Malaysian courts went further, however, by asserting that the King was by virtue of the constitution made the sole judge of whether a state of emergency truly existed and that the issue was a non-justiciable one.[95] There have been some vigorous comments by members of the judiciary on the issue,[96] but following a 1981 constitutional amendment, the ability of the courts to exercise judicial review over a proclamation of emergency has been expunged by an ouster clause.[97] It is unlikely that the Malaysian courts would adopt the "basic structure of the Constitution" doctrine as expounded in the Indian Supreme Court decision of *Kesavananda Bharati* v. *State of Kerala*[98] to strike down the ouster clause.

Social and economic rights

The Malaysian population reached 23.27 million in 2000 and is projected to increase to 26.04 million in 2005. In 2000, the Bumiputera population accounted for 66.1 percent of the Malaysian citizens, the Chinese for 25.3 percent and the Indian for 7.4 percent. The proportion of the population living in urban areas grew from 55.1 percent in 1995 to 61.8 percent in 2000.

For a period of nearly ten years up to the time of the 1997 financial crisis, the GDP grew at a stunning rate of more than 8 percent annually. According to a recent World Bank report, Malaysia's economic recovery is "gaining momentum", as illustrated by the GDP Growth and Projections (percent) issued by the Ministry of Finance in September 2002 and set out in Table 6.2.

The official forecast for full-year growth for 2004 is 4.5 percent and is expected to be much higher. Tables 6.3 and 6.4, set out in the UNDP's *Human Development Report* for 2003, placed Malaysia at an HDI rank of 58.

Dr Mahathir had spelled out "a vision for Malaysia to become a fully developed nation by 2020."[99] In 2001, Malaysia had a GDP per capita

Table 6.2 Malaysia's economic recovery

1997	*1998*	*1999*	*2000*	*2001*	*2002*	*2003*	*2004*
7.3	–7.4	6.1	8.5	0.3	4.1	4.5	–

Table 6.3 Human Development Index

	Country	*Life expectancy at birth (years), 2001*	*Adult literacy rate (% age 15 and above), 2001*	*Combined primary, secondary, and tertiary gross enrolments ratio (%), 2000/01*	*DP per capita (PPP US$), 2001*	*Life expectancy index, 2001*
1	Norway	78.7		98	29,620	0.90
58	Malaysia	72.8	87.9	72	8,750	0.80
175	Sierra Leone	34.5	36.0	51	470	0.16
	Country	*Education index, 2001*	*DP index, 2001*	*HDI value, 2001*	*DP per capita (PPP US$) rank minus DI rank*	
1	Norway	0.99	0.95	0.944	4	
58	Malaysia	0.83	0.75	0.790	–2	
175	Sierra Leone	0.41	0.26	0.275	0	

Table 6.4 Human Development Index trends

		1975	*1980*	*1985*	*1990*	*1995*	*2001*
1	Norway	0.858	0.876	0.887	0.900	0.924	0.944
58	Malaysia	0.615	0.658	0.692	0.721	0.759	0.790
175	Sierra Leone						0.275

(PPP US$) of $8,750. The UNDP's HDI Index shows a steady progress from 0.615 in 1975 to 0.790 in 2001.

In the Eighth Malaysia Plan (2001–2005), the government stated:

> [I]t is essential for the nation to create a critical mass of trained, skilled and knowledge manpower to sustain economic growth and increase competitiveness. Towards this end, efforts will be continued to strengthen

> the education and training delivery system to be more responsive to the changing needs of industries and technological advancements. The thrust of human resource development during the Plan period will, therefore, be the enhancement of the qualitative aspects of human resources in line with the needs of a knowledge-based economy.[100]

Pre-school programs for children in the five to six year age cohort would be expanded, according to the Eighth Malaysia Plan, to ensure an increase in coverage from 63.7 percent in 2000 to at least 75.0 percent by 2005.

The focus of the education and training programs during the period of the Eighth Malaysia Plan would be directed "at improving quality and accessibility as well as reducing the performance gap between rural and urban areas."[101] The development allocation for these programs amounts to 20.5 percent of the total development allocation of the Eighth Malaysia Plan.

The Malaysian Constitution does not provide for a right to education. Article 12 of the Malaysian Constitution states, however, that without prejudice to the generality of Article 8 (which provides for the guarantee of "equality"), there shall be no discrimination against any citizen on the grounds only of religion, race, descent, or place of birth in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees. It is also provided that there shall be no discrimination on the stated ground in providing, out of the funds of a public authority, financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation). By virtue of Article 12, every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law. The Article, however, also empowers the Federation or a state to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in Islam and incur such expenditure as may be necessary for the purpose. Furthermore, no persons shall be required to receive instruction in or take part in any ceremony or act of worship of a religion other than their own.

The notion of "equality" is guaranteed by Article 8. The special privileges of the Bumiputera are governed by Article 153 which states that "notwithstanding anything in this Constitution," the King is obliged to exercise his functions under the constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the states of Sabah and Sarawak and to ensure the reservation for these Bumiputera of such proportion as he may deem reasonable of positions in the federal public service, scholarships, exhibitions, and other similar educational or training privileges or special facilities and, when any permit or license for the operation of any trade or business is required by federal law,

of such permits and licenses. The King is also empowered to direct universities and other educational institutions to ensure the reservation of such places for the Bumiputera as the King may deem reasonable.

A quota system provides for the allocation of 35 percent of places in the local universities to Chinese and 10 percent to Indians, with the remaining places going to the Bumiputera. Ian Stewart pointed to the intensification of discontent among the Chinese community when it was disclosed that even though the Bumiputera allocation is never fully taken up, the vacant places are never offered to Chinese or Indians. This generated considerable controversy given that many highly qualified Chinese are denied a place because the Chinese quota has been filled.[102]

There has been an absence of litigation over the scope and meaning of Article 153 in respect of which Professor Andrew Harding has proffered the following explanation:

> It may be that the lack of litigation is a function of the designation of special privileges as sensitive issues: in practice the challenge of special privileges, even through litigation, is likely to involve the inflaming of public feeling on the issue, thereby discouraging the litigant, who might be held responsible for any adverse consequences. It could also be that litigants view these issues as beyond the willingness of the judiciary to intervene.[103]

It has been acknowledged that "Malaysia has on the whole achieved a relatively high standard of healthcare for the majority of the population in the four decades since independence despite the low level of public funding."[104] Full coverage of piped water supply was achieved for urban areas and 84 percent for rural areas in 2000. Health programs have led to significant improvements in the health status of the population. According to the Eighth Malaysia Plan,[105] life expectancy at birth (in years) was 69.4 for males and 74.2 for females in 1995 and 69.9 and 74.9 respectively in 2000. Infant mortality rate (per 1,000) decreased from 10.4 in 1995 to 7.9 in 2000. The coverage of immunization in 1999 was as follows: Bacille Calmette-Guerin (BCG): 100 percent; triple antigen vaccine (diphtheria, pertussis, and tetanus): 94.1 percent; poliomyelitis: 93.4 percent; measles: 86.2 percent. In October 2000, Malaysia was declared a polio-free area.

The most significant area of healthcare neglect, according to SUARAM, has been with marginalized groups, namely the plantation urban settler, fishing, and *Orang Asli* (indigenous people) communities. According to the government, during the Eighth Plan period, particular focus would be given to the low income and the disadvantaged groups in the delivery of healthcare.

A right to "a secure place to live in peace and in dignity" is not recognized in the Malaysian Constitution, but was affirmed by a resolution of the United Nations Commission on Human Rights. Malaysia is one of the membership countries which adopted this resolution on March 10, 1993. SUARAM has

pointed out "a consistent failure to meet the target for low-cost housing in each of the development periods."[106]

The official statistics show that both the public and private sectors met 95.3 percent of the target for low cost housing under the Seventh Malaysia Plan by completing 190,597 units out of the required 200,000. Just as under the Sixth Malaysia Plan (1991–1995), the private sector overbuilt both medium-cost housing (achieving 187.5 percent of target) and high-cost housing (achieving 435.3 percent of target) under the Seventh Malaysia Plan. At the end of June 1999, it was estimated that 93,600 units of the residential properties remained unsold. A major issue of concern arising from the rapid development related to the forced evictions of plantation workers when plantations were either developed or sold for profits. Under the Eighth Malaysia Plan, the public sector is expected to construct 312,000 units of houses. Of these units, 66.7 percent will be low-cost houses and houses for the poor. The government aims to have all squatters relocated by the end of the Plan period.

According to the UNDP, in 1997 the share of national income or consumption of the poorest 10 percent was 1.7 percent, and 4.4 percent for the poorest 20 percent. The share of the richest 20 percent was 54.3 percent, and 38.4 percent for the richest 10 percent. Malaysia's Gini index of 49.2 percent as based on World Bank data, means that Malaysia has higher income inequality than most Asian countries. Chee Yoke Heong cited another study which pointed out that in 1999 "Malaysia had the highest income disparity in the Asia-Pacific region."[107]

SUHAKAM in its 2003 *Annual Report* noted that, according to the Mid-Term Review of the Eighth Malaysia Plan, the incidence of hardcore poverty among Malaysians declined to 1.0 percent in 2002 (as compared to 3.9 percent in 1990). In its report, it added:

> However, figures in the Mid-Term Review also show that hardcore poverty is higher among certain vulnerable groups. For instance, in 2002, hardcore poverty among households headed by the elderly was at 4.9% while for female-headed households was 9.4%. Furthermore, according to the Eighth Malaysia Plan, the incidence of hardcore poverty among the Orang Asli was registered at 15.4% in 1999 as compared to the general incidence of hardcore poverty of 1.4% in the same year. Thus, poverty eradication programmes must give higher priority to these marginalised groups.[108]

During the Eighth Malaysia Plan period, emphasis would be given to "the narrowing of income imbalance as well as increasing effective Bumiputera corporate equity ownership and the number of Bumiputera in high income occupations."[109] The projected target is that the incidence of poverty would be reduced to 0.5 percent by 2005 and that effective Bumiputera participation as well as equity ownership of at least 30 percent would be achieved by 2010.

Malaysia ratified CEDAW on July 5, 1995 with reservations made to a number of articles. These reservations were "primarily grounded on Syariah laws."[110] Following a review in 1997, the government has withdrawn some of these reservations.[111] In a 2003 roundtable discussion of CEDAW which was organized by SUHAKAM, Dato' Ranita Mohd. Hussein, the chairperson of the "Treaties and International Instruments Working Group" of SUHAKAM, remarked:

> In the Malaysian scenario, the UNDP Human Development Report 2002 ranks Malaysia at an uncomfortable number fifty four (54) out of one hundred and seventy three (173) in the gender-related development index. Standing side by side with men, Malaysian women are paid fifty nine percent (59%) less and representation in Dewan Negara [The Senate] is only a meagre twenty six point one percent (26.1%) while representation in Dewan Rakyat [The House of Representatives] remains at an even lower level of ten point four percent (10.4%). Yet, of Malaysia's population of 23.79 million, forty nine point three one percent (49.31%) are females. Therefore, in view of the fact that women make up almost half of Malaysia's population, the call is even louder to promote the augmentation of social goals, in particular gender equality, as a means to achieving a more comprehensive development, in terms of the political, economic and social context of the country.[112]

Steps have been and are being taken in a "piecemeal fashion" to implement the provisions of CEDAW. Positive measures which have been effected include the amendment to Article 8(2) of the Malaysian Constitution to prohibit discrimination on the basis of gender. Some existing legislation (for example the Income Tax Act 1967 and the Guardianship of Infants Act 1961) has been amended and new legislation (for example the Domestic Violence Act 1994 and the Child Act 2001) has been enacted to give effect to Malaysia's obligations under CEDAW. Whilst recognizing that women's substantive equality "is slowly becoming a reality," there have been calls for an increase in the pace of change.[113]

Cultural rights

Three key elements in a so-called "National Culture Policy" help to shape understanding of the situation pertaining to the other minority groups in Malaysia. These elements as cited in SUARAM's 1998 report were:

(a) that the National Culture must be based on the indigenous (Malay) culture;
(b) that suitable elements from the other cultures can be accepted as part of the national culture;
(c) that Islam is an important component in the moulding of the National Culture.[114]

Clearly the National Culture Policy symbolized "the ascendancy of the Malays." Dr Harold Crouch said: "Malay culture was given prominence in official ceremonies and television programs, and Islam became more fully identified with the state." He added that "in practice, non-Malays continued to speak Chinese and Tamil, there was still plenty of scope for non-Malay cultural expression, and religions freedom continued to be respected."[115]

Instances have been documented by SUARAM regarding impediments raised in relation to the construction of churches and temples,[116] for the construction of Chinese medium schools[117] and aspects of cultural traditions.[118] In its 2002 report, SUARAM stated:

> The government generally respects non-Muslim's right to worship. Nonetheless, state governments carefully control the building of non-Muslim places of worship and the allocation of land for non-Muslim cemeteries. Approvals for such permits are generally slow and arbitrary.[119]

The Universities and University Colleges Act 1971 regulates the process for the establishment of any university. Permission must be sought from the Yang di-Pertuan Agong who would grant it if he is satisfied "that it is expedient in the national interest that a University should be established."[120] An attempt to establish a private university in which Chinese could be the main medium of instruction was unsuccessful. Professor Andrew Harding has suggested that the decision of the majority of the Federal Court in *Merdeka University Berhad* v. *Government of Malaysia*[121] was "incorrect." He said that the result of the case is that "a narrow interpretation is placed upon the language rights in Article 152(1), and the linguistic rights of minorities are correspondingly reduced."[122]

From the viewpoint of the government, the proposed use of Chinese as the medium of instruction clearly contradicted its national education policy in which *Bahasu Malaysia* would become "the *de facto* as well as the *de jure* national and official language."[123]

A significant decline in the standard of English in Malaysia led to a pragmatic decision by the government to use English to teach mathematics and science in national schools in 2003. This raised a degree of controversy with the government threatening to use the ISA and the Sedition Act to stifle criticisms of this policy.[124]

Concluding observations

In evaluating the state of human rights protection in Malaysia the following points ought to be emphasized. Unlike many developing nations, the Malaysian Constitution has operated and continues to operate (albeit with many fundamental amendments) in an uninterrupted fashion since the attainment of independence in 1957. It is also relevant to observe that at the federal level, the opposition parties have never managed to threaten the

ruling coalition's grip on power. Of the Malaysian Prime Ministers since independence, Dr Mahathir's tenure was the longest and the most controversial. There were two occasions when Dr Mahathir's leadership within UMNO was challenged: in 1987 by Tengku Razaleigh and in 1998 by his then deputy, Anwar Ibrahim. One can observe a distinct correlation between the measure of enjoyment of civil and political rights and the degree to which an incumbent Prime Minister feels his leadership is threatened.

Another significant point of Malaysian constitutionalism is that unlike some Asian nations (Indonesia and the Philippines, for example), the military in Malaysia has never attempted to usurp the civil power nor intruded into the political arena. By the yardstick of established Western democracies, Malaysia does not yet fully measure up in terms of the protection of human rights: by the standards of many developing countries, Malaysia is cast in relatively favorable light.

There is a wide spectrum of draconian legislation in Malaysia which is designed to curb dissent. The media is largely under the control of the government which affects news reporting with a strong degree of self-censorship. The government, however, regards economic development as providing the imperative for downgrading the full enjoyment of civil and political rights. On the whole, the government is seen to have delivered and to be delivering economic progress. National stability is asserted to be vital for maintaining economic progress and that the raising of "sensitive" issues which can lead to racial disharmony must be vigorously curbed. The preservation of national harmony is often invoked as the mantra for constraining the exercise of civil and political rights by the critics of the government. Despite the aim of eroding such rights, the government wants to ensure that it is seen to be acting "legally": thus, the forms of legal processes are observed in the enactment of draconian legislation and its implementation via the judicial process.

A mosaic of other factors helps to explain why civil and political rights are not accorded the same elevated status as obtained in the established Western democracies: the communist insurgency of 1948 to 1960; the legacies of British colonial rule; the diversity of races, languages, and religions in Malaysia.

The battle against the communist insurgency involved the use of draconian measures. For instance, an emergency regulation empowered the colonial authorities to exercise powers of preventive detention of up to two years. Professor Andrew Harding observed that "[i]n many ways the 1948–1960 emergency set the pattern not only for the conduct of future emergencies, but even, in some respects, for what became regular laws, such as the Internal Security Act 1960, and the Societies Act 1966."[125]

Colonial rule bequeathed a legal system which was well regarded by the Malaysian people. There was exposure of those who took over the reins of power post-independence to the notion of rule of law and that governmental acts and legislation were subject to the overriding scrutiny of the courts

when their judicial review jurisdiction was invoked. The courts prior to independence were manned by expatriate judges who were highly regarded. Eventually the expatriate judges were replaced by locals who had been trained in the UK. The first three prime ministers received their legal education in the UK and accorded respect to the notion of an independent judiciary. An independent judiciary was perceived to provide a measure of protection against governmental abuse of powers, although it followed a path of strict legalistic or literal interpretation which accorded great deference to the executive. The judiciary had acquired a solid reputation in relation to its integrity and independence until judicial independence was eroded with the dismissal of Lord President Tun Salleh Abas and two senior Supreme Court judges in the judiciary crisis of 1988.

The cleavage in the priorities accorded to civil and political rights on one hand and economic and social on the other is pronounced. A World Freedom Index placed Malaysia in the rights "Partly Free" category.[126] Using a rating scale where 1 equals "most free" and 7 equals "the least free", Malaysia was given a rating of 5 for political rights and a rating of 4 for civil liberties. On the other hand its record in reducing poverty has been viewed as impressive and it has been praised by international agencies such as the World Bank and the United Nations.[127] The diverse nature of Malaysian society with its mixture of races, languages, and religions is often raised as a rationale for a strong-arm approach by the government. The communal riots of May 13, 1969 which flared up in Kuala Lumpur have from time to time been invoked by the government to explain why extreme measures such as the ISA and the Sedition Act are still necessary. Any attempt to highlight issues pertaining to racial, language, or religious discrimination is viewed as seeking to undermine national harmony and unity. Critics have pointed out that only those who dissent from the government are the targets of the use of such laws.

The report card of the government in the protection of civil and political rights is not a glowing one. Abuses of such rights are well documented in reports by NGOs and international bodies. Despite this state of play, the ruling coalition has time and again been re-elected. There are cogent criticisms of the electoral system and the constraints placed upon access of the media to opposition politicians. Nevertheless, the government still commands majority support of the Malaysian people. There is perhaps a sense of a resigned preparedness to "trade-off" the enjoyment of civil and political rights for economic well-being and stability. Malaysia with its relatively small population has chalked up remarkable economic progress. By comparison with a number of other developing nations, it has a high level of literacy, an established educational system, and a generally good healthcare system. The government continues to beat the drums of the imperatives of economic progress and the preservation of national harmony, a message which tends to resonate with the population despite governmental derogations from civil and political rights. This passive attitude of Malaysian civil society

appears to be reinforced by the resurgence in support for the ruling coalition in the 2004 elections.

The complacency over the erosion of human rights was severely jolted when in September 1998 the ISA was used to detain Anwar Ibrahim (who was then the Deputy Prime Minister) and sixteen of his political associates. The widespread revulsion against the treatment of Anwar Ibrahim for seeking to challenge the authority of Dr Mahathir Mohamed eroded heavily the Malay support base of UMNO. The public and international outcry against the "black-eye" caused to Anwar arising from an assault by the former Inspector General of Police Abdul Rahim Noor led to the latter's resignation, a Royal Commission of Inquiry, and the prosecution and conviction of the Inspector General of Police who was then sentenced to two months' imprisonment. The Anwar Ibrahim saga, according to Amnesty International, marked "a watershed in public perceptions of human rights and the administration of justice in Malaysia". The impact of this saga should not be underestimated. Amnesty International explained as follows:

> For many years voices within Malaysia had warned that a legislative and administrative structure was emerging which posed a grave threat to the rights and liberties safeguarded in the Malaysian Constitution and under international human rights law.
>
> The Malaysian authorities rejected such criticisms as being unpatriotic, or reflective of foreign values that were inappropriate to Malaysia's stage of economic, political and social development. Many Malaysians, contemplating the country's sustained political stability, ethnic harmony and economic growth, appeared prepared to accept a gradual erosion of their fundamental rights, and a parallel increase in the powers accumulated by the Executive branch of government. Cases of individuals detained without trial under national security legislation, or charged with criminal offences for the peaceful expression of dissenting opinion, were frequently regarded by fellow citizens as acceptable and necessary for the maintenance of prosperity and stability in a multi-ethnic, multi-religious society. Many accepted the government's claims that the rights of the individual were incompatible with, and secondary to, community interests.
>
> However the events that followed Anwar Ibrahim's dismissal from office including his detention and that of his supporters under national security legislation, his ill-treatment while held incommunicado, his vilification and shaming in government-controlled mainstream media, and the manner in which criminal charges were brought against him, have challenged this public complacency.
>
> The treatment of Anwar Ibrahim, a respected Malay leader widely expected to be the next Prime Minister, has provoked increasing numbers

> of Malaysians to question the extent to which the Executive branch of government has, step by step, undermined constitutional principles safeguarding basic human rights, and accumulated legislative powers and influence over key national institutions that have enabled it to act in a way that appears arbitrary and unjust. They have asked how, if the authorities could act in such a way against a person with the status and influence of the former Deputy Prime Minister, the rights of any other individual citizen could be guaranteed and protected.[128]

Malaysia has still some way to go before it can be said that human rights are fully and effectively protected, but a human rights discourse has taken off in Malaysia. Contributing to this discourse are many prominent Malaysians. A number of NGOs have with great courage highlighted abuses of human rights. The national human rights commission, SUHAKAM, is shaping a role in broadening the education of the public on human rights, even though it has been attacked for being a "toothless" watchdog. It is hoped that, in time, the government will realize that economic well-being can go hand in hand with the protection of human rights in all aspects.

Notes

* I wish to acknowledge the research assistance provided by Justin Sethu.

1 *Report of the Federation of Malaya Constitutional Commission, 1957*, Kuala Lumpur, 1957, p. 2, para. 3. The new constitution came into existence on August 31, 1957 with the proclamation of an independent and sovereign Federation of Malaya.
2 *Ibid.*, at p. 70, para. 161.
3 *Ibid.*
4 See Tun Haji Mohd. Salleh bin Abas, "Traditional elements of the Malaysian Constitution," in F. A. Trindade and H. P. Lee, eds, *The Constitution of Malaysia: Further Perspectives and Developments*, Singapore: Oxford University Press, 1986, pp. 1–17.
5 Abdul Aziz Bari, *Malaysian Constitution – A Critical Introduction*, Kuala Lumpur: The Other Press, 2003, pp. 46–7.
6 Amanda Whiting. "Situating SUHAKAM: human rights debates and Malaysia's national human rights commission," *Stanford Journal of International Law*, vol. 39, 2003, pp. 59, 71.
7 It has also not signed the International Convention on the Elimination of All Forms of Racial Discrimination or the International Convention on the Protection of the Rights of all Migrant Workers and their Families. Amanda Whiting, *ibid.*, at p. 72.
8 Dato Param Cumaraswamy, "Foreword" in SUARAM's *Malaysian Human Rights Report 2002*, p. i.
9 *Ibid.*
10 SUARAM, *Malaysian Human Rights Report 1998*, p. 215.
11 *Ibid.* According to Amanda Whiting, Malaysia is also a state party to the Convention on the Nationality of Married Women, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery: *supra* note 6, at p. 71.

12 See H. P. Lee, "Competing conceptions of rule of law in Malaysia," in R. Peerenboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.*, London and New York: RoutledgeCurzon, 2004, p. 245.
13 See Whiting, supra note 6, at p. 63.
14 Shad Saleem Faruqi, "Human rights, globalisation and the Asian economic crisis," *INSAF* (Journal of the Malaysian Bar), vol. XXVIII, no. 1, 1999, p. 39, at pp. 52–6. See also H. P. Lee, "Constitutional values in turbulent Asia," *Monash University Law Review*, vol. 29, 1997, p. 375.
15 Malaysia was one of the thirty-four Asian states which adopted the Bangkok Declaration that epitomized the Asian perspective on human rights. This Bangkok Declaration was adopted prior to the 1993 UN World Conference on Human Rights in Vienna which adopted the Vienna Declaration and Programme of Action.
16 Cited in Eva Brems, *Human Rights: Universality and Diversity*, The Hague: Kluwer Law International, 2001, p. 61.
17 *Ibid.*
18 SUARAM, *Malaysian Human Rights Report 2002*, p. 10.
19 Rais Yatim, *Freedom Under Executive Power in Malaysia*, Kuala Lumpur: Endowment Publications, 1995, p. 378.
20 See generally Tunku Sofiah Jewa, *Public International Law – A Malaysian Perspective*, Kuala Lumpur: Pacific, 1996, Ch. XI.
21 Report of the Constitutional Commission, *supra* note 1, p. 70, para. 161.
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7 From British colony to special administrative region of China

Embracing human rights in Hong Kong

Carole J. Petersen

Introduction

Despite its undemocratic system of government, the Hong Kong Special Administrative Region ("SAR") of China is widely perceived as having a favorable human rights record. This is partly because the criteria used to assess human rights emphasizes the rule of law, procedural fairness and freedom of expression, religion, association and assembly. In these areas, Hong Kong performs well when compared to the rest of China and many other Asian jurisdictions. The large demonstrations regularly held in Hong Kong provide vivid examples of its relative openness. On July 1, 2003, the anniversary of Hong Kong's return to China, more than 500,000 people marched in opposition to the National Security (Legislative Provisions) Bill (hereinafter the "National Security Bill"), compelling the local government to withdraw the Bill and delay the implementation of Article 23 of the Hong Kong Basic Law.[1] On July 1, 2004, another massive march was held in support of greater democracy. Every year, tens of thousands of people attend a candlelight vigil in memory of those who died in Tiananmen Square on June 4, 1989. Hong Kong is the only city in China where people can demonstrate on such politically sensitive issues.

Hong Kong has extensive legal protection for human rights, both in the Bill of Rights Ordinance and in the Basic Law, Hong Kong's constitutional document.[2] Several other ordinances have been enacted to address specific issues, including the prevention of torture, sex and disability discrimination, and access to personal data. Fourteen United Nations human rights treaties apply to Hong Kong, six of which require periodic reports. The Hong Kong Government takes seriously its reporting obligations under these treaties and produces extensive reports. Although China officially submits these reports, Hong Kong officials attend the hearings held by treaty-monitoring bodies and answer questions relating to Hong Kong.

Hong Kong's human rights record becomes more controversial when one moves beyond basic civil liberties and the formal legislative framework. Residents enjoy a high standard of living relative to other Asian jurisdictions, but there is significant economic and social inequality and little recognition

of a justiciable right to economic benefits. The Hong Kong Government does not apologize for this but rather argues that the best way to assist the poor is to promote economic growth and create opportunities for people to "lift themselves" out of poverty. The United Nations Committee on Economic, Social and Cultural Rights disagrees and has concluded that Hong Kong's *laissez-faire* policies impedes the realization of economic and social rights. What is particularly troubling is that Hong Kong's economic policies are not the product of a democratic process. They were adopted in the colonial era and continued by an appointed government that is heavily influenced by the wealthy business class. Given Beijing's hostility to the democracy movement, this is unlikely to change in the near future.

Enforcement of rights is also a concern, as the government has declined to establish a general human rights commission, and the independence of other enforcement bodies, such as the Equal Opportunities Commission (EOC), has been undermined. Even in the area of basic civil liberties, many commentators fear that a gradual decline may be under way. This is partly due to post-1997 changes in legislation and policies but also due to a growing climate of self-censorship, exacerbated by the enormous economic and political influence of China's central government.

These factors will be considered in greater detail in the main body of the chapter, after a brief review of the sources of and theoretical approaches to human rights in Hong Kong. A few methodological issues should also be noted. First, since Hong Kong is not a separate country, some data are not available in the same format as for other jurisdictions. Second, although the Hong Kong Government is more transparent than China's national government, it has declined to introduce "access to information" laws and some violations of rights have been hidden from public scrutiny for decades. Finally, it should be noted that there has been an explosion of legislation, case law, and academic literature relating to human rights in Hong Kong in the past twenty years. This chapter necessarily summarizes what has become a broad field and certain topics (such as labor law, migrant workers, privacy, discrimination, and democracy) are only briefly discussed due to space constraints, although they are important to Hong Kong's human rights discourse.

Sources of human rights law and theoretical approaches

The Bill of Rights and the development of human rights law in Hong Kong

When discussing Hong Kong, there is a natural tendency to compare the pre-1997 era with the post-1997 era. This is misleading because the pre-1997 era consisted of two distinct periods. The period before 1984 was the true colonial period, whereas 1984 to 1997 was a "transition period" leading to the resumption of Chinese sovereignty. In the colonial period, Hong Kong

inherited the British common law legal system and certain traditions that facilitated civil liberties, including an independent judiciary and legal profession, strict adherence to procedural rules, and the right to a jury trial for serious criminal offenses. On the other hand, colonial Hong Kong had no democracy and the constitution did not restrict the legislature from enacting laws that violated human rights.[3] The statute books were published only in English, and contained draconian laws that gave the government enormous powers over expression, assembly, and association. There was no legal right to equality, and discrimination was common in both the public and private sectors.[4] Although the UK extended several international human rights treaties to Hong Kong, it did not ratify the optional complaint procedures or incorporate the treaties into domestic law.

In 1984 the Sino-British Joint Declaration was signed and the topic of human rights protection became more prominent. The treaty promised that Hong Kong would enjoy a "high degree of autonomy" and retain the same legal and economic systems, rights and freedoms, and basic way of life for at least fifty years after the resumption of Chinese sovereignty. Annex I promised that Hong Kong residents would enjoy a number of specific rights, including freedom of the person, speech, assembly, association, religion, choice of occupation, academic research, and the freedom to marry and raise a family. It also stated that the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR), as applied to Hong Kong, would remain in force. During the transition period, 1984 to 1997, the local government embarked upon numerous legal and policy changes, including the localization of the civil service, public consultation on democratic reforms, increased use of Cantonese in the courts, and translation of all statutes into Chinese.

Meanwhile, China began the process of drafting the Basic Law, which was to serve as the highest law in Hong Kong after 1997 and implement the promises made in the Joint Declaration. Although there was no referendum on the Basic Law, drafts were published for public comment in April 1988 and February 1989.[5] As noted below, the Basic Law includes extensive provisions protecting human rights. Unfortunately, it was still in draft form in the summer of 1989 and certain provisions were adversely affected by the tragic events of June 4. One million Hong Kong people (close to one-fifth of the population at the time) marched in support of the students and the Chinese Government accused Hong Kong of becoming a base for subversion. The Basic Law Drafting Committee ceased meeting during the Tiananmen crisis and when it resumed work Beijing insisted on strengthening the language of Article 23 and reinserting a requirement that Hong Kong enact laws against subversion. Ironically, the events of June 1989 also led directly to the enactment of Hong Kong's first domestic human rights legislation, the Bill of Rights Ordinance (BRO). Searching for a way to rebuild public confidence, the colonial government decided to incorporate

the ICCPR into domestic legislation. It selected the ICCPR because the Joint Declaration and also the published drafts of the Basic Law provided that the ICCPR would remain in force and be implemented through the laws of Hong Kong. The final version of the Basic Law, which was enacted by the NPC in 1990, retained this language. The colonial government thus hoped that China would not repeal the BRO in 1997 since it essentially reiterated rights already guaranteed by the Joint Declaration and the Basic Law.

As enacted in 1991, the BRO stated that pre-existing ordinances should either be given an interpretation that is consistent with the BRO or, if that was not possible, should be deemed repealed to the extent of the inconsistency. The British government also simultaneously amended the Letters Patent, Hong Kong's colonial constitution, by adding a clause that precluded the local legislature from enacting a law that violated the ICCPR. The Letters Patent would have no force after June 30, 1997, but the thinking was that Article 39 of the Basic Law would then take over, since it also refers to the ICCPR. That is precisely the approach that the Hong Kong courts have taken since the handover, holding that the ICCPR is incorporated into the laws of Hong Kong through both the BRO and Article 39.[6]

The BRO compelled the Hong Kong Government to review local law and a number of ordinances were amended to comply with it. It also gave Hong Kong judges the opportunity to study and apply comparative jurisprudence on human rights. In an early decision interpreting the BRO, *R* v. *Sin Yau Ming*,[7] the Court of Appeal held that guidance "can be derived from decisions taken in common-law jurisdictions which contain a constitutionally entrenched Bill of Rights," as well as from decisions of the European Court of Human Rights, the European Human Rights Commission, and the decisions and comments of the United Nations Human Rights Committee. In a later case, *A .G.* v. *Lee Kwong-kut*, the Privy Council (the final court of appeal in the colonial period) sounded a note of caution with respect to the use of comparative materials and warned against letting disputes regarding the BRO "get out of hand."[8] Some commentators believe that this case was the start of a narrower, more technical, approach. Nonetheless, the general principles stated in *Sin Yau-Ming* still stand and Hong Kong judges continue to refer to foreign and international decisions. Although China initially threatened to repeal the BRO in 1997,[9] it only removed a few introductory provisions.[10] The removal of these provisions has not had any practical impact and the courts have continued to apply the BRO in the post-1997 era.[11]

Human rights protection under the Basic Law

The Basic Law promises that the socialist system shall not be practised in Hong Kong and that the "capitalist system and way of life shall remain unchanged for 50 years."[12] It also contains substantial language protecting human rights. Although there is overlap with the BRO, the Basic Law adds

some additional rights and has the advantage of being a superior law in Hong Kong. Thus any ordinance, rule of common law, or government policy that cannot be interpreted consistently with it should be declared invalid by the local courts.[13]

Chapter III (Articles 24–42) contains most of the human rights provisions, including freedom of the person, expression, association, assembly, movement, religion, choice of occupation, and academic research. It expressly prohibits torture, as well as arbitrary or unlawful arrest, detention, and searches. It also protects privacy of communication, choice of lawyer, confidential legal advice, the right to social welfare, the sanctity of one's home, and the freedom to marry and "raise a family freely." Article 39 further provides that the ICCPR, ICESCR, and applicable labor conventions shall continue to apply and be enforced in Hong Kong. In addition, Chapter IV provides for an independent judicial system, the right to fair trial, the presumption of innocence, and the right to jury trial for serious criminal offenses.[14] Chapter V protects property rights and Chapter VI contains articles relating to academic and religious freedom.[15]

In theory, the Basic Law also gives Hong Kong a high degree of autonomy over local law making. Article 18 provides that the Chinese Government will not legislate for Hong Kong except in limited areas, such as defense, foreign affairs, and other matters considered "outside the limits" of Hong Kong's autonomy[16] and only a few national laws currently apply.[17] In practice, however, the central government can exercise considerable influence if it wishes to do so because it appoints the head of Hong Kong's Government, the Chief Executive.[18] In Hong Kong's legal system the executive branch initiates most legislation and Article 74 of the Basic Law strictly limits the type of bills that an individual legislator may introduce. Moreover, one-half of the legislature is chosen by small elitist "functional constituencies," a system that guarantees a significant number of pro-government legislators. This is important because a bill, amendment, or motion proposed by an individual legislator only passes if it receives a majority of votes from both the functional constituency representatives and the other group of legislators.[19] Thus, the Basic Law gives the functional constituencies veto power over bills opposed by the government and also over amendments to government bills.

The Basic Law also contains a small number of key provisions that give the central government direct power over Hong Kong, should it feel the need to intervene. For example, Article 17 gives the Standing Committee of the National People's Congress (NPCSC) the power to invalidate a law enacted in Hong Kong if it determines that it is inconsistent with a provision in the Basic Law regarding affairs within the responsibility of the central government or the relationship between it and the Hong Kong Government. Article 159 provides that the power to amend the Basic Law rests with the National People's Congress (NPC). Although it also states that no amendment shall contradict the "established basic policies" toward

Hong Kong, there is no independent body to determine whether an amendment would violate those policies.

The NPCSC also has, under Article 158, the power to interpret any provision of the Basic Law at any time. Although Article 158 authorizes the courts of Hong Kong to interpret the Basic Law in the course of adjudicating cases, the NPCSC can override these interpretations and need not wait for a referral from the Hong Kong Court of Final Appeal. Hong Kong members of the Basic Law Drafting Committee argued that the power to interpret should rest entirely with the Hong Kong judiciary. When that argument was lost, it was hoped that the NPCSC would, as a matter of convention, refrain from exercising its power of interpretation. However, during the 1999 "right of abode" crisis, the Hong Kong Government sought and obtained an NPCSC interpretation of Article 24, after losing two actions for judicial review in the Hong Kong Court of Final Appeal.[20] Although the NPCSC's new interpretation of Article 24 did not affect the particular cases (because Article 158 provides that "judgments previously rendered shall not be affected" by an NPCSC interpretation), the courts were obligated to apply the interpretation in subsequent cases.

More recently, in April 2004, the NPCSC applied its power of interpretation to Annex I and Annex II of the Basic Law, setting restrictive procedures for the process of proposing amendments to the method of selecting the legislature and the Chief Executive.[21] This was followed by a "Decision" of the NPCSC that rules out any significant democratic reforms in 2007 and 2008.[22] These interpretations essentially added new language to the Basic Law and demonstrate the significance of the NPCSC's interpretive powers. If it deems it necessary, the NPCSC has the power to interpret any human rights provision of the Basic Law very narrowly. On the other hand, the first eight years since 1997 indicate that Beijing will not exercise its interpretation power except on rare occasions.

Finally, it should be noted that some mainland legal scholars have criticized Hong Kong courts for occasionally declaring provisions of local ordinances invalid, having found an irreconcilable conflict between the local ordinance and a provision of the Basic Law. These comments have led to speculation that the NPCSC might eventually issue an "interpretation" of the Basic Law stating that the courts no longer have this power. If that were to occur, the role of the Hong Kong courts would be fundamentally altered and the guarantees of human rights in the Basic Law would become far less enforceable.

Theoretical approaches to human rights

Although Hong Kong is 95 percent Chinese, universalist (or "Western") theories tend to dominate the human rights discourse, particularly in the area of civil liberties. This is partly because Hong Kong inherited the UK's common law legal system but also because these theories fit well with the

government's *laissez-faire* economic policies. The concept of assessing human rights against a universal standard has been further promoted by the Joint Declaration, the BRO, and the Basic Law, which expressly refer to international treaties as sources of domestic law. Hong Kong lawyers and judges now regularly look to international and foreign judgments for guidance on the meaning of specific provisions and have also begun to cite the Hong Kong Government's reports to treaty bodies. NGOs also play an increasingly active role in the enforcement of human rights treaties. They submit shadow reports, hold conferences and training sessions on the treaties, send delegates to the international monitoring bodies' hearings, and use the concluding comments as lobbying tools.

Not everyone approves of this approach. Some commentators have argued that a more communitarian theory of rights better suits Hong Kong's cultural heritage. Some have also complained that Hong Kong has become too obsessed with individual rights and that this has destabilized society and undermined the "executive led" system of government. Those who articulate this view often criticize the EOC when it litigates against government departments and criticize the courts when they strike down legislation or government policies. Interestingly, however, the government itself generally does not publicly endorse these views, although certain officials may share them at times. The government also does not expressly rely upon communitarian or relativist theories of human rights or argue that freedom must be curtailed in favor of economic development. To do so would directly conflict with its desire to portray Hong Kong as an international city and a free society. Thus, if the government seeks to justify a restriction on freedom of expression or assembly it will argue that the restriction falls within the limits allowed by the ICCPR and compare it to a law in a "Western style" democracy, such as the UK, Canada, or Australia. The government generally will not argue that the restriction is appropriate for a "Chinese community" or draw comparisons to mainland China, Taiwan, or Singapore.

In contrast, in Hong Kong's discourse on economic and social rights, and the right to political participation, international standards and treaties play a more limited role. Although NGOs and lawyers do try to rely upon international law and practice, there is little agreement in Hong Kong on the extent to which treaties other than the ICCPR contain justiciable rights. The debate on these issues tends to focus on what is best for Hong Kong's "unique context" rather than on how to comply with a universally accepted standard. Appeals to "traditional Chinese values" are also frequently articulated, especially during debates on issues perceived to have moral implications, such as proposals to prohibit sexuality discrimination or to permit same-sex marriage.

Thus far, nationalism has not played a significant role in Hong Kong's human rights discourse. An exception is the 2002–3 debate on Article 23, in which supporters of the National Security Bill made an explicit appeal to

nationalism. Interestingly, this approach had little appeal for the general community, as evidenced by the huge turnout for the demonstration against the Bill in July 2003 and the results of the November 2003 District Council elections. The Democratic Alliance for the Betterment of Hong Kong (the DAB) was the political party that argued most strongly that Hong Kong had a patriotic duty to quickly enact the Bill and it suffered significant losses in the November 2003 elections (although it performed better in the September 2004 Legislative Council elections, by which time the Bill had been withdrawn and was not a live issue). It is, however, possible that arguments based upon patriotism will carry greater force as Hong Kong becomes further integrated with the mainland. The local economy is increasingly reliant upon the mainland for investment and tourism, and residents are well aware of the need to obtain the central government's approval for any significant steps toward democracy. Even the most liberal legislators and activists have little desire to antagonize Beijing and are trying to open channels of communication. They may eventually find that it is to their advantage to use more nationalist rhetoric.

The remainder of this chapter examines several substantive areas of rights and then concludes by drawing comparisons with other jurisdictions and by discussing the challenges of enforcing and monitoring rights in Hong Kong.

Physical integrity rights, derogation in times of emergency, and national security legislation

Physical integrity rights

The Convention Against Torture (CAT) applies to Hong Kong. Torture and other forms of mistreatment are prohibited under several domestic laws, including Article 28 of the Basic Law, Article 3 of the BRO (based on ICCPR Article 7), and the Crimes (Torture) Ordinance. There have been no reports of arbitrary arrests or politically motivated disappearances. Capital punishment was abolished before 1997 and has not been reinstated. Justices of the peace regularly inspect prisons and conditions generally meet international standards, although overcrowding is a problem. The local police force has a reasonably good reputation, as do other branches of the disciplined services (e.g. the Correctional Services Department and the Immigration Department). The Independent Commission Against Corruption (the ICAC) has extensive powers of investigation and arrest and has been accused of using overly aggressive tactics.[23] It is, however, credited with cleaning up the corruption that plagued Hong Kong in the 1960s and therefore enjoys considerable public support.

Every year several hundred complaints of assault are filed against the police, although only a small number are substantiated. NGOs have also complained of police discrimination against migrant workers. One problem with the existing system is that there is no independent human rights

commission to investigate such complaints. Instead, the government established a variety of independent bodies to "oversee" what are essentially internal investigations. For example, complaints against the police are investigated by the Complaints Against Police Office (CAPO), which is monitored by the Independent Police Complaints Council. Complaints against the ICAC are investigated by the ICAC's Operations Department, which is monitored by an Independent Commission Against Corruption Complaints Committee.

Under Article 3 of CAT, Hong Kong has an obligation not to expel a person where there are substantial grounds for believing that he or she would be subjected to torture. In the Hong Kong section of the 1999 Report under CAT, the Hong Kong Government stated that a claim of torture by a potential deportee would be carefully assessed and the person would not be deported if the claim was well founded.[24] Yet in the case of *Sakthvel Prabakar* v. *Secretary for Security*,[25] the government attempted to deport a Sri Lankan man who had alleged that he was fleeing torture and would be subjected to torture again if returned to Sri Lanka. The government had not investigated his allegations but rather relied upon the unexplained denial of refugee status by the UNHCR (which was later changed by the UNHCR). The government's deportation order was quashed in an action for judicial review and the Court of Final Appeal rejected its appeal. The Court held that it was procedurally unfair for the government to rely upon a determination by the UNHCR, particularly as it does not give reasons for its decisions on refugee status. The Court also referred to the government's undertakings in its 1999 Report under CAT.[26] Unfortunately, it did not decide the question of whether the government is legally obligated to implement its stated policy of not deporting someone with a well founded fear of persecution.

Derogation in times of emergency and national security legislation

There have been no significant threats to public order in Hong Kong in recent decades although the government has occasionally had to take strong actions against threats to public health, such as the SARS crisis in 2003.[27] Basic Law Article 14 provides that the local government is responsible for maintaining public order. There are approximately 4,000 Chinese troops stationed in Hong Kong but they have maintained a low profile since their arrival in 1997. The Emergency Regulations Ordinance gives the Chief Executive extremely broad powers to make regulations during times of emergency.[28] This Ordinance is arguably too broad and may violate the ICCPR, which requires that any restrictions on rights be narrowly construed and strictly necessary. In practice, however, the Hong Kong courts would likely read such a requirement into the Emergency Regulations Ordinance, as they would interpret it so as to comply with Article 39 of the Basic Law and the ICCPR. Another power that certainly requires reform is the power to tap telephones. Unfortunately, public discussion of this issue

has been limited since the government is extremely secretive even about the number of instances in which the power has been invoked.[29]

The NPCSC also has the power, under Article 18 of the Basic Law, to declare a state of emergency in Hong Kong if there is "turmoil within the [SAR] which endangers national unity or security and is beyond the control" of the local government, in which case the NPCSC could apply any national law to Hong Kong. This is highly unlikely, however, since the national government has no interest in being seen as taking overt control over Hong Kong. The more pressing issue is how Hong Kong will eventually implement Article 23 of the Basic Law, which was the subject of the massive protest march of July 1, 2003. Article 23 provides:

> The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

In one sense, Article 23 is a concession, allowing Hong Kong to enact its own legislation on what would normally be a national issue. Hong Kong accepts the need for laws protecting national security and has already enacted anti-terrorism legislation.[30] The community is, however, understandably wary of laws that could be used to import the central government's approach to state secrets, subversion, and secession.

In September 2002 the Hong Kong Government commenced the process of implementing Article 23 by releasing a document entitled *Proposals to Implement Article 23 of the Basic Law: A Consultation Document*.[31] The *Consultation Document* was well researched and some of the proposals would have liberalized draconian laws left over from the colonial period, although no longer enforced. Unfortunately, the government also included proposals that went beyond the requirements of Article 23. For example, it proposed to give the police special entry, search, and seizure powers for investigating Article 23 offenses, including the power to search a home without a warrant.[32] This became one of the most hotly debated issues and the government never could demonstrate why it needed to expand its existing search powers. The government also adopted an aggressive approach to the legislative process. For example, it refused to publish a White Paper (a draft of the legislation) before introducing the National Security (Legislative Provisions) Bill in the Legislative Council, in February 2003. The government then asked the legislature to adopt an accelerated schedule for scrutinizing the Bill and receiving public submissions. The pace became so rushed that organizations appearing before the Bills Committee were limited to five minutes, an absurdly short period of time given the scope, complexity, and sensitivity of the legislation.

The government's strategy was particularly unwise since the community was simultaneously suffering from SARS and increasingly lacked confidence in Tung Chee-hwa's administration. A politically astute government would have delayed the vote on the Bill for a few months and agreed to some of the amendments that had been proposed by the directly elected legislators. This would have allowed the people to feel that their elected representatives had some influence. Instead, the government tried to rely upon its domination of the functional constituency representatives and insisted that the Bill must be voted on in July 2003, before the legislature's summer recess. This created a crisis atmosphere and encouraged more people to join the protest march of July 1. The numbers were so large that the Liberal Party, a pro-business party that controlled eight functional constituency seats and normally supports the government, asked to delay the vote until later in the year. The Chief Executive declined but hastily offered three additional amendments, including the withdrawal of the extraordinary search powers. Had these three concessions been made before the protest the Bill might well have been enacted, but after the march they were not sufficient. The leader of the Liberal Party resigned from the Executive Council, withdrawing the party's support and leaving the government with no choice but to delay the vote on the Bill.

The government initially announced that it would conduct additional consultation and try to enact the Bill later in 2003. The three concessions had addressed some problems and the other disputes probably could have been resolved through negotiations. Ironically, in September 2003, the DAB, which is considered to be the most "pro-Beijing" of the political parties and had been pushing for a quick vote on the Bill, suddenly suggested that the legislation be shelved for more than one year. This was almost certainly because the DAB feared that it would be punished by voters if it enacted the Bill so close to the November 2003 District Council and September 2004 Legislative Council elections. Without its support the government had to withdraw the Bill altogether.[33]

Tung Chee-hwa never did regain credibility with the public and he resigned in 2005, two years before the end of his second term. Although the new Chief Executive, Donald Tsang, is unlikely to raise the sensitive issue of Article 23 in the near future, it cannot lie dormant forever. Since any future attempt to legislate is likely to be based upon the 2003 Bill, certain of its provisions are discussed later in this chapter, under the relevant headings.

Civil and political rights

Freedom of thought, consciousness, and religion

Hong Kong has no established religion and a high degree of religious freedom. Major religions practiced in Hong Kong include Buddhism, Taoism, Islam, Catholicism, and Protestantism. The government has continued to recognize Christian statutory holidays since 1997 and has added a statutory

holiday for Buddha's birthday. Freedom of consciousness and religion are protected by Article 18 of the ICCPR, incorporated in Hong Kong by Article 39 of the Basic Law and by Article 15 of the Bill of Rights.

In addition, there are several detailed provisions in the Basic Law protecting the autonomy of religious institutions. Many of Hong Kong's community leaders are practicing Christians or graduates of elite schools with religious affiliations. Their influence can be seen in Article 32 of the Basic Law, which states that Hong Kong residents "shall have freedom of conscience," "freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public," Article 137, which protects the right of religious schools to teach religion, and Article 141, which goes into extensive detail on the rights of religious believers and organizations. It protects property rights of religious organizations, their right to run seminaries, schools, and hospitals, and their right to maintain relations with "religious organizations and believers elsewhere." Thus Hong Kong's Catholic Church has a legal right to maintain links with Rome, which is not permitted in mainland China.[34]

Falun Gong was not an issue in the late 1980s when the Basic Law was drafted. Although it describes itself as a "spiritual organization," members could probably rely upon the religious freedom provisions in the Basic Law if any attempt were made to prohibit it in Hong Kong. Falun Gong still operates openly and holds conferences and exhibitions in the SAR. Some Hong Kong deputies to the NPC and the National Committee of the People's Political Consultative Conference have urged the Hong Kong Government to restrict Falun Gong's activities and the central government has reportedly pressured it to enact anti-cult legislation.[35] The Hong Kong Government has not done this, although some officials occasionally make hostile statements about Falun Gong. The government has also used its powers under immigration law to deny entry to foreign members attempting to enter Hong Kong for Falun Gong events, an issue that is the subject of an ongoing action for judicial review.[36] Additional issues involving Falun Gong members are discussed below, under freedom of assembly and association.

Freedom of expression and criticism of the government

Freedom of expression is protected by ICCPR Article 19, Article 15 of the Bill of Rights Ordinance, and Article 27 of the Basic Law, which provides, *inter alia*, that Hong Kong residents shall have freedom of speech, of the press, and of publication. Criticism of the Hong Kong Government is a regular (some would say constant) phenomenon. At present, Hong Kong residents also have a legal right to criticize the central government, to advocate for the end of one-party rule in China, and even to express support for the independence of Taiwan or Tibet. There are also some worrying developments, however, including non-legal pressures and a developing culture of self-censorship.[37] For example, directly elected legislator Emily Lau was

demonized by a member of the Executive Council for attending a meeting in Taiwan and stating that the Taiwan people should have the right to decide their future. Her office is frequently vandalized. Certain radio talk-show hosts have also complained that they have been pressured, even threatened, not to be so critical of government and some have resigned as a result. The proposals to implement Article 23 raised additional concerns. While some provisions of the National Security Bill (such as those relating to sedition) would have liberalized old colonial laws, others could easily have had a chilling effect upon freedom of expression and investigative reporting.[38] These issues will have to be confronted again in the next attempt to implement Article 23.

The leading post-1997 case on freedom of expression is *HKSAR* v. *Ng Kung Siu & Another* [39] in which two defendants were convicted of desecrating the national flag of China and the regional flag of Hong Kong. The defendants argued that the relevant ordinances were invalid because they violated their right to freedom of expression. The magistrate held that the restrictions were justified because they were necessary for the protection of public order. Although the incident had been peaceful, the magistrate decided that an ordinary Chinese citizen might be offended to see the flags desecrated, leading to a confrontation or even a riot, and that the government need not wait until violence occurs in order to legislate against flag desecration. The Court of Appeal disagreed and overturned the convictions, holding that the government had failed to satisfy its burden of demonstrating that the laws were *necessary* for the protection of public order. The magistrate's conclusion that violence might occur was not sufficient, especially as no evidence had been presented on the likelihood of violence. The Court of Appeal cited the US case, *Texas* v. *Johnson* (1989) 491 US 397, and noted that common law jurisdictions generally do not criminalize flag desecration.

The government appealed the judgment to the Court of Final Appeal, which was put in a difficult position. The Court of Appeal had analyzed the National Flag Ordinance like any other ordinance, which must be struck down if it does not comply with the Basic Law. In fact, it was a very special ordinance because the Provisional Legislative Council had enacted it to implement China's National Flag Law, one of the few national laws that the NPCSC had placed in Annex III to the Hong Kong Basic Law. Thus, if the Court of Final Appeal had agreed that the local version of the law violated the Basic Law it would have raised the thorny constitutional question of whether a Hong Kong court can rule on the legality of an act by the central authorities.[40] The situation was particularly sensitive because the appeal was decided soon after the right of abode crisis, in which the NPCSC had issued an interpretation of Article 24 that contradicted the interpretation given by the Court of Final Appeal. Had the Court of Final Appeal ruled against the government in the flag case, there is a good chance that another NPCSC interpretation would have been issued, further damaging public confidence in the independence and authority of Hong Kong's judiciary.

Instead, the Court of Final Appeal walked a careful line, issuing a judgment that disagreed with both the Court of Appeal and the magistrate. The Court of Final Appeal held that public order is an "elusive concept," not limited to law and order, and can have different meanings in different contexts. It then noted that the relevant context in this case included Hong Kong's new constitutional order and that due weight should be given to the view of the local legislature that the ordinance was an appropriate way to discharge its obligations arising from the decision by the NPCSC to add the Law on the National Flag to Annex III of the Basic Law. The Court of Final Appeal emphasized that the law restricted the form rather than the content of expression and noted that a number of democratic (albeit not common law) nations that have ratified the ICCPR also maintain laws prohibiting flag desecration. A positive aspect of the judgment is that the Court of Final Appeal took the opportunity to state that the ICCPR is incorporated into the Basic Law by means of Article 39.

Subsidies or limitations on political speech

Radio and Television of Hong Kong (RTHK) has editorial independence and broadcasts critical commentary regarding the local and national governments. Since the handover, some commentators have questioned whether this is the proper role of a publicly owned station. For example, in 1998 a well-known publisher Xu Simin, openly complained about RTHK when he was in Beijing for a meeting of the Chinese People's Political Consultative Conference. He claimed that he had already raised the issue several times with Tung Chee-hwa and his comments sounded like an invitation for Beijing to interfere.[41] Fortunately, mainland officials did not become involved, at least not publicly, and Anson Chan (Hong Kong's Chief Secretary at the time) immediately condemned Xu's statement. Tung Chee-hwa also eventually stated that RTHK would continue to enjoy editorial independence but the issue continues to be controversial. In 1999, Ms Cheung Man Yee, the Director of RTHK for thirteen years, was suddenly transferred to Tokyo to serve as the Hong Kong's Economic and Trade Representative. There was intense speculation that she was replaced due to her strong defence of editorial freedom and she later disclosed that she had been subjected to political pressure.

The universities in Hong Kong are also publicly funded and there is some concern for academic freedom in the post-1997 era. The leading example occurred at the University of Hong Kong. In July 2000, Dr Robert Chung alleged that he had been pressured by the Vice Chancellor to discontinue a public opinion research project that tracked the declining popularity of Tung Chee-hwa. The University Council appointed an Independent Investigation Panel, chaired by a former High Court judge. The panel concluded that as a result of the meeting between the Special Assistant to the Chief Executive and the Vice Chancellor, messages were conveyed to Dr Chung that were

calculated to interfere with academic freedom and to pressure him into discontinuing his polling project. The Vice Chancellor resigned and Dr Chung's research project still flourishes.[42] In that sense the incident was a victory for human rights. The transcript of the panel hearings, however, revealed that there are many opportunities for powerful people to cast a chill over academic freedom. Witnesses testified that a general climate of subservience is developing within Hong Kong's academic community. This is exacerbated by the fact that most Hong Kong academics do not have "tenure" but rather are employed on short-term contracts, which can be terminated at any time.[43]

Use of defamation law

Hong Kong's law of defamation continues to be based upon English law, and there is a significant number of defamation actions against the media. Ironically, the lawsuits are often filed by rival media figures or organizations.[44] This is one area in which Hong Kong law has become more favorable to freedom of expression since the handover. The leading case is *Albert Cheng* v. *Tse Wai Chun, Paul* [2000] 4 HKC 1, in which the defendants relied principally upon the defense of fair comment. The Court of Appeal had held that the test of malice is the same for the defense of fair comment as it is for the defense of qualified privilege. In particular, it held that even if the defendant had an honest belief in the truth of the statement he may not be able to succeed on the defense of fair comment if he made the statement for some other dominant motive. The Court of Final Appeal reversed the Court of Appeal on this point and held that the presence of malice was not, by itself, a reason to exclude the defense of fair comment. This effectively broadens the defense of fair comment, making it more difficult to suppress critical commentary with a defamation suit. The judgment emphasized the importance of free speech and the role of the fair comment defense in maintaining that freedom.

The Official Secrets Ordinance and legislation proposed under Article 23

Hong Kong inherited the UK's strong legislation protecting government secrets.[45] The existing Official Secrets Ordinance creates four general categories of offenses: (a) spying and espionage activities; (b) unlawful disclosure of security and intelligence information by members of security and intelligence services; (c) unauthorized disclosure of protected information by public servants or government contractors; and (d) damaging disclosure by an ordinary member of the public, such as a reporter, who comes into possession of protected information by means of an unlawful disclosure, *if* the defendant knew or had reasonable cause to believe, that the information was protected, that it came into possession by an unauthorized disclosure,

and that further disclosure would be damaging. The Ordinance has been criticized, especially as there is no general right of access to government information to counterbalance the chilling effect of these offenses.[46]

Since the Official Secrets Ordinance already protects state secrets, there is no constitutional need to expand its coverage in order to comply with Article 23 of the Basic Law. Nonetheless, the Hong Kong Government took an aggressive position during the 2002 public consultation exercise, maintaining that "Article 23 should not be interpreted as implying that information other than state secrets needs no protection."[47] The government then proposed to broaden the scope of existing offenses relating to the "unauthorized and damaging disclosure" of protected information. The proposals created so much controversy that journalists from around the world launched an opposition campaign. This is an especially sensitive area of law, since the Chinese Government is known for its expansive and unpredictable interpretation of "state secrets," and Hong Kong journalists and scholars working in the mainland have been jailed for revealing information that the central government found embarrassing.[48] The government's proposals also generated concern within the business community because they could affect market research and government transparency, which are important to companies that do business in Hong Kong.

After the protest march of July 2003, the government offered to add a limited public interest defense, one of the "three concessions" offered in its unsuccessful attempt to regain support. It will be interesting to see whether the government reopens this topic in any future legislative exercise. Given that Article 23 only requires legislation to protect state secrets, the government would be wise to make no new proposals to expand the restrictions on other types of information.

Freedom of assembly

Freedom of assembly is protected by Article 27 of the Basic Law, Article 21 of the ICCPR, and Article 17 of the Bill of Rights Ordinance. In the colonial era, the law originally provided that any public assembly of three or more persons without prior permission of the Commissioner of Police constituted a criminal offense. The law was liberalized somewhat in the 1980s and then amended again in 1995 so as to comply with the ICCPR and the BRO. The 1995 amendments were, however, "not adopted" by the NPCSC in its February 1997 decision under Article 160 of the Basic Law. Since the repeal of amendments does not automatically bring back the previous version of a statute, the Provisional Legislative Council, which was already meeting in Shenzhen in advance of the handover, conducted a public consultation and later enacted the Public Order (Amendment) Ordinance of 1997. The 1997 legislation created what is essentially a licensing system, although the government rejects this terminology. The organizers of any public procession involving more than thirty persons must notify the Commissioner of Police

of their intention to march, and the procession is only lawful if the Commissioner either responds with a "notice of no objection" or is taken to have issued one because he did not respond within a certain time period. The Ordinance empowers the Commissioner to object to a public procession if he "reasonably considers" that the objection is necessary in the interests of national security, public safety, public order (*ordre public*) or the protection of the rights and freedoms of others. The Commissioner also has a similar power to permit a procession only upon certain conditions, which may include a maximum number of people or a change to the route. If the organizers do not comply with the Public Order Ordinance the demonstration becomes unlawful, even if it proceeds peacefully and does not cause inconvenience. That is not to say that all such illegal demonstrations become the subject of prosecution, but there have been some prosecutions and there is increasing concern that decisions to prosecute or to impose conditions on a demonstration may be politically motivated. The police also have been accused of deliberately keeping protesters away from mainland officials, of putting a wall of policemen around the protesters so that they cannot be seen, and of broadcasting music to drown out their chants.

The Public Order Ordinance has been criticized by activists, international monitoring bodies, and academics on the ground that it unduly restricts the fundamental freedom of assembly.[49] Believing that the Ordinance violates the Basic Law and the ICCPR, some demonstrators have refused, on principle, to notify the Commissioner of their intention to march. In one such case, *HKSAR* v. *Leung Kwok Hung*,[50] the organizers were later convicted of the offense of holding an unauthorized assembly, although the march was peaceful. They appealed, on the ground that the notification system was unconstitutional, but their convictions were upheld by a divided Court of Appeal. Although all three judges affirmed that freedom of assembly is a fundamental right in Hong Kong, two judges held that the Public Order Ordinance complied with the Basic Law and the ICCPR. These two judges relied largely upon the fact that the language in the Ordinance describing the grounds on which the Commissioner can lawfully prohibit or restrict a procession is taken almost directly from the ICCPR. They also noted that an organizer of a proposed procession can appeal the Commissioner's decision to the Appeal Board on Public Meetings and Processions. In contrast, the dissenting judge, Justice Frank Stock, concluded that the powers given to the police are so wide and vague as to fail the test of legal certainty, in part because the Commissioner of Police is given no guidance as to the interpretation and limits of the language borrowed from the ICCPR.[51] The ICCPR only describes the outer limits of permissible restrictions and does not absolve the legislature from its separate duty to ensure that domestic limitations on fundamental rights go no further than what is necessary to achieve the legitimate objective of that particular law. The dissenting judge concluded that the government had failed to demonstrate a need for conferring such extensive powers on the police.[52] The appellants appealed the Court

of Appeal's decision to the Court of Final Appeal, which heard the appeal in May 2005 but had not issued its judgment at the time of this writing.

The danger of giving broad discretion to the police is demonstrated by the recent case of *HKSAR* v. *Yeung May Wan and Others*,[53] which arose from a demonstration by a group of Falun Gong practitioners outside the Hong Kong offices of the Liaison Office of the Central People's Government. The demonstration was so small (only sixteen participants) that the Public Order Ordinance did not apply to it. Nonetheless, the demonstrators were arrested and convicted under the Summary Offenses Ordinance of obstructing a public place, essentially because they ignored a police order to move to a place where they would have been far less visible to staff entering the Liaison Office. The Court of Appeal granted their appeal from the obstruction conviction, holding that a demonstration does not become unlawful simply because the participants ignore a police instruction *unless* the police have reasonable grounds to curtail the demonstration in the first place. The Court of Appeal concluded that the police did not have reasonable grounds and that there was no real obstruction. The Court also criticized the magistrate for making comments that appeared to convey hostility towards the Falun Gong and for disregarding evidence (e.g. evidence showing the extent of space open to pedestrians and that the spot where the police wanted to move the demonstrators was smaller and more likely to cause inconvenience).

The Court of Final Appeal went even further in its judgment, as it also struck down the related convictions for wilfully obstructing the police while acting in the due execution of their duty (which had been upheld by the Court of Appeal). The Court of Final Appeal stressed that this was not a simple case of alleged obstruction by inconsiderate parking but rather a peaceful political demonstration, which meant that the constitutionally protected right to demonstrate was engaged, as well as the related freedom of expression. These fundamental rights, when engaged, affect the scope of the obstruction offense and the scope of police powers to make an arrest on suspicion of that offense. In this case, the Court decided that the police were not even acting in the due execution of their duty when they forcefully arrested the Falun Gong practitioners. Since persons unlawfully in custody are entitled to use reasonable force to free themselves, the appellants committed no crime when they resisted arrest. The Court also cited Article 5 of the Bill of Rights and Article 28 of the Basic Law, which provide that the freedom of the person is inviolable and no Hong Kong resident shall be subjected to arbitrary or unlawful arrest.

The case is particularly significant because it appears that the central government's Liaison Office does not hesitate to put pressure on the Hong Kong police to curtail demonstrations. In this particular case the Liaison Office called police as soon as a handful of demonstrators took up their positions and it made five calls within one hour. By reiterating that the right to demonstrate is a fundamental right in Hong Kong and that the police cannot restrict it without reasonable grounds, the Court of Final Appeal's

judgment should make it easier for the police to resist this kind of pressure from mainland officials. On the other hand, there is concern that the eventual implementation of Article 23 will reduce freedom of assembly in Hong Kong. For example, commentators on the 2003 Bill feared that the new offenses of subversion and secession could be used to restrict peaceful protests against central government policies.[54] This is why it is so important to draft these offenses in narrow and precise language during the next attempt to implement Article 23.

Freedom of association

Freedom of association is protected by ICCPR Article 22, Article 18 of the Bill of Rights, and Article 27 of the Basic Law. In the true colonial period, the Societies Ordinance was very strict. It was designed to prevent Hong Kong from being used as a base for subversive activities to destabilize the mainland, and also allowed the government to monitor potential enemies of the colonial regime.[55] The Ordinance was amended in 1992 to comply with the Bill of Rights Ordinance but those amendments were not adopted by the NPCSC in its February 1997 decision. The Provisional Legislative Council then enacted the Societies (Amendment) Ordinance 1997, which reintroduced the requirement that all societies register. Failing to register exposes the office bearers to criminal liability. Thus far there are no reports of the government denying a request for registration, although it has the power to do so if it believes that refusal is necessary in the interests of national security, public safety, public order, or the protection of the rights and freedoms of others.

The Societies Ordinance also empowers the government, at section 8, to prohibit a political body that has a connection with a foreign political organization or a political organization of Taiwan if it reasonably believes that it is necessary in the interests of national security, public safety, public order or the rights and freedoms of others. This language was added in 1997 to comply with Article 23 of the Basic Law, which requires Hong Kong "to prohibit foreign political organizations and bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies." The Hong Kong Government acknowledged, in its 2002 Consultation Document, that this was one area in which Hong Kong law already complies with Article 23.[56]

Nonetheless, the Hong Kong Government proposed new powers that would have gone beyond the requirements of Article 23. First, it proposed to extend its powers of proscription beyond "societies" to "organizations," which it initially defined as: any "organized effort by two or more people" to achieve "a common objective, irrespective of whether there is a formal organizational structure." The Consultation Document then suggested three "pre-conditions" that would allow the Secretary for Security to consider proscribing a local organization, including the fact that it was "affiliated

with a Mainland organization, which has been proscribed in the Mainland by the Central Authorities, in accordance with national law on the ground that it endangers national security."[57] Government officials emphasized that it was only a "pre-condition" and that the Secretary for Security would also have to "reasonably believe that it is necessary in the interests of national security or public safety or public order to ban the affiliated organization, before the power of proscription can be exercised."[58] The government also claimed that the proposal did not give the Secretary for Security new powers since she already had the power to prohibit groups that threaten national security.[59] Critics pointed out the key difference in the language proposed in the Consultation Document – it would give the central government a role in initiating the legal process leading to proscription of an organization in Hong Kong.

When the National Security Bill was drafted, in early 2003, the Hong Kong Government tried to address concerns by defining the category of organization more precisely, as one:

> [W]hich is subordinate to a mainland organization the operation of which has been prohibited on the ground of protecting the security of the People's Republic of China as officially proclaimed by means of an open decree, by the Central Authorities under the law of the People's Republic of China.

The Bill then defined the state of being "subordinate" to include the receipt of substantial financial support from the mainland body or being under its direction or control.[60] This would have made it possible for a Hong Kong organization to take itself outside the category without cutting all ties to the relevant mainland group. Nonetheless, the proposal continued to be one of the most controversial provisions in the Bill and was especially threatening to the Falun Gong. Although local officials sometimes make hostile statements about the Falun Gong, it is highly unlikely that the Secretary for Security would try to use existing legislation to prohibit it from operating in Hong Kong. To do so would invite severe criticism, both at home and before the various international human rights monitoring bodies. Under the Bill, however, "formal notification" by the central government that an organization is prohibited in the mainland on the ground of national security would have been "conclusive" on that issue. Thus, had the Bill been enacted, the central government could have started the process of banning Falun Gong in Hong Kong by changing the ground on which it is prohibited in the mainland.[61] The local government would have found it easier to defend this type of process than to enact anti-cult legislation.

Eventually, after the July 2003 march, the Hong Kong Government offered to delete the entire provision that potentially linked proscription in the mainland to proscription in Hong Kong. This last-minute concession only underscored the fact that the proposal was not constitutionally

required by Article 23. It will be difficult for the government to justify including it when the time comes to draft a new bill.

Social and economic rights: poverty, health, and education

Hong Kong has enjoyed significant economic growth in the past twenty years, with GDP increasing at an average annual rate of 5.1 percent in real terms. Despite the recession that began in 1998, Hong Kong's per capita GDP continues to be high. In 2002 Hong Kong reported a GDP per capita of $24,010, one of the highest in Asia. The government attributes this record of economic growth to market-led and "business-friendly" policies. These include a simple tax system, low tax rates, and limited expenditures on social welfare. The government's stated goal is to "sustain workers' incentive to work and entrepreneurs' incentive to invest" and it takes pride in the fact that Hong Kong is regularly rated as one of the world's freest economies.[62] Although there are certain notable exceptions (such as the extensive provision of public housing, which is second only to Singapore in Asia), the general philosophy of the Hong Kong Government is to be non-interventionist and to encourage self-reliance.

Chapter V of the Basic Law contains detailed provisions on economic rights and policies, all designed to reassure the business community that the capitalist system would be preserved after 1997. Individual property rights are protected and the government must compensate owners at real value for any lawful deprivation of their property. Hong Kong shall keep its finances independent from the mainland, issue its own currency, operate its own exchange fund, and maintain its status as a separate customs territory.[63] Chapter V also entrenches certain economic policies, including "the principle of keeping expenditure within the limits of revenue," avoiding budget deficits, and keeping "the budget commensurate with the growth rate of its gross domestic product."[64] Hong Kong has never really embraced the concept of a graduated income tax and has kept the maximum tax rates at very modest levels. When enacting or amending laws relating to taxation, the government is required by the Basic Law to take "the low tax policy previously pursued in Hong Kong as a reference."[65] Supporters of this approach argue that low taxes and fiscally conservative policies are essential to Hong Kong's continued economic growth. Critics argue that these provisions only protect the rich, increase income disparity,[66] and limit the ability of the government to assist disadvantaged groups.

Hong Kong became a party to the International Covenant on Economic Social and Cultural Rights (ICESCR) in 1976, when the British Government ratified the ICESCR and extended it to a number of dependent territories. The British Government initially entered several reservations with respect to Hong Kong, including the right to "postpone" equal pay for equal work in the private sector (Article 7). Hong Kong lagged far behind the UK in the field of anti-discrimination law and did not prohibit sex discrimination in

the private sector until 1995. This reservation was finally withdrawn in 2001 when China ratified the ICESCR and lodged amended reservations and declarations on behalf of Hong Kong.[67]

Article 39 of the Basic Law provides that the ICESCR "shall remain in force and shall be implemented through the laws" of Hong Kong. This is the same language used to refer to the ICCPR in Article 39. Yet while the ICCPR was essentially copied into the BRO, the provisions of the ICESCR have not been copied into a single domestic ordinance. The Hong Kong Government has declined to enact such a law, stating that the provisions of the ICESCR are incorporated through several Articles of the Basic Law (it mentions Articles 27, 36, 37, 137, 144, and 149 as examples) and more than fifty ordinances.[68]

Hong Kong lawyers have attempted to cite the ICESCR in legal actions against the government. Thus far, however, the courts have not been receptive. In *Chan Mei Yee and Another* v. *Director of Immigration*[69] and *Chan To Foon* v. *Director of Immigration*,[70] the applicants sought judicial review of deportation orders and cited Article 10 of the ICESCR to support their claims that they had a right to reunite with their families in Hong Kong. In both cases, the argument failed because the judges held that the ICESCR was promotional or aspirational in nature.[71] Although these two cases are only at the Court of First Instance level, they do not bode well for the justiciability of the ICESCR in Hong Kong. The Committee on Economic, Social and Cultural Rights has since urged the government "not to argue in court proceedings that the Covenant is only 'promotional' or 'aspirational' in nature."[72] In response, the Hong Kong Government stated that "We note the Committee's observation that the Covenant is not merely 'promotional' or 'aspirational' in nature and accept that it creates binding obligations at the international level."[73] The use of the words "at the international level" may indicate that the government does not consider the ICESCR to be part of domestic law, despite the reference to it in Article 39 of the Basic Law.

The issue is potentially significant in that the ICESCR contains many specific rights that are not otherwise stated in the Basic Law. For example, apart from Article 33 (which provides that Hong Kong residents shall have freedom of choice of occupation) the Basic Law is largely silent with respect to workers' rights. Yet these rights are arguably incorporated through Article 39 of the Basic Law since the ICESCR contains numerous provisions on workers' rights.[74] While labor rights are not analyzed in detail in this chapter due to space constraints, it should be noted that this is an area in which Hong Kong law is very weak. In 1997, shortly before the handover, the Legislative Council enacted laws that would have expanded workers' collective bargaining powers and protected workers from summary dismissal for union activity. These laws were, however, repealed by the Provisional Legislative Council and the Committee on Economic, Social and Cultural Rights has criticized the Hong Kong Government for the lack of protection for workers.[75] Foreign domestic workers are particularly vulnerable and the

government's "two-week rule" (which requires the worker to leave Hong Kong soon after the termination of a contract) makes it almost impossible to switch to a better employer mid-contract and discourages workers from complaining if they are abused or underpaid.

Poverty and social welfare

Article 36 of the Basic Law states that "Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labour force shall be protected by law." Similarly, Article 9 of the ICESCR recognizes the "right of everyone to social security and social insurance" and Article 39 of the Basic Law provides that the ICESCR shall be implemented though the laws of Hong Kong. This seems to imply that there should be some law governing the entitlement to social security. In fact, however, this field is dealt with almost entirely as a matter of executive policy and the position of the Hong Kong Government, as explained by the Director of Social Welfare, is that Hong Kong residents do not have a "right" to social security.[76]

The main social security assistance programme is the Comprehensive Social Security Assistance scheme (CSSA), a means-tested program that provides assistance to individuals and families who cannot support themselves due to old age, illness, disability, single parenthood, unemployment, or low earnings. The government also operates the Social Security Allowance scheme (SSA), which is generally non-means-tested and provides a flat-rate monthly allowance for the elderly (the Old Age Allowance) and those with severe disabilities (the Disability Allowance). The government spent HK$19.8 billion on social security in the 2001–2 financial year, equivalent to 10 percent of total recurrent government expenditure, and 1.6 percent of GDP. In contrast, in 1991–2, the government spent only HK$3.746 billion, equivalent to 5.3 percent of the total recurrent government expenditure and 0.5 percent of GDP.[77]

Poverty among the elderly is a significant problem in Hong Kong and NGOs have estimated that almost one-quarter of the elderly population lives in poverty.[78] In 1995 the Hong Kong Government enacted the first Mandatory Provident Fund Scheme Ordinance, which requires employers and employees to contribute to private trust schemes. Employees will receive benefits upon retirement, corresponding to the contributions made. It will, however, take many years for this legislation to have any impact. Moreover, it has been criticized for making no provision for foreign domestic workers, homemakers, and others who do not participate in what the government considers to be the mainstream workforce.

Traditionally, the Hong Kong Government has not had explicit plans for reducing poverty, insisting that the best strategy is simply to encourage general economic growth. Since Hong Kong enjoys a higher standard of living than most of Asia, the government feels confident that its approach is

correct. The Committee on Economic Social and Cultural Rights disagrees and concluded, in 2001, that it was "gravely concerned about the widespread and unacceptable incidence of poverty" in Hong Kong and "deeply concerned" by the lack of any comprehensive anti-poverty strategies.[79] Since then, the government established a Commission on Poverty (which was welcomed by the Committee in 2005) but still has no official poverty line, which will make it difficult to assess whether the Commission is achieving its goals.[80]

During the recession that started in 1998 Hong Kong experienced higher unemployment, falling wages, and a significant increase in the number of people requiring public assistance. The government no longer enjoyed the healthy surplus that it was famous for in the early 1990s and it reduced public expenditure in many areas, including CSSA benefits. The government argued that these were only deflationary adjustments and would not reduce real spending power. Nonetheless, the reductions generated significant criticism from NGOs and from the Committee on Economic, Social and Cultural Rights. The government also reduced the asset limitations in the CSSA scheme and started counting the value of owner-occupied residential property when determining the assets of an able-bodied CSSA applicant under the age of 50. The theory is that a family that owns an apartment should sell the property and sustain itself with the proceeds before receiving CSSA. As some non-governmental organizations have pointed out, however, this leaves the family without a place to live and on a long waiting list for public housing.

The government actively encourages unemployed recipients of CSSA to find work and has strengthened these efforts in recent years. In 1999 it introduced the Support for Self-Reliance scheme (SFS). The scheme includes an Active Employment Assistance program, which provides training and placement services, and a Community Work programme, in which able-bodied CSSA recipients are required to perform a certain amount of unpaid community work. In 2001, in response to an increase in the unemployment caseload under CSSA, the government provided additional placements, raised the disregarded earnings provisions, and imposed more sanctions on recipients who refused to participate. Some of these steps are highly controversial but the government maintains that they are necessary to contain the number of CSSA unemployment cases.[81]

Another development that has generated criticism is the tightening of residency requirements for social security benefits. Prior to 2004, a person could apply for CSSA after being a resident of Hong Kong for one year, although certain other benefits required longer periods of residence. At the end of 2002, 14.9 percent of all CSSA recipients were "new arrivals" (the government's term for anyone with less than seven years of residence, the time at which a person can apply for the status of "permanent resident"). From March 1999 to December 2002, the number of CSSA cases involving new residents increased by 48 percent, while the overall CSSA caseload increased only by 14 percent. This is primarily due to the large number of mainland

residents immigrating to unite with spouses and other family members in Hong Kong. The government wanted to send "a clear message to potential migrants that they should plan carefully and ensure that they have sufficient means to support themselves in Hong Kong."[82] Thus, with effect from January 2004, an adult is only eligible for CSSA or SSA benefits if he or she has been considered a resident of Hong Kong for at least seven years and has resided in Hong Kong continuously for at least one year immediately before applying for assistance (with no more than fifty-six days away from Hong Kong during the year). The new requirement does not apply to persons who became residents of Hong Kong before 2004 or to children under the age of 18. About half of the CSSA recipients with less than seven years' residence are children and the government acknowledged that children require special protection under the UN Convention on the Rights of the Child.[83] The Director of Social Welfare also has the discretion to waive the residence requirement if she decides that it is a case of genuine hardship.

The seven-year residence requirement also applies to public housing, which is in high demand. Moreover, as most units are allocated to families, elderly people without families often live in appalling conditions. Some of the worst examples can be found in the "cage homes," which provide tenants with no privacy and just enough space to sleep and store a few belongings. Fortunately, NGOs and the Committee on Economic, Social and Cultural Rights have drawn attention to the cage homes, illegal rooftop structures, and other forms of inadequate housing, prompting some action by government. A Bed Space Apartment Ordinance was enacted that seeks to eliminate cage homes and make those that still exist somewhat safer. The government has also started to provide basic services to squatter communities and more interim housing for people who are awaiting permanent housing. According to the government, the average waiting time for public rental housing fell from over six years in 1997 to about three years in 2002, and the number of persons considered inadequately housed fell from about 460,000 in 1997 to about 274,000 in 2002.[84] Nonetheless, adequate housing continues to be a serious issue, especially for the elderly, the poor, and new immigrants.

Health

The public hospitals are managed by the Hospital Authority and provide quality medical care at heavily subsidized rates. In the 2002–3 fiscal year public expenditure on health care amounted to HK$32.5 billion (approximately US$4.2 billion), which was about 14.8 percent of total recurrent public expenditure. In comparison, the government estimated that the total expenditure, in 2000–1, in the private health care sector was HK$37.5 billion (approximately US$4.8 billion). Hong Kong's health indices compare favorably to those of developed countries. Life expectancy (84.7 years) is higher and the infant mortality rate is lower (2.4 per 1,000 live births) than in the USA, the UK, or Japan.[85]

As the demand for hospital services has increased the government has become concerned about its ability to fund the system. In 1997 it commissioned consultants from Harvard University to examine the health care system and make recommendations. It also conducted a public consultation exercise on health care reform. The process generated a number of criticisms of health care, including significant differences in fees and quality of care provided. It also generated cost-containment proposals, many of which would require individuals to contribute more to the cost of their medical care. Although the government insists that it will not deviate from its principle that no one should be denied adequate medical care for lack of funds, it seems inevitable that this type of reform will lead to greater inequality in medical care.

In 2003 Hong Kong was struck by SARS and the government was criticized for not responding quickly enough. The Secretary for Health and Welfare at the time eventually resigned after a Legislative Council inquiry. It should be noted, however, that the mistakes appear to have been errors of judgement rather than the result of any effort to conceal the epidemic. The government issued daily reports (both to the public and to the World Health Organization) on the number of deaths and the number and locations of new cases. It is widely acknowledged that Hong Kong could have done more to protect itself from SARS had mainland officials been equally transparent when the early cases developed in China.

The Hong Kong Government has been criticized by NGOs and the Committee on Economic Social and Cultural Rights for not doing enough for persons with mental illness, including refusing to authorize medicines that are more expensive but cause fewer side effects. Discrimination on the ground of disability, particularly mental illness, HIV, and AIDS, is also a severe problem in Hong Kong. The government reluctantly agreed to legislate in 1995 and the Disability Discrimination Ordinance (the DDO) went into force in 1996. The DDO defines disability broadly and prohibits discrimination on a wide range of grounds, including a past disability, an imputed disability, or a disability of an associate. Ironically, the government turned out to be one of the chief offenders of the law. *In K, Y, and W* v. *the Secretary for Justice*[86] the District Court held two government departments liable for employment discrimination. The case arose from a policy maintained by the five branches of the disciplinary forces (police, fire services, correctional services, immigration, and customs and excise) of rejecting a job applicant if he or she had a first-degree relative with a history of mental illness. The government refused to settle the complaints or to change its policy, even after the EOC determined that it violated the DDO and granted legal assistance to the plaintiffs. In court the government argued that it could legally reject applicants who have a close relative with mental illness, on the assumption that such applicants cannot be trusted to perform the job safely. While the court agreed that safety was an inherent requirement of the jobs at issue, it found that the government had not even tried to assess

the risk that each plaintiff would inherit a mental illness. Expert testimony showed that the risk was low and did not justify such a wide-ranging discriminatory policy. The government was ordered to pay close to HK$3 million in combined damages, a large award for Hong Kong, and also to pay the EOC's litigation costs, approximately HK$1.6 million. Nonetheless, the police continued to apply the policy. This led to another EOC-assisted lawsuit, which was eventually settled out of court.

It is difficult for an agency like the EOC to educate the public when the government itself clings to irrational prejudices. The EOC has also complained of a lack of cooperation from government when it attempted to protect clients and staff of health clinics from harassment by residents in the neighborhood. Apparently the residents believed that the clients were going to spread HIV or AIDS to the neighborhood and were trying to drive them away. The EOC granted legal assistance but managed to settle the complaints out of court.

Education

The government estimates that it spent HK$61 billion on education in 2002–3, approximately 4.9 percent of GDP. This represents a significant increase over 1997–8 when it spent HK$47 billion, approximately 3.5 percent of GDP. Educational attainment has also steadily increased over the past twenty years. In 1981 22 percent of the population had no education, 37 percent had only primary-level education, and 41 percent had received secondary-level education or above. In contrast, in 2001, the government reported that 13 percent of the population had no education, 25 percent had received only primary-level education, and 62 percent had received secondary-level education or above.

Consistent with Article 13 of the ICESCR, Hong Kong provides nine years of free and compulsory education. Overcrowding has been a problem and many primary schools are still "bi-sessional" (two groups of students share a building, one in the morning and one in the afternoon). The government has, however, been working to change this and predicts that all primary schoolchildren will attend whole-day schools by 2007. As recently as 1998, subsidized places in Secondary 4 and 5 (for the 15 to 17 age group) were limited to about 85 percent of eligible students. Fortunately there are now sufficient subsidized places for all students who have the ability to proceed to Secondary 4 and 5. Subsidized places in the final two years of secondary school (Secondary 6 and 7) are more limited. These final two years prepare students for the "A level" examinations, performance on which basically determines whether they will be admitted to a degree program in one of the government-funded universities. In its most recent report to the Committee the government estimated that 42 percent of the 17 to 20 age group now have access to post-secondary education. The aim is to expand this to 60 percent by 2010.

In many countries, students are allocated to public schools primarily on the basis of location, and the majority of publicly funded schools educate students across the full range of academic abilities. In contrast, Hong Kong administers a secondary-school system that is highly segregated by ability. At the conclusion of primary school, students are assessed and categorized into different ability bands. Their applications to secondary schools are then processed by the Education Department in order of ability band, ensuring that those who perform well are assigned to elite schools. Graduates from these schools are far more likely to go on to university than graduates from lower-band schools. The process of assessment and allocation is extremely tense for children and their parents and many educationalists believe that it is unfair to categorize students at the tender age of 11. Others defend the system, arguing that it is more efficient to educate students in a relatively narrow ability band.

For many years, there was no way for the public to monitor the allocation system, but in 1998 the Education Department disclosed the banding, allowing students to make comparisons. The EOC received complaints of discrimination and conducted a formal investigation, which concluded that the system violated the Sex Discrimination Ordinance. Students' assessment scores were being scaled on the basis of gender, and male and female students were also being banded separately. Thus "band one" did not consist of the top 20 percent of the students, but rather of the top 20 percent of the girls and the top 20 percent of the boys. Since girls generally performed better than boys on the raw assessments, girls were required to obtain higher scores than boys in most school nets in order to be placed in a particular ability band. Since the government refused to reform the system, the EOC ultimately sought judicial review and obtained a declaration that the gender-based adjustments were unlawful.[87] Once the adjustments to boost the boys' performance were removed girls obtained a larger number of places in the elite schools. The press reported "public alarm" at this development and the case may ultimately provide the political will for broader reforms, so that students are not categorized so early in life. The government has already taken a limited step in this direction, by decreasing the number of ability bands from five to three.

Cultural rights

Minority groups and racial discrimination

Although Hong Kong has been bound by the Convention on the Elimination of All Forms of Racial Discrimination (CERD) for many years, it still does not have legislation prohibiting racial discrimination in the private sector. Racial discrimination by government and public authorities is prohibited by the BRO but this has limited impact since the EOC does not have any jurisdiction to enforce the BRO and victims of racial discrimination generally

cannot afford private representation. For many years, the government argued that there was no need for a specific race discrimination ordinance because Hong Kong is a homogenous community: 95 percent of the population is Chinese and 89 percent speak Cantonese. Nonetheless, there are many documented cases of racial discrimination in the fields of employment, housing, education, and the provision of goods and services. The Committee on the Elimination of Racial Discrimination and other international monitoring bodies have regularly called upon Hong Kong to legislate.

In 1994, Anna Wu, an appointed legislator, introduced the Equal Opportunities Bill (EOB), which sought to prohibit discrimination on a wide range of grounds, including race, sex, disability, age, and sexuality. As a compromise, the government agreed to introduce narrower legislation, the Sex Discrimination Ordinance and the Disability Discrimination Ordinance. It then successfully lobbied against the other grounds in the EOB, arguing that the community needed time to adjust to this new area of law before broadening its coverage. Interestingly, when the EOB was pending before the Bills Committee very few minority groups came forward to testify about racial discrimination. It may be that minority groups, particularly South Asians, were reluctant to complain during the transition period, as they were uncertain about their right of abode after 1997. Now that this issue is largely resolved, the racial equality movement has become more visible. One NGO, Hong Kong Against Racial Discrimination (HARD), has done a particularly good job of publicizing individual cases and lobbying the international business community. Gradually more and more institutions have declared their support and the government has agreed to introduce a bill, probably in late 2005 or 2006.[88]

One issue being debated is whether the new law should prohibit discrimination on the ground that a person is a "new arrival" from the mainland. Laws prohibiting racial discrimination often prohibit discrimination on the ground of "national origin" but this language might not protect immigrants from the mainland since they are moving within the same country. It is widely acknowledged that new migrants experience discrimination and the Hong Kong Government has given information about programs to assist them in its report under CERD. In 2004 the government argued that this was a form of social discrimination and need not be addressed in the forthcoming bill on racial discrimination, but NGOs and the Committee on Economic, Social and Cultural Rights have urged it to rethink this position when it drafts the bill.

Chinese customary law and the New Territories indigenous community

Article 40 of the Basic Law provides that the "lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administration." This provision has generated substantial controversy in Hong Kong, in part because it is so

vague and it has never been entirely clear what constitutes the "lawful traditional rights and interests" of the indigenous community. Moreover, many people do not view this community as a distinct cultural group since the indigenous inhabitants of the New Territories are ethnically Chinese. The difference lies in how they came to Hong Kong. While most Hong Kong residents either migrated from the mainland or are descendants of migrants, the indigenous community descended from people who were already living in the New Territories when Britain acquired it from China. Since the New Territories was only leased for ninety-nine years, the colonial government allowed Chinese customary law to play a greater role there than in Hong Kong Island or Kowloon (which were theoretically ceded to the British Government in perpetuity).

In 1898, when the New Territories first became part of Hong Kong, the New Territories consisted of sparsely populated farmland and traditional walled villages. In the post-war period, however, Hong Kong's population swelled and a severe housing shortage developed. This led the government to create the densely populated high-rise developments in the New Territories known as the "new towns." Thus, in addition to making up the largest land area of Hong Kong, the New Territories now also houses a significant percentage of Hong Kong people, most of whom are not indigenous. As a result, the greater application of Chinese customary law in the New Territories has generated significant controversies.

The prohibition on female inheritance of New Territories land, which was finally reformed in 1994, was a particularly contentious issue.[89] The New Territories Ordinance provided, at section 13, that "the court shall have the power to recognize and enforce any Chinese custom or customary right" in any proceedings relating to land in the New Territories. In practice, the Hong Kong courts interpreted this to require the application of Chinese customary law, including the prohibition on female inheritance, unless the land had been expressly exempted by the governor. Although the ban on female inheritance became very unpopular during the transition period, the colonial government was reluctant to reform it because of the strong opposition of the Heung Yee Kuk, a male-dominated statutory body that advised the colonial government on New Territories matters. The Heung Yee Kuk argued that the ban on female inheritance was necessary to maintain the integrity of clan land. Since women normally married outside the village, any land that they inherited would fall into the hands of their husbands, considered outsiders to the village. This argument was, however, weakened when the value of land increased and many landowners began to rent or sell to outsiders. The issue came to a head when it was revealed that the prohibition on female inheritance did not apply only to land owned by the indigenous community but to any New Territories land that had not been expressly exempted from the application of Chinese customary law. Thus, even non-indigenous residents who had purchased land in the New Territories could be affected by the rule.

The prohibition on female inheritance was largely repealed in 1994 by the New Territories Land (Exemption) Ordinance. As originally introduced by the government the legislation would have only exempted urban developments. The government's Bill was, however, successfully amended by legislator Christine Loh so as to apply to rural land as well. The Hung Yee Kuk organized many emotional protests against the Bill and later made an unsuccessful attempt to persuade the NPCSC to "not adopt" the Ordinance in 1997, arguing that it conflicted with Article 40 of the Basic Law. The NPCSC declined, either because it did not agree that male-only inheritance was protected by Article 40 or because the Chinese Government did not want to be seen as reinstating a discriminatory provision of customary law.

The right to vote and stand for election as Village Representative has also undergone significant change in recent years. As recently as the early 1990s villages in the New Territories routinely prevented even life-long residents from standing for election for Village Representative because they were not descended from indigenous inhabitants. A significant percentage of villages also prevented women from voting and/or standing for election, either expressly or by restricting the franchise to "heads of households." The Sex Discrimination Ordinance, the Bill of Rights Ordinance, and judicial interpretation of these laws have, however, compelled the government to change the rural elections system so that women and non-indigenous residents now have a legal right to participate.[90] These reforms have met with significant opposition from some members of the indigenous community who believe that only indigenous residents should be permitted to manage village affairs. The government has attempted to deal with this opposition by separating the office of village representative into two positions: one village representative deals only with indigenous issues and must be an indigenous resident while the other village representative deals with more general issues.

The Small House Policy is the most controversial remaining example of differential treatment. This policy allows male members of the indigenous community to build a home on village land or on government land at a concessionary rate. It was adopted by the government in 1971, as a way to prevent opposition from indigenous residents to the creation of modern housing developments in the New Territories. The rationale was that indigenous residents also faced a housing shortage but were unlikely to move into the new high-rise developments because they had lived in rural villages all their lives. The Small House Policy is now increasingly unpopular in the general population, partly because the value of land has increased and partly because it excludes indigenous women and all non-indigenous residents. The policy has been "under review" since the mid-1980s but thus far has been considered too entrenched and too politically sensitive to change. A reservation was entered for it when CEDAW was extended to Hong Kong in 1996 and an exemption for it appears in the Sex Discrimination Ordinance.

Conclusions and comparisons

When compared to the other jurisdictions in this study, Hong Kong performs well on many indicators. Its main weakness is its undemocratic system of government, which is unlikely to change in the near future. Hong Kong also has a high degree of inequality and lacks justiciable rights to social and economic benefits. The legal framework could be improved in a number of important areas that have not been explored in this chapter, such as the rights of local and migrant workers and the right to a clean environment.

To a large extent, this pattern of uneven rights protection is a direct result of the lack of democratic development in the SAR. Although Hong Kong shares certain legal traditions with other former British colonies, it has taken a significantly different political path. In the colonial era, the population consisted mainly of immigrants from China who had little incentive to demonstrate for democratic reforms. To do so might have destabilized the colonial government and the only realistic alternative was to be returned to China, something that was to be avoided for as long as possible. Now that reunification has occurred, the mood is somewhat different. Hong Kong people are still pragmatic. They realize that true self-determination is not an option and that the local government must get along with the central government. Yet they were also hugely disappointed with the first appointed chief executive and they increasingly believe that democracy is essential to good governance in the post-1997 era. At a minimum they want a definite timetable for the democratic reforms that were promised in the Joint Declaration and the Basic Law.

While it is easy to blame China for the lack of progress in democracy, it is important to acknowledge the role played by the wealthy business classes. At present the elite of Hong Kong have significant influence over the appointed government and also in the Legislative Council, by virtue of the functional constituency seats. They can easily defeat proposals to improve workers' rights, to put greater environmental restrictions on industry, or to increase spending on education and social security. Conservatives often speak of the need to preserve stability in Hong Kong. What they are referring to, albeit indirectly, is their desire to preserve Hong Kong's economic policies. Business leaders fear that an elected government would give in to demands for greater social welfare benefits and that Hong Kong's low tax regime would then gradually disappear, despite the attempt to entrench it in the Basic Law. In addition to being concerned about their own tax bill, many conservatives genuinely believe that low taxes and business-friendly policies promote economic development and benefit society as a whole. Given Hong Kong's economic success thus far, critics should not simply dismiss this point of view. It is, however, difficult to defend the paternalistic assumption that one cannot trust the general public, or their elected representatives, to make intelligent choices. Moreover, without democratic checks, there is a

danger that Hong Kong will become increasingly plagued by cronyism, both from within the SAR and from across the border. This would adversely affect economic development, as well as human rights and the rule of law.

Since the public is unlikely to elect its own government at any time in the near future, it is important to maintain other checks on executive power. The Legislative Council cannot completely fulfill this role since it is only partly elected and has limited powers. As a result, the courts are increasingly viewed as the final guardians of civil liberties and fair play in post-1997 Hong Kong. Even the government likes to promote this view. When lobbying for the enactment of the National Security Bill, officials argued that the courts would interpret vague provisions so as to be consistent with Article 39 of the Basic Law and would "strike down" any legislative provision or executive act that violated the ICCPR. This is, however, a dubious assumption since courts everywhere are notoriously reluctant to intervene in matters relating to national security and since the NPCSC has the ultimate power to interpret the Basic Law. Moreover, most human rights issues never make it to the courts. A law restricting freedom of expression will not lead to prosecutions if journalists make the rational decision to comply with it. Similarly, an executive action that violates the law may never be challenged in court because the victim is unaware of his or her rights, lacks the resources to hire a lawyer, or decides that it is better to suffer in silence.

Many commentators have therefore argued that Hong Kong needs an independent human rights commission, one that fully complies with the Paris Principles. In the early 1990s, the Legislative Council called upon the colonial government to establish such a commission but it declined to do so. Governor Patten also refused to allow the Legislative Council to even consider a private member's bill to establish a commission.[91] The current government of the Hong Kong SAR has also opposed the creation of a human rights commission although it has often been criticized for this by the international monitoring committees.[92] The Hong Kong Government argues that various specialist institutions, including the Ombudsman, the Privacy Commissioner, and the Equal Opportunities Commission (EOC), fulfill the role of a human rights commission. The international monitoring bodies have not accepted this response because these institutions all have limited jurisdiction and do not have the broad powers and functions that a human rights commission should enjoy.

Moreover, there is rising concern that the independence of Hong Kong's existing institutions has been eroded since 1997. As discussed earlier in this chapter, the EOC successfully litigated against several government departments, establishing important precedents in the fields of education and employment discrimination. Unfortunately, following these judgments, the chairperson was replaced and the membership of the EOC was altered, giving conservative members a clear majority. This blatant attempt to rein in the EOC significantly damaged its credibility and independence.[93] The former Ombudsman, Andrew So, was also replaced, reportedly because he

actively pursued a human rights perspective and argued for greater jurisdiction. Similarly, Stephen Lau Ka-men was not reappointed as Privacy Commissioner and many commentators believe that it was because he submitted too many files to the Secretary for Justice for possible prosecutions.[94] This effort to weaken institutions that enforce human rights is particularly problematic in Hong Kong because the vast majority of people cannot afford to retain a private lawyer. Legal fees are notoriously high and contingency fee arrangements are not permitted. Thus, if institutions like the EOC become less assertive then many victims simply will not be able to enforce their rights.

On the positive side, it should be noted that international human rights treaties appear to be playing a larger role in protecting and promoting human rights in Hong Kong than in other jurisdictions in the present volume. This is partly because the ICCPR is incorporated through the BRO and through Article 39 of the Basic Law. A domestic law that expressly incorporates the ICCPR can be a powerful tool, particularly when combined with an independent judiciary and lawyers who know how to use foreign and international precedents. Hong Kong judges have also looked to other human right treaties for guidance when interpreting legislation and when hearing applications for judicial review. Although efforts to rely upon the ICESCR in court have not been successful, the soft enforcement process for that treaty has helped activists to publicize egregious cases and compelled the government to take some remedial actions. The rights contained in the ICESCR may not be as justiciable as those in the ICCPR but it does provide a useful counterweight to Hong Kong's predominant themes of capitalism, low taxes, and self-reliance.

Indeed, the enforcement process for human rights treaties is one of the few ways that activists and disadvantaged groups can put pressure on Hong Kong's appointed government. Unlike activists in many jurisdictions, Hong Kong NGOs do not view international treaties and monitoring bodies as distant entities with little local relevance. NGOs have become increasingly engaged in the reporting process, writing shadow reports, attending the international hearings, and using the concluding comments as lobbying tools. While the government often rejects the monitoring bodies' concluding comments or seeks to justify the status quo, it generally tries to introduce at least some new policy or legislation before its next periodic report. For example, the government responded to comments by the Committee on the Elimination of All Forms of Discrimination Against Women by establishing a Women's Commission and by introducing legislation confirming that marital rape is a crime.[95] The government has also finally agreed to introduce a law prohibiting racial discrimination in the private sector, an issue that NGOs and international monitoring bodies have consistently stressed in recent years. By making these changes the government can be confident that it will receive at least some positive comments at the time of its next report, thus enhancing its limited legitimacy.

Of course the continued effectiveness of human right treaties in Hong Kong also depends on the level of interest shown by the international enforcement bodies. The Human Rights Committee has devoted a good deal of time to Hong Kong's reports on the ICCPR because of its unique situation – a tiny jurisdiction living in the shadow of China and the only region in China in which the ICCPR is being enforced. The international committees that monitor those treaties which have been ratified by China (such as the ICESCR and CEDAW) continue to issue a special section of concluding comments for Hong Kong. It is, however, likely that the time and attention given to Hong Kong will gradually decrease, as mainland China has far more people and more serious problems. Thus the ratification of human rights treaties by China may be a double-edged sword for human rights activists in Hong Kong. On the one hand they welcome the fact that China is embracing international standards and processes. On the other hand, they do not want Hong Kong to lose its distinct identity or to fall off the radar screens of human rights-monitoring bodies. Without that international attention, "one country, two systems" could easily become a distinction without a difference.

Notes

1 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China was enacted by the National People's Congress (NPC) in 1990 and came into force on 1 July 1997. Article 23 states that Hong Kong will enact, on its own, legislation to prohibit "treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets" and to control activities of foreign political bodies in Hong Kong. The unsuccessful attempt to implement Article 23 in 2003 is discussed later in this chapter and also in Fu Hua-ling, Carole J. Petersen, and Simon N. M. Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny*, Hong Kong: Hong Kong University Press, 2005.

2 Although the Basic Law is a national law it is superior law in Hong Kong and is regularly referred to by the government, the courts, and scholars as Hong Kong's "constitution," "constitutional document," or "constitutional instrument." See Albert Chen, "The interpretation of the Basic Law – common law and mainland Chinese perspectives," *Hong Kong Law Journal* (hereinafter, *HKLJ*), vol. 30, 2000, pp. 380–431, especially pp. 380–1.

3 The Letters Patent and Royal Instructions (Hong Kong's colonial constitution) provided judges with security of tenure but did not guarantee civil liberties until 1991 when the Letters Patent was amended to incorporate the ICCPR (discussed at p. 227).

4 See Carole J. Petersen, "The right to equality in the public sector: an analysis of post-colonial Hong Kong," *HKLJ*, vol. 32, 2002, pp. 110–16; and Carole J. Petersen, "Equality as a human right: the development of anti-discrimination law in Hong Kong," *Columbia Journal of Transnational Law*, vol. 34, 1996, pp. 335–88.

5 A Basic Law Consultative Committee, consisting entirely of Hong Kong delegates, was appointed to assist with public consultation. The Basic Law Drafting Committee also included representatives from Hong Kong but they were outnumbered by mainland representatives.

6 *HKSAR* v. *Ng Kung Siu* [2000] 2 HKC 117 (CFA).

7 (1991) 1 HKPLR 88 (CA) (holding that provisions in the Dangerous Drugs Ordinance violated the presumption of innocence, protected by Article 11 of the BRO).

8 (1992) 3 HKPLR 72 (PC).

9 Under Article 8 of the Basic Law, the normal rule is that pre-existing ordinances would continue to be part of the laws of Hong Kong after the handover. However, Article 160 of the Basic Law gave the NPC's Standing Committee (NPCSC) the power to declare any pre-existing laws (or provisions thereof) to be in contravention of the Basic Law, in which case they would cease to have effect on July 1, 1997.

10 See "Decision of the Standing Committee of the National People's Congress on the treatment of the laws previously in force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" (adopted February 13, 1997) (reprinted as an appendix to an article by Albert Chen, "Legal preparation for the establishment of the HKSAR: chronology and selected documents," *HKLJ*, vol. 27, 1997, pp. 419–24).

11 The NPCSC declined to adopt three preliminary provisions of the BRO. Section 2(3) was superfluous since the language of the ordinance and the legislative history makes it clear that the intent was to incorporate the ICCPR. Section 3 merely stated a principle of common law interpretation (that the more recent law prevails in a case of irreconcilable conflict). Section 4 was also superfluous since Hong Kong courts would always endeavor to interpret domestic legislation in a manner that is consistent with Hong Kong's treaty obligations. For further discussion, see Peter Wesley-Smith, "Maintenance of the Bill of Rights," *HKLJ*, vol. 27, 1997, p. 15.

12 See Basic Law, Art. 42.

13 *Ibid.*, Arts 11 and 8.

14 *Ibid.*, Arts 80–7.

15 *Ibid.*, Arts 105, 136–7, 141.

16 As noted below, however, Article 18 states that any national law can be applied to Hong Kong in times of emergency.

17 Annex III lists the national laws that apply to Hong Kong, including the Nationality Law of the PRC, the Declaration of the Government of the PRC on the Territorial Sea, the Regulations of the PRC Concerning Diplomatic Privileges and Immunities, plus three laws relating to the national calendar and the national flag, anthem, and emblem.

18 Article 45 of the Basic Law provides that the chief executive is to be selected by local elections or consultations and then appointed by the Central People's Government. At present, pursuant to Annex I of the Basic Law, a small Election Committee of 800 people selects the Chief Executive. Candidates must be nominated by no fewer than 100 members and the nominations are public. Since the members of the Election Committee are primarily people who have an interest in pleasing the central government, this virtually ensures that a "candidate" handpicked by the central government will be nominated and selected.

19 See Basic Law, Art. 74 and Annex II. For commentary on the functional constituency system, see Simon N. M. Young and Anthony Law, "A critical introduction to Hong Kong's functional constituencies," CCPL, University of Hong Kong: 2003, and Christopher Chaney, "The Hong Kong executive authorities' monopoly on legislative power: analysis of the Legislative Council's second term voting records," CCPL Occasional Paper No. 13, University of Hong Kong: 2004, both available at www.hku.hk/ccpl.

20 For analysis of the right-of-abode cases and the resulting constitutional crisis, see Johannes M. M. Chan, H. L. Fu, and Yash Ghai, (eds), *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, Hong Kong: Hong Kong University Press, 2000.
21 See "Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China," adopted by the Standing Committee of the Tenth National People's Congress at its Eighth Session, 6 April 2004. English translation available at www.info.gov.hk/cab/cab-review/eng/basic/.
22 See "Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the year 2007 and for forming the Legislative Council of the Hong Kong Special Administrative Region in the year 2008," adopted by the Standing Committee of the Tenth National People's Congress at its Ninth Session, April 26, 2004. English translation available at www.info.gov.hk/cab/cab-review/eng/basic/.
23 See, e.g., the controversial case of *So Wing Keung* v. *Sing Tao Limited and Hsu Hiu Yee*, HCMP 1833/2004, August 10, 2004 (High Court), [2005] 2 HKLRD 11 (Court of Appeal) (relating to fourteen warrants to search the premises of newspapers and journalists' homes, in the hope of obtaining evidence of who had disclosed information relating to a person placed in an ICAC witness protection program).
24 See Hong Kong Government, *Report on the Hong Kong Special Administrative Region under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1999), para. 2.
25 [2005] 1 HKLRD 289 (CFA).
26 The case is particularly significant because the Convention on the Status of Refugees does not apply to Hong Kong. Special legislation was enacted to address the Vietnamese "boat people" but the government opposes general legislation on political refugees, arguing that Hong Kong's relative prosperity would attract people and that it is too small to accept a large number of refugees.
27 There have been no serious threats to public order since the 1960s when the violence of the Cultural Revolution spilled over into Hong Kong and the colonial government reacted with strong measures, including restrictions on demonstrations. The government issued quarantine orders during the 2003 epidemic of Severe Acute Respiratory Syndrome (SARS) but this was probably justified in the circumstances.
28 Cap. 241, Laws of Hong Kong. Section 1 provides that the Chief Executive in Council may make "any regulations whatsoever which he may consider desirable in the public interest" during a time of emergency or public danger.
29 See Ng Hon Wah, "Remedies against telephone tapping by the government," *HKLJ*, vol. 33, 2003, p. 543.
30 See United Nations (Anti-Terrorism Measures) Ordinance, Cap. 575, Laws of Hong Kong. For a critique, see Simon N. M. Young, "Hong Kong's anti-terrorism measures under fire," CCPL Occasional Paper No. 17, University of Hong Kong: 2003, available at www.hku.hk/ccpl/pub/occasionalpapers/paper7/paper7.pdf.
31 Security Bureau, Hong Kong Government, *Proposals to Implement Article 23 of the Basic Law: Consultation Document* (September 2002), (hereinafter, the Consultation Document). This was the first comprehensive attempt to implement Article 23 (although some existing laws, such as the Societies Ordinance, were amended in 1997 to comply with it).

32 Consultation Document, para. 8.5. For an analysis of the search-and-entry powers, see Simon Young, "Knock, knock. Who's there? – Warrantless searches for Article 23 offences," in Fu, Petersen and Young, *supra* note 1.

33 For a more detailed discussion of the legislative process, see Carole J. Petersen, "Hong Kong's spring of discontent: the rise and fall of the National Security Bill 2003," Chapter 1 in Fu, Petersen and Young, (eds), *supra* note 1.

34 However, in 1999 it was reported that the Pope was not allowed to visit Hong Kong.

35 Newspaper columnist Frank Ching wrote that a "highly placed source" confirmed that the central government wanted Hong Kong to enact anti-cult legislation and that the local government had declined to do so but agreed to include the controversial proscription mechanism in the Article 23 legislation. See Frank Ching, "Pressure Tactics," *South China Morning Post* (hereinafter, *SCMP*), July 18, 2003, p. 14.

36 *Chu Woan-Chyi, Theresa and Others* v. *Director of Immigration* CACV331/2003 (Court of Appeal, June 29, and September 1, 2004), relating to an application for leave to bring proceedings for judicial review with respect to decisions of the director of immigration refusing Taiwanese citizens permission to come to Hong Kong to attend a Falun Gong conference. See also Klaudia Lee, "Pressure seen for HK to rein in Falun Gong," *SCMP*, April 2, 2003, p. 8; and Bruce Van Voorhis, Asia Human Rights Commission, "Hong Kong: threats against Falun Gong threaten 'one country, two systems,' " available at www.ahrchk.net/hrsolid/mainfile.php/2001vol11no3/44/.

37 See Anne S. Y. Cheung, *Self-Censorship and the Struggle for Press Freedom in Hong Kong*, The Hague, the Netherlands and New York: Kluwer Law International, 2003.

38 Only a few of the Article 23 proposals that might have affected freedom of expression are discussed in this chapter. For further analysis, see Fu, Petersen, and Young (eds), *supra* note 1, especially Chapters 7–9.

39 *HKSAR* v. *Ng Kung Siu* [2000] 2 HKC 117 (CFA). The decisions of the Court of Appeal and the magistrate can be found at [1999] 2 HKC 10.

40 For one view, see Albert Chen's chapter in Chan, Fu, and Ghai, (eds), *supra* note 20.

41 For stories on the incident, see No Kwai-Yan, "Who's your real boss, critic Xu asks RTHK," *SCMP*, March 8, 1998, p. 6; Chris Yeung and No Kwai-Yan, "Tung: RTHK independent and a matter for HK people," *SCMP*, March 7, 1998, p. 1; and Danny Gittings, "RTHK free, for the moment," *SCMP*, March 8, 1998, p. 12.

42 See www.hkupop.hku.hk.

43 For discussion of provisions protecting academic freedom and difficulties in enforcement, see Carole J. Petersen, "Preserving institutions of autonomy in Hong Kong: the impact of 1997 on academia and the legal profession," *Southern Illinois University Law Journal*, vol. 22, 1998, p. 337, especially pp. 341–9. For discussion of the Robert Chung case, see Carole J. Petersen, "Preserving academic freedom in Hong Kong: lessons from the 'Robert Chung affair,' " *HKLJ*, vol. 30, 2000, p. 165.

44 An amusing example is the case of *Eastern Express Publisher* v. *Mo Man Ching Claudia*, [1999] 4 HKC 425 (CFA), in which the statements alleged to be defamatory related to the trend of media organizations suing each other.

45 The draconian Official Secrets Act 1911 was part of Hong Kong law until 1992, when the more liberal Official Secrets Act 1989 was applied to Hong Kong by the British Government. These provisions were essentially localized in 1997 with the enactment of the Official Secrets Ordinance, closely modeled on the British Official Secrets Act 1989. See Johannes Chan, "National security and the unauthorized

and damaging disclosure of protected information," Chapter 8 in Fu, Petersen, and Young, *supra* note 1.

46 For discussion of the potential impact on the media, see Doreen Weisenhaus, "Article 23 and freedom of the press: a journalistic perspective," Chapter 9 in Fu, Petersen, and Young, *supra* note 1.

47 Consultation Document, para. 6.14.

48 For news reports on the jailing of Xi Yang (a Hong Kong reporter who was jailed for stealing state secrets after obtaining information on interest rate policies from a Bank of China source), see Rhonda Lam Wan, "Memories dim on silenced reporter," *SCMP*, September 24, 1995, p. 6; and Chris Yeung, "Liberation brings delight in days of doubt," *SCMP*, 26 January 1997. See also Gary Cheung, "Researchers fear study threatened by new law," *SCMP*, October 14, 2002, p. 5 (interviewing Dr Li Shaomin, formerly an academic at City University of Hong Kong, who was detained for five months in China); Ella Lee, "Scholar tells of arrest 'nightmare,'" *SCMP*, August 7, 2001, p. 5; Cheung Chi-fai, "Freed scholar urges release of academics; National secrets are things China doesn't like," *SCMP*, 3 February 2002, p. 4; and Glenn Schloss, "High price for baring war's secret; a jailed mainland historian's real 'crime' may have been to highlight an operation Beijing does not want discussed," *SCMP*, May 27, 2002, p. 14.

49 See, e.g., *Concluding Observations of the Human Rights Committee (Hong Kong): China*, CCPR/C/79/Add.117, 1999, para. 19; *Concluding Observations of the Committee on Economic Social and Cultural Rights (Hong Kong): China*, E/C/.12/1/Add.58, 2001, para. 26; and Janice Brabyn, "The fundamental freedom of assembly and Part III of the Public Order Ordinance," *HKLJ*, vol. 32, 2002, pp. 271–312.

50 *HKSAR* v. *Leung Kwok Hung and Others* [2002] 4 HKC 564, appeal dismissed by the Court of Appeal, HCMA 16/2003, November 10, 2004. Leave to appeal to the Court of Final Appeal granted on January 6, 2005 (FAMC Nos 60 and 61 of 2004).

51 *Ibid.*, para. 129.

52 *Ibid.*, paras 121 and 129.

53 *HKSAR* v. *Yeung May-wan and Others*, FACC No. 19/2004, Court of Final Appeal, May 5, 2005. For the decision of the Court of Appeal, see [2004] 3 HKLRD 797.

54 See, e.g., D. W. Choy and Richard Cullen, "Treason and subversion in Hong Kong," and Kelley Loper, "A secession offence in Hong Kong and the 'one country, two systems' dilemma," Chapters 5 and 6 in Fu, Petersen, and Young, *supra* note 1.

55 See C. B. Fung, Lison Harris, and Lily Ma, "A connecting door: the proscription of local organizations," in Fu, Petersen, and Young, Chapter 10 *supra* note 1.

56 Consultation Document, para. 7.11.

57 *Ibid.*, paras 7.15 and 7.16.

58 *Ibid.*

59 See Hong Kong Government, "Proposals to implement Article 23 of the Basic Law: myths and facts," 2002, at p. 6.

60 See Clause 15 of the Bill, proposing to add a new section 8A(5)(h) to the Societies Ordinance.

61 At present, the stated ground for prohibiting Falun Gong in China is that it is an "evil cult."

62 See "Economic competitiveness" section of the government's website, at www.info.hk/infor/hkbrief/eng/econ.htm.

63 See Basic Law, Arts 105–6, 110–16.

64 *Ibid.*, Art. 107.

65 *Ibid.*, Art. 108.

66 The Hong Kong Government concedes that income disparity has increased. See *Second Report of the Hong Kong Special Administrative Region of the People's Republic of China in the Light of the International Covenant on Economic Social and Cultural Rights*, 2003, paras 11.9–11.10.
67 The application of ICESCR in Hong Kong continues to be subject to a reservation to Article 6 (allowing employment restrictions based upon birth or residence, to protect employment opportunities of local workers) and a reservation to Article 8.1(b) (stating that the Article does not imply a right of trade union federations to join political organizations or bodies from outside Hong Kong).
68 Second Report, *supra* note 66, para. 2.9.
69 HCAL77/1999 (13 July 2000, Court of First Instance).
70 [2001] 3 HKLRD 109.
71 The judges noted that the other relevant sources of law (e.g. the ICCPR as applied to Hong Kong and the Bill of Rights Ordinance) contain reservations for immigration decisions and were apparently persuaded that the reason that the ICESCR does not have a similar reservation is that the UK Government thought of ICESCR as being "promotional" when it extended the treaty to Hong Kong. See *Chan Mei Yee* v. *Director of Immigration*, at paras 42–6, and *Chan To Foon* v. *Director of Immigration*, at para. 76.
72 *Concluding Observations of the Committee on Economic, Social and Cultural Rights on the Initial Report of the Hong Kong Special Administrative Region*, May 11, 2001, E/C.12/1/Add.58, at paras 16 and 27.
73 Second Report, *supra* note 66, Art. 2, para. 1.12.
74 See, e.g., Arts 6–8 of the ICESCR.
75 See, generally, Wilson Chow and Anne Carver, "Employment and trade union law: ideology and the politics of Hong Kong labour law," in Raymond Wacks (ed.), *The New Legal Order in Hong Kong*, Chapter 15, Hong Kong: Hong Kong University Press, 1999.
76 May Sin-mi Hon, "As she defends new restrictions, Carrie Lam says welfare is not a right," *SCMP*, February 27, 2003, p. 1.
77 Second Report, *supra* note 66.
78 Human Rights Monitor, "Submission to Pre-sessional Working Group," 2000, para. 9.4, p. 50 (citing the Hong Kong Social Security Society).
79 2001 Concluding Observations, *supra* note 72, paras 18–19.
80 *Concluding Observations of the Committee on Economic, Social and Cultural Rights on the People's Republic of China* (including Hong Kong and Macau), May 13, 2005, E/C.12/1/Add.107, paras 72, 84–6, and 98.
81 Social Welfare Department, Hong Kong Government, "Progress of the intensified support for self-reliance measures under the Comprehensive Social Security Assistance Scheme," Paper No. CB(2)2695/03-04(04), prepared for discussion before the Legco Panel on Welfare Services, June 14, 2004.
82 Health, Welfare and Food Bureau, Hong Kong Government, "Residence requirements for comprehensive social security assistance and social security allowance," Paper No. CB(2)734/03-04(01), prepared for discussion before the Legco Panel on Welfare Services, December 18, 2004.
83 Health, Welfare and Food Bureau, Hong Kong Government, "Legislative Council brief: residence requirements for social security benefits," HWF CR/3/4821/99(03), June 3, 2003.
84 Second Report, *supra* note 66, paras 11.16–11.19.
85 Second Report, *supra* note 66, paras 12.1–12.5.
86 *K, Y, and W* v. *Secretary for Justice* [2000] HKC 796. For further discussion of the case, see Carole J. Petersen, "The right to equality in the public sector," *supra* note 4.

87 *EOC* v. *Director of Education*, [2001] HKLRD 690. For further discussion of the case, see Carole J. Petersen, "The right to equality in the public sector," *supra* note 4.

88 For analysis of the proposed legislation, see Carole J. Petersen, "Racial equality and the law: creating an effective statute and enforcement model for Hong Kong," *HKLJ*, vol. 34, 2004, pp. 458–80.

89 For further discussion of gender discrimination in the New Territories, see Carole J. Petersen, "Equality as a human right: the development of anti-discrimination law in Hong Kong," *supra* note 4.

90 *Secretary for Justice & Others* v. *Chan Wah and Others* [2000] 4 HKC 429 (applying Arts 21 and 26 of the Hong Kong Bill of Rights and section 35 of the Sex Discrimination Ordinance).

91 See *Human Rights and Equal Opportunities Commission Bill*, published as an appendix to George Edwards and Andrew Byrnes (eds), *Hong Kong's Bill of Rights: 1991–1994 and Beyond*, Hong Kong: University of Hong Kong, 1995.

92 See the *Concluding Comments of the Human Rights Committee on the Hong Kong Special Administrative Region*, CCPR A/55/40 (2000), para. 237 where the Committee stated that it "remains concerned that there is no independent body established by law to investigate and monitor human rights violations in HKSAR and the implementation of Covenant rights." See also the *Concluding Comments of the Committee on Economic, Social and Cultural Rights on China*, CESCR E/2002/22 (2001), para. 177(d).

93 For further discussion, see Carole J. Petersen, "The Paris Principles and human rights: is Hong Kong slipping further from the mark?," *HKLJ*, vol. 33, 2003, pp. 513–22.

94 See Human Rights Monitor, Urgent Press Release, "EOC appointment and independence of statutory watchdogs – open letter to Tung Chee-hwa," July 28, 2002.

95 For analysis of the impact of CEDAW on law reform, policy-making, and judicial interpretation of legislation, see Carole J. Petersen and Harriet Samuels, "The International Convention on the Elimination of All Forms of Discrimination Against Women: a comparison of its implementation and the role of non-governmental organizations in the United Kingdom and Hong Kong," *Hastings International and Comparative Law Review*, vol. 26, 2002, pp. 1–50.

8 Human rights in Korea

Hahm Chaihark

Introduction

For the better part of its modern history, Korea's approach to human rights has been a difficult issue.[1] As a textbook case of a so-called developmental state headed by a series of authoritarian rulers who were obsessed with achieving rapid industrialization and safeguarding the nation from communist aggression, the Republic of Korea was commonly seen by the international community, at least up until the late 1980s, as one of the worst violators of human rights. It was a fixture on the various international human rights groups' lists of countries with a poor human rights record. Under the political climate of the day, the very term "human rights" had a subversive connotation, for anyone who dared to raise issues about the government's policy and practice regarding human rights was routinely criticized and even silenced as, at best, idealistic daydreamers impeding the task of economic development or, at worst, communist sympathizers undermining the constitutional order of Korea. Thus, the label "human rights lawyer" almost automatically made one a political dissident, and membership in the Minbyun, the Korean acronym for the Lawyers' Group for Democratic Society, usually meant a life of constant surveillance and frequent harassment by the authorities.

This situation has been changing steadily since Korea took its first step toward democratization in 1987. After four presidents who were elected through relatively free and clean elections, Korea is now regarded as moving into a stage of democratic consolidation. Accordingly, the human rights situation has improved dramatically. In 1990, Korea ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), as well as the Optional Protocol to the ICCPR that provides for individual communication to the UN Human Rights Committee. In 1995, it acceded to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). To be sure, ratification of these international human rights instruments is not necessarily a dependable way of gauging a nation's respect for human rights. Indeed, some international instruments were ratified by Korea even before the democratic transition.[2] Nevertheless,

it is plausible to attribute the recent ratifications to the fact that many former dissidents who had been vocal about human rights issues are now leaders in the Korean Government.

In terms of domestic developments, a special presidential commission was created in 1999 for investigating "suspicious deaths" that occurred during past authoritarian regimes. Also, the government passed a special law designed to "compensate and restore the honor" of those who had been persecuted for having participated in democratization movements. In 2001, the Korean Government established the National Human Rights Commission, in accordance with the recommendation of the 1993 World Conference on Human Rights in Vienna. While controversy still continues regarding whether the commission has sufficient independent powers to enforce human rights norms, and whether it is receiving enough feedback from nongovernmental organizations (NGOs), it has established itself as a visible player in the human rights discourse and practice of Korea.

Of course, this change in the government's position and the legal system was largely the result of many years of advocacy by various human rights groups, some of which, like the Minbyun, had been operating since the days of military dictatorship. Furthermore, under the freer environment since the democratic transition, Korea has witnessed an enormous increase in the number of NGOs devoted to the cause of advancing human rights. Many interpret this as civil society finally coming of age in Korea.[3] Perhaps more importantly, in addition to the numerical expansion of human rights groups, there has been an expansion of the range of issues that have received attention by the NGOs. Whereas in the past human rights groups were concerned mostly with such classic rights as freedom of speech, right to assembly, or right to organize unions, in recent years new NGOs have formed that are devoted to advancing a specific type of rights or the rights of a particular group of people. For example, the rights of the disabled, or the rights of the former "comfort women" during the Pacific War, or the rights of foreign workers in Korea have started receiving attention.[4] With the improvement in their human rights situation, Koreans are also beginning to express concerns about and work toward improving human rights in other countries as well. Many are focusing on the human rights of their fellow Koreans in the Stalinist regime to the North, as well as the rapidly increasing number of North Korean escapees, such as those who crossed the border illegally into China or those who have successfully arrived in the South only to find life in a capitalist society more challenging than they had expected.

Such burgeoning of human rights discourse is quite an extraordinary change in Korean history, for according to standard accounts, Koreans did not have any conception of rights before the end of the nineteenth century. Korea had been a predominantly Confucian society for at least half a millennium and that meant that even if people had certain entitlements, they were not articulated in terms of individual rights.[5] Duties to one's family

and community were emphasized, and to make a claim to enforce one's entitlement was generally regarded as unseemly and selfish.

Even when Koreans began using the language of rights under Western influence at the end of the nineteenth century, it is not entirely clear that they understood the concept the way that Westerners did. The fact that they discussed the idea of rights by using translations derived from Confucian vocabulary suggests that they did not fully appreciate rights as something that enables one to make a claim against others.[6] Moreover, many scholars have pointed out that the purpose for which early modern Korean intellectuals argued for the recognition of rights was not so much to highlight the inviolability of the individual as to strengthen their state against its potential foreign aggressors. Emphasizing people's rights and making the state more responsive to the demands of the people was a means of forging a stronger state which could fend off foreign enemies.[7]

To an extent this is a common theme that ran through the rights discourses of China, Korea, and Japan when Asian intellectuals were first exposed to Western political thought in the late nineteenth and early twentieth centuries. In Korea, however, such aspirations to employ human rights ideas to buttress national sovereignty ultimately did not succeed, as it became a colony of Japan in 1910 and did not regain independence until 1945 after the Japanese surrender to the Allied Forces. Not surprisingly, under the Japanese colonial regime the human rights of Koreans, the subjugated people, could not flourish. No one expected that the goal of importing the Japanese legal system to its colony was to promote human rights.[8] Indeed, due to the war efforts led by the Japanese militarist regime, the rights of even the Japanese people in Japan did not fare well at that time.

One aftermath of the colonial experience that still impacts on the Korean discourse on human rights is the issue of nationalism as a factor in the politics of human rights. During the colonial period anyone who fought for Korea's independence was regarded as a nationalist. To use today's expression, they were freedom fighters devoted to improving the human rights of the Korean people. After independence, Korea was divided into two competing regimes, each claiming to be the true successor to the nationalist cause, while neither regime seemed to be genuinely concerned about promoting human rights. In both North and South Korea, the ruling elites were more interested in securing their power base, often employing ruthless force. Moreover, in the southern half of the peninsula, the government became staunchly anti-communist while pursuing rapid economic development through industrialization, which in turn created new forms of human rights abuses. The government appeared to elevate anti-communism and development over nationalism as the state's official ideology. This had the unfortunate effect of creating the impression that the North was being truer to the cause of nationalism.[9] Those who took issue with the South's human rights practices were in effect criticizing the government's decision to pursue

capitalist development and to put on hold the nation's demand for justice and reckoning for the pain and misery suffered during the colonial period.[10] As mentioned, the government routinely repressed demands for better human rights protection by characterizing activists as communist sympathizers, thereby augmenting (perhaps unwittingly) the connection between human rights advocacy and nationalist ideology.

Even after democratization, nationalism still influences the way in which human rights discourse is conducted in Korea. There remains a certain connection between human rights advocacy, anti-capitalism, and nationalism. Those that criticize the government's human rights record are mostly considered "progressive" and at the same time more concerned with national pride and national unity, or solidarity with fellow Koreans in the North. Interestingly, this concern for national unity has led these activists to be extremely cautious about raising issues with human rights abuses committed by the North Korean regime. Convinced that peace on the Korean peninsula and future reunification with the North should be the primary objective of Koreans in the South, they have resolutely opposed any action that may anger or alienate the leaders in the North.

Currently, the views of these "progressives" are strongly influencing the Korean Government's official position. This was graphically reflected at the UN in April 2004 when South Korea abstained from the vote on a resolution condemning North Korean human rights abuses.[11] Despite active lobbying by a number of South Korean NGOs at the UN, the government chose not to provoke North Korea. Nowadays, often those activists who do criticize the North Korean regime and work toward the improvement of North Korean human rights are cast as "conservatives" with a "Cold War mentality" who are jeopardizing the peace process in Korea.

Thus, in a sense there is a curious "division of labor" between human rights groups that concentrate their activities on condemning and preventing human rights violations in South Korea on the one hand, and those that focus on exposing the abuses taking place in the North as well as mobilizing the international community to put pressure on that regime, on the other. From the perspective of international human rights organizations that have consistently applied the same standard to both North and South Korea and urged them to improve their practices, it makes no sense to have such a division of labor. As a result, there are already signs of strain in the relationship between some "progressive," nationalistic NGOs of Korea and international human rights organizations, which have hitherto considered themselves allies. It remains to be seen whether the nationalist tendency which fuels the popular opposition to any perceived foreign pressure and "imposition" of global standards in the economic realm will spill over to the human rights context. Yet, already some Korean human rights groups would rather not be seen as advocating Western values and rhetoric, or as receiving support from Western (particularly US) institutions.

Civil and political rights

Right to physical integrity

Like most countries in the world, at the official level Korea is of course opposed to torture and murder by state agencies. Article 12 of the Constitution provides that no one shall be tortured or forced to testify against oneself in a criminal case.[12] As mentioned, Korea is a state party to the CAT. On the other hand, it is well known that in the past, protection of an individual's right to physical integrity has been less than satisfactory. Earlier violations of this right may be explained by the history and politics surrounding the Korean War (1950–3), and the anti-communist ideology that has influenced the way constitutional provisions and other laws were interpreted. The situation has improved drastically since Korea embarked on its process of democratization. Starting with President Kim Dae-jung's administration (1998–2003), the Korean Government has been engaged in an ongoing project of rectifying and redressing human rights abuses that took place under past authoritarian regimes.[13]

Transitional justice

In recognition of the widespread opinion that state agencies had been involved in many cases where people had simply disappeared or had been found dead under suspicious circumstances, a special Presidential Commission to Investigate Suspicious Deaths was created to investigate such cases and make recommendations for reparations.[14] In a number of cases, the commission has concluded that people who were reported to have committed suicide while being interrogated by law enforcement officers had actually died as a result of torture. Critics, however, point out that even if it makes a determination that the death was a result of unlawful exercise of state power, there is in many cases no legal means for seeking redress because the statute of limitations has already run. In response, there have been proposals that the government recognize "state crimes against human rights" as a separate category of crime for which the normal statutes of limitations do not apply.

In a clear demonstration that the "progressive" perspective is largely becoming the government's own position, the commission recently made a controversial determination that certain North Korean spies and communist armed guerrillas who had died as a result of hunger strikes to protest against the South Korean government's attempt at "ideology conversion"[15] were victims of state violence. Apparently, even those who had actively worked to undermine and even destroy the South Korean state were to be seen as having contributed to the democratization of South Korea.[16] Not surprisingly, this position has been criticized as too extreme. Indeed, a different government body in charge of determining whether a person merits

being called a "democracy movement-related person" said in response that anyone who rejected the constitutional order of the Republic of Korea and threatened national security does not deserve such a designation.[17] Nevertheless, the debate still continues and many in the government are still convinced that anyone who was oppressed under authoritarian regimes should be recognized as having worked for democracy.

In another example of recent projects aimed at rectifying past injustices, the government passed a law in early 2004 to provide redress for one of the worst cases of violations of physical integrity that occurred at the beginning of Chun Doo-hwan's rule. In August 1980, with the entire country under martial law, the military government issued a special decree for "eliminating social evil" and without warrants arrested more than 60,000 people, who the government claimed were thieves, gangsters, and vagrants. They were put in military barracks called *Samcheong Gyoyukdae*, and were forced to undergo "re-education programs" which consisted of severe boot-camp training. At least fifty-four people died from violence and mistreatment while undergoing the re-education, and almost four hundred are reported to have died as a result of injuries sustained during the program. Many more are still suffering from illnesses, both physical and mental, two decades after this horrific miscarriage of justice. The 2004 law establishes procedures for the victims of the *Samcheong* re-education to apply for compensation as well as restoration of their honor.[18] This law is the latest in a series of laws that are designed to compensate for past injustices committed in relation to the government's repression of people's demands for democracy.[19] As a result, those who died during the infamous Kwangju massacre of 1980, who had been called insurgents under authoritarian regimes, are now referred to as martyrs who gave their lives for democracy. Their families may now apply for compensation for the pain and suffering they had to endure.

As can be seen from these examples, Korea is undergoing a phase commonly known among scholars as "transitional justice," with all the attendant problems and issues arising from the competing demands for redressing past injustices while ensuring national reconciliation and avoiding an endless cycle of retributions. Perhaps the most successful case of this was the trial, conviction, and subsequent pardon of the former Presidents Chun Doo-hwan and Roh Tae-woo. When Kim Young-sam came to power in 1998, succeeding Roh, he declared that there would be no political account-settling for past persecutions. He was forced to change his position, however, under the pressure of public opinion, and ordered the investigation and trial of Chun and Roh for the crimes of treason, mutiny, and corruption. They were later convicted and their sentences (life imprisonment for Chun and seventeen years for Roh) were finally confirmed by the Supreme Court in April 1997. Then, in December of the same year, President Kim Young-sam pardoned them under an agreement with the new President-Elect Kim Dae-jung. The two Kims agreed that, faced with the daunting task of overcoming the financial crisis that had beset the country

at the time, the nation should start the next administration on a note of "grand national reconciliation."

On the other hand, there are still forces within Korea calling for more accounting of, if not retribution for, past injustice. For example, the current Roh Moo-hyun administration and his ruling party are pushing for the establishment of a special commission to investigate anti-nationalist collaborators during the Japanese colonial period.[20] The claim is that Korea has never had a chance to make a clean break with its colonial past, and that the spirit of nationalism requires bringing such people to justice. This may sound laudable from a theoretical standpoint, but critics argue that the idea is beset by a host of problems. First, there is the practical problem of gathering sufficient and reliable evidence for identifying past collaborators since it has been almost sixty years since Korea's liberation from Japanese colonial rule. Second, there is a problem in terms of fairness because most people accused of collaborating are either dead or too old to defend themselves, and it will be their descendants who, through no fault of their own, will be forced to bear the psychological burden and the social stigma. Third, opponents of the idea claim that given the stagnant state of the Korean economy, it is politically unwise to thrust the whole nation into a divisive row over who benefited and how from the Japanese over sixty years ago. Finally, critics charge that the real reason for the idea is not so much to rectify history as to undermine the current president's political opponents.[21]

More recently, the idea of establishing a comprehensive permanent commission under the National Assembly, rather than under the president, has received attention from politicians.[22] The argument is that the task of investigating suspicious deaths is better suited for the National Assembly, and that the president, who has been under criticism lately in relation to the work of the Presidential Commission to Investigate Suspicious Deaths, should not be involved in such work. The idea is also supported by the argument that it is better to integrate the disparate commissions that have been created with a limited mandate to investigate particular incidents or particular types of wrongdoing into one comprehensive commission devoted to correcting all forms of past wrongs committed by the state.

Persistent problems

This is not to say that Korea's human rights problems are all in the past or that its human rights record is now perfect. Even under Kim Dae-jung's administration, in October 2002 a murder suspect who was being investigated by the Seoul District Prosecutors' Office was found to have died from torture. This has sparked a heated debate on the general lack of respect for human rights on the part of law enforcement officers.[23] Aside from the internal investigation undertaken by the Prosecutors' Office, the National Human Rights Commission immediately started an investigation of its own, which revealed that the suspect had been arrested without a proper warrant

and that other suspects under investigation for the same murder case were similarly tortured. The commission criticized the widespread practice among prosecutors of relying on "emergency arrests" as a way to get around the arrest warrant requirement as provided for in the Criminal Procedure Code and the constitution. The commission also pointed out that the suspect's right to counsel had been violated by the prosecutors.[24] Many blamed the prosecutors for putting too much weight on extracting confessions from the suspects. In addition, the courts were criticized for failing properly to scrutinize the admissibility of confessions obtained through illegal means, thereby indirectly encouraging the prosecutors to use whatever means possible to extract confessions.[25]

Unfortunately, according to many observers such abuses of the right to physical integrity are not atypical. While the political environment has changed considerably, so that the government is no longer as quick to invoke the "national security ideology" to justify its human rights violations, the actual practices of the law enforcement apparatus in many respects still reflect the old ways. In some ways the recent death of the suspect from torture during a murder investigation was an "accident" waiting to happen.[26] As long as a more scientific, evidence-driven, approach to criminal investigation is not adopted and as long as "special interrogation rooms" are maintained in the prosecutors' office, the rights of many criminal suspects and detainees will likely continue to suffer.

In this connection, the government's recent proposal to enact an anti-terrorism law in the wake of the September 11 terrorist attacks was met with severe criticism from not only the domestic human rights NGOs (the Korean Bar Association, and Citizens' Solidarity for Human Rights, for example) and international NGOs (INGOs) such as Amnesty International, but also the government's own National Human Rights Commission. The main focus of criticism was the part of the bill which would grant the National Intelligence Service a monopoly over powers of investigation regarding terrorist acts as well as giving it paramount authority to "plan, direct, and coordinate" all state activity related to prevention of terrorism. In addition to the problem of further strengthening the government agency which, according to its critics, had been responsible for many human rights abuses in the past, the bill was also criticized for providing an overly vague definition of "terrorist act," which could invite the arbitrary exercise of the agency's powers.

The original bill was first introduced in late 2001, but was not voted on by the National Assembly before the end of the legislators' term in May 2004. Consequently, it was automatically discarded and the newly elected members of the National Assembly initially showed little interest in reviving the bill. However, in the wake of the recent shocking and tragic incident, in which a Korean worker/student was kidnapped in Iraq and ultimately beheaded by a group of militant Islamic fundamentalists, many in the legislature and the government are arguing that the country needs a new and comprehensive anti-terrorist law in order to deal with this kind of event. In response, many

human rights NGOs have pointed out that, while the beheading of a Korean national in Iraq should be condemned and denounced, it did not happen because the Korean Government had failed to pass an anti-terrorism bill. In particular, they stress that it is wrongheaded to try to prevent terrorist acts from taking place overseas by enacting a domestic law that would only give more power to a domestic intelligence agency. It remains to be seen whether a new bill will be proposed and enacted into law.

Derogation of rights and emergency powers

One of the innovations of the current Korean Constitution is a provision that states: "Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution."[27] In effect, in addition to a fairly lengthy bill of rights, it has also codified and incorporated the theory of unenumerated rights. The Constitutional Court has also recognized certain rights (such as "personality rights," the "right to self-determination," and the "right to know") as constitutionally protected even though they cannot be grounded in any particular article of the Constitution.

Limits to derogation of rights

The constitution declares that restrictions on constitutional rights are allowed only when made in the form of a statute passed by the National Assembly and when necessary for "national security, the maintenance of law and order or for public welfare."[28] The Constitutional Court has interpreted this to mean that restrictions on constitutional rights should be made according to the "principle of proportionality," which has the following dimensions: the objective must be legitimate, the manner of restriction must be appropriate, the infringement must be kept to a minimum, and the interest served by the restriction must be greater than the interest protected by the restricted right.[29]

In the same article the constitution has a proviso proclaiming that: "Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated." Whether this prohibition of restrictions on essential aspects is a separate test from the above-mentioned principle of proportionality is not clear, but the Constitutional Court has suggested that the "essential aspect" of a basic right must be determined individually with regard to each constitutionally protected right.

Emergency orders

According to the constitution, in times of "internal turmoil, external menace, natural calamity, or a grave financial or economic crisis" the president is empowered to issue "orders" having the same force as statutes, but only if the nature of the emergency is such that it cannot await the convocation of

the National Assembly. In this case, the president is required to promptly notify the National Assembly of his actions and obtain its approval. If the National Assembly's approval is not forthcoming, all his actions shall lose effect from then on, and all laws that had been suspended or overridden by the presidential order shall immediately regain their effect.[30] Compared to the corresponding provisions in the previous constitutions promulgated under Chun Doo-hwan and Park Chung-hee, conspicuously missing in the current constitution is a clause that states that the president may temporarily suspend the citizens' constitutional rights and duties as well as taking "special measures" regarding the powers of the government and the courts. The drafters of the current constitution also eliminated the expansive language in earlier constitutions which granted the president power to issue emergency decrees on "all matters relating to the governance of the state."[31]

Martial law

The constitution also gives the president power to declare martial law in times of "war, armed conflict, or similar national emergency", when use of military force is necessary for the purpose of maintaining public safety and order, or for coping with military necessity. The constitution specifies two types of martial law: emergency and precautionary. In the case of emergency martial law, special measures may be taken with regard to the system of warrants, and the freedoms of speech, of the press, assembly, and association, as well as the powers of the government and the courts. When martial law is declared the president must promptly notify the National Assembly. While the constitution contains no requirement that the National Assembly must give its approval in order for the martial law to be effective, when the legislature affirmatively demands through a vote of more than half of its entire members that martial law be lifted, the president must comply.[32] The constitution also provides that under emergency martial law, certain crimes tried by court martial may not be appealed to a higher court.[33] At the same time, it also makes it clear that this shall not be applicable when the sentence is capital punishment.[34]

The constitution is silent on whether a declaration of martial law is subject to judicial review. The general view among scholars seems to be that such action by the president is a highly political issue not suitable for judicial review. The Supreme Court has also consistently stated that such issues as whether the conditions for a declaration of martial law were met or whether the declaration was done in an otherwise proper manner are not justiciable.[35] All these Supreme Court cases, however, were decided under the previous constitution, before the transition to democracy and the establishment of the current Constitutional Court. Given that the current constitution was drafted with a view to curbing the power of the president, it may be argued that reviewing the propriety of martial law is within the constitutionally mandated powers of the Constitutional Court. This is particularly so because

the constitution contemplates the court resolving such political issues as the dissolution of undemocratic political parties and the impeachment of high-ranking government officials. Moreover, in a case involving the president's emergency order, the court has strongly suggested that even highly political acts by the ruler should be subject to the court's review.[36]

There have been no declarations of martial law under the current constitution, but Korea is still trying to rectify the human rights abuses committed when martial law was declared under previous constitutions. The case of the Samcheong "re-education program" mentioned above is a prime example. Another is the 1980 case in which Kim Dae-jung was tried and sentenced to death by a court martial under charges of having conspired to stage an insurrection. His sentence was confirmed by the Supreme Court in 1981, and but was later commuted to life imprisonment, and then to twenty years, until he was released from prison in 1982 to travel to the USA for medical treatment. After Kim was elected President, his so-called co-conspirators in the same case applied for a reopening of the case. They succeeded in having their convictions overturned and were declared not guilty by the court. In effect, the court agreed that the military government of Chun Doo-hwan had trumped up the charges against Kim and his cohorts in order to eliminate political competition and criticism.[37]

Freedom of thought, conscience, and religion

Article 20(1) of the Korean Constitution states that all citizens enjoy the freedom of religion. Article 20(2) states that no state religion shall be recognized, and that church and state shall be separate. Article 19 of the constitution guarantees the freedom of conscience. In terms of religious diversity, roughly 28 percent of the Korean population are Buddhists, while Christians, including both Protestants and Catholics, account for about 26 percent. Of the rest, other than a small percentage of followers of Islam and a couple of "native" Korean religions, a sizeable group professes no particular faith. While the Confucian influence remains very strong, there is no church or clergy representing Confucianism as an organized religion.

As there are no visible political cleavages based on religious differences, the right to practice one's religion rarely becomes a point of controversy. The government is generally tolerant of the various churches and religious groups. To be sure, under authoritarian rulers, some church groups were quite vocal in demanding that the government show better respect for human rights, and were therefore targets of government surveillance and abuse, but this was not because they were espousing a particular religious viewpoint.

Conscientious objection

One issue related to the freedom of religion that still requires resolution, and attracts the concern of many international human rights NGOs, is the issue

of "conscientious objection." Article 39 of the constitution states that all citizens have the duty to serve in the country's defense as specified by law, and all male citizens are duly expected to serve in the military. Given such a system of conscription, it is inevitable that some groups, the Jehovah's Witnesses for example, whose religious beliefs prohibit them from taking up arms will find themselves in trouble with the law. If such an individual fails to enlist after being summoned by the military, he is in violation of the Military Service Law, and if he refuses to take up arms after enlisting, he is violating the Military Criminal Code.

Under such circumstances, the Korean courts have consistently held that this does not constitute a violation of the individual's freedom of conscience.[38] While there are demands from religious groups, human rights advocates, and legal scholars urging the courts to recognize an exception for "conscientious objectors," the courts' position is that the constitutional provision on freedom of conscience is not applicable to this situation. Many argue that this can be solved by a fairly simple solution of the state adopting a system of "non-military service" or "non-combatant service," but the government so far has argued that such a system will only create more problems as it will be abused by those merely wishing to avoid military service. The Supreme Court recently declared that freedom of conscience cannot take precedence over the duties of defense, thereby ending a legal debate caused by conflicting decisions from different lower courts.[39] In a different case arising from a constitutional petition filed by an individual claiming that the Military Service Law provision which prescribes prison sentences for not enlisting is unconstitutional, the Constitutional Court held that the current conscription system which does not allow non-military alternate service was a choice made by the legislature, and that unless the legislature clearly abused its discretion in making that choice, the law cannot be held unconstitutional. The court did, however, urge the National Assembly to consider whether a different system might better harmonize citizens' right of conscience and the public interest in maintaining national security.[40]

Subversive ideology

While the constitution states that there shall be no state religion, the fact that a certain ideological point of view has been outlawed may be problematic from the human rights point of view. It is generally agreed that the theory of "militant democracy" (*streitbare demokratie*) developed in Germany is also incorporated into the Korean Constitution. According to this theory, even a democracy needs to actively defend itself from the enemies of democracy, and this theory is understood to be embodied in such constitutional provisions as those proclaiming that a political party may be dissolved by the state if the Constitutional Court determines that its objectives or activities contravene the "democratic basic order."[41] While this theory by itself may not be problematic, the fact that it is sometimes understood to

underlie certain state practices relating to the execution of the National Security Law (NSL) may be more of a concern for the uninhibited exercise of freedom of thought and conscience.

Until recently, before pardoning or releasing on parole prisoners convicted under the NSL, the government would require them to sign an "ideology conversion oath," an affidavit stating that they had renounced their former "erroneous" (that is, communist) beliefs, and now embraced the values and ideals of liberal democracy. This was criticized by many from within Korea as well as from without as a blatant violation of the freedom of thought, and in 1998 the government did away with the conversion oath and replaced it with a more innocuous-sounding "law abidance oath." On its face, this was no more than a declaration that the prisoners would henceforth be law-abiding citizens. The government justified the new oath by arguing that it had a legitimate interest in making sure that prisoners did not break the law once they were released.[42]

For many human rights activist, however, this amended oath was not much of an improvement, as it was administered only to violators of the NSL and the Law on Assembly and Demonstration, rather than to everyone who had broken the law. It was also problematic because it forced an individual to express his or her innermost conviction regarding the justness of the legal order, which is a matter of one's conscience. Yet, in 2002, when the oath was challenged, the Constitutional Court upheld the practice, saying that since all citizens have a duty to abide by the constitution and the laws promulgated under it, requiring prisoners to make a promise that they will not break the law cannot be deemed unconstitutional.[43] Nevertheless, faced with continued criticism, the Ministry of Justice in 2003 announced that it would no longer ask prisoners to sign a law abidance oath before pardoning them or releasing them on parole.[44]

On the other hand, in the recent, highly publicized case of Song Du-yul, a professor at Muenster University and a naturalized citizen of Germany, who had been charged under the NSL for, among other things, spying for North Korea and becoming a member of the Politburo of the North Korean communist party, there have been reports that the Prosecutor's Office has asked for a more severe punishment because Song has allegedly refused to recant his political beliefs.[45] If this is true, apparently the mere belief in communist ideas is still considered unlawful in Korea, or at least counts as an aggravating factor in determining the seriousness of a crime.

In the trial court, Song was found guilty of joining the North Korean communist party, taking a leading role in promoting subversive ideology in the aid of an anti-state organization, and communicating with and taking directives from Kim Jong-Il, the North Korean dictator. On appeal, however, most of these crimes were declared insufficiently substantiated by evidence, and he was found guilty only of traveling without authorization to North Korea to receive instructions regarding *juche* ideology. The appeals court explicitly stated that the NSL has the potential to be abused and to be

applied arbitrarily to violate human rights.[46] It therefore stated that the NSL should be interpreted strictly and applied only to cases where the threat to national security is obvious and clear.[47] The public prosecutors are planning to appeal the decision to the Supreme Court.

This relatively liberal decision by the appeals court has sparked a heated debate among the politicians regarding the necessity of revising or even repealing the NSL. Some progressive members of the National Assembly support the complete abrogation of the law, while more moderate to conservative members are arguing for either revising it or replacing it with a new law that is more respectful of human rights. Regardless of their specific positions on this issue, most politicians seem to recognize that although North Korea should be regarded as a partner in a dialogue for peace and reunification, it has never renounced its stated goal of subjugating the southern part of the peninsula under communist rule and has repeatedly shown aggressive behavior, not least of which is the threat that it possesses nuclear weapons. The task therefore is one of striking a new balance between ensuring that the nation is secure against North Korean aggression and guaranteeing that the law does not provide a cover for human rights violations.

Freedom of speech and of the press

Article 21 of the Korean Constitution guarantees the freedoms of speech and of the press, and declares that no permit system shall be allowed in relation to speech and the press. On the other hand, the same article states that these freedoms shall not be exercised to such an extent as to violate other people's honor or rights, or harm public morals or social ethics, and that a person whose honor or rights have been violated may request compensation.

In general terms, Koreans have enjoyed freedom of speech to a much greater degree since the democratic transition. During the last days of Park Chung-hee's rule, any speech critical of the government was explicitly forbidden by one of the many "emergency decrees" issued by the president, which were in effect supra-constitutional laws, and many were imprisoned for having criticized the emergency decree itself. No such decree is in force now, and the current constitution makes it more difficult for the president to "rule by decrees." Also, the official position of the current Korean government is no longer so staunchly "anti-communist" as before and thus less likely to stifle free speech by invoking the NSL.

National security and freedom of expression

Although many Koreans today think that the law is a holdover from the past, or a symbol of military dictatorship, and although international groups have over the years urged the Korean Government to repeal it,[48] the NSL is still in force. This is so despite the successive pledges of all the civilian presidents in the post-democratization period to abolish or at least amend

it. To be sure, the number of people arrested under the NSL has steadily declined. Yet, in the eyes of its critics, it remains a constant source of human rights violation because of its inherently vague and elastic provisions, which gives whomever is in power excessive discretion.

As it stands now, Article 3 of the NSL provides for punishment of anyone who joins an "anti-state organization" (capital punishment or life imprisonment for the "ringleader" and "leading members"), which is defined as any group "which uses fraudulently the title of the government or aims at a rebellion against the state, and which is provided with a command and leadership system." The obvious referent of this term is North Korea. Article 5 punishes anyone who offers "voluntary support" for an anti-state organization. Article 7 provides that anyone who "praises or encourages" the activities of an anti-state organization may be sentenced to seven years' imprisonment. It also makes it a crime to produce, possess, or disseminate documents or other materials with a view to praising and encouraging anti-state organizations. Further, Article 10 punishes anyone who fails to inform the authorities after learning that someone else has violated the NSL.

The crimes that human rights activists have criticized as being particularly noxious are praising and encouraging an anti-state organization's activities, and failing to notify the authorities.[49] Not only is the definition of "praising and encouraging" vague, but also the possession of perfectly innocuous books or documents can become an offense if it is done so with a view to praising and encouraging. Critics also point out that it is both cruel and unrealistic to expect that family members will notify the authorities of a violation of the NSL.

It is particularly unfortunate that the crime of "praising and encouraging" continues to be a source of abuse despite the fact that the Constitutional Court deliberated on the provision in one of its early decisions. In a 1990 decision, the court held that Article 7 of the NSL could be constitutional only if the scope of its interpretation was narrowed to apply to activities that endanger the continuity and security of the state or the "free and democratic basic order" enshrined in the constitution.[50] It recognized that certain terms were too vague and too broad and likely to invite arbitrary readings and therefore have a chilling effect on freedoms of speech and of the press, as well as on the freedom of learning and the arts. Given the continuing military confrontation between North and South Korea, however, the court held that the provision cannot be declared simply unconstitutional. It therefore rendered a decision of "limited constitutionality," meaning that it will be constitutional only when construed narrowly according to its instructions.

The NLS was revised in 1991 and the qualifying phrase, "knowingly endangering the integrity and security of the state or the free and democratic basic order" was inserted into Article 7.[51] In other words, "praising and encouraging" would be a crime only if done with the requisite subjective element. Nevertheless, the prosecutors and the regular courts have

interpreted the provision in such a way as to nullify the qualification by essentially assuming that anyone who engaged in the prohibited activities had done so with such knowledge. Similarly, although acts such as the production, dissemination, and possession of certain "subversive" documents or pictures could be punished only if the accused had engaged in those activities "with the purpose of" praising and encouraging anti-state organizations, such purpose was basically assumed to be present.[52]

Since the inauguration of Roh Moo-hyun, however, the Ministry of Justice has apparently applied the NSL in a way that is more respectful of human rights. The government initially indicated that it planned to legalize an activist student group called the Federation of Korean University Students' Councils, or *Hanchongnyon* in Korean. Although the group is still considered an enemy-benefiting organization, in prosecuting individual members of the group, the government has shown leniency toward those who became members by default, by virtue of being elected to their university's student council. It in effect requires that the prosecution prove affirmatively that the individual had joined the group with the requisite knowledge and purpose of engaging in anti-state activities.

On the other hand, at the time of writing, *Hanchongnyon* is still regarded as an enemy-benefiting organization by the government and anyone who joins the group is automatically violating the NSL. The government's goodwill toward the group seems to have evaporated after its members staged a demonstration in May 2003, blocking the entry of president Roh to the cemetery for those who died in the Kwangju democratization movement. While the students claim to have been protesting Roh's "humiliating" diplomacy toward the USA, their actions at a place considered by most progressives as sacred ground, forcing the president and his entourage to use the rear gate of the cemetery, alienated the government and the general public. In August 2003, the student group further isolated itself by forcefully entering a US military training site and climbing atop a tank to burn a US flag. The police are still trying to apprehend the core members and the government appears to have no plans to legalize the group any time soon.

Thus, until the National Assembly either revises or repeals the NSL, people will continue to be arrested and prosecuted for endangering national security. Fortunately, the number of persons arrested for violating the NSL has decreased significantly since the democratization of Korea. Yet, according to one human rights group, during the first year of the presidency of Roh Moo-hyun, a former human rights lawyer himself, fifty-eight people were arrested for NSL violations.[53] Of these, the majority were members of the *Hanchongnyon* and more than 90 percent were charged under the notorious Article 7, that is for having praised and encouraged North Korea, or for possessing and/or disseminating subversive documents with a view to praising and encouraging the activities of anti-state organization. Roh Moo-hyun government's decision to apply the NSL more narrowly, while laudable,

betrays the fact that the law can be subject to different interpretation and execution depending on who is in power.

Freedom of the press and reputational rights

During the period of authoritarian rule, freedom of the press was severely restricted. The government forcefully closed down newspapers and periodicals at will, and confiscated private broadcasting stations and turned them into state-operated ones. It also exercised tight control over the news media by issuing "guidelines" on what should be reported and in what manner. At one point, the government even dictated the headline, size, and position of an article in a newspaper as well as determining what pictures may be used in it. There was, of course, a legal cover for such repression. One notorious example was the so-called Basic Law of the Press enacted by the Chun Doo-hwan Government and later repealed after the democratic transition.

While there are conflicting assessments of the degree of freedom enjoyed by the press in the post-democratization period, some court decisions suggest a tendency to recognize a broader scope of freedom for news agencies in cases involving reputational rights of a public person. Previously, the courts had been more receptive to claims of defamation brought by higher government officials and other public persons.[54] For example, the Supreme Court had declined to adopt the more stringent requirement of having to prove "actual malice" on the part of the media defendant as was formulated by the US Supreme Court in the famous case of *New York Times* v. *Sullivan*.[55] In some cases, it awarded higher damages to plaintiffs who were public officials than to private citizens.

Recently, however, the Supreme Court seems to have switched to a more media-friendly position by clearly recognizing that in cases where the plaintiff is a public official, the public has a legitimate interest in monitoring and scrutinizing the official's moral rectitude and integrity. Thus a report raising such issues should not be actionable unless it was done maliciously or with no sense of proportionality. Similarly, in interpreting "truth" as a defense in defamation suits, the Supreme Court has specifically stated that different criteria should apply when the defamed is a public person.[56]

Libel law as a political weapon

Although the courts are taking a more liberal approach in this field, more libel suits are being brought against news organizations by public officials and government agencies. Critics charge that this is a manifestation of the government's hostile attitude toward the press. As mentioned, one beneficiary of the democratic transition was the press, and perhaps it is not surprising that once freed from the oppressive government restrictions, the press has become increasingly vocal and even critical of government policies. The three most powerful newspapers[57] are all conservative in their political outlook.

This has created a situation in which the economic policies of the relatively more progressive government and its "soft" attitude toward North Korea have been consistently criticized by the press.

This ideological feud between the mainstream newspapers and the government started when Kim Dae-jung was in office, and has continued under Roh Moo-hyun's administration. Such ideological debates might be a sign of a healthy democracy, yet it has caused the government to openly state that "reform" of the media sector, particularly the newspaper industry, is one of its top priorities. Its argument is that due to the disproportionate market share of the three conservative newspapers, the general public is being deprived of the opportunity to be exposed to diverse viewpoints. In other words, in order to rectify the imbalance in the marketplace of ideas, as it were, the state must get involved. Yet the newspapers and opponents of the government charge that this is merely a pretext for stifling criticism. Indeed, during his term in office, Kim Dae-jung ordered tax audits of all the media companies.[58] Although the government argued that these audits were just routine and intended to prevent tax evasions by the owners of newspaper companies and broadcast corporations, they were widely seen as attempts to "tame" the media and were criticized as political persecution.[59]

Similarly, the current administration of Roh Moo-hyun has announced its goal of "reforming" the newspaper industry.[60] It has also started to use libel law as a weapon in this ideological feud with the media companies. After complaining a number of times that the conservative papers' disproportionately large share of the market has resulted in distorted coverage of government actions, the government announced that it will take legal action against any news organization that publishes any article or editorial containing false information regarding government policy or personnel. In 2003, President Roh himself brought a libel suit against the major newspapers, claiming that they had defamed him and his family by publishing an incorrect story about his fund-raising activities and real-estate transactions.[61] He has subsequently decided to suspend the legal proceedings until after he leaves office.[62]

There are numerous defamation cases being litigated or arbitrated which have been brought by the president's personal assistants, the Office of the President, the Ministry of Finance and Economy, the Ministry of Foreign Affairs and Trade, and other government bodies. Given the general perception that the Korean media are not "professional" enough and still prone to sensationalism without due regard to the accuracy of the stories they report, some regard such actions as necessary measures to reform the media industry. Others are concerned that such overtly confrontational actions taken by the government against the news organizations will inevitably have a chilling effect on the media. For example, the International Press Institute passed a resolution at the conclusion of its annual general assembly in September 2003 condemning Roh's continued attempts to "intimidate and harass major independent newspapers."[63]

Freedom of assembly

Besides the constitutional provision guaranteeing the freedom of assembly and association,[64] the Law on Assembly and Demonstrations provides the basic framework for realizing and regulating the exercise of these rights. This law used to be the main target of human rights groups' advocacy for law reform because it was one of the main tools, along with the NSL, of authoritarian regimes for stifling criticism of the government. By severely restricting the conditions under which an assembly could be held lawfully, the law operated as a *de facto* permit system for peaceful assembly. It was amended in March 1989, after the transition to a democratic government, and many of the repressive provisions were removed.

Nonetheless, the law still contains a number of restrictions on holding an outdoor assembly or demonstration.[65] For example, in principle, any outdoor assembly or demonstration before sunrise or after sundown is forbidden.[66] During daytime, outdoor assemblies and demonstrations may be held freely. In other words, people need not obtain prior permits for such meetings. The law does, however, require that organizers of such events notify the relevant police station at least forty-eight hours in advance.[67] After receiving notification, the police is required to review the purpose, time and place of the planned meeting. If the proposed outdoor assembly or demonstration falls under certain categories, the police may disallow it. This includes assemblies and demonstrations that will clearly pose a direct danger to the public safety and order,[68] as well as assemblies and demonstrations held within one hundred meters of certain government buildings, such as the National Assembly building, court houses, the presidential mansion, and foreign diplomatic missions and their residences.[69] The law also enables the government to prohibit all assemblies on major roads of major cities if necessary to ensure the proper flow of traffic, although peaceful marches along such roads may not be prohibited if the organizers assign "order-maintenance" personnel.[70]

In October 2003, the Constitutional Court held that the clause prohibiting assemblies and demonstrations within one hundred meters of foreign missions and their residences was unconstitutionally broad. The court started out by noting that any such prohibition must be made in a manner that poses the least burden on people's rights. It also explained that this must be done by striking a proper balance between the state's interest in protecting the operation of foreign missions and the people's constitutional right to peaceful assembly and demonstration. It then went on to reason that there are certain instances in which the blanket prohibition of any assembly or demonstration within one hundred meters becomes unnecessarily broad and burdensome. For example, demonstrations which are not directed at the foreign missions but at other domestic groups should not be prohibited just because some foreign mission happens to be located nearby. The court also noted that there is no justification for disallowing demonstrations held on

holidays when no one is working at the foreign missions. Therefore, the court concluded that the blanket prohibition of demonstrations near foreign missions is unconstitutional.[71]

Following the court's decision, the government proposed an amended version of the law. The clause regarding foreign diplomatic missions was revised to allow outdoor assemblies and demonstrations, even if they are held within one hundred meters of the embassies, in the following three instances: (a) when the assembly or demonstration is not directed at the foreign diplomatic mission or residence; (b) when there is no danger of escalation into a large-scale assembly or demonstration; and (c) when no business is conducted at the foreign mission due to a holiday. Yet, the Korean Bar Association and human rights groups, as well as the National Human Rights Commission, have expressed concerns that the amended law is now more restrictive of human rights. They point out that the amendments enable the police to prohibit assemblies and demonstrations in areas close to schools and military bases.[72] The revised law also states that if violence breaks out at an assembly the police may disperse the meeting and disallow any further meetings for the same purpose.[73] The provision regarding marches along the major roadways has been revised so that the police may ban such marches if they determine that there is danger of "serious traffic congestion."[74]

Critics thus argued that the main thrust of the amendments was to make it easier for the authorities to regulate, disallow, and even disperse assemblies and demonstrations. It is ironic that it was passed under a president who used to be a human rights lawyer. The law has attracted criticism from international human rights groups.[75] The process of amendment was also reported to have been plagued by certain irregularities. For example, the amendment bill was never made public according to the normal practice of posting proposed bills, and no public hearing was held on it. The fact that the opinion of the National Human Rights Commission was entirely ignored during the revision process has also attracted much criticism. Soon after the passage of the amendments, many human rights groups began calling for public defiance of the law in the name of civil disobedience, arguing that the revised law is unconstitutional.[76]

Changing culture of protest

The amendments to the Law on Assembly and Demonstration discussed above were made after Roh Moo-hyun declared, in November 2003, that his government would change the nation's "protest culture." Roh made this statement following several reports of violence between the police and demonstrators. While the amended law only provoked more anger at the government, Roh's wish to see a change in the culture of protest may be becoming a reality, but not due to his government. With the emergence of a new generation of youth whose life experience include neither the authoritarian regimes nor the militant democracy movement, and whose political

activity is more often spurred by images and impressions gleaned from the Internet than by any particular fixed ideology, a new mode of expressing political views collectively may be taking shape. An example may be the increasing number of "candlelight vigils" dedicated to various causes. Perhaps the best known in recent years is the series of vigils held in the Winter of 2002 in downtown Seoul and other cities to protest the death of two middle schoolgirls who were killed by a US armored vehicle during a military exercise in Korea. While these meetings later turned into rallies for venting "anti-American" sentiments, it is worth noting that the first one convened almost spontaneously when a web user (or "netizen" in Korean parlance) casually posted a suggestion on the Internet to hold a vigil in memory of the two girls.

Being "candlelight vigils," these were obviously held after sundown, and yet they were routinely allowed. This may be partly explained by the fact that the government at the time benefited politically from these expressions of "national pride" and used them to defeat the opposition candidate in the presidential election. On the legal side, however, it was also argued that these vigils fell under Article 13 of the Law on Assembly and Demonstration, which specifically provided that the restrictions contained in other parts of the law shall not apply to academic gatherings, artistic performances, athletic meetings, or religious ceremonies. Since these vigils were originally intended as a memorial ceremony, the police had no reason to prevent them. Moreover, they were on the whole quite peaceful and bore little resemblance to the violent clashes that characterized Korean demonstrations of the past.

More recently, following the passage by the National Assembly of the resolution to impeach President Roh Moo-hyun, many of his supporters flooded the streets to hold candlelight vigils in protest of the legislature's action. When the police warned the organizers that these assemblies were not permitted under the law because they were held after sundown, the organizers claimed that these were entertainment events or artistic performances rather than political rallies.[77] Indeed, aside from speakers condemning the legislators who voted to impeach the president, there were many singers and performers at the events, making them appear more like cultural events. Especially among the younger generation, there seems to be a blurring of the distinction between politics and cultural events. Young people are making their political viewpoints known through artistic media, and their political rallies increasingly look like performance events. Enforcement of a law based on this distinction has thus become more difficult.

Economic, social, and cultural rights

As one of the many constitutions around the world which took inspiration from the Weimar Constitution, the Korean Constitution professes to combine the classical liberal approach with the principle of the "social state"

which underlies the state's commitment to guarantee a minimum standard of living for all its citizens.[78] As such, it includes many provisions on socio-economic rights. Not surprisingly, there is continuing discussion among scholars regarding the extent to which the socio-economic rights enshrined in the constitution are immediately enforceable claim-rights as opposed to programmatic statements regarding the state's political ideals and objectives. The Constitutional Court has suggested that the legislature's failure to pass a statute necessary to implement an individual's constitutionally guaranteed right may be judged unconstitutional.[79] In order to give substance to the socio-economic rights provided for in the constitution, it may be necessary to confirm the unconstitutionality of the state's inaction and to urge the state to enact legislation to realize the rights guaranteed under the constitution.

Korea ratified the ICESCR in 1990, and it submitted its country reports to the UN Committee on Economic, Social and Cultural Rights (ICESCR Committee) in 1993 and in 1999. After having reviewed these reports, the committee raised numerous issues, but its overall assessment on both occasions was that despite Korea's impressive achievements in the area of economic development, it is not doing as much as it could to raise the level of economic, social and cultural rights enjoyed by its people.

The ICESCR Committee's Concluding Observations in response to the second country report started out by applauding Korea's relatively rapid recovery from the financial crisis that began in late 1997. It also pointed out, however, that the recovery may have come at the price of sacrificing the enjoyment of economic, social and cultural rights by a significant portion of the Korean people. In addition to the after-effects of the financial crisis, the committee drew attention to a number of factors that are impeding the enjoyment of the rights enshrined in the ICESCR. These included the National Security Law and the "fortress mentality" it enforces, the "economy-first" approach adopted by the government, and certain deeply rooted traditions and cultural prejudices. It therefore urged Korea to start allocating necessary resources commensurate with its high level of economic development to guarantee the fuller enjoyment of economic, social and cultural rights, as well as making efforts to ensure that these rights are not denied to certain groups of people in the name of tradition.[80]

Labor rights

Rights of the workers have been a point of contention for several decades, particularly during the era of state-led development when the government gave the highest priority to economic development and industrialization. The suicide death (self-immolation) in 1972 by a young textile worker named Jeon Tae-il has become a legend and an icon for the human rights movement devoted to improving labor conditions in Korea. He is said to have chosen this drastic mode of protest when his demands that his employer

observe the requirements of the Labor Standards Law fell on deaf ears. Many human rights advocacy groups were launched in direct response to this tragic incident.

While labor conditions and labor rights have improved considerably over the years, there are still a number of issues that are being fought over between labor, employers, and government. Many observers have noted the general militancy of labor unions and the hostile nature of labor disputes in Korea, yet it is also true that in the wake of the Asian financial crisis there have been increased demands for making the labor market more flexible by easing the conditions under which employers may lay off workers.

In order to deal with the labor issues arising from the financial crisis, in 1998 the government established the Tripartite Commission. Made up of representatives from labor, management, and the government, the commission agreed to allow companies to lay off workers in times of economic hardship. The UN Committee on Economic, Social and Cultural Rights expressed concern that as a result of the "overreliance on macroeconomic policies" implemented after negotiating with international financial institutions, there have been large-scale employee dismissals and lay-offs and a significant deterioration in employment stability.[81] Korean workers now have less job security than they used to, which is arguably a setback for labor rights. Yet, many have argued that the previous system of "lifetime employment" was at least partly responsible for reducing the competitiveness of Korean companies and perhaps even contributed to the financial crisis.

On the other hand, the government's stated policy of switching to a five-day working week for the entire country may be seen as an advancement of labor rights. This has been one of the long-standing goals of workers in Korea. When the government first seriously considered adopting this system in 2000, it hoped that the Tripartite Commission would reach a solution acceptable to workers and employers. When labor and management failed to reach an agreement beyond the basic goal of a forty-hour working week, the National Assembly took up the issue and passed legislation in 2003. The Labor Standards Act was thus revised to provide for a maximum regular workweek of forty hours, with higher wages for overtime. Despite shorter working hours, companies are not allowed to cut salaries, or force employees to work overtime. Meanwhile, a one-day monthly leave which used to be guaranteed under law has been eliminated and replaced by a system of annual leave to be set between fifteen to twenty-five days. The new system, however, is to be implemented in stages according to the size of the workplace and the type of work.[82]

One salient feature of the Korean labor market since the financial crisis is that the number of "irregular workers" has risen markedly. Irregular workers refer to part-time and short-term employees who contract to work for a fixed period. While they normally do the same work as regular workers, the treatment they receive from employers is considerably poorer. According to some surveys, irregular workers now account for more than 50 percent of

the entire Korean workforce. Their status and treatment are thus fast becoming a human rights issue, and the ICESCR Committee's Concluding Observations urged Korea to guarantee their rights under the ICESCR.[83]

Since the regular workers will not grant irregular workers membership in their trade unions, they are not able to negotiate collectively with their employers. Moreover, under current law, only one trade union may be formed for one workplace. In 1996, as Korea was preparing to become a member of the Organization for Economic Cooperation and Development, the Korean Government considered allowing multiple unions at the same workplace. Indeed, the law was amended in 1997 to authorize the formation of multiple competing unions. Implementation of that part of the law has been postponed until 2007, under the rationale that competing unions may cause confusion in the process of collective bargaining and that they might promote discord and dissension among workers.[84] Until irregular workers can form unions of their own, their wages and working conditions will likely continue to be well below those of regular workers. Recently, however, under pressure from human rights groups to accord better treatment to irregular workers, some companies have started to offer them the same package of wages and benefits as regular workers.[85]

Schoolteachers and government employees in Korea have traditionally been barred from establishing their own unions. This was the reason for Korea's decision, when ratifying the ICCPR, to make a reservation to Article 22, which declares that everyone except soldiers and policemen have the right to form unions.[86] In 1999, however, the government passed a law to allow teachers to form unions.[87] Teachers are, however, still prohibited from engaging in collective bargaining and in strikes. This was noted by the ICESCR Committee, which in its Concluding Observations urged the Korean Government to lift such restraints.[88] In response to the government's argument that allowing teachers to go on strike or to participate in collective bargaining is inappropriate because Korean society has traditionally bestowed a highly elevated status to teachers in Korean society, the committee stated that it is "inappropriate for the Government to assume the role of guardian of traditions that prevent the exercise" of this right.[89] The current Roh Moo-hyun Government has announced plans to legalize government employee unions as well, but as of this writing the enabling law is still being negotiated by the relevant parties.

Right to education

Article 31(1) of the Korean Constitution proclaims that all citizens "have an equal right to receive an education corresponding to their abilities," and section 3 states that "[c]ompulsory education shall be free of charge." The right to education is thus clearly provided for in the constitution. On the other hand, the same article also provides in section 2 that all parents have the duty to ensure that their children receive at least elementary education

and other education as provided by law. Not only do children have the right to receive education, but also their parents have the duty to provide education.

What was not clearly spelled out in the constitution was the parents' rights regarding the education of their children: the right to choose and define the substance of the education that their children will receive. Fortunately, the Constitutional Court has clarified this point. In a 2000 decision, the court held that the education of a child is in the first instance the right and duty of the parents. While the state may have an interest in regulating the education that the child receives at school, its claim is much narrower regarding education that takes place privately outside the school. This falls within the the parents' rights and the child's own right to express freely his or her individuality.[90] The court therefore held unconstitutional a statute which forbade extra-curricular lessons at private academies.

This case is actually a sad commentary on the state of public schools in Korea. As was pointed out by the ICESCR Committee, parents are spending exorbitant amounts of money on private lessons and tutors because they feel that the education that their children are receiving at public schools is inadequate.[91] This has created a sense of resentment among those who cannot afford such extra-curricular education because they feel that they are being left behind and that the already privileged rich people are being allowed to perpetuate their status by providing better education for their children. The government responded to this with an ill-considered decision to ban all private lessons and tutoring for students currently enrolled in school. From the very outset, this was severely criticized as a violation of the parents' right to educate and the students' right to receive education, but the government persisted with the policy, until the Constitutional Court pronounced it unconstitutional. At the same time, the court recognized the need to improve public education and urged the government to implement policies aimed at expanding educational opportunities for lower-income groups.

According to the Basic Law on Education, as amended in 2000, six years of primary school and three years of middle-school education are compulsory. The law, however, also states that not all three years of middle-school education will be free of charge immediately. Instead, it provides that the scope of free education shall be expanded gradually by taking into consideration the national financial situation.[92] So, notwithstanding the constitutional provision that proclaims unconditionally that compulsory education shall be free of charge, middle education was not provided completely free of charge – until now. Beginning in the year 2004, all three years of middle-school education are provided free of charge. In addition, the government recently passed a law on state assistance for pre-school education which provides that one year of education immediately before entering school will be made available free of charge beginning in 2007. When that is realized, ten years of schooling will be free for all citizens.

Right to medical care

Article 36(3) of the constitution provides: "The health of all citizens shall be protected by the state." The state in 1989 instituted a compulsory system of medical insurance for all citizens, in which people remit monthly insurance fees according to their finances, and receive benefits later in the form of co-payment when they receive medical treatments. Wage earners' fees are determined by their annual income for the previous year. The fees of non-wage earners such as those in the agricultural or fishing sectors or in self-employment are based on their property ownership and other considerations. Those who have no income or property are expected to be declared dependants of those who do.

Thus, at the beginning, there were two agencies for managing national health insurance, one based on workplaces for wage earners and another based on regions for self-employed people. The two agencies have since been merged into one National Health Insurance Corporation, but there is continuing debate because of the inherent difficulty in assessing and collecting the appropriate fee for those in the regional system. Indeed, as a result of the merger, wage earners, whose fees are far easier to assess, have in effect been subsidizing those who are assessed through the region-based system.[93] The issue of equity will continue to be controversial since national health insurance is compulsory and there is a sense that the fees constitute taxation.

When understood expansively, the right to medical care includes a right to demand proper treatment for disease from the state. This means, however, that the state may be in a position to micromanage the details of the patient's personal life. Therefore, provision of medical care by the state may come at a cost from the perspective of human rights. An example of this is Korea's legal framework concerning the management of AIDS/HIV. Korea's total number of HIV-infected persons is still quite small by world standards,[94] but nevertheless the new infection rate in 2003 passed one a day.[95] Korea was one of the first nations in the world to pass a special law to deal with the AIDS epidemic: the AIDS Prevention Law was passed in 1987 and the government has until now had a policy of providing free treatment to those infected with HIV. To critics, however, the law's main purpose is not the protection and treatment of AIDS patients, but rather their surveillance and management, which results in stigmatization and discrimination. In other words, the law may promote human rights violations. For example, the law prescribes mandatory testing for certain groups of people, and doctors and other medical professionals are required to report all cases of infection to the government. Thus, the state maintains a list of all HIV-infected people throughout the nation, including their names and other personal information, while putting relatively little effort into maintaining their confidentiality. Authorities may force patients to undergo treatment and even search their residence to ensure that they receive treatment. Furthermore,

HIV-infected people are prohibited from working in certain occupations, including ones where the risk of communicating the virus is low.

Conclusion

Korea is often regarded as an example of the Asian mode of development in which democracy is postponed until the economy has developed past a certain point. The argument is that without a viable economic basis, immediate implementation of liberal democracy and human rights will cause disorder and make everyone worse off. The harsh restrictions on, and sometimes blatant disregard for, human rights were made in the name of first securing economic prosperity. The notorious *Yushin* Constitution of Park Chung-hee used to be justified under the theory that such a system was needed to implement "Korean-style democracy." Long before Lee Kuan Yew preached the superiority of "Asian values" or Deng Xiaoping argued for socialism with "Chinese characteristics," Koreans were told that theirs was a system tailored to meet Korea's political and economic situation and therefore particularly well suited for their needs. Of course, this was not offered as a position on human rights or as a form of cultural relativist argument. Nevertheless, Koreans are quite familiar with the line of reasoning which puts a premium on the alleged uniqueness of their socio-political situation.

Perhaps this has been most obvious in the argument for restraint and restriction based on the need to protect the nation from communist aggressions. Given the unique geopolitical environment surrounding Korea, the threat from the North was easily utilized to create what critics have called a "national security ideology" which served to justify all sorts of human rights abuses. The National Security Law served as the legal basis for criminalizing even legitimate criticism of the government as well as the exercise of academic freedom. Thus, the supremacy of the twin ideologies of economic development and national security operated to suppress demands for human rights and to deflect criticism from outside Korea.

Fortunately, however, with democratic consolidation under way and with growing demands for more equitable distribution of the fruits of development, the government is slowly becoming more sensitive to issues of human rights. Yet, in the process of softening its devotion to the twin ideologies, the government is growing more and more sympathetic toward a different ideology, namely, nationalism. Interestingly, nationalism brings with it a tendency to emphasize the "uniqueness" of Korea and Korean people. For some, therefore, this nationalism is potentially as dangerous as the previous ideologies. In the political realm, this is most apparent in the growing assertion of "sovereignty" or "independence" in foreign relations, particularly with the USA. In the economic sphere, nationalism is expressed in terms of opposition to the many faces of globalization, including free-trade agreements, the opening up of service markets, and a more flexible labor market.

These demands for more nationalistic policies may be articulated in terms of human rights: independence in foreign policy is a natural extension of the right to national self-determination that is enshrined in the international human rights instruments. Opposition to trade liberalization is required if one is serious about protecting the subsistence rights of local farmers and manufacturers. Adoption of global standards in terms of labor policy must be opposed if we are to safeguard the rights of Korean workers. In these terms, a nationalistic outlook becomes all the more attractive and legitimate because it can readily assume the language of human rights. Only time will tell if the anti-globalization rhetoric will be directed at international human rights organizations as well. When that happens, local human rights advocates will find themselves pitted against their erstwhile allies.

Notes

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1 In this chapter, "Korea" will refer to the Republic of Korea, i.e., South Korea.
2 For example, the government signed the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1978, during the Park Chung-hee era. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been in force for Korea since 1985 when Chun Doo-hwan was still in power.
3 For a discussion about civil society and human rights in Korea from a historical perspective, see David I. Steinberg, "Civil society and human rights in Korea: on contemporary and classical orthodoxy and ideology," *Korea Journal*, vol. 37, no. 3, 1997.
4 See generally Cho Hyo-Je, "Human rights in Korea at the crossroads: a critical overview," *Korea Journal*, vol. 42, no. 1, 2002; Jang Dong-jin, "Hanguk-eui Ingweon Danche-wa Undong [Korean human rights organizations and movement]," *21-segi Jeongchihak Hoebo* [21st-Century Political Science Review], vol. 10, no. 2, 2001.
5 To highlight this aspect of the pre-modern Korean legal culture, one scholar has called it a society that offered "remedies without rights." William Shaw, "Korea before Rights," in William Shaw (ed.), *Human Rights in Korea*, Cambridge, MA: Harvard Council on East Asian Studies, 1991.
6 Chung Yong-hwa, "Confucianism and human rights: the reception of the concept of people's rights during the enlightenment period in Korea," *Korean Social Science Journal*, vol. 27, no. 2, 2000.
7 Vipan Chandra, "Korean human-rights consciousness in an era of transition: a survey of late nineteenth-century developments," in Shaw, *supra* note 5.
8 On the other hand, recent scholarship has questioned the conventional view that the Japanese colonial legal system was characterized by sheer oppression, arbitrariness, and backwardness. Employing Foucaultian notions of discipline as a modern form of power, Chulwoo Lee seeks to show that the colonial law had its own form of regularity and even "modernity" in that it served as a conduit for disseminating state power throughout the country and into the people's daily lives. Chulwoo Lee, "Modernity, legality, and power in Korea under Japanese rule," in Gi-Wook Shin and Michael Robinson (eds), *Colonial Modernity in Korea*, Cambridge, MA: Harvard University Asia Center, 1999.

9 The fact that the US occupying forces in the South ended up employing the service of Koreans who had worked in the Japanese colonial administration, particularly the police force, did not help the South's nationalist credentials. Also, the first president Syngman Rhee is still criticized for having thwarted, for political reasons, the efforts of the National Assembly to punish collaborators. By contrast, in the North, Kim Il Sung is said to have identified and punished the collaborators immediately after taking power with the support of Russians.

10 For example, president Park Chung-hee's decision to normalize relations with Japan in 1965 – "merely" twenty years after the end of their rule – was seen as an affront to the *esprit de nation*, particularly because the decision was made in large part to obtain from Japan the loans and other economic assistance needed to jump-start the process of economic development. From this perspective, the fact that the communist regime in the North to this day refuses to establish diplomatic ties with Japan further hurts the South's legitimacy.

11 In fact, this was the second time that South Korea chose not to join the other nations at the United Nations in condemning North Korea's human rights practices. In 2003, when a similar resolution was proposed for the first time, South Korea did not even participate in the vote, whereas in 2004 it did participate but cast a vote of abstention. See Don Kirk, "South Korea abstains from vote assailing North on rights," *New York Times*, April 16, 2003. For a justification of the government's decision, see Ministry of Foreign Affairs and Trade, "Explanation of vote by the Republic of Korea on the human rights situation in the Democratic People's Republic of Korea," April 15, 2004, www.mofat.go.kr/ko/index.mof.

12 The article also goes into considerable detail specifying the requirement for warrants, the right to counsel, right to request court's review of detention, and the principles regarding admissibility of confession as evidence. This was the result of extensive discussion and revision during the drafting of the current constitution, which derived from the recognition that the right to physical integrity had been frequently violated under previous authoritarian regimes.

13 For a critical review of the many human rights abuses that took place under Park Chung-hee's and Chun Doo-hwan's administration, see Jerome Cohen and Edward J. Baker, "US foreign policy and human rights in South Korea," in Shaw, *supra* note 5.

14 Article 2 of the Special Law on the Verification of Truth regarding Suspicious Deaths defines "suspicious death" as "death related to democratization movement, whose cause has not been determined and surrounding which there are reasonable cause to suspect the involvement (direct or indirect) of unlawful exercise of state power." (Law No. 6170, enacted January 15, 2000, as revised by Law No. 6750, 5 December 2002.)

15 For a discussion of human rights issues relating to the so-called "ideology conversion," see pp. 275–8 dealing with freedom of thought, conscience, and religion.

16 "Presidential panel causes stir over NK spies," *Korea Times*, July 2, 2004.

17 "Compensation for North Korean spies rejected," *Korea Times*, July 6, 2004.

18 Law on the Restoration of Honor and Compensation for the Victims of the Samcheong Gyoyuk (Law No. 7121, enacted January 29, 2004).

19 Law on the Compensation for Members of the Kwangju Democratization Movement (Law No. 6122, enacted January 12, 2000); Law on the Restoration and Compensation for Members of Democratization Movement (Law No. 6123, enacted January 12, 2000); Special Law on Verification of Truth Regarding the April 3rd Jeju Incident and Restoration of the Victims' Honor (Law No. 6117, enacted January 12, 2000).

20 In fact, in March 2004, the National Assembly already passed a "Special Law on the Investigation of Truth Regarding Pro-Japanese, Anti-Nationalist Activities

During the Japanese Colonial Period" (Law No. 7203, enacted March 22, 2004), but the Roh Government is seeking to expand the scope of people to be investigated.

21 "Bill targets ex-President Park as pro-Japan collaborator," *Korea Times*, July 13, 2004.
22 "Assembly to address suspicious deaths," *Korea Times*, July 23, 2004.
23 Needless to say, for many, this also brought back memories of the 1987 torture and death of the Seoul National University student Park Jong-cheol at the police headquarters. News of this tragic disregard for a person's basic human rights in April 1987 precipitated the outpouring of popular demands for democracy, culminating in the so-called June Uprising of 1987, which in turn forced the Chun Doo-hwan Government to accept the demands for constitutional revision and democratic transition.
24 The prosecutor and the investigators in the case have been charged and convicted of homicide resulting from unlawful arrest, as well as violence and cruelty in the performance of law enforcement duties.
25 For a critical discussion of the recent changes to Korean criminal procedure law, see generally Kuk Cho, "The unfinished 'criminal procedure revolution' of post-democratization South Korea," *Denver Journal of International Law and Policy*, vol. 30, 2002, p. 377.
26 "Gomun-chisa, teojil il teojeotda," [Torture resulting in death: it was bound to happen], *Jugan Dong-A* [Dong-A Weekly], November 13, 2002.
27 Korean Constitution, Article 37, §1,
28 Korean Constitution, Article 37, §2.
29 Case No. 92 HeonGa 8 (December 24, 1992).
30 Korean Constitution, Article 76. For a discussion on a Constitutional Court case concerning the validity of a presidential order issued under this article, see Hahm Chaihark, "Rule of law in Korea: rhetoric and implementation," in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law*, London: RoutledgeCurzon, 2002, pp. 385–416.
31 See Korean Constitution of 1980, Article 51; Korean Constitution of 1972, Article 53.
32 Korean Constitution, Article 77. According to the Martial Law Code, when the National Assembly is not in session, the president must immediately request the convening of a session. Martial Law Code, Article 4, §2.
33 Citing this constitutional provision, the government when ratifying the ICCPR made a reservation to Article 14(5) of the Covenant, which provides that everyone convicted of a crime shall have the right to appeal to a higher tribunal.
34 Korean Constitution, Article 110, §4.
35 See, for example, Supreme Court Case No. 79 Cho 70 (December 7, 1979) (describing the president's act of declaring martial law as a highly political and military act unfit for judicial review, and as an act whose propriety may only be judged by the National Assembly which by the constitution has the power to demand the lifting of martial law).
36 Case No. 93 HeonMa 186 (February 29, 1996). For a discussion of this case's significance in the process of implementing rule of law in Korea, see Hahm, *supra* note 30.
37 This was facilitated by the Special Law on the May 18th Democracy Movement, which was originally passed in the process of indicting and convicting the former Presidents Chun Doo-hwan and Roh Tae-woo for treason, insurrection, and corruption. For more on the trial of Chun and Roh, see James M. West, "Martial lawlessness: the legal aftermath of Kwangju," *Pacific Rim Law and Policy Journal*, vol. 6, 1997, pp. 85–168.

38 Perhaps due to the fact that these people are called "conscientious" objectors, the legal discourse in Korea has focused on whether the constitutionally guaranteed freedom of conscience (Article 19) is or is not applicable to them. Relatively few arguments have been made which are based on the constitutional provision on the freedom of religion (Article 20).
39 Supreme Court Case No. 2004 Do 2965 (July 15, 2004). Yet, even in this case, a number of the justices argued for the need to institute a system of alternative, non-military service. See, generally, "Court rules against objectors: national security placed above religious faith or conscience," *Korea Herald*, July 16, 2004.
40 Case No. 2002 HeonGa 1 (August 26, 2004).
41 Korean Constitution, Article 8, §4. In Germany the same principle was invoked to declare the Communist Party unconstitutional. By a decision of the German Constitutional Court, the party was dissolved and its properties confiscated.
42 The Ministry of Justice argued that in actuality the oath is not a requirement (i.e., a *quid pro quo*) for pardon or parole, but rather merely one of many factors the government considered when deliberating on the prisoner's file. It stated that just as submitting the oath does not guarantee release, so some prisoners are released even without submitting one.
43 Case Nos. 98 HeonMa 425, 99 HeonMa 170, 99 HeonMa 498 (April 25, 2002) (consolidated).
44 "Pledge to abide by law repealed," *Korea Herald*, July 9, 2003.
45 "Open letter to Acting President Goh Kun – continued use of the draconian National Security Law: Amnesty International's concerns about Professor Song Du-yul's case," April 3, 2004, AI INDEX: ASA 25/003/2004; http://web.amnesty.org/library/print/ENGASA250032004.
46 See the next section dealing with freedom of speech for more discussion on the specifics of the National Security Law.
47 Seoul High Court Case No. 2004, 827 (July 21, 2004).
48 Amnesty International, "Republic of Korea (South Korea): time to reform the National Security Law," February 1, 1999, AI INDEX: ASA 25/003/1999. The UN Human Rights Committee has also recommended the NSL's repeal: "Concluding Observations of the Human Rights Committee: Republic of Korea", CCPR/C/79/Add.114, paras 8 and 9. See also US Department of State, "Korea, Republic of: country reports on human rights practices for 2003."
49 Articles 7 and 10.
50 Case No. 89 HeonGa 113 (April 2, 1990).
51 Moreover, in Article 1, which states the objective of the law, a new paragraph was added to declare that the law shall not be interpreted expansively or used to restrain the people's basic human rights guaranteed by the constitution.
52 For a critical overview of the National Security Law, see Kuk Cho, "Tension between the National Security Law and constitutionalism in South Korea: security for what?," *Boston University International Law Journal*, vol. 15, 1997, p. 125.
53 Minjuhwa Silcheon Gajok Undong Hyeopeuihoe [Council of Families of Democratization Movement], "Chamyeo Jeongbu Chulbeom 9 Gaewol Gukgaboanbeop Jeokyongsiltae Bogoseo" [A report on the application of National Security Law in the first nine months of Roh Moo-hyun Government], http://minkahyup.org/kbreport/list.php?code=kbreport. According to this report, this number is relatively small since even during Kim Dae-jung's presidency, there were more than one hundred people arrested each year for NSL violations. Yet the report criticized the courts for accepting all the charges brought by the prosecutors.
54 See, generally, Kyu Ho Youm, "Freedom of expression and the law: rights and responsibilities in South Korea," *Stanford Journal of International Law*, vol. 38, 2002, p. 123.

55 Case No. 97 Da 34563 (May 8, 1998).
56 Case No. 2002 Da 64384 (July 8, 2003).
57 The three are *Chosun Ilbo, Joong-Ang Ilbo*, and *Dong-A Ilbo*. The first and the last are the oldest newspapers in Korea, having been in operation since the 1920s and they pride themselves as having contributed in their own way to the enlightenment of the Korean people and to the nationalist cause at the time.
58 In fact, his predecessor Kim Young-sam also ordered tax audits of the major newspapers and broadcast companies, but this was not seen as a reflection of an ideological fight.
59 See generally Jay Solomon, "As South Korea fines major media firms, some fear autocracy," *Wall Street Journal*, July 10, 2001; Seung-Mock Yang, "The media tax probe and the media reform movement in South Korea," *Harvard Asia Quarterly*, vol. 6, no. 1, 2002.
60 A number of high-ranking officials in the Roh administration, including its first Minister of Culture and Tourism, have openly discussed the idea of instituting a system of common delivery for all the newspapers. The argument is based on the idea that the conservative newspapers' disproportionate influence derives from their network system of delivery, which is made possible by their "unfair" advantage in capital and personnel.
61 "Roh goes all out in his 'war on media'," *Korea Times*, August 13, 2003.
62 "President Roh suspends libel suit against newspapers," *Korea Times*, September 27, 2003.
63 "Resolution on South Korea," passed by the 52nd IPI General Assembly, Salzberg, Austria, September 15, 2003, http://www.freemedia.at/index1.html. As expected, politicians loyal to Roh criticized the resolution as based on lack of understanding of the Korean press, while the opposition utilized it to put more pressure on the president. See "Parties clash over IPI's resolution on Roh's media policy," *Korea Times*, September 25, 2003.
64 Article 21.
65 Law on Assembly and Demonstration, Law No. 07123, as revised January 29, 2004.
66 Article 10. The article does recognize an exception for assemblies that by their nature must be held before sunrise or after sundown, and authorizes the police to allow such events on condition that the organizers assign "order-maintenance" personnel and take responsibility in the event of any disruption of order during the assembly or demonstration.
67 Art. 6(1).
68 Art. 5(1).
69 Art. 11.
70 Art. 12.
71 Case No. 2000 HeonBa 67, 2000 HeonBa 83 (judgment of October 30, 2003) (consolidated).
72 Art. 8(3).
73 Art. 18(1).
74 Art. 12(2).
75 Asian Human Rights Commission, "Republic of Korea: the revision bill of the Law on Assembly and Demonstration clearly violates the right to expression," December 8, 2003, http://www.ahrchk.net/ua/mainfile.php/2003/510/.
76 "Groups plan 'civil disobedience': revised Law on Assembly/Demonstration stirs controversy," *Korea Times*, March 4, 2004.
77 "Controversy erupts over legality of candlelight vigils," *Korea Times*, March 16, 2004.
78 The current German Constitution, or Basic Law, is also understood to embody this principle of *Sozialstaat*. For a discussion of the basic principles or values underlying the current German Constitution, see Donald P. Kommers, *The*

Constitutional Jurisprudence of the Federal Republic of Germany, Durham, NC: Duke University Press, 1997.

79 More specifically, the court said that, in cases where the constitution has explicitly delegated to the legislature the authority to pass laws necessary to protect constitutionally guaranteed rights, or in cases where a particular right accrues to a specific individual through a proper interpretation of the constitution and it is clear that certain action by the state is required to protect that right, the state's failure to enact the necessary laws may become a proper subject matter for a constitutional petition. Case No. 89 HeonMa 248 (September 27, 1993).

80 "Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea", May 21, 2001, E/C.12/1/Add.59 (hereafter, ICESCR Committee's concluding observations).

81 *Ibid.*, at para. 12.

82 Employees in the financial sector as well as workers at public enterprises and other workplaces with 1,000 employees or more have already started to benefit from the new system since July 2004. "Five-day workweek begins amid mixed responses," *Korea Times*, July 1, 2004. The five-day working week will apply to smaller enterprises with more than 300 workers in July 2005, those with more than 100 in July 2006, those with more than 50 in July 2007, and those with more than 20 in July 2008. It will be applied to enterprises with less than 20 employees by 2011, with the specifics to be set out in a presidential decree. Labor Standard Act, Addenda, Article 1 (Law No. 6974, as revised September 15, 2003).

83 ICESCR Committee's concluding observations, *supra* note 80, para. 17.

84 Trade Union and Labor Relations Adjustment Act, Addendum, Article 5 (Law No. 6456, as revised March 28, 2001).

85 "Kumho tire gives part-time workers full-time status," *Korea Times*, April 29, 2004.

86 On the other hand, Korea did not make any reservations when it was ratifying the ICESCR even though Article 8 of this treaty guarantees the same right in more detail. Indeed, Korea did not make any reservations to ICESCR and this is a reflection of the Korean Government's (incorrect) understanding at the time that the rights contained therein do not entail any immediate government obligation to implement them. Jeong In-seop, "Gukje Ingwon Gyuyak Gaip 10 nyeon-eui Hoego" [Ten Years After Ratification of International Human Rights Instruments], *Gukje Ingwonbeop* [International Human Rights Law], vol. 3, 2000, pp. 1–34.

87 Law on the Formation and Operation of School Teachers' Union (Law No. 5727, enacted January 29, 1999).

88 The same point was also raised by the Human Rights Committee in response to Korea's country report submitted under the ICCPR. "Concluding Observations of the Human Rights Committee: Republic of Korea", November 1, 1999, CCPR/C/79/Add.114, para. 19.

89 ICESCR Committee's concluding observations, *supra* note 80, para. 19.

90 Case No. 98 HeonGa 16 (April 27, 2000).

91 ICESCR Committee's concluding observations, *supra* note 80, para. 27.

92 Basic Law on Education, Article 8, para. 1 (Law No. 07071, as amended January 20, 2004).

93 "Workplace health insurance's first-ever profit of 850 billion to be used to cover region's deficits," *Chosun Ilbo*, August 31, 2004 (in Korean).

94 As of March 2004, there were 2,679 people who were reported to be infected.

95 In 2003, 535 people were newly infected.

9 The implementation of human rights law in Taiwan

Frederick Chao-Chun Lin

The two interrelated goals of this chapter are to explain how human rights law has been implemented in Taiwan, and to analyze the rationales behind various outcomes and developments. I hope to illustrate the characteristics and essence of human rights in Taiwan, indicating the strengths and weaknesses of its human rights law.

Introduction

The concept of human rights[1] is a modern one. Although historically the origins of the term "human rights" can be traced as far back as Thomas Paine's influential book *The Rights of Man* in the late eighteenth century, the expression "human rights" became popular only after the Second World War, when those who drafted various international human rights treaties promoted and contributed to these fundamental rights. Despite the fact that the US Bill of Rights and the French Declaration of the Rights of Man and the Citizen set a precedent more than two centuries ago for the transformation of human rights from a matter of natural law into national positive law, the practice of inserting domestic bills of rights in state constitutions is also a legacy of the Second World War.[2] The story of human rights gaining a more universal status is even more recent, occurring only after the demise of the former communist bloc in Eastern Europe. After half a century of trials and tribulations, the claim that human rights are a normative ideal in today's international society is perhaps taken for granted by the average person, hence the common use of the concept of human rights in accusing states of violations of human rights.

Indeed, the prevalence of discourse about human rights in many parts of the world has led scholars to argue that the signing by countries, especially non-Western countries, of international human rights treaties or the incorporation of human rights into many domestic constitutional bills of rights implies agreement exists among various nations on the issue of human rights.[3] Consequently, for scholars, the real challenges are "what material and political resources are available for their implementation" and "how effective are the processes of enforcement."[4] While such a view is basically sound, we

need to go further in establishing an effective human rights law system in non-Western countries. Despite the symbolic transcultural consensus represented by the various international conventions of human rights and domestic constitutional bills of rights, the difficulties in implementing human rights law are formidable. First, how does a domestic bill of rights become a real foundation for the protection of human rights? How does a court in a non-Western country determine the scope and limitations of various rights? How valid are the rationales behind the interpretation of various rights? What factors can be used to evaluate the strengths and weaknesses of a country's human rights jurisprudence?

Taiwan's experience in implementing the constitutional bill of rights provides an initial response to these foregoing questions, and demonstrates the challenging process of building and refining a local human rights law system for the jurisdiction. But before going into more in-depth analysis, I shall first describe the context, the development, and the problems of enforcing human rights in Taiwan.

The context of implementing human rights law in Taiwan

Three general issues bear on the problems Taiwan faces when implementing human rights law.

First, Taiwan is a country without a major element of Western civilization: a Judeo-Christian tradition. The modern concept of human rights, which may be traced to the Western system of values as far back as ancient Greece and Rome, is also closely related to religious and natural-law doctrines such as those developed by St Thomas Aquinas. Lacking such a tradition, Taiwanese have difficulty grasping the value of human rights.

Second, Taiwan is a country which has transplanted most of its jurisprudence from foreign legal systems. This distinguishes Taiwan from Germany and Italy, which introduced the system of constitutional protection of human rights and judicial review after the Second World War without abandoning their own legal traditions. A country that imports legal ideas is very different from a country that is capable of addressing the issue of human rights within its own legal tradition. Like the transfer of high-tech machinery, the transfer of foreign legal systems is not easy. Therefore, it is easier for Germans or Italians than for Taiwanese to develop their own systems of human rights protection.

Third, in Taiwan, an originally dormant constitutional system of human rights protection and judicial review began to be used in the process of political and legal reform, even while the former ruling party – the Nationalist Party (KMT) – was still in power. What distinguishes Taiwan from Eastern European countries is that its transformation took place not only under the existing constitution and judicial institutions, but also under the rules of the authority it challenged, the KMT. By contrast, the collapse of communist regimes in Eastern European countries, particularly the disintegration of the

former Soviet Union, marked the beginning of a completely new era in the building of constitutional democracy.

The historical development of constitutional law in the Republic of China

Although a constitutional bill of rights has existed in Taiwan, the Republic of China (ROC), since 1947, it only began to function effectively as the basis of the protection of human rights in the past decade. The very fact that it took forty years for the ROC Bill of Rights to become the foundation for protecting people's basic rights indicates the difficulties of implementing human rights in Taiwan. In this regard, it is important to understand the effect that the ROC constitutional framework has exerted on the enforcement of human rights, because certain elements that existed prior to the birth of the ROC Constitution deeply influenced the later practice of human rights in Taiwan. Among these factors, the motive behind the promulgation of the ROC Constitution and the environment surrounding its enactment are most significant.

The major difference between the constitutions of the ROC and its major Western counterparts lies in the motivation for enacting them. As Professor William Alford points out, the foremost goal of every "pro-democratic movement" in China after the Opium War was not to protect its people's freedom, but to maintain the collective good and reform the country.[5] In other words, maintaining national security and stability, rather than securing the liberty of individuals, was the main purpose of the ROC Constitution at its inception.[6]

After China's defeat by the British Empire in the Opium War in 1842, the Chinese people refused to admit that the cause of their defeat lay in the weakness of their entire social and political system. The common belief that Westerners excelled only in technology and science gave rise to the famous saying of the early Chinese reformers: Chinese learning for substance, Western learning for use.[7] Accordingly, after a subsequent series of defeats by Britain and France in the 1850s, the Qing Dynasty launched the "Self-strengthening Movement,"[8] by which it endeavored to introduce Western technological skills and industrial knowledge, particularly those relating to weapons and ships. The imperial government also set up institutions to teach foreign languages.

Not until China's defeat by Japan in the Sino-Japanese War of 1894–5 did the Chinese realize that its attempt to advance technologically was futile.[9] Furthermore, Japan's victory in its war against Russia in 1905 aggravated the Chinese people's sense of disgrace and humiliation, for they understood that a more complete transformation, including the modification of the thousand-year-old political tradition, was needed in order to save China. In the opinion of most intellectuals, its adoption of a Western-style constitutional framework was one of the reasons that Japan became the

dominant power in the East Asian region.[10] Hence the fervent appeal among Chinese intellectuals for the establishment of a Western-style constitutional government ever since the later part of the Qing Dynasty.

After the establishment of the Republic of China in 1911, this trend continued. Sadly, although successive constitutions were adopted,[11] none was effective due to a series of civil wars. Why did the warlords with little knowledge of Western constitutionalism want, at least symbolically, to enact a Western-style constitution? Certainly, their desire was a legacy of the idea in the late Qing that a Western-style constitution could rescue China, when the warlords thought that to rule China, leaders must demonstrate sincerity by enacting a constitution. In a context where politicians deemed a constitution to be a political tool for appeasing opponents and winning public support rather than an instrument for the protection of people's fundamental rights, how can the constitution created by these politicians be expected to serve as an effective foundation for people's "life, happiness and liberty"?

The transformation of human rights law in Taiwan

The Grand Justices of the Judicial Yuan

The Grand Justices of the Judicial Yuan – the Constitutional Court in Taiwan – have played a central role in the transformation of human rights that has taken place in the last decade in the region. Under Professor Mauro Cappelleti's famous classification of judicial review, the system of judicial review in Taiwan, the Republic of China, is a decentralized system,[12] with the Grand Justices of the Judicial Yuan the only institution exercising the power of judicial review. There are fifteen Grand Justices,[13] whose appointment is based on nomination by the president followed by confirmation by the Legislative Yuan (according to the latest amendment).[14] Each of the Grand Justices serves a non-renewable term of eight years.

Three essential facts about the jurisdiction of the Grand Justices in human rights protection should be mentioned. First, as in the case of the *certiorari* power of the US Supreme Court, the Grand Justices can decide which cases are to be entertained on the basis of their merits.[15] Second, the Grand Justices may issue constitutional interpretations; they may also unify the interpretation of ordinary statutes and regulations when lower courts or administrative branches have adopted divergent interpretations of the same provision.[16] Delivering constitutional interpretations is an exercise of the power of judicial review, a task of a more political nature than unifying interpretation.[17] The growing number of constitutional interpretations is highly relevant to the protection of human rights. Third, the jurisdiction of the Grand Justices falls within "abstract judicial review," which imposes limitations on petitions brought by individual citizens. It is thus necessary to distinguish between petitions submitted by individuals and non-individuals.[18]

The increasing availability of constitutional review and the increasing willingness on the part of citizens to challenge doubtful laws signal the growth of an open society in Taiwan.

The quantitative transformation

Four statistics are worthy of attention. The first reflects the huge increase in the workload of the Grand Justices, especially that generated from the petitions submitted by individuals. In the first term of the court (from October 1949 to October 1958), there were only 226 petitions by individuals. Three decades later, 2,626 individual petitions were filed during the fifth term (from October 1985 to October 1994): a tenfold increase.[19] Second, there is an increasing number of petitions for constitutional interpretation. In the first term, such petitions only accounted for 7.75 percent of the workload of the Grand Justices, whereas today, such petitions account for 88.93 percent.[20] Third, there has been an immense increase in the number of interpretations applied for by individuals. Before the fourth term, only one petition by an individual was filed with the Grand Justices, but within the first half of the last term, the Grand Justices delivered interpretations in seventy-four cases brought by individuals,[21] which is an encouraging sign. Fourth, the huge increase in the number of interpretations involving constitutional issues is a final indicator of quantitative transformation. In the first three terms, cases seeking constitutional interpretation accounted for barely 20 percent of all decisions. In the last term, such cases rose to nearly 98 percent.[22]

The workload of the Grand Justices has thus increased significantly, mainly due to applications by individuals, particularly those seeking constitutional interpretation. Since most individual petitions for constitutional interpretation involve human rights issues, the protection of human rights in Taiwan has evidently expanded considerably at least from the quantitative perspective.

The qualitative transformation

The qualitative transformation of human rights in Taiwan is signified by the Grand Justices' efforts to review statutes enacted by the old regime and to declare some of them unconstitutional. These efforts have resulted in three salient outcomes. First, the Grand Justices, through their interpretations, have enhanced the procedural protections in criminal, civil, and administrative law.[23] One common phenomenon in these reforms is that the Grand Justices have stressed the importance of oral arguments in criminal and administrative procedure, so as to give parties a better chance to present their cases. In particular, the Grand Justices have applied the US doctrine of due process of law in strengthening procedural protection.[24]

Second, the Grand Justices have expanded the protection of the rights of civil servants, military officers, and students in public schools. In the past,

on the basis of pre-war German administrative law theory and because of their special relationship with the government, the rights of these groups to take the government or any public agency to court were restricted. As a result of a series of interpretations since 1984, these groups have gained the right to appeal to the judiciary through an administrative procedure to protect their rights and interests against the government.[25] Third, in recent years the Grand Justices have touched upon some fundamental rights that had not been dealt with before in Taiwan but which had already been widely litigated in major Western countries. They include personal freedom,[26] freedom of speech,[27] rights to assembly and association,[28] academic freedom,[29] gender equality,[30] and freedom of religion.[31] To a large extent, the scope of every fundamental right has come under consideration by the Grand Justices. Although some Taiwanese scholars have criticized the reasoning in some of these cases,[32] there is no doubt that the Grand Justices gave a jump-start to the protection of human rights in the past decade.

The legitimacy of judicial review

One of the significant developments in constitutional law in Taiwan is that the issue of the legitimacy of judicial review has gradually come to the fore. Along with democratic developments, the Grand Justices have played an increasingly active role in the protection of human rights. In the fifteen years since 1987, the Grand Justices were the main force behind the facilitation and consolidation of the democratic movement and the protection of human rights in Taiwan. Legislators often petitioned the Grand Justices for the review of statutes enacted in the authoritarian era, thus creating a cooperative relationship between the Grand Justices and legislators that has improved the protection of human rights in Taiwan. The Grand Justices and the legislators agreed about the abolition of illegitimate laws, so the legitimacy of judicial review was not originally an issue. After Taiwan became more democratic, however, especially after President Chen Shui-bien came to power in 2000, there have been more debates about the role of the Grand Justices and their relationship with the political branches. The various branches compete for power in the new democratic polity.

Many developments have contributed to these debates. First, since Taiwan has become more democratic, the will of the majority of the people may now be carried out, so reliance on the Grand Justices may become less important. Second, since there has been a divided government in Taiwan in recent years, with different political parties controlling the executive and legislative branches, the issue of the separation of powers has become more important. Third, while the Grand Justices have established their reputation as the protectors of the constitution, the political nature of their role has become more widely understood. Although the present situation in Taiwan does not entail the severe problem referred to by Professor Alexander Bickel as the "counter-majoritarian" difficulty,[33] the process of appointing new Grand

Justices in 2003 suggests that all political forces in Taiwan recognize the significant political role that the Grand Justices now play in the system of government.

The Grand Justices' approach to constitutional interpretation

The characteristics of the interpretative approach adopted by the Grand Justices can be illuminated by the concepts of originalism and non-originalism that dominate US constitutional jurisprudence, and by contrasting it with Professor Cass Sunstein's "judicial minimalism."[34] Generally speaking, when dealing with issues of the separation of powers, the Grand Justices prefer to apply originalism. When interpreting the constitutional bill of rights, however, the Grand Justices favor non-originalism,[35] probably because the bill of rights is too simple and ambiguous. Compared with their US counterparts, the Grand Justices in Taiwan are more willing to invoke grand theory. For example, in one interpretation,[36] they introduced the US jurisprudence of due process of law, which is a product of more than one hundred years' development, attempting to use it as the foundation for the reform of the criminal procedure law. In another case,[37] the Grand Justices applied several US First Amendment doctrines: the distinction between content-based and content-neutral regulations, the principle of clear and present danger, and the principle of public forum.

Physical integrity rights, due process, and criminal procedure

Although extra-judicial killings, disappearances, torture and arbitrary detention occurred when the KMT first came to Taiwan,[38] the enhancement of personal liberty and physical integrity is the most highly visible of the various human rights in Taiwan. Taiwan receives the highest level-1 score on the Political Terror Scale.[39] In a related development, the ROC Criminal Procedure Law has undergone a major overhaul since the mid-1990s, with reforms introducing various elements of the Anglo-American adversarial system. Another main reform of the criminal justice system related to the police power to stop and frisk people. One controversial issue relating to personal integrity rights in Taiwan today concerns the process for the restriction of the personal liberty of non-criminals such the homeless, the mentally ill, and minors. All of these reforms have been heralded by critical interpretations of the Grand Justices. Among them, Interpretations 384, 392, and 539 are the most influential. Two of these interpretations will be introduced below, followed by further discussion of issues of criminal justice in Taiwan.

The interpretations

The importance of Interpretation 384 lies in the fact that it applied the US doctrine of due process of law in declaring a specific criminal procedure

law unconstitutional. The Grand Justices emphasized that any procedure that restrains the liberty of the person has to provide the person with a chance "to be confronted with the witness against him." Borrowing from US due process jurisprudence, the Grand Justices held that any process involving the deprivation of personal liberty must meet the requirements of due process.

Interpretation 392 consolidated as well as expanded the reform of criminal justice initiated by Interpretation 384. While Interpretation 384 dealt mainly with the definition of what constitutes due process in a criminal trial, Interpretation 392 relates to preliminary criminal procedure, declaring that only judges – and not prosecutors – have the power to determine whether to take individuals into custody, a significant departure from the traditional concept that deemed prosecutors part of the judiciary and gave them the power to order detention. Since this Interpretation, some compulsory powers originally enjoyed by prosecutors have been transferred to judges.

The reform of the criminal procedure: introducing the adversarial system

To try to calm the opposition, the judicial authority in Taiwan called the current criminal procedure a "modified version of the adversarial system," but whether it is a purely adversarial system or a modified one, the current criminal procedure is now significantly different. The most significant development is that the compulsory powers of the prosecutors have been whittled down. Today, if prosecutors want to take a person into custody, or conduct a search, or seize the property of any suspect, they must first obtain a warrant from a judge. Only the power to detain suspects remains in the hands of prosecutors. This downgrading of the role of prosecutors in Taiwan's criminal justice system laid the foundation for the switch toward the adversarial system.

A fundamental change in trial procedure is the introduction of cross-examination. In the past, judges interrogated the suspects or defendants, and criminal procedure was a formality without substantial confrontation or debates between the parties. In addition, suspects and defendants now have the right to remain silent in the preliminary stages of criminal procedure as well as during the trial (the right not to testify against oneself), while police officers, prosecutors and judges have the obligation to inform suspects or defendants of their right to silence (the *Miranda* rule in the USA). The exclusionary rule in evidence and a defendant's right to counsel have been expanded. Furthermore, with the introduction of cross-examination in 2003, hearsay rules have been established, and in 2004 a plea-bargaining process was introduced.[40]

Despite these similarities with the US system, some differences remain. Most notably, Taiwan does not have the jury system, which not only plays a key role in the American system but also forms the backbone of some of the mechanisms mentioned above.[41] The hearsay evidence rules in Taiwan

are not as comprehensive as those in the USA. Moreover, some important elements of the adversarial system have not been incorporated into Taiwan's criminal procedure. For example, because the current law only punishes witnesses for perjury and only entitles defendants to the right to remain silent, the defendant's statement during the trial is not treated in the same way as the statements of the witnesses.

Two current issues

The reform of criminal procedure has met with some resistance in Taiwan. One problem is that the introduction of the adversarial system has increased the already heavy workload of judges, at least temporarily, because it takes more time to complete the proceedings in cases. At the same time, although practicing lawyers embraced the introduction of the adversarial system in Taiwan, they subsequently found it hard to defeat prosecutors in cross-examination, or simply lost money because fewer cases went to trial after many cases were screened out by the recently reformed pre-trial procedures.

The other issue relates to the protection of non-criminals' personal liberty, because of the Grand Justices' emphasis in interpretation 384 on equal protection for both criminals and non-criminals. Questions were then raised about Article 8 of the ROC Constitution and the due process doctrine as it applied to non-criminals such as the mentally ill, the homeless, and minors. These issues have not so far been resolved.

Civil and political rights

Political participation

The current challenge facing Taiwan is not the decision whether to embrace the ideals and benefits of democracy, but the decision about what kind of democratic system can best guarantee the protection of human rights and secure the right of political participation for its people. Three aspects remain to be tackled. First, what kind of separation of powers should be adopted in Taiwan? Second, what kind of electoral system would be most suitable for Taiwan? Third, what is the appropriate size of the legislature given Taiwan's situation as a divided society? These three issues are actually intertwined, for to avoid a zero-sum game within a profoundly divided society, the challenge is to design a system that reflects the voices of different political groups more fairly.

The system of separation of powers

The most important process of political participation for people is that of determining the highest executive authority in a country, that is, the president or prime minister. The people's right to elect their preferred candidate

depends in turn on the design of the system of the separation of powers. From the inception of the ROC Constitution, discussion about which system of separation of powers to adopt has taken place, though the issue is more theoretical than practical. The picture changed after the Democratic Progressive Party (DPP) came to power in 2000, making the question about what kind of separation of powers to adopt difficult for Taiwan's people.

The presidential election of 2004 further prompted the question of whether a presidential or a parliamentary system would be more appropriate for Taiwan's current situation as a divided society. Some argue that the presidential election is a zero-sum game, since essentially "the winner takes all." Such a result is difficult for supporters of the losing party to accept, especially in a deeply divided society. Arguably, a parliamentary system would generate a better result.

Congressional reforms

One further issue relating to the people's political participation is the reform of the electoral system. Of two interrelated problems, the first concerns the size of the legislature and the other whether Taiwan should adopt a first-past-the-post system or a combination first-past-the-post and proportional representation system.

According to the original ROC Constitution, the people would elect members of three institutions, namely, the National Assembly, the Control Yuan, and the Legislative Yuan. However, after a series of constitutional amendments in the 1990s, the Legislative Yuan is the only remaining institution to serve as the legislative branch of government, and now more powerful than ever. Regrettably, the performance of the Legislative Yuan in recent years has not met with the people's expectations, resulting in calls for its reform. One of the reforms proposed is to reduce the number of legislators in the Legislative Yuan from 225 by roughly half. Regardless of which plan is carried out, any reform process will not be easy.

The other area for possible reform, and perhaps the more important one, is the electoral system for selecting legislators. Until now, Taiwan has adopted the system of the "single non-transferable vote in a multi-member district," which is unfavorable for the development of party politics and divisive for society. However, because the legislators themselves are both the initiators and the targets of any reform, it is difficult to predict whether and when Taiwan will move toward a system that combines the single member district plurality system with proportional representation.

Freedom of speech, association, and religion

By contrast with the significant advancements in the protection of physical integrity and due process rights in the past decade, the protection of freedom of speech and related rights has not been as prioritized. Given that a sophisticated First Amendment jurisprudence has been developed in the

USA, why have the Grand Justices accorded comparatively little emphasis to freedom of speech? Is it because most former Grand Justices are unfamiliar with issues concerning freedom of speech? Or is it because most people in Taiwan do not know how to assert their constitutional right to freedom of speech? The Grand Justices nevertheless recognize some fundamental elements of freedom of speech, such as the famous principle of "clear and present danger," the distinction between "content-based" and "content-neutral" regulation, the concept of malicious intent, and the distinction between commercial speech and political speech.

Freedom of speech

Several major interpretations apply to freedom of speech. The first concerns the constitutionality of the criminal punishment for libel under the ROC Criminal Code. As in *New York Times* v. *Sullivan*,[42] the constitutionality of this statutory provision was challenged in Taiwan when the Grand Justices held in Interpretation 509 as follows:

> Such restraints do not violate Article 23 of the Constitution. Article 310, Paragraph 3 of the Criminal Code provides truth as an affirmative defence against a conviction of the criminal defamation. However, it is not a corollary that for a successful assertion of the defence, an accused disseminator of a defamatory statement would have to carry the burden of proving its truthfulness. To the extent that the accused fails to demonstrate that the defamatory statement is true, as long as the accused has reasonable grounds to believe that the statement was true when disseminated and has proffered evidence to shore up the belief, the accused must be found not guilty of a criminal defamation.[43]

The next case, Interpretation 414, concerned the protection of commercial speech. Here, the Grand Justices clearly indicated that the level of protection of commercial speech could be lower than that of political speech. In this case, the application of a system of prior restraint to advertisements on the sale of drugs was upheld. The Grand Justices stated:

> Drug commercials are economic activities engaged by pharmaceutical manufacturers for the purpose of obtaining profits. These kinds of activities involve protection of property rights and possess characteristics of a commercial speech. Because drug commercials are closely related to nationals' health, they thus should be strictly regulated by law to maintain the public health.

The Grand Justices concluded that the "prior censorship requirement is necessary to improve the public interest and is consistent with Article 11 and 15 of the Constitution."

In the third case, Interpretation 364 concerning the people's right of access to media, the Grand Justices held:

> [T]he protection of the freedom of speech described under Article 11 of the Constitution includes the expression of opinion via radio or television broadcast media. To protect this freedom, the state must fairly and reasonably distribute the use of radio wave frequencies and bandwidth. The laws must be enacted in such a way as to respect equal rights to media access provided that the freedom to edit is taken into account.

This interpretation is particularly significant at a time when private companies are increasingly controlling the media.

One of the most influential cases concerning freedom of speech in Taiwan is Interpretation 445, which touches on issues such as prior restraint on the freedom of speech, the distinction between content-based and content-neutral restrictions, and the principle of "clear and present danger." In their interpretation, the Grand Justices held that although the prior restraint of speech was unconstitutional, the content-neutral regulation of speech was constitutional. Further, the principle of clear and present danger was used to expand the scope of freedom of speech. Because it introduced US First Amendment jurisprudence to Taiwan, this interpretation represents significant progress towards freedom of speech in Taiwan, although some problems still remain about the details of the interpretation.

Freedom of association

If the Grand Justices of Taiwan have paid relatively little attention to freedom of speech, they have neglected freedom of association even more. It is true that even in the USA, the jurisprudence with respect to freedom of association was developed relatively late, with the issue gradually coming to the fore in the 1980s. In the course of democratization, the Taiwanese government has adopted a more tolerant policy towards freedom of association, liberalizing the processes concerning various types of social organization, although restrictions still exist with regard to religious and political ones. Two issues of particular relevance to freedom of association in Taiwan are discussed below. The first is the freedom to choose the name of one's organization, while the other is organized crime.

In their Interpretation 479, about whether a nationwide organization may use "Taiwan" as part of the name, the Grand Justices held that "a free choice of organizational name is at the hard-core protection of freedom of association since naming an organization is crucial to the purpose, nature, and identity of members in one's organization, and to its own distinctiveness from those of others." Thus the Grand Justices concluded that it was not permissible to infringe an association's right to determine its own name.

As a result of this case, which has a particular historical background, an association can now choose a name that it considers most suitable for its objectives.

Another case relevant to freedom of association is Interpretation 556. In order to maintain public security, the government in Taiwan adopted extensive measures to crack down on organized crime, with one of them being the enactment of a statute similar to the RICO in the USA. Interpretation 556 arose from the statute punishing those who join, but are no longer active in, a group that has committed organized crime. This case may be compared with the similar cases decided by the US Supreme Court more than forty years ago, such as *Scales* and *Notto*, as well as *Scheidler* v. *National Organization For Women, Inc*. (2003).[44] The Grand Justices held that:

> Where a syndicate member voluntarily surrenders himself to the authorities before his act of participation is discovered or has had no contact with the syndicate or has not participated in syndicated activities for a long time, with sufficient evidence to prove that he has positively broken away from the criminal syndicate, he should no longer be considered to be continuously participating in the syndicate . . .

Freedom of religion

Compared with the caseload of high courts in major Western countries, the issue of religious freedom is largely ignored by the Grand Justices in Taiwan. To date, there only two cases pertinent to freedom of religion. The first is Interpretation 490, concerning the refusal of people (male adults) to perform mandatory military service because of their religious beliefs. The Grand Justices held as follows:

> Article 13 of the Constitution ensuring that people shall have freedom of religious belief means that people shall have freedom of believing or disbelieving any religion and of participating or not participating in any religious activities. The State shall neither forbid nor endorse any particular religion and shall never extend any privileges or disadvantages to people on the basis of their particular beliefs . . . [T]he Conscription Law indicat[es] that . . . only male citizens have the duty of performing military service. This role differentiation has been made to incarnate both national goals and constitutionally prescribed basic duties of the people and, thus, is of legislative policy nature. It does not encourage, endorse, or prohibit any religion, nor does it have such effects.[45]

The second is Interpretation 573, which touches upon the extent to which the government may regulate various religious activities. The Grand Justices held not only that various religious organizations enjoy certain rights to property but also that government may only use statutes rather than

administrative regulations to supervise the buying and selling of property by various religious organizations.

Academic freedom

The Grand Justices's rulings on several cases within the higher education system redefine and reinforce the ideal of academic freedom. For example, in Interpretation 380, the Grand Justices point out that the provision about freedom of teaching in Article 11 of the Constitution extends institutional protection to academic freedom.[46] Again, in Interpretation 450, the Grand Justices held that freedom of teaching as provided for in Article 11 of the Constitution includes "university self-government," explaining that, "Any such important matters as related to the freedom of instruction and freedom of study are subject items of university government. State supervision over universities shall be specifically authorized by statutes. . . . Any such statutes shall be in conformity with the principle of university self-government."[47]

Social and economic rights

The protection of social and economic rights in Taiwan is a complicated matter, for only Article 15 is strictly relevant to social and economic rights within the ROC constitutional bill of rights. However, if we shift the focus to the government's obligation to maintain the social and economic interests of the people, many more regulations are pertinent to social and economic rights under the section "Fundamental National Policies." In fact, more than one-quarter of the Grand Justices' caseload deals with issues of social and economic rights.

The ROC constitutional framework: more a government's obligation than people's rights

The ROC Constitution tackles the social and economic issues from the perspective of both people's rights as well as governmental obligations. Under the ROC constitutional bill of rights, Article 15 of the ROC Constitution guarantees the people's right of existence, right of work, and right to property. This is the only constitutional article concerning social and economic issues to use the term "rights."

By contrast, in the section "Fundamental National Policies," the ROC Constitution raises social and economic issues in terms of governmental obligation. For example, the Tenth Amendment provides:

> The state shall promote national health insurance and promote the research and development of both modern and traditional medicines . . . The state shall guarantee availability of insurance, medical care, obstacle-free environments, education and training, vocational guidance,

> and support and assistance in everyday life for physically and mentally handicapped persons, and shall also assist them to attain independence and develop [their potentials] . . . The state shall emphasize social relief and assistance, welfare services, employment for citizens, social insurance, medical and health care, and other social welfare services. Priority shall be given to funding social relief and assistance, and employment for citizens.

The caseload of the Grand Justices in the field of social and economic rights

Even if cases on the constitutionality of various kinds of taxation are included in the category of social and economic rights, the Grand Justices' caseload in this regard has been smaller and less important than in the fields discussed above. A close review of these cases, except for cases about the right to work, reveals that most relate to public health insurance and the higher education system. Cases on other social and economic rights, such as rights to existence, are rare. By the end of 2004, the Grand Justices made a total of 586 interpretations, of which 165 may be said to belong to the field of social and economic rights. About 80 percent of the 138 interpretations concern tax issues.

People in Taiwan are proud of their various public health insurance systems: farmers' insurance, labor insurance, and public servants' insurance have been in operation for several decades, although the national health insurance scheme is relatively new. In total, the Grand Justices have decided twenty cases about public insurance.[48]

Right to education

Under the ROC Constitution, the right to education is particularly worthy of mention. Most importantly, the original ROC Constitution provides for a minimum budget for education, either at the central government level or at the local government level.[49] Unfortunately, this excellent precedent has changed somewhat in the new constitutional amendments. The Tenth Amendment merely provides that: "Priority shall be given to funding education, science, and culture, and in particular funding for compulsory education, the restrictions specified in Article 164 of the Constitution notwithstanding . . ."

Cultural and minority rights

As for cultural and minority rights, it is noteworthy that since the inception of the ROC Constitution, a system to protect the rights and interests of women and aboriginal people has been in place. The extent of the protection of cultural and minority rights under the ROC Constitution may be

illuminated by Will Kymlicka's political theory of "multiculturalism," which provides for three group-differentiated rights,[50] as well as developing a social culture to distinguish the protection of national minorities from that of immigrants.[51] Taiwan has made considerable efforts to protect the rights of aboriginal people, immigrants and foreigners.[52]

ROC constitutional provisions

In Taiwan, unlike in the USA, most people do not oppose the use of affirmative action. At least, there have been no deep philosophical debates over the meaning and the function of affirmative action.

Basically, the ROC Constitution has always treated minority groups fairly and even generously, at both symbolic and concrete levels, and rightly so. As in the new South African Constitution, but not the US Constitution, the first Article of the ROC constitutional bill of rights affirms the idea of equality with respect to gender, religion, race, class, and members of a particular party, while other articles in the constitution also deal with issues of gender and racial equality. This indicates the importance attached by the drafters of the ROC Constitution to the raising of women's social status and maintenance of harmonious coexistence among different ethnic groups in the republic.

Of course, to mention equality in the first Article of the ROC constitutional bill of rights does not necessarily ensure the protection of minorities, which requires more specific measures. An analysis of the three kinds of group-differentiated rights advocated by Kymlicka, namely, self-government, polyethnic rights, and special representation, shows that all of these minority rights are embodied in the ROC Constitution, at least symbolically.

The principal constitutional mechanism for the enforcement of polyethnic rights is the article about the policy of protecting minorities. This is probably the most significant feature of the ROC Constitution, as regards the fulfillment of special representation rights. Women and minority groups have always been granted rights of special representation under the ROC Constitution, and this protection remains in today's ROC Constitution, overhauled in the 1990s. According to Amendment 3(3), every county that can elect more than five legislators should guarantee at least one seat for a female legislator in the election for legislators.[53] Furthermore, paragraph 2 of the same amendment guarantees a total of eight seats for aboriginal people.

Polyethnic rights have been enforced in two ways. First, the original constitution as well as the amendments, provide for a general policy of favorable treatment for national minorities. The amendments use the term "aboriginal people" instead of "ethnic minorities." At a lower level, the ROC government endows various minority groups with favorable treatment in various national examination systems.

Current debates

One of the current debates about the protection of the minorities in Taiwan is whether ethnic minorities, immigrants, and guest workers need different kinds of protection. For example, the three group-differentiated rights advocated by Kymlicka are implicated in the current debate about the protection of aboriginal people in Taiwan. First, aboriginal people hope to enjoy a certain degree of self-governance. Second, they hope to maintain their special representation in the Legislative Yuan, particularly if Taiwan embraces the "single member district" system of election in future. Third, from the perspective of polyethnic rights, they advocate the language right to use their mother tongue in public as well as the protection of their traditional culture.

Whether self-governing territories should be created for various aboriginal groups is now a controversial issue. Since Taiwan is already a highly populated island, it is not easy to carve out areas for ethnic minorities' self-rule. The right of special representation is also difficult, since it is necessary to seek a right balance between the development of a better electoral system and the protection of the right of aboriginal groups to political participation. As for polyethnic rights, especially the language right, the problem may be compared to Canada's, where the cost of recognizing every aboriginal group's language right is thought to be too expensive.

Concluding reflections

Taiwan's human rights jurisprudence and practice exhibits the following salient characteristics.

The Grand Justices seldom refer to international conventions on human rights

After the Second World War, the protection of human rights flourished domestically as well as internationally. The United Nations itself adopted the Universal Declaration of Human Rights, followed by the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. From the standpoint of efficacy, the most successful human rights instrument is probably the European Convention on Human Rights (ECHR). With the development of the jurisprudence of the European Court of Human Rights, the interaction between the ECHR system and various domestic constitutional systems ushered in a new phase of international protection of human rights.

If the Grand Justices in Taiwan had rendered their interpretations on the basis of international human rights jurisprudence, it would have been much easier to build a coherent local constitutional law for Taiwan.

Unfortunately, despite the phenomenal progress of international human rights law, the Grand Justices in Taiwan have not paid enough attention to it. For example, of the 120 cases decided by the current sixth term of the Grand Justices, only two cases mention international standards of human rights protection.[54] Furthermore, the outcomes in at least three interpretations obviously contradict international human rights law.[55]

There are various possible explanations for this neglect of international human rights law. First, most international conventions on human rights have no binding force in Taiwan, either because Taiwan has a dualist system, or because Taiwan is not a party to the international convention or treaty. Second, from a practical standpoint, most international conventions on human rights do not have an efficient court system to enforce them and build a concrete body of case law. Such case law would be useful in Taiwan, a country that needs to transplant foreign human rights jurisprudence in order to develop its own human rights law.

The role of foreign constitutional jurisprudence

The most conspicuous feature of the Grand Justices' method of building a local human rights jurisprudence in Taiwan is that various foreign countries' constitutional jurisprudence is a major source of inspiration. In some of the leading cases, the Grand Justices borrowed heavily from major Western high courts or foreign scholarly opinion to solve local problems. Such willingness to accept foreign jurisprudence in order to tackle local issues may be further illustrated as follows.

The coexistence of different countries' constitutional jurisprudence in Taiwan

Significantly, the Grand Justices are willing to refer to *different* countries' constitutional jurisprudence for help, particularly US and German constitutional jurisprudence. This is because most Taiwanese legal scholars received their postgraduate education either in the USA or in Germany. Besides, when many issues to be decided by the Grand Justices have already been resolved by the US Supreme Court or the German Constitutional Court, it is easier for the Grand Justices to follow in the footsteps of these two courts than to start from scratch. Furthermore, as many of the newly established democracies in the world also follow these two countries' models, it is no surprise if the Grand Justices in Taiwan do the same.

Whether employing different countries' constitutional jurisprudence simultaneously is wise is debatable. Clearly, however, the Grand Justices need to address the issue of the compatibility or coexistence of different countries' constitutional jurisprudence in Taiwan, if a local human rights jurisprudence is to develop in Taiwan.

Unstable and unpredictable constitutional jurisprudence

Another feature, or rather problem, of the current practice of borrowing from different countries' constitutional jurisprudence is that Taiwanese constitutional law becomes unstable, even unpredictable, when it is unknown which country's jurisprudence will be adopted. Since any foreign constitutional jurisprudence invoked by the Grand Justices becomes a part of local constitutional law, the text of the ROC Constitution is now no more than a means to introduce foreign constitutional jurisprudence. This point can be further illustrated with reference to the US debate between originalism and non-originalism. The Grand Justices, as I have said, have almost never adopted an originalist approach when interpreting various provisions on the protection of individuals' rights in the ROC Constitution. Instead, they apply foreign constitutional jurisprudence – which necessarily reflects the values of Western culture and society – in order to specify the meaning and content of the ROC constitutional bill of rights. This means that the materials and sources applied to substantiate the content of constitutional human rights are unfamiliar to Taiwanese citizens, who then have difficulties understanding what the real ROC Constitution is.

Lack of benchmark for appropriation of foreign constitutional jurisprudence

As to methodology, the concern about the compatibility of different countries' constitutional jurisprudence and an unstable and unpredictable constitutional law in Taiwan arises from the fact that the Grand Justices have not yet established any standards for deciding when and how to borrow foreign constitutional jurisprudence. Although formulating manageable rules for invoking foreign constitutional jurisprudence is no easy task, it is necessary for the sake of a better human rights jurisprudence in Taiwan.

The role and influence of the traditional culture: Confucianism

Although the Grand Justices tend to apply foreign constitutional jurisprudence to deal with human rights issues in Taiwan, this does not mean that Chinese traditions or culture have no influence at all on the process of building the local human rights jurisprudence. For example, as mentioned above, the constitution requires a minimum budget for education, which may reflect the pro-intellectual stance of Confucianism.

An important question relevant to human rights in Taiwan is whether the initial success of implementing human rights in Taiwan implies the compatibility of traditional obligation-based Chinese political theory and rights-based Western theory. Alternatively, does it mean the influence of traditional Chinese culture is lessening in Taiwan?

The priority of different rights

Reflection upon the Grand Justices' work so far suggests that the Grand Justices have their own agenda for prioritizing the various human rights. Although freedom of speech is probably one of the most litigated subjects in US constitutional jurisprudence, it has not been a priority in Taiwan. The Grand Justices of Taiwan seemed to believe that it was more urgent and necessary to emphasize the importance of procedural protections for the liberty of the person, as reflected in the many interpretations concerning criminal and administrative procedure.

The colonial past

Finally, unlike the case in most nations that emerged from former colonies, the colonial era has not left much legacy in Taiwan. Although Japanese jurisprudence does have some influence on Taiwan, it is because most scholars in late imperial China and in the early Chinese republican era learned Western legal knowledge through Japan. Thus some Japanese influence can be found in many of today's ROC statutes. Thus the Japanese influence is due to the law-making efforts of the governments of the late Qing Dynasty and the Republic of China rather than to the heritage of Japanese colonial rule in Taiwan from 1895 to 1945.

Notes

1 Human rights, as discussed in this chapter, generally means values embodied in a domestic constitutional bill of rights or an international convention of human rights.
2 For the development of international human rights law after the Second World War, see Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen*, Philadelphia: University of Pennsylvania Press, 1998. See also Louis B. Sohn, "The new international law: protection of the rights of individuals rather than states", *American University Law Review*, vol. 32, no. 1, 1982.
3 See Wm. Theodore de Bary, "Introduction," in Wm. Theodore de Bary and Tu Weiming (eds), *Confucianism and Human Rights*, New York: Columbia University Press, 1998, p. 5.
4 *Ibid.*
5 See William Alford, "Making a goddess of democracy from loose sand: thoughts on human rights in the People's Republic of China," in Abdullahi Ahmed An-Na'im (ed.), *Human Rights in Cross-cultural Perspectives: a Quest for Consensus*, Philadelphia: University of Pennsylvania Press, 1992, p. 73. Although a few Chinese scholars were genuinely dedicated to protecting people's welfare through enacting a constitution, they were in the minority.
6 In fact, this attitude of treating a constitution as a means to strengthen the unity and security of China represents the general policy of various Chinese governments on the mainland from the late Qing Dynasty to today's communist regime. See David Shambaugh, "Introduction: the evolving and eclectic modern Chinese state," in David Shambaugh (ed.), *The Modern Chinese State*, Cambridge: Cambridge University Press, 2000, p. 1.

7 The Chinese version is "中學為體，西學為用."
8 For a precise introduction to the Self-Strengthening Movement, see J. A. G. Roberts, *A Concise History of China*, Cambridge, MA: Harvard University Press, 1999, pp. 184–90.
9 Consequently, many scholars designate the year 1895 as another turning point in the course of Chinese history, even a more significant point than the Opium War in the process of Chinese modernization. See Jonathan D. Spence, *The Gate of Heavenly Peace: the Chinese and their Revolution, 1895–1980*, New York, NY: Penguin Books, 1982 (discussing the transformation in China from 1895). For the Chinese intellectuals' reaction to the Chinese defeat in the Second Sino-Japanese war, see John King Fairbank, *The Great Chinese Revolution, 1800–1985*, New York: Harper & Row, 1986, pp. 125–40.
10 See 荊知仁 (Chi-Ren Jin),《中國立憲史》[A History of Chinese Constitutional Development], (1992), pp. 70–106.
11 In total, there were seven constitutional drafts publicized by the Military Government in Beijing before the Nationalist Party unified China in 1928. For a short history relevant to the constitutional development in this period, see W. Y. Tsao, *The Constitutional Structure of Modern China*, Westport, CT.: Hyperion Press, 1973, pp. 1–8.
12 See Mauro Cappelletti, *Judicial Review in the Contemporary World*, Indianapolis: Bobbs-Merrill, 1971, p. 46.
13 Article 3 of the Organic Law of the Judicial Yuan.
14 Before 1992, the Control Yuan controlled the power of confirmation. From 1992 to 2000, the National Assembly was responsible for the process of confirmation.
15 A panel composed of three Grand Justices makes this decision. See Article 10(1) of the Law of Interpretation Procedure for the Grand Justice, which provides: "A petition to the Judicial Yuan for constitutional interpretation shall be reviewed initially by a panel consisting of three Justices . . ." Consequently, an enormous gap exists between the number of cases petitioned and the number of interpretations rendered by Grand Justices.
16 See Article 7 and Article 8 of the Law of Interpretation Procedure for the Grand Justices.
17 In addition to the different political implications, the main difference between these two kinds of interpretations is that the former basically requires a supermajority vote to pass an interpretation, but the latter requires only a majority vote. In other words, it is much easier to reach a uniform interpretation than to have a constitutional interpretation. See Article 14 of the Law of Interpretation Procedure for the Grand Justices.
18 Before the new Law of Procedure for the Grand Justices Council became effective on February 3, 1993, only government agencies, besides individuals, could submit petitions. After the passing of the new law, one-third of legislators could also submit petitions. Later, following the German system, in Interpretation 388, the Grand Justices Council granted judges the right to petition.
19 See 司法院大法官釋憲五十週年史料 [Record in Memory of the Fifth Anniversary of Judicial Review], (1998), p. 510.
20 *Ibid.*
21 *Ibid.*, at p. 511.
22 *Ibid.*
23 See, for example, Interpretations 392, 446, 466.
24 Interpretation 384.
25 Roughly, more than ten interpretations are relevant to this issue.
26 See, for example, Interpretations 384, 523, 535.
27 See, for example, Interpretations 407, 513.
28 See, for example, Interpretation 445.

29 See, for example, Interpretations 380, 450, 462.
30 See, for example, Interpretations 365, 452.
31 See, for example, Interpretation 490.
32 For example, with regard to the reasoning of Interpretation 380 concerning the concept of academic freedom, why did the Grand Justices prefer to use the German theory of institutional protection? What are the differences between the German theory and other major Western countries? Is the German theory superior or better suited to the Taiwanese context? With regard to interpretation 384, applying the US jurisprudence of due process of law to protect personal liberty, why must Taiwan adopt the US institution of due process of law rather than that of other major Western countries?
33 There are many reasons why Taiwan has not met the so-called "counter-majoritarian difficulty" defined by Alexander Bickel, *The Least Dangerous Branch*, New Haven: Yale University Press, 1962, p. 16.
34 Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Cambridge, UA: Harvard University Press, 1999.
35 Nigel N. T. Li and Joyce C. Fan, "An uncommon case of bigamy; an uncommon constitutional interpretation", *Journal of Chinese Law*, vol. 4, p. 69, 1990.
36 Interpretation 384.
37 Interpretation 445.
38 The most notorious example was the so-called 2–28 events in 1947, in which KMT military forces killed several thousand civilians.
39 See Chapter 1 to this volume.
40 The plea-bargaining system in Taiwan is not exactly the same as that in the USA, though.
41 Akhil Amar, *The Bill of Rights*, New Haven: Yale University Press, 1998.
42 *New York Times Co*. v. *Sullivan*, 376 US 254 (1964).
43 Note, however, that some scholars criticize Interpretation 509 as not establishing the exact same principle as that in the case of *New York Times Co*. v. *Sullivan*.
44 *Scheidler* v. *National Organization For Women, Inc.*, 537 US 393 (2003).
45 Interpretation 490, 1 ROC Const. Ct., pp. 41–2, 2000.
46 Interpretation 480, 3 ROC Const. Ct., p. 233, 2000.
47 Interpretation 450, 1 ROC Const. Ct., p. 233, 2000.
48 National Health Insurance: Interpretations 473, 524, 533, 550. Government Employees' Insurance: Interpretations 246, 274, 316, 434, 466, 474. Labor Insurance: Interpretations 279, 310, 389, 456, 549, 560, 568, 578. Farmers' Insurance: Interpretation 398.
49 Article 164 of the ROC Constitution.
50 Will Kymlicka, *Multiculturalism*, Oxford: Oxford University Press, 1995, pp. 26–33.
51 *Ibid.*, at 75–80.
52 With regard to the protection of foreigners in Taiwan, see Nigel Nien-tsu Li (李念祖), "*Alien: a notion alien to constitution*," a paper prepared for the Conference of the International Association of Constitutional Law, July 1999.
53 The constitution can guarantee seats for women because of the electoral system that Taiwan has adopted.
54 Interpretations 392 and 499.
55 Interpretations 265, 454, and 558. All of these three cases involve a citizen's rights to return to his country. Although the Grand Justices' position has changed slightly, the basic position remains the same: the right of ROC citizens' to enter Taiwan is not absolute. In other words, the ROC government can limit the rights of its nationals to return to Taiwan.

10 Human rights in the era of "Thailand Inc."

Vitit Muntarbhorn

Introduction

One of the remarkable "success" stories of Southeast Asia in 2004 is the current economic resurgence of Thailand, a country with some 64 million inhabitants. By contrast, it can be recalled that in 1997 the country was the first of a number of Asian countries to experience an economic crash of gargantuan proportions with critical impact on human rights, particularly the upsurge of poverty and unemployment. That crash was due to a variety of factors causing the cataclysmic burst of the economic bubble, including excessive private sector borrowing, the negative impact of hedge funds, over-investment in the property sector, a dangerous lack of economic transparency, and poor governance.

There now seems to be a renaissance at least in economic terms: the current growth rate of the GDP hovers at above 7 percent, with low inflation and low unemployment. Is this an unqualified boon for the country from a human rights perspective?

Moreover, the current government was democratically elected in 2001 and it has adopted a proactive, populist, and (at times) nationalist agenda, with a sense of steely determination rarely seen in Thai politics. It is led by Prime Minister Thaksin Shinawatra, a highly successful businessman – a man with a vision and hands-on approach to "getting things done." The ruling party which he formed, the *Thai Rak Thai* (TRT or "Thais love Thais"), exercises overwhelming control over the Thai Parliament and the various lifelines of the Thai economy.

Ironically, perhaps, while in the past Thailand suffered from military dictatorships and weak fragmentary civilian coalition governments, and longed for a strong civilian government, today this government embodies a strong civilian rule based upon practically one political party, with the opposition in disarray. For the first time in Thai history there is a civilian administration with near total control of the national power base and the various key arteries of the nation. Yet, there remains the question: is this an automatic guarantee of the realization and enjoyment of human rights?

The promotion and protection of human rights have benefited from the current administration on some fronts, especially in its attempts to access the poor, boost self-reliance, and propel an economic drive which may also benefit the populace. Paradoxically, however, on other fronts the record concerning human rights in Thailand is disquieting, and there is a business-based conglomeration at the top that enjoys many benefits closely linked with the powers that be, often verging on a conflict of interests.

The country is now being run by an administration acting like a corporation, with a chief executive officer (CEO) at the pinnacle of the system, replete with satellite mini-CEOs throughout the country.[1] There is an inherent danger in the emergence of this value system: the "CEO-ization" of the country whereby the business-oriented executive branch is more prone to pursue "efficiency-based performance and results" in political and economic terms rather than an ethical, transparent, and accountable approach with the checks and balances required by human rights against abuses of power. Ironically, the ends often justify the means (although they should not),[2] with various components of human rights sacrificed for the sake of running the country as "Thailand Inc."

Background

The history of human rights in Thailand during the past century has been based upon a continuous struggle for democracy and human rights. The country was under an absolute monarchy until it was overturned in 1932 and the first constitution was born. Yet, it was not a real social contract leading to popular participation in government. Since then, the country has witnessed fifteen other constitutions. Until 1992, the military, who were brought into power by periodic *coups d'état*, and their allies ran the country for most of the time, at times with civilian administrations set up by the military.

Most of the sixteen constitutions found their demise at the hands of these coups. The sixteenth and current constitution,[3] promulgated in 1997, was the result of a struggle in 1992 between popular mobilization and authoritarian elements. Massive street demonstrations took place, calling for the military to surrender power to the people. In May 1992, the military used excessive force against civilian demonstrators, resulting in many deaths, injuries, and enforced disappearances. The huge public uproar and furore after the bloody May incident pressured the military to relinquish power. A national election was then called, bringing into existence a civilian government.

This paved the way for the drafting of a new constitution, the most democratic ever, with extensive popular participation throughout the whole country. It is an exemplary constitution. Yet, despite the popular spirit embodied therein, it is evident that currently the constitution is being increasingly undermined by various vested interests and their surrounding cliques. The provisions on human rights in the constitution are regrettably being diluted in practice, even under a democratic regime. The reasons for

this "backtracking" will be seen later when the study specifically examines the implementation of civil, political, economic, social, and cultural rights.

At this juncture, it is worth examining the constitution, which embodies human rights in an extensive manner, and underlining the need to at least abide by its provisions in the pursuit of democracy, human rights, peace, and sustainable development.

Conceptualization

The sixteenth constitution is the barometer for identifying the conceptualization of human rights in Thailand in a number of ways.

First, the process of drafting it. The constitution was drafted by a committee of independent persons, and not by parliamentarians. This reflected the public opinion at the time which wanted a non-partisan group to lay down the framework for an enlightened constitution without meddling by political parties. There was also public mistrust of some of the parliamentarians in that several represented the "old guard" of vested interests linked to previous regimes and authoritarian elements. This draft constitution was also put to public hearings throughout the whole country, and is thus Thailand's first fully-fledged people's constitution.

Second, in this constitution, there is a key umbrella provision which entrenches the notion of "human dignity" as the rationale or synonym for human rights. Section 4 thus states that "the human dignity, right or liberty of the people shall be protected." This is enhanced further by section 26 which calls upon state organs to bear in mind human dignity, rights, and liberties.

Third, the principle of equality and non-discrimination – the backbone of the international human rights regime – is highlighted in section 5. It is further elaborated in section 30 as follows:

> All persons are equal before the law and shall enjoy equal protection under the law.
>
> Men and women shall enjoy equal rights.
>
> Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age, physical or health condition, personal status, economic or social standing, religious belief, education or constitutionally political view, shall not be permitted.
>
> Measures determined by the State in order to eliminate obstacles to or promote persons' ability to exercise their rights and liberties as other persons shall not be deemed as unjust discrimination under paragraph three.

Fourth, those rights and liberties can now be invoked directly in courts of law and other state organs to protect one's rights.[4]

Fifth, restrictions cannot be imposed on those rights and liberties except as provided by the law and only to the extent necessary. These restrictions are not to affect the substance of those rights and liberties.[5]

Sixth, while the constitution protects a variety of rights internationally associated with individuals, it also protects community rights, especially in regard to the management and conservation of natural resources and the environment. This has practical implications such as the need for public hearings before decisions that will impact on the community are made. This is exemplified by section 46 as follows:

> Persons so assembling as to be a traditional community shall have the right to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law.

It is further strengthened by section 56 as follows:

> The right of a person . . . and communities to participate in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and preservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life, shall be protected, as provided by law.
>
> Any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impacts on the quality of the environment have been studied and evaluated and opinions of an independent organization, consisting of representatives from private environmental organizations and from higher education institutions providing studies in the environmental field, have been obtained prior to the operation of such project or activity, as provided by law.

Seventh, there are various rights not (generally) internationally classified as human rights which are recognized in the constitution, such as consumer rights.[6]

Eighth, there is a right to resist peacefully acts aimed at overturning the constitution (such as *coups d'état*).[7]

Ninth, with new rights come new obligations. Unlike previous constitutions, this constitution imposes a duty to vote. The failure to do so results in the suspension of various rights as provided by law.[8]

Tenth, unlike previous constitutions which principally recognized rights "subject to law" or "as provided by law," implying the need to concretize such rights by the adoption of other laws through parliament, the current constitution takes an approach towards the protection of rights based upon

binding obligations without necessarily requiring other laws to concretize them. There remain various gradations of rights, however. At one level, there are various rights which are absolute, without the need for the enactment of other laws, such as the right to life and freedom from torture in section 31. At another level, there are those rights for which restrictions are not to be imposed except by virtue of the law, such as the right to freedom of expression (section 39) and the right to travel (section 36). At another level, there are other rights which depend on the enactment of other laws, such as community rights in sections 46 and 56 above which impose the condition "as provided by law."

Eleventh, the constitution establishes a variety of new entities to act as independent organs. These include the National Human Rights Commission, the Constitutional Court, the Administrative Court, and the Ombudsman. The basic thrust is to have stronger checks and balances against abuse of power, especially the ominous potential of an all-powerful executive.

Twelfth, there are new modalities for people's participation. For instance, a new law can be proposed if 50,000 persons of Thai nationality call for it. This has been done, for example, in regard to the law concerning medical matters. Groups can also petition state bodies to question the conduct of state representatives and officials.

While the above examples demonstrate the national conceptualization of human rights, there are also a number of conceptual problems which need to borne in mind, before we delve more deeply into the question of implementation and daily practices.

First, it may be debated whether the term "human dignity" is an automatic synonym for "human rights." Internationally, the terms are not necessarily synonymous with each other. The drafters of the Thai Constitution were influenced to some extent, however, by the fact that the term "human dignity" appears in some European laws, especially the German Constitution.

Second, the perception of human rights in the constitution is somewhat hampered by the traditional view that constitutional rights pertain to nationals rather than non-nationals. This is still prevalent in the current constitution whose main Part on rights and liberties – Part III – is entitled "Rights and liberties of the Thai people." Interestingly, during the drafting stage, civil society actors did not wish to have this title, preferring the title "Rights and liberties of persons." Parliamentarians overturned this position and introduced the current terminology which harks back to previous constitutions.

Does the constitution also protect the rights of non-Thais? A liberal interpretation suggests that it does, at least partly if not wholly. For example, Part VIII on access to the courts applies to all persons, not simply Thais. This converges with the general civil and criminal laws which apply to all persons irrespective of nationality. The Constitutional Court had an opportunity to deliberate upon this issue in one case where a Japanese national, imprisoned in Thailand for a crime, complained that the use of chains as an

instrument of restraint was a breach of his rights and thus unconstitutional.[9] In the end, the court did not have to decide upon the issue since the accused was transferred to the Japanese authorities for further proceedings. At least one of the judges in his deliberation, however, veered towards recognizing that human rights pertain to not only Thais but also non-Thais.

Third, there are many laws from past governments, particularly military regimes in the form of military or executive decrees, which still need to be reformed. The pace is still slow on this front. Examples include Decree number 30 concerning entertainment places (1959); Decree number 37 concerning Thailand's participation in a regional educational organization (1972); Decree number 45 concerning bowling (1972); Decree number 58 concerning trade in goods affecting safety (1972); Decree number 189 concerning ancient artefacts (1972); Decree number 253 concerning use of alcohol (1972); Decree number 290 concerning expressways (1972); Decree number 305 concerning medals (1972).

Fourth, many of the rights stipulated in the constitution depend upon organic laws which are required to concretize the rights in practice. This is seen in relation to the above articles on community rights, and is exemplified by a draft law on community forestry – the subject of a long debate, to date. Generally, this means that in addition to the constitution, other acts of parliament need to be promulgated to give content to those rights. As will be seen below, progress on these organic laws has been tardy in several areas, often perpetuating vestiges of an undemocratic past. At times, the tardiness seems almost intentional and instrumentalized. It would seem not to be in the interest of some of the current powers-that-be or vested interests to enact these organic laws, as these laws will ultimately clip their omnipotent wings and dampen their "efficiency-based performance and results."

Civil and political rights

Context

In one sense, the situation of civil and political rights has improved from the past: unlike the pre-1992 period when the military more often than not ruled over the country, the current administration was democratically elected in 2001. Ironically, perhaps, democratic elections do not necessarily guarantee the totality of human rights, if the strategy of the authorities is to run the country like a corporation without adequate regard for the ethics of implementation.

Three situations have been particularly disconcerting. First, in 2003 the authorities put into action a campaign to suppress the drugs trade. Precisely because of the push for quick results, there have been many reports and allegations of extra-judicial killings. There has been no truly independent inquiry on the issue, even though a large number of people have been subjected to violence.[10]

Second, the spread of terrorism worldwide has been a key reason for the adoption of new anti-terrorist laws globally. The Thai authorities are no exception to the rule. In 2003, an executive decree was passed by the Cabinet to give the authorities more powers to suppress terrorism.[11] Both the form and content of this law were and are questionable. Precisely because the content of the decree was tantamount to creating criminal offenses, the process of enacting a new law on the matter should have been by means of an act of parliament with full public debate, rather than by executive decree. With regard to the content of the new law, there are many ambiguities, such as on the issue of complicity, which give the authorities too much power; this will affect the operations of many civil society actors who might be prosecuted for complicity.

Third, at the beginning of 2004, there was an explosion of violence in the predominantly Muslim part of southern Thailand. Currently, the three southern provinces are under martial law implying that many of the constitutional rights are being constrained. At the end of April, in a volatile situation, thirty-two dissidents who had taken control of an historic mosque were killed by Thai security forces.[12] In a spate of incidents in one day, over a hundred dissidents were killed. While some of the top government leaders in Bangkok claimed that many of those who were killed had been linked to the drugs trade, this is an incomplete explanation. A more likely scenario is the political discontent *vis-à-vis* the longstanding heavy-handed nature of the Bangkok centralized administration. For years, there has been a lack of empathy on the part of key administrators for the development and cultural needs of the south. This is compounded by the failure to respond adequately to the call for more political participation and decentralization to benefit the local population. Thus, the south has, for a long time, witnessed insurgency problems, compounded by various extremists who wish to see the creation of a separate state.

Elections/democratic process

In principle, the democratic process is guaranteed by the constitution and related electoral laws. The bicameral parliament consists of the lower house (the National Assembly) filled with representatives of political parties, and the Senate whose members do not represent political parties (at least in principle). The membership of the former is through a mixture of voting on the basis of the "first past the post system" and proportional representation through a party list system whereby, depending upon the number of votes for the party concerned, a proportional number of parliamentary seats is allotted to those on the list. The Senate is directly elected. Apart from national elections for the parliamentary process, there are also local elections for municipalities and other levels of administration. The electoral laws provide for a series of safeguards against vote-buying, such as a prohibition against the giving of gifts. Members of the Cabinet, as well as their

spouses and children under the age of majority, are also obliged to disclose their assets before and after appointment.

The National Electoral Commission, a constitutional body, oversees the national to the local elections. Another constitutional body, the National Counter-Corruption Commission, monitors against corruption, and has the power to vet the assets of politicians. While these bodies have done their work in monitoring situations and barring wrongdoers from office on some occasions, there are increasing fears that the executive branch will try to stack them with those close to its interests. For example, the members selected in May 2001 for the Election Commission's second term included a general whose own election to the Senate had been voided by the commission in 2000, and who was later removed by the Constitutional Court on the grounds that his appointment had been technically incorrect; a judge whose promotion had failed to gain royal approval; a bureaucrat under investigation for corruption; and another Interior Ministry official who had earlier been accused of printing fake election ballots. The National Counter-Corruption Commission delivered some politically daring judgments through 2003, and the first round of reappointments completed in November 2003 included an old friend of Thaksin's whose previous employer had been Thaksin's brother-in-law.[13]

Has the situation become fairer and more transparent than the old era of authoritarianism, prior to the reversion to democracy in 1992? Intriguingly, the current administration came to power on a wave of popular support in 2001. As already noted, it is all-powerful: it is the first civilian government to have overwhelming control over the lower house and also exerts substantial influence over the Senate through its allies.

The complaint lodged by analysts against the current administration is particularly in regard to potential or actual conflict of interests and "policy corruption." This is based upon the current power system which is almost a monopoly or oligopoly in the hands of the few, often linked with vast business interests. This lends itself to a high degree of unfair advantages and propensity for systemic benefits (for example, the award of concession contracts of national proportions to those close to the executive branch), rather than the old style of individualized largesse aimed at soliciting favors. The former is often more subtle, yet more exponential and insidious in impact.

Some aspects of civil and political rights deserve more attention as below. The examples are not exhaustive. In this respect, it should be noted that Thailand is a party to the International Covenant on Civil and Political Rights, and the finalization of its first report for submission to the international Human Rights Committee under this Covenant is awaited. Thailand is also a party to the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and most recently the Convention on the Elimination of All Forms of Racial Discrimination.

Life and humane treatment

The constitution, of course, guarantees the right to life and humane treatment, although it does not prohibit capital punishment. Yet, the practice is often amiss. The "ends justify the means" approach affecting the current administration seriously undermines the right to life and humane treatment. This was exemplified by the administration's anti-drugs drive in 2003. While strong action needs to be taken against drug-trafficking and traffickers for their violations of human rights, such action should be based upon the rule of law, and include such basic rights as access to the courts in relation to prosecutions rather than extra-judicial killings. Due to various lapses on the part of the authorities, there has been much criticism against them for human rights violations.

The more recent killings in southern Thailand reflect violations by both extremists and security forces. The government has now set up a committee to inquire into the mosque-related incident noted above (see p. 326). There has also been a promise from the prime minister to help the families of those who were killed. On another front, recently a lawyer defending various accused persons in regard to the anti-terrorism drive was abducted in broad daylight in Bangkok; it is feared that he was killed by law enforcers trying to cover up various official malpractices. Several policemen have now been indicted in relation to this crime, exemplifying the fact that often the worst violators are the law enforcers themselves.[14]

Freedom of religion

Freedom of religion is guaranteed under the constitution, and Thailand is generally seen as a tolerant society with the presence of many religions. Although Buddhism is not expressly designated as the state religion in the current constitution, it is implied. The majority of the Thai population is Buddhist.

The southern part of Thailand is primarily a Muslim region, however. Islamic law is recognized in regard to family matters and there are religious courts which have jurisdiction in this area. Yet, the history of the south has been particularly problematic with intermittent clashes between security forces and those who call for separatism.

The issue has been brewing for many years due to a variety of reasons. First, originally, parts of southern Thailand did not belong to Thailand but became part of Thailand through the vicissitudes of history and pressure by the colonial powers and their counterparts in the Southeast Asian region. Second, some of the past Bangkok administrations were nationalistic and highly centralized in mentality and management, thus alienating many local people in the south. Third, the south has suffered from underdevelopment and neglect. There is a high unemployment rate among the youth in some areas and a lack of adequate livelihood opportunities. Fourth, there has not

been enough sensitivity to and empathy for the local culture. Although the language of the south (Yawee) may be taught to some extent, there has been a continual problem concerning whether to permit and register religious schools (*Pondoks*) which teach Islam. While some fear that such schools could be used as a venue for dissent, others see the existence of such schools as essential to respond to the distinctive culture of southern Thailand. As noted above, matters came to a head recently with the violent clashes in the south, which still await peaceful solutions.

Freedom of thought/expression/information

The constitution has a number of provisions on freedom of thought and expression and access to information. Yet, freedom of thought and expression has been severely curtailed by the current administration, even though it came to power through a democratic electoral process. The media are shackled in a variety of ways – both direct and indirect.

First, it should be noted that television and radio channels are still very much in the hands of the state or those close to the state, such as the military. While these channels are at times licensed to other operators, ultimate control rests with the state. Second, while the press is free to some extent, at times the authorities issue intimidating messages to members of the press when they impinge upon the administration. It is well known that today there is a lot of self-censorship. Pressures are also exerted by the administration via their business arms, for example by threatening to cut back on advertising in relevant newspapers, thus affecting the latter's income, for the sake of "compliance." Recently, the editor of a well-known newspaper who described the powers-that-be as arrogant was removed; many suspected that those close to the authorities had a hand in this "reshuffle."

Third, various laws to liberalize media freedoms have not yet been promulgated. An example is the need to reform the antiquated Press Act 1941 which gives broad powers of censorship, and which is, in fact and law, in breach of the current constitution.

Fourth, under the constitution, transmission frequencies are supposed to belong to the people. The public has been waiting for many years for the establishment of an independent agency to regulate the frequencies and shift them from government control to the public domain. This has not yet happened. The formation of the proposed National Broadcasting Commission and the National Telecommunications Commission, which would have the power to liberalize television and radio frequencies and telecommunications respectively, has been blocked. In the meantime, the various monopolies in these fields, at times run by people close to those in power, profiteer from the current impasse.

The Official Information Act 1997[15] allows the public to access official information and this has helped to expose official malpractices on a number of occasions. Yet, there are broad exceptions which may lean in favor of the

authorities. These include the exceptions based on national security, international relations, economic and financial security; information whose disclosure will be detrimental to the law; opinions and advice given by officials; and other official information protected from disclosure by law.

Media freedoms, people's access to information and their interface with the conflict of interests represented by the powers-that-be can be seen through the experience of a case related to ITV, the only independent television channel, which in 2000 was bought into by a company in Thaksin's Shinawatra group. After the purchase, "the investigative and analytical programmes totally lost the sharpness that had made the station in its early years a real departure in Thailand's controlled broadcasting." A group of journalists were sacked for protesting against the manipulation of their reports on the 2001 election, the chairman resigned, and there were reports of journalists being punished for overstepping the company line. This led to concerns that the station was now being used as a propaganda tool. Curiously, an arbitration board recommended that ITV's license fee be cut to a fraction of its existing level, and that the limitation on entertainment programming during prime time be eased from 30 to 50 percent, despite ITV's weak grounds for calling for such a move.[16] Subsequently, a group of consumers questioned the arbitration ruling before the administrative court.[17] A final decision is now awaited from the administrative court.

Freedom of assembly/association

The current constitution stipulates many guarantees for freedom of assembly and association. Even so, despite the fact that the current administration came to power through democratic elections, it often shows a sense of unease, at times verging on the reactionary, towards the freedom in question.

First, even though the constitution and national labor laws allow the formation of trade unions in many sectors, some sectors, such as the civil service, are not allowed to form unions. Second, the trade union movement in Thailand is weak. This is partly due to the fact that during the undemocratic era, authoritarian elements suppressed the rise of trade unions.

Third, there have been periodic efforts on the part of the authorities to reform laws with the aim of further constraining rather than permitting public protests and gatherings. This was exemplified by a recent attempt to reform the law in regard to public throughways so as to allow the authorities to clamp down on public demonstrations.

Fourth, a pervasive practice today is the authorities' use of a "carrot and stick approach" of baiting demonstrators with financial and other promises; if the latter fail to accept the bait or do not abide by the bargain, repression from the authorities follows.

Fifth, the space for human rights defenders, who depend greatly upon freedom of expression, assembly, and association, is diminishing increasingly due to restrictive governmental action. A recent UN report[18] identified

various state instruments which have been used to impede the work of human rights defenders, including:

- damaging the public image of human rights defenders;
- attempting to control and restrict access to funds;
- imposing more requirements for international NGOs to register with the authorities;
- scrutinizing and harassing NGOs on the basis of national security;
- using civil proceedings and criminal prosecutions against human rights defenders to curb their operations;
- restricting their right to protest, and using state violence;
- collusion between local authorities and the private sector against human rights defenders.

A variety of cases have come to the attention of the National Human Rights Commission. For instance, human rights defenders and demonstrators against the Thai–Malaysian gas pipeline referred to later in this chapter (see p. 341) have been intimidated by the police, and those arrested have been denied access to their relatives and lawyers. Media and NGO leaders have had their assets vetted secretly by the anti-money-laundering arm of the authorities. Defamation laws have been used to claim huge sums against media and NGO critics of the authorities. One tactic used by the authorities to "pre-empt" the National Human Rights Commission from exercising its powers to protect human rights and human rights defenders is to litigate in court; according to the authorities' interpretation of the law concerning the powers of the National Human Rights Commission, the latter is prevented from investigating cases if the authorities have already submitted them to a court of law.

The prime minister's approach to NGOs can be inferred from his own words as follows:

> Some people finish their education and do nothing but work for these organizations and collect these overseas subsidies . . . This group of NGOs includes people who want to be famous, who want to enter politics and so stir up other people. There are an estimated one thousand of them. They command no confidence among the other 63 million. I maintain most people understand that the government does everything for the people. I have no interest in their absurd gatherings. It's just people looking to make a name for themselves with no purpose.[19]

Exceptions/derogations

The exercise of civil and political rights is hampered by the exceptions and derogations claimed by the powers-that-be and law enforcers on many

occasions. This is apparent in a variety of ways. First, martial law is still permitted in Thailand and is currently applied in southern Thailand, thus restricting the basic rights usually associated with the rule of law. Second, some laws in form and/or content are tantamount to a restriction of human rights. This was exemplified by the adoption of an executive decree to counter terrorism. Yet, parliament has now confirmed this decree, providing it with legitimacy, even though it confers too much power on the authorities and may be seen as reducing the country's commitment to human rights.

Third, poor law enforcement, vested interests, and corruption often undermine human rights, even when protected by the law, to the extent of rendering their content almost meaningless in practice. This is exemplified by many instances of abuse committed by elements of law enforcers, including extrajudicial killings, torture, abductions, and other violence.

Fourth, the response to human rights and the law needs to be gauged from the angle of how the authorities use and interpret the notion of national security. In the past, there was an anti-communist rationale behind all this, with an anti-communist law on the books. During the Cold War, this led to various violations against those who disagreed with the government and who were branded as communists or subversives. Fortunately, that law has now been reformed. Nonetheless, there is still a road to be traveled to ensure that national security is not based upon a fictitious threat to be used to clamp down on dissidents. It should be reshaped to respond to human security, rather than the state-centric rationale of old.

Economic and social rights

Context

These rights are closely related to the drive to promote human development, overcome poverty, elevate the standard of living, build responsive safety nets and a quality workforce, and protect the environment. Directly on this front, Thailand is a party to the International Covenant on Economic, Social and Cultural Rights, but its first report under this covenant has not yet been prepared.

The majority of the population (about 60 percent) still live in rural areas and are agricultural by profession. While there has been rapid urbanization, the backbone of the country is still the agricultural sector. In recent years agricultural exports have declined, however, and the "number one export" is computer parts. Still, any talk of human development and anti-poverty inevitably has to respond to rural and agricultural needs, while not forgetting other disadvantaged groups such as those in the slums and those with special needs.

From the end of the Second World War, the various military governments in Thailand took a top-down approach to development with little or no involvement of the people, in the distorted hope that the national wealth

would trickle down to the population. It did not, and income disparities began to broaden substantially. There was also over-emphasis on macro-economics, such as the preoccupation with the GDP, and macro-projects such as dam construction, rather than human development at the grass-roots. The national development process was shaped to a large extent by five-year national economic and social development plans; the early plans paid scant attention to the issues of human development and human rights, particularly at the individual level.

This began to change in the 1990s, especially with the advent of democracy in the country in 1992. Recent national economic and social development plans have become more participatory and more reflective of the broader vistas of human development and human rights. Currently the country is in the middle of the Ninth National Economic and Social Development Plan 2002–2006.[20]

From another angle, the form and content of national development and the linkage with economic, social, and other rights is changing radically for another key reason: the strong hand of the current administration. While in the past the country was much influenced by the "policy" outlined by the national plans, today the country is more influenced by the "agenda" set by those in power. There is a key difference in terms of the mindset and related action: while in the past the development process was led, to a large degree, by bureaucrats, today it is led by the politicians in power with a hands-on approach based upon their political platform. There are pros and cons to these changes. By shifting from "policy" to "agenda", from "bureaucrats" to "politicians", the development process is much more directed and targeted, indeed "dirigiste" or "populist–dirigiste." It is shaped by those in power more strongly than ever with skilful manipulation of populism. This can also have constructive implications for restructuring of the bureaucracy, their performance, related budgets and financial commitments for the development process, if done transparently and with checks and balances.

With such "agenda" as the real national strategy, it is unlikely that there will be a tenth national economic and social development plan, because in political terms, it is redundant. Today, politicians rule over bureaucrats, expecting them to conform to their agenda and perform accordingly; to be efficient and produce results as part of the CEO-ization of the country. If bureaucrats do not perform, there are negative consequences for them. Yet, the fact that those in power are exercising an increasing stranglehold over bureaucrats also opens the door to the instrumentalization of the bureaucracy to serve the political agenda of a particular party, especially where the correlative checks and balances against abuses of power are being undermined. In reality, while in the past, bureaucrats were supposed to be non-partisan, they now find themselves increasingly subjected to partisan control.

With regard to popular participation in the development process, the authorities will doubtless claim that they take this to heart, especially in

their populist policies (for details, see p. 338). Yet, the participation element is often premised upon the "carrot and stick approach" noted earlier. In effect, populism does not necessarily lead to popular participation; it may also be instrumentalized to justify repression.

From another angle, the constitution has provided impetus for decentralization, particularly to capacity-build various local entities such as the local administrative organizations to have more decision-making powers for local development, with local revenues channeled directly to them. While the move to decentralize is welcome, a key obstacle is the pervasiveness of patronage and patron–client relationships often represented by those who sit in the entities mentioned. These lend themselves to a conflict of interests as well as accumulation of power among the few, reinforced by their links with the ruling administration. The decentralization process is thus inadequate unless processes are brought into play to break the cycle of patronage, and this depends much upon nurturing alternative leaders and power bases as part of a more pluralistic type of democracy.

Pro-human development and anti-poverty

In human development terms, Thailand is at a middle–high level according to the ranking in the United Nations Development Programme's (UNDP) Human Development Report, by comparison with other countries, as illustrated by Tables 10.1 to 10.3.

Table 10.1 Human Development Index (HDI)

HDI rank		*Life expectancy at birth (years), 2001*	*Adult literacy rate (% age 15 and above), 2001*	*Combined primary, secondary, and tertiary gross enrolment ratio (%), 2000–01*	*GDP per capita (US$), 2001*	*Life expectancy index*
1	Norway	78.7	–	98	29,620	0.90
74	Thailand	68.9	95.7	72	6,400	0.73
175	Sierra Leone	34.5	36.0	51	470	0.16

HDI rank		*Education index*	*GDP index*	*Human development index (HDI) value, 2001*	*GDP per capita (US$) rank minus HDI rank*
1	Norway	0.99	0.95	0.944	4
74	Thailand	0.88	0.69	0.768	–2
175	Sierra Leone	0.41	0.26	0.275	0

Table 10.2 Human Development Index trends

HDI rank		*1975*	*1980*	*1985*	*1990*	*1995*	*2001*
1	Norway	0.858	0.876	0.887	0.900	0.924	0.944
74	Thailand	0.612	0.650	0.673	0.705	0.739	0.768
175	Sierra Leone	–	–	–	–	–	0.275

Table 10.3 Human and income poverty (developing countries: HPI-1)

HDI rank		*Human poverty index (HPI-1)*		*Probability at birth of not surviving to age 40 (% of cohort), 2000–05*	*Adult illiteracy rate (% age 15 and above), 2001*	*Population without sustainable access to an improved water source (%), 2000*
		Rank	*Value (%)*			
73	Saudi Arabia	30	16.3	5.2	22.9	5
74	Thailand	24	12.9	10.2	4.3	16
75	Suriname	–	–	6.5	–	18

HDI rank		*Children underweight for age (% under age 5), 1995–01*	*Population below income poverty line (%)*			*HPI-1 rank minus income poverty rank*
			$1 a day, 1990–2001	*$2 a day, 1990–2001*	*National Poverty line, 1987–2000*	
73	Saudi Arabia	14	–	–	–	–
74	Thailand	19	<2	32.5	13.1	12
75	Suriname	–	–	–	–	–

Source: UNDP, 2003.

Prior to the economic crash in 1997, the number of people under the poverty line was in decline, but the number rose again in the aftermath of the crash. On a brighter note, the current situation has improved and poverty is in decline again; some 9 percent of the population is classified as under the poverty line (about 900 baht per month – at about 39 baht to the US dollar). A recent report of the World Bank (2004) noted that "poverty in Thailand has trended down, though large differences between provinces remain." The poverty incidence lowered to 9.8 percent in 2002, lower than that of the pre-crisis period. This national average, however, masks the higher rates of poverty in certain parts of the country, particularly the northeast which has a poverty incidence of 18 percent.[21]

This clustering of poverty may affect the government's economic growth strategies:

> As part of the "deconcentration" of the public sector, Thailand has recently appointed CEO governors for each province and grouped provinces into clusters. These clusters are management units which normally include four to five neighbouring provinces. Based on the regional development strategies formulated by the National Economic and Social Development Board (NESDB) with the Ninth National Economic and Social Development Plan, each cluster has laid out its own priorities, often focusing on developing specific product lines where a cluster holds a comparative advantage. While these clusters have not been formed from a poverty eradication perspective, they are likely to play an important role in formulating economic growth strategies which in turn will affect poverty.[22]

The Ninth National Economic and Social Development Plan provides the policy angle. First, it emphasizes the philosophy of "sufficiency economy":

> Sufficiency economy is a philosophy that stresses the middle path as the overriding principle for the appropriate conduct and way of life of the entire populace. It applies to conduct and way of life at individual, family and community levels. At the national level, the philosophy is consistent with a balanced development strategy that would reduce the vulnerability of the nation to shocks and excesses that may arise as a result of globalization. "Sufficiency" means moderation and due consideration in all modes of conduct, and incorporates the need for sufficient protection from internal and external shocks.[23]

Second, the poverty alleviation target is to reduce absolute poverty to less than 12 percent of the population by 2006. Accordingly to the above statistic, this has been achieved.

Third, the economic and social development strategies include the following, as *per* the Ninth Plan:

- good governance strategy:
  - upgrading the efficiency and effectiveness of the public sector;
  - decentralization of responsibilities to local administrative bodies;
  - prevention of corruption;
  - development of check-and-balance mechanisms;
  - promotion of corporate good governance in the private sector;
  - promotion of strong families and community ties.
- development of human potential and social protection:
  - empowerment of the people to cope with changes;
  - employment policies to promote self-employment and small-scale entrepreneurship;

  - improvement of the social protection system;
  - prevention and suppression of drug abuse and increased public security;
  - promotion of development partnerships with family-oriented institutions, religious organizations, schools, communities, NGOs, voluntary organizations and the mass media.

- restructuring of management for sustainable rural and urban development:

  - empowerment of communities and development of livable cities and communities;
  - alleviation of rural and urban poverty through the process of popular participation;
  - establishment of linkages between rural and urban development;
  - management of integrated area–function–participation development.

- natural resources and environmental management:

  - upgrade the efficiency of natural resources and environment management in support of conservation, and rehabilitation and development of the grassroots economy;
  - preservation and rehabilitation of natural resources;
  - rehabilitation and preservation of community surroundings, art, and culture, as well as tourist attractions, to enhance the quality of life and the local economy;
  - efficient pollution abatement management conducive to the development of livable cities and communities.

With regard to poverty eradication, there are these emphases *per* the Ninth Plan:

- provision of access by the poor to government services;
- provision of access by the poor to natural resources;
- development of social safety nets to enhance security of poor people;
- development of grassroots economies to create opportunities for the poor and enhance local self-reliance;
- adjustment of government management systems to enhance the creation of opportunities for the poor;
- acceleration of legal and regulatory reforms.

In recent decades, the country has also used various basic minimum needs indicators to measure the fulfillment of basic needs (*Jor Por Tor*) at the local level. There are nearly forty such indicators, such as women's access to health services before and after childbirth. Data are collected from the village level periodically and are computerized at the national level to identify areas that require assistance. Where there are deficiencies, resources will be mobilized

on the basis of the data collection to respond to the needs of the populace. The poorest part of the country is still the arid north-eastern part of the country.

The above orientations should be placed in context. The current administration has adopted a series of proactive populist agenda and measures with key impacts on the development process and anti-poverty action including the following:

1. The provision (by the government) and creation of a one million baht fund per village throughout the whole country for activities, including loans for villagers to undertake activities.
2. A national health scheme based upon the payment of 30 baht per person for a health card, and related services.
3. Temporary debt moratorium for the agricultural sector.
4. Support for the production of one product per Tambon (sub-district) and small/medium scale enterprises.
5. National assets management scheme to take over the debts accumulated during the 1997 crisis and restructure them.
6. Establishment of a People's Bank to assist the poor with financial services; basically this aims to convert the dormant Government Savings Bank and related banks into a pool of resources for the poor.
7. Conversion of property into assets, such as improved use of land holdings as a conduit for loans and their productive use for economic activities, and action to enable the poor to use formal channels to borrow money with reasonable interest rates rather than informal loans with exorbitant interest rates.
8. Registration of the poor for direct assistance by the state.

The government has also ingeniously kept bank interest rates very low, at less than 1 percent. This has pressured investors to move their assets from banks to other financial institutions and equities which offer higher returns as part of the drive to tap resources for national investment.

Currently, the authorities claim success in regard to several of these measures. A recent UN report invites reflection, however, interlinking economic/social rights and other rights, as follows:

> Many human rights defenders contend that the urge to secure economic growth and avoid a return to the recession of the 1990s is a major reason for the strong emphasis laid by the Government on economic development – for example, in the context of mega-projects in the energy sector – and which has encouraged the trampling on the economic, social and environmental rights of some sections of the population. Defenders state that many civil and political rights concerns – including curtailment of the right to protest and the freedoms of assembly, expression and movement – have emerged as a result of action by the

authorities against those criticizing the denial of economic, social and cultural rights.[24]

There are other key areas of concern. First, in the macro-economic context, Thailand's current boom is consumer led. Can it be sustained, and how real and non-superficial is the boom?

Second, the anti-poverty programs above, such as the 30 baht medical scheme, demand an enormous subsidy from the government. Is this fiscally prudent in the long run? The experience of the national health service in many countries indicates that the costs are likely to become prohibitive in the end, if the state is expected to intervene all the time.

Third, the current economic boom has increased family and personal debts substantially, precisely because it is consumer led.

Fourth, with regard to the measures targeted at the poor so that they may have greater access to loans, not enough attention has been paid to the risk factor involved in taking loans and the capacity to manage risk. There has not been equal attention for the need to nurture a culture of "saving" rather than "spending".

Fifth, the income disparity between the haves and have-nots is still very wide, although recent statistics indicate a slight improvement.

While there have been some positive benefits of current policies, therefore, there are grey areas where a dose of skepticism is healthy.

Education, health, employment, and safety nets

For decades, access by the population to primary education has been high. The current rate is nearly 95 percent,[25] although a key problem in the past was the high drop-out rate of students. The constitution is enlightened in promoting twelve years' basic education as the norm, guaranteed by a new Education Act, passed in 2002. Progressively this will be raised to fourteen years' education. Statistics at other levels are positive but can also be improved: access to the first phase of secondary education is nearly 80 percent while access to the second phase is nearly 59 percent. Access to tertiary education stands at just over 16 percent.

Positively, access to primary education is available to all, including non-Thais. Entry into primary school thus does not depend upon Thai nationality. Access is free at the primary level, but not at other levels. This has been attenuated to some extent by the provision of scholarships and student loans. The rate of default on student loans is high, however.

There are key challenges to access to education in practice. First, there are still some instances where children have been prevented from attending primary school, particularly children of stateless people and marginalized groups such as streetchildren and the children of hill tribes. Second, the Education Act also calls for decentralization of decision-making with the potential of more public and local participation in shaping the functioning

of schools. This has yet to happen. Third, while the rating is high in regard to access to primary education, Thailand still suffers from a workforce gap in regard to students at the higher levels of education. Fourth, there are longstanding issues of the quality of teachers and incentives for their work.

With regard to the health sector, the government initiative of providing a national health scheme has already been recognized. While attempts to help the population attain a decent standard of health should be commended, the government must also bear in mind the issue of sustainability, quality of care, and the role of individuals and communities in sharing the cost. Notably there have been complaints from hospitals concerning the current strain on the system and shortage of funds. The issue of private medical insurance has not yet received enough attention, and this needs to be coupled with state incentives, including tax deductions for those who invest in health insurance.

With regard to employment, as noted earlier, the majority of the Thai population is employed in the agricultural sector and they tend to be the poorest sector in the country. Addressing their rights and needs is currently interlinked with the government's anti-poverty drive, as discussed above. From the angle of labor protection, this sector is seen as informal, and it is uncovered by the variety of labor laws and regulations targeted at the formal, industrial sector which is often linked with urban areas. On a positive front, labor-related social security measures now cover not only the death, sickness, and injuries of employees but also their unemployment. Yet in practice, there are numerous violations in both the formal and informal sectors, such as child labor and exploitation of migrant labor with related human trafficking.

The government is now directly addressing other avenues for social welfare and social safety nets, through a variety of measures. First, there is the agenda to register the poor and to help them directly. Second, recently three laws were promulgated with great impact as safety nets. There is now a new child protection law with extensive protection for children based upon the Convention on the Rights of the Child, to which Thailand is a party. There is a new law with a fund to help the elderly. There is also a new law establishing a social welfare fund to help the needy. This is independent of the social security fund which is linked with those who are employed.

Natural resources/environment

The depletion of natural resources and the degradation of the natural environment are key problems in Thailand directly linked with human rights. Environmental groups are also often the strongest advocacy groups, stronger than the traditional human rights NGOs which tended to deal with political issues rather than environment issues.

Key concerns are the human displacement and environmental harm caused by state-backed mega-projects such as various dams and gas pipelines. Under

the constitution, there should be public hearings on these issues prior to the adoption of key decisions, and there should be transparent and fair environmental impact assessments beforehand. Yet, there are lapses in practice.

Recently, one of the most famous instances interlinking the variety of human rights and a mega-project impacting upon the environment was the decision of the authorities to allow the construction of a gas pipeline through the south of Thailand, linked with Malaysia.[26] Opponents complained that this had not been done transparently, and there was ultimately a physical clash in the south on the issue. There were allegations of violence used by law enforcers against civilian demonstrators. The National Human Rights Commission then sent a team to investigate the issue, and found against the heavy-handed conduct of various law enforcers. Ironically, when the report on this matter was sent to parliament for deliberation, in the hope that parliament would provide or pressure for justice for the people, parliament merely referred it to the Constitutional Court to test the constitutionality of the action of the National Human Rights Commission.[27] A decision from the court is pending.

One can but ask: *ubi ius, ibi remedium* – where there is a law, is there a remedy?

Cultural rights

Context

While some observers like to claim that Thailand is a relatively homogeneous society, it is in fact a multi-ethnic society. While there is a high degree of tolerance on most fronts, there has been a tendency on the part of various administrations to adopt an assimilationist stance towards different groups – to pressure them to fit into the Thai vision of the political machinery. Those who do not fit the norm are likely to be marginalized.

There is now an international yardstick which could help to influence the national setting in nurturing a more pluralistic and inclusive system: the Convention on the Elimination of All Forms of Racial Discrimination. It remains to be seen what impact this convention will have in real terms. There are no affirmative-action programs in the form of quotas or the equivalent providing for the needs of marginalized groups or aimed at enabling them to have more access to key positions and services.

Self-determination and ethnicity

The issue of self-determination has a cultural dimension as well as other dimensions, especially political and economic. At the national level, the answer from the authorities is clear on the issue: self-determination cannot be used to justify secession or separatism.

With regard to aspects of ethnicity, there are degrees of flexibility from the authorities. For instance, the authorities are open to different ethnic groups manifesting their cultural identities in a variety of ways, such as language, names, dress, and religion. As noted above, Muslim family law is recognized in the south of Thailand and there are special courts that apply this law. With regard to the hill tribes, education in their languages is provided for, to some extent.

There are also grey areas, however. First, the authorities do not acknowledge the notion of "indigenous rights" or "indigenous peoples," a notion which has at times been used by the hill tribes to advocate their rights and identity. Second, there are continual pressures upon non-Thai groups to take up Thai names and Thai practices. Third, there are at times problems with the civil status of different ethnic groups. The issues range from birth registration to household registration, identification cards, and nationality, and particularly affect non-Thais on Thai territory or those who are Thai in fact but not in law. For instance, the children of illegal immigrants, including migrant workers and refugees who enter in breach of the Thai immigration law, are not provided with the opportunity to have their births registered fully and to have a "birth certificate" issued to them. The situation was attenuated in 2003 when the authorities allowed "delivery certificates" to be given to those children. These certificates indicate details concerning the child's birth, although they do not carry the weight of official birth certificates.

The plight of hill tribes in the north of Thailand and their quest for Thai nationality is a major issue. In a famous case concerning a number of hill tribe people, some state officials revoked the Thai nationality which had been granted to them. The National Human Rights Commission intervened to call for the restoration of Thai nationality to the group, and the case was also taken to the Administrative Court. The latter ordered the restoration of nationality to this group.[28]

A sizeable number of other hill tribes do not have Thai nationality, although they were born in Thailand. Periodically, the Thai authorities grant nationality to the group, but a number remain in effect stateless.

Gender sensitivity

The issue of gender, particularly women's rights, has a cultural dimension as well as other human rights dimensions. There has been marked progress in the status of women on many fronts, including the abolition of constraints impeding women's access to various positions such as the judiciary, district officers, and the military. The constitution, which advocates equality and non-discrimination, has been well tested in regard to women's status. For instance, the Constitutional Court has now decided that a law on names which compels women to give up their maiden name upon marriage is unconstitutional.[29] Thus women are now able to choose to retain their maiden name or take the name of the husband upon marriage.

Yet, key challenges remain. While the access of girls and women to education is high and while their participation in the economy is great, their access to decision-making positions at the top level is still low. There are still too few women parliamentarians, senators, and ministers. Moreover, various anomalies in the law are still on the books; for instance family law provisions on divorce still favor men. Culturally, the various religions also need to take stock of how they enable women to participate. For example, it is still not possible for women to be ordained as Buddhist monks in Thailand. There is now a movement to change this position, but it also has to deal with the close relationship between the church and the state.

There are also instances of rampant abuses and violence committed against women such as in the labor sector and the sex industry. Violence ranges from the family to the community and state settings. As in many other countries, while the laws are often there to protect, it is the practice which fails to deliver. A key challenge is, therefore, to mobilize communities and law enforcers to become more gender sensitive and to ensure that there is no discrimination in law (*de jure*) or discrimination in practice (*de facto*).[30]

Conclusion

The above analysis takes stock of some of the key developments concerning today's Thailand in an era of economic boom, directed by a government with a strong agenda, administered with the wand of a CEO. While that wand may help to foster human rights on some fronts, it leaves much to be desired on other fronts. It also provides a crucial lesson: the mere fact that an administration is democratically elected does not automatically imply that it will promote and protect human rights in a comprehensive manner. Often, if it does so at all, it does so selectively, or it may be doing so merely as part of the marketing strategy or "branding and rebranding" that is part of the business know-how. In such setting, the space for human rights and human rights defenders is being reduced markedly.

How then to retain the space that still exists for human rights and those advocating a comprehensive approach? On the one hand, in Thailand, there are various independent organs established by the constitution, such as the Human Rights Commission and the Administrative Court, which could provide some checks and balances against abuses of power. It is well known, however, that some of these organs are becoming less independent.

On the other hand, there is a range of civil society actors and human rights defenders who need to be supported as community guardians. Here too their space is diminishing, and they need to guard it zealously with the support of both the local and international communities.

There is a related challenge in this era of globalization of which "Thailand Inc." is part and parcel: when faced with an administration that runs the country like a corporation and that has tentacles in nearly all sectors, how to retain, if not strengthen, checks and balances against abuse of power?

It is essential to maximize the space for these checks and balances whether they are formal institutions, such as the courts and the National Human Rights Commission, or non-formal actors such as NGOs and community leaders. Community awareness, education, and mobilization on human rights must also be enhanced to bolster societal vigilance against transgressions.

Those elements will remain important monitors and pressure points for accountability, in the face of the omnipotent state and its business cohorts. At times, they may even act in a more "media-savvy" manner to catalyze the population – not superficially but substantively. They may even wish to maximize the know-how for propelling the cause of human rights by learning from some of the proactive ways of the business sector.

Yet, behind that scenario, there lies a potential paradox for "Thailand Inc.": while businesses are primarily about profits, and the politics of generating them, human rights are primarily about people, and the ethics of (mis)treating them.

Notes

1 Pasuk Pongpaichit, "A country is a company, a PM is a CEO," *Bangkok Post*, April 21, 2004, p. 13.
2 *Bangkok Post*, *ibid.*, p. 6.
3 Constitution of the Kingdom of Thailand, BE 2540 (1997), Bangkok: Office of the Council of State/Senate.
4 Constitution of Thailand, section 28.
5 Constitution of Thailand, section 29.
6 Constitution of Thailand, section 57.
7 Constitution of Thailand, section 65.
8 Constitution of Thailand, section 68.
9 *Hayashi Hasinori* v. *Prosecutor*, case number 3/2544, Constitutional Court, January 18, 2001. (In Thai: www.concourt.or.th/decis/y2001d/d00344.html.)
10 Amnesty International, "Thailand: grave developments – killings and other abuses," London, November 2003.
11 *Government Gazette*, vol. 120, part 76, August 11, 2003, p. 1 (in Thai).
12 *Bangkok Post*, April 29, 2004, p. 1.
13 Pasuk Phongpaichit and Chris Baker, *Thaksin: The Business of Politics in Thailand*, Chiangmai: Silkworm Books, 2004, pp. 174–5. The names in the quotation have been modified here for the sake of anonymity.
14 *Ibid.*, p. 236, which notes: "As security forces became more concerned over possible links to militant Islam, the frequency of searches and seizures increased, especially in pondok (religious) schools. According to the National Human Rights Commission (2004), many people were beaten or abducted. An activist lawyer, Somchai Neelapaichit accused the police of barbarically torturing arrested suspects. A few days later on 12 March 2004, he disappeared. Four police officers were subsequently arrested and accused of abducting him. A (Deputy Prime Minister) let slip in parliament that he knew Somchai was already dead."
15 *Royal Gazette*, vol. 114, part 46, September 10, 1997, p. 1 (in Thai).
16 Pasuk Pongpaichit and Chris Baker, *supra* note 13, pp. 218–20.
17 *Mulaniti Boripok, Mulaniti Sukapap Thai, Smakom Pitak Prayot Pouboripok, Samakom Kon Tabot Hang Prathet Thai, Sahapan Ongkarn Pou Boripok, Kanakamakarn Ronarong Prachathipathai, Kanakamakarn Ranarong Pua*

Patiroopsue and Naew Ruam Pua Kwam Kao Na Pouying v. *Prime Minister's Office and ITV Corp*., Black case number 397/2547, Central Administrative Court, April 20, 2004 (in Thai).

18 Hina Jilani, *Promotion and Protection of Human Rights Defenders: Addendum Mission to Thailand*, UN Doc.E/CN.4/2004/94/Add.1, December 19, 2003.

19 As cited by Pasuk Pongpaichit and Chris Baker, *supra* note 13, pp. 147–8.

20 Government of Thailand, *The Ninth National Economic and Social Development Plan (2002–2006)*, Bangkok: National Economic and Social Development Board, 2001.

21 World Bank, "Thailand economic monitor," Bangkok, April 2004, p. 7.

22 *Ibid.*

23 Government of Thailand, *supra* note 20, p. i.

24 Hina Jilani, *supra* note 20, p. 10.

25 Source: Ministry of Education, Bangkok, Thailand.

26 Hina Jilani, *supra* note 18, pp. 16–17.

27 *President of the National Assembly* v. *National Human Rights Commission*, case number 46/2456, Constitutional Court, September 17, 2003 (in Thai).

28 *Bangkok Post*, April 20, 2004, p. 6.

29 *Reference from the Ombudsman to the Constitutional Court*, case number 21/2546, Constitutional Court, June 5, 2003 (in Thai).

30 *Report for the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Fourth and Fifth Combined Report* (in Thai), Bangkok: Ministry of Social Development and Human Security, [no date].

11 The Philippines

The persistence of rights discourse vis-à-vis substantive social claims

Raul C. Pangalangan

General introduction to rights theory and practice in the Philippines

Historical context of rights-thinking in the Philippines

Rights-based discourse pervades public debate in the Philippines, owing to a long history of political struggles animated by the values of Western liberalism. Rights discourse began with the independence movement against Spain. The anti-colonial revolution culminated in 1899 with a homegrown constitution, called the "Political Constitution of the Republic," written in terms inspired by the French Revolution. It contained a separate title "The Filipinos and their National and Individual Rights," which listed twenty-seven articles guaranteeing liberty with judicial safeguards, the privacy of communications, the protection of dwellings from unlawful searches, and the "full enjoyment of . . . civil and political rights." Significantly, it bore a clear anti-feudal bias in rules banning "primogeniture[,] institutions restrictive of property rights, [and] honorific titles or nobility."[1] Although this charter was drafted by European-trained or influenced leaders,[2] it remains clear proof that the idea of the rights-bearing citizen had taken root among Filipinos and was indeed used to contest the power of the Western colonizer.

This was followed by half a century of US rule that further formalized the institutions of democracy with a strong bill of rights and, with even more lasting effect, created a cadre of lawyers and government bureaucrats reared in the language of rights. The Philippines regained its independence in 1946, and has since been governed under four constitutions: the independence charter which was in effect until Marcos declared martial law in 1972;[3] the Marcos charter which was in effect from January 1973 until Cory Aquino's "People Power" uprising; the interim Freedom Constitution of 1986 under which Cory governed during the transition; and the current 1987 Constitution which codified the libertarian goals and the social reform agenda of Cory's democratic coalition.

The central fact that animates Philippine human rights discourse today is the historical rejection of dictatorship as experienced under Marcos, and of the violations of human dignity and integrity that ensued. At a deeper level,

however, the discourse looks, on one hand, at how Marcos used the pursuit of economic, social and cultural rights as an excuse for the curtailment of political liberties (the classical "trade-off" argument), and on the other, at how the degradation of economic and social conditions had fueled the insurgency that precipitated the militarization of governance.

Nonethless, rights discourse is a veneer over a deeper, but less often officially articulated, cultural impulse toward substantive justice. Filipinos tend to think in terms of "the good" rather than "the right," and thus do not intuitively accept the Rawlsian notion that there are rights that even the good of society cannot override. That the social good can trump rights is discussed below, in relation to the tendency of the courts to override rights claims to promote welfare claims amply provided for in the constitution and extravagantly interpreted by the courts. This stance reflects, rather than stands apart from, populist thinking.

International human rights obligations

The Philippines is party to all the major human rights instruments, among them:

(a) the International Covenant on Civil and Political Rights (ICCPR);
(b) the International Covenant on Economic, Social and Cultural Rights (ICESCR);
(c) the Convention Against Torture (Torture Convention);
(d) the Convention on the Rights of the Child (CRC); and
(e) the Convention on the Elimination of Discrimination Against Women (CEDAW).

Significantly, the Philippine Constitution contains an incorporation clause:

> The Philippines . . . adopts the generally accepted principles of international law as part of the law of the land[4]

with the effect that treaties establish not just international obligations owed to other states, but have the force of a legislative act, whereby they become effective as municipal law for the people to observe.[5] Accordingly, the specific human rights recognized under these instruments have been invoked directly in Philippine courts and, more significantly, have been made the basis for granting judicial relief.

Dating back to the 1950s, the court has "incorporated" human rights norms into domestic law, for example in the famous cases *Borovsky* v. *Director of Prisons*[6] and *Meijhoff* v. *Director of Prisons*.[7] In both cases, the petitioners were being deported as undesirable aliens but were denied re-entry by the countries of their original nationality. They were detained in the national penitentiary but filed suit before the Supreme Court, invoking the liberty clause in the Universal Declaration of Human Rights (UDHR).[8]

The court held that the UDHR had been directly incorporated into domestic law, and set them free.

The Supreme Court's record has not been consistent, however. In *Ichong* v. *Hernandez*, the petitioner challenged the Retail Trade Nationalization Law that excluded all aliens from the retail business. The Nationalization Law, though neutral "on its face" (but for an express constitutional exemption, since expired, for Americans), was discriminatory "as applied," because the retail trade in the Philippines at that time was overwhelmingly run by Chinese merchants. The petitioner invoked the same UDHR incorporation as in the *Borovsky* and *Meijhoff* cases, but the court retracted its earlier stance, saying that the incorporation clause operated only on treaties, not on the UDHR, a mere declaration setting "standards of achievement."

Indeed, in a strange twist of fate, the incorporation clause was invoked by Ferdinand Marcos when he sought to return to the Philippines after his ousting. The Supreme Court affirmed that the ICCPR provision on the "right to return may be considered, as a generally accepted principle of international law and under our Constitution, as part of the law of the land." In an even stranger twist of logic, however, the court said that the bill of rights "treats only of the liberty of abode and the right to travel." It does not speak of a "right to return to one's country," which is "distinct and separate from the right to travel and [which] enjoys a different protection under [Article 12(4) of] the International Covenant of Civil and Political Rights,"[9] and that therefore Marcos may thus be barred from returning under the Philippine Constitution.

More recently, the court has "incorporated" the non-discrimination clauses in the human rights covenants to strike down differential wages for local and foreign hires in an international school that catered primarily to the expatriate community.[10]

The Supreme Court recently invoked international human rights instruments to resolve a controversial attempt to disqualify a hugely popular presidential candidate, on the ground that he was an illegitimate child and was not eligible to run for president, an office reserved only to natural-born citizens.[11] In that case, the right to political participation[12] was coupled with the right of "all children whether born in or out of wedlock . . . to the same social protection,"[13] to uphold the candidate's right to non-discrimination on the basis of civil status in the exercise of his political rights.

Finally, the human rights treaty mechanisms have been invoked against the Philippines, which was called to answer before the United Nations Human Rights Committee in the case of *Carpo* v. *The Philippines* for imposing the death penalty upon the petitioner.[14] The Philippine Constitution states:

> Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall the death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it.[15]

The Philippine Congress subsequently restored the death penalty for heinous crimes,[16] a move that was upheld by the Supreme Court.[17]

Significantly, the incorporation of human rights was affirmed in a Marcos-era response to the questionnaire submitted by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UNCTAD on the preparation of the study entitled "The Status of the Individual and Contemporary International Law." The response stated that the Philippines "is a signatory to the Universal Declaration of Human Rights; that it considers the human rights stated there in to be 'part of the law of the land' in this country; and that the Constitution of the Philippines expressly guarantees to everyone, whether an alien or a citizen, 'due process of law' and 'equal protection of law'."[18]

In another Marcos-era response to a UN query on the civil and political rights section of the "1982 United Nations Report on the World Social Situation," however, the Philippines objected to the "notion that the influence of developed nations may be utilized to exert pressure upon allegedly oppressive governments for the purpose of promoting human rights. [Citing] President Marcos [the Philippines affirmed that] any attempt on an international level in this regard may constitute interference in the affairs of less-developed countries without advancing the cause of human rights."[19]

Normative and structural approaches

The 1987 Constitution has been hailed as a "human rights constitution," the fruit of the anti-Marcos struggle that brought Cory Aquino to power. It contains a strong bill of rights, setting forth the traditional civil rights insulating the individual from state power, as well as a separate and elaborate provision containing directive principles and normative statements setting forth the affirmative duties of the state. Finally, and most significantly, it establishes structural guarantors of checks and balances to ensure that the rights are protected, such as the separation of the powers of government; an independent judiciary; an ombudsman; and an independent Commission on Human Rights (CHR). The power of the CHR has been clipped, however, by the Supreme Court. The court has ruled that the power to injunct government acts that may threaten human rights is judicial in character and is exercisable only by the courts.[20]

Black-letter law and case law on specific human rights: a summary

Freedom of speech and of assembly

The Philippines today has a robust, almost licentious press, insulated from the power of the state, flowing from the rejection of the censorship and

state control of the Marcos years. The 1987 Constitution states in ringing terms:

> No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.[21]

The clause has been consistently and liberally applied in favor of free speech, with the court vacillating between the dangerous-tendency test and the clear-and-present-danger test. The Philippines has also adopted the *New York Times* v. *Sullivan*[22] test, allowing more open criticism of public officers, and of "public figures." The court has held that journalists may be held liable for defamation only for "actual malice," and most recently applied that rule in a complaint by no less than then President Corazon Aquino who sued a leading publisher for reporting that, at the height of a coup attempt, she, the commander-in-chief, cowered under her bed. The Supreme Court eventually threw out the case, finding that the report was a case of legitimate hyperbole and was covered by the liberal *New York Times* standard.[23]

The court has also upheld the validity of time, place, and manner regulations over the freedom of assembly,[24] including protest activities in schools where, historically, militant youth organizations abound.[25] The court has further applied leading US rulings (*Roth* v. *US*[26] and *Miller* v. *California*)[27] in defining obscenity.[28]

Right to privacy

Although the express constitutional recognition of the right to privacy is limited to the "privacy of communication and correspondence,"[29] privacy has been more expansively interpreted through the due process clause. The Supreme Court has recognized a "public figure" exception in a case involving a movie on the historic people power uprising that ousted Marcos. The Defense Secretary who turned against Marcos, and later against Cory Aquino as well, sought to injunct the film, but was rebuffed by the Supreme Court. The court held that the film portrayed his role in an historic event, a public matter over which he could lay no claim of privacy.[30]

The right to political participation

The most exciting recent developments in the Philippines pertain to the right of political participation, which was enlarged by the 1987 Constitution as part of the restoration of democracy in the Philippines. The constitution grandly states in its Declaration of Principles and State Policies that:

> The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.[31]

Republicanism is implemented by the clause on suffrage, providing that:

> No literacy, property, or other substantive requirement shall be imposed on the exercise of suffrage.[32]

This right was most recently expanded to enable Filipinos living abroad to vote through the Absentee Voting Law[33] and the Dual Citizenship Law.[34]

The constitution also provides for the people's power of direct initiative to propose and reject laws,[35] to recall local officials,[36] and to propose constitutional amendments.[37] To implement these rights, the Congress has enacted the Initiative and Referendum Act,[38] which provided for three systems of initiative, namely, to amend the constitution; to propose, revise, or reject statutes; and to propose, revise, or reject local legislation. The Supreme Court has hailed this law as "actualizing . . . direct sovereignty" and expressly recognizing the people's "residual and sovereign authority to ordain legislation directly through the concepts and processes of initiative and of referendum."[39] The Supreme Court has since "rhapsodized people power"[40] in several cases where the "direct initiative" clauses of the constitution had been invoked.

The Congress has also enacted the Local Government Code,[41] which provides for the recall of local officials by either the direct call of the voters, or through a "preparatory recall assembly" consisting of local government officials, which was hailed by the Supreme Court as an "innovative attempt . . . to remove impediments to the effective exercise by the people of their sovereign power."[42]

The court subsequently faced a bogus, obviously manipulated "people's initiative" to lift the constitutional term-limits and enable then President Fidel Ramos, a former general, to remain in power perpetually. Confronted with a misuse of the "direct initiative" powers, the court read the Initiative Law very narrowly and rejected a purported spontaneous groundswell seeking the constitutional amendment.[43]

Finally, a prerequisite for the right of political participation is the right to information, guaranteed expressly by the constitution:

> The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.[44]

The court has rejected the invidious Marcos practice (quite bravely, after Marcos had been ousted) of issuing secret decrees and unpublished laws,[45] and has recently upheld the right of citizens to information about government contracts.[46]

Freedom of speech in relation to political participation

The Philippines has long agonized over the disproportionate access to political power by its ruling elites. For instance, the constitution has enshrined in its directive principles the following disapproval of political dynasties:

> The State shall guarantee equal access to opportunities for public service, and prohibit political dynasties as may be defined by law.[47]

Today, seventeen years later, the Philippine Congress has not legislated on political dynasties. To the credit of Congress, however, it has actually taken a few steps to level the political field. First, it has carried out the constitutional requirement that party-list representatives sit in Congress:

> The party-list representatives shall constitute twenty per centum of the total number of representatives including those under the party list. For three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector.[48]

The Supreme Court has ruled that only *bona fide* marginalized sectors may have party-list representatives, and barred some mainstream group representatives from taking their congressional seats.[49]

Second, it has passed – but subsequently repealed – a law prohibiting paid political advertisements on television. The law aimed to equalize the contest between rich and poor candidates, or what Chief Justice Hilario G. Davide Jr. reviled as "the politics of the elite, the rich, the powerful and the pedigreed." The law required all candidates instead to advertise through a common COMELEC hour on radio and TV. That ban was challenged twice before the Supreme Court, which upheld the ban on both occasions. In the first challenge, the court held that the "mind-deadening" messages beamed to a "passive and unthinking audience" were entitled only to the lowest level of protection.[50] In the second challenge, the court concluded that Holmes's "marketplace of ideas can prove to be nothing but a romantic illusion if the electoral process is badly skewed, if not corrupted, by the unbridled use of money for campaign propaganda." Significantly, the court characterized the regulation as content neutral, and as merely a time, place, and manner regulation, shifting the campaign propaganda from one forum (paid TV ads) to another forum (the shared COMELEC hour on TV and radio).[51] The Congress has since lifted the ban, responding to critics who said that the ban favored candidates who were already famous. Rather than neutralize the power of money, they preferred to neutralize the fame and visibility of

TV and movie celebrities, who had emerged as the only possible challengers to the entrenched elites.

Third, further along on this campaign to neutralize the electoral draw of media celebrities, the COMELEC itself aimed to purify the political process and exclude improper influences upon the sovereign voice. These attempts recognized the power of suggestion, the lure of the bandwagon and of "trending," to sway the sovereign will. COMELEC banned survey groups from publishing their findings at the height of campaign season.[52] The court struck down a ban on publishing survey results during the crucial period before election day, aiming to prevent the bandwagon effect, the "junking" of weak candidates, and election cheating. The COMELEC embargo on survey results was found to be a prior restraint on speech bearing "a weighty presumption of invalidity." The COMELEC "suppresse[d] a whole class of expression, while allowing [expression on] the same subject matter by newspaper columnists, radio and TV commentators, armchair theorists." This was an example of the content-based regulation so abhorred in our constitutional order, in which the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

Next, the COMELEC tried to ban exit polls on election day and the dissemination of their results through mass media.[53] The court struck down the order, holding that this constitutes an essential part of the freedom of speech. The COMELEC had acted "in the guise of promoting clean, honest, orderly and credible elections [but] quite the contrary, exit polls – properly conducted and publicized – can be vital tools in eliminating the evils of election-fixing and fraud."

Religious freedom

The 1987 Constitution declares: "The separation of Church and State shall be inviolable."[54] The principle of separation was first expressed in Philippine history in the Malolos Constitution of 1899, the first native articulation of constitutional principles. The Malolos Constitution contained a separate title specifically on "Religion," setting forth only one. "The State recognizes the freedom and equality of all religions, as well as the separation of the Church and State."[55] The history of this clause shows the "original sin" of the separation doctrine in Philippine history.[56] The revolution had been inspired by anti-church sentiments because the power of the Spanish colonial government in Manila relied in large part upon the organizational reach in the provinces and the ideological influence of the Roman Catholic Church. This union of church and state allowed abuses by clergy that eventually moved the people to rebel. Yet at the moment of victory, the Founding Fathers wrote and adopted the separation of church and state clause inside a church. Worse, when the constitutional convention delegates cast their votes, the separation clause won by only one vote. To top it all, the first thing they did next was to suspend its operation "in order to preserve unity"

in light of impending war with the USA upon the outbreak of the Spanish–American war.[57]

The wall of separation is vital in the Philippines. It is predominantly (85 percent) Roman Catholic, with a 10 percent Islamic minority concentrated in the south, where there is an active Islamic separatist movement.[58] At the same time, the church has played a large role in Philippine politics, leading the protests against human rights abuses under Marcos. Yet, more recently, the church has suppressed the population-control programs of government, to the chagrin of development and family-planning advocates, as discussed below.

In terms of black-letter law, the Philippines has borrowed almost verbatim the US Constitution's doctrines on religious freedom:

> No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.[59]

We further carry out the establishment clause in fine detail.

> No public money or property shall be appropriated, applied, paid, or employed, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or system of religion, or of any priest, preacher, minister, or other religious teacher, or dignitary as such, except when such priest, preacher, minister, or dignitary is assigned to the armed forces, or to any penal institution, or government orphanage or leprosarium.[60]

These clauses are lifted bodily from US church-and-state doctrine, structured along the free-exercise clause and the establishment clause. For instance, when the Philippine Supreme Court applies the establishment clause, it expressly adopts the doctrine laid down in the US case *Lemon* v. *Kurtzman*.[61] In the 1959 *Gerona*[62] case, the Philippine Supreme Court followed the US Supreme Court's 1940 ruling in *Gobitis*.[63] The Gerona children, who belonged to the Jehovah's Witnesses, refused to take part in flag-saluting ceremonies, but the Supreme Court, speaking through a Catholic justice, said the flag ceremony was wholly consistent with their biblical interpretations. It took another thirty-four years before the Philippine Court reversed itself in *Ebralinag*.[64]

The saga of church-and-state separation throws a unique light on the US separation doctrine, which emerged in a pluralistic community where people chose their faiths in a "level playing field." It is transformed when applied in a Philippine setting where a hegemonic church reigns supreme and where religious practices have been internalized in the native culture.

Indeed, the court itself has not consistently applied the doctrine. On one hand, the court refused to strike down (now repealed) a provision in the Administrative Code prohibiting priests from running for public office. Several justices said that the constitutional intent was to prevent precisely such union of church and state, some of them tracing the drafting history all the way to the Philippine Revolution that produced the Malolos charter. The court has also upheld the right of the members of a minority faith, the *Iglesia ni Cristo*, whose religion prohibits them from joining unions, and whom the court thus exempted from "closed-shop, union-shop" clauses in collective bargaining agreements requiring all employees to join the certified union.[65]

On the other hand, the court, in *Gerona*, showed intolerance for minority religions. Having reversed this in *Ebralinag*, the court most recently has demonstrated solicitude for a court employee who was to be disciplined for immorality for having remarried. Divorce is not allowed in Philippine law, but the employee had remarried as a Jehovah's Witness, and the union had been stable for almost twenty years. The administrative hearing officer unabashedly applied "the strict moral standards of the Catholic faith in determining her administrative responsibility in the case at bar."[66]

Today politicians shamelessly seek the benediction of religious leaders, the better to win the vote of the loyal flock, and clerics dispense their blessings upon candidates. During the campaign for the June 2004 elections, several lawyers petitioned a Manila trial court to prohibit religious leaders from endorsing political candidates on the ground that this violates the separation of church and state. The trial judge obliged, but was rebuffed on jurisdictional grounds by the Supreme Court.[67]

Ironically, this case stood before a Supreme Court that itself has adopted what it calls an ecumenical prayer for the courts. The prayer was certainly carefully enough worded to be ecumenical, but is sometimes recited by the overzealous who would give nary a thought if they began with the sign of the cross, or ended with the "Our Father." Indeed, a law student has sued the University of the Philippines to stop classroom prayer, albeit an isolated case already banned by standing regulations in campus.[68]

Economic, social, and cultural rights

The Philippines has signed up for the programmatic obligations contained in the ICESCR, and has incorporated these obligations into domestic law. The post-Marcos 1987 Constitution did one better, though. After long debates, the drafters created new sections for non-traditional claims: economic and social rights in the Declaration of Principles and State Policies;[69] economic protectionism in the section called the National Economy and Patrimony;[70] and affirmative action in the section called Social Justice and Human Rights.[71]

That constitution thus contains broad normative statements and sets forth the affirmative duties of the state, that is, what the state must do, in contrast

with the bill of rights, the succeeding article in the constitution, which sets forth the negative duties of the state vis-à-vis individuals, that is, what the state may not do. These clauses contain "the basic ideological principles that underlie the Constitution."

The drafting history shows that this in fact was a compromise, between the activists in the Constitutional Commission that authored the charter (who wanted to codify all the welfare claims into the charter) and the traditionalists (who preferred a traditional bill of rights dedicated mainly to civil and political rights):

> We have been called to this Commission by a revolutionary government to the extent that it is a government that is a product of [Cory Aquino's 1986] revolution. And very much in the air nowadays are phrases like "people power," "revolutionary Constitution," "social justice," and "those who have less in life should have more in law." Therefore, what we are trying to formulate here is a constitution that will set up structures capable of continuing the goals of the revolution. It is said that the revolution . . . was primarily a *political revolution*. It was a revolution that released from the political oppressions that were institutionalized under the old [Marcos] regime . . .
>
> But it is also said that we still have to complete a social revolution. And if we look at the Bill of Rights, . . . we find guarantees which by themselves are self-executory. But when it comes to guarantees of social and economic rights, the farthest we can go is to set goals for future legislatures to attain . . . because we, as a Constitutional Commission, cannot legislate fully effective means for attaining these social and economic goals.
>
> What we need today is the *completion of a peaceful social and economic revolution*.[72]

The result was that the traditional rights were placed in the bill of rights, and could therefore be judicially enforced in court, while the newfangled welfare claims were placed in the directive clauses.

In one line of cases, the court has kept faith with that distinction. In a case challenging Philippine ratification of the WTO agreement, the court held that the economic protectionism found in the directive clauses was:

> [N]ot intended as self-executing principles ready for enforcement through the courts. They are used by the judiciary as aids or as guides in the exercise of its power of judicial review, and by the legislature in its enactment of laws.[73]

In a case challenging government-sponsored gambling through the "lotto", the court similarly held that the "good morals" clauses were not:

> [S]elf-executing provisions, the disregard of which can give rise to a cause of action in the courts. They do not embody judicially enforceable constitutional rights but guidelines for legislation.[74]

The court has had an opportunity to affirm the classic function of directive clauses as guides to the political branches of government. The right to health, discussed below, has been invoked by the court to uphold the Generic Drugs Law, which aims to provide cheap, quality medicine to the public,[75] and has in fact been used to prod Congress to adopt other proactive legislation in public health.[76]

In a separate line of cases, however, an "activist" Supreme Court treated the directive clauses as no different from the bill of rights, so long as the directive clause used the word "right." For instance, one directive principle pertains to the right to health:

> The State shall protect and promote the *right to health* of the people and instill health consciousness among them.[77]
>
> The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.[78]

In a petition led by environmentalists to stop the issuance of timber-cutting permits, the court said that these rights were directly enforceable before the courts, and the trial court erred in dismissing the petition for failure to state a cause of action:

> While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation . . . As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.[79]

In contrast, under the strong influence of the Roman Catholic Church, the Philippine Government has interpreted extremely narrowly the directive principles in relation to population policy. The constitution provides:

> The State shall defend [t]he right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood.[80]

The government has read this clause to mean the virtual abdication by government of its role in population control in deference, so they say, to the

"right of spouses" to make that choice, notwithstanding overwhelming evidence that poor uneducated parents continue to have more children than they can afford to feed, mainly out of ignorance of family-planning methods. Ignoring the need for fully informed choice, the government has recently signed an agreement with a religious group to promote the only church-sanctioned family planning method, referred to as "Natural Family Planning" under a "fertility awareness program."[81] The mayor of the capital city, Manila, has also declared his administration's "total commitment and support [for] Responsible Parenthood," vowing to:

> [U]phold natural family planning not just as a method but as a way of self-awareness . . . while discouraging the use of artificial methods of contraception like condom, pills, intrauterine devices, surgical sterilization, and other[s].[82]

Right to economic participation

The court has also directly enforced the protectionist clauses of the constitution that reserve preferential treatment for Filipinos. In the infamous *Manila Prince Hotel* case, the Supreme Court allowed a losing bidder, a Filipino company, to match *post hoc* the winning bid of a Malaysian company.[83] The Filipino bidder invoked a protectionist clause:

> In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.[84]

The court, noting the reference to "rights", held that the state's constitutional duty to "give preference to qualified Filipinos" was "self-executory" and "*per se* judicially enforceable" even without implementing legislation enacted by the Congress:

> A provision which lays down a general principle . . . is usually not self-executing. But a provision which is complete in itself and becomes operative without the aid of supplementary or enabling legislation, or that which supplies sufficient rule by means of which the right it grants may be enjoyed or protected, is self-executing.
>
> [This provision] is a mandatory, positive command which is complete in itself and which needs no further guidelines or implementing laws or rules for its enforcement . . . It is *per se* judicially enforceable.

In another widely criticized decision, *Board of Investments* v. *Garcia*, the court reversed a petrochemical plant investor's decision to relocate a

proposed plant, citing the duty of the state to "develop a self-reliant and independent national economy effectively controlled by Filipinos," and using policy arguments to explain why the investor's decision was bad for the nation. Strong dissenting opinions argued for judicial restraint, citing the dangers of "government by the judiciary":[85]

> [C]hoosing an appropriate site for the investor's project is a political and economic decision which, under our system of separation of powers, only the executive branch, as implementor of policy formulated by the legislature . . . is empowered to make.[86]
>
> [The majority has] decided upon the wisdom of the transfer of the site; . . . the reasonableness of the feedstock to be used; . . . the undesirability of the capitalization aspect; . . . and injected its own concept of the national interest.[87]

Primacy of civil and political rights vis-à-vis economic, social, and cultural rights

There are Supreme Court rulings that have in a way "demoted" economic, social, and cultural rights. A case decided under the 1935 Constitution still stands as controlling doctrine, wherein steel-mill workers staged a mass demonstration during work hours despite a "no strike" clause in their collective-bargaining contracts. It was not a strike, they argued, because theirs was a sympathy protest against police abuses elsewhere, not an industrial grievance against management. It was a work-stoppage nonetheless, cried the employer, asking why he, an innocent bystander, had to pay the price for the workers' statement of principle and for acts of brutality by the police. The court held that "[w]hile the Bill of Rights also protects property rights, the primacy of human rights over property rights is recognized." The court spoke of a "hierarchy" of rights and the "superiority of [political] freedoms over property rights."[88]

The Supreme Court has more recently limited the mandate of the Commission on Human Rights to civil and political rights, excluding economic, social, and cultural rights. The court examined the drafting history of the constitution, and found that the intent of the framers, owing to the recent experience of abuses under Marcos, was to create a CHR to protect traditional civil and political rights. The drafters were concerned that undue emphasis on economic, social, and cultural rights might allow a future Marcos to use the classic trade-off argument to justify curtailing civil and political rights in exchange for economic progress.[89] Indeed, Marcos had earlier deployed the trade-off argument. In a response to a query by the UN Secretary General on the "promotion and protection of human rights," the Secretary of Justice declared, citing a Marcos-authored book on human rights:

> The totality of our government's program of democratization of society is geared towards the attainment of the great welfare and dignity of every member of society, particularly the poor and the underprivileged. This program encompasses not only protection and promotion of the individual's political rights but also his social and economic rights. In concrete terms, it assures to man all the things vital to human life, namely, food, health, shelter, work, education and security.[90]

Concluding remarks

The "Asian values" debate and the challenge to the universality of human rights do not resonate in Philippine discourse. For several reasons, the Philippines has relied heavily on the old intellectual armory of law to promote new causes in social transformation. First, the historical nightmare with the Marcos dictatorship cautions against loosening legal restraints on governmental power. Second, the law stands as the only institution to restrain economic or political domination by various elites, whether they are business, warlord, or religious elites, and is tolerated as the neutral umpire that will referee these competing elites. Third, the nation is bereft of any unifying ideology that can provide the legitimizing force for the exercise of state power.

At the same time, the post-Marcos governments have proved unresponsive to the extreme poverty and the huge gap between rich and poor, and much of that unresponsiveness has been traced to a political system immobilized by excessive checks and balances, and misplaced reliance upon populist politics. Ironically, the greatest threats to post-Marcos democracy lay in its very achievements.

The activism of the Supreme Court should thus be seen as law compensating for the deficiencies of politics. By appealing to the constitution, the court accomplishes what the political process cannot. At the same time, an activist court runs the risk of overextending the limits of its legitimacy: when it relies on fine technicalities to shun or resolve normative debate that calls instead for candor and moral clarity; when it overplays its corrective function and supplants the political process; or when it uses the expansive language of the constitution to carry out the justices' personal notions of the social good.

The Philippines' human rights-inspired constitution may have proved too cumbersome and inconvenient to assist in the country's slow climb out of poverty. Why, then, are Filipinos so tolerant of law and its baggage of structures and traditions? Because in its recent history, the nation had seen the immense social and human cost of not having law. As memories of the martial law years recede, and a new generation emerges that was exposed only to the dismal failure of the democracy that followed, the "totalitarian temptation" will re-emerge. Already, we hear echoes of the debate during the martial law era under Marcos, between democracy and political rights

as "First World" luxuries, and economic and social rights as "Third World" imperatives. The challenge is to attain the ample social visions enshrined in the constitution, not through counter-majoritarian courts, but through political processes of a free and open democracy.

Notes

1 Sulpicio Guevarra (ed.), *The Laws of the First Philippine Republic; the Laws of Malolos*. Manila: National Historical Commission, 1904, p. 104 (referring to the Malolos Constitution).
2 Cesar Adib Majul, *The Political and Constitutional Ideas of the Philippine Revolution*, Quezon City: University of the Philippines Press, 1967, p. 92 ff.
3 Hereinafter, the 1935 Constitution.
4 Constitution, Art. II §2.
5 *Guerrero's Transport Services Inc.* v. *Blaylock Transportation Services Employees Association – Kilusan (BTEA-Kilusan)* No. L-41518, June 30, 1976, 71 SCRA 621.
6 *Borovsky* v. *Commissioner of Immigration* No. L-4352, 90 Phil. 107 (1951).
7 *Mejoff* v. *Director of Prisons* No. L-4254, 90 Phil. 70 (1951).
8 Hereinafter, UDHR.
9 *Marcos* v. *Manglapus* GR No. 88211, September 15, 1989, 177 SCRA 668.
10 *International School Alliance of Educators* v. *Quisumbing* GR No. 128845, June 1, 2000, 333 SCRA 13.
11 *Tecson* v. *COMELEC and Ronald Allan Kelly Poe (aka Fernando Poe Jr.)* GR No. 161634, March 3, 2004.
12 Universal Declaration of Human Rights, Article 21; International Covenant on Civil and Political Rights (ICCPR), Article 25.
13 Universal Declaration of Human Rights, Article 25.
14 See Sec. of Justice Op. No. 021, s. 2004 re: *Carpo* v. *The Philippines* (Communication No. 1077/2002).
15 Constitution, Art. III §19.1.
16 Rep. Act No. 7659 (1993).
17 *People* v. *Echegaray* GR No. 117472, June 25, 1996, 257 SCRA 561.
18 Sec. of Justice Op. No. 176, s.1982.
19 Sec. of Justice Op. No. 122, s.1983.
20 For instance, the Supreme Court has chastised the CHR for issuing an order asking the Secretary of Education, a cabinet member, to explain why public schoolteachers' salaries had not been paid (*Carino* v. *CHR* GR No. 96681, December 2, 1991, 204 SCRA 483); for issuing a "cease and desist order" stopping a city mayor from evicting "squatters" or informal settlers to make way for a train terminal (*Simon* v. *CHR* GR 100150, January 5, 1994, 229 SCRA 117); and for issuing a stop order against a special economic zone relocating dispossessed settlers and farmers from their land (*Export Processing Zone Authority* v. *CHR* GR 101476, April 14, 1992, 208 SCRA 125.
21 Constitution, Art. 3 §4.
22 376 US 254 (1964) 84 S. Ct. 710; 11 L. Ed. 2d. 686; 95 ALR 2d 1412.
23 *Borjal* v. *Court of Appeals* GR No. 126466, January 14, 1999.
24 *Primicias* v. *Fugoso* No. L-1800, 80 Phil. 71; *Navarro* v. *Villegas* GR No. L-31687, February 18, 1970, 31 SCRA 731, but see *J.B.L. Reyes* v. *Bagatsing* No. L-65366, November 9, 1983, 125 SCRA 553.
25 *Malabanan* v. *Ramento* No. L-62270, May 21, 1984, 129 SCRA 359.
26 354 US 476 (1957), 77 S. Ct. 1304; 1 L. Ed. 2nd 1498.
27 413 US 15 (1973), 93 S. Ct. 2607; 37 L. Ed. 2nd 419.

28 *Gonzales* v. *Kalaw Katigbak* No. L-69500, July 22, 1985, 137 SCRA 717.
29 Constitution, Art. 3 §3.
30 *Ayer Productions* v. *Judge Capulong* No. L-82380, April 29, 1988, 160 SCRA 861; Rep. Act. No. 9165, Art. III, sec. 36 (2002).
31 Constitution, Art. II §1.
32 Constitution, Art. V §1.
33 The constitution, in Article IV §2, states: "The Congress shall provide a system for securing the secrecy and sanctity of the ballot as well as a system for absentee voting by qualified Filipinos abroad."
34 The constitution, in Article IV §5 states: "Dual allegiance of citizens is inimical to the national interest and shall be dealt with by law."
35 The constitution, in Article VI §1 states: "The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, *except to the extent reserved to the people by the provision on initiative and referendum*."
36 The constitution, in Article X §3 states: "The Congress shall enact a local government code which shall provide for . . . effective mechanisms of *recall, initiative, and referendum* . . ."
37 The constitution, in Article XVII §2 states: "Amendments to this Constitution may likewise be *directly proposed by the people through initiative* upon a petition of at least twelve per centum of the total number of registered voters, of which every legislative district must be represented by at least three per centum of the registered voters therein . . ."
38 Rep. Act No. 6735 (1989) (hereinafter, the Initiative Law).
39 *Subic Bay Metropolitan Authority* v. *COMELEC* GR No. 125416, September 26, 1996, 262 SCRA 492.
40 *Santiago* v. *COMELEC* GR No. 127325, March 19, 1997, 270 SCRA 106.
41 Rep. Act No. 7160 (1991).
42 *Garcia* v. *COMELEC* GR No. 111511, October 5, 1993, 227 SCRA 100.
43 *Defensor-Santiago* v. *COMELEC* GR No. 127325, March 19, 1997, 270 SCRA 106; *People's Initiative for Reform, Modernization and Action* v. *COMELEC* GR No. 129754, September 23, 1997.
44 Constitution, Art. III §7.
45 *Tañada* v. *Tuvera* No. L-63915, December 29, 1986, 146 SCRA 446.
46 *Chavez* v. *Public Estates Authority* GR No. 133250, July 9, 2002, 384 SCRA 152.
47 Constitution, Art. II §26.
48 Constitution, Art. VI §5.2.
49 *Bayan Muna* v. *COMELEC* GR No. 147613, February 18, 2003.
50 *National Press Club* v. *COMELEC* GR No. 102653, March 5, 1992, 207 SCRA 1.
51 *Osmena* v. *COMELEC* GR No. 132231, March 31, 1998, 288 SCRA 447.
52 *Social Weather Stations* v. *COMELEC* GR No. 147571, May 5, 2001, 357 SCRA 496.
53 *ABS-CBN Broadcasting Network* v. *COMELEC* GR No. 133486, January 28, 2000, 323 SCRA 811.
54 Constitution, Art. II § 6.
55 Malolos Constitution, *supra* note 1, at Title III, Article 5.
56 Raul Pangalangan, "The Constitution's 'Original Sin'," *Philippine Daily Inquirer*, April 25, 2004.
57 Cesar Adib Majul, *The Political and Constitutional Ideas of the Philippine Revolution*, *supra* note 2.
58 *Abbas* v. *COMELEC* GR No. 89651, November 10, 1989, 179 SCRA 287.
59 Constitution, Art. III §5.
60 Constitution, Art. VI §29.2.

61 *Lemon* v. *Kurtzman* 403 US 602 (1970); 91 S. Ct. 2105; 29 L. Ed. 2nd 745.
62 *Gerona* v. *Secretary of Education* No. L-13954, 106 Phil. 2 (1959).
63 *Minersville School Dist.* v. *Gobitis* 310 US 586 (1940); 60 S. Ct. 1010; 84 L. Ed. 1375; 127 ALR 1493.
64 *Ebralinag* v. *Superintendent of Schools* GR No. 95770, March 1, 1993, 219 SCRA 256.
65 *Anucension* v. *NLU* No. L-26097, November 29, 1977, 80 SCRA 350.
66 *Estrada* v. *Escritor* AM No. P-02-1651, August 4, 2003, 408 SCRA 1.
67 *Velarde* v. *Society for Social Justice* GR No. 159357, April 28, 2004.
68 *Marcelino C. Arias* v. *University of the Philippines Board of Regents* RTC, CC Case No. 47696 RTC-QC (Branch 27) (currently pending trial).
69 Constitution, Art. II.
70 Constitution, Art. XII.
71 Constitution, Art. XIII.
72 Commissioner Bernas, in *Record of the Constitutional Commission*, vol. II, Record No. 35, July 21, 1986.
73 *Tañada* v. *Angara* GR No. 118295, May 2, 1997, 272 SCRA 18.
74 *Kilosbayan* v. *Morato* GR No. 118910, November 16, 1995, 250 SCRA 130.
75 *Del Rosario* v. *Bengzon* GR No. 88265, December 21, 1989, 180 SCRA 521.
76 These other laws are: Rooming-In and Breast-feeding Act of 1992 (RA 7600); Magna Carta for Disabled Persons (RA 7277); National Health Insurance Act (RA 7875); Barangay Health Workers Act (RA 7883); National Diabetes Act (RA 8191); Counterfeit Drugs (RA 8203); Food Fortification Act (RA 8976); AIDS Prevention and Control (RA 8505); Traditional and Alternative Medicine (RA 8423); Salt Iodization Nationwide (RA 8172); Barangay-level Total Development and Protection of Children Act (RA 6972); Compulsory Immunization Against Hepatitis B for Infants and Children (RA 7846); Toxic Substances and Hazardous and Nuclear Wastes Control (RA 6969).
77 Constitution, Art. II §15.
78 Constitution, Art. II §16.
79 *Oposa* v. *Factoran* GR No. 101083, July 30, 1993, 224 SCRA 792.
80 Constitution, Art. XV.
81 Memorandum of Agreement between the Department of Health and the Couples of Christ-Medical Missions Foundation Inc. (October 22, 2003).
82 Exec. Order No. 003 (2000).
83 *Manila Prince Hotel* v. *Government Service Insurance System, Manila Hotel Corporation, Committee on Privatization and Office of the Government Corporate Counsel* GR No. 122156, February 3, 1997, 267 SCRA 408.
84 Constitution, Art. II §10.
85 *Garcia* v. *Board of Investments* GR No. 92024, November 9, 1990, 191 SCRA 288.
86 *Ibid.* (Griño-Aquino, J., dissenting).
87 *Ibid*. (Melencio-Herrera, J., dissenting).
88 *Philippine Blooming Mills Employees Organization* v. *Philippine Blooming Mills Co., Inc*. No. L-31195, June 5, 1973, 51 SCRA 189.
89 *Simon* v. *CHR*, *supra* note 20.
90 Sec. of Justice Op. No. 186, s. 1982 citing Ferdinand Marcos, *The Philippine Experience: a Perspective on Human Rights and the Rule of Law*, pp. 42–9.

12 Human rights in Indonesia

Hikmahanto Juwana

Introduction

Since its inception as a state in 1945,[1] Indonesia has expressed the issue of human rights in formal language in its constitution. At the time the constitution was drafted, however, human rights were not the center of attention. The Founding Fathers were more concerned with the fundamental issues of building a state, such as determining the ideology of the state and the form of government. If human rights were discussed intensively it was with respect to the right to self-determination of the Indonesian people.[2] Nevertheless, some human rights provisions were drafted. The provisions provide for equality before the law, freedom of association and expression, freedom to choose a religion, right to education, cultural protection, economic rights, and right to social security.[3]

In 1949 and 1950, Indonesia introduced two new constitutions consecutively. Those two constitutions contain detailed human rights provisions, adopting the rights and freedoms under the United Nations Universal Declaration of Human Rights. In 1959, the 1950 Constitution was amended when the government issued a decree to reintroduce the constitution adopted in 1945. The 1945 Constitution survived without any amendment until 1999. From October 1999 until 2002 the constitution was amended four times. The most significant of these amendments from a human rights perspective was the second amendment made in 2000, which provides detailed human rights, in addition to duties.

Indonesia is a party to major international human rights instruments. These include the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Political Rights of Women, and the International Convention against Apartheid in Sports. It is also a party to various ILO conventions, such as the ILO Convention concerning Minimum Age for Admission to Employment, and the ILO Convention concerning Discrimination in Respect of Employment and Occupation.

In addition, Indonesia has signed some optional protocols to the major conventions, such as the Optional Protocol to the Convention on the Elimination of All Forms of the Discrimination against Women, and the Optional Protocol to the Convention on the Rights of the Child. Currently Indonesia is preparing to ratify the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic, and Cultural Rights.

Apart from the substantive law dealing with human rights, an important aspect of human rights promotion and protection is the existence of institutions to protect and enforce basic rights. In Indonesia, there are both government and private institutions dealing with human rights. The National Commission of Human Rights was the first government institution established to deal exclusively with human rights. The commission was highly regarded during the Soeharto Government and its recommendations influenced government policies. Ironically, in recent times, as the government has become more democratic, recommendations from the commission have not been taken seriously. There are several reasons for this. First, the government is poor at following up recommendations. Second, the commission does not have strong enforcement powers. Third, the commission has to compete with many non-governmental organizations (NGOs) who demand various actions for the protection of human rights.

Within the government there are several ministries, sections or desks, which deal with human rights. The institutions include the defunct Ministry of Human Rights which has been restructured and placed within the Ministry of Justice. It is regrettable, however, that under a more democratic government and with a sound legal basis, the many government institutions dealing with human rights have failed to improve human rights practices in Indonesia. The main cause of this failure is the lack of coordination among the relevant institutions. Each institution has its own sectoral ego in dealing with human rights.

Before 1998 there were only a handful of human rights NGOs, but recently the number has grown considerably. The NGOs include the Commission for Disappearances of Persons and Victims of Violence (Kontras),[4] *Imparsial*,[5] *Lembaga Studi dan Advokasi Hak Asasi Manusia* (Institute for Human Rights Studies and Advocacies) which is better known as ELSAM,[6] and *Perhimpunan Bantuan Hukum Indonesia* or PBHI.[7] In addition, there are many centers for human rights attached to universities. One of the leading human rights institutions is the Legal Aid Institute which was founded in 1970s and has been very critical of human rights abuses perpetrated by the government or the military.

Unfortunately, the significant improvement in the substantive law and the growing number of institutions has not resulted in an improvement in human rights. Violations of human rights continue to take place. There are six main reasons for the gap. First, the legal framework to promote human rights was passed for the wrong reasons: most of these laws were passed

only in response to international pressure, NGO pressure, or even for the purpose of holding onto power. There has not yet been any genuine attempt to improve human rights conditions.

Second, many substantive laws were drafted or international instruments ratified without making a good feasibility study of the supporting infrastructure for effective implementation. Third, the leniency extended by law enforcement agencies to human rights violators results in little incentive for compliance. In addition, some provisions in the legislation are difficult to enforce since they are the result of political compromises.

Fourth, the abrupt introduction of a substantive law creates problems at the enforcement stage as it involves changes in the legal culture and mindset of the general public. In addition, these laws have not been adequately publicized throughout Indonesia. Fifth, the international instruments ratified by Indonesia have not been translated into domestic obligations. For example, the domestic laws that protect laborers have remained unchanged even though a number of international treaties have been ratified to ensure their protection.

Sixth, national legislation and policies are passed even though they contradict international treaties that have been ratified. For example, caning in open places has been introduced in Aceh province irrespective of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment. National legislation that discriminates against Indonesian Chinese[8] still exists even though the Convention on the Elimination of All Forms of Racial Discrimination has been ratified.

Looking at Indonesia as a phenomenon, one has to say it is a country undergoing a transition. In a transition period one has to expect that improvement in the legal framework and institutions does not necessarily result in the betterment of human rights.

Derogation of civil and political rights

Indonesia currently has to deal with separatist movements from three minority groups claiming the right of self-determination. The first group is the Free Aceh Movement (*Gerakan Aceh Merdeka*, or GAM) in Aceh province, which struggles for Aceh independence. The second group is the Free Papua Movement (*Organisasi Papua Merdeka*, OPM) in the Papua province, which struggles for the independence of West Papua. Lastly, the Republic of South Maluku (*Republik Maluku Selatan*, RMS) in the province of Maluku struggles for an independent state of South Maluku. These three groups have used arms in their struggle, notably GAM.

The current law governing states of emergency in Indonesia is the Government Regulation in Lieu of Law (Perpu) 23 of 1959 (hereinafter referred to as the Emergency Law).[9] Perpu 23 was later confirmed as a statute by the parliament, *Dewan Perwakilan Rakyat* (DPR), in 1961. An attempt to introduce a new Emergency Law in 1999 failed amid widespread protest and it has never come into force.

Under the Emergency Law, the power to declare and terminate a state of emergency in all or part of Indonesia rests with the president.[10] Under Indonesian Emergency Law, the president may declare one of three levels of state emergency: civil emergency, military emergency, and a state of war. The president established an authority referred to as the "Emergency Authority" which has the main responsibility of handling day-to-day government affairs during emergencies.[11]

There are three circumstances in which the president may declare a state of emergency.[12] The first is where the security or law and order of all the territory of Indonesia are threatened by rebellion, disturbances or the effects of natural disaster, so that they cannot be overcome in the normal way by the existing apparatus. This situation comes under the control of the Civil Emergency Authority. The second situation is where the state is threatened or it is clear from specific factors that there is a threat to endanger the state. This situation is under the control of the Military Emergency Authority, which has the powers of the Civil Emergency Authority as well as additional powers. Lastly, a state of emergency may be declared where a war or danger of war arises due to a violation of the territory of Indonesia. This situation is under the control of the State of War Authority, which has further powers.

The president has the exclusive right to declare and terminate the state of emergency, and, according to the Emergency Law, he need not obtain approval from other institutions. In practice, however, in particular after 1998, the president has set a precedent of consulting with the DPR prior to declaring a state of emergency. Although the Emergency Law does not specifically provide for any judicial review of the decision to declare the state of emergency, the Supreme Court may generally review such decisions.

Various rights may be restricted during a state of emergency. The restriction on rights is carried out by the Emergency Authority through the introduction of regulations considered necessary in the interests of public order or in the interests of security.[13] The regulations may not contradict the central legislative regulations, however.[14] For example, the Emergency Authority has the power to introduce regulations to restrict performances, and the printing, publication, announcement, transmission, storage, distribution, trading, and posting of any kind of writing as well as paintings, negatives, and pictures.[15] The Emergency Authority also has the power to order the police or other investigation officers on their behalf to enter or search any place, even against the will of its owner or occupant, by showing a general letter of authority or a special letter of authority.[16] It is also entitled to order the investigation or confiscation of goods presumed or likely to be used to endanger security, and to restrict, or prohibit the use of such goods.[17] In addition, the authority has the power to seize or use general service goods.[18]

Moreover, the authority has the power to: (a) scrutinize all news as well as conversations transmitted by telephone or radio, and to prohibit or disconnect the transmission of news or conversations by telephone or radio; (b) restrict or prohibit the use of codes, secret communications, secret printing,

shorthand, pictures, signs as well as the use of languages other than the Indonesian language; and (c) stipulate regulations restricting or prohibiting the use of telecommunication equipment such as telephone, telegraph, radio transmitter, and other equipment related to radio broadcasting and which may be used to communicate with the general public, and to confiscate or destroy such equipment.[19]

Freedom of assembly may also be restricted by the Emergency Authority. The law provides that the authority has the power to introduce provisions that make it obligatory to apply for prior permission to hold public rallies, public meetings, and processions. The permission may be granted unconditionally or with conditions attached by the authority.[20] The right to enter or use buildings, residences, or public spaces for a certain period of time can also be restricted,[21] although the law provides that such restrictions will not apply to religious services, Koran incantations, religious, and traditional ceremonies or to government meetings.[22] People can also be restricted from leaving their homes,[23] and the authority is entitled to search the body and dress of every person against whom they have any suspicion or to have such persons searched by the police or other investigation officers.[24]

In a state of military emergency, the authority has the power to: (a) regulate, restrict, or prohibit completely by regulations, the manufacture, import and export, transportation, possession, use of and trade of firearms, ingredients for explosives, ammunition, explosives and explosive goods; (b) control postal equipment and telecommunication equipment such as telephone, telegraph, radio transmitters, and other equipment relating to radio broadcasting and which can be used to communicate with the general public; (c) restrict or prohibit completely by regulation the changing of fields and objects in those fields; (d) close, for a certain period of time, theaters, meeting places, restaurants, stalls, and other places of amusement as well as factories, workshops, stores, and other buildings; (e) regulate, restrict, or prohibit the export and import of goods from and to a region declared to be under military emergency; (f) regulate, restrict, or prohibit the circulation, distribution, or transportation of goods in a region declared to be under a military emergency; and (g) regulate, restrict, or prohibit land, air and water traffic as well as fishing.[25]

The Military Emergency Authority has the power to take measures to restrict shows/performances, printing, publication, announcement, transmission, storage, distribution, trading, or posting of writings in any form, and paintings, negatives, and pictures.[26]

In addition, the Military Emergency Authority has the power to: (a) to order the retention or confiscation of all letters and other packages entrusted to the postal services or other expedition services, as well as money orders and receipts together with the amounts of money paid and collected, and to open, see, examine, destroy, or change the contents and make illegible those letters or packages; and (b) scrutinize cables entrusted to the cable offices as well as retain, confiscate, destroy, or change the contents, and prohibit the delivery or despatch of such cables.[27]

A person's right to live in a region or part of a region may be restricted during a military emergency by the Military Emergency Authority, if after being investigated by the investigation officers there are sufficient reasons to consider such persons as dangerous to that region.[28] The law, however, provides that such a person as well as his or her dependants may be given a reasonable living allowance and also be provided with a dwelling place, maintenance, and care at the expense of the state.[29]

The Military Emergency Authority also has the power to prohibit a person staying in that authority's region from leaving that region if the presence of such person is considered vital, either for public security or defense or for the benefit of companies that are crucial to the sustenance of the national economy.[30] The Military Emergency Authority has the power to instruct persons living in a region declared to be under military emergency to do compulsory labor for the implementation of regulations or to perform other labor in the interests of security and defense.[31]

The Central Military Emergency Authority has the power to militarize a service, company, plantation, or part of a function thereof.[32] Furthermore, the Military Emergency Authority may detain and arrest a person for a maximum of twenty days. If the examination is not completed within twenty days and a prolongation of the arrest is considered necessary, the person concerned may be held for a maximum of fifty days with the approval of the Central Military Emergency Authority.[33] Each detention and arrest shall be carried out with a warrant.[34]

In a state-of-war emergency, the powers of the Emergency Authority in a state of civilian and military emergency apply. Furthermore, rights may be derogated since the War Authority has the power (a) to summon a civilian residing within the territory of the Republic of Indonesia to work for the Armed Forces of the Republic of Indonesia and request their assistance and help in maintaining security or participate in defense activities or perform military tasks which he or she is capable of doing; (b) to prevent any person from wilfully neglecting or refusing to perform the tasks which he or she has agreed to perform or which must be performed by him or her by virtue of his or her position if according to the State of War Authority such non-performance is damaging or can be considered to be damaging to the state, to public order, or to the country's economic life, without prejudice to the possibility of the settlement of labor disputes according to the prevailing laws; in the event of such a prohibition, the company, plantation, factory, workshop, or place where or to what purpose the work must be performed shall be clearly designated; (c) together with the abovementioned prohibition, to order the employer concerned to take measures appropriate for the interests of those working for him or her.[35]

The use of military tribunals in a state of emergency can be divided into two periods. During the Soeharto Government, military tribunals were never used, or if they were used they were never made public. After the Soeharto Government, military tribunals have been used, particularly in the troubled

Aceh province. A military officer was convicted of assault and battery of civilian detainees by the military tribunal.[36] Another case involved three soldiers charged with assaulting villagers during an offensive against separatist rebels in Aceh province.[37]

The Military Authority in Aceh has on occasion derogated rights, mainly to contain insurgent movements or movements that would facilitate insurgency. For example, public rallies have been banned and people have been arrested for initiating public rallies.

Civil and political rights

Freedom of thought, conscience, and religion

As a majority of Indonesia's population are Muslims, Islam has become the state orthodoxy. The state promotes Islamic views, although in a limited sense. The application of the state's Islamic views is limited to three areas: to certain fields of law, to specific territories, and to matters that enable Muslims to conduct their beliefs in an orderly manner.

The first category is the promotion of Islamic views in the field of family law. Under the Judicial Power Law the court system is divided into four jurisdictions, one of which is the Religious Tribunal (*Peradilan Agama*).[38] The Religious Tribunal under the Religious Tribunal Law is a tribunal for Muslims. The Religious Tribunal has jurisdiction over marital disputes, inheritance disputes, and Islamic charitable trust disputes. Another law that promotes Islamic views is the Marriage Law which allows polygamy and provides for it with detailed provisions.

The second category is the promotion of Islamic views in a limited territory. In 2002, the government issued a law giving special autonomy to the province of Aceh. Under this law, the provincial government of Aceh has the authority to implement Sharia law in areas other than family law. The Sharia law has been translated into provincial regulations known as Qanun. Since the granting of its special autonomy, the provincial government has issued numerous Qanun, such as a regulation that women have to wear the veil (*hijab*) and a regulation that men have to observe their Friday prayer.

The third category relates to the state's role in facilitating Muslims to practice their beliefs better. The Haj pilgrimage is one example. The Haj Law was issued to administer and regulate various affairs for Indonesian Muslims to do their Haj. Another example is the Zakat Law. *Zakat* is the amount of money that every adult who is a mentally stable, free, and financially able Muslim, male or female, has to pay to support specific categories of people. Based on the Zakat Law, Muslims who have paid their *zakat*, as is the case in many Arab and Islamic countries, may receive an equivalent reduction in their tax. This may be seen as a positive differential tax policy for Muslims.

Indonesia guarantees freedom of religion, which means that citizens are free to choose their religion, but they are not permitted to have no religion. Under the Soeharto Government, there were five religions recognized by the state: Islam, Catholicism, Protestanism, Bali-Hinduism, and Buddhism. The state in those days did not recognize Confucianism as a religion, because under the Soeharto Government, Indonesian Chinese were not allowed to use their Chinese names, Chinese script, or to promote their culture, including the practice of Confucianism. The prohibition was put in place in 1967 under a presidential instruction, because of the government's dispute with China which was believed to be behind a failed government coup in 1965.

In 2000, when Abdurrahman Wahid became president, the presidential instruction was revoked, and Confucianism was allowed to be practiced. In 2002, the government under President Megawati acknowledged the Chinese Lunar New Year as a national holiday. There are now no restrictions on the religious practices that people may conduct in Indonesia.

Under the Attorney General Law, the duties of the office of the attorney general include the duty to monitor religious beliefs that may endanger the community and state and also to prevent abuse of religion and blasphemy. Under the Soeharto Government, the office frequently monitored and determined that certain religious teaching was endangering the community.

Freedom of speech

Although the constitution guarantees free speech, this right has been interpreted differently by the administration throughout the life of the constitution. Under the Soeharto administration, freedom of speech was curtailed. The government imposed laws and regulations which in effect limited freedom of speech by individuals and the mass media. The government used criminal law and the law prohibiting subversion against those exercising freedom of speech against the government.

Under the Habibie administration, freedom of speech improved significantly, but not as a result of any intentional government policy. Rather, it was because people were not afraid of voicing their concerns even if that meant violating laws and regulations. This attitude became manifest when President Soeharto was about to resign and was one of the decisive factors leading to his resignation. The public and university students had staged continuous demonstrations, despite official attempts to clamp these down. The protests reflected a display of people power.

With this improvement of freedom of speech, the public could express freely almost anything without any anxiety, including sensitive issues such as the demand that Soeharto be tried. Protests against government policies were held and there were also protests demanding that corrupt public officials be removed. There were even calls to ban the previous ruling party, *Golongan Karya* (Golkar).[39]

Unfortunately, some of the public demonstrations were violent, resulting in the destruction of public facilities and private property.[40] These caused public inconvenience and created resentment. Large-scale demonstrations, giving rise to face-to-face confrontations with the police and the military, resulted in casualties and deaths.[41] To curb and avoid further chaotic demonstrations, the government felt it had to regulate such activities. The government passed a regulation known as the Government Regulation in Lieu of Law or *Peraturan Pemerintah Pengganti Undang-undang* (hereinafter abbreviated as Perpu) concerning the freedom to express opinion in public. This measure was heavily criticized by human rights activists and NGOs on two counts. First, the policy was seen as an attempt to restrict, not regulate, freedom of speech. Second, the form of regulation used was criticized as Perpu is only supposed to be issued when the nation is in a state of emergency.[42] It was asked whether the situation at the time the Perpu was issued qualified as a state of emergency. To avoid further debate, an effort was made to convert the Perpu into an appropriate regulation. For this purpose, the government was quick to obtain endorsement from the DPR. The DPR swiftly gave its endorsement that same year and, with some changes, the Perpu became law (hereinafter referred to as the Law of Free Speech).[43]

Initially, the police faced some difficulty in enforcing the Law of Free Speech.[44] People were not willing to see restrictions imposed on their new found freedom and were not hesitant to break the law to keep this freedom. In addition, the police were reluctant to take harsh measures as they were outnumbered and afraid of being accused of violating human rights.[45] One writer noted that the standard excuse for the police when standing by and witnessing a menacing armed crowd ransack someone's property or burn somebody alive was: "We don't want to be accused of human rights abuse."[46] Furthermore, the law was not enforced strictly as it was seen as undermining the government's effort to win public acceptance and support.

Under the Wahid administration, freedom of speech continued to flourish. The public and the mass media could say whatever they wanted without any hesitation. However, this phenomenon was considered negative by many, and some people have expressed their dislike of the concept of having no limitations on freedom of speech.

When Megawati took over from Wahid, the public held a negative perception of the value of human rights. The government began challenging some aspects of human rights that were considered to be practiced excessively. The police have been more assertive in clamping down on demonstrations which did not comply with the Law of Free Speech. There have been cases ranging from where individuals were arrested and charged with holding unlicensed demonstrations, disturbing public order, smearing or stamping on pictures of the president and vice president to those that turned on the subject matter of demonstrations deemed to be against the law, such as insulting the head of state.[47] The government warned protesters not to entertain any notion of toppling Megawati's legitimate government as it would

confront them.[48] Excesses of press freedom have also been challenged by the government. Recently editors from the mass media have been brought to court to face criminal charges, such as in the *Rakyat Merdeka* case.[49]

Under the Habibie and Wahid administrations, freedom of the press was exercised as if there were no boundaries or laws. This freedom was demonstrated by the growing number of new newspapers, magazines, and radio and television stations.[50] The mass media can report almost anything without any government censorship, in contrast with the situation under the Soeharto administration. However, members of the public have brought lawsuits, for example for libel, against the excesses of the press.[51] Of course, from the perspective of human rights activists and journalists, the many cases against the press have been seen as a threat to freedom of the press.[52] Ever since the beginning of the Soeharto Government in 1966 there has been no real or strong opposition from non-ruling political parties. Opposition parties were not considered to be vital elements in a continuously critical political process and were therefore kept weak and given no chance to assume power. They served only to enhance government's claim that Indonesia was a democratic state, so the opposition was not allowed to criticize the government, the president, or the government's program. Non-ruling political parties were only symbolic, and there were few real policy differences between government and opposition parties. One of the reasons behind these circumstances is that the political elites in the Soeharto Government believed in consensus. Diverse social groups were to be brought into harmony, instead of conflict. Opposition based on ideology, or social and ethnic principles had no place. The government even forced political parties and NGOs to adopt Pancasila as their principal establishment, in order to prevent conflict, and to bring about national unity and integrity.

In 1999 Indonesia had its first free and democratic general election since 1955. Since then, the number of political parties has grown. The major political parties who won the election, however, were not divided into ruling and opposition parties. Instead, they have formed a coalition government, making it difficult for a real opposition to exist.

Since a real opposition as found in other countries does not yet exist in Indonesia, defamation laws have never been used to harass opponents within the political parties. Opposition outside the government, however, has been growing since the mid-1980s. The opposition was referred to as "street" opposition rather than parliamentary opposition. For example, voices of democratic opposition were heard from a group called the Petition of Fifty. The group, comprising former generals, political leaders, academics, students, and others, called for greater political freedom. During this period the street opposition was harassed with various laws, from criminal to anti-subversion. The defamation law was rarely used as it was considered an ineffective tool for clamping down on the movement.

Under Indonesian law, there are limitations on the release of military and other sensitive information. Articles 112 to 116 of the Criminal Code provide

criminal sanction for the release of military and sensitive information. Under Article 112, for example, it is stipulated that any person deliberately releasing any documents or information which, in the interest of the state, should be kept secret, or informing or rendering information to foreign countries can be jailed for a maximum of seven years.[53] In addition, anyone found guilty of leaking secret documents, maps, plans, drawings, or objects related to the country's defense and security policies can be imprisoned for a maximum of four years.[54]

Nonetheless, the term "state secret" has yet to be properly defined in the law. A state secrecy law is now being drafted, which is expected to include a definition of the term. Some people have opposed the drafting of the legislation, while others agree that it should be drafted, so long as a law on freedom of information is also promulgated.

Apart from the Criminal Code, the Law on Archives provides that state archives are the government's responsibility and outside parties who possess such documents are in violation of the law and will be penalized to a maximum of twenty-year jail term.[55]

Hate speech is mainly stipulated in the Criminal Code. The Criminal Code provides that anyone who in public uses hate speech in relation to the government, or an ethnic group, or religion can be penalized with imprisonment. To prevent potential hate speech, the Soeharto Government required speeches by political leaders, clerics, and many others to be examined before being delivered. The government did threaten to use the hate speech provisions to deny freedom of expression and speech, but this has not been the case following the Soeharto Government.

Obscenity and pornography in printed and electronic media have reached an alarming level, although the Criminal Code provides criminal sanction against pornographic activities. There has been an increasing amount of publications that feature semi-pornographic pictures and stories. In addition, the black-market sales of pirated pornographic video compact discs have been growing. This has worried the public. Parliament was quick to respond and started in September 2003 to draft an anti-pornography law.[56] The draft law bans the creation, dissemination and use of pornography in printed and electronic media, and would penalize anyone who intentionally becomes a model or the object of pornography. The draft does not, however, clearly define what constitutes pornography, and simply says that pornography is designed to create sexual urges by exploiting sex, indecency, or eroticism.

In addition, Parliament is sponsoring a bill that would ban illegal acts of pornography.[57] The bill defines acts of pornography as actions intended to show and/or to exploit sexual, indecent, and/or erotic activities. The bill restricts anyone from showing their genitals, buttocks, or breasts in public places. It also bans anyone from appearing naked or kissing on the mouth in public. It bans masturbation, lewd gestures and sex in public places. Performing in, organizing, or watching sex shows or parties would become crimes under the bill.

At the time this chapter was written, none of the bills has been debated. It is uncertain when the bills will become law.

Freedom of assembly

Although Indonesia's Constitution guaranteed the freedom of assembly,[58] under the Soeharto Government, in reality the government imposed significant controls. Public meetings of five or more persons, as well as academic or other seminars and marches and demonstrations, had to have permits from the police and several government agencies. While obtaining such approval was usually routine, the authorities occasionally arbitrarily and inconsistently withheld permission or broke up peaceful gatherings for which no permit had been obtained.

Since the fall of the Soeharto Government, the restrictions have been eased. Restrictions remain for the purpose of conducting an assembly in an orderly manner, particularly in public places. There are no longer content-based prohibitions or limitations by the police or other government authorities. This is different from the Soeharto days where authorities insisted upon scrutinizing a written speech before it was delivered in public. The Law of Free Speech provides the requirements and procedure for holding demonstrations.

There are time, place, and manner restrictions for holding demonstrations in public places. Under article 9(2) of the relevant law, demonstrations are not allowed in the vicinity of the president's palace, religious places, military complexes, hospital, and so on. As to time restrictions, the law provides that demonstrations may not be held on national holidays. The law also provides that those participating in demonstrations may not bring objects that may endanger public safety.[59] Furthermore there are procedures requiring that a permit be obtained from the police before the demonstration is held.[60] The law stipulates sanctions if an assembly in the form of a demonstration has not followed the law. The form of penalties range from the dispersal of the assembly, to imprisonment for those responsible for the assembly.[61] In practice, however, there are demonstrations which are held without observing the law, and for which no sanctions have been imposed.

Restrictions on other forms of assembly, such as seminars, group discussions, and academic seminars, have been greatly relaxed. Permits are no longer required, but the organizing committee has to inform the police of the activities.

Economic, social, and cultural rights

Indonesia is not a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), but a number of positive rights were provided under the constitution when it was amended for the second time. These positive rights are: the right to live; the right to establish a family and

for a child to have the rights to live, grow and develop; the rights to prosper and improve; the rights to be recognized and protected before the law; the rights to work, equal opportunities in government, and to citizenship status; the right to choose one's religion and the right of association and expression; the rights to communicate and to obtain information; the rights to protection and to be free from inhuman treatment; the right to live in physical and spiritual prosperity; the right to receive facilitation; the right to social security and the right to own personal property; and the rights to life and to be free from discriminative treatment.

In 1999 the government introduced a law exclusively dealing with human rights, the Human Rights Law.[62] The law has 106 articles and contains various basic human rights, including positive rights. It includes detailed provisions concerning the right to life and the right not to be abducted or killed, the right to establish a family and bear children, the right to self-development, the right to justice, the right to freedom of the individual, the right to security, the right to welfare, the right to participate in the government, women's rights, children's rights, and the right to religious freedom.

Although the Education Law does not use the term "free education," it provides that citizens between the age of 7 and 15 must have primary education. The responsibility for funding this compulsory primary education rests with the central and regional governments. There is no obligation under the law or regulations for the state to fund public secondary education, but nevertheless the government does so. As for tertiary education, although there is financial support in the form of subsidies to public universities, there is no financial support for students in need, and the law does not require the state to provide such support.

Medical care in Indonesia is still lacking, despite the fact that article 34(3) of the constitution places an obligation on the state to provide sufficient medical and public service facilities.[63] The Health Law[64] does not create a right to free medical treatment, but only stipulates that the government is responsible for providing medical care throughout Indonesia evenly and within the reach of the public.[65] In addition, the government has a duty to make sure that medical services can be obtained by those who are impoverished.[66] Currently there is no national health care system funded by the government.

The constitution places an obligation on the state to take care of impoverished persons and abandoned children,[67] but this has yet to be implemented. This is also true of the right to social security, although the constitution provides that the state has the obligation to develop a system of social security for all people and to empower the inadequate and underprivileged in society in accordance with human dignity.[68]

The government has dealt with the three separatist movements differently, depending on whether they receive support from local people. In the case of GAM, which has support from the people in Aceh, the government has pursued two main policies. The first is to win back the hearts of the people

in Aceh by giving the province a special autonomous status, by transferring economic resources from the central to the local government, and by giving greater respect for human rights. The second policy is to declare Aceh to be in a state of emergency and to take military action to deal with GAM.[69] In 1989, under the Soeharto Government, Aceh was declared a Military Operation Zone (DOM). President Habibie lifted the status on August 1998, but military action was re-launched in March 2003 after peace talks with GAM in Tokyo failed.

The law providing Aceh special autonomy was passed in 2001, changing the name of Aceh to *Nanggroe Aceh Darussalam* (NAD).[70] The law also permits Sharia law to apply and, thus, civil and criminal law will be based on the Sharia. The province has the right to form its own police force. The Sharia law, however, will be imposed on Muslims only, not on members of other religions in the province.

The NAD law enables the provincial government to legislate its own law referred to as "Qanun." One example of a Qanun that has been enacted by the Sharia council is Qanun 11 of 2002 on the implementation of the Islamic faith (*aqidah*). This law includes the obligation to pray and to spread Islamic teaching.[71] The law also requires that all Muslims practice Islamic teaching in all aspects of life. This includes the practice of Friday prayer for men. Women have to wear the veil. It also prescribes the use of Arabic as the second official language within the government.

The NAD government also imposes severe punishment on those who violate the rules of Qanun. For example, anyone who deliberately does not conduct the Friday prayer three times consecutively may be punished with up to six months in jail or three lashes in public. If a transportation company does not provide facilities for Muslims to conduct their prayers then the Sharia court has the authority to revoke its license.[72] A Muslim who deliberately chooses not to fast in the month of Ramadhan may be jailed for up to four months or lashed two times in public.

The institution that has the authority to supervise the implementation of Qanun in NAD is called "*Wilayatul Hisbah*."[73] The officer of *Wilayatul Hisbah* has the authority to warn people who violate Qanun rulings and, if necessary, report the violation to the local police in order to enforce the existing law.[74]

The court in NAD is "*Mahkamah Sharia*" at the district level and provincial level. The apex of the court is the Supreme Court in Jakarta. Following the establishment of the Sharia court in NAD, all religious courts in Aceh were turned into Sharia courts. The Sharia court will only have jurisdiction over Muslims, however, and non-Muslims will continue to be dealt with by the general court.

Furthermore, the law transfers unprecedented amounts of power and resources from the central government to the province, and gives Aceh a greater share of income from its natural resources.[75] The most important provision of the law, from an Acehnese perspective, is that 70 percent of the revenues

generated from Aceh's rich oil and gas fields will now be allocated to the province, with the remaining 30 percent going to the central government. After an eight-year period, the province will receive 50 percent of the revenue. The law allows more freedom for the regional government to run its internal affairs and to redesign the local government in line with local traditions. The province, through its executive, may have direct access to foreign aid.[76]

The law maintains the central government's authority over Aceh's foreign political relations, external defense and monetary affairs, while all other responsibilities fall to the provincial government. The law provides for local electoral reform giving the people greater control over their own affairs. The governor, regents, and mayors will be elected directly by the people, rather than by their local legislators.

By contrast, in relation to the separatist movement in Papua, unlike Aceh the government did not declare the province to be in a state of emergency. In 2001, however, the government approved a special autonomy law for Papua.[77] The law grants the province of Papua more specific control over its resources. The law provides that 70 percent of oil and gas royalties are to be channeled to the territory (to be reviewed after a twenty-five-year period), as well as 80 percent of mining, forestry, and fisheries royalties, and funds from the national General Allocation Fund – as under "normal" autonomy, 2 percent of the national General Allocation Fund for education and health, and extra funds (of an amount not yet determined) for infrastructure.

The law also created the Papuan People's Council which is made up of indigenous, church and women's leaders, designed to protect the customary ("*adat*") rights of indigenous Papuans. In addition, the use of the Papuan flag as a cultural symbol, not as an expression of Papua's sovereignty as an independent state, is allowed.

The government has dealt with the separatist movement in Maluccas without giving special autonomy. The Maluccas conflict arises not only from a separatist movement, but also from religious conflict between Muslims and Christians. The population is largely Christian, unlike that of Indonesia as a whole, which is mainly Muslim. In the past Christians and Muslims have coexisted peacefully, but in 2002 the government declared the province of Maluccas and North Maluccas to be in a state of emergency, at the level of civil emergency.[78] The emergency status for North Maluccas was lifted on May 18, 2003.[79] After a peaceful period, on April 25, 2004 a clash occurred again when RMS activists planned to hoist the RMS flag.

In Indonesia, the state has adopted some affirmative-action laws to protect minority groups or individuals; however, this does not include preferential access to education and quotas or preferential treatment on economic contracts. For example the Indonesian Chinese, who are a minority group, can now celebrate the Chinese New Year ("*imlek*") which previously was prohibited.

As to political representation, the state has taken action with the passing of the General Election Law of 2003. Under the law each political party,

when proposing candidates for parliament and DPR seats, should take into account women's representation, at a minimum of thirty.

Cultural practices of groups are not subsidized by the state, although many local governments have been actively promoting local cultures for tourism purposes. The displays of "*Grebegan*"[80] in Yogyakarta or "*Ngaben*"[81] in Bali are just two examples of many instances.

There are many customary laws that apply to particular cultural groups, and each cultural group may have its distinct customary laws. There are two reactions from the state when the practices of customary laws conflict with national laws. First, the state attempts to institutionalize the customary laws. For example, in the area of inheritance rights, the state did not do anything to change the practices of certain cultural groups where females inherit, instead of males. Under Minang (West Sumatra) custom, the female holds a special place because Minang customs are based on a matrilineal system. The institutionalization of these practices is carried out by judicial decisions and, later on, accommodated in laws and regulations. For example, the Supreme Court upheld the decision that women in Lombok, West Nusa Tenggara should be given the right to inherit according to customary law. This contradicts national law.

A different approach is taken to women in a patriarchal system, however. This is exemplified by the Batak Toba tribe, where traditionally women do not have access to inheritance. In Toba, it is a tradition that once a woman marries, she no longer belongs to her family. In recent times, the younger generation of women have pursued claims in the national court for inheritance.

Conclusion

Since the fall of the Soeharto administration, there has been significant improvement in Indonesia's legal framework for the protection of rights, which can be seen in many sectors. Tremendous effort has been made to abolish legislation that restricted civil and political rights. In the field of economic, social, and cultural rights, improvement is also significant. In particular, cultural rights have been recognized by the state. Although this was the case for many years, including the Soeharto administration, it had not been made public.

As a country with diverse cultural groups covering a wide area, Indonesia's human rights practice is also diverse, as it would be difficult to create a uniform practice of human rights through regulation. Improvements to human rights practice is made difficult by the fact that black-letter law is not always reflected in reality, for a number of reasons. First, legislation is often enacted not to address social issues faced by society but rather for political rhetoric, to be recognized by the international community, or to meet demands placed on Indonesia from international sources.

Second, the drafters sometimes lack understanding of the intricacies of the issues. Understanding the intricacies is important since at the implementation

stage the law enforcement agencies will rely mostly on what is contained in the written provisions. Thus, inaccuracy in translating concepts and policies when incorporating them into the provisions will result in high levels of inconsistency between what is intended and what is in fact implemented.

Third, legal drafters in Indonesia tend to translate foreign legislation rather than make reference to the source countries' legislation. Translating provisions, although ensuring that legislation is in fact promulgated, neglects to take into account prevailing local conditions. Fourth, new legislation has embedded new concepts that require society's values to change abruptly. The legislation may be seen as unfit for the local community as it does not have a good understanding of the new values.

Lastly, the conventional top-down approach in making legislation has not been the best panacea for the protection and promotion of human rights. A bottom-up approach is absolutely needed.

Notes

1 Formally Indonesia became independent from the Netherlands in 1949.
2 The right to self-determination is stated in the preamble of the constitution which provides: "With independence being the right of every nation, colonialism must be eliminated from the face of the earth as it is contrary to the dictates of human nature and justice."
3 Under the Soeharto Government, these seven articles were interpreted to include various other human rights.
4 Kontras: www.desaparecidos.org/kontras/.
5 Imparsial: www.imparsial.org/.
6 Elsam: www.elsam.or.id/.
7 PBHI: www.pbhi.or.id/.
8 The Indonesian Chinese are discriminated against by the state from the time their birth certificates are issued with a mandatory stamp denoting their ethnicity. They are forced to prove their citizenship at many stages throughout their lives, and also have to provide additional certification, and pay higher fees, for identification cards, passports, and other legal documents: "Chinese-Indonesians continue to suffer from discrimination," *The Jakarta Post*, February 18, 2002: www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20020218.A07. In 2002 it was reported that Hendrawan, a top shuttler who saved the country in the Thomas Cup championship, had to struggle to get his citizenship certificate before heading to China for a badminton tournament: "Chinese-Indonesians still discriminated against," *The Jakarta Post*, May 12, 2002: www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20020521.@03.
9 Law 23 of 1959, State Gazette No. 139 Year 1959.
10 Art. 1(1) and (2).
11 According to the status of state of emergency, the Emergency Authority is divided into the Civilian Emergency Authority, the Military Emergency Authority, and the War Authority.
12 Art. 1.
13 Art. 10(1).
14 Art. 11(2).
15 Art. 13.
16 Art. 14(1).

17 Art. 15(1).
18 Art. 16.
19 Art. 17.
20 Art. 18(1).
21 Art. 18(2).
22 Art. 18(3).
23 Art. 19.
24 Art. 20.
25 Art. 25.
26 Art. 26.
27 Art. 27.
28 Art. 28(1).
29 Art. 28(2).
30 Art. 29.
31 Art. 30.
32 Art. 31.
33 Art. 32(3).
34 Art. 32(4).
35 Art. 41.
36 "Indonesian military tribunal sentence officer to seven years' jail," *ABC News*, February 1, 1999: www.abc.net.au/ra/newsarchive/1999/feb/rael-1feb1999-64.htm.
37 "Indonesian soldiers jailed in Aceh," *BBC News*, June 9, 2003: http://news.bbc.co.uk/2/low/asia-pacific/2974230.stm.
38 The other three tribunals are the General Tribunal ("*Peradilan Umum*"), the Military Tribunal ("*Peradilan Militer*"), and the Administrative Tribunal ("*Peradilan Tata Usaha Negara*").
39 "Students commemorate parliament occupation, call for dissolution of Golkar," *Kompas Online*, May 19, 1999: www.kompas.com/kompas%2Dcetak/9905/19/english/stud.htm.
40 One demonstration, for example, had blocked the toll road: "Workers stage protest on toll road," *The Jakarta Post*, May 26, 1999: www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=19990526.L09.
41 These usually involved demonstrations held by students who demanded that former President Soeharto face trial or that Megawati resign as president.
42 The Government Regulation in Lieu of Law as a form of legislation is enacted by the president in emergency circumstances only. Under Indonesia's legislation hierarchy, this kind of government regulation is one rank below that of a law or act ("*Undang-undang*"). The constitution requires that the Perpu be brought to parliament within one year after its promulgation to be confirmed or rejected as law.
43 Law of the Republic of Indonesia, No. 9 of 1998, Law Concerning Freedom to Express Opinion before the Public: www.dephan.go.id/hukum/keptni2/uu_9_99.htm. A striking difference between the two is that the Perpu has seventeen articles, while the law has twenty articles.
44 This was despite a police warning that they could shoot anarchistic demonstrators: "Anarchistic demonstrators can be shot," *Kompas Online*, February 18, 1999: www.kompas.com/kompas%2Dcetak/9902/18/english/anar.htm.
45 The non-assertive actions by the police in those days are ambiguous: were the police afraid of taking actions for fear of being accused of human rights violations, or did the police intentionally not take action hoping that people would see its important role in managing orderly demonstrations?
46 Carl Chairul, "Enough of democracy and human rights!" *The Jakarta Post*, April 8, 2001: www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20010408.@05.

47 "Two protesters jailed for insulting state leaders," *The Jakarta Post*, October 25, 2002: www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20021025.A08; "Police fire warning shots, beat anti-CGI protesters," *The Jakarta Post*, January 20, 2003: www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030120.@01; "Mega reacts emotionally to stomping protesters," *The Jakarta Post*, January 29, 2003: www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030129.A04.

48 "Protesters told not to think of toppling govt," *The Jakarta Post*, January 7, 2003: www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030107.@02.

49 *Rakyat Merdeka* is a daily newspaper. In one case, one former editor of the newspaper was found guilty of insulting the chairman of the Golkar political party who was serving as speaker of DPR, Akbar Tanjung. The case was brought after the paper published a caricature depicting Akbar Tanjung shirtless and dripping with sweat trying to appeal his corruption conviction. In another case, an editor was prosecuted for insulting Megawati, Indonesia's President. This is after the newspaper ran a series of headlines concerning controversial government policies related to fuel and basic-commodity price increases. One headline said the president's mouth smelled of diesel.

50 There were 289 private printed media companies, six television companies, including the public broadcaster TVRI, and 740 radio broadcast companies during the former Soeharto administration. Soon after Soeharto stepped down, and following the promulgation of the new Press Law, there were 1,687 private printed media companies; 11 private, and one public, television companies; and 1,100 privately run radio companies and one public radio station. *The Indonesian Press Directory 2002–2003*, Jakarta: Serikat Penerbit Suratkabar, 2003, pp. 10–18.

51 Two lawsuits are particularly well known. First is the case involving Tomy Winata, a controversial businessman with powerful friends, who sued *Tempo*, a weekly magazine, for US$22 million. The case has not yet been decided. The second case involves Texmaco and its former owner, a leading textile company in the verge of bankruptcy, who sued *Kompas* daily newspaper and *Tempo*. Texmaco and *Kompas* reached out-of-court settlement even though the court had started examining the case. In the case of Texmaco against *Tempo* there are two cases decided: one against *Tempo* weekly magazine which resulted in the court rejecting Texmaco's claim, and the other against *Tempo* newspaper which resulted in the court finding *Tempo* guilty of printing libellous articles.

52 "Press freedom," *The Jakarta Post*, September 12, 2003: www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030912.E01.

53 Article 112 of the Criminal Code.

54 Article 113(1) of the Criminal Code.

55 Law 7 of 1971, State Gazette No. 32 Year 1971, Art. 11.

56 "Pornography to be allowed for medication, education," *The Jakarta Post*, September 4, 2003: www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030904.A07.

57 "Bill bans public erotic dances," *The Jakarta Post*, March 8, 2004: www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20040308.C01.

58 Before the amendment, Article 28 of the constitution provided that "Freedom of association and assembly, of expressing thoughts by speech and writing, and so on, shall be laid down by law," see original constitution, Art. 28.

59 Law 9 of 1998, Art. 9(3).

60 Law 9 of 1998, Art. 10.

61 *Ibid.*, Art. 15 and 17.

62 Law of the Republic Indonesia No. 39 of 1999, Law Concerning Human Rights Court: www.asiamaya.com/undang-undang/uu_pengadilan*ham*/*uu*pengadilan_ham_index.htm.

63 Constitution, Art. 34(3).
64 Law 23 of 1992, State Gazette No. 3495 Year 1992.
65 *Ibid.*, Art. 7.
66 *Ibid.*, Art. 8.
67 Constitution, Art. 34(1).
68 Constitution, Art. 34(2).
69 Presidential Decree 28 of 2003.
70 Law 18 of 2001, State Gazette No. 114 Year 2001.
71 The full text document of Qanun Law No. 11 of 2002 is available at: www.lin.go.id/dokumen/060803O2xA0002/Qanun%20Prov%20NAD%20No%2011_2002.doc.
72 *Ibid.*, Art. 21.
73 *Ibid.*, Art. 14.
74 *Ibid.*, Art. 15.
75 *Ibid.*, Art. 4.
76 Law No. 18 of 2001, Art. 5.
77 Law No. 21 of 2001, State Gazette No. 135 of 2001.
78 Presidential Decree 88 of 2000.
79 Presidential Decree 27 of 2003.
80 *Grebegan* is a ceremony held by the Sultan of Yogyakarta in order to celebrate the birth of prophet Muhammad SAW.
81 *Ngaben* is a ceremony held by the Hindu people in Bali by burning the corpses of their relatives as prescribed by their religion and culture.

13 Protection of human rights and production of human rightlessness in India

Upendra Baxi

Introduction

Unsurprisingly, more than five decades of the working of the Indian constitutionalism have spawned whole varieties of institutional practices in the promotion and protection of human rights. Its working has also significantly impacted the social, and human rights, movements. The overall robustness of judicial protection of fundamental rights to freedom of speech, expression, association, conscience, and religion has contributed to the creation and sustenance of social space for different social movements, legal pluralisms, and flourishing diverse fighting faiths. In the process, we also find that the constitution is, of course, not the only source of thinking about human rights; the sources and scope of rights and obligations vary within, and across, religious and cultural traditions, which also historically commingle.[1] Thus once we avoid egregious generalizations concerning the "absence" or "lack" of human rights in these traditions,[2] the task of attempting even a bare review of the human rights discourse in India becomes even more formidable; the cultural life of human rights is never exhausted by the doings of legislatures and courts.

Locating the Indian experience within comparative constitutional traditions of human rights discursivity is no easy task because of the "poverty of theory" (here meaning the very slow emergence of a comparative social theory of human rights).[3] An understanding of constitutionalisms at work from the perspectives of internationally proclaimed human rights is never quite the same as the constitutionally based understandings of human rights as put to work by judges and lawyers, social movements, and the political processes in each national context. The relationship between these two domains remains exceedingly complex indeed because in each the nature, number, scope, and negotiability of rights vary a great deal[4] and so do patterns of institutional integrity of the agencies concerned with human rights promotion and protection.[5] Further, when we step beyond the existing institutional ensemble, we move into the formidable metaphysical territory that constitutes an array of "thin" and "thick" conceptions of rule of law and "good governance," and priorities and hierarchies of human rights

values, ideals, and goals.[6] Constructions of human rights hierarchies, whether in the idiom of "negative" and "positive" rights, rights here-and-now enforceable, and those subject to "progressive realization" (often called "manifesto" or "program" rights) perforate the endless proclamations of the indivisibility of all human rights. The Indian Constitution may make the unique (but unhappy in my view) claim of anticipating (as early as 1949) the distinction between political and civil rights, and social, cultural, and economic rights through the device of judicially enforceable Fundamental Rights in Part III and the Directive Principles of State Policy in Part IV investing elected officials with "paramount" constitutional obligations to pursue social, economic, and cultural rights. This device has subsequently infected many a post-colonial constitutionalism.

Further, the "thick" conceptions require us to explore the place of human rights not merely in normative terms but in their very *institutionality* as well. Put another way, we need to attend to apparatuses and processes that, as it were, put human rights to work or to sleep in real life. The post 9/11 world, manifesting "authoritarian post-Fordism"[7] encrypting certain "no entry" zones for human rights norms and standards, certainly put human rights into a sedated slumber.[8] But, as we note in slight detail later, beginning with the Indian Constitution all post-colonial constitutionalisms had to respond to their very own various pre-9/11 "Ground Zero," which profoundly affected the place of human rights in the development of governance cultures.

Were we to speak of the structuration of "adaptive" state formation, that is the "implantation" of human rights in governance structures and processes, in India this process begins with the constitution itself, with the bestowal of extraordinary powers of judicial review on the Supreme Court and the creation of many a constitutional commission,[9] decades before the idea of National Human Rights Institutions (NHRI) became voguish.[10] India has since the 1980s established other human rights specific institutions such as the National Commission for Women, the Minorities Commission, and a child rights commission (in the offing). The proliferation of NHRI networks remains a mixed blessing, especially when the apex courts begin to transfer the burden of adjudicating violations of human rights to these institutions. The Supreme Court of India increasingly tends to transfer its adjudicatory burdens to the NHRI networks, with some worthwhile and some diversionary impacts, a theme that I may not here pursue. To be sure, efficiency in protection of human rights requires a division of labor between the apex court and the NHRI networks; at the same time, this also expands the scope for bureaucratization of human rights and of human suffering. And eventually it also affects the social imagery of the apex judiciary as a final custodian and protector of human rights. In turn this also marks ongoing and various shifts in the balance of power between governance institutions, and human rights and social movement actors.[11]

Further, and not just in the Indian case, narratives of human rights are inadequate, even misleading, without companion narratives of the production

of human rightlessness. Hannah Arendt drew our attention to the simultaneity of the phenomenon of the production of human rights and of coequal, though at times incommensurate, human rightlessness at the very moment of the enunciation of the Universal Declaration of Human Rights, in the image of the stateless and the refugee as the quintessential embodiment of human rightlessness.[12] This iconic figuration is further dissipated in various images: the rightlessness of the rural and urban impoverished, women, indigenous peoples, the "victims" of ethnic hatred,[13] the Project Affected Peoples, or environmental exiles or sustainable development refugees, migrant workers, and peoples of the so-called "post-conflict" societies. One way of conceptualizing human rightlessness is offered by the complex and at times arcane languages of measurement of human rights via "indicators" and "benchmarks."[14] But rightlessness goes beyond this; it is produced by the acts of bare sovereignty[15] that simply refuses to accept certain claims to being human and having human rights in the first place. This makes the languages of compliance and fulfillment otiose at the very threshold of human rights protection and promotion. I elaborate this point elsewhere but this chapter remains informed by rightlessness that can be identified in terms of human rights values, norms, and standards as well as forms of rightlessness that as yet know *no language*.

Dilemmas of human rights-oriented democratic governance

In general, the Indian experience narrates conflicting notions of democratic governance that negotiate trade-offs of protection and promotion of human rights against economic development and the preservation of national security. The pursuit of national security and "development" goals entails violation of fundamental freedoms and human rights that raises questions of constitutional arbitrage: are these decisions to be taken entirely by the Supreme Executive or should the Supreme Court have jurisdiction to invalidate rights-violating state conduct?

As concerns the pursuit of developmentalism under state auspices, human rights activism has tested notions of democratic governance by asking whether the apex court should be allowed to have a final say on macroeconomic policies such as accession to the WTO treaty regime as human rights violative,[16] and mega-development projects such as large dams, the location of ultra-hazardous industry (of which the Bhopal catastrophe remains an archetype), and public sector nuclear energy projects. Should judicial power have a final say on how best human rights costs thus incurred can be altogether avoided and at the next best level be minimized? With what justifications may courts constitutionalize (and legitimate) such costs?

The pursuit of the security of the state, or organized political life, raises equally intransigent issues. These arise in their everydayness all across the existing South democratic constitutionalism in two related but distinct situations. The first is presented by the exercise of within-constitution powers to

declare public emergencies in cases of external aggression or threat or alleged/real internal armed rebellion, thus authoring constitutional dictatorship. The second situation arises when incumbent regimes act in expedient ways (more or less just as they please) to suspend the existing constitution, replace it with an interim one, and defer the making of a new one. The first situation preserves room for a degree of judicial invigilation of the suspension of fundamental human rights; the Supreme Court of India has thus declared, after a long period of quiescence, that within-constitution exercise of emergency power may not justifiably suspend the right to life and rights to certain freedoms. This approach has now fortunately been codified by the Forty-Fourth Constitutional Amendment. Even so, the court has denied itself the power to *invalidate* the declaration or imposition of the emergency rule, no matter how overwhelmingly tainted (as was the case with the 1975–76 state of emergency) by considerations not cognate to preservation of the national unity and security. The second situation has happily not arisen in India;[17] yet, regime-oriented court-packing remains a recurrent Indian experience.

The rather well-worn Euro-American constitutional discourse concerning the "anti-majoritarian" character of judicial review (the notion that the elected officials enjoy both representational power and authority, and even wisdom and foresight, because they remain in some form or the other accountable to those who elect them) is severely contested by practices of human rights activism in India. Indeed, these yield to judicially crafted approaches of redemocratization of governance. The question here from the standpoint of human rights is no longer one of the interpretive power of justices and courts as serving a subsidiary, even if important, function of clarifying ambiguities and resolving conflicts of rights,[18] rather, it concerns entrusting the judiciary with the very custodianship of the future of human rights. On this view, the judicial role, function, and power emerge as democracy-reinforcing. Of course, a handful of activist justices everywhere have marshaled astounding hermeneutic prowess to the extent of rendering this problematic somewhat redundant. But, for the most part, the question of the human rights friendly structuration of an autonomous adjudicature remains. Unhappily, the International Bill of Rights, and its progeny, even in the context of the right to judicial remedies, bypasses the issue.[19]

The Indian experience also suggests the importance, in comparative terms, of the ways of constituting democratic political governance. Contrary to the experience of a proud bicentennial US constitutionalism that after all, as late as 2000, produces such stunningly impoverished discourse as *Bush* v. *Gore*,[20] an activist Indian judiciary increasingly blurs the distinction initially made between the *constitutional* (as against merely *statutory*) right to free and fair elections. Not too many actually existing South democratic constitutions enshrine and crystallize a fundamental human right to free and fair elections, in which courts systemically monitor effective disenfranchisement. Happily aided and fortunately abetted by a constitutionally robust

autonomous Election Commission, the Indian Supreme Court has exercised wide-ranging powers over the integrity of the electoral processes. Faulty electoral roles are not as incapable of judicial redress as in the USA. The Supreme Court is quick to sustain the powers of the Election Commission to reorder polls on a *prima facie* showing of violent "booth-capturing." It systemically reviews allegations of corrupt practices in the conduct of elections; as far as I know, no apex court in the Commonwealth has invalidated the election of a charismatic prime minister.[21] The Supreme Court has also enabled the Election Commission to invigilate both money and muscle power in ways that now mandate disclosure of assets and income by prospective candidates, secure public access to the histories of criminal indictment of candidates, and the exercise of wide-ranging powers to invigilate violent practices of intimidation of voters. The result, overall, is that each general election incrementally enacts a human rights friendly electoral process and monitoring system. The Indian narrative thus offers the most thoroughgoing juridification of the electoral politics.

Moreover, the remarkable provision of legislative reservations[22] for the Scheduled Castes and Tribes (and now further extended to ensure representation for women in grassroots governance in the urban and the Panchayati Raj institutions) empowers the millennially deprived communities to contest elections from specific seats where everyone has the right to vote. The issue of legitimation of constitutionally sanctioned derogations of an equal right to *contest* elections no longer remains open to public contestation. All this raises some intractable issues of respect for within-nation deference to the politics of regional and sub-national identity and difference. The issues thus posed also foreground the "recognition and redistribution dilemma."[23]

Outside issues concerning the place of human rights in structuring basic principles composing democratic governance, a rise in the affairs of federalism, the structuring of the federal *principle* and *detail*. Put another way, these raise concerns about the allocation of resources for human rights achievement within patterns of "cooperative federalism," marked by distinctive power-sharing patterns between the national and state governments. How may, for example, the pre-eminent national governance ways allocate national revenues equitably between resource rich and poor constituent states? Is the competitive, liberal, party political, and asymmetrical distribution of national revenues to be justified in terms of the overall needs of national economic and social development, even at the cost of human rights? How may we assess, from human rights perspectives, conflicts between federated units over scarce resources?

For example, the Indian federalism and constitutional politics at work have been riven by seismic conflicts concerning allocation of water resources between neighboring states. Interstate river disputes find their way onto the Supreme Court docket, despite attempts at tribunalized forms of negotiated solution and periodic national water policy enunciations. States in conflict mobilize sub-national identities with a telling effect. The rise and fall of

regional coalitional parties, and even the fortunes of national coalitional parties often fluctuate with the ways in which the Supreme Court handles these extraordinarily sensitive matters. These conflicts are not merely superstructural in terms of human rights diction concerning the right to food and water; they entail huge, often unconscionable, human rights costs where enormously indebted farmers commit collective suicides, unable to negotiate grueling debt repayment schedules, arising out of the losses in annual agrarian productivity. The Indian constitutional experience thus far suggests some heavy issues of constitutional architecture that provide the indispensable background condition for access to individual, and collective, human rights to food, water, health, and livelihood. This also affects women's rights as human rights because upon women in impoverished areas falls the inevitable and disproportionate burden of acquiring everyday resources of water, wood, and fuel.[24]

Further, some aspects of contemporary economic globalization complicate narratives of human rights protection and promotion of human rights. What has come now to be known as new economic constitutionalism[25] or "disciplinary neo-globalization"[26] induces an overload in terms of constitutional reform and human rights cultures. The de-juridicalization of the rights of labor and the re-juridicalization of the rights of property (read global capital flows protected by the rights of direct favoring investors over the rights of citizens), for example, remain an accomplished fact.[27] The emergence of what I have called a trade-related market friendly human rights paradigm threatens erosion of the paradigm of universal human rights.[28]

Global economic constitutionalism directs attention to the fact that: (a) high levels of corruption are not always exogenously caused;[29] (b) "ethnicization of politics" that generates ethnic hatred and strife, and even Holocaustian practices of violence, owe a great deal to within-nation management of society, economy, and politics; and (c) not all practices of torture, and cruel, degrading and inhumane treatment arise out of geopolitics and the new empire; some are decisively located in societal cultures and practices of management of power. It may well be said that the distinction between the endogenous and the exogenous factors is a distinction of *degree*, not of *kind* and all that we have is a continuum rather than sharply drawn spheres that mirror human rights violation or the modes of production of human rightlessness. Even if so, this raises important issues for theoretical and empirical analyses, which need serious engagement, not yet in sight.

Likewise, the critical event of 9/11 inaugurates new forms of the "war *of* terror" and the "war *on* terror" (a distinction I elaborate elsewhere). These two "wars" create a new milieu in which human rights values, standards, and norms are subjected to new stresses. The jurisdiction of suspicion has, all over again, begun to displace the due process, human rights oriented administration of criminal justice; a new global agenda of law reform abbreviating due process rights is already in place; powers of police and security personnel have been augmented (at times beyond belief); the number of

strict-liability "terrorist" offenses is growing apace, untroubled by the fact that many of these may be tried *in camera* and even by secret tribunals, with severe curtailment of legal aid and representation for the accused. Indefinite incarceration of suspects, at times under savage conditions and treatment, has now become the rule. Because the "war on terror" is endless, the retreat from minimal human rights norms and standards of civil and political rights also emerges as well-nigh irreversible.

With all these considerations in view, this chapter addresses only a few dimensions of human rights theory and practice in India. I know that this selectivity detracts from the overall comparative range of our common project; despite this, even a synoptic overview of constitutional development in the abovementioned fields remains a forbidding task, given the *embarras de richesses* of the Indian constitutional interpretivism. Further, this narrative cannot be presented in any fully-fledged political economy genre, one that traces constitutionalism, and the place of human rights within it, as an ongoing aspect of state formative practices.[30] I compensate this shortfall somewhat by rather extensive bibliographical references.

The pre-constitutional imagery of human rights

Self-determination as secession

I evoke the notion of the "imagery" here as Cornelius Castoriadis famously developed; it would indeed be fascinating to extend his analysis to South constitutionalisms at work, and the place of human rights, within these. But some traces of his analysis inevitably remain even in a rather mundane usage of this notion. The first stage is provided by the realm of political fantasy that gave birth to the very idea of a post-British nation called India. No freedom struggle would have been possible outside this. The fantasy also proceeded to invent the right to self-determination (known as *Swaraj*) pitted against the divine right to empire. This inaugural invention was world historic as is justified a whole range of anti-colonial movements in Asia and Africa; it also gave birth several decades later to recognition of a human right to self-determination in the common Article 2 of the International Covenants of Human Rights. The national freedom struggle led by Mahatma Gandhi also birthed the fantasy of non-violent social and political revolution,[31] and the invention of a whole technology of peaceful mass civil disobedience. Human rights were thus born as *collective or peoples' rights against an alien rule*.

The Indian Independence Act 1947, passed by the British Parliament, created two dominions of India and Pakistan; it also created a lapse of British paramountcy over some six hundred Princely States, which were given the option to accede to either dominion. Even as the Indian Constitution was being written, the interim national government proceeded apace with the policy of integrating these states into the Indian Union. Three of

these, with a substantial Muslim population, resisted integration (the Princely States of Junagadh, Hyderabad, and Kashmir.) All three were "integrated" by instruments of accession with the Indian Union. However, the Pakistani "invasion"[32] and some popular movements resisting a Hindu ruler's hasty accession to India complicated the situation in Kashmir, creating in the process a Pakistan-occupied state of Azad Kashmir (not internationally recognized as such) and a much contested United Nations intervention, mandating a plebiscitary choice of final accession, which did not come to pass.

This necessarily truncated narrative raises at least two questions concerning the imagery of self-determination. First, how may we view the British Act as an incipient manifestation of the right to self-determination? Of course, the act signified the colonial and imperial stratagem of divide and rule; surely, it was not in the least animated by what we understand to be the logics of self-determination. But the normative question remains, outside the histories of imperial politicking. Second, all this inaugurates a distinctive early postcolonial understanding of the right to self-determination; the "self" that is thus to be "determined" is merely the postcolonial nationhood self, which leaves intact its colonial cartographies. Understandably[33] India, and many other postcolonial nations, filed a reservation to the common Article 2 of both the international covenants on human rights.[34]

The same order of understanding informs constitutional development in relation to radical constructions of the notion of "alien" rule. Indeed, on the very first day of the Constituent Assembly proceedings, a veteran tribal leader (the assembly had a minuscule representation of indigenous peoples) poignantly articulated the logic of self-determination by saying that his peoples understood independence as a twofold movement: first, the British must quit India and then all the "later-comers" should also quit India, restoring India to its indigenous inhabitants. Peoples of the Northeast (the erstwhile province of Assam) interpreted the new constitutional regime of Indian governance as alien, and began (especially with the Naga People's Army) a war against the newly constituted nation, almost at the same moment when the Constitution of India was adopted. This was a long and fierce war and fifty years later, the Indian Government is still deftly negotiating in Bangkok a "truce" with its leaders.

Violent practices of secessionist politics profoundly affected the writing of human rights in the Indian Constitution and their hermeneutic careers. These practices have also irreversibly accomplished the militarization of governance and politics ever since. It is impossible to grasp the place of human rights in Indian constitutionalism outside the histories of secessionist insurgencies.

The fundamental rights to life and liberty (Article 21 of the constitution) thus merely guaranteed the right to life and liberty in accordance "with the procedure established by law." Article 22, however, immediately provided for broad state, as well as federal, legislative powers for the enactment of dragnet security legislation. This meant that parliament remained the ultimate

arbiter of the meaning, content, and scope of these precious human rights. Although the Supreme Court acquiesced with such plenary powers of preventive detention from 1950 until 1977 (when it rewrote the article to mean by "procedure established by law" by the inscription of the fully-fledged "due process of law"),[35] it also developed a magnificent preventive detention jurisprudence that cumulatively whittled down the preventive detention powers and processes. To be sure, the relief thus offered to victims of arbitrary preventive detention remains historically impressive. Faced, however, with uneven access to judicial remedies, and occasional judicial venalities, the structures of the encyclopedic variety of preventive detention powers continue to thrive overall, unmolested by the rigors of judicial invigilation. Available and ample empirical evidence suggests that impoverished peoples, local trade union activists, and in particular the Muslim minority populace remain disproportionately represented in the detune populations. The use of preventive detention legislation against political enemies or adversaries of the regime is well known. Further, in the post-9/11 world, the Prevention of Terrorism Act (POTA), with all the judicially engrafted safeguards, unfolds massively the anti-liberty aspects of Indian constitutionalism at work.

In the preceding paragraph, I have jumped several histories of what, at least in this respect, must be called constitutional authoritarianism. I hope, however, that I have illustrated its origins in the dialectical play of violent secessionism and insurrection, and the state's response. The career of human rights to life and liberty in India is enclosed in the discourse of national unity and integration. Preventive detention laws reiterate (in Benjamin–Derrida phrase regime)[36] the foundational violence of Indian constitutionalism. They also mark the emergence of the Indian appellate judiciary as a custodian of the rights to life and liberty; of necessity, judicial impositions of the discipline of human rights remain episodic (one step forward two steps backwards) rather than structural.

Self-determination as within-nation insurgency

There is, outside the languages of autonomy/identity movements, no appropriate mode available to describe these constitutional insurgencies, which I call "within-nation" movements. These signify mass movements, involving considerable civic and state violence, which ultimately reshaped the maps of the Indian federation. Ever since the first decade of Indian constitutionalism, mass movements asserting regional identity and autonomy claims commenced their career that disrupted the translation of the British-Indian administrative provinces into new constituent units of the Indian nation. Thus, in an ongoing process of struggle, for example, the erstwhile Bombay province divided itself into the states of Maharashtra and Gujarat, Bengal into Orrisa and Bihar, Assam into seven federating states, Punjab into Punjab and Haryana (uniquely with a shared capital for the two states: Chandigrah) and more recently Bihar into Jharkhnad, Madhya Pradesh into Chattisgarh,

and Uttar Pradesh into Uttarkhand. This proliferation process will continue, with important human rights fall-outs.[37]

This contribution, of course, cannot trace these developments in their full complexity because the timespace of the pre-constitutional merges heavily with the post-constitutional. Four aspects may, however, be briefly mentioned here. First, "within-nation" irredentist movements successfully crystallized claims for self-determination along linguistic and cultural lines; the institutionalization of sub-nation identities creates space for conflicting political loyalty. Second, this signifies a popularization of the idea of participation in governance: the larger the constituent states, the lesser remains the scope for participatory self-governance. In this sense, the histories of the within-nation autonomy movements furnish some extraordinary instances of the accomplishment of the values proclaimed by the United Nations Declaration of the Right to Development. Third, however, these movements also register a new, even sinister, endangerment of the idea of Indian citizenship. I refer here to the Shiv Sena-type sons-of-soil movement in Maharashtra[38] that terrorize out-of-state migrants and furnish the wherewithal for the anti-minority rights (the Hindutva) ideology of non-governmental formations.[39]

Fourth, within-nation autonomy movements also demonstrate some profound human rights relevant considerations concerning the sharing of resources for development. Thus, constituent states wrangle interminably over the sharing of inter-state water resources, as already noted, with some real life consequences for the affected peoples. For example, the collective farmer suicides in the state of Tamil Nadu were related to Karnataka State claims for greater control over the sharing of water resources generated by the Kaveri Dam, and the internationally noted controversy over the Narmada Dam project involved issues of a just allocation of resources among, and within, the three beneficiary states. Likewise, the states of Assam and Gujarat have been locked in a dispute concerning equitable apportionment of revenues derived from exploitation of oil and related petroleum products, contesting an overweening share claimed by the national government. Unlike any other comparable constitutional experience, the Supreme Court of India remains inexorably implicated in fashioning an approach to federal resource allocation and sharing. Recently, the court has gone so far as to order the national government to propose an equitable scheme for sharing water resources among the Indian states!

During the sixty plus years of the freedom struggle, the imagery of human rights has been prefigured variously. Human rights were perceived to provide ways of righting historic, millennial wrongs. Salient among these were: the abolition of practices of discrimination on the ground of "untouchability", the restoration of the rights of the Indian indigenous peoples, elimination of gender injustice and inequality, the removal of human slavery and bondage, and the promotion and protection of the rights of religious, cultural, and linguistic minorities. The Indian freedom struggle thus conceptualized human

rights primarily as group/community/collective/peoples' rights. By definition, articulation of these rights was subordinated to a wider cause of mass mobilization against the imperial rule. When we recall that all this happened in a world almost altogether *bereft* of contemporary human rights languages, logics, and paralogics, the normative achievement remains indeed astounding. Its various itineraries await Foucaldian explorations.

The constitutional construction of human rights

The Indian Constitution was written during the Holocaustian violence of the partition of the Indian sub-continent, to which many meandering practices of the Indian freedom struggle contributed.[40] Although not historically unique when compared with the foundational violence that birthed classical US and French bicentennial constitutionalisms, and many latter-day postcolonial constitutionalisms, the critical events escalated the importance of constructing human rights values, standards, and norms. What remains distinctive is the design of human rights provisions in the constitution.

Understandably, then, a full affirmation of minority rights remained a task of paramount importance. Article 30 of the Indian Constitution enacts a near-absolute right of religious and cultural minorities to establish and administer educational institutions. Articles 27 to 29, broadly speaking, preserve and protect the rights of linguistic minorities. The unique device of the Fifth and the Sixth Schedule accords deference to self-governance institutions for indigenous peoples, even to the point of authorizing them to determine what state and national legislations may extend within their jurisdictions. And Article 13, as interpreted by judicial and political actors preserves full autonomy of minority communities in relation to their "personal law" systems, even as the fundamental right to religion is constitutionally conceived as a "charter of reform" of Hinduism.[41] We attend later to the contemporary vicissitudes of this provision.

Other histories also inform the constitutional construction of human rights. Human rights imagery is constituted in part by a determination to overcome millennial injustices. The constitution thus outlaws practices of "untouchability," and social conduct that results in the imposition of disadvantages and discrimination on the ground of "untouchability (Article 17) as an integral aspect of the fundamental right to equality before the law, and equal protection of law." In enunciating a human right against "exploitation" (Articles 23, 24), the constitution outlaws bonded or slave labor, agrestic serfdom, traffic in human beings, and certain forms of child labor.

Conceptions of equality before the law and equal protection of law, this dominant software of constitutionalism, thus began its long and tumultuous journey, soon after the adoption of the Indian Constitution. The First Amendment, hardly before the ink on the constitution dried, re-programmed constitutional conceptions of the right to equality by enshrining basic rights to affirmative-action programs for the millennially deprived peoples, the

"untouchables" and the First Nations peoples (described respectively as "Scheduled Castes" and "Scheduled Tribes", a governance and rights device to name the deprived peoples.) This, unlike US constitutionalism, dictates that affirmative-action programs and policies in India, far from being a pre-eminent gift of fluctuating judicial review processes, is a constitutional estate enshrining the democratic rights of, as the constitution variously phrases this, the "socially and educationally backward classes" and the "other backward classes." Indian justices no doubt constantly invent, and refurbish, ways of adjudication that draw bright lines between and among various notions of equality (equality of opportunity/equality of results/horizontal equality versus "vertical" forms, for example) but affirmative action ("compensatory," "preferential" and "reverse" discrimination – and these descriptions do make and mark important differences) remains the leitmotiv defining the core of the Indian "good governance" practices.

Indian constitutional theory and practice, overall, adopts a theory of "regulated freedoms." Most civil and political rights are expressed in terms of the *right to freedoms*. But all fundamental rights in Part III are explicitly subjected to parliamentary powers of "reasonable regulation" on specified grounds. This marks a deeply troubled and conflicted site because the conferral of rights serves also and at the same time to register grants of plenary legislative powers. In some rich pre-Foucault modes, the "authors" of the Indian Constitution elaborate "reasonable restrictions" that confer meaning for fundamental freedoms and human rights.[42]

Even when Indian justices proclaim the public virtue of drawing clear lines between permissible "regulation" and offensive "abrogation," they may only do so amid case-by-case contestation. The spectacle of the judicial review process and power midwifery delivering human rights and limited governance indeed fascinates, until we recall, as we all must, that judges and courts, always and everywhere, resymbolize the sovereign power of the state. The spectacle and the truth are not uniquely Indian; what is distinctive to the Indian story is that justices increasingly believe, and act on the belief, that basic human rights remain safer in their interpretive custody than with the representative institutions. This belief and practice combine to produce a distinctive type of "constitutional faith" (to borrow a fecund expression of Sanford Levinson), which legitimizes expansive judicial review. It is tolerably clear, however, that on the whole judicial interpretation of regulated fundamental rights to freedoms helps to sustain, rather than abrogate, these rights.

Freedom of speech and expression

Article (19)(1)(a) guarantees freedom of speech and expression to all citizens. This right remains open to reasonable restrictions, however. Parliament may by law place reasonable restrictions on the grounds of the sovereignty and integrity of India, security of state, public order, decency, morality, contempt of court, defamation, and appeals to incitement offenses

(Article 19(2)).[43] This catalog may seem at first sight life threatening for the right to free speech and expression; however, in a somewhat curious sense it has nourished free speech rights because each exercise of the power to restrict invites political and social contestation and most are challenged before the High Courts and the Supreme Court of India.

The Supreme Court has delivered, from 1950 to 2002, 119 judgments concerning Article 19(1)(a) freedoms and seven judgments specifically concerning the freedom of the press. The number of decisions compared with other Part III fundamental rights for the same period is slender but this does not diminish their overall significance.[44] The minimal threshold requirements – "reasonableness" restrictions thus placed must relate strictly to the constitutional grounds, these must be "reasonable", and must remain *restrictions* on the right and never constitute its *abrogation* – spawn not merely substantive and continual judicial oversight but also expand the very understanding of the social meaning of free speech.

The first step towards protection of freedom of speech and expression is taken when the right to free press is affirmed as integral to the right to free speech.[45] This right was proposed for explicit incorporation during the Constituent Assembly Debates but was expressly excluded.[46] Freedom of press is not however just a matter of "free propagation of ideas"; free press also involves both publication and circulation. Publication and circulation entail recourse to other basic rights also guaranteed by Article 19 – such as the right to property, and the right to engage in any occupation, business, or trade. Restrictions justified as reasonable in relation to other fundamental rights (such as freedom to carry on a business), may however be violative of the right to free press and speech.[47] The Supreme Court has consistently reiterated its understanding that press freedom may not be violated directly or indirectly, that latter by "placing restraint on something that is an essential aspect of that freedom." Any "excessive or prohibitive burden" will "not be saved by Article 19(2)."[48]

The privileging of the free press because it has as its object a free "propagation of ideas" has been further questioned and refined. Constitutional protection of the freedom of press, it has been said (notably by Justice K. K. Mathew) derives its justification from *people's right to know*. This teleological approach would favor legislative limitations that can be shown to serve this collective peoples' right, as otherwise freedom of the press would only mean liberty for those who may have the good fortune and economic resources to own the print media.[49] In some recent justifications of "commercial speech", the idea of the right to know has been translated differently as the protection of the right of the "individual to listen to, read, and receive" commercial speech. Earlier, the "right to advertise," or even the right to carry an advertisement, was not considered an essential part of the right to free press;[50] now in a globalizing India "commercial speech" has become integral to this right. It is also now recognized that advertisements contribute to the resources necessary for the existence of the free press;

protection of "commercial speech" may only be regulated on the basis of its contents.[51]

The transformation of the rationales of free press has not fully addressed other related aspects. The right to hire and fire editors who stray from the corporate line on sensitive political matters has been regarded in terms of contractual tenure or management prerogative. While justified as the right to pursue business, occupation, and trade under Article 19(1)(g), it is not compellingly clear why this does not invite strict judicial scrutiny in terms of indirect effects on free speech. Careers in investigative journalism have a fluctuating short shelf life for the same problematic reason. The rights of working journalists are protected by statute but this does not deal with the issue of their own rights to freedom of speech and expression within the organizational constraints of the free press. The balance of content between news or views and advertisement also affects the freedom of speech and expression, when wholly determined by commercial profit considerations. Libertarians may be justified in insisting that the government should not be authorized to set these matters right, as they would use this power to meet their own expedient ends. This does not justify the relative paucity of best industry standards in India's free press, standards that rigorously serve peoples' right to know and to articulate their views and opinions in pursuit of their own constitutional estate of free speech.[52] A couple of national dailies have instituted an ombudsman system to deal with readership complaints; we do not know yet how effective this is.

What then may be regulated? Three potent grounds of reasonable restriction on the right to free speech and free press continue to evoke concern: obscenity, contempt of court, and defamation. Pre-censorship of contents mainly affects movies and other dramatic representations. The content regulation of movies, administered by a government appointed statutory Film Censor Board, is accepted as routinely justified, though specific decisions concerning sexual acts or exposures of nudity are often challenged. Pre-censorship of dramatic performances are often matters falling within local self-government powers and carry a low visibility. The guiding discourse concerning constitutional scrutiny of content owes much to *Lady Chatterley's Lover*; a ludicrous act of banning its import, publication, and sale led to the gifted discourse by Chief Justice Hidyatullah.[53] Pre-censorship also occurs via banning of books and films, the most notable being Salman Rushdie's *Satanic Verses*; but this did not reach judicial scrutiny. The ban was justified on the ground that it would contribute to communal violence.

The Contempt of Court Act continues to administer some chilling effects on freedom of speech and expression as well as media freedom. Although the Supreme Court has used this power sparingly, the probability of contempt proceedings is a specter that haunts leading Indian newspapers and periodicals. Media attorneys, even though otherwise celebrating the robustness of free press in India, systematically urge editors and reporters to err on the side of caution, thus inhibiting thoroughgoing investigative journalism.

The offense of scandalizing the court, judicially determined and administered, prevents free public discussion of the venality of the Indian judiciary. Protection of justices at their work from scurrilous and politically motivated public criticism is no doubt an important function served by contempt of court jurisdiction, but at the same time it unduly immunizes suspect judicial conduct.

I do not even summarily deal with the third corpus of restraints provided by the ground of defamation save to say that libel suits remain aplenty (and since each publication is a distinct offense, editors and publishers often face proceedings in far-flung places in India) and that these adversely affect the exercise of the rights to free speech and press by small activist publications.

Constitutional secularism

Constitutional secularism is one way of talking about state–religion relationships. The development of the concept, in the Indian context, has largely been the work of the relatively autonomous judiciary, especially the Supreme Court of India. Competitive party politics also crystallized certain operative consensus.[54] In the *Kesavananda Bharathi* case,[55] the Supreme Court of India ruled that secularism was an essential feature of the basic structure of the constitution that limited the reach of constitutionally granted plenary powers of amendment. And in 1976, the Forty-Second Amendment amended the Preamble to the constitution by declaring India to be a "democratic socialist secular republic."[56]

The Indian Supreme Court, in a long line of decisions, has articulated nine enunciations of the secular ideal and principle, mainly through interpretations of Articles 25 and 26.[57] Article 25 guarantees the right to freedom of conscience and religion, subject to the legislative power to regulate the scope of this right on the grounds of public order, health, and morality. As concerns the freedom of *conscience*, this subjection (especially on the grounds of morality) is indeed puzzling, because this assumes that the "conscience" may itself be unethical and that a majority of elected public officials have a right to curb conscientious belief or action! A more severe repudiation of Mahatma Gandhi's vision and legacy is hard to imagine. I cannot, for reasons of space, pursue this aspect here.

While the general imagery of constitutional secularism suggests that its central tenet entails equal respect for all religious traditions, Article 17 (abolishing "untouchability") and Article 25(2)(b) (mandating "throwing open of all Hindu religious institutions of public character to all classes and sections of Hindus") clearly justify state-sponsored reform of Hinduism. Further, Article 25(2)(b) also gives the state the power to "provide for special welfare and reform of Hinduism." This power was primary understood to signify the reform of classical Hindu law, particularly from the standpoint of gender equality and justice in the "personal law" systems governing marriage and divorce and inheritance. The freedom of religion for the Hindus thus

stood constitutionally conceived as a freedom to reformed Hindu religion that sought to right millennial wrongs. This remained relatively unproblematic for four decades, until social and human rights activists began to raise the problem of human rights of women in "minority" religious traditions. The preservation of the "personal law" systems based on the *shari'a*, or Catholic prescriptions, or indigenous customary law formations also, it was argued, required the same *programschrift* of state-sponsored renovation of religion.

The constitution-makers realized this anomaly, which they tried to rectify through Article 44 by mandating that the state shall strive to achieve a "uniform civil code." There was simply no other way out in the wake of the Holocaustian violence that characterized the partition, but, as decades rolled by, state inaction became liable to a growing human rights indictment. This chapter cannot review even a bare outline of the causes and the careers of this inaction.[58] Even so, the rise in "communal" riots or collective practices of organized violence raised the issue of state legitimacy over personal law reform: many Muslim leaders and spokespersons insisted that the state must first learn to provide security and survival for the minorities before it may assume a moral leadership to reform a religious-based law formation. Some argued that in this context of basic insecurity of life and livelihood rights, within-community consensus must precede any legislative recodification of Islamic personal law in India. Progressive Islamic opinion insisted that a pious reading of the Holy Qur'an obviated any further within-community hermeneutic labors, because it already authorized a women's rights friendly interpretation. Progressive judicial opinion flayed unconscionable political inaction and continues to urge expeditious legislative reversal. The Supreme Court and the parliament have variously begun to undo gender discrimination in the Christian, Parsee, and indigenous religious tradition-based personal law formations. The intransigence of the *sharï'a* personal law formations continues to severely test the promise of constitutional secularism.

In the meanwhile, "communal violence" continues to grow apace, of which the events in Gujarat in 2002[59] remain a cruel archetype. The Hindutva forces thrive on the rhetoric of minority appeasement. The Bharatiya Janata Party (BJP) has begun to describe the dominant version of constitutional secularism as "pseudo-secularism" where the state acts to reform the majority religious tradition under the banner of righting ancient wrongs while remaining helpless to address similar wrongs in Muslim personal law. Further, the BJP and its political cohorts have been able project Hindus as a beleaguered majority, which has allegedly been converted into a persecuted minority – the dominant figuration here refers to the history of forced conversions during the Mogul rule of India, restoration of Hindu temples converted to mosques, and related factors that "discriminate" against the Hindu faith. Hindu militia assails, with considerable impunity, aesthetic, and cultural productions, which they portray as desecrating Hindu religious iconography and traditions. Hate speech and unrestrained political violence remain the favored means to protect an altogether new religion called

Hindutva. All this threatens not just the constitutional conceptions of secularism but also the paradigm of human rights by putting at stake the very future of Indian constitutionalism.

At the same time, processes of *secularization* are also in place. These refer not so much to an ideological or normative discourse concerning state neutrality in a multi-religious society but to productions of science and technology that inflect both the state and popular law-ways. These processes, further reinforced by contemporary Indian economic globalization, generated a variety of social facts, where religious identities and transcendental concerns scarcely matter. For example, considerations, so peculiar to classical Hinduism, concerning purity and pollution, do not affect the economic production of goods and services; even the most pious Hindu remains untroubled by the caste identity of the operators of mass public transport, health care providers, the producers and distributors of the print media, films, and electronic media entertainment. Nor do conscientious Hindus any more check the vegetarian credentials of medications they take, or question the "impure" or "polluting" medical technologies (whether diagnostic or surgical) to which they have recourse. All this, even when we grant that the production of science and technology remain culturally embedded, and that economic development does not bring about equality for all in realization of a human rights-oriented quality of life, raises issues concerning the attainment of constitutional secularism as authorizing *secularization* of everyday life, not yet fully addressed in comparative constitutional studies.

The human right to education

Understandably, literacy and education are crucial to the attainment of the constitutionally desired Indian social order; and are important human rights in themselves. It is also important to see how constitutional secularism becomes integrally related to the right to education, recognized by the Directive Principles of State Policy (Article 41) as a right to literacy and elementary and primary education for all children up to 14 years of age which has now been transformed into a judicially created enforceable fundamental right. This judicial assertion has now led to a constitutional amendment that finally makes free and compulsory elementary and primary education a basic right of all young Indian citizens.[60]

The movement for the affirmation of the right to education occured in two related but distinct contexts: it occured first by way of judicial rectification of governmental inaction in "living up" to the Directive Principle mandated obligation to provide free and compulsory education up to the age of 14 years; and, second in terms of the scope of minority educational institutions' privileges of admission and overall control over the education they impart. Considerations of constitutional secularism weigh heavily in the latter discourse. For the present purposes, I provide rather rolled-up, and necessarily brief, narrative hints.

In *Mohini Giri* v. *State of Karnataka*[61] the Supreme Court seized the opportunity, in the context of capitation fees levied in specialist professional education offered by privately sponsored educational institutions, to articulate a fundamental right to education. The Directive Principle mandate had to be "translated" into a fundamental right for various reasons. First, the "right to education flows directly from the right to life." Second, Article 19 rights to freedom of speech and expression can scarcely be realized "unless the citizen is conscious of his individualistic dignity," and this entails both the right to literacy and education. Third, further, all human rights enshrined in the constitution entail a concomitant right to literacy and education. Constitutional pundits may discuss endlessly the doctrinal legitimacy of these enunciations but it is clear that finally the journey of a thousand miles begins with this single decisive step. A year later,[62] this rationale was expressed in terms of the very foundation of democracy, and no effort in fulfilling the right to education may be said to be excessive because: "A true democracy is one where education is universal, where people understand what is good for them and the nation, and know how to govern themselves." Although both these decisions remain superstructural (providing context for capital intensive, high fees, professional – medical and engineering – education), the justices found a way of addressing the longstanding denial to the grassroots of access to literacy, primary, and elementary education.[63]

The parameters of the right to education continue to unfold in the context of minority educational institutions' assertions of autonomy and identity. Did the right to education invest these institutions with a right to provide a quota for students belonging to specific religious communities? Further, did they have a right to operate the scheme of educational reservations or quotas for students belonging to the Scheduled Castes and Tribes, autonomously of their own procedures and rules, and the regulations of the universities with which they were affiliated?[64] Overall, complex doctrinaire issues of interpretation aside, the issue stood framed as a choice between "a melting pot" and the "salad bowl" conception of Indian secularism. Justice (Ms) Rumma Pal, in her partial dissenting opinion in the *Pai Foundation* case[65] rendered an inestimable service to constitutional jurisprudence by framing the issue this way; in her view the "salad bowl" conception of constitutional secularism fosters "homogeneity without an obliteration of identity," in contrast to a "melting pot" approach that may indeed lead to "religious bigotry."

Even this barebones narrative raises the following issues. First, in terms of constitutional comparison what weight may we attach to a constitutional right to education? Is this a *necessary* even when a *desirable*, but never a *sufficient* step toward the performance of obligations to recognize and respect, protect and promote cultural, economic, and social human rights? Second, what corresponding duties thus arise for state policy-making and political actors? The Ninety-Third Amendment merely casts a duty to provide education by a legislative enactment. What kind of obligations should law prescribe? Third, how far may the highest court in the land go to

enforce such obligations? Fourth, how may we evaluate national policy on education under international human rights standards and norms? (Here, the Jomitien Declaration on Education for All provides an excellent example.) The issue here is how far "soft" human rights law may bind national policy actors. Fifth, how may state agencies servicing the right to education promote the values and the virtues of constitutional secularism? This is a big issue in Indian discourse currently.[66] Sixth, from where in the discourse of contemporary human rights may we derive appropriate minimal standards for matters such as basic infrastructural facilities for schools and tenured staff? The imperatives of economic liberalization and austerity in public expenditure have led in India to a massive casualization of teachers; they are appointed on fluctuating terms, with no assurance of renewal of service, and no service rights, including terminal benefits.

I desist from raising further related questions. At stake, however, are the issues of *governmentality* as such, not just in relation to the right to education but also other social and economic rights (and not just in the case of India). Put simply, while even a minimalist normative development is worthwhile, a simple contrast between norms and facts, while necessary, is not sufficient. The mediating category of *resources* is crucial to both national and international standard setting.

Article 2(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) obligates parties to take obligation-oriented steps "to the maximum of available resources." How are the key terms "maximum" and "resources" to be constructed? The Committee on Economic and Social Rights in its General Comment 3 has developed the notion of "a minimum core content" of economic, social, and cultural rights with a view to ensuring that "every effort has been made to use all resources," at the disposal of the state party, "to satisfy, as a matter of priority, those minimum obligations." It is not clear how far this mandate extends to a requirement that a certain percentile of national resources ought to be made available for elementary and primary education. Allocation of resources, whether through annual budget-making or through special policies and plans is a function of the constellation called "governmentality" (in the Foucaldian sense here) which as of now remains unbound by human rights norms and standards. In this zodiac, saying that "every effort" should be made "to use all resources" at best helps us to expose the distance between the norms and the facts, but only at the cost of altogether simplifying the situation. The question here pertains not merely to *allocation* of available resources but their *creation*.

The *creation*-of-resources issue engages attention primarily with the demand side. I here put forward the following hypothesis:

> When the demand for the creation of resources is exogenously fostered, it will be most efficiently met by the proportion of resource flows from international aid and development assistance policies and programs; when the demand is endogenously induced and fostered, it will be most efficiently met by national governmental action.

The operationalization of the terms of inside–outside dichotomy in this hypothesis is complicated because human rights, and social, activist movements that constitute the "demand side" for human rights-oriented creation of resources straddle all kinds of interlocking national, regional, and international networks. And all this is further complicated by their profound ambivalence about international, and regional financial institution "conditionalities" for development aid, grants, and borrowing. Even so, the hypothesis suggests that the potential for creation of resources is the greater when within-nation movements possess the capability to either create conditions that foster governance legitimation deficit or reinforce legitimacy.

Having said this, I remain content (for the present) to acquiesce with my distinguished friend Katarina Tomasevski's suggestion (in her role as the Special Rapporteur on Primary Education)[67] that we measure the supply side (the flow of resources servicing the right to education) via her four "organizing principles": availability, accessibility, accountability, and adaptability. These crystallize qualitative dimensions of the exercise as well as enjoyment of the "core" content of the right to education.

The human right to food

At the outset, we should honestly acknowledge a global social fact. Hunger and malnutrition pose a *universal* human rights problem that transcends the North–South dichotomy, although the ratios of the adversely affected human populations vary cruelly and enormously. The decline of the institutions and process of the much-vaunted North forms of the welfare state render rather otiose some North–South distinctions. The urban and rural impoverished in the North, the increasing populations of legal and extralegal immigrants, and the indigenous peoples, remain exposed to the very same order of human, and human rights, deprivation that afflicts the impoverished postcolonial South nations. Our common project must strive to avoid a dichotomy that thus cruelly mystifies human rightlessness, and its continuing social reproduction, across the globe.

This having been fully said, I now briefly turn to some Indian narrative specifics, which always carry risk of epistemic violence. The right to food, or immunity from hunger and malnourishment, figures variously in the Indian Supreme Court discourse. First, it features as a component of the right to life guaranteed under Article 21. Second, it derives wider constitutional meaning and pertinence from associated Directive Principles of State Policy that articulate the basic human right to health under Article 39, and right to just and humane conditions of work assured under Article 42.[68] Third, judicial narratives are increasingly more focused on the contexts provided by cruelly outmoded colonial famine relief codes. Fourth, these also address an incredible variety of regimes – expedient public food distribution programmes and policies that spawn executive aspects of constitutional largesse in the shape of food-for-work, and related famine and drought-relief programs, some of which merit the description of the "biggest scam" (in the words of

the foremost right-to-food scholar-activist Jean Dreze.) Fifth, the Supreme Court of India, in activist mode, has begun an arduous journey of monitoring the career of actual implementation of these measures,[69] particularly within the context of a rather obscene situation, where despite a nearly seventy million ton stockpile of food grains, starvation deaths remain a common situation. The extraordinary achievement of food security sits cruelly at unease with total deprivation of access to food and nutrition by impoverished masses that entails selling young girls and children in certain parts of India at the going price of *ten* Indian rupees! Sixth, even despite headline news, politics of denial persist; prevaricating state affidavits before the Supreme Court persist.[70] Seventh, all this does not deny one bit the rather impressive overall policy achievement of the distinctive forms of Indian *governmentality* manifest in apparatuses such as: the Agricultural Prices Commission, the Food Corporation of India, the Integrated Child Development Scheme and most notably the Public Distribution System. But it does point to rather enormous regional disparities in terms of the human right to immunity from hunger and malnutrition. Eighth, the recent invigilation by the Supreme Court of the details of the public distribution system, and other schemes such as the food-for-work program and large number of anti-poverty programmes, in itself constitutes an unusual human rights performance. Ninth, by itself, as well as comparatively, all this invites a consideration of the role of activist judiciary in attempting leadership towards food security. Tenth, access to water remains an ineluctable aspect of the right to food and here we witness the conflicts between proponents of large dams and human rights. Eleventh, not to be ignored in this respect are the human rights of women in the context of national population-planning policy measures and the programs that entail.[71]

The right to health and medical treatment

Article 47, a Directive Principle of State Policy, imposes a constitutional obligation on the state to secure the health of all citizens and particularly of the vulnerable populations. Its implementation has generally focused upon the creation of an expanded base of public health care institutions (government-run hospitals) and primary health care institutions especially in the rural areas. Major legislation[72] and policies[73] have been increasingly shaped by social action groups, who have begun to keep a constant vigil on the implementation of Article 47[74] and acquired enough power to insist on the creation of new, or changes to existing, legal frameworks. Medical education has remained a contested terrain, especially in terms of affirmative action programs that seek to ensure the admission of students belonging to weaker sections of society and judicial invigilation of actual implementation.[75] This overall archive of policy and legal framework achievement, however, when read with the various public health expenditure indicators developed by the World Health Organization pales into insignificance. Overall the national health expenditure amounts to only a meager and rather static allocation of

3.1 percent of the GDP; and PvtHE (private health expenditure) remains staggeringly high at 82.1 percent.[76] This compares unfavorably even with the least-developed countries.

The Supreme Court of India, in its expansive social action/public interest jurisdiction, has now successfully managed to convert, and enforce, Article 47 duties into an Article 21 right to life by reading into it the right to health, and provision of state health care.[77] It has declared the right to health as "one of the most sacrosanct and valuable rights of a citizen" and ruled that this right entails as a "top priority" the "harnessing" of financial resources, as the state "can neither urge nor say that it has no obligation to provide medical facility."[78] Further, it reiterates that the state "cannot avoid this primary responsibility on the ground of financial constraints."[79] It now obligates all state governments and the Union of India to provide a "time bound plan" for provision of life-saving medical facility in state-run hospitals and begins to award compensation for failure to so provide. It has removed totally an ugly scar on the human right to health care by declaring invalid statutory and administrative policies that until 1989 permitted denial of health care, even in emergency cases, in what were called "medico-legal" situations, where public hospitals refused to admit patients until a valid information report of accidental or premeditated injury was produced; the Supreme Court banished this rights-denying practice by insisting on "a total, absolute, and permanent obligation" to extend medical services, with due expertise for protecting life."[80] It has also extended the ambit of the Indian Consumer Protection Act to include free health care services in government hospitals and dispensaries enabling adversely affected patients some recourse to the more expeditious local, regional, and national consumer fora.[81] The emerging fundamental right to health, and health care, and compensation upon failure, also extends to industrial and corporate negligence that causes accidental situations (like fire) leading to health damage or disability.[82] However, the still ongoing, on the eve of the twentieth anniversary of the Bhopal catastrophe, dispensation of the newly enunciated right to health, and health care suggests its own distinctive vicissitudes.[83]

Conclusion

I must perforce end by saying, in a biblical vein, "Sufficient unto the day is the evil thereof"! Our common project, especially in its focus on economic and social human rights, requires going beyond *the growing scientism of human rights*. Human rights indicators and benchmarks, and other empirically testable measurements provide only the first step. We need also to review the social movement literature that, when most authentic, accomplishes the conversion of individual biographies of human and social suffering into social texts problematizing governance at all levels (global, supranational, national, sub-national, and the local). We further need to find or invent new vocabularies – beyond the languages of "violation," "progressive implementation," "core minimum," "basic needs," "millennial goals" – that begin

to take *human suffering seriously as the very prerequisite of taking human rights seriously*. Perhaps, the most promising approach lies in the transition from the languages of human rights to those of human capabilities and flourishings notably pioneered by Martha Nussbaum and Amartya Sen[84] and further to languages of global justice.[85] Towards this task our collective endeavor, I hope, marks a refreshing point of departure even when the points of arrival may remain somewhat indeterminate.

Notes

1 However, fully-fledged explorations of the place of human rights in Islam, Hinduism, Buddhism, Jainism, Zoroastrianism, and the diverse indigenous peoples' conceptions of law, justice, and rights are scarce (but see the versatile corpus of J. Duncan, M. Derrett and more recently Fred Dallmayr), "Asian values and global human rights", no. 52, *Philosophy East and West* (2002), pp. 173–89; Arvind Sharma, *Hinduism and Human Rights: a Conceptual Approach*, New Delhi: Oxford University Press, 2004.

2 Upendra Baxi, *The Future of Human Rights*, Delhi: Oxford University Press (2002); consult also the second edition, forthcoming in 2006.

3 *Ibid.*

4 In a recent presentation concerning justice of rights I identified these notions as follows: by "nature" I mean primarily distinctions made between enforceable and not directly justiciable rights. By "number," I refer to the distinction between enumerated and unenumerated rights, the latter often articulated by practices of judicial activism. By "limits" I indicate here the scope of rights thus enshrined, given that no constitutional guarantee of human rights may confer absolute protection. The "negotiation" process is indeed complex; it refers to at least three distinct though related aspects: (a) judicially upheld definitions of grounds of restriction or regulation of the scope of rights; (b) legislatively and executively unmolested judicial interpretation of the meaning, content, and scope of rights; and (c) the ways in which the defined bearers of human rights chose or chose not to exercise their rights, this in turn presupposing that they have the information concerning the rights they have and the capability to deploy them in various acts of living.

5 In a within-nation human rights-based understanding, "institutional integrity" refers not just to the independence of the bench and the bar and the related national human rights institutions, including law reform agencies, but also of the legislature itself. A common law approach to constitutionalism is too court-centric and thus limits our understanding of the political economy of human rights. In a cross-national understanding, institutional integrity refers to the integrity of agencies such as, for example, the United Nations Human Rights Commission and the specialist treaty bodies.

6 See, for example, Jurgen Habermas, *Between Facts and Norms: Contributions Towards a Discourse Theory of Ethics*, Cambridge, MA: The MIT Press, William Rehg (trs.), 1995; John Rawls, *Political Liberalism,* New York: Columbia University Press, 1993 and *The Law of Peoples*, Cambridge, MA: Harvard University Press, 1999; David Ingram, "Between political liberalism and postnational cosmopolitanism: toward an alternate theory of human rights," *Political Theory*, no. 31, 2003, pp. 359–91.

7 George Steinmetz, "The state of emergency and the revival of American empire: toward an authoritarian post-Fordism," *Public Culture*, no. 15, 2003, pp. 323–45.

8 See, for the discovery of the "emergency constitutionalism" in the USA: Bruce Ackerman, "The emergency constitution," *Yale Law Journal*, no. 113, p. 1029; Eric Posner and Adrian Vermule, "Accommodating emergencies," *Stanford Law Review*, no. 56, 2004, p. 605; and Mark Tushnet, "Issue of method in analysis of policy response to emergencies," *Stanford Law Review*, no. 56, 2004, p. 1581.

9 For example: The Scheduled Castes and Tribes Commission, The Election Commission, and the Finance Commission.

10 An important question arises concerning the proliferation of national human rights institutions (NHRIs). A recent study by the Carr Center of Human Rights (Sonia Cardenas, "Adaptive states: the proliferation of new human rights institutions," Carr Center for Human Rights Working Paper T-01-04, 2004) shows that although the Asia-Pacific region is the "only major region in the world that does not have a multilateral human rights treaty," it has witnessed a proliferation of a particular form of NHRIs, namely the National Human Rights Commissions (NHRC).

11 Not to be ignored is the freedom of the press and electronic media; (and not merely in India), which have, by assorted practices of investigative journalism, even sting journalism, exposed torture and terror in custodial state institutions, corruption in high places; these forms have also created patterns of partnership among professions, including activists and learned professions, notably the medical and the legal profession. The human right to individual and associational freedom of speech and expression, and the human rights of corporate capital that owns mass media, needs to be understood in terms of the wider democracy-reinforcing impact.

12 Hannah Arendt, "The perplexities of the rights of men," in Peter Baehr (ed.), *The Portable Hannah Arendt*, Hammondsworth: Penguin Books, 2000, pp. 30–45.

13 Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability*, New York: Doubleday, 2003; Donald Horowitz, *Ethnic Groups in Conflict* and *The Deadly Ethnic Riot*, Berkeley: University of California Press, (1985, 2001); Upendra Baxi, "Reflections on the 60th Annual Grotius Lecture by Anna Chua," *American University Journal of International Law and Policy*, no. 19, 2004.

14 Maria Green, "What do we talk about when we talk about indicators: current approaches to human rights measurement," *Human Rights Quarterly*, no. 23, 2001, pp. 1062–97.

15 Giorgio Agamben, *Homo Sacer*, Stanford: Stanford University Press, 1988.

16 Both the Supreme Court of the Philippines and India had to consider the question which they answered differently but both in ways that preserved the executive power; this by itself raises difficult questions but issues that are even more difficult would have arisen had either court proceeded to invalidate accession.

17 As it has so unhappily in Pakistan and Sri Lanka where further re-constitution of the apex court was processed whether by sacking the justices who refused to take an oath of allegiance to the "new" constitution or by court-packing. This situation, described by the Pakistan Supreme Court as usurpation, has been several times also legitimated by recourse to the doctrine of "necessity."

18 Justices then (in a memorable phrase of Ronald Dworkin) should always remain "deputies to the legislators" and never assume the role of "deputy legislators." See Upendra Baxi, "A known but an indifferent judge: situating Ronald Dworkin in contemporary Indian jurisprudence," *International Journal of Constitutional Law*, no. 1, 2003, p. 557.

19 Judicial implementation of human rights remains an aspect of a going legal culture. Only a handful of citizens are elevated as justices of the apex court and their social or class background as well as their formative experiences (usually at the

bar) and the processes of elevation remain, more or less, hidden from public view and scrutiny. This has generated considerable attention to transparency in appellate judicial appointments, the favorite device being a national judicial appointments commission. The Indian Supreme Court has itself, in a series of landmark decisions, generated a collegium of justices of the apex court that powerfully limits the role of an overweening executive: see Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford: Oxford University Press, 2nd edn, 1999, pp. 278–92; Upendra Baxi, *Courage, Craft, and Contention: the Indian Supreme Court in the Mid-Eighties*, Bombay: N. M. Tripathi, 1985. Conceivably, the United Nations codes of conduct for law enforcement personnel, and the Declaration on the Independence of Judiciary and Legal Profession assuage the situation somewhat but not in any distinct terms of human rights to access to equitable and efficient justice system. Our project needs to enquire on how these, and related, norms have been translated into effective legal action in the region.

Further, security of judicial tenure, in terms of tenure and impeachment, are important factors in shaping adjudicatory policies and approaches to the task of protecting and promoting human rights. Not to be ignored are patterns of esteem and influence that the state law officials often command; and the politics of the bar as a whole. Yet, from a human rights perspective, the already formed judicial predispositions or attitude-sets remain crucial. These are identified variously: legalism, activism, restraint, and eclecticism. Each set has a specific bearing on how human rights issues are perceived and handled by individual justices negotiating collective outcomes within an institutional public setting.

20 531 US 98 (2000).

21 *Indira Gandhi* v. *Raj Narian* AIR1975 SC 2299; see also Austin, *supra* note 19, pp. 314–27; S. P. Sathe, *Judicial Activism in India*, Delhi, Oxford: Oxford University Press, 2003, pp. 73–7.

22 Upendra Baxi, “Emancipation as justice: Babasaheb Ambedkar’s legacy and vision,” in Upendra Baxi and Bhikhu Parekh (eds), *Crisis and Change in Contemporary India*, London: Sage Publications, 1985, pp. 122–50; Upendra Baxi, “Legislative reservations for social justice,” in R. B. Goldman and J. Wilson (eds), *Managing Ethnic Conflicts*, London: Pinter, 1984, pp. 210–24; Marc Galanter, *Competing Equalities*, Delhi: Oxford University Press, 1984.

23 Thus, lesbian, gay, and transgendered people have successfully claimed the right to contest elections. Comparative constitutional studies may no longer ignore the insights of Nancy Fraser, “Social justice in the age of identity politics: redistribution, recognition, and participation,” in Nancy Fraser and Axel Honneth (eds), *Redistribution or Recognition: a Political–Philosophical Exchange*, London: Verso, 2003, pp. 7–110.

24 I desist from voluminous citation save to refer to the work of Bina Agarwal and Vandana Shiva and further to the series of studies produced by the Indian Law Institute concerning water rights, struggles, and policy.

25 David Schneiderman, “Investment rules and new constitutionalism,” *Law and Social Enquiry*, no. 25, 2002, p. 757.

26 Stephen Gill, “The constitution of global capitalism,” 2000: www.theglobalsite.ac.uk.

27 As shown in the recent study by Anthony Woodiwiss, *Globalization, Human Rights and Labor Law in the Pacific Asia*, Cambridge: Cambridge University Press, 1998.

28 Upendra Baxi, *The Future of Human Rights*, *supra* note 2.

29 The recent United Nations Conventions and the African Convention of 2003, now open to ratification, conceptualize ways of combating corruption so may somewhat alter the future scenario for the theory and practice of human rights. These conventions fall short of asserting that immunity from official corruption

is a human right, and the theory of human rights has not yet attained levels of normative sophistication to promote the argument that governance corruption is itself, and further causes, violations of human rights.

30 Upendra Baxi, "Constitutionalism as a site of state formative practices," *Cardozo Law Review*, no. 21, 2000, pp. 1183–1210.

31 This led Antonio Gramsci to fashion his notion of passive revolution: see the discussion in Upendra Baxi, *Marx, Law, and Justice*, Bombay: N. M. Tripathi, 1993, pp. 178–83.

32 I put the word invasion in quotation marks not because this did not actually happen, but because the official Pakistani and also the United Nations prose offer contested alternate readings.

33 Though the question of justification remains an important *separate* issue: see, generally, Allen Buchanan, *Secession: the Political Morality of Political Division: from Fort Sumter to Lithuania and Quebec*, Boulder, CO: Westview Press, 1991.

34 See, Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: the Accommodation of Conflicting Rights*, Philadelphia: University of Pennsylvania Press, 1996.

35 See Sathe, *supra* note 20, Austin, *supra* note 19, and the literature therein cited.

36 See Jacques Derrida, *Acts of Literature*, London: Routledge, 2002.

37 Given the complex history of the making of the Indian nation, the constitution sagaciously authorizes the Indian Parliament to redraw the maps of the constituent states of the Indian Union. Its second Article empowers parliament to proliferate constituent units of the Indian federation; its powers extend to naming and making new within-nation Indian states via a simple majority decision to amend the constitution. This crucial constitutional flexibility offers a pacifying device of accommodation for the emergence of sub-national identities and accompanying forms of irredentism. Thus, in the first decades of constitutionalism at work, India devised ways and means of state reorganization along linguistic and cultural lines. The Nehruvian era of Indian constitutionalism inaugurated the device of the State Reorganization Commission, which initially resisted but finally sanctioned the break-up of the erstwhile British colonial boundaries and borders (Austin, *supra* note 19). Undoubtedly considerable mass violence and state repression, marked the birthing of the constituent states that in complex and contradictory modes of democratic governance endeavored to fulfill the identity and autonomy of within-nation insurgencies, an aspect that may possibly enrich a South constitutionalist reading of Antonio Negri's *Insurgencies: Constituent Power and the Modern State*, Minnesota: University of Minnesota Press, 1999.

38 See for a vivid account, V. S. Naipaul, *India: a Million Mutinies Now*, New York: Viking, 1991.

39 See, for example, Donald Horowitz, *supra* note 13. See also, Ashutosh Varshney, *Ethnic Conflict and Civic Life: Hindus and Muslims in India*, New Haven, Yale University Press, 2002; Thomas Bloom Hansen, *Saffron Wave: Democracy and Hindu Nationalism in Modern India*, Delhi: Oxford University Press, 1999.

40 Gyanendra Pande, *Remembering Partition*, Cambridge: Cambridge University Press, 2001.

41 Galanter, *supra* note 22.

42 In his *History of Sexuality, Volume 1*, Foucault memorably begins by stating that freedom of speech makes sense only within regimes of interdiction that we call "censorship." The outside (reasonable restriction) is thus the very core of the inside (freedom of speech and expression).

43 These grounds were first expounded in the First Amendment of 1950. Since the Constitution permits continuance of colonial laws to the extent that they do not violate fundamental rights, provisions of the Indian Penal Code 1860, and other related laws have been judicially examined.

44 Thus, we find 846 decisions on the right to property, and 912 decisions on the right to life and liberty; Article 311, which provides a unique constitutional protection to civil servants, has produced 873 decisions.

45 *Romesh Thappar* v. *Madras* AIR 1950 SC 124. In a companion ruling the freedom of press was held to be an "essential part" of the right to free speech: *Brij Bhusan* v. *Delhi* (1950) SCR 605.

46 Austin, *supra* note 19.

47 See *Express Newspapers* v. *Union of India* (1959) SCR 12 and *Sakal Newspapers* v. *Union of India* AIR 1962 SC 395. I must refer here to the insightful writings of Rajiv Dhavan, including *Only the Good News: On the Law of the Press in* India, Southside Press, 1987.

48 See *Tata Press* v. *Mahanagar Telephone Nigam* (1995) 5 SCC 139, para. 22.

49 Justice Mathew's has been a more or less lone judicial voice, but it poses the problem of private ownership of almost all the leading Indian newspapers and magazines (the only exception being *The Hindu*). The libertarian political discourse emphasizes the dangers of erosion of the free press, if fickle political majorities were to muzzle the free press. They favor collective self-regulation through the autonomous Press Council of India, which has developed an impressive code for journalistic ethics. This does not, however, address the issue of enormous corporate power thus wielded by the industry-owned press. See, generally, Upendra Baxi (ed.), *K. K. Mathew, Democracy, Equality, and Freedom*, Lucknow: Eastern Book Co., 1978.

50 *Hamdard Dawakhana* v. *Union of India* AIR 1960 SC 554.

51 In terms of whether advertisements remain inaccurate, deceptive, or misleading or may even be said to be immoral or obscene. Owing to a successful campaign by women's rights groups, a law now monitors indecent representations of women in the mass media.

52 The "Letters to the Editor," space, for example, has steadily shrunk in the last decade. The court has ruled, however, in *LIC* v. *Manubhai Shah* (1992) 3 SCC 633 that private or public industrial house magazines may not decline to publish letters to the editor or even detailed rebuttal statements.

53 *Ranjit D. Udeshi* v. *State of Maharashtra* (1965) 1 SCR 63; see also *K. A. Abbas* v. *Union of India* (1970) 2 SCC 780; and the recent decision concerning the *Bandit Queen*, *Bobby Arts International* v. *Om Pal Singh Hoon* (1996) 4 SCC 1.

54 Thus, it is now settled that reliance on caste and community sentiments (within the permissible range of the Representation of People's Act) and the creation of "vote banks" on these lines does not violate any tenet of secularism; nor do displays of religious faith by holders of high public offices.

55 AIR 1973 SC 1461.

56 This amendment was enacted during the Indian Emergency of 1975 to 1976, with most of the opposition parties held in preventive custody under the draconian Maintenance of Internal Security Act, under conditions of severe media censorship. But upon the cessation of the emergency, the Forty-Fourth Amendment that canceled many of these amendments because of their undemocratic character did *not* undo the inscription of secularism in the preamble.

57 Upendra Baxi, "The struggle for redefinition of secularism in India," *Social Action*, no. 44, 2004, pp. 13–30.

58 See Austin *supra* note 19, and the literature referred to therein. See also Gary J. Jacobsohn, *The Wheel of Law: India's Secularism in a Comparative Constitutional Context*, Princeton: Princeton University Press, 2003.

59 See Upendra Baxi, "The Gujarat catastrophe: notes on reading politics as democidal rape culture," in Kalpana Kannabiran (ed.), *Violence Against Women*, 2005 (forthcoming), and the literature therein cited.

60 The Constitution (93rd Amendment) Act 2001, enacts Article 21A: "The State shall provide free and compulsory education to all children of the age of six to

fourteen years in such manner as the State may, by law, determine." It replaces Article 45 with the following text: "The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years." Further, Article 51-A (prescribing the fundamental duties of citizens) was amended to place an obligation upon "a parent or guardian to provide opportunities for education to his child or as the case may be, ward between the age of six and fourteen years." Many human rights activists have criticized this amendment for not providing a financial commitment to translate the right into reality. The fundamental duty cast on parents and guardians has been criticized as a hostile act against poor parents. The amendment does not speak to facilities and programs for pre-primary education.

61 (1992) 3 SCC 386.

62 *Unni Krishnanan* v. *State of A. P.* (1993) SCC 645.

63 These decisions also occur in the context of privatization of university education, which began with resource starvation of the national universities entrusted to the care of the Union Government. As the Vice Chancellor of Delhi University, I took the unusual step of filing an *amicus* brief, and the decision in *Unni Krishnan* (*supra* note 62) happily translates into judicial prose many of the operational suggestions I made.

64 On this issue, as the Vice Chancellor of Delhi University, I took the view that the century-plus old St Stephen's college, a jewel in Delhi University's crown, may not enjoy such an autonomy; the Supreme Court disagreed!

65 *T. M. A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481.

66 The Supreme Court of India recently declined to intervene in the matter of revision of school history books by the NCERT, a state agency, which produces teaching materials and provides for teacher training. Petitioners sought to demonstrate that history books were revised with a Hindutva intent that carried a potential effect of fostering ignorance or hatred of minorities as well as non-Hindu secular movements. The defenders of the revision maintained that they were only correcting past editorial mistakes with utmost rectitude.

67 *The Right to Education – Report of the Special Rapporteur*, UNDoc E/CN.4/2003/9, December, 13 2002.

68 See, for example, *Air India Statutory Corpn.* v. *United Labour Union* (1997) 9 SCC 377, at 432.

69 See the website of the UN Special Rapporteur on the Right to Food: www.righttofood.org.

70 In the State of Orrisa Kalahandi petitions (see *Krishan Pattnaiyak* v. *State of Orrisa* 1989 (1) SCC 258), the government's affidavit denied starvation deaths but meagerly acknowledged deaths due to "progressive malnutrition." I know from my association with the pioneering work of the Center for Administration Famine Relief how eminent political leaders, including the Union Ministers, and even prime ministers of India feign disbelief concerning starvation deaths. Not merely are investigation journalism exposés regularly discredited but activist human rights accounts are faulted as being "partisan."

71 I do not here further rehearse the difficult dilemmas of human rights measurement, already visited in some detail in the preceding section concerning the pathways servicing the *creation* and *allocation* of resources, excepting to say that much of the same considerations are pertinent.

72 These include organization of health care via the Indian Medicine Control Act 1970; the Employee State Insurance Act; the Medical Termination of Pregnancy Act 1970; the Mental Health Act; Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse Act) 1991; and the HIV/AIDS Control and Prevention Act.

73 These include: National Drug Policy, National Blood Policy, and National Population Policy.

74 Thus special attention is now focused by various social action groups on: maternal health and infant mortality, health of incarcerated peoples in state and other custodial institutions, rights of patients in institutions of psychiatric care, HIV/AIDS affected persons, and people with disabilities.
75 The Supreme Court oversees the implementation of quotas in state as well as private medical colleges; the decisional law is too vast to allow even a cursory citation. Further, the requirement of mandatory internship upon graduation to a primary health center, a welcome move, has remained largely on paper.
76 PvtHE is a measure that includes not just household "out of pocket" spending but also outlays of insurers and third parties, "mandatory" employee health service programs, and non-profit, private and NGO health care provision.
77 See for most recent affirmation *N. D. Jayal* v. *Union of India* (2004) 9 SCC 362.
78 *State of Punjab* v. *Ram Lubhaya Bagga* (1998) 4 SCC 167.
79 In *Paschim Banga Khet Mazdoor Smaity* v. *State of W. B.* (1996) 4SCC 37.
80 *Parmanand Kataria* v. *Union of India* (1989) 4 SCC 286.
81 *Indian Medical Association* v. *V. P. Shantha* (1995) 6 SCC 651.
82 See, for example, *Harvinder Chaudhry* v. *Union of India* [1995] 8 SCC 80; *Lata Wadhwa* v. *State of Bihar* [2001] I SCC 197.
83 I here desist from citing various Supreme Court decisions, and public health literature, for reasons of space. It is clear, however, that mass disasters pose challenges to judicial creativity in fashioning a creative right to health response for such groups as the violated Bhopal humanity (comprising more than 20,000 human beings) still suffering from diseases and syndromes caused by 47 tonnes of MIC exposure. The effete disbursal of compensation scarcely provides a measure of human rights implementation redress. See Upendra Baxi, "The 'just war' for profit and power: the Bhopal catastrophe and the principle of double effect," in Lene Bomann-Larsen and Oddny Wiggen (eds), *Responsibility in World Business: Managing Harmful Side-effects of Corporate Activity*, Tokyo: United Nations University Press, pp. 175–201.
84 See, for a recent discussion, Sabina Alkire, *Valuing Freedoms: Sen's Capability Approach and Poverty Reduction*, Delhi: Oxford University Press, 2002.
85 A nascent but still a crucial discourse; see Thomas W. Pogge, *World Poverty: Cosmopolitan Responsibilities and Reform*, Oxford: Blackwell, 2000.

14 Human rights in China

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China has ratified over twenty human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), and the Convention on the Rights of Child (CRC) along with its two optional protocols. It has signed but not ratified the International Covenant on Civil and Political Rights (ICCPR), and has opposed the International Criminal Court along with the USA, Israel, and a handful of other states.

Chinese citizens on the whole undoubtedly enjoy a higher standard of living and more freedoms than ever before. However, as the empirical studies in Chapter 1 of this volume demonstrated and as fleshed out below, there are still numerous problems in realizing many of the rights provided by the constitution and other domestic and international laws. Most notably, the government continues to impose tight limits on several key civil and political rights. While China scores well below the average in its lower-middle income category on civil and political rights, China outperforms the average country in its income class on most if not all other indicators. Nevertheless, there are still many people living in relative and absolute poverty, concerns about the rights of laborers, migrant workers, women, and minorities as well as shortcomings in criminal justice and the rule of law, widespread corruption and a host of other good governance issues. The government has acknowledged, and continues to take steps to address, many of these shortcomings.

However, most of these issues are factually, legally, politically, economically, and normatively contentious, and defy easy solution, especially for such a large developing country as China. As a result, the PRC Government has expressed impatience with the international human rights community for failing to appreciate the complexity of the issues, for discounting the progress made in improving people's living standards and expanding citizens' freedoms while exaggerating the problems by focusing on the relatively few cases involving political dissidents, and for attempting to impose simplistic

solutions that are normatively biased toward liberalism and likely to be counter-productive given China's history and traditions, level of economic development, and current legal and political institutions.[2]

Before turning to a detailed examination of the different areas of rights, a few methodological issues bear noting. Obtaining reliable, comprehensive information about many civil and political rights cases is difficult. Reports from human rights organizations and foreign government entities often provide a wealth of valuable information, frequently obtained under difficult circumstances that prevent more in-depth investigation. Nevertheless, the reports generally suffer from a cursory or one-sided presentation of facts, the lack of citation to sources, reliance on hearsay evidence, and unconfirmed information, and no or little legal analysis, with citations to relevant PRC or international law as rare as a snowman in the tropics. Most reports dismiss summarily the arguments of the government and prosecutors about violations of PRC law, underestimate the complexity of the legal issues involved, and assume an expansive and liberal interpretation of civil and political rights that is often contested as a matter of international law. They rarely attempt to place the individual cases selected within a broader comparative, historical, economic, or political context or include any statistical analysis that would give any indication of the representativeness of the cases. In short, many of the reports are more advocacy for a particular viewpoint than impartial legal analysis of the merits of the decision.

On the other hand, although Supreme Court regulations require that most trials be open to the public and that courts publish judgments, politically sensitive cases are often closed to the public or limited to a few observers on the ground that they involve state secrets and issues of national security. Nor are court judgments and documents submitted by the procuracy and defense counsel readily accessible or in some cases accessible at all. The account of the facts reported in the judgments when available are often dramatically at odds with the facts reported by human rights organizations or defense counsel, or subject to very different interpretations. Several cases involve serious due process concerns, including allegations of torture and forced confessions, that undermine the credibility of the prosecutors' claims and the courts' judgments. As a result, it is at times all but impossible to verify the facts and to assess the merits of the court's judgment as a matter of international and domestic law. Nevertheless, enough information can be pieced together from various sources in many contested cases, and there are sufficient cases where the facts are not contested, to obtain a reasonably accurate view of where the limits of freedom exist in practice.

Analysis of social and economic rights is hindered by the basic problem encountered in most legal systems: social and economic rights are generally not justiciable. Accordingly, we are forced to fall back on general laws, policies and statistics, supplemented by a few cases on rather narrow issues. Unfortunately, the statistics and facts are often unreliable and/or contested. Even the proper standards for measurement are heavily contested: scholars

disagree over the utility and significance of different measures of poverty, for instance. Moreover, country-wide data often mask wide regional variation. In addition, there is a conflict between the starry-eyed utopianism of human rights activists who expect wonders despite the reality of limited resources and those who would set more realistic standards consistent with China's level of development and priorities for government spending.

Given the size and diversity of China, reliance on a small number of select cases inevitably gives rise to questions about representativeness. Accordingly, I provide summary results of several cases for each type of right and for particular issues to establish the boundaries in practice today. In addition, I note regional variations where appropriate and when information is available, and provide statistical information to better round out the picture.

Physical integrity rights and derogation of rights in times of emergency

China received a level-4 ranking on the Political Terror Scale (PTS) based on both Amnesty International and State Department reports. Level-4 indicates extensive political imprisonment or a recent history of such imprisonment. Unlimited detention, with or without a trial, for political views is accepted and "extended to large numbers." Execution, political murders, disappearances, brutality and torture are "a common part of life." Despite its generality, terror affects those who interest themselves in politics or ideas.

This ranking puts China in the unsavory company of such notorious rights violators as Kenya, Nigeria, Pakistan, Russia, India, and Indonesia. Even North Korea and Cambodia received a better level-3 ranking based on Amnesty International reports. By way of comparison, few countries receive the worst level-5 rating. Examples include Colombia, with its ongoing war on drug lords, and Nepal, where the government is currently fighting a civil war against Maoist rebels.

Does China merit such a dismal rating? Unlike in some of the other level-4 countries, there are very few if any politically motivated extrajudicial killings or disappearances in the usual sense. The *2004 US State Department Report* did note that some dissidents without family members were detained or committed to psychiatric wards, which the report claimed amounted to disappearance. However, commitment to psychiatric wards is a far cry from the kind of widespread disappearances that plagued Latin American countries where large numbers of people were sent off to prisons to be tortured, many of them ending up dead in unmarked mass graves.

China also imposes more capital punishments than any other nation, and indeed more than the rest of the world combined. Some estimates put the number as high as 10,000 to 20,000 per year. Citing due process concerns, the State Department report suggests that the executions may in some cases border on extrajudicial killings. Whatever the shortcomings in due process, describing the executions as extrajudicial killing is a stretch of the normal

meaning of that term as used in judging the rights performance of other countries. One wonders whether the State Department would describe the executions of criminals in the USA as extrajudicial killing given the various due process failures that have contributed to many documented cases of innocent people being executed and to a disproportionately high rate of executions of poor black men, which has led the UN Special Rapporteur and even the US Supreme Court itself to describe the process as arbitrary and racially discriminatory. In response to due process concerns, China's Supreme Court is considering revoking its delegation over final review to lower-level courts.

Torture remains a serious problem for a variety of reasons, despite being prohibited by PRC law and the considerable efforts to stamp it out.[3] The scope of the problem is difficult to quantify however. In recent years, the government has adopted various measures to address the problem, including tightening the prohibitions against torture, increasing the penalties for abusing detainees, restructuring police departments, requiring prison guards to sit for professional exams every five years, appointing section-level officers based on open competition, firing incompetent police and prosecuting cases of abuse of police powers more aggressively. The government's 2004 Human Rights White Paper notes that in 2003 the procuratorate prosecuted 259 cases of illegal detention, 29 of illegal search, 52 of extorting confessions by torture, and 32 of abusing prisoners or detainees. Nevertheless, much remains to be done.[4]

China's poor PTS score may also reflect concerns with arbitrary detention. Human rights organizations have criticized as arbitrary, and called for the elimination of, all forms of administrative detention. In fact, there are several different types of administrative detention, some of which exist in other countries.[5] Administrative detention is intended for minor offenses that do not rise to the level of more serious crimes. Accordingly, it is meant to be a lighter form of intervention with a greater emphasis on rehabilitation than the more punitive formal criminal law system. Supporters, most of whom advocate significant reforms, argue that eliminating administrative detention will harm the vast majority of those the reformers are trying to help by pushing many marginal offenders into the harsh and decidedly unfriendly penal system, forcing them to live with hardened criminals, and resulting in their being forever stigmatized as convicts.

There are undeniably serious due process concerns both in administrative detention and formal criminal cases. However, it is important that one distinguish between arbitrary detention in a procedural and in a substantive sense. Administrative and criminal detentions are rarely arbitrary in the sense that substantive grounds are lacking for arrest and conviction. Nevertheless, human rights reports often depict the detentions as arbitrary because they allegedly involve persons engaging in political activities, usually peacefully, that many would claim are protected by domestic and international law. Such detainees then are characterized as political prisoners of conscience, another key component of the PTS index.

Academic experts have noted however that the purpose of administrative detentions has changed over the last two decades, and that Education Through Labor (ETL) and other forms of administrative detention are used primarily to deal with petty criminals. In fact, only a tiny fraction of those subject to ETL could in any way be considered political prisoners, less than 1 percent if one excludes Falun Gong disciples charged with violations under generally applicable criminal laws, and somewhere around 2 percent even if one includes such cases as political cases.[6]

Similarly, there are at most 500 to 600 prisoners serving sentences for the now repealed crime of counter-revolution.[7] Although many rights organizations continue to press for their release, whether someone convicted under a valid law at the time should be released if the definition of the crime is changed or the crime is repealed is controversial. Such a person would not be released under US law.[8] In this case, most if not all of those convicted for the crime of counter-revolution would also be guilty under the new crime of endangering the state that replaced the old crime of counter-revolution. While counter-revolution was a frequently invoked charge in the politicized Mao era, accounting for almost 60 percent of the crimes in some years, today endangering the state accounts for less than 0.5 percent of crimes.[9]

In addition, Amnesty International claims "scores of people" are imprisoned for Tiananmen-related activities, although it has apparently identified fifty people. The head of Human Rights in China estimated about 130, while acknowledging the true number is unknown. The US State Department Report, citing unspecified "credible sources," suggested the number of people still in prison for events related to Tiananmen in 1989 may be as high as 2,000, although that seems highly unlikely as few people were given sentences of fifteen years or more and of those, some would have been released on parole.[10] Of course, the government claims that they are not imprisoned for their political views but for violating generally applicable criminal laws such as attempting to overthrow the state or disturbing public order. Accepting their characterization as political prisoners and the highest of all the estimates of their numbers, they would constitute about 0.1 percent of the total prison population of 2 million, keeping in mind that China's incarceration rate is much lower than that of many other countries, particularly the USA (184 per 100,000 versus 701 for the USA).

Simply put, politics is generally not an issue in most criminal cases. To be sure, there are many problems with both administrative detention and the formal criminal system. I do not mean to trivialize Falun Gong or political dissident cases either in terms of the impact on individuals, the potential injustice involved, or their significance in deterring others from engaging in what many would consider to be nothing more than the exercise of their rights as provided under PRC and international law. However, we need to have some sense of the size of the problem. Taking China's population of 1.3 billion as the basis, and erring on the high side even according to estimates of human rights groups by assuming 20,000 prisoners of conscience

of all stripes in all forms of detention, the total rate would be 0.0015 percent. The 20,000 estimate may seem like a "large number" – and probably overstates the actual number by five to ten times even accepting a liberal definition of political prisoner. But even assuming 20,000 prisoners, given the size of the total population, it is difficult to see how China can be described as a country in which execution, political murders, disappearances, arbitrary detention, imprisonment for political beliefs, brutality and torture "are a common part of life," as required for a level-4 PTS rating.

Derogation of rights in emergencies: martial law, strike-hard-at-crime campaigns and terrorism

The ICCPR, not yet ratified by China, allows for the declaration of a state of emergency only when the life of the nation is threatened. Even then, states cannot derogate from all rights. Derogation is not allowed with respect to the right to life, torture, cruel, and unusual punishment, freedom of thought and religion, and the principles of *nullem crimen sine lege* and recognition as a person before the law.

Global practice, however, is considerably different. Countries generally react to threats to security by restricting rights.[11] The "margin of appreciation" afforded countries is greatest when it comes to national security.[12] A wide margin of appreciation does not mean unlimited discretion, of course. China declared martial law in parts of the country in 1989. Many commentators believe that the peaceful student demonstrations were not an adequate ground to declare martial law. But even if martial law was justified, many would argue that decision to use force to clear the square in Tiananmen was not justified, and that excessive force was used. The recent disclosure of internal documents revealed differences of opinion among government leaders, although the final decision was made after lengthy discussion in which all sides had an opportunity to present their views.[13] The announcement was then made by Li Peng, as Premier and head of the State Council, in accordance with constitutional requirements. Today, public opinion remains divided in China about Tiananmen, in contrast to the near universal condemnation abroad. Some Chinese citizens see the government's response as excessively brutal but necessary to regain control and ensure an extended period of stability that has lasted until today, allowing China to progress economically while keeping the lid on social unrest. Many others, led by those who participated in the demonstrations or lost loved ones, continue to call for justice and a reversal of the government's verdict on Tiananmen as political turmoil that disrupted social order and economic development. However, the government has refused to reconsider its official position.

A second area of concern has been the cyclical campaigns to "strike hard" at crime (*yanda*) which, although not involving a formal declaration of emergency, have led to human rights abuses and the curtailment of rights for the criminally accused. Although government officials and court leaders

always take care to emphasize that the strike-hard campaign must be in accordance with law, the endless campaigns no doubt put pressure on police to make additional arrests, on prosecutors to prosecute more often and charge more serious crimes, and on judges to convict and issue heavier sentences within the range permitted by law. Goaded on by a public widely supportive of the war on crime, police, prosecutors, and judges, in their zeal to strike hard at crime, also exceed the limits imposed by law in some cases.

A third area of concern is that the "war on terrorism" may be undermining progress on rights in China as elsewhere. China beefed up its anti-terrorism laws by amending the criminal law in 2001. Beijing has identified the East Turkestan Islamic Movement (ETIM) as a terrorist organization, citing more than 200 violent incidents in Xinjiang between 1990 and 2001, which resulted in 166 deaths and injuries to 440 people.[14] In a move much criticized by human rights groups, the USA supported the designation of ETIM as a terrorist organization, with the UN Security Council following suit. Although a government spokesperson reported in Spring 2004 that there had been no violent incidents in recent years in Xinjiang, in December 2003, Beijing added to the list the East Turkestan Liberation Organization (ETLO), the East Turkestan Information Center (ETIC) and the World Uighur Youth Congress (WUYC), as well as eleven individuals.[15] ETIC and WUYC are based in Germany. All four groups openly advocate for East Turkestan independence, although they do not publicly sanction violence.[16] However, ETLO members have been involved in bombings and shootouts, according to the US State Department Counterterrorism Office. Human rights groups have also accused China of taking advantage of the recent global concern with terrorism to restrict the rights of Uighars and Tibetans. While it is clear that there have been several people arrested in recent years, the details are often murky, with even the basic facts frequently contested.

For instance, Uighar Shaheer Ali was tried and convicted on November 12, 2002, and sentenced to death in March 2003 for "manufacturing and stockpiling illegal weapons and explosives," separatism, and "organizing and leading a terrorist organization," namely ETIM and the East Turkestan Islamic Party of Allah.[17] The court claimed Ali's organization took part in a beating, smashing, and looting incident in Yining on February 5, 1997. However, Amnesty International claims that independent eyewitnesses report that the incident was a peaceful demonstration calling for equal treatment for Uighars, which became violent after security forces used tear gas and water cannons to disperse the protesters.[18] In an interview, Ali claimed that he was a member of the Eastern Turkestan Islamic Reform Party, which he described as a non-militant organization. He also claimed that he was repeatedly tortured while in custody.

Wang Bingzhang, a dissident based in the USA, was sentenced to life imprisonment by a Shenzhen court after being convicted of espionage and leading a terrorist group. The judgment was upheld by the Guangdong

High Court. The Shenzhen court's judgment and the official press reported in detail the evidence against Wang.[19] The judgment includes a lengthy review of the evidence, including witness testimony, documents from the National Security Bureau and Wang's own publications and internet writings, to show that Wang received payments for providing military secrets to Taiwan intelligence organs, advocated terrorism through publications and on the Internet, plotted to blow up the PRC embassy in Thailand, planned an explosion in China on the national day holiday, and so on.[20]

The case attracted the interest of the international community when Wang was apparently abducted from Vietnam along with Zhang Qi and Yue Wu, both of whom were later released by PRC authorities. Beijing claims PRC security officers rescued Wang after he was kidnapped. The UN Commissioner on Human Rights has claimed that his disappearance, arrest, and imprisonment violated international standards. Wang has gone on a hunger strike to protest extended periods of solitary confinement and political education sessions three times a day.[21]

In a case that has led to considerable criticism abroad, Tibetan Lobsang Dondrub was executed for a series of bombings in Sichuan in 2002, while Buddhist teacher Tenzin Deleg was sentenced to death with a two-year reprieve.[22] The court found Lobsang Dondrub guilty of incitement to split the country and illegal possession of firearms and ammunitions, and Tenzig Deleg guilty of incitement to separatism, for acts that the authorities have described as "terrorism." PRC authorities claim that both defendants confessed to the crimes. However, Tenzig Deleg denies having confessed and reportedly shouted his innocence at trial before being silenced. Lobsang Dondrub reportedly also refused to confess. He was executed immediately after the Sichuan High Court upheld the Intermediate Court's verdict, even though Beijing officials had promised a US government delegation that the Supreme Court would review the case. Other due process concerns included allegations that the defendants were not allowed to choose their own counsel and that they were tortured during the investigations. Critics of the decision note that Tenzig Deleg has a history of social activism, including renovating temples and establishing charitable organizations for orphans and the elderly, and is a staunch supporter of the Dalai Lama, but that he has no record of political protest. A government's spokesperson responded to foreign criticism by claiming that the case was handled according to law and that courts in other countries would punish criminals who undermine state security and engage in terrorism.

Civil and political rights

During the Mao era, Chinese citizens were afraid to discuss political issues with their family members, much less in public with foreigners. Today, political discussion is commonplace whenever friends and colleagues meet socially, while visitors are often surprised at how readily even first-time

acquaintances are to criticize the government, disparage top leaders, or call for faster political reforms. Academics regularly publish works critical of the government and calling for greater democratization and political reforms. Legal scholars and government officials continue to press for constitutional reforms including greater judicial independence. The media, forced to respond to consumers' interest as a result of market reforms, are ever more critical and free-wheeling.

At the same time, the government continues to impose – often ruthlessly and with little regard for legal niceties or international opinion – severe limitations on civil and political freedoms when the exercise of such rights is deemed by the government to threaten the regime and social stability. The lines of what is permissible and what is not are clear and fixed in some areas, but vague and fluid in others. As important as the subject matter is the time, place, and manner of expression. What may be tolerated in some circumstances may be subject to greater restriction when there are certain aggravating factors present. In keeping with the emphasis on social stability, expression of political views or other acts are likely to be subject to greater restrictions when they involve social organization, particularly involving student or labor activism or links to foreign organizations; large, coordinated demonstrations; or publication of ideas on the Internet or in other media to a large and undefined audience.

State sponsorship of ideological orthodoxy and restrictions on religious freedom

The government unapologetically endorses socialism, including in the preamble to the constitution adherence to the four cardinal principles: the leading role of the Party, adherence to socialism, the dictatorship of the proletariat and adherence to Marxism-Leninism-Mao Zedong thought, now buttressed by the "Three Represents." The Three Represents are Jiang Zemin's attempt to update socialism in accordance with today's market economy by shifting the focus away from the proletariat to the "advanced productive forces," including the private sector and entrepreneurs, in order to develop an "advanced and modern culture" and serve the fundamental interests of the broad majority of citizens. Whereas Jiang's formulation highlights that some will lose out in the transition to the market economy, the Hu and Wen regime, perhaps in an effort to distinguish themselves from the Jiang regime, have paid attention to social injustice and the needs of the least well-off in society. Significantly, however, the focus of both regimes is on the interests of the majority of the people, whose interests the Party will continue to determine and serve, not on the rights of the individual interpreted as a countermajoritarian trump on the interests of society as a whole. Although the rhetorical commitment to socialism remains, socialist ideology is now less coherent, more widely contested, and much less of a factor in everyday life than previously.

The government has also promoted the development of a socialist spiritual civilization, consisting of attacks on wholesale westernization and bourgeois liberalism combined with blatant appeals to nationalism, celebration of the importance of culture and art, praise for Confucianism, and exhortation of citizens to ask not what the nation can do for them but what they can do for the nation and their fellow citizens. While many Chinese respond to the nationalist component of the spiritual civilization plank, few take seriously the emphasis on socialism.

Appeals to Confucianism have also failed to take hold, in part because of the contested nature of Confucianism, which has been interpreted to support both liberal and authoritarian positions. Accordingly, the government is reluctant to appeal to Confucianism given efforts by New Confucians to apply parts of the vast Confucian corpus to support democracy and human rights. Conversely, reformers are wary of making too much of Confucianism given that historically Confucianism was undeniably sexist, elitist, and inegalaritarian, and failed to provide popular sovereignty or to protect even the most fundamental civil and political liberties.

China's educational policies continue to call for mandatory classes in politics and morals. When challenged by the Special Rapporteur on Education, the government spokesperson replied that all governments inculcate political and moral values through the education system. China is no different.

Mindful of a long history of religious-based movements toppling dynasties, growing problems with "cults" around the world, and the rise of fundamental Islam in recent years, China imposes both content and time, place, and manner restrictions on religious belief and practices. Freedom of religion is confined to five recognized religions – Buddhism, Taoism, Islam, Catholicism, and Protestantism – and registered places of worship. All religious groups are required to register with the State Administration of Religious Affairs. Proselytizing by foreigners is not allowed, although in practice individual foreign citizens need not hide their faith, and foreigners may preach in registered churches or at the invitation of registered social groups.[23] Mormons and Jews are also allowed to practice.

The government claims that there are more than 100,000 venues for religious activities, with a clergy of about 300,000, over 3,000 national and local religious organizations, plus 74 religious colleges and schools. Each religion publishes its own scriptures or classics, books, and magazines.[24] The government provides funding to build and maintain places of worship, supports members of the clergy, offers preferential tax treatment to registered religious groups, and pays for trips to Mecca for some Muslims.

In addition to restricting belief to the five authorized religions, the government has imposed content-based restrictions on "cults" and abnormal religious beliefs and practices. The crackdown on Falun Gong has received the most attention abroad. The government justified the ban by citing the sect's increasingly political agenda, organized demonstrations including the occasion when more than 10,000 people suddenly surrounded Zhongnanhai

(the seat of the government), and the deaths of more than 1,600 adherents, including the self-immolation of five people, one of them a 12-year-old girl. Senior leaders were apparently divided on how to deal with the sect, with some arguing for prosecution of particular individuals for violation of generally applicable criminal laws rather than an outright ban on the group. Whatever the merits on the substantive issue, the way that the crackdown has been carried out has given rise to due process violations, including torture and deaths while in detention.[25]

The government has also outlawed a number of other sects, claiming they lack theological training, preach the coming of the apocalypse or Holy War, exploit members for financial gain or commit other violations of generally applicable laws such as rape, assault, and tax fraud. The government has defended the policies by citing similar restrictions on cults in other countries.

The government's response to unapproved "house churches" has not been uniform. Some are closed, while others are allowed to operate, depending on their size, relationship to the official church, links to foreign organizations and in general their capacity to foment social unrest. Catholic priests aligned with Rome have run into problems because of conflicts over issues where the views of the Pope conflict with government policy, most notably with respect to family planning, birth control, and abortion. Authorities have also reportedly forced Catholics in Hebei, where the majority of China's Catholics are located, to follow the Patriotic Church or face fines, job losses, detention, and in some cases removal of children from school.[26] Leaders of Protestant house churches have also been detained.[27]

Buddhism is increasingly popular in China, and generally accepted by the government, except in Tibet, where the regime fears that Buddhist beliefs and practices will support a movement for independence. Tibetan Buddhists outside of the Tibetan Autonomous Region enjoy somewhat greater freedom. A number of monks have been sentenced on charges of endangering the state, splitting the motherland, and undermining the unity of nationalities.[28] Human rights groups protest that they are being detained for non-violent political practices. The Tibet Information Network estimated that approximately 150 Tibetans were imprisoned on political grounds, 75 percent of whom were monks or nuns.

The government continues to oversee the daily operations of major monasteries, and to insist that Party members and senior government employees adhere to atheism and not support the Dalai Lama. In a public relations disaster, the government replaced the boy recognized by the Dalai Lama to be the eleventh reincarnation of the Panchen Lama with their own candidate.

The government has also taken steps to make sure that Islam does not become a source for political instability by prohibiting the teaching of Islam to children under 18, preventing preaching by imams whose sermons are considered too fundamentalist, and limiting construction of mosques in areas of unrest, although the government continues to support the building and renovation of mosques in other areas.[29] In a case that has come to symbolize

government oppressiveness abroad, Rebiya Kadeer, a businesswoman and provincial delegate to the Chinese People's Political Consultative Committee, whose social activist husband had sought political asylum in the USA, was sentenced to eight years in March 2000 for providing state intelligence to foreigners. The state secrets were reportedly local newspaper articles discussing the treatment of Uighars. Beijing recently announced a reduction in her sentence, with possible further reductions for good behavior.[30]

Freedom of speech: criticism of the government

The 1991 Human Rights White Paper noted that according to the constitution, citizens have the right to criticize and make suggestions regarding any government entity or official and the right to expose any government entity or official for violation of law or dereliction of duty.[31] In fact, a wide range of political speech, including criticism of the government, is allowed. Nevertheless, there are limits.

One clear line in the sand is advocating the overthrow of the CCP or the government, whether by violent or non-violent means, even if the actual threat is minimal to non-existent, although again aggravating circumstances are usually required. For instance, Luo Yongzhong was sentenced for three years for inciting subversion for publishing on the Internet articles calling for the overthrow of the Party and criticizing the Three Represents and the government's handling of the Tiananmen incident.[32] Similarly, Wang Zechen was sentenced to six years for subversion for attempting to establish a Liaoning branch of the banned China Democratic Party, attacking the Party as a dictatorship, and advocating the end of the single-party system and the establishment of a multiparty system with separation of powers.[33] Wang did not contest the facts but argued the acts were legal. He Depu was also sentenced to eight years in prison for collaborating with the banned China Democracy Party, posting essays on the Internet that incite subversion, and signing an open letter calling for political reforms. According to his wife, he shouted calls for democracy and criticisms of the one-party system at his hearing.[34]

Another controversial case raises the issue of how clear and present the danger to the state must be, and shows that the government, wary of student activism, closely monitors attempts to establish student organizations for political purposes. In 2003, Yang Zili, Xu Wei, Jin Haike, and Zhang Honghai, four of the eight members of a group of students and recent graduates called the New Youth Study Group, received eight to ten years for subversion. According to the judgment of the Beijing Intermediate Court,[35] the purpose of the group, which was never registered, was to "actively explore ways of improving society." The articles of the group and related documents included ideas for expanding the size and influence of the group through publications and Internet postings, as well as rules on membership and dues. Apparently, the group planned on setting up branches in Xian and Tianjin, although there does not appear to be any evidence that branches were actually

set up. The court judgment relied heavily on the testimony of other members of the group. One of them was cooperating with the Ministry of National Security. Two others, under repeated questioning from security officers and the threat of criminal prosecution for their own involvement, signed damaging statements claiming that the group opposed socialism and sought to overthrow the Party and establish a liberal democracy. The reports accused Zhang Honghai of wholesale rejection of the Party, Yang Zili of advocating liberalism and opposing single-party socialism, Xu Wei of advocating an uprising by farmers and the use of violence if necessary to change the system, and Jin Haike of describing the political system as authoritarian and advocating the overthrow of the Party. The court also cited articles written by the defendants, some posted on the web and others not published, that demonstrated that they were not happy with the current political situation and their intent to overthrow the government. However, the court did not discuss in detail the contents of the publications or cite passages to support these conclusions, other than to note that publications by Yang Zili described democracy in China as fake democracy, and called for an end to "old man politics."

Defense counsel for Xu Wei pointed out on appeal that four of the founders were Party members, and that the members voluntarily terminated the group.[36] He portrayed the members as patriotic citizens whose only goal was to improve society. He also noted that the group raised just a couple of hundred RMB in dues, and lacked the wherewithal to overthrow the state. The defendants and their lawyers also contested the evidence by the procuracy, claiming statements were taken out of context and the meaning twisted, and that the witness testimony was given under pressure, inconsistent, and inaccurate. The defendants further objected that the court refused to consider exculpatory evidence. Two of those who wrote reports along with other members of the group were not allowed to testify on appeal. Citing inconsistency with other evidence, the Beijing High Court also refused to recognize letters from the three members who had written reports, two of which were in the possession of the Intermediate Court during the first trial, denying that the group ever sought to overthrow the Party or the government.[37] After repeating the Intermediate Court's evidence and findings in full, the High Court summarily dismissed the defendants' arguments that there was insufficient evidence of subjective intent to overthrow the government or insufficient objective acts. The courts did not expressly address the issue of advocacy of violent versus non-violent proposals to change the government. Nor did the courts address the issue of the likelihood that the defendant's acts would lead to overthrow of the government.

Agitating for a reversal of the Tiananmen verdict may also land one in trouble. The leader of the Tiananmen Mothers, Ding Zilin, was recently detained along with two other members of the group, although they were subsequently released.[38] Social activist Hu Jia was also detained, and then released shortly after, for planning a demonstration to commemorate

Tiananmen.[39] In some cases, however, the punishment may be more serious, particularly if there are other allegations.[40] Three years after being detained, Huang Qi was finally sentenced to five years for inciting subversion for managing a website where he posted articles on Tiananmen, Falun Gong, and the banned China Democratic Party.[41] The Intermediate Court decision is interesting for two reasons. First, it expressly rejects the argument raised by Huang Qi that his actions were protected by the right of free speech, arguing that the right does not extend to defamation or spreading rumors to incite subversion and undermine state interests or national security. Second, the court rejected the prosecutor's charge of trying to "split the nation" by posting articles calling for Xinjiang independence on the ground that the articles were posted by others on Huang's site.

Although the media regularly carries exposés of corruption, the government has imposed limits on stories involving higher level officials, for which approval must be obtained. Li Zhi, a government official in Sichuan, was sentenced to eight years for subversion after posting an article on the Internet and chatroom discussion boards exposing corruption at high levels of the government, and for contacting foreign dissidents.[42] An Jun, who founded an anti-corruption NGO that attracted more than three hundred people, was also sentenced to four years for exposing corruption.[43]

Individuals who have reported classified information about SARS and AIDS have also been detained for revealing state secrets and other charges. Wan Yanhai, head of the Beijing-based Aids Institute, was detained for revealing state secrets when he posted information about HIV deaths on his website, although he was released one month later.[44] Henan health official Ma Shiwen was also detained for revealing state secrets, though he too was subsequently released without standing trial.[45] Acknowledging the scope of the AIDS problem, the government has recently adopted new policies on AIDS, including the provision of free medical treatment and testing, and a long-term plan for treatment and prevention.[46] AIDS victims may also be able to use the legal system to fight discrimination in employment and elsewhere. In a related case, a person infected with Hepatitis B won an administrative litigation suit when he was denied a post as a civil servant because of his disease.[47]

Freedom of the press and prior restraints

Chinese citizens now have greater access to a wider variety of information and cultural products due to changes in technology including the Internet and satellite television; markets reforms that have forced newspapers, television stations and book publishers to respond to consumer demands; and the rise of a small number of independent publishers and an even smaller underground press. Nevertheless, the government continues to maintain tight controls on what gets published.

The list of sensitive topics that are off-limits or require prior approval varies from time to time, and is enforced with varying degrees of strictness.

Topics in the last two years include the government's handling of SARS; prosecution of successful businesspeople like Zhou Zhengyi and Yang Bin on corruption charges; financial information such as speculation about the appreciation of the Renminbi or the selling of stocks by government agencies; and exposés about former government officials who go into business or become lobbyists.[48] Often, the media will be allowed to discuss a topic until the government or the courts have taken a final position, as in the "BMW case," where a rich and well-connected plaintiff crashed into a crowd after a dispute; the "Liu Yong case," where a former NPC delegate depicted as a mafia boss was sentenced to death; and the "Sun Zhigang case," where a college student was beaten to death while in administrative detention. All three cases were widely debated on the Internet and covered in the press, leading to a central-level investigation in the BMW case, a highly unusual retrial by the Supreme Court in the Liu Yong case, and the elimination of detention and repatriation in the Sun case. Discussion of popular books may also be restricted, such as *The Chinese Peasant Report* detailing the plight of farmers today, or *The Heart of Girls*, which described the sexual awakening of a teenager and was considered pornographic. Other books and magazines may also be subject to censorship, removed from shelves, or confiscated at customs. However, the widespread if illegal practice of selling "book numbers" and leasing out publication numbers for magazines allows many publications to slip past the censor. Banning books now often simply results in increased demand, with books reportedly banned still readily available even in major Beijing bookstores. In one interesting case that shows how efforts to implement rule of law are paying dividends even in politically sensitive cases, a lawyer won an administrative litigation suit in Beijing High Court challenging Custom's confiscation of a book on the Yan'an period published by the Chinese University of Hong Kong.[49]

However, in other cases exceeding the bounds of permissible coverage has resulted in confiscation of publications, closure of the paper or arrests.[50] Editors of the widely popular muck-raking *Nanfang Zhoumo* were arrested on embezzlement and bribery charges.[51] According to one report, thirty-nine reporters were imprisoned in 2000.[52] Foreign reporters have also been harassed or detained for covering sensitive stories such as the plight of North Korea refugees or Falun Gong protests.[53]

The government has also clearly struggled over how to manage the potential risks caused by increasing numbers of Internet users. The government regularly blocks sites, regulates Internet cafes, holds servers and Internet companies responsible for content published on their sites, and prosecutes individuals who post articles that the authorities find go too far in criticizing the government or that reveal information deemed to be state secrets. All of the top-ten sites for the topics Tibet, Taiwan, and "equality" were blocked, as were eight of the top-ten sites for democracy and Chinese dissidents, and six of the top-ten sites for "freedom China" and "justice China."[54] A much lower percentage of the top-100 sites were blocked for these topics: 20 percent to

45 percent with the exception of Tibet at 60 percent. Similarly, 20 percent to 25 percent of the top-100 URLs were blocked for "hunger China," "famine China," and "AIDS China." Interestingly, the authorities blocked a lower percentage of Chinese URLs for these topics.

Several foreign news URLs are also regularly blocked, including BBC, CNN, *Time* magazine, and PBS, although other foreign news sites are available. Recently, new regulations were issued to limit chatrooms. The rules prohibit websites from running news forums about any subject that has not already been covered by mainstream state-run media.[55]

The arrests of Liu Di, Du Daobin and others for Internet postings have been the subject of much public debate. Liu Di, the Stainless Steel Mouse, is a student at Beijing Normal University. She was detained and then released months later for operating a popular website and posting satirical articles about the Party, as well as articles calling for the release of Huang Qi.[56] Her arrest led to two online petitions signed by over 3,000 people.

Du Daobin was arrested for posting twenty-eight articles on the Internet, including some that opposed limitations on democracy and civil liberties in Hong Kong, and for receiving funding from foreign organizations.[57] His arrest led to a petition, signed by over 100 writers, editors, lawyers, philosophers, liberal economists, and activists, calling for a judicial interpretation to clarify the crime of subversion. Citing the non-binding and decidedly liberal Johannesburg Principles, the petition argued that seeking change through peaceful means should not constitute incitement of subversion, and that the government should not rely on subversion charges to restrict critical discussion of government shortcomings, maintain the reputation of the ruling regime, enforce ideological controls, or even prevent instability. After the petition, Du was convicted of inciting subversion, but his three-year sentence was commuted to four years' probation.[58]

Although China has passed a number of regulations regulating Internet activities, convictions for posting articles on the Internet are generally based on the applicable criminal law provisions. Posting on the Internet, which reaches a diffused and unidentified audience, serves therefore as a triggering or aggravating factor: the same speech that would be tolerated in a different forum even though in violation of the criminal law results in arrest and detention when posted on the Internet. Sentences are usually in the two to four year range.

Freedom of assembly

As of 2002, there were more than 133,000 social organizations, including 111,000 private non-profit corporations. Although all social groups are legally required to register, there are also reportedly as many as one to two million unregistered "NGOs."[59] Social organizations are subject to various degrees of supervision and control, with the government imposing both content and time, place and manner restrictions. Some groups are not allowed

to register, including the China Democratic Party and Falun Gong. The founders of the China Democratic Party Xu Wenli, Wang Youcai, and Qin Yongmin were sentenced on subversion charges in 1998 to thirteen, twelve, and eleven years respectively. Wang and Xu have since been released on medical parole and are in the USA.

The government requires prior approval of all demonstrations. Approval is not possible to obtain in some cases, such as Falun Gong protests, and is difficult to obtain in other cases, such as for protests against government takings and relocations, treatment of HIV patients, and labor disputes. In practice, however, there were almost 60,000 demonstrations involving more than three million people in 2003, many of them not approved. In most cases, the protesters are allowed to demonstrate provided the demonstration is peaceful, orderly, limited in size, and for a limited duration. The government often responds to labor demonstrations by pumping in funds to pay off the protestors, although authorities have also arrested a number of the leaders, particularly when the demonstrations were cross-regional. China ratified the ICESCR with a reservation that provisions regarding unions and strikes be interpreted consistently with PRC laws. Labor unions remain tightly controlled and marginally effective, often serving as a bridge between workers and the state or management. Many foreign investors have opposed the formation of strong unions within their companies. The right to strike is not recognized in PRC law, although work slow-downs and strikes do occur.

Assessing restrictions on civil and political rights

Clearly, the government does not tolerate much dissent and imposes numerous restrictions on the exercise of civil and political rights. Are such restrictions consistent with international law? More importantly, are they justified? Unfortunately, international law is less determinative on many more issues than often assumed. Human rights groups and activists within China frequently invoke liberal principles or interpretations that are not accepted as a matter of international law. For instance, the Johannesburg Principles cited by the petitioners in the Du case have not been adopted by any country with the possible exception of Peru. Incorporating the contemporary US standard, Principle 6 states that expression may be punished as a threat to national security or public order only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. However, in general, national security restrictions require a showing of a more serious potential harm but a lower degree of imminence and likelihood than restrictions for public order. Although the distinction between violence and non-violence is an important factor to consider, clearly non-violent acts, such as injecting a virus into a country's national defense computer system, may endanger the state. Similarly, while a clear and present danger is more

threatening than a vague and distant danger, a state need not wait until the last minute to take steps to protect national security or public order. Countries differ over whether violence must be likely and imminent even for public order restrictions. Some countries require only that the speech will likely lead to a violation of law or breach of the peace, while others (often former British colonies) require an even lesser showing that the comments are likely to excite ill-will or contempt of the government.[60]

Rather than a bright-line test based on violence or non-violence, restrictions on rights are subject to a balancing test. The ICCPR Human Rights Committee, the European Court of Human Rights (ECHR) and other bodies apply a three-part test. To be valid, the restriction must (a) be prescribed by law; (b) serve a legitimate purpose; and (c) be necessary (in a democratic society). While this analysis must be conducted on a case-by-case basis in light of the particular circumstances at the time, a general application to the restrictions on civil and political rights in China is also instructive. As for the first prong, the constitution, laws, and administrative regulations provide ample grounds for restricting pornography, religious practices, demonstrations, criticism of the government, and the Party, and to justify confiscation of property, fines, administrative detention, and criminal punishments. Whether the laws are clear enough to prevent citizens from unexpectedly running afoul of the law is however an issue in some cases given the broad and vaguely stated provisions on state secrets, subversion, and endangering the state. However, it is unlikely that most people convicted in the cases discussed earlier were unaware that they were crossing the line given previous convictions for similar behavior, though many clearly felt that their actions should not have been considered illegal. Nevertheless, a judicial interpretation of subversion and related charges, and a more restrictive definition of "state secrets" would go a long way toward clarifying the scope of impermissible activities and expanding the scope of legitimate activities without detriment to state interests.

A separate but related issue is whether the procuratorate laid out with sufficient detail the alleged acts constituting the offense or the precise threat to national security. The dangers of relying on broad allegations of subversion or endangering the state are readily apparent in this era of heightened sensitivity to terrorism. Yet in several of the cases, there was little analysis of specific statements in the articles alleged to be evidence of subversion.

The restrictions generally serve a legitimate purpose on their face, such as national security, public order, and morality. However, in some cases involving criticism of government policies on AIDS, disclosure of the number of capital punishment cases, or exposure of corruption, the restrictions appear only to serve the interest of the ruling party or to protect the reputation of particular officials rather than to protect national security or the interests of the nation. The tendency of governments around the world to rely on broad state secret laws and vague references to national security to cover up government mistakes has been exacerbated after 9–11, and should

be resisted in China and elsewhere.[61] Moreover, by relying on a broad state secret law, the government prevents defendants from relying on the truth of their criticisms or statements as a defense: the mere disclosure of the information is sufficient to find wrongdoing.

The final prong is usually the most crucial. The requirement of "necessity" as interpreted by the ECHR and other bodies does not mean the restriction is "indispensable," although it must be more than merely "reasonable" or "desirable." The ECHR affords countries a margin of appreciation in deciding what is necessary, with the widest margin in the areas of national security and morality. In addition to being necessary, the restriction must also be proportionate, while some jurisdictions such as the US apply a higher "least restrictive" standard for limitations of fundamental rights.

The Universal Declaration on Human Rights and other international documents require the restrictions to be necessary for a democratic order, even though democracy is not required under the ICCPR. Some of the arguments for free speech in a democracy may not apply in a socialist state, although many of the same arguments would apply. For example, the argument that political speech, including criticism of the government, deserves special protection in a democracy given the need for citizens to elect their leaders may be weakened.

In most cases, however, the difference will be between liberal and non-liberal positions. Thus, the liberal emphasis in other countries on autonomy, individualism and self-development will lead to different outcomes than in China.

But even accepting such differences, are the restrictions imposed by China necessary? To some extent, the response turns on assessments of how stable China is. Ironically, the argument of many liberal critics that China is very unstable tends to undercut their opposition to restrictions on civil and political rights. China clearly faces a number of threats to stability, including increasing rural poverty, rising urban employment, a weak social security system, and rapidly aging population that has pushed pensioners into the streets to protest for retirement benefits, and a looming banking crisis that could put an end to the economic miracle, leading to further unemployment and more unrest. The desire for greater autonomy if not independence among many Tibetans and Xinjiangese, the rise of Islamic fundamentalism in the region, and the difficulty of separating Buddhism and politics in Tibet also present risks that cannot be dismissed, even though they should not be exaggerated.

More generally, authoritarian regimes are particularly stable in the $3,000 to $4,000 per capita (PPP) range, more so than any other range except where per capita income is less than $1,000.[62] However, the likelihood of a transition to democracy increases when per capita income is between $4,000 and $6,000, with the tipping point at which a regime is more likely to be democratic than authoritarian being $4,115. China is currently at $4,020. Thus, China is just beginning to outgrow a highly stable period for authoritarian regimes, and like to become increasingly unstable as pressure for political reforms grow.

Another test applied by some courts is to multiply the probability or likelihood by the degree of harm to calculate the expected danger or threat. With one-fifth of the world's population, almost half living on less than $2/day, and a history of chaos as recent as the Cultural Revolution, the consequences of instability for China, the region, and the world would be severe. Adopting this measure virtually assures a wide margin of deference to restrictions in the name of public order. However, each case must be considered on its own, and the threat to public order or the state evaluated based on the particular facts.

In practice, the balance reached by the government seems to be that individuals are generally free to pursue their own interests, engage in religious beliefs or criticize the government as they like, provided their acts are not combined with any of the aggravating circumstances discussed above that increase the likelihood of unrest. While acknowledging the possibility of instability, many of the decisions fail to provide any discussion of how the particular acts in question will lead to instability or endanger the state. A more considered analysis of the nexus between the acts and disruptions of the public order or harm to the state would expand greatly the range of civil and political rights without harming national security of state interests. It is difficult to see how such a case-specific analysis could justify the tight limitations on discussion of issues of legitimate public concern such as constitutional reform, medical crises, corruption, government takings and rising income gaps. After all, these issues are widely discussed anyway. Moreover, whatever the outcomes on the substantive merits, the many due process violations even under China's own laws are clearly inconsistent with the efforts to implement rule of law and should be rectified.

Social and economic rights: poverty, health, and education

China defends its human rights record by pointing to a stunning rise in wealth that has lifted over 150 million out of poverty in less than a decade and improved the quality of life of hundreds of millions more. With a 2001 GDP per capita (PPP) of $4020, China falls into the lower-middle income country. An official average annual growth rate of 8.2 percent from 1975 to 2001 has resulted in steady progress in the UNDP's HDI Index from 0.52 in 1975 to 0.72 in 2001. The Index measures life expectancy at birth, adult literacy, school enrollments, and standard of living.

However, economic growth has not benefited all equally. There is wide regional variation, and a growing income gap. The eastern coastal region is much wealthier than the rest of the country, and rural areas are poorer than cities,[63] although the number of poor urbanites has also grown dramatically. According to the UNDP, in 1998, the share of national income or consumption was 5.9 percent for the poorest 20 percent, whereas the share of the richest 20 percent is 46.6 percent.[64] By 2003, the share of the top 20 percent had risen to 51 percent.[65] Meanwhile, some 47 percent live on less than

$2/day, and 16 percent on less than $1/day, while 4.6 percent live below the national poverty line. One-quarter of the population, or over 300 million people, lacks sustained access to an adequate water source; 9 percent of the population is undernourished, with 10 percent of children under 5 underweight for their age. The rapid growth has also taken its toll on the environment. China's growth has been fueled by energy consumption three times less efficient than the world's average.[66]

The process of modernization inevitably involves a period of urbanization where rural residents are moved into cities and rural incomes lag behind urban incomes. In a country as large as China, the process will take several generations to reach a stable equilibrium. In the meantime, the government has responded to growing inequality both in the countryside and cities by issuing a steady stream of legislation to improve social welfare, strengthen job training and creation programs, ease restrictions on migrant workers and enhance their rights to education and medical treatment, reduce the tax burden on farmers, stimulate growth in western and central regions, tighten labor safety rules especially in the mining industry, and improve environmental protection. Perhaps more importantly, the government has given substance to the commitments and promise of these new regulations by increasing spending.[67] In 2003, 29.33 million retirees were covered by welfare, an increase of 41 percent over 2002. Nearly 60 million people have been covered by the rural old-age insurance scheme, with close to 1.4 million farmers receiving pensions.[68] Although these increased expenditures will not put an end to the problems, and benefit different groups disproportionately, with former State Owned Enterprise employees better taken care of than others, they do demonstrate the commitment of the new leadership to pay attention to social justice issues.

Chinese citizens have on the whole also enjoyed greater access to medical care, better health, and longer lives. In 2001, life expectancy was 70.6, double that in 1949.[69] The population with access to essential drugs reached 80 percent to 94 percent; 77 percent to 79 percent of 1-year-olds are immunized against TB, measles and other illnesses. In 2000, health care was available to 86 percent of pregnant women, and maternal mortality had dropped to 53 per 100,000 from 61.9 in 1995, although in some rural areas the rate can be as high as 400/100,000.[70] The percentage of women giving birth in hospitals was 72.9 percent, up 15 percentage points from 1995. Efforts to encourage breastfeeding also paid dividends, with 54 percent of urban mothers and 72 percent of rural mothers breastfeeding for four months. All are significant improvements.

However, China is poor: only $205/capita is spent on health. Public health expenditure is 2.0 percent of GDP, while private health expenditure is 3.4 percent of GDP. There are still problems with Hepatitis-B, tuberculosis and lack of potable water, as well as new medical issues such as an upsurge in AIDS, sexually transmitted diseases, obesity, death by traffic accidents, and mental illness. Medical treatment in the countryside in particular leaves

much to be desired. Moreover, with longer lifespans and China's one-child policies changing demographics, China is facing the problems associated with aging, including more people suffering from chronic ailments, a lengthening of the course of diseases, and constant increases in medical and pharmaceutical costs, all of which have an enormous impact on medical and health care facilities.

PRC law provides for nine years of compulsory education. According to the UNDP, public education expenses for 1998 to 2000 amount to 2.1 percent of GDP, of which 37.4 percent is for primary education, 32.2 percent for secondary, and 15.6 percent for tertiary.[71] According to official sources, the ratio of education expenditure to GDP has increased five years in a row, from 2.5 percent in 1997 to 3.41 percent in 2002.[72] In 2001, adult literacy was 85.8 percent, up from 78.3 percent in 1990. Youth literacy is even higher, at 97.9 percent.[73] The government has proudly noted that according to statistics published by UNESCO in 2003, China made the most progress in eliminating illiteracy in the past decade among the forty countries surveyed.[74]

However, illiteracy rates are higher among women, minorities, and in rural areas. As recently as 1999, 100 million women, mostly rural, were illiterate.[75] In response, the government initiated Project Hope to assist children in poor districts and the Spring Buds Scheme to promote girls' enrollment or return to school to complete their primary education. According to the Ministry of Education, the proportion of females receiving education at all levels has risen and the overall educational level of women has improved. From 1990 to 2000, the illiteracy rate among women has decreased from 32 percent to 13.5 percent, with the total population of female illiteracy decreasing from 159 million to 62 million.[76] Less than 5 percent of young and middle-aged women are illiterate.[77] In 2000 the primary school enrollment rate of female students reached 99.1 percent. Even in the economically less-developed western regions, the rate of school enrollment of female students reached 95 percent. At present, the proportion of female students in China's primary schools is 47.2 percent and that in colleges and universities is 43.95 percent. In general, 97 percent of the primary school graduates go to junior high school, 58.3 percent of the junior high school students make it to senior high school, while 15 percent go on to college.[78]

Despite such achievements, the UN Special Rapporteur (SR) on the Right to Education issued a critical report that challenged some of the data and offered a number of recommendations for improvement.[79] The SR noted that many public schools had begun to charge tuition and impose other fees, which the poor are not able to afford. She recommended that all fees be eliminated and that the budgetary allocation for education be increased to the "internationally recommended" minimum of 6 percent (though it bears noting that only Malaysia meets that standard among the countries in our study). She also noted ongoing problems with gender equality and with education for minorities, including the lack of bilingual education. In addition, she recommended a clarification of the rights of young unmarried

people to sex education and family-planning services and to self-protection against sexually transmitted diseases and AIDS.

The government responded with a scathing critique, accusing the SR of being politically biased and making groundless comments and accusations that distorted the facts and discounted China's achievements. Beijing complained that the SR ignored information provided by the government, relying instead on materials from overseas sources and organizations. The government pointedly observed that although the SR did not visit Tibet, she nevertheless made "biased and irresponsible comments" on education in Tibet.

To some extent, the difference lies in the government's approach of citing regulations and general statistics, and the approach of the SR and other human rights organizations that highlights individual cases or relies on accounts about how the laws are implemented in practice by parties who are often disgruntled. For instance, the government noted that the State Council has issued regulations requiring that schools charge only a single fee and that fees be waived for indigent students. However, as with other types of laws, local governments often ignore or modify central regulations.

In other cases, the difference seems to be more one of spin or interpretation, or due to the tendency of human rights advocates to hold up idealistic standards that cannot be achieved given China's current level of development and regional variations. The SR for example accused China of backing away from its commitment to universal nine-year compulsory education. The government acknowledges that nearly 10 percent of the population lives in regions where universal education can only be provided at the primary level or even only up to the third or fourth year of primary school. Moreover, while the national drop-out rate in 2000 was 0.55 percent for primary schools, and 3.21 percent at the junior middle school level, the drop-out rate in some rural areas is high. In light of significant regional differences, the government has adopted an approach of "'different plans in different regions, different guidance for different kinds of education, and promoting compulsory education in a progressive process' by realizing six-year universal compulsory education first," after which the regions can strive for nine-year compulsory education. However, the government adamantly denied that it was backing away from universal nine-year compulsory education as a long-term goal.[80]

The constitution provides for citizens' right to work, rest, education, scientific research and cultural activities, material assistance from the state and society when aged, ill or having lost the ability to work, and ownership of lawful property. Constitutional rights are generally not directly justiciable in China without implementing legislation. Moreover, like elsewhere, many economic rights, because of their aspirational nature, vagueness, or policy implication with respect to distribution of resources, are not considered to be justiciable. Nevertheless, there have been a number of cases that have arisen in relation to some of these rights, particularly the right to education. In fact, the first case to directly invoke the constitution as a basis for a claim absent implementing legislation involved the right to education.[81] One

subsequent case involved a student who successfully sued her school for damages for failing to inform her about her college entrance exam scores in time to apply to university, as well as another case where a student sued the school and various individuals for allowing someone else to appropriate her name and score to enter university.[82]

In still another case that combined the right to education with a discrimination claim, three students from Qingdao sued the Ministry of Education for its admissions policy that allowed Beijing residents to enter universities in Beijing with lower scores than applicants from outside Beijing.[83] However, the plaintiffs filed the suit directly with the Supreme Court. Although the Supreme Court has the discretionary power to hear important cases in the first instance, it opted not to exercise the power, rejecting the case on jurisdictional grounds and advising the plaintiffs to file in the Intermediate Court. Facing a number of serious legal obstacles, including that the Administrative Litigation Laws permits challenges to the legality of specific administrative acts but not generally applicable administrative regulations, the students withdrew the case.

In a case that relied on the parent's duty to support their children, a college student over the age of 18 successfully sued his father for additional support. Although the student's mother was solely responsible for his support according to a divorce agreement, she was laid off and unable to pay.

Cultural rights

The study of cultural rights is complicated by the fact that China is a large country, with fifty-five different ethnic groups constituting approximately 9 percent of the population. The legal regime is complex, with numerous autonomous zones,[84] preferential policies and a wide range of local regulations. Accordingly, different minority groups or even members of the same minority group are subject to different rules depending on where they are located. In addition, international law and domestic law are not clear on many points relating to the rights of minorities. Moreover, many issues are not resolved through the formal legal system. There are also different values at stake, and sharply divergent views among Hans and ethnic groups on many issues.

The government claims that it has greatly improved the living standards of minorities, affords them considerable political autonomy and opportunities to participate in national and local government, offers preferential treatment in education, employment and family practices, and protects cultural sites and practices, including religious practices so long as they are non-political. On the other hand, the SR on racism and racial discrimination expressed concerns in his 2002 report that Tibetans in the Tibetan Autonomous Region (TAR) suffer various forms of systematic and institutional discrimination in the fields of employment, health care, education, housing, and public representation.[85]

There is no doubt that China's minority regions are wealthier than in the past, and that the standard of living has improved for the vast majority of individuals. However, minority regions, located on the fringes and largely rural, are generally still poorer than the Han-dominated eastern region. In response, the government listed poverty relief for ethnic minorities with relatively small populations as a focus of the state's development-oriented poverty reduction program.[86]

Critics claim that economic policies have disproportionately benefited Hans living and working in minority areas, that some projects favored Hans, especially for technical and senior positions, and that minorities have less access to credit and financing.[87] The government responds that minorities hold the majority of positions in local governments, that all fifty-five ethnic groups are represented in the NPC, with minority candidates constituting 14 percent of NPC delegates even though they represent only 9 percent of the population, and that minorities hold key Party posts. Nevertheless, minorities tend to have more positions in government, whereas Hans continue to have relatively higher positions in the Party, which remains the ultimate authority.[88] In addition, there are relatively few minority persons in the most powerful positions of government or the Party. Critics also allege that development has upset traditional living patterns and led to relocation. Such complaints are perhaps inevitable in the march toward economic development and modernization. However, allegations of genocide based on an influx of Hans into Tibet and Xinjiang and the destruction of cultural practices are overstated.[89] Hans tend to congregate in the large cities, which generally tend to be more well-off than rural areas. Being on average more educated, they also tend to have higher paying jobs, and thus can afford better housing.

In terms of education, illiteracy has been greatly reduced among minorities, but remains significantly higher than the national average in some minority areas. According to government statistics, 32.5 percent of the population in the TAR was illiterate in 2001,[90] although the rate for young and middle-aged people is less than 3 percent.[91] Enrollment for children in the TAR is 86 percent, compared to 93 percent nationally. Illiteracy among young and middle-aged Uighars in Xinjiang is less than 2 percent.[92]

Native language and bilingual education has also been a concern of rights groups, with the Committee on the Elimination of Racial Discrimination recommending that children in all minority regions have the right to develop their own language and culture.[93] However, this goal is difficult to achieve given that there are over twenty-five different languages used in China, with many minorities spread out around the country or living in predominantly Han areas. The Education Law and other laws provide that schools with a majority of ethnic students may use the oral and written languages of the ethnic group in their teaching. Tibetan is the main language in 60 percent of middle schools in Tibet. There are also Tibetan curriculum high schools, although most also involve classes in Chinese. Minority students, who benefit

from affirmative action in entering colleges, are also able to take the national entrance exam in their own language. On the other hand, while Tibetan and other minority languages may be used in courts and official business within the particular minority region, Chinese is often a requirement for economic and social advancement both within the region and the rest of the country. Thus the desire to promote Tibetan culture by emphasizing Tibetan language in schools is at odds with the need to learn Chinese to succeed in the broader society.

In a controversial move, the SR on education recommended that China allow religious education. This drew a sharp retort from Beijing, which claimed that while people enjoy freedom of religion, and parents are free to instruct their children in religious beliefs at home during non-school hours, China adopts the policy of separating education from religion. Accordingly, the Compulsory Education Law provides that no organizations or individuals may use religion to interfere with public education. In keeping with this policy, authorities closed down Ngaba Kirti Monastic School in Sichuan, which was established using private funds and sought to provide traditional monastic education to rural Tibetans.[94] Also, anyone below the age of 18 is not allowed into mosques or other places of worship, although in practice this policy may be relaxed in areas where unrest is not an issue.

Conclusion

Rights performance by area within a comparative context

Chinese citizens enjoy greater rights to participate in governance and more freedoms than ever before. Nevertheless, the authorities continue to impose severe limitations on civil and political rights whenever the expression of such rights is perceived to threaten the regime or social stability. In terms of *subject matter*, calls for democracy and the overthrow of the Party or government; advocacy of independence and greater autonomy for Xinjiang, Tibet, and Taiwan; religious practice outside officially sanctioned bounds by "cults" or in house churches; labor activism; and exposés of corruption at high levels are subject to restraints depending on the circumstances. The authorities are particularly likely to intervene when *the manner* of exercise of such rights involves social organization especially across regions, large-scale and well-coordinated demonstrations, exposure to a wide and unidentified audience through the mass media and the Internet, and links to foreign entities. In contrast, individuals, academics and government officials generally are allowed to express virtually any view in private or even publicly to a limited and defined audience, although some academics have been fired from their posts or experienced censorship.

China's level-4 PTS rating seems to overstate the degree of "political terror" and to be the result of reporting practices by the foreign media and human rights organizations that focus on egregious individual cases which

are not representative of the system as a whole. The power of horrific, individual cases to drive human rights policies toward China should not be understated.[95] While imprisonment of political dissidents and physical abuse of detainees in prisons and administrative detention centers are deplorable and merit attention, the reality is that only a tiny fraction of the prison population could possibly be described as political prisoners. Unfortunately, the egregious cases latched onto by the media often create a distorted picture abroad, feeding into the stereotypical image of China as a repressive, authoritarian police state – an image constantly reinforced by the repeated playing of the scene of an individual citizen blocking the path of a tank more than fifteen years ago in Tiananmen. Visitors coming to China for the first time often express surprise when they do not see machine-gun-toting soldiers in military fatigues on every corner or find ominous-looking public security agents in black trenchcoats lurking about suspiciously in alleyways and Internet cafes.

The overwhelming majority of criminal law and administrative detention cases are not political. While crime disrupts social order, criminals do not directly challenge the Party's right to rule. What makes criminal cases special and distinguishes criminal law from other areas of law is that there is little support for criminal law reforms on the part of the public because the vast majority of the citizenry sees such reforms as harming rather than furthering their interests. Consistent with the general pattern elsewhere, modernization, industrialization, urbanization, and the turn to capitalism have led to spiraling crime rates. The government has responded to the fears of the public and citizens' demand to crack down on crime by doing just that. The crack-down has taken the form of much publicized campaigns to "strike hard" at crime. China's weak legal institutions have been unable to stand up to the combined pressure coming from an angry public demanding heavy punishments to deter criminals, and a political regime seeking to shore up its legitimacy by pandering to the public's appetite for vengeance. Cultural preferences for social stability, a tendency to favor the interest of the group over the individual, and the lack of a strong tradition of individual rights further undermine significant efforts in recent years to strengthen the criminal justice system and better protect the rights of the accused.

Assessing the performance of any criminal justice system is a problematic exercise. People attach different weights to competing values, such as the rights of individual suspects and the importance of assuring that no innocent person is wrongly convicted, versus social order and the freedom and interests of individuals who may be victims of crime, even violent crime, if suspects are not detained or are acquitted on "technicalities," such as the exclusion of tainted evidence. They also disagree about the purposes of the criminal justice system and the relative weights assigned to deterrence, rehabilitation, retribution, vengeance, education, and incapacitation. And they disagree about the causes of crime and hence the relative effectiveness of different approaches to dealing with it. Nevertheless, there is some

evidence that China's policies have been successful in curtailing crime. Despite the increase in crime rates over the last several decades, China still has much lower murder, rape, and burglary rates than the USA, France, and Germany, though the murder and rape rates are now higher than for Singapore and Japan.[96] It also has lower murder, rape, and burglary rates than the Philippines and Romania, both of which are, like China, lower-middle income countries. The much lower rates in China are striking, even allowing for differences in the way crimes are defined and other factors that affect crime rates.

Nevertheless, there are still numerous shortcomings in the criminal justice and administrative detention systems, and many possible reforms that would strengthen the protection of the rights of the accused while making the systems more just and fair.

In terms of social and economic rights, China does well both absolutely and relative to its income level in housing, feeding, and clothing its vast population. It also does well relative to income level in education and access to medical care. However, individual citizens are largely dependent on the good graces of the government because economic and social rights are not generally justiciable. Moreover, China is a relatively poor country, with wide regional disparities and a rapidly growing income gap not only between rural and urban areas but within cities as well. The new leadership of Hu and Wen has shown sensitivity to issues of social justice, implementing a number of policies to ease the hardships of those who have lost out in the transition to a more competitive capitalist economic system.

China has made considerable efforts to improve the lives of its many ethnic minorities through a series of policies to stimulate economic growth and a complicated regulatory framework that establishes special autonomous zones for Tibet, Xinjiang, and other ethnic regions and provides preferential treatment in employment, education, and family planning to minorities. Nevertheless, as in other countries, ethnic divisions, often based on religious identities, have led to tensions between the Hans and other ethnic groups and calls for greater autonomy and even secession. Conflicting views about the effects of government policies, conflicting interpretations of the facts, and normative differences result in widely different assessments of China's record on cultural rights by Hans and members of the various minority groups. Due in part to efforts to improve the living conditions of minorities and in part to tight controls, China has managed for the most part to avoid large-scale ethnic conflicts. However, sporadic bombings and other acts of violence have occurred. The government has responded with force, and by further tightening control on possible sources of dissent.

Finally, critics are often quick to attribute any failure in governance – whether it be the belated response to SARS, widespread corruption, or shortcomings in the implementation of rule of law – to China's political system. However, China outperforms other countries in its income category on core good governance indicators. It beats the average for lower-middle income countries in political stability, government effectiveness, rule of law,

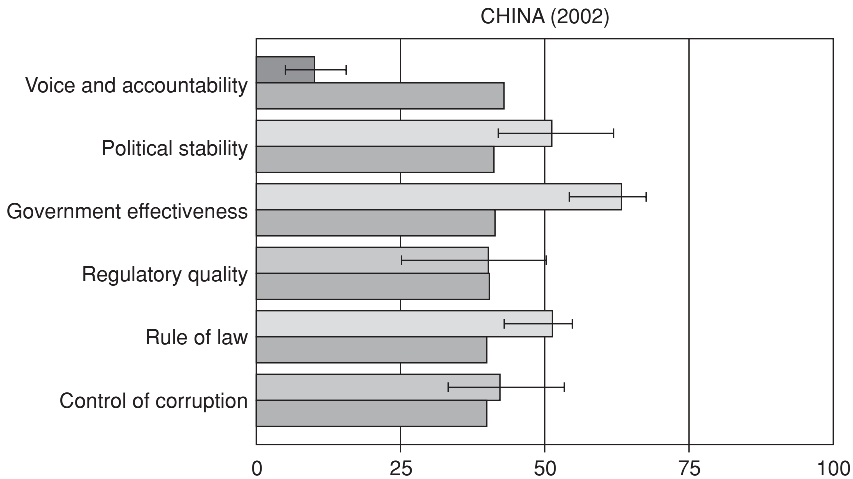

Figure 14.1 Comparison with income category average (lower-middle income) (lower bar). Country's percentile rank (0–100)

Source: D. Kaufmann, A. Kraay and M. Mastruzzi, 2003: *Governance Matters III: Governance Indicators for 1996–2002* (at: www.worldbank.org/wbi/governance/pubs/govmatters3.html).

and control of corruption. It is about average for regulatory quality, which is biased toward neo-liberal economic principles, and falls far short on voice and accountability, which measures civil and political rights.

Causes of rights problems and general constraints on improved performance

Economic factors go a long way toward explaining both the improvements in rights performance in recent decades and the continuing problems, many of which are directly or indirectly related to poverty and lack of resources. Ongoing deficiencies in access to food, clean water, medical care, and education are most directly related to China's relatively low level of economic development, although a weak tax system and policies that fail to redistribute resources from China's increasingly wealthy high-income earners exacerbate the problems. Wealth, or the lack thereof, also contributes to ethnic tensions and even a higher incidence of civil and political and personal integrity rights violations: economically well-off people generally do not take to the streets to protest, favoring less confrontational channels for advancing their interests that do not threaten social stability or challenge the state to the same degree. Indeed, China's nouveau riche tend to be politically conservative and supportive of the regime, if only out of fear that demands for faster political reforms will lead to political instability and social chaos, thus undermining their steady incomes and threatening their comfortable lifestyles.

In contrast, most protests are the result of economic injustices, often by people who have little to lose. Pensioners are the most likely to protest, largely because many of them are desperate and need their retirement funds to survive, although they also take to the streets because of a genuine sense of grievance that the state has violated the previous social contract whereby they would work for low wages in exchange for lifetime employment and cradle-to-grave social welfare. Many other main areas of conflict are also fundamentally economic in nature, including the problems associated with laid-off workers and labor activism, government takings and relocation, migrant workers, and urban crime – the majority of which is committed by migrant workers with little money in their pockets.

Population size is relevant in several ways. First, China's huge population is directly tied to quality of life as reflected in social and economic measures because limited resources are spread thin over large numbers. Second, as elsewhere, population size is a proxy for ethnic diversity, which leads to conflicts between minority groups and the government, between minorities and the majority Hans, and among minorities. Such conflicts may result in restrictions on civil and political rights, especially in Xinjiang and Tibet, and complicate the issue of cultural rights. Third, the sheer size of the population results in a "large" number of violations of physical integrity rights and civil and political rights, though proportionally the number is small. Fourth, and more substantively, the size of the population makes control more difficult, instability more likely and the expected danger value calculated by multiplying the likelihood of instability by the consequences of chaos higher. In a country the size of China, even the most radical anti-government movements and bizarre cults may attract a significant number of followers, especially now that the Internet has eliminated the barrier of communication across distance.

Political, ideological, and cultural factors also explain some of the results, particularly with respect to the tight limitations on civil and political rights.[97] China's leaders make no apology for not being liberals. Clearly statist socialism influences the general view of human rights as well as the outcome in particular cases. Liberal democracies are frequently characterized by a neutral state in which the normative agenda for society is determined by the people through elections and a limited state with an expansive private sphere and robust civil society independent of the state. In contrast, China's statist socialism is defined by single-party rule, elections at only the lowest level of government and at present a nomenklatura system of appointments whereby the highest-level personnel in all government organs including the courts are chosen or approved by the Party. Rather than a neutral state, the Party in its role as vanguard sets the normative agenda for society, as in the four cardinal principles. In addition, there is a smaller private sphere and a correspondingly larger role for the state in supervising and guiding social activities.

Political views in China are not limited to either support for statist socialism or liberal democracy.[98] There is also considerable support for *neo*- or

soft authoritarianism, and for various forms of *communitarianism*. Neo-authoritarians prefer single party rule to genuine democracy. They would either do away with elections, or were that not politically feasible, limit elections to lower levels of government. If forced to hold national-level elections, they would attempt to control the outcome of the elections by imposing limits on the opposition party or through their monopoly on major media channels. Like the statist socialists, they reject the neutral state and favor a large role for the government in controlling social activities. Nevertheless, they would tolerate a somewhat smaller role for the government and a correspondingly larger civil society, albeit one still subject to restrictions and characterized by corporatism.

In contrast, communitarians favor genuine multiparty democratic elections at all levels of government, though not necessarily right at the moment. Given their fear of chaos, urban distrust of the allegedly ignorant rural masses and lack of requisite institutions, many are willing to postpone elections for the moment and to accept a gradual step-by-step process where elections are permitted at successively higher levels of government. Like the statist socialists and neo-authoritarians, they believe state leaders should determine the normative agenda for society, and hence allow a larger role for the state in managing social activities than in a liberal democratic state. However, they prefer a somewhat more expansive civil society. Although some groups, particularly commercial associations, might find close relationships with the government helpful, other more social or spiritual groups might not. The latter would be permitted to go their own way, subject to concerns about social order, public morality, and specific harms to members of the group or society at large.

In terms of rights, liberal democrats favor a liberal understanding of rights that gives priority to civil and political rights over economic, social, cultural, and collective or group rights. Rights are often conceived of in deontological terms as distinct from and normatively superior to interests. Rights are considered to be prior to the good (and interests) both in the sense that rights "trump" the good/interests and in that rights are based not on utility, interests or consequences but on moral principles whose justification is derived independent of the good. To protect individuals and minorities against the tyranny of the majority, rights impose limits on the interests of others, the good of society and the will of the majority. Substantively, freedom is privileged over order, individual autonomy takes precedence over social solidarity and harmony, and freedom of thought and the right to think win out over the need for common ground and right thinking on important social issues. In addition, rights are emphasized rather than duties or virtues.

In contrast, communitarians endorse a communitarian or collectivist interpretation of human rights that emphasizes the indivisibility of rights. Greater emphasis is placed on collective rights and the need for economic growth, even if at the expense of individual civil and political rights. Rather

than a deontological conception of rights as anti-majoritarian trumps on the social good, rights are more often conceived of in utilitarian or pragmatic terms as another type of interest to be weighed against other interests, including the interests of groups and society as a whole. Accordingly, stability is privileged over freedom; social solidarity and harmony are as important, if not more so, than autonomy and freedom of thought; and the right to think is limited by the need for common ground and consensus on important social issues. Communitarians, neo-authoritarians and statist socialists also pay more attention than liberal democrats to the development of moral character and virtues and the need to be aware of one's duties to other individuals, one's family, members of the community and the nation.

Like communitarians, neo-authoritarians and statist socialists conceive of rights in utilitarian or pragmatic terms. However, they have a more state-centered view than communitarians. Statist socialists in particular are likely to conceive of rights as positivist grants of the state and useful tools for strengthening the nation and the ruling regime. They are also more likely than neo-authoritarians to invoke state sovereignty, "Asian values" and the threat of cultural imperialism to prevent other countries from interfering in their internal affairs while overseeing the destruction of the communities and traditional cultures and value systems that they were allegedly defending. Nevertheless, communitarians and neo-authoritarians in China are also likely to object to strong-arm politics and the use of rights to impose culture-specific values on China or to extract trade concessions in the form of greater access to Chinese markets. Moreover, like communitarians, neo-authoritarians and statist socialists privilege order over freedom. They go even farther than communitarians, however, in tilting the scales toward social solidarity and harmony rather than autonomy, and are willing to impose more limits on freedom of thought and speech. While neo-authoritarians would restrict the right of citizens to criticize the government, statist socialists prefer broader restrictions, drawing a clear line at public attacks on the ruling party or challenges to single-party socialism. Despite the changes in society over the last twenty years that have greatly reduced the effectiveness of "thought work," they continue to emphasize its importance to ensure common ground and consensus on important social issues defined by the Party.

On some issues, there are clear preferences among the majority of citizens, not withstanding the general differences among the various camps. There is, for example, a clear majority preference for stability and economic growth, even if that means postponing democracy and tolerating for the time being greater restrictions on civil and political rights. Conversely, there is little support for political dissidents or for liberal democrats who push for liberal interpretations on many rights issues or for immediate democratization. Similarly, there is wide support for the war on crime, including the death penalty and other harsh punishments. Where there is such a clear majority, reforms that go against the tide are not likely to be passed into

law; even if they do become law, there is a good chance that the laws will not be implemented in practice.

Institutional factors also inhibit the protection and advancement of rights. Although China has various official and quasi-official human rights research centers, there is no national human rights commission or ombudsmen for the promotion of human rights. Nor is there an Asian regional system comparable to that in Europe, the Americas, or Africa that could serve as a source for rights promotion or the development of jurisprudence. Of course, given its sovereignty concerns, China is not likely to accept the jurisdiction of a regional court over issues arising in China or between China and other member states.

China's legal system remains relatively weak, although greatly improved in many ways over the last twenty years. Courts are able to handle most cases competently and independently. Party organs rarely intervene in individual cases.[99] Nevertheless, the judiciary still lacks the authority to decide many controversial political cases and cases with major social consequences independently, as suggested by the long delays before a verdict is issued.

Even when courts do decide cases independently, they are obligated to apply non-liberal laws that require social organizations to register, that require prior authorization to demonstrate and give the authorities broad grounds to deny applicants permits, and that define state secrets, endangering the state, and disturbing the public order broadly. They are also limited in economic and social rights cases by the lack of justiciability of such rights and more generally by the lack of direct justiciability of the constitution. The lack of a constitutional review body arguably also impedes the protection of rights, although such a body would most likely not be all that liberal and effective given the current circumstances.

Due process violations continue to be a problem in run-of-the-mill criminal cases as well as politically sensitive cases. Criminal lawyers have been harassed, with more than four hundred being detained since 1997.[100] Recent regulations and reforms have attempted to strengthen the position of criminal defense lawyers. However, the persisting influence of the inquisitorial approach with its limited role for defense counsel, the public's desire to strike hard at crime and problems within the legal profession itself suggest that criminal lawyers will be fighting an uphill battle for some time to come.

The future: prospects and challenges

China is a relatively poor, developing country. Moreover, attitudes change relatively slowly. Institutional obstacles such as the deficiencies in the professional qualifications of some segments of the judiciary cannot be overcome overnight. The political situation remains sensitive. A number of other problems add to the pressure on the government, increase the risk of instability, and contribute directly or indirectly to rights violations. For there to be further progress in human rights, continued economic growth and political

stability are essential. At the same time, greater redistribution of wealth and the improvements to the social welfare system are necessary to ensure social justice and protect the least advantaged members of society who have lost out or not benefited as much from the transition to a market economy.

Political reforms must also keep pace with economic reforms. In my view, the government is unnecessarily restrictive of civil society, and would do well to loosen the reins on freedom of speech and assembly. Given the potential for instability and other circumstances including majoritarian value preferences that fall within a reasonable margin of appreciation, the government may still impose more restrictions on civil and political rights than do economically advanced, politically stable Western liberal democracies. However, the lines for what is permitted and what is not should be clarified, and the rules should be enforced consistently, fairly and in a transparent manner, without recourse to torture or coerced confessions or harassment of defense counsel. Accordingly, continuing the efforts to strengthen the legal system and implement the rule of law is essential, though not alone sufficient, to ensure better protection of rights in China.

Notes

1 I have had to simplify some of the arguments, reduce the number of cases, cut back on detailed discussion of the evidence, limit citations to sources, and forego normative analysis and comparisons with other countries because of space limitations. For a fuller, more detailed presentation, and the argument that China is subject to double standards, see Randall Peerenboom, "Assessing human rights in China: why the double standard?" *Cornell International Law Journal*, no. 38, pp. 71–172 (2005).
2 For a discussion of the government's official position on human rights, see *ibid.*
3 Randall Peerenboom, "Out of the pan and into the fire: well-intentioned but misguided recommendations to eliminate administrative detention in China," *Northwestern Law Review*, vol. 98, 2004, pp. 991–1104 (hereinafter, "Administrative detention").
4 For recommendations, see "Administrative detention," *ibid.*
5 *Ibid.*
6 *Ibid.*, at note 34.
7 US Department of State, *US State Department Country Reports on Human Rights Practices, China*, released February 25, 2004: www.state.gov/g/drl/rls/hrrpt/2003/27768.htm (hereinafter, *State Department Report*).
8 Wayne R. LaFave, *Criminal Law* (*Hornbook Series*), West Group, 4th edn, 2003, p. 121 (noting that the common law rule, applied in the USA, is that someone whose conviction is final is not released if the criminal statute on which the person is convicted is subsequently repealed).
9 Robin Munro, "Judicial psychiatry in China and its political abuses," *Columbia Journal of Asian Law*, vol. 14, 2000, pp. 67–8.
10 State Department Report, *supra* note 7, p. 2.
11 See Diane Wood, "The rule of law in times of stress," *University of Chicago Law Review*, vol. 70, 2003, p. 460.
12 Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, The Hague and Boston: Kluwer Law International, 1996.

13 Liang Zhang *et al*. (eds), *The Tiananmen Papers*, New York: Public Affairs, 2001.
14 Information Office of the State Council of China, "'East Turkistan' terrorist forces cannot get away with impunity," *Beijing Review*, vol. 45. no. 5, January 31, 2002, p. 15.
15 Colin Mackerras, "Why terrorism bypasses China's far west," *AsiaTimes* (online), April 23, 2004: www.atimes.com/atimes/China/FD23Ad03.html.
16 The US State Department Counterterrorism Office, *Patterns of Global Terrorism 2001*, released in May 2002, p. 17 (describing ETLO as a cause for concern, along with the East Turkestan Islamic Party, which was founded in the early 1980s with the goal of establishing an independent state of Eastern Turkestan, advocates armed struggle and is oriented towards religious extremism and pan-Islamism).
17 Amnesty International, "AI Index: ASA 17/037/2003," October 24, 2003: http://web.amnesty.org/library/Index/ENGASA170372003?open&of=ENG-393. See also "Executed Uyghur refugee left behind tapes detailing Chinese torture," *Radio Free Asia*, October 23, 2003: www.rfa.org/front/article.html?service =eng&encoding=10&id=118780.
18 Amnesty International, "No justice for the victims of the 1997 crackdown in Gulja, ASA 17/011/2003," February 4, 2003 (also citing unconfirmed reports that police fired into the crowd, and reports of torture and deaths in detention in relation to the incident).
19 "Wang Bingzhang convicted of terrorist activities and espionage," *Xinhuanet*, February 20, 2003.
20 The court's judgment is available at: www.cdjp.org/wbz/panjueshu.htm. See also "Hunger strike helps improve conditions for jailed Chinese dissident – report," *Agence France Presse*, January 27, 2004.
21 "US resident jailed in China threatens hunger strike," *BBC Monitoring International Reports*, December 11, 2003.
22 Congressional-Executive Committee on China, *The Execution of Dobsang Dondrub and Tenzin Deleg: The Law, the Courts and the Debate on Legality*, released February 10, 2003: www.cecc.gov/pages/news/lobsang.php.
23 State Department Report, *supra* note 7.
24 Information Office of the State Council of China, *2004 White Paper: Progress in China's Human Rights Cause in 2003*, Beijing, China, released March 30, 2004 (hereinafter, *2004 White Paper*).
25 For a more extensive discussion, see Randall Peerenboom, *China's Long March toward Rule of Law*, Cambridge and New York: Cambridge University Press, 2002 (hereinafter, *China's Long March*), pp. 91–101.
26 State Department Report, *supra* note 7, p. 21.
27 *Ibid.*
28 *Ibid.* China forbids hate speech. Articles 149 and 250 of the Criminal Law prohibit "incitement of national enmity or discrimination" by any organization or individual.
29 State Department Report, *supra* note 7, p. 22.
30 "Rare sentence reduction for leading Uighur activist in China," *Agence France Presse*, March 3, 2004.
31 Information Office of the State Council of China, "The Chinese people have gained extensive political rights," in *Human Rights in China*, Beijing, released in November 1999: www.china.org.cn/e-white/7/7-II.htm.
32 Changchun Intermediate Court, *Luo Yongzhong Inciting Subversion Case*, Changchun Intermediate Court Judgment, October 14, 2003: 171.64.233.179/articles/luo/luo001.htm.
33 Anshan Intermediate Court, *Wang Zechen Ssubversion Case*, Anshan Intermediate Court Judgment, September 4, 2002: www.bignews.org/20020904.txt.

34 See, for example, "Reporters without borders concerned about health of cyberdissident He Depu," *Reporters without Borders*, March 2, 2004 (reporting He, in ill health, might not be able to survive the eight-year jail term): www.rsf.org/article.php3?id_article=8475.
35 Beijing First Intermediate Court, *Judgment of the Yang Zili, Xu Wei, Jin Haike, Zhang Honghai* case, Beijing, May 28, 2003: www.peacehall.com/news/gb/china/2004/01/200401311031.shtml.
36 His statement is available at: www.peacehall.com/news/gb/china/2003/11/200311120832.shtml.
37 Philip Pan, "A study group is crushed in China's grip," *Washington Post*, April 23, 2004, at A01. According to news reports, the four defendants claimed that they were physically and psychologically abused while in detention. Other due process concerns involved the lengthy detention before trial and issuance of the verdict.
38 Apparently they were sent T-shirts from Hong Kong with the logo "Tiananmen Mothers." More seriously from the government's perspective, the Human Rights Commission had received a videotape of their testimony regarding their efforts to have the government reassess Tiananmen. "China releases three arrested members of 'Tiananmen Mothers'," *Agence France Press*, April 2, 2004.
39 Hu is known for his work on AIDS issues and the environment, as well as his support for the release of the "Stainless Steel Mouse" for Internet violations. "AIDS activist released after hunger strike," *South China Morning Post*, April 6, 2004.
40 See State Department Report, *supra* note 7 (a petition signed by 192 people calling for political reforms and a reassessment of Tiananmen led to the arrest on subversion charges of six of the signatories).
41 Chengdu Intermediate Court, *The judgment of the Huang Qi case*, Chengdu, China, February 23, 2003: www.peacehall.com/news/gb/china/2003/05 200305171038.shtml (in Chinese). Huang's appeal was apparently also rejected. Amnesty International, *Continuing Abuses under a New Leadership – a Summary of Human Rights Concerns*, ASA 17/035/2003, October 1, 2003, p. 8.
42 Yang Ming (of Voice of America), "Sichuan government official Li Zhen sentenced to eight years for exposing corruption on Internet," December 11, 2003: www.epochtimes.com/gb/3/12/11/n427422.htm; "BBC, Sichuan interneter Li Zhi arrested", September 24, 2003: www.peacehall.com/news/gb/china/2003/09/200309242141.shtml.
43 "Well-known anti-corruption activist An Jun sentenced to four years this morning for subversion," April 19, 2000: www.bignews.org/20000419.txt.
44 Murie Dickie, "China frees AIDS official," *Financial Times* (US edition), October 20, 2003, at 5.f.
45 *Ibid*.
46 *2004 White Paper*, *supra* note 24.
47 The court's judgment is available at: www.yecao.net/Html/20044324116-1.Html (in Chinese). While the plaintiff won the suit in that the court quashed the act to deny him employment, the court could not order the defendant to provide a job as the post had already been filled.
48 See generally State Department Report, *supra* note 7, pp. 15–16; China Information Center, "Chinese authorities issue 'ten forbiddens' to the media," April 22, 2004: www.cicus.org/news/newsdetail.php?id=2159.
49 Case report at: www.sina.com.cn, September 25, 2003 (in Chinese).
50 Human Rights Watch, *Human Rights Watch World Report 2003, China and Tibet*, April 1, 2004, p. 2.
51 Elaine Kurtenbach, "Chinese experts urge retrial of editors," *Associated Press*, April 9, 2004.
52 State Department Report, *supra* note 7, p. 15 (citing Committee to Protect Journalists).

53 *Ibid*.
54 Jonathan Zittrain and Benjamin Edelman, "*Internet filtering in China*," Harvard Law School Research Paper No. 62 (2003): http://ssrn.com/abstract_id=399920 (ironically, this was not accessible when I tried from Beijing on April 19, 2004).
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56 Philip P. Pan, "China releases 3 Internet writers, but convicts 1 other," *Washington Post*, December 1, 2003, p. A14.
57 "Security official confirms Chinese man arrested for internet 'subversion'," BBC Monitoring Asia Pacific, February 17, 2004.
58 "Internet dissident found guilty of subversion, but given probation," *Agence France Presse*, June 11, 2004.
59 State Department Report, *supra* note 7, p. 19.
60 See United Nations High Commissioner, *Article 19 Freedom of Expression Manual* (1993) (part 2), ch. 6: www.article19.org/docimages/811.htm.
61 Thomas Blanton, "National security and open government in the United States: beyond the balancing test," in Campbell Public Affairs Institute (ed.), *National Security and Open Government: Striking the Right Balance*, Syracuse: Campbell Public Affairs Institute, 2003, p. 59.
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63 Allen T. Cheng, "Rich poor gap among the worst, study finds; with city earnings triple rural incomes, mainland is on a par with Zimbabwe," *South China Morning Post*, February 26, 2004 (Chinese Academy of Social Sciences poll finds urban incomes 2.8 times rural incomes, although the actual gap is even greater if medical, education, and other subsidies for urban workers are included).
64 United Nations Development Program, *Human Development Report 2003*: http://hdr.undp.org/reports/global/2003/indicator/cty_f_CHN.html (hereinafter, *HDR Report 2003*) (citing survey data from 1998). Unfortunately, data reported vary by year depending on availability, with the year not clearly indicated in some cases. According to the World Bank, the Gini coefficient in 2002 was 40.3 (see Chapter 1, Table 1.7 in their volume). However, the official PRC press has reported higher numbers of 42.4 in 1996 and 45.6 to 45.8 from 1998 to 2000. "How wide is the gap of China's individual income?," *People's Daily Online* (English), August 31, 2001: english.peopledaily.com.cn/200108/31 eng20010831_78962.html.
65 "China's reforms cause dramatic widening gap between rich and poor," *Agence France Presse*, March 9, 2003.
66 Jiang Wen-ran, "Perilous prosperity shafts China's heartland," *Taipei Times*, April 20, 2004, p. 9.
67 State Council of China, 2004 Government Work Report, released March 5, 2004.
68 *2004 White Paper*, *supra* note 24.
69 *HDR Report 2003*, *supra* note 64. The *2004 White Paper*, *supra* note 24, claims that there were 108.95 million people covered by medical insurance, an increase of 14.95 million as compared with the figure at the end of 2002.
70 See China's Report to the ICESCR Committee of the Office of the United Nations High Commissioner for Human Rights, E/1990/5/add.59, March 4, 2004.
71 *HDR Report 2003*, *supra* note 64.
72 Comments by the Chinese Government on the Report on the Mission of the Special Rapporteur on the Right to Education to the People's Republic of China, E/CN.4/2004/G/16, December 11, 2003 (hereinafter, Government Comments).
73 *Ibid*. China in its report to the ICESCR Committee cited census data for 2000 showing adult literacy at 91.3 percent and literacy for those under 40 at 95.2 percent.
74 *2004 White Paper*, *supra* note 24.

75 Committee on the Elimination of Discrimination Against Women of Office of the United Nations High Commissioner for Human Rights, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: China*, 03/02/99, A/54/38, para. 257 (Concluding Observations/Comments) (citing statement from China's representative), available at: www.unhchr.ch/tbs/doc.nsf/(Symbol)/1483ffb5a2a626a980256732003e82c8?Opendocument.
76 *2004 White Paper*, *supra* note 24.
77 *Ibid.*
78 Government Comments, *supra* note 72.
79 United Nations Special Rapporteur on the Right to Education, E/CN.4/2004/45/Add.
80 Government Comments, *supra* note 72.
81 See Supreme People's Court of China, *Supreme Court Reply, No. 25*, August 15, 2001.
82 Wang Lei, *Xuanzi Xianfa* [To Choose Constitutional Law], Beijing: Peking University Legal Press, 2003, pp. 61–7.
83 For details, see Yu Meisun, "Cong Jiaoyubu Dang Beigao de Liangan, Kan Zhaosheng Zhidu Chuangxin de Poqiexing" [On the Exigency of Renovating the College Recruiting System, Judging From the Two Cases Where the Ministry of Education is the Defendant], Epochtimes.com, April 23, 2004: www.epochtimes.com/gb/4/4/23/n519496.htm (also reporting another case where a student, who did not meet the requirements to take the graduate student exam but was nevertheless permitted to do so, was rejected by the Chinese Academy of Social Sciences even though others who did not meet the minimal score were admitted; after losing in administrative reconsideration and in both the Beijing Intermediate and High Courts, the student took his case to the Supreme Court, where it is pending).
84 As of 1998, there are five autonomous regions, 30 autonomous prefectures and 120 autonomous counties, and 1,256 ethnic townships. Among the 55 ethnic minorities, 44 have their own autonomous areas, with a population of 75 percent of the total of the ethnic minorities and an area of 64 percent of the area of the whole country. Information Office of the State Council of China, "Chapter III Regional autonomy for ethnic minorities," in *National Minorities Policy and Its Practice in China*, released June 2000: www1.china.org.cn/e-white/4/4.3.htm.
85 Maurice Glèlè-Ahanhanzo (Special Rapporteur), *Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, E/CN.4/2002/24, February 13, 2002: www.hri.ca/fortherecord2002/documentation/commission/e-cn4-2002-24.htm.
86 *2004 White Paper*, *supra* note 24.
87 See State Department Report, *supra* note 7, p. 45 (citing complaints that of 38,000 people hired to work on the Qinghai–Tibet railroad, only 6000 were Tibetans).
88 See Mackerras, *supra* note 15.
89 See Barry Sautman, "'Cultural Genocide' and Tibet," *Texas International Law Journal*, vol. 38, 2003, pp. 173–247.
90 Information Office of the State Council of China, "II. Tibet's modernization achievements," in *Tibet's March Toward Modernization*, released in November 2001: www.china.org.cn/e-white/20011108/3.htm.
91 Government Comments, *supra* note 72.
92 Information Office of the State Council of China, "VI. Progress in education, science and technology, culture and health work," in *History and Development of Xinjiang*, released in May 2003: www.china.org.cn/e-white/20030526/6.htm.
93 Committee on the Elimination of Discrimination of the Office of the United Nations High Commissioner for Human Rights, *Concluding Observations of the*

Committee on the Elimination of Racial Discrimination: China, 09/08/2001. A/56/18, paras. 231–55 September 8, 2001.

94 State Department Report, *supra* note 7. However, other reports suggest that schools run by religious organizations are tolerated in some cases.

95 See Philip Pettit, "Is criminal justice politically feasible?," *Buffalo Criminal Law Review*, vol. 5, 2002, pp. 427–50.

96 See Table 1.10, chapter 1 in this volume.

97 Cultural factors are evident in women's issues, including domestic violence, the rights of the child, female infanticide and the preference for male children, the reliance on the family to pick up the slack left by a poor state welfare system, and in preferences for group over individual interests across a range of issues.

98 For a more extensive discussion of the views of statist socialists, neo-authoritarians, communitarians and liberal democrats regarding politics, the economy, rights, and rule of law, see *China's Long March*, *supra* note 25. I also include polling data that demonstrates the existence and strength of these viewpoints on a number of issues.

99 While Party intervention has declined, judges continue to receive pressure from a variety of other sources, including local government officials, people's congresses and members of society who have an interest in the case and connections within the court. *Ibid*.

100 2004 State Department Report, *supra* note 7, p. 10 (citing the All China Lawyers' Association).

15 Evolving concepts of human rights in Vietnam

John Gillespie

Introduction

Discussions about human rights in Vietnam appear polarized. External critics and internal dissidents depict a monolithic state that tightly manages its citizens' rights. The state vigorously rejects this portrayal and stresses instead the collective benefits of national independence, social reforms and increasing prosperity. The gulf separating these accounts suggests fundamentally different ways of conceptualizing the role of the state in securing social benefits for its citizens. But a closer examination reveals a more complex dynamic in which the state is progressively moving towards a rights-based approach to human rights. This chapter aims to move beyond an examination of the inevitable contradictions between constitutional declarations of human rights and conditions on the ground. Instead it focuses on the political, economic and social forces changing the way human rights are perceived and enforced in Vietnam.

Constructing a political morality

Chinese political–moral system

Discourse on contemporary rights in Vietnam draws from myriad influences: Chinese, French colonial, socialist, contemporary East Asian and Western. Yet China provided much of the moral, political and legal thinking which underlie attitudes towards human rights in contemporary Vietnam. Chinese political–moral thought came to Vietnam with the invading Han Dynasty armies in 111 BC.[1] Following independence, Vietnamese rulers promoted Chinese teachings about the "reduction of religions into the same source" (*tam giao dong nguyen*), which syncretically blended Confucianism, Mahayana Buddhism and Taoism.[2] Local experimentation with legalism (*phap tri*), which rulers considered more suitable than humanistic moral persuasion (*duc tri*), slowed during the Lê Dynasty (1428–1788). By this time sinophilic mandarins had convinced the emperors that Chinese morality and institutions were complex and interrelated, and tinkering with established practices carried the risk of system failure.[3]

Reflecting this moral reorientation, many provisions in the *Lê Trieu Hinh Luat* (Lê Penal Code) were either borrowed directly from, or were substantially influenced by the Chinese Tang and Ming Codes.[4] Even so, the Lê Code contained numerous articles regulating civil relationships not found in Chinese legal texts, such as compensating landowners for unauthorized government appropriation, private encroachment and fraudulent sales. The code also adjusted gender rights to preserve the higher status enjoyed by women in Vietnamese society.[5]

Buddhist teachings emphasizing spiritual liberation through ethical conduct and discipline counteracted Confucian hierarchical values promoted by the state. The Buddhist vision of human entitlements encouraged the mutually reinforcing concepts of *kuruna* (compassion, love) and *prajna* (absolute knowledge). Following Mahayana principles that linked self-enlightenment and a commitment to emancipating others from injustice, Vietnamese monks actively proselytized Buddhist values in Vietnamese social and political life. Especially at the village level, the people were adept at juggling two different sets of values. Confucian values stressed social duties, hierarchies and obligations, whereas Buddhism and Taoism emphasized individual integrity and social equality.

French colonial legalism

For almost ninety years (1867–1954), French colonialists imported Western rights-based law and political morality into Vietnam.[6] By the early twentieth century, Vietnamese intellectuals were familiar with the works of Voltaire, Montesquieu and Rousseau. Nationalists, like Phan Boi Chau and Phan Chu Trinh, enlisted borrowed notions regarding "the right to life and freedom" in the anti-colonial struggle. Both believed in universal inalienable human rights.

Contradictions between the harsh implementation of colonial law and its lofty idealism (liberty, equality and fraternity) also excited radical opposition to rights-based thinking.[7] Socialist leaders rejected French human rights discourse as hypocritical.[8] They discarded inalienable human rights in favour of the Marxist-Leninist view that rights are contingent on class background, revolutionary contributions and prevailing economic conditions (the base–superstructure metaphor). Ho Chi Minh syllogistically argued that colonization was an abuse of human rights and since the independent revolutionary government opposed colonization, the Democratic Republic of Vietnam (DRV) under the leadership of the party was the ultimate attainment of human rights.

Socialist period

On gaining power, party leaders conflated selected Confucian and Marxist-Leninist principles into a revolutionary morality. Convergence between

Confucian and socialist ideals occurred in three main areas: public needs were exalted over individual interests; rulers were invested with a moral obligation to lead society; and law was treated as a tool to maintain social order. Party leaders used these frames of reference to present socialist values in a familiar Confucian context – new wine in old bottles.

In socialist theory the distribution of material benefits was determined by social need. In practice, social prestige determined by loyalty to the party influenced access to privileges. At the village level, party relationships were mediated by longstanding clan and familial relations and mystical beliefs that worldly success came to those who harnessed external forces by practising rituals and achieving *chinh nhgia* (exclusive righteousness).

Following *doi moi* (renovation) reforms in 1986, the state more frequently engages in human rights discourse. Human rights are usually equated with collective social entitlements and obligations and national independence.[9] Party commentators write that "any Vietnamese can see the organic relationship between human rights and national sovereignty, without national sovereignty, there will be no human rights".[10]

Legal reforms ensure that human rights are not only framed in moral and nationalistic terms. During the Sixth Party Congress in 1986 the party agreed that "management of the country should be performed through laws rather than moral concepts". The law-based-state (*nha nuoc phap quyen*) doctrine, which was introduced in the 1992 Constitution, promotes the use of law rather than moral values to regulate society.[11] Although law remains merely one means of implementing party policy, a side effect of developing a law-based state has been a growing awareness that law defines state–society relationships, including human rights.

The legal hierarchy in Vietnam consists of codes, laws (*luat*), ordinances and resolutions issued by the National Assembly and decrees, decisions and circulars promulgated by government agencies. According to the Constitution 1992 and Law on the Promulgation of Legal Documents 1996, superior legislation passed by the National Assembly requires subordinate legislation to become legally active.

The relationship between party and state is complicated by the party's dual roles. In some circumstances the party functions as a type of political bureaucracy that formulates policy for the state. In this manifestation the party is functionally separate from, and frequently competes with state institutions. In revolutionary mode the party functions like a mass organization infiltrating, managing and controlling state institutions. In this guise, the party uses the state as a tool to manage society.

Though falling well short of a "rule of law" notion that citizens can harness law to constrain state action, the party is slowly incorporating rights-based notions into human rights discourse.[12] For example, the state has ratified some of the major international human rights conventions and is contemplating joining the rigorous Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984.[13]

By enhancing the role of law in society, *doi moi* reforms have enlivened both the perception and practice of human rights in Vietnam, but contemporary discourse about human rights reflects ongoing tensions between moral and legal conceptions of human rights.

Constitutional representations of civil rights

Everywhere the balance between private rights and broader social needs is contentious. Marxist-Leninist doctrine expects individuals to subordinate private interests to the overarching needs of the state and national harmony (*hoa hop dan toc*). But even during the orthodox socialist period (1954–1986) the Vietnamese state needed to reconcile socio-political objectives with individual needs. In the mixed-market economy the state is increasingly using rights-based language to balance the public good against individual civil, political and economic rights.

Signs of tensions between state and private interests were muted in the 1946 Constitution. Reminiscent of places with liberal democratic constitutions, this document guaranteed basic rights such as freedom of the press, speech, assembly, religion and travel, together with freedom from discrimination based on race, religion and gender. The socialist project was more explicitly articulated in the 1959 Constitution. Although the same basic individual rights were protected, it also evinced the influence of socialist political morality. Article 38 declared, for example, that "the state forbids any person from using democratic freedoms to the detriment of the interests of the state and of the people". Vietnamese legal writers observed that local conditions were not remotely receptive to rights-based state–society relationships, especially at a time when the nation was preparing for war with the south.[14]

Following reunification in 1975, the 1980 Constitution borrowed deeply from the 1977 Soviet Constitution. Both constitutions, for example, used similar words to describe the communist party as the "only force leading state and society" and the Vietnamese state structure closely mirrored Soviet institutional arrangements. But the moral tone of Vietnamese rule is evident in a speech about the constitution made by Truong Chinh to the National Assembly (NA):[15]

> The essence of this relationship is that the citizens' rights are inseparable from their duties. As the citizens have their rights, they must perform their duties. In return as they perform their duties, they are entitled to the rights ensured by the state.

Some NA delegates argued that in qualifying civil rights in the constitution with provisions such as "according to law" and "in conformity with the interests of socialism and the people", the state "gave with one hand and took with another".[16] Party leaders dismissed their concerns on the grounds that limitations are necessary to prevent "enemies and bad elements" from

"using civil rights to harm socialism".[17] In the revolutionary environment preceding *doi moi* reforms, the mere articulation of private rights was considered bourgeois individualism and contrary to socialist principles.

This debate resurfaced in discussions concerning the 1992 Constitution. Emboldened by the party's adoption of the law-based state doctrine, deputies observed that basic civil rights guaranteed in the 1980 Constitution were not observed in everyday practice. They argued for a general constitutional guarantee of human rights without legal qualifications and social obligations. The third draft of the constitution reflected their concerns and provided that "all human rights are respected and protected". In the final draft the general guarantee was qualified by the statement that "human rights in the political, civil, economic, cultural and social fields" are limited to rights stipulated in the constitution and law (Article 50). Article 51 reaffirmed the longstanding political morality by making "the rights of citizens inseparable from their obligations". In sum, civil rights must conform to state-sponsored socio-political objectives.

Freedom of assembly

In pre-colonial Vietnam, imperial law permitted public assembly for authorized purposes such as social occasions (e.g. weddings and funerals) and licensed associations (e.g. religious ceremonies and trade associations (*phuong*)).[18] Other gatherings required single-purpose licences and unauthorized meetings were severely punished.[19] French colonial authorities continued pre-colonial controls over village associations, but licences were required for meetings of over twenty people in urban centres.

After independence, guarantees of "freedom of association" in the 1946 and 1959 Constitutions were qualified in the 1980 Constitution by the proviso that rights must not be "misused to violate the interests of the state and people". Constitutional provisions do not, however, disclose the Leninist-managerial structures used to control spontaneous association in Vietnam.

Public association is only permitted for state-sanctioned purposes. Based on the collective mastery (*lam chu tap the*) doctrine, for decades the state mobilized the masses to build a *Dai Doan Ket* (Great Unity) among the classes. Popular participation in the "Great Unity" was (and still is) secured by co-opting spontaneous association into mass organizations controlled by the Fatherland Front (*Mat Tran To Quoc*). These bodies represent people according to age (e.g. Youth League and Senior Citizen Organizations), gender (e.g. Women's Union), industries (e.g. Bankers' Association), workers (e.g. Vietnam Federation of Trade Unions (VCTU)), employers (e.g. Union of Associations of Industry and Commerce (UAIC)) and farmers (e.g. Peasant Associations).

Following *doi moi* reforms, the party cautiously granted selected social organizations, especially entrepreneurs, more autonomy from direct party supervision. Carlyle Thayer wrote "Vietnam's market reforms have not only

given birth to a legalized private sector, but have led to the revitalization of groups and associations formed as a result of local initiatives. With the exception of groups which have attempted to engage in overtly political activity, state authority has generally tolerated – if not encouraged – the activities of revitalized organizations and newly formed associations".[20] These changes were reflected in the 1992 Constitution, which went further than its predecessors in granting rights to "assemble, form associations and hold demonstrations in accordance with the provisions of the law".

After years of debate and numerous redrafts, Decree No. 88 ND-CP Providing for the Organization, Operation and Management of Associations was passed in 2003. The Decree attempts to reconcile the need for associations that promote economic and social development against concerns that associations may organize opposition to party and state policies. Article 4 of the Decree rather nebulously instructs state institutions to "make favourable conditions enabling associations to operate efficiently in accordance with their character". This vague exhortation is followed by numerous articles giving state agencies discretionary powers to proactively manage associations. For example, the Interior Ministry is invested with discretionary powers to license associations, change association charters, guide their *nghiep vu* (operating skills) and appraise association office bearers (Articles 15, 34). Associations, moreover, require permission to hold meetings, operate in new localities and receive financial assistance from domestic and international sources (other than subscriptions from members) (Articles 23, 34).

The emphasis on state management (*quyen ly nha nuoc*) reflects official policy that does not recognize an inherent civil right to associate. Without such rights, individuals must either join a mass organization or state-approved association to form religious, workplace, recreational and professional bodies. It is a criminal offence to organize unauthorized gatherings.

In practice the state exercises its extensive powers over associations liberally. Unauthorized gatherings, even demonstrations, are occasionally tolerated. With the notable exceptions of political and religious organizations, the state is permitting an increasingly diverse group of associations to flourish. World Values Survey data show that Vietnamese are more likely to belong to mass-organizations and associations (2.33 groups), than Chinese (0.91 groups) and Japanese (1.41 groups).[21] These findings undoubtedly reflect government efforts to engage citizens in "Great Unity" projects, but they also show that the state tolerates many forms of social organization. As the following discussion reveals, the state is less tolerant towards associations advocating views that directly challenge party and state power.

Religious freedom

For centuries, Vietnamese culture has proved receptive to religious influence. The "reduction of religions into the same source" (*tam giao dong nguyen*) syncretically blended Confucianism, Buddhism and Taoism with

local Vietnamese spirit cults. Vietnamese in the Mekong Delta absorbed Khmer deities into their religious life during the nineteenth and twentieth centuries.[22] Catholicism introduced by Jesuit missionaries during the sixteenth century was initially tolerated as a new source of religious inspiration. Later, as French colonial aspirations became more apparent, Vietnamese rulers began vigorously suppressing the religion of their enemy.[23]

Revolutionary leaders believed in the power of secularism to transform and modernize Vietnamese society. They criticized organized religions for lacking ethical relevance, inspiring fatalism and supporting ruling elites and found ethical renewal in Marxist-Leninism. A "new-democracy culture" based on Soviet secular culture was supposed to link the working classes in different countries. National cultural and religious barriers were expected to dissolve in the face of this unifying force.

Party leaders initially moderated their theoretical opposition to religions to gain support from influential religious leaders in the anti-colonial struggle.[24] The 1946 and 1959 Constitutions permitted "citizens to enjoy freedom of worship and rights to practise or not to practise religion". But by the 1960s toleration gave way to the belief articulated in Circular No. 60 TTg of 1964 that "freedom of belief is closely associated with national independence and people's democracy".

Official attitudes to religious expression softened after reunification in 1975.[25] Even so the link between political and religious aspirations was formalized in the 1980 Constitution, which provided that "no one may misuse religions to violate states laws or policies" (Article 68). The 1992 Constitution repeated this qualification.

Unravelling the legal standing of Article 70 of the 1992 Constitution

It is unclear what the qualification "misuse of beliefs and religions" means. Some clarification is provided by Politburo Resolution No. 24 on Religious Work 1990, which provides:[26]

> [T]hose religious sects and organizations that find deep attachment to the nation in their religious practices, which have guiding purposes and charters that are compatible with state laws and have appropriate organizational apparatus to ensure both the religious and non-religious activities shall be allowed by the state.

Resolution No. 24 marked a significant break from previous policies in recognizing the valuable contribution religions make to Vietnamese spiritual life, especially "ancestral worship and veneration for people with meritorious service to the Fatherland". It also established three ground rules for religious expression: compatibility with "Great Unity" objectives, compliance with the law, and organizational structures capable of "managing" (*quyen ly*) members.

Politburo Resolution No. 37 CT/TW issued 2 July 1998 directed the state to enact a legislative framework providing "detailed provisions and guidance on the activities of religious orders and associations". In response, the government enacted Decree No. 26 ND-CP on Religious Activities 1999. The decree regulates core aspects of religious life as follows:

- Religious orders require official permission to organize and function. These provisions ensure that only religious associations under the Fatherland Front are allowed to represent religious denominations.
- Religious organizations require annual licences to teach and conduct rituals and services, while religious conferences, retreats and "mediation sessions" are licensed on a case-by-case basis.
- The printing, publishing and importing of "religious cultural articles" are regulated by the state.
- Fund-raising and charitable work conducted by religious organizations requires state approval.
- The Government Religion Commission together with the Ministry of Education license both the students and the curricula taught at religious training centres.
- Contact between religious organizations and foreigners require state approval.
- Religious activities that do not support the "Great Unity" and/or encourage "*me tin*" (superstitious) activities and "wasteful" rituals are discouraged.

These basic principles were retained and expanded in the Ordinance on Beliefs and Religions promulgated in 2004.

Patriotic religions

Most commentators agree that after decades of official disapproval and active repression the state now tolerates most forms of religious expression.[27] This shift is evident in both accounts of everyday religious practice and a growing realization among party leaders that religious values play a valuable role in combating "social evils". Ranging from increasing household observance of ancestor spirit cults to popular Buddhist pagodas and packed Catholic services, participation in religious activities is undoubtedly increasing.[28]

Changes in official attitudes are revealed in writings that ponder the contribution Confucian ethics make to economic production and social stability.[29] Some writers even posit that Catholicism, long labelled the religion of colonization, made positive contributions to Vietnamese social and intellectual traditions.

State tolerance of religious activity is predicated, however, on religions contributing to state socio-economic objectives. Religions must generate

patriotic sentiments and uphold the "Great Unity". "The criterion for appraising religions . . . is love for the Fatherland, for the Fatherland is the community including all other communities, even religious ones."[30] For example, the authorized Viet Nam Buddhist Church (VBC) (*Giao Hoi Phat Giao Viet Nam*) declares its patriotic mission with the motto "Dharma–Nation–Socialism".

*Managing (*quyen ly*) religious expression*

In addition to legislative controls, both the party and the State Committee on Religion exercise Leninist-managerial powers over religious organizations. Politburo Resolution No. 24 on Religious Work 1990 stipulated that religions should "possess an organizational structure capable of controlling its members". This is interpreted in the Ordinance on Beliefs and Religions 2004 as meaning that religious practices should take place within state-managed religious organizations. Unlicensed religious organization is prohibited. For example, as a Fatherland Front organization, the VBC receives state subsidies to represent Vietnam's Buddhist population and promote the goals of "Buddhism, Nation and Socialism".[31] In contrast, the Unified Buddhist Church of Viet Nam (UBCV) (*Giao Hoi Phat Giao Viet Nam Thong Nhat*), which formed in South Vietnam before reunification is officially discouraged from representing its members.

Different accounts about the legitimacy of the UBCV illustrate competing views of religious expression.[32] According to party sources, the UBCV leadership and other southern Buddhist groups reached consensus at the Viet Nam Buddhist Unification Congress in 1981 to amalgamate with the northern Buddhist organizations. Two UBCV leaders (Thich Huyen Quang and Tich Quang Do) subsequently reneged on the arrangement and commenced a long campaign for the restoration of the UBCV's independence.

The UBCV leadership, on the other hand, says they refused to participate in the merger when it became apparent that the purpose of the congress was to bring southern Buddhist associations under the Fatherland Front. Both sides agree, however, that there are few doctrinal and spiritual differences between the organizations. The dispute primarily concerns attempts by the state to control the political orientation of Buddhist associations.[33]

The state's management of Catholic organizations follows a similar pattern. The state established the Solidarity Committee of Patriotic Vietnamese Catholics (SCPVC) in 1955 as a Fatherland Front organization. The Committee guided Catholic opinion and provided a rallying point for patriotic Catholics. As the official mass organization representing Catholics, the committee exercises a veto over the ordination of clergy endorsed by the Vatican.[34] This was most recently exercised when the committee refused to recognize the Vatican's appointment of Archbishop Jean-Baptiste Pham Minh Man as a cardinal.[35]

State authorities have used Decree No. 26 1999 (similar provisions appear in the Ordinance on Beliefs and Religions 2004) to limit certain religious activities, especially the social justice campaigns conducted by Catholics. Local authorities have refused permission to appoint parish priests or build new churches. Extensive church properties appropriated by the state have not been returned for religious use and little new land is made available to construct new churches. Catholics believe the state is limiting the number of students at seminaries in order to restrict the religion from expanding.[36] More generally though, most forms of religious practice are permitted.

The closest the state comes to prohibiting religious worship in its own right, is its objection to some forms of spirit worship. Article 30 of the constitution proscribes "superstitions and harmful customs". The term "*me tin*" (superstition) is not defined in the Ordinance on Beliefs and Religions 2004, though "belief activities" defined in the ordinance encompases the worship of deities, saints, idols and "folk beliefs". Article 247 of the Criminal Code 1999 links "*me tin*" to spiritual mediums, or those pursuing other superstitious practices. For example, the leaders of the *Long Hoa Di Lac* (Chinese Dragon Buddha Sect), a designated "superstitious" cult, were charged in 2001 with unlawful assembly under the Criminal Code. While members of the *Tam Giao Tuyen Duong* sect, another religious cult, were forced to destroy altars and pledge to abandon the sect.[37] Authorities in these cases appeared more concerned with minimizing civil disturbances and controlling unauthorized organizations than with opposing spiritual beliefs. Authorities routinely permit well-organized pilgrimages to worship goddess cults and spirits conducted by licensed religious associations such as the *Cao Dai* and *Hoa Hao*.

In summary, freedom of religion in Vietnam is qualified by loyalty to the Fatherland and party. Although the state is increasingly using laws to regulate religious activities, it continues to exercise broad "state management" powers to control the formation of religious organizations, select office bearers, and to a lesser extent determine religious doctrine.

Evidence suggests that state officials are primarily concerned with religious activities that excite opposition to party policies, but otherwise tolerate a wide diversity of religious views and practices. For example, the state routinely controls unregistered Catholic and Buddhist organizations and vigorously suppresses *Tin Lanh* (Good News) evangelical churches, because of their perceived association with political unrest in the central highlands. Vietnamese authorities believe their treatment of religions is consistent with provisions in the International Convention on Religious Freedom that permit states to prohibit religious activities that infringe "political security and social order".[38] Foreign based non-government organizations and the US State Department counter that proactive "state management" of religious association of itself constitutes a treaty violation, because it is not proportionate to perceived threats to state security and order.

Free speech

Once the Lê Emperors declared Confucianism the state religion in the fifteenth century, freedom of thought and speech increasingly came under state control.[39] Confucian moral principles became the central organizing principles of political and social life and writings, public discussions and petitions questioning the prestige and moral authority of the emperor and senior mandarins were criminalized.

French colonial ideology promised liberal democratic pluralism, but instead delivered political censorship. The law required every publication to have a French citizen as *gerant* (or director).[40] Government officials jailed journalists who used publications to support anti-colonialism. But the sheer number of publications, exceeding one hundred by the 1940s, made comprehensive political censorship almost impossible. Anti-colonial groups, especially precursors of the Communist Party, exploited legal loopholes to promulgate their message through journals such as *Tien Phong* (the Avant-garde) and *Dan Chung* (the People).

Having witnessed the capacity of the media to undermine colonial authority, on gaining power, party intellectuals insisted that public expression should promote party socio-political objectives. Despite guarantees of freedom of speech in the 1946 Constitution, writers and intellectuals opposing party orthodoxies were imprisoned in purges conducted in 1956 and 1957.[41] During this period publishing houses were nationalized and the number of daily newspapers was reduced to just two outlets controlled by party propaganda units (*ban tuyen huan*).

Following *doi moi* reforms, the party reasoned that a media geared to ideological dissemination could not communicate the knowledge required to modernize society.[42] In 1987 the Politburo issued a resolution to "renovate and enhance leadership and management and develop creative power in literature, arts and culture". The resolution excited a rapid change in media content and control. Mass organizations, ministries, local governments and state-owned enterprise began publishing newspapers, magazines and newsletters to inform their constituents.[43]

Legal controls over the media

The Press Law 1989 (amended in 1999) reveals tensions between orthodox Marxist-Leninists' views that the media is the party's mouthpiece, and the economic and social need for diverse sources of information. It applies to all forms of media, not just printed media. Article 1 describes the role of the press as disseminating information essential to social life and "constituting the voice of the party, state and mass-organizations". The law requires reports to not only be true, but to also "conform to the interests of the state and the people". According to party ideology, "the truth is something which is in the interest of the country and people. What runs counter to the interests

of the country and the people is not the truth".[44] For this reason, the press is encouraged to report positive news that shows "good examples" and combats "negative social phenomena". Article 4 gives citizens rights to access domestic and world news, submit articles to the press, and "express opinions on the formulation and implementation of party directions and polices and the law". Finally, publications are required to balance two occasionally conflicting duties: one, to disseminate and popularize party policies, and two, to reflect and guide public opinion (Article 6).

Most editors believe their primary duty is to inform the public. Books and articles offering technical information (e.g. how to repair computers and decorate rooms), along with local and foreign fictional writings, are available, and foreign news items appear in books, magazines, newspapers and television. More significantly, articles reflecting a diversity of views about party and state policy have filled newspaper space that until the mid-1980s was exclusively devoted to political commentary. Intense competition among the media has improved publication and writing standards. Journalists compete for breaking news and stories that expose new social problems. Many newspapers give citizens a public voice, by carrying "letters to the editor" sections and *Dien Dan* (Forum) sections in which selected topics are discussed and editorialized.

Cong An Thanh Pho Ho Chi Minh (Ho Chi Minh City Police) has become the nation's largest selling daily newspaper by serving readers gruesome and perverse crime stories. Even newspapers with serious pretensions run sensationalist articles about the private lives of fashion models, movie actors and other non-political public figures.[45] Clearly circulation is on the minds of most editors. Party leaders blame commercialization for "lowering one's cultural characteristics by heeding the vulgar instincts of a portion of the public for the purposes of boosting sales, thus causing tremendous harm to traditional culture".[46]

Reporters have used provisions in the Press Law to gain sensitive information from state officials and to protect sources from investigation.[47] *Cong An Thanh Pho Ho Chi Minh* reporters convinced police, who were evicting residents to make way for an urban development, that journalists are lawfully entitled to gather information.[48] Other reporters have exposed corruption in government and business circles. For example, *Troi Tre* (Youth) and *The Anh Ninh The Gioi* (The World Security Magazine) published many articles alleging large-scale corruption by Tran Minh Phung, a well-connected Ho Chi Minh businessman.[49]

Controlling media content: censorship

Despite increased media diversity and public access, the guarantee in the Press Law that individual opinions can be expressed without censorship remains unrealized. State management over media content is maintained through four lines of control. First, party and state *co quan chu quan* (supervisory

organizations) own and control all media outlets. NA delegates voted overwhelming in 1999 to maintain state ownership over media, book publication and distribution.[50] The state controls electronic media by jamming politically offensive radio broadcasts and prohibiting private ownership of television satellite dishes.[51]

Second, party control over media content is secured by the careful recruitment of chief editors and directors by the party's *Ban Van Hoa Tu Tuong* (Culture and Ideology Commission (CIC)).

Third, the CIC and the *Bo Van Hoa Thong Tin* (Ministry of Culture and Information) use Leninist-managerial powers to control the media. These bodies have overlapping jurisdictions, but the CIC has more authority over content than the ministry, which is primarily concerned with procedural issues such as issuing publication permits and punishing criminal and administrative infractions.

Editors and directors are required to attend weekly meetings where CIC officials explain party policies and lines. According to Le Kha Phieu, a former party secretary general, "the press are the shock troops on the ideological and cultural front".[52] Party-sponsored values include "ardent patriotism, national self-reliance", together with social values such as "high esteem for sentimental links, morality and families".

Censorship controls reflect changing nuances in state policy. Economic discourse in particular is now much more robust than in the past. For example, the *Chinh Tri Quoc Gia* (National Politics Publishing House) in Hanoi translated and published a study of Vietnamese economic development authored by Adam Fforde and Stefan de Vylder entitled "From plan to market".[53] Rather than following past practices and deleting sections that "did not conform to Vietnamese attitudes", the authorities permitted the publishers to insert text or footnotes to correct perceived errors and omissions. The only sections entirely omitted referred unflatteringly to past Vietnamese leaders and to limits imposed on citizens' rights to travel and meet foreigners.

Authorities struggle to censor press reports. Pre-publication guidelines are vague and vary considerably among media outlets and from province to province.[54] This allows, for example, the conservative *Nhan Dan* (the People) to interpret the general prohibition against discussing multiparty democracy more restrictively than the adventurous *Tuoi Tre* (Youth) in Ho Chi Minh City. Journalists ascribe fragmented censorship to difficulties faced by the CIC in making Marxist-Leninist ideology relevant to contemporary conditions and the divergent interpretation of party policy in different regions.

Central supervising authorities can correct regional anomalies by ordering media outlets to stop publishing stories, publish corrections and/or apologies, and suspend or cancel publishing licences. Take for example, the Nam Cam corruption case. During 2002 some newspapers published a series of articles exposing corrupt links between Nam Cam, an organized crime boss, and state and party officials.[55] At first only middle-level officials were implicated, but as the weeks passed investigators began to charge high-level officials

including a vice-minister and member of the party's Central Committee. A month after reports first appeared, Nguyen Khoa Diem, the director of the party's Culture and Ideology Commission prohibited further coverage, telling the Ministry of Justice newspaper *Phap Luat* that "some stories have revealed internal matters of state organs, which is not allowed".[56]

Central authorities dealt more severely with *Sinh Vien Vietnam*, a weekly youth magazine. Its publishing licence was suspended for three months in 2002 by the Ministry of Culture and Information for publishing a front cover featuring naked human statuettes.[57]

Fourth, when administrative controls fail, the Criminal Code 1999 provides numerous grounds to criminalize editorial and journalistic transgressions. It is a criminal offence to undermine the implementation of state "socio-economic policies" or weaken "national unity" by inciting division among classes and religions, and provoking racial hatred (Articles 86, 87). More generally, journalists are guilty of conducting propaganda against the state where they "distort or defame" the government, "spread fabricated news" or "store and/or circulate documents and/or cultural products with contents against the state" (Article 88).

Criminal laws are most frequently used to censor political criticism and obscenity. Some criticism is permitted, even encouraged, but the media is not allowed to report sensitive political issues, such as unrest among ethnic minorities, multiparty democracy or high-level party corruption.[58] Journalist Ha Sy Phu was placed under house detention in 2001 for reporting the government's suppression of ethnic minorities in the Central Highland region. Nguyen Dinh Huy was sentenced in 1995 to fifteen years' jail for attempting to "overthrow the people's government".[59] His crime was to write a serious of articles unfavourably comparing democracy in socialist Vietnam with rule under the Republic of Vietnam.

Other state laws are used to restrict press reporting. Bureaucrats have successfully silenced critics by threatening to sue newspapers for libel. Courts routinely restrict reporting in politically sensitive trials.[60] But more importantly, vague rules governing the protection of state secrets, which cover not only military but also economic and social statistics, generate a culture of self-censorship.[61]

The Internet

Technological advances have made "state management" of information immensely more difficult. From a small base, Internet use has grown significantly to an estimated 1.5 million users in June 2003.[62] Concerned that the Press Law 1989 and Publication Law 1993 could not control seditious content on the Internet, the government in 2001 enacted Decree No. 55 ND-CP on the Management, Provision and Use of Internet Services. Duplicating provisions in the Press Law, the decree controls content, access and distribution of information. Article 5, for example, requires information stored,

transmitted and received on the Internet to comply with the Press and Publication Laws and the Ordinance on the Protection of State Secrets. Removing any lingering doubt about its purpose, Article 11 of the decree forbids "taking advantage of the Internet to oppose the state, disrupt security and order, breach ethics, customs and fine traditions and commit other legal violations".

Decree 55 of 2001 further tightened state control by investing the Department of Post and Telecommunications (DPT) with licensing and inspection powers over Internet service providers (ISPs). Responding to party criticism that the Internet was being used for sedition, the following year the Minster of Culture and Information issued Decision No. 27 QD-BVHTT in October 2002 licensing the creation of websites. All users require a licence before establishing or changing the content of websites. Internet service providers and cybercafé owners are made legally responsible for their customers' messages.[63]

Circumventing tight state controls, dissident groups inside and outside the country have used the Internet to circulate proscribed material. In January 2002 Nguyen Khac Hai, Deputy Minister for Culture and Information, ordered the police to destroy unauthorized information stored on Internet servers.[64] Later in August, the DPT suspended the website licence for TTVNonline.com, a government-owned ISP, for violating the Press Law and "twisting the truth".[65] TTVNonline.com carried a discussion group that criticized the government for ceding Vietnamese territory to China during border negotiations in December 1999. Le Chi Quang was arrested in 2002 at an Internet café in Hanoi for "conducting propaganda against the state" after circulating information condemning the same territorial concessions.[66]

In summary, although the party and state possess extensive legal and Leninist-managerial powers over free speech, they primarily use their powers to control seditious activity. Diverse political reporting is partially explained by polycentric power structures within the party and state that lead to different interpretations about the limits of free speech. This bifurcation allows determined media outlets the space to negotiate around censorship controls. In addition, reforms introducing a "law-based state" have given the media leverage to use the Press Law to investigate a wide range of state abuses and social problems. But the law has not eroded Leninist-management structures that control media content and the public's freedom of expression. The dilemma facing authorities is how to restrict anti-government comment and "cultural evils" without limiting the flow of information required for social and economic development.

Democratic processes

Vietnamese "socialist democracy" (*dan chu xa chu nghia*) draws from Lenin the conviction that popular elections do not adequately secure the people's control over the state.[67] Lenin thought that democratic rights were better

safeguarded by "proletarian dictatorship" (*chuyen chinh vo san*) in which the "ruling class" directly supervised state organs through their proxy – the Communist party and mass organizations. According to this formula the public participate in democracy through mass-organizations and the party, and enjoy representative democracy by electing representatives to the NA.

Public participation in democratic processes is guided by the principle of "centralized democracy" (*tap trung dan chu*) that authorizes the state to manage access to democratic rights. Official narratives identify four elements of "centralized democracy". First, democracy corresponds to levels of development in the economic base. As a corollary, a vigorous socialist-oriented market economy is considered "the most reliable guarantee for the process of democratization".[68] Second, also based on Marx's base–superstructure theory, democracy is closely linked to "party leadership" (*su lanh dao cua dang*) over state and society.

Third, democratization must avoid social dislocation. Stability is realized by strengthening democratic centralism and party leadership. Multiparty democracy in Vietnam "means giving the greenlight to reactionary forces in the country and abroad to rear their head lawfully and engage in activities against the Fatherland and renovation".[69] Others in the party argue that "pluralism is not necessarily a correct demonstration of democracy and one-party institutions are not necessarily a negation of pluralism".[70] Multiparty democracy and political pluralism is equated to "peaceful evolution" (*dien bien hoa binh*), that is an attempt by Vietnam's enemies to achieve through peaceful means what they could not do through force: remove the party from power.

Article 258 of the Criminal Code criminalizes acts that "take advantage of democratic rights so as to encroach upon the interests of the state or lawful interests of organizations and the community". This provision is vigorously enforced to deter those opposing party policies. Even high-ranking party officials and respected war veterans have been charged and jailed for agitating for multiparty democracy. It will be recalled that state management of associations, religions and free expression is especially vigilant in suppressing popular support for multiparty democracy.

Fourth, since the introduction of the law-based-state doctrine, Vietnam has ratified the International Covenant on Civil and Political Rights and official writings now link democratization with raising social awareness about constitutional and legal rights to vote (Article 25). "Socialist democracy" now competes in the official discourse with liberal democratic-sounding notions such as the "state is of the people, by the people, for the people", but there is no clear explanation how these seemingly incompatible positions are reconciled.[71]

State management over participatory democracy has been previously discussed in the context of "collective mastery" and popular association. Representative democracy is regulated by the Laws on the Election of Members to the NA and People's Councils. They provide that anyone over the age

of 18 can participate in universal, free, equal and direct elections. Electoral rules ensure that 90 percent of "the people" elected as NA delegates are party members.[72] For the other 10 percent, party loyalty is rarely an issue, since only "politically dependable" citizens are permitted to nominate candidates.[73] The Fatherland Front guides democracy by selecting candidates to fill predetermined class and ethnic-minority quotas.[74]

The capacity for citizens to interact with and influence delegates is limited. Delegates meet constituents in gatherings organized by mass organizations, but the range of issues discussed is evidently tightly controlled.[75] Individual voters are rarely permitted to debate concrete issues, much less voice concerns outside those contemplated in agendas. Media depictions of delegates debating voter concerns are highly orchestrated by NA officials. For example, provincial delegates involved in televised discussions about sensitive land corruption cases in April 2002 were given prominent seats to emphasize their commitment to resolving these problems.

Frustrated by the tightly controlled interaction with delegates, voters are increasingly expressing their concerns in petitions. Yet even where they are in sympathy with their constituents, delegates lack electoral offices and staff to investigate and respond to complaints.[76] Since most delegates are appointed part-time, they have insufficient time and professional skills to effectively represent voters.[77] Full-time delegates have more time to communicate with voters, but they are located in Hanoi, far from their constituents. Petitions are referred to an NA committee, which liaises directly with concerned government agencies. Only highly synthesized reports that summarize key issues are presented to NA delegates for consideration.[78]

Efforts by the state to extend socialist democracy to the "grassroots" have generated mixed results. Stunned by spontaneous village protests against land and public finance abuses, the party introduced a series of reforms designed to give citizens more control over local officials.[79] Decree No. 29 on Grass Roots Democracy (*dan chu tan goc*) in 1998 endeavoured to increase public accountability through improved procedural transparency and public forums. Disclosure and complaint procedures seemed to invest individuals, more than party collectives, with rights to take action against malfeasants. The decree sent mixed signals that the state was moving from Leninist-managerialism and "*co che xin cho*" (asking–giving) processes towards democratic rights. For example, instructions issued by the Prime Minister in 2003 guiding the implementation of Decree No. 29 1998, urged local officials to "let the people know, people discuss, people do and people monitor" (*dan biet, dan ban, dan lam va dan kiem tra*). The decree established processes allowing citizens to debate and express opinions about decisions made by communal authorities. At the same time, it also located reforms within a political structure that privileged "party leadership" over the state.[80]

Some commentators sceptically dismiss "grassroots democracy" as *su chung luat* (legal vaccinations) designed to forestall far-reaching change. They argue that the party initiated the reforms to strengthen the party apparatus by

reducing corruption and improving leadership skills. The people were given powers to recall elected officials for minor financial violations, leaving more meaningful powers to dismiss, appoint and nominate officials in the hands of local party leaders.[81]

Others believe "grassroots" democracy is cautiously shifting local state–societal relationships from personal "*co che xin cho*" connections to impersonal democratic process.[82] Studies show that people believe they know more about the work of local commune offices today than ten years ago, but still do not feel they can influence official decisions.

Given its political sensitivity, popular support for democracy is difficult to gauge accurately. Results from the World Values Survey conducted in Vietnam provide a complex picture.[83] Over 90 percent of the interlocutors declared their confidence in the government, NA and party. Even more were satisfied with the current political system. People belonging to marginalized religious and public interests groups showed slightly more enthusiasm for democratic reforms than members of party-controlled mass organizations. But it was unclear from the survey whether interlocutors were responding to the same concept of democracy.

Other researchers have found little popular support for democratic reforms. Martin Gainsborough, for example, argues that people attempt to effect change through personal contacts with party and state bodies, rather than agitating for systemic democratic reforms.[84]

Protecting personal freedoms

Citizens' basic rights to due process such as the presumption of innocence and arrest warrants were introduced in the Criminal Code 1986. Personal rights were counterbalanced, however, by vaguely worded provisions protecting "national security". These provisions imposed lengthy custodial sentences, and even the death penalty, for political and economic crimes such as "sowing division among social strata" or "using propaganda to undermine the people's power" (Articles 81, 82). Basic personal freedoms such as the prohibition against torture and imprisonment without trial were entrenched in the 1992 Constitution (Articles 71 and 72). The 1999 Criminal Code abrogated socialist economic crimes, such as speculation and interfering with socialist property, without fundamentally changing socialist era state security crimes.

The Politburo initiated a fresh cycle of criminal law reforms in 2002. Resolution No. 8 NQ-TW on Forthcoming Principal Judicial Tasks 2002 is notable not only for reconfirming that courts must follow party policies and defend the state interest, but also for directing judges and procurators to guarantee citizens equal treatment before the law and objectively resolve cases on their merits after testing evidence. Some commentators believe that the party increasingly aims to generate legitimacy by projecting an image of due process in the criminal justice system.[85]

Movement towards more robust state protection for personal freedoms is also suggested by NA debates in 2003 about the draft Criminal Procedure Code. Some delegates argued that a balance was required between state investigation powers and citizens' rights to personal freedoms.[86] A high level of public dissatisfaction about unlawful arrests and court decisions can be inferred from the numerous petitions sent to the NA and media reports about procedural irregularities.

The Criminal Procedure Code 2003 has clarified rules prohibiting unlawful arrest and detention, and now gives lawyers access to their clients before prosecutions commence. Evidence suggests that early intervention by lawyers is a significant improvement, because most personal abuses occurred during the initial stages of investigation when police extracted confessions from suspects.[87] For the first time, people charged with minor offences can apply for bail pending trial (Article 93). More importantly, the code has introduced a modest adversarial process giving defence lawyers equal rights with prosecutors to admit evidence, examine witnesses and present legal arguments.

Investigation powers are also amply supported by the code. Suspects can be held without charge for twenty-four hours, but this initial period is easily extended to three or nine days by investigating agencies. Lawyer–client confidentiality is not protected and lawyers are compelled to disclose all evidence gathered during the pre-trial period (Article 58). In sensitive cases, a concept that is not defined in the code, prosecutors can refuse to allow lawyers to consult with the accused.

There are two other areas where the law gives officials scope to compromise personal freedoms. First, Decree No. 31 Issuing Regulations on Administrative Prohibitions 1997 gives local authorities broad powers to fine, place under house arrest or imprison those accused of offences against national security (Articles 1, 2 and 5). The decree takes its definition of offences against "national security" from the Criminal Code, but does not distinguish between criminal and non-criminal infractions. Treason, attempts to overthrow the state and terrorism are always criminal in nature, but it is unclear whether administrative penalties apply to other offences such as "opposing the government", or "undermining socioeconomic policies or national unity". The distinction is important because due process protections for criminal violations, such as no arrest without a warrant or imprisonment without a trial, do not apply to administrative infractions. Although reports from the Peoples' Procuracy suggest that Decree No. 31 is used sparingly, it is nevertheless a potent weapon for controlling personal freedoms.[88]

Judicial review of administrative decisions is a comparatively recent initiative. By any measure judicial review has been unsuccessful.[89] Courts are only permitted to review a narrow range of administrative decisions and have limited powers to collect evidence and enforce decisions.[90] Citizens must first complain to an administrative agency before administrative courts have

jurisdiction to review decisions. But procedures for lodging petitions and complaints are complicated and frequently result in government officials reviewing their own decisions. In the eight years that the administrative courts have been operating, complainants have won less than fifty cases. Even fewer judgments have overturned official decisions.

Second, during the 1960s Vietnamese criminal law adopted the Soviet doctrine of "legal analogy" (*ap dung phap luat tuong tu*), which enabled courts to criminalize (otherwise legal) politically or socially harmful behaviour.[91] Although the Vietnamese Criminal Code 1986 followed the Soviet Criminal Code 1960 in abolishing the doctrine, criminal lawyers believe the practice continues unabated. For example, lawyers acting for Tang Minh Phung[92] thought that the Ho Chi Minh City Provincial Court applied the doctrine to overcome the procurator's failure to prove misappropriation of socialist property (Criminal Code 1986, Article 134). Their suspicions were confirmed by a textbook currently used in Vietnamese law schools that states "legal analogy" is permitted to protect revolutionary ideals of "socialist legality" and criminalize *phan cach mang* (counter-revolutionary) activities that would otherwise escape through gaps in the law.[93]

It is difficult to determine accurately the levels of derogation from the rules of criminal procedure. Reports from foreign human rights groups contend that irregularities routinely occur in sensitive political cases.[94] The recent trial of Truong Van Cam in 2003 for corruption illustrates their concerns. Since it took place after Resolution No. 8, the trial became a litmus test to assess the state's commitment to judicial reforms. The presiding judge, Bui Hoang Danh, declared the trial "public and democratic" and "in line with legal reforms".[95] Consistent with adversarial reforms, defence lawyers were permitted to argue their clients' cases in court.

Cracks in the state's resolve began to appear when Dang Van Luan, the defence counsel representing a high-ranking party official, dismissed the prosecution's case as "vague, unsubstantiated and unpersuasive" and asserted that the "police had orchestrated gangsters' testimony in prison rehearsals".[96] Both the prosecutor and Ministry of Police called on the judge to take disciplinary action against Dang Van Luan. His offence was to break the democratic centralist principle that outcomes in important criminal trials are prearranged, and defence counsels should plead for mitigation rather than fundamentally protest the innocence of their clients. The trial judge did not refer to the defence counsel's arguments when sentencing the accused.

Contrasting with the Minh Phung criminal trial conducted five years earlier, this time the chairman of the Bar Association and some media outlets were prepared to support the rights of lawyers to fully and vigorously represent their clients. Anecdotal evidence from criminal lawyers suggests that greater press scrutiny combined with more clearly defined procedural rules have improved the delivery of criminal justice for those accused of non-political crimes.

Economic rights

Party leaders have long stressed that human rights and economic development are inextricably linked. Decades before the state signed the ICESCR, Ho Chi Minh declared that "[i]f the people are hungry, it is the fault of the Party and the Government, if the people are cold, it is the fault of the Party and Government, if the people are sick, it is the fault of the Party and the Government".[97] The 1980 Constitution formalized this policy by guaranteeing citizens' rights to employment, education, housing and assistance for the aged.

Despite war damage and low economic productivity under the command economy, in the 1980s the state delivered education and health services that compared favourably with social services in wealthier South-East Asian countries.[98] Although, in principle, access to economic benefits depended on need rather than personal wealth, by 1986 less than 40 percent of manufactured goods passed through official distribution channels.[99]

Socialization policies

Following market reform in the late 1980s, citizens were encouraged to satisfy their own education, health and housing needs.[100] The 1992 Constitution codified this policy by making both the state and citizens share responsibilities for social services.[101] With the exception of revolutionary martyrs' families (*gia dinh liet si*) and war invalids (those who backed the winning side), preferential access to economic rights is now a function of wealth and personal (usually political) connections.[102]

Doi moi reforms were further refined by the Eighth Party Congress, which declared in 1996, "caring for the people is the responsibility of the whole society, each unit, each household and it is also the aim of the party, state and people". Resolution No. 90 CP on the Direction and Policy of Socialization of Education, Medical and Cultural Activities 1997 conceded that the state was unable to meet demands for social services and outlined a shift from socialist welfare to a "user-pays" system. "Socialization" (*xa hoi hoa*) of health services, for example, "encouraged people to pay for their own medical treatment rather than relying on state subsidies".[103] Socialization in the housing sector is also well advanced and public housing is now confined to high-ranking state officials and small-scale foreign funded accommodation for the very poor. Vagrancy and anti-begging laws are periodically enforced to clear homeless rural migrants from urban streets.[104] Finally, strict controls governing private investment have limited "socialization" in the education sector.[105]

Although market reforms have increased personal wealth and reduced poverty, uneven wealth distribution has exacerbated longstanding urban–rural and ethnic inequalities.[106] The Gini-coefficient for Vietnam increased from 35.6 in 1995 to 40.7 in 1999, but in comparison to most other

South-East Asian countries wealth is still evenly distributed.[107] Nevertheless, inequalities between ethnic minorities and the majority *Kinh* (ethnic Viet-speaking population) and between urban and rural areas have greatly increased.

Evidence suggests that deregulation accompanying "socialization" policies has increased rent-seeking, further widening the gap between those who can pay for social services and those who cannot. Increasing numbers of services now charge fees. It has become common practice for teachers to reveal vital information required to pass exams in fee-for-service evening classes. Deregulation in the medical sector has led to non-scheduled fees being charged for hospital beds, over-servicing and falling standards of care for the those unable to pay.[108]

Economic rights to conduct business

Once the state admitted the command economy could no longer provide for the people, policies were needed to allow the people to provide for themselves. Under the guise of a "socialist oriented" mixed-market economy, the 1992 Constitution recognized private rights to own income-producing property (means of production). Legislation now protects the contractual and property rights considered necessary for private entrepreneurial activity. Although much has been done to remove or limit "state economic management" (*quan ly nha nuoc kinh te*) over private entrepreneurs, studies suggest that officials continue to "manage" private business rights.[109] For example, Directive No. 17 CT-TTg on Further Stepping Up the Implementation of the Law on Enterprises 2002 shows that local government arrogate discretionary powers to "manage" market entry rights.

Debate continues within the party on whether the state should "*quan ly*" (manage) the economy to protect working-class interests. Contrasting with recent constitutional reforms in China, party conservatives prevented a proposed amendment to the Vietnamese Constitution in 2002 from declaring the equality of the state and private economic sectors.

Although legislation has created a rights-based transactional matrix for businesses, commercial rights are difficult to enforce horizontally against other commercial players and virtually impossible to enforce against the state. Most commercial litigation involves state-owned enterprises and to a lesser extent foreign investors. Domestic firms rarely litigate.[110] The demand for commercial litigation is also questionable, because litigation rates have remained static at a time when the private economy is growing rapidly.[111] A cultural reluctance to litigate coupled with a well-founded scepticism about the competence and impartiality of judges inhibits litigation. Compounding the problem, less then 20 percent of court judgments are enforced.

Despite procedural shortcomings, more than any other single reform, the recognition of legal rights to conduct business has improved social and economic conditions for most Vietnamese. Entrepreneurs continue to grow

in number and economic significance. Legal reforms have been less kind to those on the social periphery living in isolated rural communities and ethnic minorities (especially hill tribes and ethnic Khmer) without marketable skills and capital.

Cultural rights

According to Vietnamese demographers there are fifty-four ethnic minority groups in Vietnam comprising approximately 14 percent of the population.[112] The remaining population consists of the ethnic *Kinh*.

Vietnamese rulers have a long tradition of managing different ethnic groups. The Lê Code in the fourteenth century distinguished between people of the state or capital (*kinh*), ethnic minorities (*man lieu*) and foreign nationals (*ngoai quoc nhan*).[113] Rules governing the conflict of laws ensured that disputes among the same ethnic groups were resolved by customary rules, whereas the national law governed disputes among different ethnic groups. Ethnic minority tribal leaders were required to pay tribute, but were otherwise given considerable cultural autonomy. The Nguyen Dynasty during the nineteenth century adopted a more assimilationist approach and treated ethnic minorities as "children of the court".[114] In discussing the hill tribes and Khmer minorities, Emperor Minh Mang wrote "we must hope that their barbarian habits will be subconsciously dissipated, and they will daily become more infected by Han (Sino-Vietnamese) customs".[115] Assimilation only applied to culture; intermarriage between *Kinh* people and ethnic minorities was prohibited.

Policies adopted by French colonial authorities to protect ethnic minorities from the economically assertive *Kinh*, were ultimately more destabilizing than imperial assimilation.[116] In 1923 the French *resident superieur* of Annam (central Vietnam), encouraged hill tribes to abandon swiddening agriculture and adopt wet-rice cultivation. Introducing sedentary agriculture to hill tribes was viewed as a *mission civilisatrice* that would solve problems of malnutrition and disease. But colonial authorities opened previously remote mountains areas inhabited by the ethnic minorities to *Kinh* traders and settlers from the overcrowded lowlands.[117] They also redrew borders bringing ethnic minority tribal lands within a geopolitical space dominated by the *Kinh*.

Adopting Marxist theory that advocated ethnic autonomy, the revolutionary movement during the 1930s expressed support for "self-determination . . . all nationalities will be free to adhere to the Union of Indochinese Soviet Republics or to leave it, and the more important nationalities should not impose their will".[118] These sentiments were formalized in the 1959 Constitution, which gave ethnic minorities autonomy as a reward for their support in the anti-colonial struggle.[119] Article 3 stated:

> All the nationalities living on Vietnamese territory are equal in rights and duties. The state has the duty to maintain and develop the solidarity

> between the various nationalities. All acts of discrimination against, or oppression of any nationality, all actions which undermine the unity of the nationalities are strictly prohibited.

Autonomous regions established for twenty-four ethnic minority groups in the northern mountainous regions during the 1950s were abolished after reunification in 1981. While ethnic autonomy was quietly dropped from the 1980 Constitution, policies supporting equality, rights to culture, language, and above all else, unity among ethnic groups continued through to the 1992 Constitution.[120]

National unity

Every country with ethnic minorities experiences tensions between dominant and subordinate cultural aspirations. In Vietnam the assertion of cultural rights is circumscribed by constitutional provisions that promote an "advanced culture that is rich in national culture [*nen van hoa tien tien, dam da ban sac dan toc*]" (Article 30). National culture (*van hoa dan toc*) is based on essentualized *Kinh* traditions.[121] Like articles of faith, certain Vietnamese spiritual institutions, such as ancestral links to the mythical Lac Hong kings and Red River Delta villages, are placed within the traditional core.[122] National culture is not only an imagined political entity, but also an imagined cultural identity.

The inculcation of a "national culture" has been so successful that despite deep regional differences in language, customs, myths and artistic forms, the *Kinh* ethnic majority shares a common national identity.[123] Informed by this universal perspective, central law-makers decide which strand or representation of a culturally and ethnically diverse society receives legitimacy.[124] For example, according to Article 1 of Decision No. 124 QD-TTg Approving the Scheme on Conservation and Development of Vietnamese Ethnic Minority Group's Culture 2003, the Ministry of Culture and Information must "conserve, selectively inherit and promote traditional cultural quintessence, build and develop new values of culture and artists in ethnic groups".

In a curious twist in Marxist-Leninist logic, some academic theorists argue that ethnic minority communities are insufficiently economically advanced for socialist historical materialist conditions to apply.[125] Lacking the class divisions characteristic of mainstream *Kinh* society, they believe that ethnic minorities are still governed by inherent or "natural" customary rights. This reasoning extends ideological legitimacy to those advocating limited autonomy for ethnic minorities. Nguyen The Sang argued for example, that "all people living in mountainous areas, including soldiers and state-owned farmers should follow customary laws on forests, rivers, streams, soil and animal protection".[126] Ecological damage in mountainous areas is attributed to derogation from customary law. Similarly Le Sy Giao observed that "many primary forests that were long protected as sacred burial forests

have lost their religious meanings and are destroyed. The best solution is to rely on customary laws and legal rules".[127]

Conflicting land use rights

The greatest source of tension between *Kinh* and ethnic minorities' culture is generated by land competition. The 1992 Constitution declared that the country comes "under the ownership by the entire people" (Article 17) and the "state manages all the land" (Article 18). In practice this means that state land laws used to support lowland immigration and agricultural investment in the highlands override customary law.[128] State laws designed to promote sedentary agriculture (*van dong dinh canh dinh cu*) strike at the heart of minority cultural practices and communal relationships grounded in a swiddening agricultural economy.[129] Some Vietnamese commentators go so far as to equate the *Kinh* treatment of customary laws to French colonial disregard for *Kinh* practices.[130]

In February 2001, ethnic minorities in three Central Highland provinces protested, sometimes violently, against official and unofficial land acquisitions and other issues going back decades. Following reunification in 1975, the government sponsored transmigration of *Kinh* farmers from the lowland into the Central Highland provinces. A national land-titling programme exacerbated tensions between settlers and the indigenous population. By issuing land use rights to ethnic minority hill tribes, local officials converted large tracts of customary forestland into an alienable commodity. Reports compiled by the government suggest the land-titling reforms enabled unscrupulous lowland settlers and corrupt local officials to dispossess hill tribes people.[131]

The government responded to protests by imprisoning organizers and banning certain religious groups. But it has also significantly increased funds for economic development in the region.[132]

Ethnic minorities are given preferential access under the electoral laws to approximately 15 percent of the seats in the NA. But ethnic minority delegates rarely vote as a bloc and are more likely to represent regional party and state views than any cohesive ethnic perspective.

The conundrum facing the government is whether to grant ethnic minorities a degree of legal autonomy. Some government officials are aware that integration into the national legal system will erode minority cultures. They also acknowledge that state recognition of traditional communal mechanisms could increase land and cultural security at a fraction of the cost of formal legal processes. Yet the doctrine of "national culture" and "national unity" discourages pluralism of any kind.

Conclusion

Attitudes to human rights in Vietnam are constructed from different systems of knowledge, the new overlaying and intermingling with the old. An

examination of the ways in which the Vietnamese borrow and recycle systems of knowledge provides glimpses into the party's and state's multilayered approaches to human rights. Three interrelated forces shaping human rights are identifiable.

First, for decades the party has used "revolutionary morality" more than law to define social relationships. Morality rule emphasized, and continues to emphasize, ideological and moral homogeneity (Great Unity), strict organizational hierarchies (democratic centralism), government by example and intolerance towards non-elite opposition. Statements by party leaders that an "equitable, democratic and civilized society" is best realized through the "Great Unity" are sincere moral beliefs and should not be dismissed as mere propaganda. As a corollary, attempts to assess civil and democratic rights according to constitutional and statutory rules underestimates the role of moral guidance in defining and protecting human rights in Vietnam.

The political morality that informs the substantive content of human rights is not static. As new systems of knowledge influence elite thinking the permitted range of human rights is slowly increasing. In less than two decades this process of "creeping pluralism" has opened the authoritarian political morality to new forms of social expression. Provided citizens do not challenge political power, they are now entitled to practise religion, form associations, express opinions and conduct businesses free from arbitrary arrest and trial.

Second, as the state moves towards being a law-based state, it is increasingly using laws and international treaties to delineate the boundaries of human rights. This transformation is placing the state under more scrutiny to explain why derogations from civil and political rights are necessary and proportional to preserving state security. As a result, much official discourse aims to show that state security in Vietnam is bound up in broad moral notions of national sovereignty, party supremacy and cultural hegemony (Great Unity).

More progress towards law-based human rights is discernable in reforms designed to improve due process. Vague administrative controls over businesses and many social activities have been clarified or abolished and procedural rules protecting the rights of those charged with criminal offences have been strengthened and extended.

Further movement in this direction must negotiate deeply entrenched communitarian views that human rights should be assessed according to broad social outcomes rather than individual needs. According to this formula, if most people enjoy religious freedom, for example, it does not matter that a few are disenfranchised. This trade-off between the collective good and private rights is under challenge as "socialization" policies dismantle social benefits that propped up collective endeavours such as the "Great Unity". The state is currently gambling that wealth generated by the market economy will translate into good will towards state-sponsored collective projects.

Public access to human rights is further limited by the state's positivistic approach to law. State institutions only recognize rights created by the state

and reject the possibility of natural or inherent rights. Although the constitution and legislation confer an extensive range of human rights, without fully functioning legal institutions rights lack enforcement. Citizens need constitutional courts to strike down laws that negate constitutional rights. They also need fully functioning administrative courts that are capable of checking discretionary "state management" powers used by officials to control legal rights. Inadequate rights in the Civil Code protecting individuals from non-contractual physical harm, including personal injuries inflicted during state sanctioned torture, also constrains private litigation to prevent infringements of civil rights. Recently reforms, however, allow those wrongfully imprisoned to sue judges and the state for compensation.

It is still unclear whether improved judicial processes will necessarily excite more private enforcement of human rights. Studies consistently show that most Vietnamese do not view rights in a legalistic manner. As some commentators have observed "rights seem to be closely associated with the mere opportunity to do something, with the freedom to act in accordance with one's wishes".[133] Rights are not associated with an expectation of protection by the legal system.

Third, both moral and legal approaches to human rights presuppose universally acceptable values that ignore the diversity and tensions about the meaning of human rights across class, ethnic and urban–rural divides. A crucial question thus concerns not so much what human rights are, but rather which social groups have the power to decide what constitutes appropriate human rights. Public access to decision making processes will determine whether state sanctioned intellectual/cultural traditions will engage or subordinate other traditions.

There is compelling evidence that the state responds to the needs and aspirations of the Vietnamese people by selectively conferring economic, social and cultural rights. Interest groups, however, have limited opportunities to shape the political morality underlying conferred rights. As Martin Gainsborough surmised:

> For all the emphasis in foreign journalistic and academic writing on civil society, the emerging middle class, Buddhist and Catholic religious dissent, dissident intellectuals, youth disillusionment, and rural unrest – all of which are real phenomena up to a point – one gains the strong impression in Vietnam that the main arena of struggle is within the state.[134]

In other words, discourses that shape official attitudes to human rights primarily take place within party and state circles.

NA debates and media reports are increasingly exposing party and state decision-making to a broad range of social views. It is possible that as the NA acquires more policy-making power, delegates will arrogate more power to themselves. But the transformative potential for democratic reform and

moral pluralism is limited by party concerns about "peaceful evolution" eroding their powers and low public demand for democratic rights. Studies show that generally, citizens have high levels of satisfaction with the political system and prefer to secure rights through personal connections rather than through formal processes.

For the present, provided most people enjoy prosperity and basic social freedoms, the public is likely to tolerate tight state controls over political expression. Yet this formula for social management excludes those on the periphery of the market economy, those agitating for political reform and ethnic minorities living outside the dominant *Kinh* culture.

Notes

1 Chinese influence was impeded by linguistic and administrative barriers that effectively isolated villagers from deep Chinese culture. See Keith Taylor, *The Birth of Vietnam*, Berkeley: University of California Press, 1983.
2 See E. S. Ungar, "From myth to history: imagined polities in 14th century Vietnam", in David Marr and A. C. Milner (eds), *Southeast Asia in the 9th and 14th Centuries*, Singapore: Institute of Southeast Asian Studies, 1986, pp. 177–86; Keith K. Taylor, "Authority and legitimacy in eleventh-century Vietnam," *Vietnam Forum*, vol. 12, 1988, pp. 20–59.
3 Notions emphasizing self-reliance such as *tu do* (self-originating freedom) gave way to Confucian values that stressed inner perfection such as *chi thanh* (total sincerity) and *tu thanh* (self-completion). See Alexander Woodside, "Freedom and elite political theory in Vietnam before the French", in David Kelly and Anthony Reid (eds), *Asian Freedoms*, Cambridge: Cambridge University Press, Cambridge, 1998, pp. 206–8.
4 Of the code's 722 articles, 200 were either directly borrowed from, or were substantially influenced by the Tang Code and 17 were borrowed from the Ming Code. See Ta Van Tai, "Vietnam's Code of the Lê Dynasty (1428–1788)", *American Journal of Comparative Law*, vol. 30, no. 3, 1982, pp. 523, 525.
5 A married woman, for example, was entitled to reclaim her contributions to the matrimonial estate after her husband's death. See Tran Thi Tuyet, "Vietnam's feudal laws and the protection of women's interests", *Vietnam Law and Legal Forum*, vol. 6, no. 65, 2000, pp. 28–30.
6 See S. H. Roberts, *The History of French Colonial Policy 1870–1925*, London: Frank Cass, 1929 (new impression 1963), pp. 64–75; also see Nguyen The Anh, "The Vietnamese monarchy under French colonial rule 1884–1945", *Modern Asian Studies*, vol. 19, 1985, pp. 153–5.
7 See Nguyen Khac Vien, "Confucianism and Marxism", *Vietnam Studies*, no. 1, 1994, pp. 54–5.
8 Ho Chi Minh caustically observed that:

> Justice is represented by a good lady holding scales in one hand and a sword in the other. As the greatness of the distance between Indochina and France was so great, so great that, on arrival there, the scales lost their balance and the pans melted and turned into opium pipes and official bottles of spirits, that the poor lady had only the sword left with which to strike. She even struck innocent people and innocent people especially.
>
> Ho Chi Minh, *Selected Works*, Hanoi: Foreign Languages Publishing House, 1961, vol. 2, p. 96.

9 See, e.g., Vo Van Ai, "Human rights and Asian values in Vietnam", in Michael Jacobsen and Ole Bruun (eds), *Human Rights and Asian Values: Identities and Cultural Representations in Asia*, Surrey: Curzon, 2000, pp. 95–7.

10 See Hoang Van Hao, "National sovereignty and human rights", *Tap Chi Cong San online*: www.tapchicongsan.org.vn/show_content.pl?topic; Vu Cong Giao, "Nhung Gia Tri Nhan Quyen Chau A Hay Nhung Muu Do Va Do Dao Duc Gia Cua Phuong Tay Trong Linh Vuc Nhan Quyen?" [Asian Values of Human Rights or Western Conspiracy and Hypocrisy in Human Rights Issues?], *Nghien Cuu Quoc Te* [International Studies], no. 2, 2002, p. 42.

11 The socialist legality (*phap che xa hoi chu nghia*), borrowed from the Soviet Union, treated law as a "management tool" (*cong cu quan ly*) to adjust or balance (*dieu chinh*) social relationships – a practice allowing for the substitution of party policy for law. For a discussion about how this doctrine interacts with the law-based-state doctrine see John Gillespie, "Concepts of law in Vietnam: transforming statist socialism", in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of the Rule of Law in Twelve Asian Countries, France and the U.S.*, London: Routledge, 2004, p. 146.

12 *Ibid*., pp. 157–61.

13 Interview with Director Cao Duc Thai, Human Rights Department, Ho Chi Minh Political Academy, Hanoi, March 2004. Vietnam is a party to the 1966 International Covenant on Civil and Political Rights, 1965 International Convention on the Elimination of all Forms of Racial Discrimination, the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid, the 1979 Convention on the Elimination of all Forms of Discrimination Against Women, Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, and the 1989 Convention on the Rights of the Child, but it has not ratified the 1984 or the 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights.

14 See Dinh Gia Trinh, "May Y Kien Dong Gop Ve Van De Bao Ve Phap Che" [Some Opinions on the Protection of Legality], *Tap San Tu Phap*, no. 3, 1961, pp. 20–32.

15 Tuong Chinh, "Report to the National Assembly 12 December 1980", trans. *FBIS East Asia Daily Report*, 15 December 1980, p. K15.

16 Le Duan, "Speech to the September 1980 Communist Party Plenum", trans. *FBIS East Asia Daily Report*, 13 January 1981, p. K22.

17 *Ibid*.

18 See Ta Van Thai, *The Vietnamese Tradition of Human Rights*, Berkeley: Institute of East Asian Studies, University of California, 1988, pp. 180–5.

19 See *Hoang Viet Hinh Luat* [Criminal Code of the Vietnamese Emperor], ch. 12. Reproduced in the Ta Van Thai, 1988, *The Vietnamese Tradition of Human Rights*.

20 Carlyle A. Thayer, "Mono-organizational socialism and the state", in Benedict J. Tria Kerkvliet and Doug J. Porter (eds), *Vietnam's Rural Transformation*, Boulder, Co: Westview Press, 1995, p. 52. See also Benedict Kerkvliet, "An approach for analyzing state–society relations in Vietnam", *Sojourn*, vol. 16, no. 2, 2001, p. 238.

21 R. Dalton and N. Ong "The Vietnamese public in transition: the World Values survey: Vietnam 2001", Center for the Study of Democracy, University of California, Irvine, 2001: www.uci.edu/csd (hereafter, the "World Values Survey Vietnam 2001").

22 See Philip Taylor, "The ethnicity of efficacy: Vietnamese goddess worship and the encoding of popular histories", *Asian Ethnicity*, vol. 3, no. 1, 2002, p. 85; Philip Taylor, *Goddess on the Rise*, Honolulu: University of Hawaii Press, 2004.

23 See Ta Van Tai, *supra* note 18, p. 149.

24 See Pierro Gheddo, *The Cross and the Bo Tree*, trans. W. Quinn, New York: Sheed and Ward, 1968, pp. 4, 25.
25 See “Religion in Vietnam today”, *Indochina Journal*, January–February, 1983; David Marr, “Church and state in Vietnam”, *Indochina Issues*, no. 74, 1968, p. 4.
26 See Party Central Committee, “Party Central Committee 7th Plenum; Resolution on Religious Work”, *Vietnam Law and Legal Forum*, vol. 9, no. 106, 2003, pp. 19–21. See also Pham Huy Thong, “Su Phat Trien Ve Nhan Thuc Ton Giao Cua Dang” [Developing the Party’s Perception of Religion], *Tap Chi Cong San*, no. 7, 2003, pp. 15–18.
27 See Shaun Kingsley Malarney, “Return to the past? The dynamics of contemporary religious and ritual transformation”, in Hy V. Luong (ed.), *Postwar Vietnam: Dynamics of a Transforming Society*, Boulder, Co: Rowman and Littlefield, 2003, pp. 235–45; Stephen Denney, “The Catholic church in Vietnam”, in Pedro Ramet (ed.), *Catholicism and Politics in Communist Societies*, Durham, NC: Duke University Press, 1999, pp. 270–95.
28 Le Quang Vinh, “Facts about religious freedom in Viet Nam”, *Tap Chi Cong San online* (2003): www.tapchicongsan.org.vn. In the 1997 census over 15 million people or 21 percent of the population claimed adherence to a religious faith. There were approximately 7 million Buddhists, 5 million Catholics, 400,000 Protestants; 100,000 Muslims; 2 million Cao Dai and 2 million Hoa Hao. See *Vietnam Law and Legal Forum*, vol. 9, no. 106, 2003, pp. 20–1.
29 See Nguyen Hong Duong, *Nghi Le va Loi Song Ton Giao Van Hoa Viet Nam* [Liturgy and the Catholic Way of Life in Vietnamese Culture], Hanoi: Nha Xuat Ban Khoa Hoc Xa Hoi [Social Sciences Publishing House], 2001, pp. 69–75.
30 Dang Nghiem Van, “On the problem of religion”, *Vietnam Social Sciences*, no. 2, 2001, pp. 48, 54. See also Ordinance on Beliefs and Religions, Articles 5, 7.
31 See Le Quang Vinh, *supra* note 28; Thanh Tu, “Vietnam’s Buddhism promotes unity and harmony to build and defend the nation”, 10 November 2003, *Nhan Dan online*. See also Ordinance on Beliefs and Religions 2004, Article 16, which defines the types of organizations recognized as “religious organizations”.
32 See Le Quang Vinh, *supra* note 28.
33 The leader of the UBCV, Tich Huyen Quang, has been held under house arrest for almost ten years on a series of Criminal Code sedition charges, such as “activities aimed at overthrowing people’s powers” (Article 79), “undermining national unity” (Article 87), “propaganda against the social system” (Article 88) and “disrupting public security” (Article 89).
34 See Trung Ba Can, “Interview with Prime Minister Vo Van Kiet”, *Saigon Giai Phong*, 27 February 1994, p. 7, trans. *FBIS East Asia Daily Reports*, pp. 56–8.
35 See Margie Mason, “Vietnam refused to recognize Vatican appointment of Ho Chi Minh Cardinal”, *Associated Press*, 29 September 2003.
36 For example, seminaries are only permitted to train twenty students every two years leading to severe shortages of clergy in many dioceses. Catholics must publish in newspapers issued by the SCPVC, such as *Nguoi Cong Giao* [Catholics] in Hanoi and *Cong Giao va Dan Toc* [Catholicism and Nation] in Ho Chi Minh City.
37 See Human Rights Watch Report Vietnam 2001: www.hrw.org.
38 Vietnam joined the International Convention on Religious Freedom on 24 September 1982. The convention provides that religious freedom does not extend to issues involving “political security and social order”.
39 See Ta Van Thai, *supra* note 18, pp. 176–8.
40 See Marr, *Vietnamese Anti-Colonialism 1885–1925*, Berkeley: University of California Press, 1971, pp. 44–53.

41 See Georges Boudarel, “The Nhan-Van Giai Pham affair: intellectual dissidence in the 1950s”, *Vietnam Forum*, vol. 13, 1990, pp. 154–74.
42 See Russell Hiang-Khng Heng, “Media in Vietnam and the structure of its management”, in David Marr (ed.), *The Mass Media in Vietnam*, Canberra: Political and Social Change Monograph ANU, 1998, pp. 32–4.
43 In 2003 there were over 500 accredited media agencies, with over 600 publications, 20 online newspapers, and over 10,000 media officials. See Ha Dang, “Improvement of the party’s media work in the light of Ho Chi Minh thought”, *Tap Chi Cong San online* (2003).
44 *Ibid*.
45 See, e.g., Le Hong Minh, “Co Mot Thi Truong ‘An Theo’ Dam Tang Le Cong Tuan Anh”, *Saigon Tiep Thi*, 16 October 1996, p. 3.
46 Le Kha Phieu, “Party leader addresses cultural officials”, *Nhan Dan*, 9 October 1998, pp. 1, 5.
47 Article 9 in the amended Press Law 1999 strengthened the right for the media to seek explanations from state officials.
48 See Cong An Thanh Pho Ho Chi Minh, “Mot Vu Vi Pham Nghiem Trong Luat Bao Chi”, *Cong An Thanh Pho Ho Chi Minh* [Ho Chi Minh City People’s Court], 7 August 1996, p. 7.
49 Nguyen Nhu Phong and Vu Cao, “Minh Phung Lam Giau va Sup Do The Noa” [Minh Phung – How did It Get Rich? How did It Collapse?], *The Anh Ninh The Gioi* [The World Security Magazine], no. 61, 13 February 1998, pp. 1–3.
50 See generally Russell Heng Hiang Khng, “Media negotiating the state: in the name of the law in anticipation”, *Sojourn*, vol. 16, no. 2, 2001, p. 213.
51 Decision No. 79 QD-TTg on the Management of the Reception of Foreign Television Programs, 2002.
52 See Le Kha Phieu, *Vietnam Entering the 21st Century*, Hanoi: The Gioi Publishers, 2001, p. 85.
53 See David Marr and Mark Sidel, “Understanding the outside world”, in David Marr (ed.), *The Mass Media in Vietnam*, Canberra: Political and Social Change Monograph 25, ANU, 1998, p. 142.
54 Carole Beaulieu “Vietnamese media ride an economic boom and the censors take the back seat”, Institute of Current World Affairs, Report CB-19, 14 March 1994.
55 See Vietnam News Service, “Crime boss faces court in nation’s biggest trial”, vietnamnews-online, 27 February 2003: www.vietnamnews.vnagency.com.vn.
56 See Reuters, “Vietnam orders media to limit scandal coverage”, *Reuters*, 21 June 2002.
57 See Reporters Without Borders, 2003 Vietnam: Annual Report: www.rsf.org/t.php3?id_article=6491.
58 See VNA, “Party leader urges army’s newspapers to promote attractiveness and diversity”, *Nhan Dan online*, 17 July 2003.
59 Criminal Code 1986, Article 73. See Reporters Without Borders, “Vietnam: Annual Report 2003”, at: www.rsf.org/t.php3?id_article=6491.
60 See Minh Tu, “Bao Lao Dong va Nha Bao Nguyen Hoan Bi Ra Toa Vi Chong Ham Nhung?” [Were Labour and Reporter Nguyen Hoan in the Dock because they Fought Corruption?], *Nguoi Lam Bao* [The Journalist], 1999, pp. 35–6, 50.
61 See, e.g., Ordinance on State Secrets 2000; Decree No. 33 Detailing the Implementation of the Ordinance on State Secrets 2002.
62 Reporters Without Borders, “Internet in Vietnam”, 2003: www.fva.org/200306/story07.htm.
63 See Decision No. 92 QD-BBCVT 2003, Articles 5, 6.
64 *Ibid*.
65 See VNA, “Suspension of unlicensed website TTVNOnline”, *Vietnam News Agency* online, 13 August 2002: www.vietnamnews.vnagency.com.vn.

66 Criminal Code 1999, Article 88. See "Amnesty International condemns sentence against Le Chi Quang", 2002: www.fva.org/200211/story03.htm.
67 See Dinh Gia Trinh, *Nghien Cuu Nha Nuoc va Phap Quyen* [Studies about State and Legality], Nha Xuat Ban Su Hoc [Hanoi: Historical Studies Publishing House], 1964, pp. 90–2.
68 See Duong Xuan Ngoc, "Social democracy according to socialist orientation", *Vietnam Social Sciences*, no. 3, 1996, p. 41.
69 *Ibid.*, p. 43.
70 See Ha Xuan Truong, "Problem of democracy", *Vietnam Social Sciences*, no. 1, 1991, p. 77.
71 Constitution 1992, Article 2. See Nguyen Dang Quang *et al.*, "Scientific forum: democracy in Vietnam", *Vietnam Social Sciences*, no. 1, 1991, pp. 69–83.
72 In the 1997 elections 663 candidates stood for 450 NA seats, and CPV members stood for every seat. Among the 450 winners, 384 were CPV members, and only 3 "self-nominated" candidates won seats. See Report, "Newly elected National Assembly holds its first session", *Vietnam Law and Legal Forum*, vol. 8, no. 95, 2002, pp. 6, 7.
73 See Nhan Dan, "Rights to vote and stand for National Assembly election", 2002: www.nhandan.org.vn.
74 Interview with Nguyen Si Dung, Director, Center for Information, Library, and Research, Office of the National Assembly, Hanoi, 17 February 2000.
75 Delegates from the same province generally meet voters in combined meetings. See Legis, "The National Assembly in a nutshell", *Nghien Cuu Lap Phap* [Legislative Studies], English edn, no. 1, 2001, p. 60.
76 See VNS, "National Assembly delegates told to pay close heed to voters' complaints", *Vietnam News Agency* online, 24 April 2002.
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78 Of 20,000 petitions sent to the NA 40 percent are sent to the Law Committee, and the remainder go the Standing Committee. See Goran Andersson *et al.*, "Strengthening the capacity of the office of the Vietnam National Assembly", unpublished paper, Sida Evaluation 12/12, Stockholm, 2002, p. 25.
79 See Economic Affairs Reports, "Can Trong Ne Nang, Dai Khai" [Serious, Careful and not Perfunctory and Spare No One], *Lao Dong*, 11 September 2000, p. 3.
80 See Nhan Dan, "PM instructs openness and democracy at communal level", *Nhan Dan online*, 11 July 2003: www.nhandan.com.vn.
81 See Regulations to Implement Democracy at the Commune Level, Promulgated in Decree No. 29 ND-CP 1998.
82 Interviews with Hanoi-based Vietnamese lawyers in October 2000 and March 2001.
83 "World Values Survey Vietnam 2001", *supra* note 21.
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86 See VNS, "Draft Criminal Procedure Code prompts long debate", *Vietnamnews-online*, 17 June 2003.
87 Interviews Nguyen Van Chien, Vice Chairman, Hanoi Bar Association, Hanoi, March 2004.
88 See VNS, "New law gives sharper teeth to prosecutors", *Vietnamnews-online*, 29 March 2002.

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90 See Ordinance of Administrative Procedures 1996 (amended); Resolution No. 3 NQ-HDTP Guiding the Implementation of a Number of Provisions of the Ordinance on Procedures for Handling Administrative Cases 2003, Articles 3 and 4.

91 See John Gillespie, "Self-interest and ideology: bureaucratic corruption in Vietnam", *The Australian Journal of Asian Law*, vol. 3, no. 1, 2002, pp. 18–19.

92 A prominent southern businessman charged with fraudulently appropriating socialist property.

93 Dinh, Van Que, *Legal Practice and Precedent* [Phap Luat Tuc Tien va An Le], Da Nang: Da Nang Publishing House, Nha Xuat Ban Da Nang, 1999, pp. 181–7.

94 See, e.g., Amnesty International, "The case of Le Hong Ha and Ha Si Phu", 1996, Report-ASA 41/09/96: www.amnesty.org/ailib/aireport/ar96/index.html.

95 See Cohen, "Rare move targets gangs, protects those in government", *The Asian Wall Street Journal*, 6 June 2003.

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100 See Trinh Duy Luon and Nguyen Quong Vinh, "Tac Dong Kinh Te Xa Hoi Cua Doi Moi Trong Linh Vuc Nha O Do Thi Vietnam" [Social and Economic Impact of Reforms on City Residential Areas in Vietnam], *Xa Hoi Hoc* [Sociology Review], no. 21, 1996, pp. 5, 17–19.

101 See Constitution 1992, Articles 59, 61, 62, 65.

102 See Ordinance on Privileges to Revolutionaries, Fallen Soldiers and their Families, War Invalids, Resistance Activists, People with Meritorious Service to the Revolution 1994.

103 See VNS, "Health sector gets greater autonomy", *Vietnamnews-online*, 20 June 2003. See also Decree No. 73 ND-CP on Policies to Encourage Socialization of Education, Health, Culture and Sports, 1999.

104 See Decree No. 36 CP 1996. Tran Dinh Thanh Lam, "Rights – Vietnam: crackdown on child beggars has little effect", *Global Information Network*, 11 November 2003, p. 11.

105 See Education Law 1998. See also Tran Tam Dan, "Luat Giao Duc – Co So Phap Ly De Phat Trien Giao Duc va Dao Tao" [The Education Law – Legal Foundations to Develop Education and Training], *Nhan Dan*, 27 January 1999, p. 3.

106 The UNDP Human Development Index increased from 0.583 in 1985 to 0.688 in 2002. Vietnam now ranks in forty-third place out of eighty-nine in the Human Poverty Index.

107 Vietnam has a Gini-coefficient of 0.407 that compares favourably with Malaysia on 0.49 and is similar to China on 0.4, source: UNDP Human Development Index 2000. See Do Hoai, Vu Quoc Huy, Vo Tri Thanh and Tran Dinh Thien,

"The *doi moi* process and human development", *Vietnam's Socio-Economc Development*, no. 29, 2002, pp. 6–24.

108 See VNS, "Health sector gets greater autonomy", *Vietnamnews-online*, 20 June 2003; "Graft rampant in Vietnam health insurance system", *Agence France Presse*, 21 October 1996.

109 See Nguyen Phuong Quynh Trang, "Doing business under the New Enterprise Law: a survey of newly registered companies", Mekong Project Development Facility, Hanoi, 2001, pp. 13–15.

110 Of private sector respondents surveyed 90 percent concluded that economic courts could not satisfactorily resolve commercial disputes. See John McMillan and Christopher Woodruff, "Interfirm relationships and informal credit in vietnam", *Quarterly Journal of Economics*, vol. 114, no. 4, 1999, pp. 1285, 1286.

111 In 2002 there were 598 economic cases, source: Supreme People's Court, Hanoi.

112 See Dien, Khong, *Population and Ethno-Demography in Vietnam*, Chiang Mai: Silkworm Books, 2001; VNA, "List of 54 nationalities of Vietnam", *Vietnam Law and Legal Forum*, vol. 9, no. 107, 2003, pp. 9–11.

113 See Lê Code Article 40. See also Ta Van Tai, *supra* note 18, pp. 132–8.

114 Drawing from the Chinese Ching Code, the Nguyen Code insisted that "all people of alien culture who are guilty shall be adjudged under the national law". See Nguyen Code, Article 33.

115 See Alexander Woodside, *Vietnam and the Chinese Model: A Comparative Study of Nguyen and Ch'ing Civil Government in the First Half of the Nineteenth Century*, Cambridge, MA: Harvard University Press, 1971, p. 167.

116 See G. C. Hickey, *Sons of the Mountains*, New Haven: Yale University Press, 1982, p. 300.

117 By 1968, 830,000 *Kinh* people had migrated with government assistance into a highland population of 2.36 million, and by 1999 several million *Kinh* had migrated. See Canh Quang, "Economic transformation of mountainous regions", *Vietnamese Studies*, no. 15, 1969, p. 108.

118 See Chung Viet, "National minorities and nationality policy in the DRV", *Vietnamese Studies*, no. 15, 1968, p. 12.

119 See Hoang Van Chuc, "National unity and equality in Ho Chin Minh thought", *Tap Chi Cong San online*, 2003: www.tapchicongsan.org.vn.

120 See Constitution 1980, Article 5; Constitution 1992, Article 5. See Joachim Schlesinger, *Hill Tribes of Vietnam*, Bangkok: Lotus Press, 1997.

121 See Minh Quang Dao, "History of land tenure in pre-1954 Vietnam", *Journal of Contemporary Asia*, vol. 23, 1993, pp. 84–90.

122 See Nguyen Duy Quy, "Phan Dau Vi Mot Nen Van Hoa Viet Nam Tien Tien Dam Da Ban Sac Dan Toc" [Striving for a Vietnamese Culture that is Advanced and Profoundly Imbued with National Identity], *Tap Chi Cong San*, no. 7, 2003, pp. 12–14.

123 Interview Hoang Ngoc Hien, Nguyen School of Creative Writing, Hanoi, August 2000.

124 See Nguyen Van Huy, "Van De Bao Ton va Phat Huy Nhung Di San Van Hoa Cua Cac Dan Toc" [The Issue of Preserving and Promoting Cultural Heritage of Nationalities], *Tap Chi Cong San*, no. 7, 2003, pp. 25–8.

125 According to Marxist historical materialism, labour is insufficiently specialized in tribal economies to excite class antagonisms. See Nguyen Viet Huong, "Values of customary law from legal perspectives", *Vietnam Law and Legal Forum*, vol. 7, January 2001, pp. 29–32.

126 See Nguyen The Sang, "Ruglai customary law on ecological environment", unpublished papers, Conference on Customary Law and Contemporary Rural Development in Vietnam in Buon Ma Thuot, 23–25 November 1999.

127 Le Sy Giao, "The traditional customs of natural land management of some ethnic minority groups in the northern mountains", unpublished papers, Conference on Customary Law and Contemporary Rural Development in Vietnam in Buon Ma Thuot, 23–25 November 1999.

128 See Vo Quy, "Ethnic minorities in Vietnam: culture, environment and development", *Vietnam Social Sciences*, vol. 2, 1995, pp. 84–8.

129 See, e.g., Decision No. 73 TTg Approving the Master Plan for Protection of Forests in the Upstream Area of the Lower Ayun Irrigation Project (Gia Lai Province) 1995; Decree No. 4 CP on Sanctions Against Administrative Violations in the Domain of Land Management and Use 1997, Articles 1(3), 3(1,2).

130 Phan Dang Nhat, "The nature of customary law of Tay Nguyen", unpublished papers, Conference on Customary Law and Contemporary Rural Development in Vietnam in Buon Ma Thuot, 23–5 November 1999.

131 Hill tribesmen were either convinced to transfer their land use rights to lowland settlers or lowlanders simply encroached on forest land with the collaboration of corrupt local officials. See VNA, "Mass organizations hold the key to Central Highland's social stability", *Vietnamnews-online*, 18 May 2001; Clare Arthurs, "Hanoi admits a role in hill tribes crisis", *BBC World Service*, 12 June 2003.

132 See Ben Rowse, "Demonstrators arrested in Vietnam's Central Highlands", *Agence France Presse*, 6 September 2002; VNA, "Central Highlands Dac Lac Province undergoes great changes", *Vietnamnews-online*, 14 August 2002.

133 See Tine Gammeltoft and Rolf Herno, "Human rights in Vietnam: exploring tensions and ambiguities", in Michael Jacobsen and Ole Bruun (eds), *Human Rights and Asian Values: Constesting National Identities and Cultural Representations in Asia*, Surrey: Curzon Press, 2000, p. 173.

134 Martin Gainsborough, *Changing Political Economy of Vietnam: the Case of Ho Chi Minh City*, London: RoutledgeCurzon, 2003, pp. 53–8.

16 Conclusion: comparative reflections on human rights in Asia

Albert H. Y. Chen

Introduction

The twentieth-century Chinese philosopher Fung Yulan examined the discourse and thinking which employed the distinction between "Chinese" and "Western", and that which employed the distinction between "ancient" and "modern". He pointed out that the correct description of the task or challenge for China in the twentieth-century is not "Westernization" but "modernization". He wrote:

> Some people say that Western culture is a motor car culture . . . But motor cars did not exist in the West originally [and only came into existence at a certain point in history]. Having motor cars and not having motor cars is a distinction between the ancient and the modern, and not a distinction between China and the West.[1]

I think the reference to "motor cars" in this passage can be perfectly substituted with "human rights".

The concept and discourse of human rights is a unique phenomenon of modernity. It is true that it first appeared, in the course of the seventeenth and eighteenth centuries, in the sphere of Western civilization. But at the time, it represented an intellectual breakthrough and a political revolution. Something new was created that had never before existed in the history of the West – in the civilizations of ancient Greece, ancient Rome or the Middle Ages. The concept and discourse of human rights was a new invention of modern times, just as the steam engine was a new invention of modern times. And, as the contemporary Argentinean thinker C. S. Nino points out, "There can be no doubt that human rights are one of the greatest inventions of our civilization".[2]

Sceptics may say that human rights are simply beautiful slogans, and that the reality of gross violations of human rights in modern history and in the contemporary world demonstrates the futility of human rights talk. They also doubt the possibility of the moral progress of humankind, as distinguished from progress in the spheres of science, technology and material life. I do not share this view.

First, I think the fact that good ideas are often disregarded or not practised does not mean that the ideas are worthless, or that it is not important to distinguish between good ideas and bad ideas. The doctrine of human rights is an idea, as is Nazism, Fascism, the kind of Maoism that led to the Cultural Revolution in China, or the kind of Christianity that formed the background to the inquisitions in medieval Europe. These are different ideas, and they led to different practical consequences in history. History is a tale of suffering, cruelty, oppression and wars, and some ideas do lead to an increase in human suffering, while some others do lead to the alleviation of human suffering.

Second, I think it can be demonstrated that the modern doctrine of human rights is a good idea, and that the development of this doctrine is a sign of moral progress on the part of humankind. The possibility of humanity's moral growth in the course of history was first raised by Kant in his 1784 essay entitled "Idea for a universal history with a cosmopolitan purpose".[3] Following up on Kant's speculations, the twentieth-century Italian political thinker Norberto Bobbio writes:

> My theory, which is inspired by this extraordinary passage of Kant's, is that from the point of view of the philosophy of history, the current increasingly widespread and intense debate on human rights can be interpreted as a "prophetic sign" of humanity's moral progress, given that it is so widespread as to involve all the peoples of the world and so intense as to be on the agenda of the most authoritative international judicial bodies.[4]

Reflecting on the moral resources developed by modern civilization, particularly the concept and discourse of human rights, the contemporary Canadian philosopher Charles Taylor writes that the "imperative of benevolence" associated with the modern human rights consciousness:

> [C]arries with it the sense that this age has brought about something unprecedented in history, precisely in its recognition of this imperative. We feel that our civilization has made a qualitative leap, and all previous ages seem to us somewhat shocking, even barbarous, in their apparently unruffled acceptance of inflicted or easily avoidable suffering and death, even of cruelty, torture, to the point of revelling in their display . . . [H]igher standards in the relevant regards [have been] built into the moral culture of our civilization.[5]

Human rights were thus not part of pre-modern Western civilization, but rather human rights are a modern invention. The rise and globalization of human rights thinking may be interpreted as a sign of humanity's moral progress, a quantum leap in the moral consciousness of humankind. From this perspective, the reception and development in Asia of the theory and

practice of human rights is an integral component of the processes of the modernization of Asia.

In this book, we have included chapters on the theory and practice of human rights in twelve countries or jurisdictions in East Asia, South-East Asia and South Asia, as well as chapters on human rights in France and the USA for the purpose of comparison between East and West. By comparing and contrasting the theory and practice of human rights in various Asian jurisdictions, and by further comparing and contrasting them with that in representative Western jurisdictions, we hope to acquire a better and deeper understanding of the phenomenon of human rights in Asia as it seeks to meet the challenges posed by the globalizing Western civilization, and to develop its own version of modernity.

In this concluding chapter, I will attempt to summarize our findings by: (a) classifying the jurisdictions studied into several categories, with the jurisdictions within each category sharing important similarities; (b) summarizing, comparing and contrasting the human rights situations in the jurisdictions concerned; and finally (c) making some general observations on the theory and practice of human rights in contemporary Asia.

Category I: France, the USA and Japan

France and the USA may be regarded as the countries of origin of the modern theory and practice of human rights. They are also two of the most highly developed countries of the world. Japan is the most highly developed country in Asia, and its wealth rivals that of any major Western power. In terms of standards of economic development or levels of modernization, the three countries are comparable. I would therefore group them as Category I and seek to compare and contrast them in terms of human rights.

Both the French and the Americans can justifiably feel proud of their historical contribution to modern human rights. The American Declaration of Independence 1776 proclaimed the "self-evident" "truths" that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness". The Bill of Rights, inserted into the Constitution of the USA in 1791, is undeniably one of the most influential constitutional instruments in modern legal history. Of even greater impact on the continent of Europe was the Declaration of the Rights of Man and the Citizen promulgated by the French National Assembly in 1789.

Although the doctrine of human rights became a dominant political and legal theory in France and the USA at more or less the same time, the subsequent trajectories of the theory and practice of human rights in the two countries have diverged considerably. The chapters in this book on the two countries testify to such divergence. For example, the constitutional recognition and protection of human rights in the USA is, even today, still largely confined to the "first generation" human rights – civil and political

rights. On the other hand, the "second generation" human rights – social and economic rights – have gained their place in the French Constitutions of 1946 and 1958.

The Preamble to the 1946 Constitution (which has been reaffirmed in the Preamble to the 1958 Constitution) provides that "The Nation shall assure to the individual and the family the conditions necessary for their development".[6] On education, it provides that the nation guarantees to children and adults equal access to education, and that it is the state's duty to organize free and public education.[7] It provides that the nation shall guarantee health care to everybody.[8] Furthermore, "Any human being who, by reason of age, mental or physical state, or economic situation is incapable of working has the right to obtain means of subsistence from the community".[9] The constitution also refers to the right to work, although this is a constitutional objective only and not legally enforceable.[10] In France, the right to fair housing is also recognized, though only at the legislative level and not at the constitutional level.[11]

As pointed out by Dinusha Panditaratne in this volume, in the USA not only are economic and social rights absent from the constitution, but matters such as education and housing are largely outside the domain of the federal government. State constitutions and legislation do guarantee access to public education, although the Supreme Court has held that the right to receive education is not a fundamental right for the purpose of constitutional review under the equal protection clause.[12] On the other hand, the right to health care or medical treatment is neither guaranteed by the federal constitution nor by state constitutions.[13] Panditaratne notes that "there is more prevalent belief in the USA than in most other industrialized nations that medical treatment is a product for private individuals to consume, rather than a right or entitlement for the government to ensure to all".[14]

As regards cultural rights, there seems to be greater sympathy for this concept in the USA than in France. In USA, there are numerous "reservations" in which American Indians and Alaska Native peoples practise self-government and cultural self-determination. In France, as noted by Guy Scoffoni in this volume, the general approach towards ethnic and cultural minorities is that of assimilation: "The conception of equality which prevailed during the Revolution derived directly from the image of a united and homogeneous national community".[15] The constitution presupposes "only one (French) people composed of all citizens without distinction";[16] and the "French concept of equality and of the indivisibility of the Republic prevents any constitutional recognition of minorities or any distinction made on ethnic criteria".[17] Still, although the collective rights of minorities do not receive any constitutional recognition, the French government has introduced legislative and administrative measures on minorities' rights.[18]

Apart from their different approaches towards social and economic rights, the Americans and the French also differ in their attitudes to the international system of human rights protection. France is a party to most international

human rights treaties. It is also an active participant in the European systems for the protection of human rights, and is subject to the jurisdictions of the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg.[19] By contrast, although the Department of State of the USA issues annual reports on human rights in countries around the world, the USA has acceded to few international human rights treaties. Some Americans seem to believe that "international human rights treaties are designed for *other* nations, whose domestic institutions fail to adequately protect rights",[20] and are thus not relevant to the USA where rights are already sufficiently guaranteed. It has also been pointed out that the USA has opposed the recognition of some concepts as human rights in international law, such as the right to development and the right to housing.[21]

On the issue of the right to life, the US insistence on the retention of capital punishment[22] also stands in sharp contrast with the European consensus on the abolition of the death penalty. On the other hand, there do exist important strengths in the US system for the protection of human rights, such as the vibrant system of constitutional judicial review (which compares favourably with the French system which has only become more active since 1971),[23] the mature culture of advocacy, lobbying and litigation on issues of rights,[24] and the vigorous protection of civil and political rights. In the area of civil and political rights, the US Supreme Court has in landmark cases like *New York Times* v. *Sullivan* and *Brandenburg* v. *Ohio*[25] set noble standards which many politically and socially less stable developing countries consider luxuries that they can ill afford. The post-9/11 developments[26] in US criminal procedure leave much to be desired, however. The US practice of affirmative action[27] to promote the well-being of groups historically suffering from discrimination may also be contrasted with the lack of support for reverse discrimination in France.[28]

Turning to the case of Japan, the first point to note is that its current constitution, the 1946 Constitution,[29] provides for basically the same rights as those set out in the US Bill of Rights, plus social or welfare rights such as the right to receive education, the right to work, and the right to maintain minimum standards of living.[30] It also provides for judicial review of the constitutionality of laws. As the chapter in this volume on Japan demonstrates, however, the role of the courts in constitutional judicial review of human rights in Japan is very different from, and is of limited significance compared with, that of the US courts. Conservative Japanese governments, which have continuously been in power in the post-war period, have appointed conservative judges,[31] and the courts have been consistently deferential to the legislative and executive branches of government.

The record of constitutional judicial review of the Japanese courts has been examined in detail by Shigenori Matsui in this volume.[32] He points out that since the 1946 Constitution came into existence, there is a total of only nine cases in which the Japanese Supreme Court has declared legislative or governmental actions unconstitutional, including four cases in which statutes were

invalidated. Most of the cases involve property rights and economic freedoms, and very few of them concern civil and political rights.[33] A comparison of freedom of expression under US and Japanese laws shows that the scope of this freedom is broader in the USA.[34] As regards social rights, although they are provided for in the Japanese Constitution, their existence "appears to have no substantive implications since the Japanese Supreme Court has interpreted them as merely a political goal and not a judicial norm".[35]

On the other hand, focusing exclusively on the courts' performance – or lack of lustrous performance – would belie the reality of human rights in Japan. Japan is a liberal constitutional democracy and one of the wealthiest nations of the world. The level of civil and political rights, as well as economic and social rights, enjoyed by the Japanese is among the highest in Asia, and compares favourably with most Western countries. Matsui has rightly pointed out that human rights in Japan cannot be judged simply by looking at the record of the courts.[36] A more complete picture of the human rights scene in Japan would take into account the fact that the concept and discourse of human rights is popular in the media and among many people; litigation on human rights issues has not been rare; and the advocacy of constitutional rights and human rights litigation often serve important moral and political functions.[37] On the one hand, it is true that there exist conservative opinions that emphasize social harmony and the collective interest rather than individual rights, and that human rights may not have become deeply rooted in Japanese culture yet.[38] On the other hand, the discourse of and social movements inspired by human rights still have vitality in Japanese civil society. Whether Japan will move closer to the West in the domain of human rights or will move farther away remains to be seen.

Category II: Singapore and Malaysia

In his famous book entitled *The End of History and the Last Man*,[39] Francis Fukuyama predicted the global victory of liberal democracy, but at the same time noted that "Singapore's authoritarianism . . . is distinctive in two ways. First, it has been accompanied by extraordinary economic success, and second, it has been justified unapologetically, not just as a transitional arrangement, but as a system superior to liberal democracy".[40] The governments of Singapore and Malaysia have in recent decades been the principal advocates of the doctrine of "Asian values" and human rights, and opponents of the hegemony of Western discourse and standards of human rights. It is argued that it is perfectly legitimate for non-Western countries to develop their own version of human rights, to work out a balance between individuals' interests and the collective interests that may be different from that in the West, and to choose to give higher priority to certain values (such as economic development, social and racial harmony, effective governance and political stability) rather than others (such as liberty of the person, freedoms of speech, association and religion).

As the chapters on Singapore and Malaysia in this volume demonstrate, there are striking similarities between Singapore and Malaysia. Both were under British colonial rule and inherited the English common law. They are neighbours, and Singapore was once part of Malaysia. The texts of their constitutions share much in common. Both are racially divided societies, and both have experienced the threat of communist subversion. In both countries, a governing party or coalition has been continuously in power since the founding of the postcolonial state. Both have actively pursued economic development; in this regard Singapore has been one of the great success stories of Asia, and Malaysia has also performed well in achieving growth and reducing poverty. The two countries have acceded to relatively few international human rights treaties.

Both Singapore and Malaysia had and still have notorious Internal Security Acts which they inherited from the colonial era, though the number of cases of preventive detention under these acts has declined over the years. In both countries, the legislature has introduced ouster clauses to limit the courts' jurisdiction in politically sensitive domains. Even in cases not covered by ouster clauses, where in theory judicial review of legislative and administrative actions is available, the courts have generally been deferential towards the executive and the legislature where matters of civil and political rights are concerned.

In Singapore and Malaysia, the law is at once an instrument for protecting proprietary interests, facilitating commercial transactions and promoting economic growth, and a tool for the restriction of civil and political rights in the interest of political and social stability in a multi-ethnic and multicultural society. For example, Societies Acts exist to control freedom of association. Civil actions in defamation are used to stifle criticism of government leaders and officials by opposition politicians. As H. P. Lee points out in relation to Malaysia, "Despite the aim of eroding [civil and political] rights, the government wants to ensure that it is seen to be acting 'legally': thus, the forms of legal processes are observed in the enactment of draconian legislation and its implementation via the judicial process".[41] This observation is equally applicable to Singapore.

The discussion above should not however be taken to mean that there is no significant difference between Singapore and Malaysia as far as human rights are concerned. For example, at the constitutional level, Malaysia declares Islam to be the religion of the federation; the constitution recognizes the "special position of the Malays".[42] On the other hand, as Li-ann Thio points out in her chapter in this volume, Singapore's constitution only guarantees the rights of individuals and not the collective right of any ethnic group, although the interests of minority groups (such as Malays and Indians) are recognized by the constitution and taken care of at the legislative and administrative levels.[43] The education system in Malaysia gives certain privileges to Malays,[44] but Singapore recognizes no such privileges for any racial group.[45] Freedom of religion is more limited in Malaysia than in Singapore

in the sense that the constitution identifies Malays with Islam and it is not legally possible for a Malay to change his or her religion.[46]

Singapore and Malaysia seem to provide classic examples of the subordination of civil and political rights to social, economic and cultural rights (or the imperatives of stability and development) where the trade-off between the two groups of rights seems to be successful in the sense that economic prosperity and social and political stability are actually achieved. It would probably be premature, however, to conclude that the situation we have described represents an "equilibrium" state that can and will continue indefinitely. The chapters in this volume on the two countries both suggest that the language and discourse of human rights are not without significance in politics and society.[47] As suggested by Thio, Singapore's participation, though limited, in the international human rights treaty regime is "promising".[48] In Malaysia, "NGOs have with great courage highlighted abuses of human rights. The national human rights commission, SUHAKAM, is shaping a role in broadening the education of the public on human rights".[49] It is therefore conceivable that demands from below and reform from above[50] may converge to produce improvements for civil and political rights in Singapore and Malaysia in future.

Category III: Taiwan, South Korea and Hong Kong

Historically, Taiwan, Hong Kong and South Korea (referred to as "Korea" below) all belong to the Confucian culture sphere. From the perspective of economic development and modernization, they – together with Singapore – are the "Four Little Dragons" of Asia. They have also been under colonial rule – British in the case of Hong Kong, and Japanese in the case of Taiwan and Korea, with colonial rule in Taiwan and Korea ending at the end of the Second World War, while Hong Kong continued to be a British colony until 1997, when it became a Special Administrative Region of China under a specially designed constitutional arrangement known as "one country, two systems".

Writing about Malaysia in the present volume, H. P. Lee commented that "One can observe a distinct correlation between the measure of enjoyment of civil and political rights and the degree to which an incumbent Prime Minister feels his leadership is threatened".[51] Presumably, the more secure a regime feels about its rule, the more space the regime can allow for civil and political rights. This proposition can, I believe, explain the difference in the human rights situation (particularly civil rights such as physical integrity rights, freedom of speech and freedom of association) between Hong Kong on the one hand and Singapore and Malaysia on the other hand. In the post-war era, particularly after the riots of the 1960s, colonial rule in Hong Kong was relatively secure because the people of Hong Kong knew that the only alternative to British rule was incorporation into communist China – an option far worse than British rule. Thus the British Hong Kong

government could afford to grant the people more extensive civil rights than those granted in Singapore and Malaysia, as well as those granted in Taiwan and Korea in their eras of authoritarian rule.

After the signature in 1984 of the Sino-British Joint Declaration, which provided for Hong Kong's return to China in 1997, further steps were taken to strengthen the system of human rights protection in Hong Kong, culminating in the enactment of the Hong Kong Bill of Rights Ordinance in 1991. As explained by Carole Petersen in this volume, this statute established for the first time in the colony's history a system of judicial review of the constitutionality of legislation on human rights grounds. From 1985 on, the colonial government began in stages to transform the appointed colonial legislature into an elected one. Under the Basic Law of the Hong Kong Special Administrative Region which came into effect in 1997, Hong Kong is not yet a full democracy in the sense that neither the Chief Executive nor all the members of the legislature are elected by universal suffrage (though a portion of legislators are so elected). In this respect Hong Kong has not experienced the full democratization that has taken place in Taiwan and Korea.

Like Singapore and Malaysia, Taiwan and Korea could be regarded, until their democratization began in the late 1980s, as examples of the Asian "developmental state" in which civil and political rights were sacrificed for the sake of economic development (and thus economic and social rights) under the political tutelage of a benevolent dictatorship. But unlike Singapore and Malaysia, where the same party or coalition has been in power since independence, the post-war history of both Taiwan and Korea can be divided into a pre-democratization era and an era of evolving liberal democracy – "democracy" in the sense of the government being produced by free and periodical elections with multiparty competition for votes on the basis of universal suffrage, and "liberal" in the sense that basic civil rights (particularly freedoms of speech, press, association and assembly) are respected so that different voices can be heard in politics and can compete for votes. Both Taiwan and Korea have also experienced the success of a peaceful transfer of political power between different parties pursuant to a free and fair election. They seem to suggest an alternative model of Asian human rights to that provided by Singapore and Malaysia, the former model being to postpone the full enjoyment of civil and political rights until the country becomes wealthy enough, and social and economic rights reach a reasonable level, and only then radically improving civil and political rights.

The improvement in civil and political rights was truly radical in South Korea. As Hahm Chaihark points out in this volume, "the Republic of Korea was commonly seen by the international community, at least up until the late 1980s, as one of the worst violators of human rights".[52] Restrictions on physical integrity rights and civil and political rights were considered necessary not only for the sake of economic development but also to respond to the security threat posed by North Korea. Although the human

rights situation "has improved drastically"[53] in the era of democratization and Korea has not only ratified various human rights treaties but also accepted the Optional Protocol to the International Covenant on Civil and Political Rights,[54] the National Security Law has so far survived. Under the law people in South Korea may be punished for joining or supporting an "anti-state organization" (the obvious referent being North Korea), praising or encouraging the activities of such an organization, possessing documents with a view to doing so, or failing to inform the authorities after learning that someone has violated the National Security Law.[55] It has also been pointed out that there are still occasional violations of physical integrity rights by law enforcement officers; "the actual practices of the law enforcement apparatus in many respects still reflect the old ways".[56]

Nevertheless, progress in human rights in Korea is real and undeniable. A constitutional court[57] and a national human rights commission[58] have been established in 1988 and 2001 respectively. Human rights NGOs have proliferated in a "civil society finally coming of age".[59] Steps have also been taken to address and redress the human rights abuses of the past, including providing compensation to victims and the restoration of their honour,[60] and the establishment of a special commission to investigate suspicious deaths.[61] Drawing its inspiration from the Weimar Constitution, the Korean Constitution (1988) contains many provisions on social and economic rights, thus giving rise to a continuing discussion of the extent to which such rights are directly enforceable.[62]

In his chapter on Korea in this volume, Hahm notes that the concept of rights was alien to Korea's traditional Confucian culture, and that "the purpose for which early modern Korean intellectuals argued for the recognition of rights was not so much to highlight the inviolability of the individual as to strengthen their state against its potential foreign aggressors".[63] Frederick Lin, writing about Taiwan in this volume, makes a similar observation about the rights guaranteed by the Constitution of the Republic of China (1947) which is now in force in Taiwan: "maintaining national security and stability, rather than securing the liberty of individuals, was the main purpose of the ROC [Republic of China] Constitution at its inception".[64]

As in the case of Korea, Taiwan was liberated from Japanese colonial rule at the end of the Second World War. Also as in Korea, Taiwan experienced authoritarian rule during the process of its economic rise as one of the "Four Little Dragons"; in both territories, democratization began in the late 1980s, resulting in dramatic improvements in physical integrity rights and civil and political rights. The chapter on Taiwan in this volume highlights the contribution that the Council of Grand Justices – Taiwan's constitutional court – has made to such improvements, and demonstrates the mutual interaction between the work of the constitutional court and the democratic movement in society.[65] The Council has declared various laws made in the authoritarian era to be unconstitutional,[66] and it has gained the

trust of the people. Increasing numbers of petitions for constitutional review have been lodged with the Council,[67] and "the Grand Justices have established their reputation as the protectors of the constitution".[68]

Many areas of human rights law and practice have been reformed in Taiwan in the era of democratization, including criminal procedure, police powers, administrative procedure, and freedoms of speech, assembly and association.[69] Reformers have actively borrowed from the human rights jurisprudence of the USA and Germany.[70] Since Taiwan is not recognized by the international community as an independent sovereign state, however, it has not been able to participate in the international system for the protection of human rights.

At the end of his chapter on Taiwan in this volume, Lin raises the following interesting questions: "An important question relevant to human rights in Taiwan is whether the initial success of implementing human rights in Taiwan implies the compatibility of traditional obligation-based Chinese political theory and rights-based Western theory. Alternatively does it mean that the influence of traditional Chinese culture is lessening in Taiwan.[71] The same questions may be raised with regard to Hong Kong and Korea. If, as suggested at the beginning of this chapter, human rights are an invention of modernity and have universal significance, then the acceptance and rooting of human rights in Taiwan, Hong Kong, and Korea may be interpreted as an essential element of the modernization of Confucian culture as it responds to the challenges of modernity.[72]

Category IV: Thailand, the Philippines and Indonesia

Thailand, the Philippines, and Indonesia may be grouped into one category in this study since they are all South-East Asian states which have undergone a political regime transition from authoritarianism to democracy – in 1992, 1986 and 1998 respectively, and are all in the process of consolidating liberal constitutional democracy. In this sense they are similar to Taiwan and Korea which have been grouped under the previous category, Category III. There are however at least three differences between Categories III and IV: first, as a matter of geographical location, Category III territories are in East Asia, and Category IV countries are in South-East Asia. Second, in terms of culture, Category III territories are all within the "Confucian culture sphere", whereas Category IV states are not (with Buddhism, Catholicism and Islam being the dominant religions in Thailand, the Philippines and Indonesia respectively). Third, in terms of levels of economic development, Category III territories are among the "Four Little Dragons" of Asia, while Category IV countries are trying to catch up, with Thailand taking the lead for the moment.

As a symbol for the victory of liberal democracy and human rights, Thailand's 1997 Constitution is "an exemplary Constitution".[73] The process of its drafting was "the most democratic ever, with extensive popular

participation throughout the whole country".[74] In its constitutional design, the principle of checks and balances was given full effect, with the establishment of various independent institutions such as a constitutional court, an administrative court, an ombudsman and a national human rights commission.[75] In the spirit of democracy, a requisite number of citizens may initiate a bill themselves.[76] The constitution affirms the concept of human dignity[77] and provides for a wide range of constitutional rights, including "community rights" (such as those relating to the management and conservation of natural resources and the environment),[78] consumers' rights and the right to resist peacefully acts aimed at overthrowing the constitution.[79]

Since the end of the era of rule by military government, Thailand has seen clear improvements in civil and political rights.[80] The authoritarian laws of the previous military regime are in the process of being reformed;[81] in the domain of national security, the anti-communist law has been changed.[82] As Vitit Muntarbhorn points out in this volume, however, the reforms have not gone far enough. For example, the media are still "shackled";[83] the antiquated Press Act of 1941 has not been overhauled; "various laws to liberalize media freedoms have not yet been promulgated".[84]

Muntarbhorn also makes a more general point, which is that democracy does not necessarily guarantee human rights;[85] "the mere fact that an administration is democratically elected does not automatically imply that it will promote and protect human rights in a comprehensive manner".[86] In his view, the populist government elected in 2001 has run the country like a corporation, and has in its pursuit of economic development not hesitated in "trampling on the economic, social and environmental rights of some sections of the population".[87] It has also committed human rights violations in its war against drug trafficking (in which there have been extra-judicial killings)[88] and its struggles against the separatists in the south, where three provinces are under martial law.[89] In other contexts, there are also "many instances of abuse committed by elements of law enforcers, including extrajudicial killings, torture, abductions, and other violence".[90]

A few years before Thailand underwent its transition to democracy in the midst of popular protest against its military government, the Philippines also experienced the upsurge of "people power" which led to the toppling of the Marcos regime. Indeed, the peaceful revolution of 1986 in the Philippines was the first demonstration of people's power in East and South-East Asia in the wave of democratization that swept this part of the world in the last two decades of the twentieth century. Filipinos can also justifiably feel proud of their "human rights constitution"[91] of 1987, which represents the fruit of the struggles against dictatorship.

Raul Pangalangan begins his chapter in this volume by pointing out that "Rights-based discourse pervades public debate in the Philippines, owing to a long history of political struggles animated by the values of Western liberalism".[92] Liberal values in the Philippines can be traced back to the independence movement against Spain culminating in the 1899 revolution,

and were further cultivated during US rule in the first half of the twentieth century. Although suppressed by the Marcos regime, human rights discourse has become triumphant in the era of democracy, drawing its strength partly from "the historical nightmare with the Marcos dictatorship"[93] and the lessons of human rights violations in that era. As a result, the Philippines stands out among its neighbours in South-East Asia as a country that is particularly "human rights friendly".

The Philippines is a party to all major international human rights instruments.[94] Unlike the case in most Asian countries, the Philippines' Constitution recognizes the domestic legal force of treaty obligations, and the human rights enshrined in such treaties may be and have been "invoked directly in Philippine courts and, more significantly, have been made the basis for granting judicial relief".[95] The constitution itself contains a strong bill of rights (on traditional civil and political rights),[96] establishes an independent commission on human rights,[97] and provides a declaration of principles and state policies which sets forth social and economic rights and welfare claims.[98] Indeed, the courts have held that some of these social and economic rights, such as the right to health and the right to a balanced and healthful ecology, are directly justiciable in the courts.[99]

The Philippines also stands out among its neighbours in allowing a broad scope for freedom of speech and in institutionalizing new modes of political participation. For example, its Supreme Court has used US jurisprudence (such as the "clear-and-present danger test" and the "dangerous tendency test") in interpreting the free speech clause in the constitution,[100] and has adopted the test in *New York Times* v. *Sullivan*[101] for protecting public criticism of officials and public figures from defamation suits.[102] The Congress of the Philippines has enacted the Initiative and Referendum Act to actualize the people's "residual and sovereign authority to ordain legislation directly through the concepts and processes of initiative and of referendum".[103]

Despite significant achievements in democracy and human rights in the Philippines, it has, as Peerenboom points out in the first chapter of this volume, "struggled economically, posting some of the lowest rates in the region".[104] The Filipino case reminds us of the grim reality that the dominance of rights discourse and the practice of liberal democracy do not guarantee economic growth, and the level of social and economic rights enjoyed by people in a country where such rights are justiciable before the courts is not necessarily higher than that in a country where such rights are not justiciable. Thus Pangalangan writes towards the end of his chapter in this volume: "As memories of the martial law years recede, and a new generation emerges that was exposed only to the dismal failure of the democracy that followed, the 'totalitarian temptation' will re-emerge. Already, we hear echoes of the debate during the martial law era under Marcos, between democracy and political rights as 'First World' luxuries, and economic and social rights as 'Third World' imperatives".[105]

The Philippines' neighbour, Indonesia, is also a developing country plagued by poverty and corruption. It is however also the most recent showcase of democratization in East and South-East Asia and of democratization in a state that is predominantly Muslim. The process began with the fall of Soeharto in 1998 and culminated in the first direct popular election of the president in 2004. In terms of its participation in the international human rights treaty regime and of the law in the books, Indonesia has become very "human rights friendly". It is a party to most international human rights treaties.[106] Its National Commission of Human Rights was highly regarded even during the Soeharto regime.[107] Human rights NGOs have flourished in recent years.[108] The Human Rights Law of 1999 provides for a wide range of human rights, including the right to self-development, the right to justice, the right to security, the right to welfare, and the rights of women and children, among others.[109] The constitutional amendment of 2000 has also made detailed provisions for human rights, including the right to establish a family, the rights of a child to live, grow and develop, the right to live in physical and spiritual prosperity, the right to work, and the right to social security.[110]

As Hikmahanto Juwana points out in this volume, Indonesia has seen concrete improvements in the area of civil and political rights.[111] There is definitely much greater freedom of speech, freedom of the press and freedom of demonstration than before, when criticism was stifled in the name of harmony and consensus.[112] On the other hand, the promises of human rights in other domains have remained unfulfilled.[113] There is a huge gap between the law in the books and the law in action. International human rights commitments have been undertaken mainly to satisfy foreign governments and international public opinion without the infrastructure that is necessary for implementation being put in place.[114] Human rights law is largely a matter of "political rhetoric".[115] Foreign legal models are copied without sufficient attention to the domestic reality.[116] The pre-existing culture, mentality, values and attitudes are slow and hard to change:[117] "[N]ew legislation has embedded new concepts that require society's values to change abruptly. The legislation may be seen as unfit for the local community as it does not have a good understanding of the new values".[118] Finally, separatist movements in several provinces (particularly Aceh) have led to emergency powers being resorted to, with inevitable tolls on human rights.[119]

Category V: India

As the most populous democracy in Asia and in the world today, India stands out among Asian nations as a major contributor to the theory and practice of human rights. As discussed by Upendra Baxi in this volume, the people of India have been the pioneers in conceiving of human rights as including the collective right of a people to self-determination and to liberate itself from alien rule.[120] The enactment of the Indian Constitution

in 1949 was an important step forward in the world history of constitutionalism. One of the innovations of the constitution is (in addition to providing for traditional civil and political rights and judicial review for their enforcement) the inclusion of a chapter on directive principles of state policy which provide for various social, economic and cultural rights.[121] Some of these rights, such as the right to education,[122] the right to food[123] and the right to health,[124] have since become justiciable and enforceable in the courts. The Indian model provided for judicial enforceability of fundamental rights, and the constitutional obligations on elected officials to pursue the directive principles of state policy "has infected many a post-colonial constitutionalism".[125]

The Indian judiciary has not only been activist in the defence of social and economic rights. It has also acted in an exemplary manner on many issues of civil and political rights in recent decades. For example, since 1977 the Supreme Court has developed a jurisprudence of due process of law for the protection of the right to life and liberty.[126] It has "incrementally whittled down the preventive detention powers and processes".[127] It has held that the constitutional rights to life and to certain freedoms may not be suspended even in a state of emergency.[128] Judicial redress is available to give effect to the constitutional right to free and fair elections.[129] Freedoms of speech and press, as well as the people's right to know, have been well defended.[130] On the whole, the judicial role has been "democracy-reinforcing"[131] and "has contributed to the creation and sustenance of social space for different social movements, legal pluralisms, and flourishing diverse fighting faiths".[132]

This is not to suggest that all is well with human rights in India. Indeed, as Peerenboom points out in the first chapter of this volume,[133] India, together with Indonesia and China, are the Asian countries covered in the present study with the least satisfactory scores on the "political terror scale", which can be used as a measure of physical integrity rights; he explains the Indian case by ethnic and religious tensions. Communal violence is referred to at several points in Baxi's chapter on India in this volume. The poverty and social inequality in India are also well known. India, then, is not an example of an Asian country where human rights are perfectly protected; it is, rather, an example of how the notion of human rights can be and has been used in Asia in the struggle for a better tomorrow. Baxi talks about taking "human suffering seriously as the very prerequisite of taking human rights seriously".[134] The suffering of the past and the present in India is immense; but human rights provide a hope for the future. Thus as Baxi writes:

> Human rights were perceived to provide ways of righting historic, millennial wrongs. Salient among these were: the abolition of practices of discrimination on the ground of "untouchability", the restoration of the rights of the Indian indigenous peoples, elimination of gender injustice and inequality, the removal of human slavery and bondage,

> and the promotion and protection of the rights of religious, cultural, and linguistic minorities . . . When we recall that all this happened in a world almost altogether *bereft* of contemporary human rights languages, logics, and paralogics, the normative achievement remains indeed astounding.[135]

Category VI: China and Vietnam

China and Vietnam, together with North Korea which is not covered in the present study, are the only Marxist-Leninist states in Asia, and are among the few remaining Marxist-Leninist states in the world. The ideology of the communist parties of China and Vietnam was originally hostile to the idea of human rights. Until the 1980s, the term "human rights" was within the forbidden zone of scholarly and public discussion in China.[136] "Human rights" was regarded as a bourgeois notion, originally developed by the bourgeoisie in its struggles against the political and social systems of feudalism; and it was thought that the notion as used in capitalist states was deceptive because in those states, the majority of the people lived under oppression and exploitation and the human rights formally guaranteed by law were illusory. The right to private property, in particular, was considered the source of evils in capitalism.

Another aspect of Marxist and socialist thinking about human rights has been to stress the importance of social and economic rights, and the unity and inseparability of rights and duties[137] – citizens have rights but at the same time have duties – and the priority of the community's collective interests over the rights of the individual. Thus in the words of the Chinese Constitution (1982), citizens "in exercising their freedoms and rights, may not infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens".[138] Unlike Singapore and Malaysia, China has not relied heavily on the "Asian values" thesis. Instead, in recent years it has emphasized the importance of economic development,[139] the right to subsistence and social and economic rights, and insisted that the protection of national sovereignty against foreign domination is a prerequisite for the enjoyment of human rights by citizens within the nation.[140]

On the ideological front, however, both China and Vietnam in the 1990s abandoned the Marxist-Leninist hostility to the notion and term of "human rights" and have actually embraced "human rights" as a noble and even universal ideal for humankind. The White Paper entitled "Human Rights in China"[141] issued by the Chinese State Council in 1991 – the first of a series of White Papers on human rights issues published since then – proclaimed that:

> It has been a long-cherished ideal of mankind to enjoy human rights in the full sense of the term . . . As a developing country, China has

> suffered from setbacks while safeguarding and developing human rights. Although much has been achieved in this regard, there is still much room for improvement.

In the Chinese constitutional amendment of 2004, the principle that the state shall respect and protect human rights was written into the constitution,[142] which previously contained the term "citizens' rights", but not "human rights". In the case of Vietnam, the constitutional affirmation of "human rights" came even earlier: in the 1992 Constitution, the principle of respect for and protection of human rights was introduced.[143] Private property rights and the law-based state (*Rechtsstaat*) also received constitutional recognition in Vietnam in 1992,[144] and in China by its constitutional amendment of 2004 (as regards private property rights) and 1999 (as regards the law-based state and "ruling the country according to law").[145] Both China and Vietnam are now parties to a number of international human rights treaties.[146]

There are other similarities between China and Vietnam. They both have a tradition of Confucian culture, and the modern synthesis of Confucianism with socialism has initially produced a society that is unsympathetic to the notion of the individual's rights.[147] Both societies are however in the transition from communist totalitarianism to authoritarianism, with the loosening of the control of the party-state on many aspects of citizens' lives. Market-oriented economic reforms have proceeded in both countries, generating a huge space for private business activities. There is also – at least relative to the pre-reform era – more toleration of speech, expression, religious activities and social groups in domains where the party-state does not feel threatened and the authority of one-party rule is not challenged. All the same, the general impression seems to be that civil and political rights exist only at the sufferance of the authorities and are not effectively secured by legal and judicial institutions. And although past achievements in social and economic rights have been considerable given the initial starting point of extreme poverty, marketization has in recent years resulted in the weakening of state welfare provisions and a greater pressure on families and social groups to take care of themselves,[148] as well as increasing social and economic inequalities among the people.

The deficiencies in civil and political rights in mainland China are well known. For example, human rights violations are sometimes committed in the course of "strike hard" campaigns against crimes,[149] and capital punishment is used for a wide range of offences.[150] The system of "administrative detention" is notorious under which persons may be deprived of their liberty by the police without the need for a trial by an independent court.[151] Falun Gong and "house churches" have been persecuted.[152] Strict political controls are imposed in Tibet.[153] The media, publications and the Internet are subject to censorship; all media and publishing houses are state owned, editors are occasionally dismissed and publications occasionally closed down on political grounds.[154] Organizing groups and advocating non-violent change

of the system of one-party rule would amount to the crime of subversion.[155] Independent trade unions are not allowed.[156] State secrets are broadly defined and so is the offence of obtaining or releasing state secrets.[157] On politically sensitive issues, the line between what is permissible and not in speech and publication is sometimes "vague and fluid": "What may be tolerated in some circumstances may be subject to greater restriction when there are certain aggravating factors present".[158]

In his chapter on China in this volume, Peerenboom points out that it is internationally recognized that many human rights may be restricted, provided that the restrictions are prescribed by law, for a legitimate purpose and are necessary and proportionate, and he suggests that the restrictions may be different in different countries.[159] He goes on to ask: "But even accepting such differences, are the restrictions imposed by China necessary? To some extent, the response turns on assessments of how stable China is".[160] His view seems to be that it may be justified under certain circumstances to restrict rights in the interest of political and social stability. He believes that in the case of China, there is "a clear majority preference for stability and economic growth, even if that means postponing democracy and tolerating for the time being greater restrictions on civil and political rights. Conversely, there is little support for political dissidents or for liberal democrats . . . Similarly, there is wide support for the war on crime, including the death penalty and other harsh punishments".[161] However, he concludes by pointing out that economic reforms should be accompanied by political reforms.[162] In his view, "the government is unnecessarily restrictive of civil society, and would do well to loosen the reins on freedom of speech and assembly", although "the government may still impose more restrictions on civil and political rights than do economically advanced, politically stable Western liberal democracies".[163]

As in the case of China, Vietnam also severely limits civil and political rights in order to maintain one-party rule. Thus religious organizations and activities are tightly regulated by law.[164] The media are state owned; editors are subject to control and politically sensitive issues may not be discussed in the media.[165] Writing on Vietnam in this volume, John Gillespie notes that "even high-ranking party officials and respected war veterans have been charged and jailed for agitating for multi-party democracy".[166] Violations of rules of criminal procedure have occurred, particularly in politically sensitive cases.[167] Lawyers' rights are not respected,[168] although "[a]necdotal evidence from criminal lawyers suggests that greater press scrutiny combined with more clearly defined procedural rules have improved the delivery of criminal justice for those accused of non-political crimes".[169]

Gillespie is not completely pessimistic about human rights there. He points out, for example, that even in the midst of extensive controls on freedom of expression, circumvention is sometimes possible, and the "polycentric power structures within the party and state . . . lead to different interpretations about the limits of free speech".[170] The Press Law has made it possible for

journalists to "investigate a wide range of state abuses and social problems"[171] and even to "gain sensitive information from state officials and protect sources from investigation".[172] "Journalists compete for breaking news and stories that expose new social problems".[173] Entrepreneurs enjoy autonomy from direct party supervision, and there has been a "revitalization of groups and associations formed as a result of local initiatives".[174] "Unauthorized gatherings, even demonstrations, are occasionally tolerated. With the notable exceptions of political and religious organizations, the state is permitting an increasingly diverse group of associations to flourish. World Values Survey data show that Vietnamese are more likely to belong to mass organizations and associations (2.53 groups) than Chinese (0.91) and Japanese".[175]

The nascent civil society has not however led to social movements demanding rights for the people. Gillespie points out that there is in Vietnam "low public demand for democratic rights";[176] people have little expectation about legal protection of their rights, and prefer to rely on personal connections rather than formal legal processes.[177] "Interest groups . . . have limited opportunities to shape the political morality underlying conferred rights . . . discourses that shape official attitudes to human rights primarily take place within party and state circles".[178] The communitarian view prevails that a "trade-off between the collective good and private rights"[179] is legitimate, so that "if most people enjoy religious freedom, for example, it does not matter that a few are disenfranchised".[180] This seems to coincide with Peerenboom's assessment of the prevailing sentiment in China discussed above.

Concluding reflections

"The swift rise of human rights as a normative benchmark for any government claiming legitimacy must surely rank as one of the most inspiring humanitarian stories of all time".[181] The postmodernist critique of "grand narratives" notwithstanding, I believe it is possible to interpret the story of human rights as a story of social struggles for a better and more humane world with less cruelty, less injustice, more toleration and more benevolence. Just as E. P. Thompson describes the idea of the rule of law as an "unqualified human good",[182] the same may be said for the idea of human rights. The language of human rights is primarily the language of the weak, the oppressed, the exploited, the disadvantaged, the marginalized, the minorities, those who are discriminated against, and those who have little power and wealth, a language which they and their sympathizers use to struggle for political, social and economic systems in which their human dignity, basic needs and welfare can be better recognized than before.[183] "The rights discourse is important for political and social mobilization throughout much of Asia",[184] and "social movements have constructed claims for human rights" and succeeded to varying extents in "getting these rights institutionalized".[185]

In the modern history of the West, the human rights idea was born in the midst of intense religious conflict and in the course of the struggle against royal absolutism, under which rulers could arbitrarily deprive subjects of their life and liberty. Civil and political rights – the "first generation" human rights – can be interpreted as a response to the might of the modern state in which immense power of coercion and violence has been concentrated. As capitalism and industrialization gave rise to new forms of social and economic inequality, the idea of social and economic rights – the "second generation" human rights – was conceived, partly under the influence of socialism and Marxism. These rights may be regarded as a response to – or a "safety net"[186] for – the risks and insecurity posed by the capitalist system to the well-being of ordinary people. Thus it has been pointed out that human rights represent essential protection for people in the modern world of sovereign states and the capitalist market.[187] In so far as the people of non-Western parts of the world also live under the power of the modern state and the merciless operation of the capitalist world system, the doctrine and institutions of human rights are as necessary for their welfare as they are to people in the West.[188]

It is therefore natural that although the concept and language of human rights first originated in the modern West, they have been borrowed by people in Asia and elsewhere in their social and political struggles, whether against imperialism and colonialism (thus the invention of the right to self-determination), Western domination of the world economy (thus the invention of the right to development), or against the despotism of their governments (thus reliance on the concept of civil and political rights), or against poverty, economic inequality, social injustice and discrimination (thus reliance on social, economic and cultural rights). Although people may still disagree on the theoretical origins of or philosophical justifications for human rights, the legitimacy of human rights has become unquestioned, or even unquestionable, in the contemporary world, and human rights principles and standards have also become a principal moral criterion for the evaluation of a government's legitimacy to rule.[189]

My own interpretation of the study in this book is that there has been, generally speaking, an ascendancy of human rights discourses, practices and institutions in East, South-East and South Asia in recent times. This can be attributed both to the post-cold war international environment and to endogenous social and political dynamics in individual countries. The transition from authoritarianism to democracy in several countries (the Philippines, Taiwan, South Korea, Thailand, Indonesia, listed roughly according to the chronological order of democratization) has resulted in regimes that are more "human rights friendly" than before – in the sense that they are more willing to participate in the international system for the protection of human rights,[190] as well as readier to engage in domestic law reform to promote human rights, and to establish human rights commissions or constitutional courts. In these countries, there is also evidence – as supplied by

relevant chapters in this book – of a significant improvement of civil and political rights[191] since the transition to democracy, although it will take time for a human rights culture to take roots and to grow in some of these countries.[192]

Apart from the abovementioned countries that moved from authoritarianism to democracy, three other Asian jurisdictions covered in the present study can also be considered "human rights friendly" (to the doctrine and institutions of human rights): they are Japan, Hong Kong and India. Japan, a liberal democracy since the end of the war, has inherited significant elements of the US constitutional system of human rights, although social practices differ from that of the USA. Hong Kong's human rights are still largely shaped by the common law system as strengthened by a bill of rights. India may be regarded as Asia's stronghold in the defence and development of human rights theory and practice: "Whatever the practices in India, the Indian government has a firm commitment to rights; its constitution provides for a strong protection of rights, its Supreme Court has an exemplary record in upholding rights and freedoms and its newly-established Human Rights Commission has been particularly energetic in pursuing violations of rights".[193] Another commentator wrote of the Indian contribution to the world's human rights jurisprudence as follows:

> [I]n most Third World societies the legitimacy of [human] rights will be linked to how economic and social rights are vindicated. In this context the Indian experience of social action litigation is a telling example . . . The facts presented by an Indian reality have forced Indian lawyers and the Indian Supreme Court to take the initiative and create new vistas with regard to human rights in Third World societies . . . Therefore the transportation of the human rights idea to India as part of the Federal Indian constitution has not only given these ideas a new cultural context, but the cultural context itself has enhanced and developed the concept of human rights.[194]

In trying to resolve the issues raised by the human rights debate between universalists and relativists, Jack Donnelly has argued that whereas the concepts of human rights have universal validity, contextual and cultural differences may justify divergent interpretations of the concepts within a particular range, as well as further differences in modes of implementation within an even wider range.[195] Joseph Chan draws a similar distinction between the meaning of human rights which should be the same in different countries and cultures, and the weight of and ranking of different rights and the scope of and limits to rights which may all vary from place to place.[196] Charles Taylor believes in the possibility of an overlapping consensus (in the Rawlsian sense) at the global level on norms of government conduct, though there may be different philosophical background justifications of such norms and different mechanisms for the enforcement of such norms in different societies

and cultures.[197] The human rights situations in the "human rights friendly" countries in East, South-East and South Asia mentioned above seem to testify to the viability of these theories which on the one hand affirm the universality of human rights and on the other hand recognize the legitimacy of differing interpretations and manners of implementation in different countries and societies.

The remaining countries to be considered are China, Vietnam, Singapore and Malaysia. They (together with a few countries not covered by the present volume such as North Korea and Myanmar) are the East and South-East Asian countries which so far have been most resistant to the hegemony of the "Western" discourse of human rights, particularly Western criticisms of their human rights records and Western interference with domestic affairs within their sovereignty. Following the orthodox Marxist approach to human rights, China and Vietnam stress the priority of social and economic rights, particularly the right to subsistence and to development. Lee Kuan Yew of Singapore and Mahathir Mohamad, former prime minister of Malaysia, have been the principal advocates of "Asian values", suggesting that Western rights-based thinking and individualism are not suitable for Asians who cherish the community and the family, prefer harmony to confrontation, and believe that the requirements of economic development and social and political stability may override certain civil rights of individuals.

The Bangkok Declaration on Human Rights adopted by the governments of more than thirty Asian states in 1993[198] and the Vienna Declaration adopted by the World Conference on Human Rights[199] in the same year both affirm the "indivisibility" and "interdependence" of human rights. One interpretation of indivisibility – that preferred by human rights advocates – is that civil and political rights may not be traded off for economic and social rights. However, another possible interpretation – that preferred by countries resisting Western human rights diplomacy – is that there should not be overemphasis on civil and political rights, but sufficient weight should be given to economic and social rights.[200] The two interpretations are not necessarily inconsistent with each other. It is possible to recognize the importance of economic and social rights, and at the same time to query whether countries such as China, Vietnam, Singapore and Malaysia are curtailing civil and political rights in circumstances where the restrictions are not necessary nor proportionate for the purpose of ensuring economic and social rights.[201] As Donnelly points out, the "liberty trade-off" may not be defensible at all.[202]

In my view, neither the "priority of economic rights" argument nor the "Asian values" argument is convincing, and none of the four countries concerned (i.e. their governments and those defending them) have developed a coherent theory of human rights that can compete in persuasive power with the dominant paradigm of human rights in contemporary international law as based on human rights treaties to which an overwhelming majority of states in the international community are now parties. As regards the

"economic rights" argument, there is no clear evidence that authoritarianism is more capable of achieving economic development than liberal democracy (there are examples and counter-examples either way),[203] and achieving economic development does not necessarily mean fulfilling social and economic rights.[204] Indeed, some strategies of economic development may result in gross social and economic inequality and the denial of social and economic rights for many. Even if the postponement of civil and political rights for the sake of economic development was justified in the particular circumstances of a country at a particular historical moment, this does not answer the question of whether it is now time to take steps towards liberalization and democratization (i.e. following the footsteps of South Korea, Taiwan and Thailand where economic growth achieved under authoritarian rule was followed by democratization). Finally, the important intrinsic value of human rights should also be recognized, irrespective of their instrumental value in relation to economic development.[205]

The "Asian values" argument was developed in the context of the ethnically divided societies of Malaysia and Singapore in which social and racial harmony is essential if political and social stability and economic development are to be secured.[206] Some curtailment of civil and political rights in the aftermath of communal riots (as in the case of Malaysia in 1969) is justifiable even according to the standards of international human rights law. But this does not mean that such curtailment can be justified for an indefinite period of time. It is doubtful whether the need for "political stability" can be a valid excuse for the denial or restriction of civil and political rights to such an extent as is practised in some Asian countries. As regards the argument on the basis of culture, the easy answer is that a culture is neither unified nor static. There are different voices – the voices not only of officials but also of workers, peasants, the middle class, intellectuals, businesspersons, NGOs, and so on. The majority voice today may become a minority voice tomorrow. There were times – not too long ago – when Western culture accepted slavery (in the USA), denied women the suffrage, discriminated against people on the basis of race, ethnic origin or religion, or accepted as normal the use of punishment considered cruel and inhuman today. But Western culture now considers these practices clear violations of human rights. Furthermore, what the majority of people in a culture believe in at a particular historical moment may not be right: "it is hard to justify cultural practices of widow-burning, genital mutilation and the oppression of minorities. Human rights become valuable only when they establish higher moral standards than exist in the traditional culture of a society".[207]

Thus the future of Asian human rights turns on cases like China, Vietnam, Singapore and Malaysia. I for one am cautiously optimistic. There appears to be a trend in these countries of diminishing resistance to the theory and practice of human rights which have now established themselves in their Asian neighbours. In Malaysia, a national human rights commission has been established and is promoting human rights education. Singapore

has begun to participate in the international human rights regime. The concept of human rights received formal constitutional recognition in Vietnam in 1992, and in China in 2004. Both China and Vietnam are now parties to a number of international human rights instruments.

I believe that these countries' increasing participation in the international human rights system is of far-reaching significance. The development of international human rights law provides a firm doctrinal and institutional basis for the dialogue of different states, cultures and civilizations on human rights issues, and the search for an "overlapping consensus" on at least some of these issues. As pointed out by a Japanese scholar of international law: "taken as a whole, international human rights instruments can no longer be characterized as products of the West. They are the products of long discussions, controversies, and negotiations among various nations with diverse civilizational backgrounds . . . [T]hese instruments represent common normative standards based on the widest attainable consensus among nations with diverse perspectives".[208] For example, socialist and communist nations have contributed to the expansion of the concept of human rights to cover social and economic rights; Third World countries have contributed to its further expansion to cover the right to self-determination and the right to development.[209] In today's world, the human rights movement has become a "global politico-cultural movement"[210] which is not merely Western-inspired but finds indigenous support in many non-Western parts of the world. This, then, is the global and historical context in which our study of human rights in Asia should be placed.

In his essay entitled "Asia as a fount of universal human rights", Edward Friedman points out that "the extraordinary rise of human rights sentiment in Asia in the last quarter of the twentieth century could betoken a great future potential for democracy and human rights".[211] He even believes that "Asia could well become a world leader in human rights in the twenty-first century".[212] We may not be as optimistic as he is, but we would probably agree with him that "Asia can be decisive for the future of human rights".[213] Each contributor to this volume is a witness on the state of human rights in the country or jurisdiction concerned. It is for the reader to make his or her assessment of the present situation and future prospects. Human rights postulate a social and political ideal for humankind to realize, and at this historical juncture nobody in East or West, North or South can be complacent about the realization of the ideal. The nobility of the ideal inevitably implies the difficulty in realizing it.[214] The project of human rights is an unfinished project of modernity. It is to be hoped that Asians, as relative latecomers to modernity, may also contribute their share to this project. Inoue Tatsuo writes of the project of liberal democracy:

> I consider liberal democracy to be an unfinished project, not only in the sense that it has yet to be fully implemented, but in the deeper sense that its foundations, principles, and institutional devices leave much to be

clarified, refined, and developed. Asian voices can and should be incorporated into this process.[215]

I believe exactly the same may be said of the unfinished project of human rights.

Notes

1 Chen Lai (ed.), *Feng Youlan yucui* [Fung Yulan Anthology], Beijing: Huaxia Press, 1993, p. 105.
2 C. S. Nino, *Etica derechos humanos*, Buenos Aires: Paidos Studio, 1984, p. 13, quoted in Norberto Bobbio, *The Age of Rights*, trans. by Allan Cameron, Cambridge: Polity Press, 1996, p. 64.
3 I. Kant, *Political Writings*, Cambridge: Cambridge University Press, 2nd edn, 1991, pp. 41–53.
4 Bobbio, *supra* note 2, at p. 35.
5 Charles Taylor, *Sources of the Self: the Making of the Modern Identity*, Cambridge, MA: Harvard University Press, 1989, pp. 396–7.
6 Article 8 of the Preamble.
7 Article 13. See chap. 2 of this volume, p. 72.
8 Article 11 of the Preamble. See chap. 2 of this volume, p. 73.
9 Article 11. *Ibid.*
10 *Ibid.*
11 *Ibid.*
12 *San Antonio Independent School District* v *Rodriguez* (1973) 411 US 1; see chap. 3 of this volume, pp. 100–1.
13 *Ibid.*, p. 101.
14 *Ibid.*, p. 102.
15 See chap. 2 of this volume, p. 74.
16 *Ibid.*, pp. 76–7.
17 *Ibid.*, p. 77.
18 *Ibid.*, pp. 78–9.
19 *Ibid.*, p. 65.
20 See chap. 3 of this volume, p. 87.
21 *Ibid.*, p. 99.
22 *Ibid.*, pp. 95–6.
23 See chap. 2 of this volume, p. 66.
24 See chap. 3 of this volume, p. 85.
25 See the discussion of these cases at pp. 90–1 of this volume.
26 See chap. 3 of this volume, pp. 92–3 and 96–9.
27 *Ibid.*, pp. 107–9.
28 See chap. 2 of this volume, p. 77.
29 This constitution departed significantly from the Meiji Constitution of 1889: see chap. 4 of this volume, pp. 121–3.
30 *Ibid.*, pp. 125–6 and 140.
31 *Ibid.*, p. 148.
32 *Ibid.*
33 *Ibid.*, p. 146.
34 *Ibid.*, pp. 146–7.
35 *Ibid.*, p. 148.
36 *Ibid.*, pp. 148–9.
37 *Ibid.*, p. 149.

38 *Ibid*.
39 Francis Fukuyama, *The End of History and the Last Man*, New York: The Free Press, 1992.
40 *Ibid*., p. 241.
41 See chap. 6 of this volume, p. 216.
42 *Ibid*., p. 192.
43 See chap. 5 of this volume, p. 174.
44 See chap. 6 of this volume, p. 211.
45 See chap. 5 of this volume, p. 174.
46 See chap. 6 of this volume, pp. 196–7.
47 See chap. 5 of this volume (on Singapore) and chap. 6 of this volume (on Malaysia).
48 See chap. 5 of this volume, p. 179.
49 See chap. 6 of this volume, p. 219.
50 For example, it remains to be seen whether Prime Minister Abdullah Ahmad Badawi in Malaysia or the post-Lee Kuan Yew leadership in Singapore might take a different approach to human rights from that adopted by Mahathir bin Mohamad and Lee Kuan Yew.
51 See chap. 6 of this volume, p. 216.
52 See chap. 8 of this volume, p. 265.
53 *Ibid*., p. 269.
54 *Ibid*., p. 265.
55 *Ibid*., p. 279.
56 *Ibid*., p. 272.
57 *Ibid*., p. 273; see also Hahm Chaihark, "Rule of law in South Korea: rhetoric and implementation", in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law*, London: Routledge, 2004, p. 385, at p. 395.
58 See chap. 8 of this volume, p. 266.
59 *Ibid*.
60 *Ibid*.
61 *Ibid*.
62 *Ibid*., p. 286.
63 *Ibid*., p. 267.
64 See chap. 9 of this volume, p. 300.
65 *Ibid*., p. 303.
66 *Ibid*.
67 *Ibid*., p. 302.
68 *Ibid*., p. 303.
69 See generally chap. 9 of this volume, pp. 298–319.
70 *Ibid*., p. 315.
71 See chap. 9 of this volume, pp. 298–319.
72 See Albert Chen, "Confucian legal culture and its modern fate", in Raymond Wacks (ed.), *The New Legal Order in Hong Kong*, Hong Kong: Hong Kong University Press, 1999, chap. 16.
73 See chap. 10 of this volume, p. 321.
74 *Ibid*.
75 *Ibid*., p. 324.
76 *Ibid*.
77 *Ibid*., p. 322.
78 *Ibid*., p. 323.
79 *Ibid*.
80 *Ibid*., p. 325.
81 *Ibid*.
82 *Ibid*., p. 332.
83 *Ibid*., p. 329.

84 *Ibid*.
85 *Ibid*., p. 325.
86 *Ibid*., p. 343.
87 *Ibid*., p. 338.
88 *Ibid*., p. 325.
89 *Ibid*., p. 326.
90 *Ibid*., p. 332.
91 See chap. 11 of this volume, p. 349.
92 *Ibid*., p. 346.
93 *Ibid*., p. 360.
94 *Ibid*., p. 347.
95 *Ibid*.
96 *Ibid*., p. 349.
97 *Ibid*.
98 *Ibid*., p. 350.
99 *Ibid*., p. 357.
100 *Ibid*., p. 350.
101 376 US 254 (1964). *Ibid*.
102 *Ibid*.; see also chap. 3 of this volume, pp. 90 and 91.
103 See chap. 11 of this volume, p. 351.
104 See chap. 1 of this volume, p. 22.
105 See chap. 11 of this volume, pp. 360–1.
106 See chap. 12 of this volume, p. 364.
107 *Ibid*., p. 365.
108 *Ibid*.
109 *Ibid*., p. 376.
110 *Ibid*., pp. 364 and 375.
111 *Ibid*., p. 379.
112 *Ibid*., pp. 371 and 373.
113 *Ibid*., p. 365.
114 *Ibid*., pp. 365–6.
115 *Ibid*., p. 379.
116 *Ibid*., p. 380.
117 *Ibid*., p. 366.
118 *Ibid*., p. 380.
119 *Ibid*., pp. 366–70.
120 See chap. 13 of this volume, p. 390.
121 *Ibid*., p. 385.
122 *Ibid*., pp. 400–3.
123 *Ibid*., pp. 403–4.
124 *Ibid*., pp. 404–5.
125 *Ibid*., pp. 391–2.
126 *Ibid*., p. 392.
127 *Ibid*.
128 *Ibid*., p. 387.
129 *Ibid*., pp. 387–8.
130 *Ibid*., pp. 395–8.
131 *Ibid*., p. 387.
132 *Ibid*., p. 384.
133 See chap. 1 of this volume, p. 9.
134 See chap. 13 of this volume, p. 406.
135 See chap. 13 of this volume, pp. 393–4.
136 See generally Albert Chen, “Human rights in China: a brief historical review”, in Raymond Wacks (ed.), *Human Rights in Hong Kong*, Hong Kong: Oxford University Press, 1992, chap. 5; “Developing theories of rights and human rights

in China", in Raymond Wacks (ed.), *Hong Kong, China and 1997: Essays in Legal Theory*, Hong Kong: Hong Kong University Press, 1993, chap. 5.
137 See chap. 15 of this volume, p. 455.
138 Art. 51 of the Constitution of the PRC.
139 Vietnamese leaders have also "stressed that human rights and economic development are inextricably linked": see chap. 15 of this volume, p. 472.
140 Vietnam has similarly argued that "without national sovereignty, there will be no human rights": *ibid.* p. 454.
141 Information Office of the State Council, "Human rights in China", *Beijing Review*, 4–10 November 1992, pp. 8–45; also available in a booklet form.
142 See Albert Chen, *An Introduction to the Legal System of the People's Republic of China*, Hong Kong: LexisNexis Butterworths, 3rd edn, 2004, pp. 46, 54.
143 See chap. 15 of this volume, p. 456.
144 *Ibid*., p. 455.
145 See Chen, *supra* note 142 at pp. 45–6.
146 See chap. 15 of this volume, p. 454 (on Vietnam); chap. 14, p. 413 (on China); see also Chen, *supra* note 142 at p. 54.
147 See chap. 15 of this volume, pp. 453–4.
148 See for example, chap. 15 (on Vietnam) in this volume, p. 467.
149 See chap. 14 of this volume, p. 418.
150 *Ibid*., p. 415.
151 *Ibid*., p. 416.
152 *Ibid*., pp. 422–3.
153 *Ibid*., p. 423.
154 *Ibid*., pp. 426–8.
155 *Ibid*., pp. 424–5.
156 *Ibid*., p. 429.
157 *Ibid*., p. 426.
158 *Ibid*., p. 421.
159 *Ibid*., p. 430.
160 *Ibid*., p. 431.
161 *Ibid*., pp. 444–5.
162 *Ibid*., p. 446.
163 *Ibid*. Peerenboom suggests that China follows the "Asian developmental model" of limiting civil and political rights before economic development is achieved. He also points out that comparative evidence shows that there is a correlation between the level of civil and political rights and the level of wealth; even so, China performs poorly in civil and political rights relative to the average performance in its income class, and this is has been typical for East Asian states.
164 See chap. 15 of this volume, pp. 457–61.
165 *Ibid*., p. 463.
166 *Ibid*., p. 467.
167 *Ibid*., p. 470.
168 *Ibid*., p. 471.
169 *Ibid*.
170 *Ibid*., p. 466.
171 *Ibid*., p. 456.
172 *Ibid*., p. 463.
173 *Ibid*.
174 *Ibid*., p. 457.
175 *Ibid*.
176 *Ibid*., p. 479.
177 *Ibid*.
178 *Ibid*., p. 478.
179 *Ibid*., p. 477.

180 *Ibid.*

181 Randall Peerenboom, "Human rights and Asian values: the limits of universalism", *China Review International*, vol. 7, no. 2, Fall 2000, pp. 295–320, at p. 295.

182 E. P. Thompson, *Whigs and Hunters: the Origin of the Black Act*, Harmondsworth, Penguin Books, 1977, p. 266.

183 See generally Yash Ghai, "Rights, social justice, and globalization in East Asia", in Joanne R. Bauer and Daniel A. Bell (eds), *The East Asian Challenge for Human Rights*, Cambridge: Cambridge University Press, 1999, chap. 10, at p. 249; Yash Ghai, *Human Rights and Governance: the Asia Debate*, Asia Foundation's Center for Asian Pacific Affairs, Occasional Paper No. 1, November 1994, at p. 13; Yash Ghai, "Human rights and Asian values", *Public Law Review*, vol. 9, no. 3, September 1998, pp. 168–82, at pp. 178–9; Jack Donnelly, *International Human Rights*, Boulder, CO: Westview Press, 2nd edn, 1998, p. 20; Michael Freeman, "Human rights: Asia and the West", in James T. H. Tang (ed.), *Human Rights and International Relations in the Asia-Pacific Region*, London: Pinter, 1995, chap. 2, at p. 23; Inoue Tatsuo, "Liberal democracy and Asian orientalism", in Bauer and Bell (book cited above in this note), chap. 1, at p. 31.

184 Ghai, "Human rights and Asian values", *supra* note 183, at p. 169.

185 Ian Neary, *Human Rights in Japan, South Korea and Taiwan*, London: Routledge, 2002, p. 8.

186 Ghai, *Human Rights and Governance: the Asia Debate*, *supra* note 183, at p. 16.

187 Donnelly, *supra* note 183, p. 22; Freeman, *supra* note 183, p. 18; Peerenboom, *supra* note 181, p. 304; Randall Peerenboom, "Beyond universalism and relativism: the evolving debates about 'values in Asia'", *Indiana International and Comparative Law Review*, vol. 14, no. 1, 2002, pp. 1–85, at p. 63; Onuma Yasuaki, "Towards an intercivilizational approach to human rights", in Ko Swan Sik *et al.* (eds), *Asian Yearbook of International Law*, vol. 7, Kluwer Law International, 2001, pp. 21–81, at p. 61; Ghai, "Rights, social justice, and globalization in East Asia", *supra* note 183, at p. 248.

188 Jack Donnelly, "Human rights and Asian values: a defense of 'Western' universalism", in Bauer and Bell, *supra* note 183, chap. 2, at p. 69.

189 Donnelly, *International Human Rights*, *supra* note 183, pp. 20, 28.

190 For example, it has been pointed out that "Despite many convolutions and points of resistance, there appears to be a gradual trend towards participating in UN human rights regimes by ASEAN states", "broadly correlating with levels of democratization": Philip J. Eldridge, *The Politics of Human Rights in Southeast Asia*, London: Routledge, 2002, pp. 2, 11.

191 As regards social and economic rights, the information provided by the chapters in this volume is not detailed and specific enough to form a solid basis for the comparison of different countries' performance in the domain of social and economic rights.

192 As pointed out by Eldridge (*supra* note 190, at p. 3), "communal and religious conflict, linked to high levels of criminality and corruption, have been aggravated in several states undergoing turbulent democratic transitions. The challenge, therefore, is to develop a more deep-rooted human rights culture across both civil society and state structures".

193 Ghai, "Human rights and Asian values", *supra* note 183, at p. 174.

194 Radhika Coomaraswanny, "Comments", in A. Eide and B. Hagtvet (eds), *Human Rights in Perspective*, Oxford: Blackwell, 1992, p. 105, at pp. 108–9 (quoted in Ghai, "Human rights and Asian values", *supra* note 183, at p. 180).

195 Donnelly, *International Human Rights*, *supra* note 183, p. 34; Donnelly, "Human rights and Asian values: a defense of 'Western' universalism", *supra* note 188, p. 83.

196 Joseph Chan, "The Asian challenge to universal human rights: a philosophical appraisal", in Tang, *supra* note 183, chap. 3.
197 Charles Taylor, "Conditions of an unforced consensus on human rights", in Bauer and Bell, *supra* note 183, chap. 5.
198 For a summary of and excerpts from the Bangkok Declaration, see Tang, *supra* note 183, appendix I, and Lynda S. Bell *et al.* (eds), *Negotiating Culture and Human Rights*, New York: Columbia University Press, 2001, appendix B.
199 See: www.hri.ca/vienna+5/vdpa.shtml.
200 Peerenboom, "Beyond universalism and relativism: the evolving debates about 'values in Asia'", *supra* note 187, at pp. 36–7.
201 Referring to international human rights jurisprudence, Joseph Chan points out that "To justify restriction of a human right, it has to be shown, firstly, that the right to be restricted is in conflict with a legitimate aim, and, secondly, that the restriction is absolutely necessary and proportional to the protection of that legitimate aim. Many restrictions of human rights which occurred in Asia do not pass these tests": Chan, *supra* note 196, at p. 36.
202 Donnelly, "Human rights and Asian values: a defense of 'Western' universalism", *supra* note 187, pp. 72–4; Jack Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca: Cornell University Press, 1989, chaps. 9–10.
203 Amartya Sen, "Human rights and economic achievements", in Bauer and Bell, *supra* note 182, chap. 3, at p. 91: "[S]ystematic statistical studies give no real support to the claim that there is a general conflict between political rights and economic performance".
204 Ghai, "Rights, social justice, and globalization in East Asia", *supra* note 183; Ghai, *Human Rights and Governance: the Asia Debate*, *supra* note 183, p. 12.
205 Sen, *supra* note 203.
206 Edward Friedman, "Asia as a fount of universal human rights", in Peter Van Ness (ed.), *Debating Human Rights: Critical Essays from the United States and Asia*, London: Routledge, 1999, chap. 3, at p. 58.
207 Ghai, "Human rights and Asian values", *supra* note 183, at p. 173.
208 Onuma Yasuaki, "Toward an intercivilizational approach to human rights", in Bauer and Bell, *supra* note 183, chap. 4, at p. 122. See also Onuma, *supra* note 187, p. 73.
209 "Taken together, the global human rights regime, built of treaties, establishing these three generations of rights in international law, is a set of standards co-authored jointly by the West, the socialist countries, and the Third World – in effect, the entire world": Peter Van Ness, "Introduction", in Ness, *supra* note 206, p. 1, at pp. 9–10.
210 Freeman, *supra* note 183, at p. 17.
211 Friedman, *supra* note 206, at p. 73.
212 *Ibid.*, p. 57.
213 *Ibid.*
214 As Yash Ghai writes: "The projection of human rights is difficult in all cultures and political systems, for neither in the abstract nor in practice are all its norms acceptable to all the people, and are frequently regarded as inconvenient by governments. This is why we should regard the universal respect for rights as the collective responsibility of us all": Ghai, "Human rights and Asian values", *supra* note 183, at pp. 169–70.
215 Inoue Tatsuo, *supra* note 183, at p. 29.

Index

academic freedom: China 421; Hong Kong 237–8; Japan 126; Taiwan 311
affirmative action 8; France 77, 491; USA 77–8, 107–9, 111, 491
Afghanistan 9, 18
Africa 13, 20
AIDS *see* HIV/AIDS
Ainu people 144
Amnesty International (AI) 10, 25, 415; China 415, 417, 419; Malaysia 202, 203, 218; Singapore 160–1, 168
Asian financial crisis 23, 287, 320; IMF and 36
Asian Human Rights Commission (AHRC) 160, 162
"Asian values" 2, 26, 27, 36, 37–9, 291, 508, 509; authoritarian regimes and 2; China 502; Malaysia 193, 492, 502, 509; Singapore 158, 178–9, 492, 502, 509
Association of Southeast Asian Nations (ASEAN) 18, 33
Aum Shinrikyo 28, 133
authoritarian regimes: "Asian values" and 2; economic growth and 1; human rights and 23–7

Bangkok Declaration on Human Rights 508
begging: USA 105–6; Vietnam 472
Belgium 28
Bobbio, Norberto 488
Buddhism 28, 29; China 423; Thailand 29, 497; Vietnam 452, 453, 457, 460

Cambodia 17, 25
Canada 77
capital punishment *see* death penalty
Catholicism 29, 497; China 422, 423; Vietnam 458, 460, 461
Chan, Joseph 507
China 267, 413–51, 487, 502–5, 508–10; academic freedom 421; arms sales 13; atheism 28; bad loans 18; border conflicts with Vietnam 17; Buddhism 423; CAT and 413; Catholicism 422, 423; CEDAW and 413; CERD and 413; civil and political rights 10, 12, 23, 29, 413, 420–32, 442–4, 503; colonial history 36; communitarianism 443–4; Confucianism 422, 503; courts 29, 30, 414; CRC and 413; crime rates 16, 440; criminal justice system 418–19, 439–40, 445; criticism of the government 421, 424–6; cultural rights 436–8, 440, 443; Dalai Lama and 28, 420, 423; death penalty 415–16, 419, 420, 427; democratization 19, 22; East Turkestan Islamic Movement (ETIM) 419; economic development 20, 22; education 12, 422, 434–6, 437; emergencies 418; employment rights 429; ethnic diversity 33–4; Falun Gong cult 7, 18, 28, 235, 243, 417, 422–3, 427, 428, 503; foreign aid 23; foreign direct investment 22, 23; freedom of assembly 428–9; freedom of religion 28, 422–4; freedom of speech and expression 27, 424–6; governance 15; health care 433–4; HIV/AIDS 426; house churches 28, 423, 503; ICCPR and 413, 430; ICESCR and 413, 429; incarceration rates 417; income inequality and

wealth distribution 13; Internet 426, 427–8, 503; Islam in 419, 422, 423–4, 438; Islamic fundamentalism 28; judicial independence 29; legal institutions 29, 30; media freedom 27, 426–8, 503; military expenditure 13; minority rights 33–4, 436–8, 440, 443; nationalism 36; neo-authoritarianism 442–3, 444; NGOs 428; Overseas Development Aid (ODA) 23; physical integrity rights 8, 415–18; political prisoners 417–18; political stability 18, 431–2, 441; population size 33–4, 417, 442; pornography 427; poverty 11, 432–3; preventive detention 416–17; prior restraints 426–8; religious cults 7, 18, 28, 422–3; religious education 35, 422, 438; SARS 426; social and economic rights 10, 11, 30, 414–15, 432–6, 443, 503; Spratly Islands and 17–18; standard of living 11; state sponsorship of ideological orthodoxy 421–4; states of emergency 418; strike, right to 429; strike-hard-at-crime campaigns 418–19, 503; suicide rates 16; Taiwan and 17; terrorism 18, 419–20; Tiananmen 224, 417, 418, 425–6; Tibet 18, 28, 419, 420, 423, 427, 428, 436, 437, 438, 440, 503; torture 416; trade unions 429, 504; Xinjiang 18, 419, 437, 438, 440; young-mother rates 16

civil and political rights 1, 3, 10, 12, 41; African countries 20; China 10, 12, 23, 29, 413, 420–32, 442–4, 503; Confucian heritage and 20; France 10, 70–2; Hong Kong 10; India 10, 385; Indonesia 10, 23, 366–75; Islam 20; Islamic tradition and 20; Japan 10, 132–8, 147; judicial independence and 29; Korea 10, 269–85, 495; Latin American states 20; Malaysia 10, 195–209, 217; Philippines 10, 359–60; Singapore 10, 160, 165–71; Taiwan 10, 306–11; Thailand 10, 325–32; USA 10, 83, 85–99, 110–11, 489–90; Vietnam 10, 12, 23, 455–66, 504; wealth and 20, *see also* freedom of assembly; freedom of association; freedom of conscience; freedom of religion; freedom of speech and expression; freedom of thought; media freedom

collective action: France 73; Japan 142–3, *see also* trade unions

colonial history 35–7; British colonialism 3, 34, 35, 225–6, 227; China 36; French colonialism 35, 453; Hong Kong 225–6, 227; Japanese colonialism 35, 267, 271, 317; Korea 36, 267; Malaysia 36, 216–17; Singapore 36; Taiwan 317

Confucianism: China 422, 503; Indonesia 371; Korea 266, 497; Neo-Confucianism 158, 171, 422; Singapore 158, 171; Taiwan 316, 497; Vietnam 452, 454, 457, 503

conscientious objection to military service: Jehovah's Witnesses 28, 166; Korea 166, 275–6; Singapore 166; USA 88–9

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): China 413; Hong Kong 231, 232; Indonesia 364, 366; Japan 128; Korea 265, 269; Philippines 347; USA 87

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): China 413; Hong Kong 254, 257, 258; Indonesia 364; Japan 128; Malaysia 192, 214; Philippines 347; Singapore 161, 167, 171, 173, 176, 178; USA 87, 100

Convention on the Elimination of All Forms of Racial Discrimination (CERD): China 413; Hong Kong 251, 252; Indonesia 364, 366; Japan 128; Thailand 341; USA 87

Convention on the Prevention and Punishment of the Crime of Genocide 161

Convention on the Rights of the Child (CRC): China 413; Indonesia 364; Japan 128; Malaysia 192; Philippines 347; Singapore 161, 171, 173–4, 178; Thailand 340; USA 99, 100

corporal punishment: Indonesia 366; Singapore 163, *see also* torture

Corsica 76–7, 79, 80

courts: China 29, 30, 414; Hong Kong 30, 227; Japan 29, 30, 130, 491–2; Korea 29, 30; Malaysia 29, 30, 195; Philippines 29, 30, 32; Singapore 29, 30; Vietnam 29, 30, *see also* legal institutions

crime rates 15–16, 50, 440
cultural rights 8, 27; China 436–8, 440, 443; France 73–80, 490; Hong Kong 251–4; India 385; Indonesia 375–9; Japan 143–5; Malaysia 214–15; Philippines 355–8; Singapore 176–8; Taiwan 312–14; Thailand 341–3; USA 83, 99, 106–9, 490; Vietnam 474–5

Dalai Lama 28, 420, 423
death penalty: China 415–16, 419, 420, 427; Hong Kong 231; Japan 145; Singapore 163–4; USA 95, 110, 491
Declaration of the Rights of Man and of the Citizen 1789 70, 71, 74, 75, 298, 489
defamation laws 8; Hong Kong 238; Indonesia 373; Japan 135; Korea 281–2; Philippines 350; Singapore 167–8; Taiwan 308; USA 91, 168
democracy: economic growth and 1, 22, 24–5; human rights and 23–7; levels of 24; majoritarian 26; measuring 24; non-liberal 26; Thailand 22, 26, 31, 326–7, 333; types of 26
democratization: China 19, 22; economic development and 1, 22, 24–5; Korea 265, 268; qualitative studies 24; quantitative studies 24
disability discrimination: Hong Kong 249–50
divorce rates 16, 51
Donnelly, Jack 507, 508

East Timor 17, 18, 25
economic development 19–23; China 20, 22; democratization and 1, 22, 24–5; foreign assistance 22; foreign direct investment (FDI) 4, 22–3; France 19; growth rates 21–2; Hong Kong 19, 22, 244; India 20, 21, 22, 386; Indonesia 20; Japan 19; Korea 19, 22, 26; levels of 19–21; Malaysia 19–20, 22, 209–10; Philippines 20, 21, 22; regime-type and 21; Singapore 19, 22, 158, 159, 171; Taiwan 19, 22; Thailand 19–20, 26, 320; USA 19; Vietnam 20, 22
economic and social rights *see* social and economic rights
education 8, 11, 12–13; bilingual 35, 437; China 12, 422, 434–6; France 12, 13, 72; Hong Kong 250–1; India 13, 400–3; Indonesia 376; Japan 12, 13, 141–2; Korea 13, 288–9; Malaysia 211, 212; Singapore 177–8; Taiwan 312; Thailand 13, 339–40, 343; USA 12, 86, 100–1, *see also* religious education
emergencies *see* states of emergency
empirical studies of human rights 2; legal-case-centered approach 6–7; quantitative and qualitative 2–5
employment rights 3, 4; China 429; France 73; Hong Kong 245–6; Indonesia 364; Japan 126, 142–3; Korea 286–8; Philippines 359; Singapore 160; Thailand 340, *see also* collective action; strike, right to; trade unions
ethnic diversity 33–5; China 33–4; group rights approach 34–5; India 33–4; Indonesia 34; Malaysia 34; melting pot approach 34, 175; salad bowl approach 34, 175; Singapore 34, 35, 158, 161, 175–6; Thailand 34, 341–2, *see also* minority rights
European Charter of Fundamental Freedoms 67
European Convention of Human Rights 65, 67, 70, 72, 314
European Court of Human Rights 39, 70, 71, 227, 314, 430, 431, 491
European Union Constitutional Treaty 67

Falun Gong 7, 18, 28, 235, 243, 417, 422–3, 427, 428, 503
female circumcision 176
foreign aid 23
foreign direct investment (FDI) 4, 22–3
France 6, 65–82, 122, 489–91; 1958 Constitution 66, 76; advertising 72; affirmative action 77, 491; Alsace-Lorraine 79; arms sales 13; Bill of Rights 66; civil and political rights 10, 70–2; collective bargaining 73; colonialism 35, 453; Constitutional Charter 72; Constitutional Council 69, 71, 74, 75, 76–7, 78; Constitutional Court 66, 68, 72; constitutional equality 74–80; Corsica and 76–7, 79, 80; crime rates 15; cultural rights 73–80, 490; current debates 67–8; Declaration of the Rights of Man and of the

Citizen 1789 70, 71, 74, 75, 298, 489; economic development 19; education 12, 13, 72; employment rights 73; equality principle 74–6; foreign direct investment in 23; freedom of assembly 71–2; freedom of conscience 70; freedom of religion 70–1; freedom of speech 71–2; freedom of thought and religion 70–1; French language, status of 77, 79; fundamental values 68; governance 14; health care 12, 13, 73; Holocaust denial 72; horizontal effects of fundamental rights 68; housing right 68; human dignity 68; ICCPR and 67; incarceration rate 16; income inequality and wealth distribution 13; international instruments of protection 67, 490–1; legal institutions 6; limitation of fundamental rights 68, 69–70, 71; media freedom 71; military expenditure 13; minimum means of subsistence, right to 73; minority rights 73–80; National Register 67; New Caledonia and 77, 78, 80; Overseas French Territories statute 78; physical integrity rights 68–70; political stability 19; population size 33–4; pornography 71–2; Preamble of the 1946 Constitution 66, 72, 73, 75, 490; Preamble of the 1958 Constitution 66, 490; professional training, right to 72; protection of fundamental rights 65, 66–80; public order 68; quotas 78; religious cults 28, 70; religious symbols 71; reverse discrimination 77; right to work 68, 73; secularization 70–1; social and economic rights 66, 67–8, 72–3, 490; strike, right to 73; suicide rates 16; terrorism 68; trade unions 73; transnational instruments of protection 67; Universal Declaration of Human Rights (UDHR) 67; young-mother rates 16

free speech *see* freedom of speech and expression

freedom of assembly: China 428–9; France 71–2; Hong Kong 239–42; Indonesia 368, 375; Japan 123, 136; Korea 283–5; Malaysia 203; Philippines 350; Thailand 330–1; USA 93–5; Vietnam 456–7

freedom of association: Hong Kong 242–4; Malaysia 203; Singapore 170–1; Taiwan 309–10; Thailand 330–1

freedom of conscience: France 70; Japan 132; Singapore 165–6

Freedom House 25, 27

freedom of the press *see* media freedom; media ownership

freedom of religion 27–9; China 28, 422–4; France 70–1; Hinduism 33, 34, 398–400; Hong Kong 234–5; house churches 28, 423, 503; India 33, 34, 398–400; Indonesia 370–1; Japan 126, 132–4; Jehovah's Witnesses 28, 160, 166; Korea 275–8; Malaysia 29, 34, 196–7; Philippines 353–5; political stability and 28; restrictions on 8; separatism 28; Seventh-Day Adventists 89; Shinto 29, 122–3, 133–4; Singapore 28, 158, 165–6; state-endorsed atheism 28; Taiwan 310–11; Taoism 452, 457; Thailand 29, 328–9; USA 88–9; Vietnam 28, 457–61, 505, *see also* Buddhism; Catholicism; Confucianism; Islam; Islamic fundamentalism

freedom of speech and expression 8, 27; China 27, 424–6; France 71–2; Hong Kong 235–7; India 395–8; Indonesia 371–5; Japan 123, 126, 134–6, 146, 492; Korea 278–82; licensing laws and 168–9; Malaysia 27, 197–203; Philippines 349–50, 352–3; public figures and 91, 168, 281; Singapore 27, 160, 166–70; Taiwan 307–9, 317; Thailand 329–30; USA 90–3, 492; Vietnam 27, 462, *see also* academic freedom; defamation laws; prior restraint

freedom of thought: France 70–1; Hong Kong 234–5; Indonesia 370–1; Japan 123, 126, 132; Korea 275–8; Singapore 165–6; Thailand 329–30

Friedman, Edward 510

Fukuyama, Francis 492

Fung Yulan 487

gender discrimination *see* sex discrimination

Germany 122, 125

Guantánamo Bay 9, 95, 96–7

health care 8, 12–13; China 433–4; France 12, 13, 73; Hong Kong 248–50; India 13, 404–5; Indonesia 376; Japan 12, 13; Korea 13, 290–1; Malaysia 212–13; Philippines 13, 357; Thailand 13, 340; USA 12, 101–3; Vietnam 472, *see also* HIV/AIDS
Hinduism 33, 34, 398–400
HIV/AIDS 20; China 426; Japan 149; Korea 290–1
Holocaust denial 72
homelessness: Singapore 173; USA 104–5, 112; Vietnam 472, *see also* housing
Hong Kong 224–64, 494–7, 507; academic freedom 237–8; Basic Law 18, 224, 226, 227–9, 230, 232, 233, 240, 244, 245; Bill of Rights Ordinance (BRO) 224, 226–7, 228, 230, 231, 257; capital punishment 231; CAT and 231, 232; CEDAW and 254, 257, 258; civil and political rights 10, 234–44; colonial history 225–6, 227; Complaints Against Police Office (CAPO) 232; courts 30, 227; crime rates 15; criticism of government 235–7; cultural rights 251–4; defamation law 238; demand for democracy 22; Democratic Alliance for the Betterment of Hong Kong (DAB) 231, 234; disability discrimination 249–50; economic development 19, 22, 244; education 250–1; emergencies 232–4; employment rights 245–6; Equal Opportunities Commission (EOC) 225, 230, 250, 256; equal pay 244; Falun Gong 35, 243; female inheritance 253–4; foreign aid 23; foreign direct investment in 22; foreign domestic workers 245–6; freedom of assembly 239–42; freedom of association 242–4; freedom of expression 235–7; freedom of thought, consciousness and religion 234–5; governance 14; health care 248–50; ICCPR and 226, 227, 228, 230, 232, 235, 239, 240, 242, 256, 257, 258; ICESCR and 226, 228, 244–5, 246, 250, 258; income inequality and wealth distribution 13; Independent Commission Against Corruption (ICAC) 231, 232; infant mortality 12; inheritance law 253–4; legal institutions 30; life expectancy 12; limitation on political speech 237–8; media freedom 237; minority rights 251–4; national security legislation 19, 232–4; nationalism and 230–1; New Territories indigenous community 252–4; NGOs 230, 231, 248, 252; Official Secrets Ordinance 238–9; Overseas Development Aid (ODA) 23; physical integrity rights 231–4; police 231–2; political demonstrations 224; political stability 19; population size 33–4; poverty 225, 246–8; prisons 231; Public Order Ordinance 240; racial discrimination 251–2; SARS 234, 249; sedition laws 35; sex discrimination 244–5, 253–4; Sino-British Joint Declaration 226, 230, 495; social and economic rights 30, 225, 244–51; social welfare 246–8; Societies Ordinance 242; states of emergency 232–4; suicide rates 16; taxation 244; theoretical approaches to human rights 229–31; women 244–5; young-mother rates 16
house churches 28, 423, 503
housing: France 68; Malaysia 212–13, *see also* homelessness
Human Development Index (HDI) 10–11, 12; Malaysia 210; Singapore 171
human dignity: France 68; Germany 125; Japan 125; Singapore 158; Thailand 322
Human Poverty Index (HPI) 11
human rights commissions 32
Human Rights Watch 160

incarceration rates 16, 417
income inequality 13, 47
India 384–412, 500–2, 507; Bharatiya Janata Party (BJP) government 30–1; civil and political rights 10, 385, 395–8; conflicts with Pakistan and China 17; constitutional secularism 398–400; crime rates 16; cultural rights 385; economic development 20, 21, 22, 386; education 13, 400–3; electoral processes 387–8; emergencies 387; ethnic diversity 33–4; ethnic strife 18, 34, 501; food, right to 403–4; foreign aid 23; foreign direct investment in 23;

freedom of religion 33, 34, 398–400; freedom of speech and expression 395–8; governance 15; group rights 34; health care 13, 404–5; Hinduism 33, 34; human rightlessness 386; human rights commission 32; judicial activism 29, 30, 387, 501; judicial review 387, 395; legal institutions 29, 30; media freedom 396–8; military expenditure 13; minority rights 394; National Human rights Institutions (NHRI) 385; Overseas Development Aid (ODA) 23; physical integrity rights 8, 501; political instability 18; population size 33–4; poverty 11, 18, 501; religious conflicts 28, 34; religious education 35; right to life and liberty 391; secessionist politics 390–2; self-determination 390–4; social and economic rights 30–1, 385; states of emergency 387; suicide rates 16; terrorism 18, 389–90, 392; untouchability 34, 394–5; "war on terror" 389; within-nation insurgency 392–4; women 388; young-mother rates 16

Indonesia 364–83, 497–500, 506; caning 366; CAT and 364, 366; CEDAW and 364; CERD and 364, 366; civil and political rights 10, 23, 366–75; communications 367, 368; compulsory labor 369; Confucianism 371; corporal punishment 366; CRC and 364; crime rates 16; cultural rights 375–9; defamation law 373; democracy 22, 25, 26, 32, 373; derogation of civil and political rights 366–70; detention and arrest powers 369; economic development 20; education 376; elections 373; emergencies 366–70, 500; employment rights 364; ethnic diversity 34; foreign aid 23; foreign direct investment in 23; freedom of assembly 368, 375; freedom of information 373–4; freedom of speech 371–5; freedom of thought, consciousness and religion 370–1; hate speech 374; health care 376; human rights commission 32; ICESCR and 375; ILO conventions 364; income inequality and wealth distribution 13; international human rights 364; Islamic fundamentalism 18, 28, 34; judicial independence 29; legal institutions 29; martial law 26, 34; media freedom 27, 367; Megawati government 27, 31; military tribunals 369–70; National Commission of Human Rights 365; NGOs 365, 366, 500; obscenity 374; optional protocols 365; Overseas Development Aid (ODA) 23; physical integrity rights 8; political parties 373; population size 33–4; pornography 374–5; poverty 11, 12; preventive detention 369; religious conflicts 28; search and seizure powers 367; separatist movements 366, 376–8; social and economic rights 30, 31, 375–9; states of emergency 366–70, 500; telecommunications 367, 368; terrorism 18, 31; violence 17; young-mother rates 16

infant mortality 12, 14, 45

International Convention on Civil and Political Rights (ICCPR) 9, 19, 39; China 413, 430; France 67; Hong Kong 226, 227, 228, 230, 232, 235, 239, 240, 242, 256, 257, 258; Japan 127–8; Korea 265; Malaysia 192; Philippines 347, 348; Singapore 164; USA 87, 99

International Covenant on Economic, Social and Cultural Rights (ICESCR): China 413, 429; Hong Kong 226, 228, 244–5, 246, 250, 258; Indonesia 375; Japan 127; Korea 265, 286, 288; Malaysia 192; Philippines 347, 355; Singapore 171, 174; Thailand 332; USA 99

International Criminal Court 413

International Labour Organization (ILO) Conventions 173, 364

International Monetary Fund (IMF): Asian financial crisis and 36; structural adjustment programs 25

Internet: China 426, 427–8, 503; Vietnam 465–6, *see also* media freedom

Iraq 9, 18, 19

Islam 1, 28–9; China 419, 422, 423–4, 438; civil and political rights in 20; democracy in 5; fundamentalism *see* Islamic fundamentalism; human rights protection in 5; separatists 19, 28; Singapore 28, 160, 161, 164, 165–6, 167; women in 34; Zakat Law 370

Islamic fundamentalism 10, 18, 28, 34; China 28; Indonesia 18, 28, 34; Malaysia 18, 28, 193–4; Singapore 164; Thailand 19, 28, 34, 326, 328

Japan 121–51, 267, 491–2, 507; academic freedom 126; active rights 126; Ainu people 144; Aum Shinrikyo 28, 133; CAT and 128; CEDAW and 128; censorship 135–6; CERD and 128; civil and political rights 10, 132–8, 147; collective action 142–3; colonialism 35, 267, 271, 317; conception of fundamental human rights 125–7; courts 29, 30, 130, 491–2; CRC and 128; crime rates 15; criminal suspects 128–9; cultural rights 143–5; death penalty 145; defamatory speech 135; economic development 19; economic freedoms 125, 126, 138–40; education 12, 13, 141–2; elections 136–8; emergencies 131–2, 134; emperor 122, 124; employment rights 126, 142–3; equality right 126, 143–4, 147–8; family law 122; forced confessions 130; freedom of assembly 123, 136; freedom of conscience 132; freedom of religion 28, 29, 126, 132–4; freedom of speech and expression 123, 126, 134–6, 146, 492; freedom of thought 123, 126, 132; governance 14; government, right to participate in 126; health care 12, 13; HIV/AIDS 149; human dignity 125; ICCPR and 127–8; ICESCR and 127; incarceration rate 16; income inequality and wealth distribution 13, 14; individualism 125; infant mortality 12, 14; influence of American constitutionalism 145–6; international human rights 127–8; Iraq and 19; Japanese Constitution 123–4, 125–46 *passim*, 150; Japanese Supreme Court and American Supreme Court compared 146–50; judicial review 29, 124; legal institutions 29, 30, 130, 491–2; life expectancy 12, 14; limits on fundamental human rights 127; malapportionment in election system 137–8; marriage 143; media freedom 27, 123, 134; Meiji Constitution 121–3, 124, 150; mental freedoms 125–6, 132–4; military 13, 19; minority rights 144, 148; natural rights 125; nature of rights 125–7; negative freedoms 125–6; patricide 145; peers and peerages 143, 144; physical freedom 125, 126, 128–30; police 129–30; political rights 136–8; political speech ban 134–5; political stability 19; population size 33–4; positive rights 126; prior restraint 135–6; privacy right 126; private discrimination or infringements of human rights 126–7; property rights 146–7; public welfare restrictions 127; racial discrimination 144, 145; religious cults 28; search and seizure powers 129; Self-Defense Force (SDF) 131–2; sex discrimination 126, 143, 144, 145, 147–8; Shinto 29, 122–3, 133–4; social and economic rights 30, 126, 138–43, 148; social rights 140–3, 148; states of emergency 131–2, 134; strike, right to 142–3; suicide rates 16; tax deduction system 144–5; torture 123, 128, 129; trade unions 142; UN involvement 19; voting rights 126, 136–7; welfare rights 125, 140–1; women 126, 143, 144, 145, 147–8; young-mother rates 16
Jehovah's Witnesses 28, 160, 166, 354
Judeo-Christian tradition 299
judicial activism 29–30; India 29, 30, 387, 501; Philippines 29; Taiwan 29; Thailand 29–30
judicial independence 29, 31–2; China 29; civil and political rights and 29; Indonesia 29; Korea 29; Myanmar 29; Taiwan 29; Vietnam 29
judicial review 29, 30; India 387, 395; Japan 29, 124; Singapore 159; Taiwan 301, 303–4; USA 86, 491

Kant, Immanuel 488
Khmer Rouge 25
Korea 18, 265–97, 494–5, 506; authoritarian rule 26; candlelight vigils 285; CAT and 265, 269; changes to protest culture 284–5; civil and political rights 10, 269–85, 495; colonial history 36, 267; Confucianism 266, 497; conscientious objection to military service 166, 275–6; courts 29, 30; crime rates 16;

defamation laws 281–2; democracy 22, 25, 26; democratization 265, 268, 269–70; derogation of rights 273; divorce rates 16; economic development 19, 21, 22, 26; education 13, 288–9; emergency orders 273–4; employment rights 286–8; foreign direct investment in 23; freedom of assembly 283–5; freedom of speech and expression 27, 278–82; freedom of thought, conscience and religion 275–8; governance 14; health care 13, 290–1; HIV/AIDS 290–1; ICCPR and 265; ICESCR and 265, 286, 288; income inequality and wealth distribution 13; international human rights 265–6; investigation of suspicious deaths 266, 269; Japanese colonialism 267, 271; Jehovah's Witnesses in 28; judicial independence 29; Korea and 36; Kwangju massacre 270; labor rights 286–8; legal institutions 29, 30; libel laws 281–2; martial law 270, 274–5; media freedom 27, 278, 281; military expenditure 13; Minbyun 266; National Human Rights Commission 266; National Security Law (NSL) 25, 277–8; nationalism 36, 267–8, 291–2; NGOs 266, 268, 272, 273; nuclear weapons development 17; physical integrity rights 9, 269–73; political instability 18; population size 33–4; reputational rights 281; social and economic rights 30, 31, 285–91; states of emergency 273–4; student protests 18; subversive ideology 276–8; suicide rates 16; torture 271–2; trade unions 288; transitional justice 270–1; young-mother rates 16

labor rights *see* employment rights
Latin America 13, 20, 26
legal institutions 29–33; China 29, 30, 414; France 6; Hong Kong 30, 227; India 29, 30; Indonesia 29; Japan 29, 30, 130, 491–2; jurisprudence of economic and social rights 30; Korea 29, 30; Malaysia 29, 30, 195; Myanmar 29; national human rights commissions 32; Philippines 29, 30, 32; regional rights systems 32–3; rule of law 14, 15, 29, 35, 454, 505; Singapore 29, 30; Taiwan 29; Thailand 29–30, 31; USA 6; Vietnam 29, 30, *see also* judicial activism; judicial independence; judicial review
legal-case-centered approach 6–7
libel *see* defamation laws
licensing laws: Singapore 168–9
life expectancy 11, 12, 14
life and liberty, right to: India 391; Singapore 164–5; Thailand 328
Locke, John 66

Malaysia 191–223, 492–4, 508–10; "Asian values" 193, 492, 502, 509; CEDAW and 192, 214; civil and political rights 10, 195–209, 217; colonial history 36, 216–17; courts 29, 30, 195; CRC and 192; cultural rights 214–15; deaths in custody 195–6; economic development 19–20, 22, 209–10; education 211, 212; emergency powers 208–9; equality guarantee 211; ethnic diversity 34; foreign aid 23; foreign direct investment in 23; freedom of assembly and association 203; freedom of religion 29, 34, 196–7; freedom of speech and expression 27, 197–203; fundamental rights 194–5; governance 14–15; group rights 34–5; health care 212–13; housing provision 212–13; human rights commission 32; ICCPR and 192; ICESCR and 192; income inequality and wealth distribution 13; Internal Security Act 32, 35; international human rights 192–3; Islamic fundamentalism 18, 28, 193–4; language 215; legal institutions 29, 30; media freedom 27, 201–3; national security 195; Official Secrets Act (OSA) 201–3; Overseas Development Aid (ODA) 23; physical integrity rights 9; police shootings 195–6; political stability 18; population size 33–4; poverty 213; preventive detention 35, 204–8; race riots 34; religious education 211; Sedition Act 198–201; sex discrimination 214; social and economic rights 12, 30, 209–14; states of emergency 208–9; SUARAM 192, 196, 197, 198,

212–13, 215; SUHAKAM 207, 213, 219, 494; terrorism 18; United Malays National Organisation (UMNO) 194, 207, 216, 218; women 214
martial law: Indonesia 26, 34; Korea 270, 274–5; Philippines 346; Thailand 34, 326
media freedom 27; China 27, 426–8, 503; France 71; Hong Kong 237; India 396–8; Indonesia 27, 367; the Internet 426, 427–8, 465–6, 503; Japan 27, 123, 134; Korea 27, 278, 281; Malaysia 27, 201–3; Myanmar 27; Philippines 349–50; public figures and 91, 168, 281; reputational rights 281; Singapore 27, 169–70; Thailand 330, 498; USA 91–2; Vietnam 27, 462–6, 504–5, *see also* defamation law
media ownership: Taiwan 309; USA 85, 111
medical treatment *see* health care
military expenditure 13
military tribunals: Indonesia 369–70; USA 96
minority rights: Canada 77; China 33–4, 436–8, 440, 443; France 73–80; Hong Kong 251–4; India 394; Japan 144, 148; Singapore 34, 35, 158, 161, 174–8, 493; Spain 77; Sweden 78; Taiwan 312–14; Thailand 323, 342; USA 106–7; Vietnam 474–6, *see also* affirmative action; ethnic diversity
Myanmar 1, 167, 508; economic growth 21; freedom of speech and expression 27; judicial independence 29; legal institutions 29; media freedom 27

nationalism: China 36; Hong Kong 230–1; Korea 36, 267–8, 291–2; Vietnam 453
natural law 66
Neo-Confucianism 158, 171, 422
Nepal 18
New Caledonia 77, 78, 80
newspapers *see* media freedom; media ownership
Nino, C. S. 487
non-governmental organizations (NGOs) 31, 32, 36; Hong Kong 230, 231, 248, 252; Indonesia 365, 366, 500; Korea 266, 268, 272, 273; Singapore 162, 167, 170–1; Thailand 31, 331, 344
North Korea *see* Korea

Organization for Economic Co-operation and Development (OECD) reports 101, 103–4
Overseas Development Aid (ODA) 23

Paine, Thomas 298
personal integrity rights *see* physical integrity rights
Philippines 346–63, 497–500, 506; CAT and 347; CEDAW and 347; civil and political rights 10, 359–60; contraception 357–8; courts 29, 30, 32; CRC and 347; crime rates 16; cultural rights 355–8; defamation laws 350; democracy 25, 26–7; economic development 20, 21, 22; economic participation right 358–9; education expenditure 13; employment rights 359; family planning 357–8; foreign aid 23; freedom of assembly 350; freedom of religion 353–5; freedom of speech 349–50, 352–3; governance 15; health care 13, 357; hierarchy of rights 359–60; human rights commission 32; ICCPR and 347, 348; ICESCR and 347, 355; income inequality 13; international human rights 347–9; judicial activism 29; legal institutions 29, 30; martial law 346; media freedom 349–50; military expenditure 13; Overseas Development Aid (ODA) 23; political participation rights 350–3; population size 33–4; poverty 11, 12, 25; privacy right 350; public figure doctrine 168; rebel insurgents 18; social and economic rights 30, 355–60; suicide rates 16; terrorism 25; UDHR and 347–8; young-mother rates 16
physical integrity rights 3, 8, 9–10, 40; China 8, 415–18; France 68–70; Hong Kong 231–4; India 8, 501; Indonesia 8; Japan 125, 126, 128–30; Korea 9, 269–73; Malaysia 9; Singapore 9, 162–4; Taiwan 9, 304–6; Thailand 9; USA 8, 95–9; Vietnam 9; wealth effect 43, *see also* torture
Poland 16

political stability 18–19; China 18, 431–2, 441; France 19; Hong Kong 19; Japan 19; Malaysia 18; religion and 28; Singapore 19; Thailand 18
population size 33–4
pornography: China 427; France 71–2; Indonesia 374–5
poverty 11–12, 44; China 11, 432–3; Hong Kong 225, 246–8; Human Poverty Index (HPI) 11; India 11, 18, 501; Indonesia 11, 12; Malaysia 213; measurement 11; Philippines 11, 12, 25; Thailand 11–12, 334–9; USA 12, 103–4; Vietnam 11
press freedom *see* media freedom
preventive detention: Afghanistan 9; China 416–17; Indonesia 369; Iraq 9; Malaysia 35, 204–8; Singapore 164–5; USA 95–8
prior restraint: China 426–8; Japan 135–6; Taiwan 308–9; USA 91–3
privacy rights: Japan 126; Philippines 350
public spending priorities 46

qualitative empirical studies of human rights 2–3, 5; democratization 24, *see also* legal-case-centered approach
quantitative empirical studies of human rights 2–5; democratization 24

religious cults: China 7, 18, 28; France 28, 70; Japan 28, 133
religious education 35; China 35, 422, 438; India 35; Malaysia 211; Singapore 35, 177; Thailand 35, 329; Vietnam 35
religious freedom *see* freedom of religion
Rousseau, Jean-Jacques 66, 74
rule of law 14, 15, 29, 35, 454, 505

SARS: China 426; Hong Kong 234, 249
search and seizure powers: Indonesia 367; Japan 129; USA 98
self-determination right 8; India 390–4; Thailand 341–2; USA 106–7
separation of powers 29; Taiwan 306–7
Seventh-Day Adventists 89
sex discrimination: Hong Kong 244–5; Japan 126, 143, 144, 145, 147–8; Malaysia 214; Singapore 160, 161–2, 176; USA 86, 109
Shinto 29, 122–3, 133–4
Singapore 158–90, 492–4, 508–10; anti-welfarism 158, 171, 172–3; "Asian values" 158, 178–9, 492, 502, 509; capital punishment 163–4; CEDAW and 161, 167, 171, 173, 176, 178; Central Provident Fund (CPF) 172–3; civil and political rights 10, 160, 165–71; colonial history 36; conscientious objection to military service 166; corporal punishment 163; courts 29, 30; CRC and 161, 171, 178; crime rates 15; cultural rights 176–8; death row phenomenon as torture 163–4; defamation laws 167–8; divorce rates 16; economic development 19, 22, 158, 159, 171; education 177–8; emergencies 162–3; employment rights 160; ethnic diversity 34, 35, 158, 161, 174–5, 493; female circumcision 176; foreign aid 23; foreign direct investment in 22–3; foreign media controls 170; freedom of assembly and association 170–1; freedom of conscience 165–6; freedom of religion 28, 158, 160, 161, 165–6; freedom of speech and expression 27, 160, 166–70; freedom of thought 165–6; governance 14; homelessness 173; Human Development Index ranking 171; human dignity 158; ICCPR and 164; ICESCR and 171, 174; income inequality and wealth distribution 13; infant mortality 12; international human rights 161; Islam 28, 160, 161, 164, 165–6, 167; Jehovah's Witnesses in 28, 160, 166; judicial review 159; legal institutions 29, 30; libel suits 167–8; licensing laws 168–9; life expectancy 12; media freedom 27, 169–70; meritocracy 158; military expenditure 13; minorities 34, 35, 158, 161, 174–8, 493; monitoring by treaty-based bodies 173–4; multi-racialism 158; Neo-Confucianism 158, 171; NGOs 162, 167, 170–1; Nominated MP scheme 158–9; OB markers 167; Open Singapore Centre (OPC) 167; Overseas Development Aid (ODA) 23; parliamentary system 158–9; People's Action Party (PAP) 158, 159, 167, 171, 177; physical integrity rights 9, 162–4; political

stability 19; population size 33–4; preventive detention laws 164–5; property rights 159; religious schools 35, 177; right to life and liberty 164–5; right to personal security/ integrity 162–4; rights theory 162; sex discrimination 160, 161–2, 176; social and economic rights 12, 30, 171–4; social security 172–3; states of emergency 162–3; terrorism 158, 164; Think Centre 167; torture prohibition 163–4; trade unions 160; *tudung* controversy 160, 161, 177–8; unemployment 172; volunteerism 173; women 160, 161–2, 176; young-mother rates 16
social contract theories 66
social and economic rights 8, 10–12, 42; China 10, 11, 30, 414–15, 432–6, 443, 503; France 66, 67–8, 72–3, 490; Hong Kong 30, 225, 244–51; India 30–1, 385; Indonesia 30, 31, 375–9; Japan 30, 126, 138–43; jurisprudence of 30; justiciability 8, 30; Korea 30, 31, 285–91; Malaysia 12, 30, 209–14; Philippines 30, 355–60; quantitative studies 3–4; Singapore 12, 30, 171–4; Taiwan 311–12; USA 12, 83, 99–106, 111–12, 332–41, 490; Vietnam 30, 472–4, 503, *see also* education; health care; homelessness; hunger; poverty
South Africa 16
South Korea *see* Korea
Spain 77
Spratly Islands 17–18
Sri Lanka 32
states of emergency 7; China 418; Hong Kong 232–4; India 387; Indonesia 366–70, 500; Japan 131–2, 134; Korea 273–4; Malaysia 208–9; Singapore 162–3
strike, right to: China 429; France 73; Japan 142–3
suicide rates 16, 51
Sweden 78

Taiwan 298–319, 438, 494–7, 506; academic freedom 311; adversarial system 305–6; China and 17; civil and political rights 10, 306–11; colonial history 317; Confucianism 316, 497; congressional reforms 307; criminal procedure reform 304–6; cross-examination 305; cultural rights 312–14; democracy 22, 25–6; economic development 19, 22; education 312; foreign constitutional jurisprudence 315–16; freedom of association 309–10; freedom of religion 310–11; freedom of speech 307–9, 317; governance 14; Grand Justices of the Judicial Yuan 301–4; historical development of constitutional law 300–1; international conventions 314–15; judicial activism 29; judicial independence 29; judicial review 301, 303–4; legal institutions 29; libel law 308; media ownership 309; minority rights 312–14; organized crime 310; physical integrity rights 9, 304–6; prior restraint 308–9; public health insurance 312; separation of powers 306–7; social and economic rights 311–12; transformation of human rights law 301–4; workload of Grand Justices 302, 306, 312
Taoism 452, 457
Tatsuo, Inoue 510–11
Taylor, Charles 488, 507
television *see* media freedom; media ownership
terrorism: China 18, 419–20; France 68; India 18, 389–90, 392; Indonesia 18, 31; Malaysia 18; Philippines 25; Singapore 158, 164; Thailand 326; “war on terror” 1, 19, 84, 92, 95, 389
Thailand 320–45, 497–500, 506; anti-terrorist laws 326; Buddhism 29, 497; CERD and 341; civil and political rights 10, 325–32; conceptualization of human rights 322–5; Constitution 497–8; coups 18, 26; CRC and 340; cultural rights 341–3; democracy 22, 26, 31, 333; democratic process 326–7; distrust of international institutions 36; drugs trade 325; economic development 19–20, 26, 320; education 13, 339–40, 343; elections 326–7; employment rights 340; environmental issues 340–1; equality principle 322, 342; ethnic diversity 34, 341–2; exceptions and derogations 331–2; foreign aid 23; foreign direct investment in 23; foreign nationals’ rights 324–5; freedom of assembly and association 330–1; freedom of religion 29, 328–9;

freedom of thought, expression and information 329–30; gender sensitivity 342; governance 15; health care 13, 340; hill tribes 342; history of human rights 321–2; human dignity 322; human rights commission 32; human treatment right 328; ICESCR and 332; Islamic fundamentalism 19, 28, 34, 326, 328; judicial activism 29–30; legal institutions 29–30, 31; life, right to 328; martial law 34, 326; media freedom 27, 330, 498; military expenditure 13; minority rights 323, 342; murder 16; natural resources 340–1; NGOs 31, 331, 344; non-discrimination principle 322–3, 342; Official Information Act 329–30; Overseas Development Aid (ODA) 23; physical integrity rights 9; political stability 18; population size 33–4; poverty 11–12, 334–9; religious education 35, 329; self-determination 341–2; sex discrimination 342–3; social welfare 340; suicide rates 16; terrorism 326; Thai Rak Tahi (TRT) 320; trade unions 330; traditional communities 323; violence against women 343; women 342–3

Thompson, E. P. 505

Tibet 18, 28, 419, 420, 423, 427, 428, 436, 437, 438, 440, 503

torture 20; China 416; Japan 123, 128, 129; Korea 271–2; Singapore 163–4, *see also* corporal punishment

trade unions: China 429, 504; France 73; Japan 142; Korea 288; Singapore 160; Thailand 330, *see also* collective action

United Nations Covenant on Civil and Political Rights 77

United Nations Development Programme 103, 209

United Nations Human Rights Committee 227

Universal Declaration of Human Rights (UDHR) 67, 192, 314, 347–8, 364, 386

USA 6, 74, 83–120, 489–91; affirmative action 77–8, 107–9, 111, 491; amendments to the Constitution 85, 86, 87, 88, 89, 90, 91–2, 94, 95, 98, 105, 108, 110; American Indians and Alaska Native peoples 106–7; annual country reports on human rights 84; arms sales 13; begging 105–6; Bill of Rights 66, 85–6, 90, 99, 110, 298, 489, 491; CAT and 87; CEDAW and 87, 100; CERD and 87; civil and political rights 10, 83, 85–99, 110–11, 489–90; conscientious objection to military service 88–9; Constitution 84, 85, 86, 99, 100, 489; CRC and 99, 100; crime rates 15, 16; criminal law 110; criticism of government 90–1; cultural rights 83, 99, 106–9, 490; death penalty 95, 110, 491; Declaration of Independence 489; defamation in political speech 91, 168; demarcation of federal and state powers 84; detention of "enemy combatants" 95–6; detention of non-citizens 97–8; disenfranchisement of criminals 110–11; divorce rates 16; economic development 19; education 12, 86, 100–1; electronic surveillance 98; Emergency Medical Treatment and Active Labor Act (EMTALA) 103; equal protection clause 86; federalist government structure 84–5; Food Stamp Program 104; foreign direct investment in 23; foreign policy 6; free exercise of religion 88–9; freedom of assembly 93–5; freedom of contract 83; Freedom of Information Act (FOIA) 92–3; freedom of speech and expression 90–3, 492; governance 14; Guantánamo Bay 9, 95, 96–7; health care 12, 101–3; homelessness 104–5, 112; hunger 104; ICCPR and 87, 99; ICESCR and 99; Immigration and Naturalization Service (INS) 98; incarceration rate 16; income inequality and wealth distribution 13; individual freedom and liberty 83; infant mortality 12; international treaties and 84, 87, 490, 491; internationally recognized civil and political rights 87; Japanese Constitution and 145–6; Japanese Supreme Court and American Supreme Court compared 146–50; judges 84–5; judicial review 86, 491; legal institutions 6; life expectancy 12; media freedom 91–2; media ownership 85, 111; Medicare 102–3;

military actions 17; military expenditure 13; Military Order 96; military tribunals 96; minority rights 106–7; national security interests 91–2; Native Americans 106–7; Patriot Act 93, 97–8; permits for mass gatherings 94–5; physical integrity rights 8, 95–9; political instability 18; population size 33–4; poverty 12, 103–4; prior restraint of free speech 91–3; private property rights 83, 146–7; public figure doctrine 168; public opinion on government policies 98–9; race discrimination 86; registration of groups and members 93; reservations, declarations and understandings (RUDs) 87; search and seizure powers 98; self-determination right 106–7; sex discrimination 86, 109; social and economic rights 12, 83, 99–106, 111–12, 332–41, 490; suicide rates 16; terrorist organizations 93; "three strikes" laws 110; vagrancy 105, 106; violent crime 16; "war on terror" 1, 19, 84, 92, 95; wealth, concentration of 85; women 86, 109; young-mother rates 16

vagrancy: USA 105, 106; Vietnam 472
Vietnam 452–86, 502–5, 508–10; atheism 28; begging 472; border conflicts with China 17; Buddhism 452, 453, 457, 460; business rights 473–4; Catholicism 458, 460, 461; Chinese political-moral system 452–3; civil and political rights 10, 12, 23, 455–66, 504; conflicting land use rights 476; Confucianism 452, 454, 457, 503; constitutional representations of civil rights 455–71; courts 29, 30; crime rates 16; criminal law 469–71; cultural rights 474–5; democratic processes 466–71, 504; economic development 20, 22; education 12; foreign aid 23; foreign direct investment in 23; freedom of assembly 456–7; freedom of religion 28, 457–61, 505; freedom of speech and expression 27, 462; French colonial legalism 453; governance 15; health care 472; homelessness 472; Internet 465–6; invasion of Cambodia 17; judicial independence 29; legal hierarchy 454; legal institutions 29, 30; media freedom 27, 462–6, 504–5; minority rights 474–6; national unity 28, 475–6, 477; nationalism 453; Overseas Development Aid (ODA) 23; patriotic religions 459–60; physical integrity rights 9; political instability 18; population size 33–4; poverty 11; protecting personal freedoms 469–71; religious education 35; social and economic rights 30, 472–4, 503; social services 472–3; socialist period 453–5; socialization policies 472–3; Spratly Islands and 17–18; Taoism 452, 457; vagrancy 472; young-mother rates 16
Voice and Accountability Index *see* World Bank

war 17–18, 20
"war on terror" 1, 19, 84, 92, 95, 389
wealth effect 13, 20, 43; civil and political rights 20; culture 20; distribution 13, 14, 85; physical integrity rights and 43
women: female circumcision 176; female inheritance right 253–4; Hong Kong 244–5; India 388; in Islam 34; Japan 126, 143, 144, 145, 147–8; Malaysia 214; Singapore 160, 161–2, 176; Thailand 342–3; USA 86, 109; violence against 343; young-mother rates 16
World Bank 159; reports 171, 209; structural adjustment programs 25; Voice and Accountability Index 8, 10
World Trade Organization (WTO) 386

Xinjiang 18, 419, 437, 438, 440

young-mother rates 16

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